



## PURPOSE

***The purpose of this bill is to permit a court to grant probation for specified drug offenses which are currently either ineligible or presumptively ineligible for probation.***

*Existing law* defines “probation” as the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. (Pen. Code, § 1203, subd. (a).)

*Existing law* prohibits the court from granting probation to or suspending the imposition of a sentence for any person convicted of specified drug offenses, if the person has previously been convicted of one of several specified drug offenses. (Health & Saf. Code, § 11370, subd. (a).)

*Existing law* prohibits the court from granting probation to or suspending the imposition of the sentence for any person convicted of any of the following offenses:

- Possession for sale of 14.25 grams or more of a substance containing heroin.
- Selling or offering to sell 14.25 grams or more of a substance containing heroin.
- Possession of heroin for sale or selling or offering to sell heroin, and who has one or more prior convictions for either offense.
- Possession for sale of 14.25 grams or more of any salt or solution of phencyclidine (PCP) or any of its analogs, as specified, or any of the precursors of PCP.
- Transporting for sale, importing for sale, or administering, or offering to transport for sale, import for sale, or administer, or attempting to import for sale or transport for sale, PCP or any of its analogs or precursors.
- Selling or offering to sell PCP or any of its analogs or precursors.
- Manufacturing or offering to perform an act involving the manufacture of PCP or any of its analogs or precursors.
- Using, soliciting, inducing, encouraging, or intimidating a minor to act as an agent to manufacture, compound, or sell any controlled substance, as specified.
- Using a minor as an agent or who solicits, induces, encourages, or intimidates a minor with the intent that the minor be in possession of PCP for sale, sells, distributes, or transports PCP, or manufactures PCP or any of its analogs or precursors.
- Possession of piperidine, pyrrolidine, or morpholine, and cyclohexanone, with intent to manufacture phencyclidine or any of its analogs.
- Possession for sale, selling, or offering to sell cocaine base, cocaine, or methamphetamine, and who has one or more prior drug offense convictions, as specified. (Pen. Code, § 1203.07, subd. (a).)

*Existing law* requires the existence of any fact which makes the defendant ineligible for probation to be alleged in the charging document, and either admitted by the defendant or found to be true by the trier of fact. (Pen. Code, § 1203.07, subd. (b).)

*Existing law* restricts the granting of probation, except in an unusual case where the interests of justice would be served, when a defendant is convicted of the following drug crimes:

- Possessing for sale or selling of a substance containing 28.5 grams or more of cocaine or cocaine base.

- Possessing for sale or selling a substance containing 28.5 grams or more of methamphetamine.
- Manufacturing, compounding, converting, producing, deriving, processing, or preparing of specified controlled substances, except manufacturing of PCP.
- Using, soliciting, inducing, encouraging, or intimidating a minor to manufacture, compound, or sell heroin, cocaine base, cocaine, or methamphetamine.
- Manufacturing, or offering or arranging to sell, furnish, transport, administer, or give any methamphetamine, or possession of its precursor chemicals, with one or more specified prior convictions involving methamphetamine. (Pen. Code, § 1203.073, subs. (a) & (b).)

*Existing law* requires the existence of any previous conviction or fact which would make the defendant ineligible for probation to be alleged in the charging document, and either admitted by the defendant or found to be true by the trier of fact. (Pen. Code, § 1203.073, subd. (d).)

*This bill* would remove the above listed drug offenses from the prohibition against granting probation or suspending a sentence except those offenses involving minors.

*This bill* would authorize the court to grant probation for drug offenses involving minors only where the interests of justice would best be served.

## COMMENTS

### 1. Need for This Bill

According to the author:

Current law prohibits a judge from ordering probation for nonviolent drug offenses, if the person has previously been convicted of any one of an expansive list of drug felonies. Existing law also prohibits judges from granting probation or suspending a sentence for persons convicted of specified nonviolent drug offenses, even if it is their first offense. Mandatory minimums contribute to the crisis of mass incarceration, which costs California billions of dollars each year that the state should be investing in schools, infrastructure, healthcare, and other nonprofits to make our communities and economy stronger. These harsh mandatory minimums are rooted in the racist war on drugs era, which has been disproportionately waged against Black and Latinx people. Imposing mandatory minimum sentences, for nonviolent drug crimes, tie the hands of judges and force them to incarcerate individuals, even when judges believe people would be better treated and supervised in their community.

Evidence shows that mandatory minimum sentences for drug crimes do not improve public safety or reduce drug use or sales, but instead exacerbate existing racial disparities in our criminal justice system and disproportionately affect those suffering from mental illness. California has an urgent need to reduce our incarcerated population, especially in the era of COVID-19. SB 73 is an incremental reform that will return discretion to the courts and will provide our criminal justice system with alternatives to mass incarceration. This bill does not eliminate the upper penalties for these offenses or affect sentencing enhancements.

## 2. Probation Eligibility

Probation is the suspension of the imposition or the execution of a criminal sentence and the order of conditional release to the community. (Pen. Code, § 1203, subd. (a).) As a general rule, most felony and misdemeanor cases are eligible for probation. However, a number of statutes prohibit the granting of probation for certain crimes or offenders. (See e.g., Pen. Code, §§ 1203.06 (certain violent felonies); 1203.065 (certain sex offenses); 1203.07 (certain drug offenses); 1203.075 (specified crimes when the defendant inflicts great bodily injury).) The existence of the fact which makes the defendant ineligible for probation must be alleged in the accusatory pleading and either admitted by the defendant in open court, or found to be true by the jury or judge. (*People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1192-1193.)

There are other circumstances and enumerated offenses which are presumptively ineligible for probation and for which probation may be granted only in unusual circumstances where the interests of justice