

## RESOLUTION LF-01-2020

### DIGEST

#### Theft: Effect of Declaration of Emergency on Penalties for Burglary and Theft

Amends Penal Code section 463 to provide that in a state of emergency, the increased penalties for burglary and theft shall only apply if the offense relates to the emergency.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Penal Code section 463 to provide that in a state of emergency, the increased penalties for burglary and theft shall only apply if the offense relates to the emergency. This resolution should be approved in principle because a declaration of emergency should not increase the penalty for an offense that was not motivated or facilitated by the conditions arising from the emergency.

Under current law, under normal circumstances, second degree burglary and grand theft are punishable by imprisonment of *not more than* one (1) year, or the specified terms of imprisonment set forth in Penal Code, section 1170, subdivision (h). (Pen. Code, §§ 459, 461, 487, 487a, subd. (a), 489 [emphasis added].) Petty theft is punishable by a fine not exceeding \$1,000.00, imprisonment of *not more than* six (6) months, or both. (Pen. Code, §§ 488, 490 [emphasis added].)

However, under current law, if an emergency is declared by a “state of emergency,” a “local emergency,” or an “evacuation order,” then second degree burglary and grand theft shall be charged as “looting” and punishable by one year imprisonment, or the specified terms of imprisonment set forth in Penal Code section 1170, subdivision (h). (Pen. Code, § 463, subs. (a) and (b).) Petty theft is punishable by six months imprisonment. (Pen. Code, § 463, subd. (c).) Additionally, even if probation is granted for burglary and grand theft, the current law mandates a one year jail sentence for a felony conviction, or 180 days in jail for a misdemeanor conviction, unless the court specifies circumstances showing that the interest of justice would best be served by reducing or eliminating that imprisonment during probation. (Pen. Code, § 463, subs. (a), (b).) Similarly, probation for petty theft requires a 90-day jail sentence, unless the court specifies circumstances showing that the interest of justice would best be served by reducing or eliminating that imprisonment during probation. (Pen. Code, § 463, subd. (c).)

These increased penalties apply regardless of whether or not the offense was related to the declared emergency. For instance, if a state of emergency is in place, then both the theft of make-up from a well-staffed department store in a part of the county minimally impacted by the emergency, and the theft of goods from a jewelry store forced to close in the midst of a riot that gave rise to the state of emergency, would be subject to increased penalties.

This resolution would require that increased penalties only apply if the offense was motivated or facilitated by conditions arising from the declared emergency. Therefore, to get the increased penalties, the prosecutor would have to prove a nexus between the state of emergency and the offense. Requiring such a nexus would help ensure that the punishment fits the crime; persons who take advantage of an emergency to harm others made vulnerable by that emergency are subject to increased penalties, while persons whose misconduct is unrelated to the emergency are penalized just as they would be if their actions had occurred without the emergency.

Therefore, this resolution should be approved in principle.

## TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 463, to read as follows:

1 § 463

2 (a) Every person who violates Section 459, punishable as a second-degree burglary  
3 pursuant to subdivision (b) of Section 461, during and within an affected county in a “state of  
4 emergency” or a “local emergency,” where the offense is motivated or facilitated by conditions  
5 arising from the emergency, or under an “evacuation order,” resulting from an earthquake, fire,  
6 flood, riot, or other natural or manmade disaster shall be guilty of the crime of looting,  
7 punishable by imprisonment in a county jail for one year or pursuant to subdivision (h) of  
8 Section 1170. Any person convicted under this subdivision who is eligible for probation and who  
9 is granted probation shall, as a condition thereof, be confined in a county jail for at least 180  
10 days, except that the court may, in the case where the interest of justice would best be served,  
11 reduce or eliminate that mandatory jail sentence, if the court specifies on the record and enters  
12 into the minutes the circumstances indicating that the interest of justice would best be served by  
13 that disposition. In addition to whatever custody is ordered, the court, in its discretion, may  
14 require any person granted probation following conviction under this subdivision to serve up to  
15 240 hours of community service in any program deemed appropriate by the court, including any  
16 program created to rebuild the community.

17 For purposes of this subdivision, the fact that the structure entered has been damaged by  
18 the earthquake, fire, flood, or other natural or manmade disaster shall not, in and of itself,  
19 preclude conviction.

20 (b) Every person who commits the crime of grand theft, as defined in Section 487 or  
21 subdivision (a) of Section 487a, except grand theft of a firearm, during and within an affected  
22 county in a “state of emergency” or a “local emergency,” where the offense is motivated or  
23 facilitated by conditions arising from the emergency, or under an “evacuation order,” resulting  
24 from an earthquake, fire, flood, riot, or other natural or unnatural disaster shall be guilty of the  
25 crime of looting, punishable by imprisonment in a county jail for one year or pursuant to  
26 subdivision (h) of Section 1170. Every person who commits the crime of grand theft of a firearm,  
27 as defined in Section 487, during and within an affected county in a “state of emergency” or a  
28 “local emergency” resulting from an earthquake, fire, flood, riot, or other natural or unnatural  
29 disaster shall be guilty of the crime of looting, punishable by imprisonment in the state prison, as  
30 set forth in subdivision (a) of Section 489. Any person convicted under this subdivision who is  
31 eligible for probation and who is granted probation shall, as a condition thereof, be confined in a

32 county jail for at least 180 days, except that the court may, in the case where the interest of  
33 justice would best be served, reduce or eliminate that mandatory jail sentence, if the court  
34 specifies on the record and enters into the minutes the circumstances indicating that the interest  
35 of justice would best be served by that disposition. In addition to whatever custody is ordered,  
36 the court, in its discretion, may require any person granted probation following conviction under  
37 this subdivision to serve up to 160 hours of community service in any program deemed  
38 appropriate by the court, including any program created to rebuild the community.

39 (c) Every person who commits the crime of petty theft, as defined in Section 488, during  
40 and within an affected county in a “state of emergency” or a “local emergency,” where the  
41 offense is motivated or facilitated by conditions arising from the emergency, or under an  
42 “evacuation order,” resulting from an earthquake, fire, flood, riot, or other natural or manmade  
43 disaster shall be guilty of a misdemeanor, punishable by imprisonment in a county jail for six  
44 months. Any person convicted under this subdivision who is eligible for probation and who is  
45 granted probation shall, as a condition thereof, be confined in a county jail for at least 90 days,  
46 except that the court may, in the case where the interest of justice would best be served, reduce  
47 or eliminate that mandatory minimum jail sentence, if the court specifies on the record and enters  
48 into the minutes the circumstances indicating that the interest of justice would best be served by  
49 that disposition. In addition to whatever custody is ordered, the court, in its discretion, may  
50 require any person granted probation following conviction under this subdivision to serve up to  
51 80 hours of community service in any program deemed appropriate by the court, including any  
52 program created to rebuild the community.

53 (d) (1) For purposes of this section, “state of emergency” means conditions that, by  
54 reason of their magnitude, are, or are likely to be, beyond the control of the services, personnel,  
55 equipment, and facilities of any single county, city and county, or city and require the combined  
56 forces of a mutual aid region or regions to combat.

57 (2) For purposes of this section, “local emergency” means conditions that, by reason of  
58 their magnitude, are, or are likely to be, beyond the control of the services, personnel, equipment,  
59 and facilities of any single county, city and county, or city and require the combined forces of a  
60 mutual aid region or regions to combat.

61 (3) For purposes of this section, a “state of emergency” shall exist from the time of the  
62 proclamation of the condition of the emergency until terminated pursuant to Section 8629 of the  
63 Government Code. For purposes of this section only, a “local emergency” shall exist from the  
64 time of the proclamation of the condition of the emergency by the local governing body until  
65 terminated pursuant to Section 8630 of the Government Code.

66 (4) For purposes of this section, “evacuation order” means an order from the Governor, or  
67 a county sheriff, chief of police, or fire marshal, under which persons subject to the order are  
68 required to relocate outside of the geographic area covered by the order due to an imminent  
69 danger resulting from an earthquake, fire, flood, riot, or other natural or manmade disaster.

70 (5) Consensual entry into a commercial structure with the intent to commit a violation of  
71 Section 470, 476, 476a, 484f, or 484g shall not be charged as a violation under this section.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Michael Fern, Nick Stewart-Oaten, Lara Kislinger, Frank Leidman, Darin Wessel, Joel Douglas, Jeff Hayden, Jack Osborn, Matt Schechter, Ben Rudin

## **STATEMENT OF REASONS**

The Problem (including Existing Law): On March 4, 2020, Governor Newsom proclaimed a state of emergency in California due to COVID-19. (See “Proclamation of a State of Emergency,” <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.) Pursuant to Penal Code section 463, upon a declared emergency, any second-degree burglary or theft that occurs during and within an affected county may be charged as “looting.” Conviction carries a jail sentence of at least 90 days for petty theft, or at least 180 days for burglary or grand theft, unless the court finds that imposition of the mandatory jail sentence is not in the interest of justice. However, nothing in Section 463 requires proof of a nexus between the emergency and the underlying offense. Thus, a second-degree burglary or theft arising from circumstances unrelated to the emergency could still be charged as looting, which seems contrary to the spirit of the statute.

The Solution: This resolution would require the prosecution to prove that a charge of looting based on a declared emergency was motivated or “facilitated by conditions arising from the emergency.” (See Fla. Stat. § 812.014, subd. (c).) “[C]ourts have upheld the validity of the use of such statutory words as ‘facilitate’ against contentions that the words are unconstitutionally vague.” (*Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 556.)

## **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

## **CURRENT OR PRIOR RELATED LEGISLATION**

In 2018, Assembly Bill No. 3078 was enacted, applying Penal Code section 463 to include an area under an evacuation order and for the underlying offense of petty theft.

## **AUTHOR AND/OR PERMANENT CONTACT:**

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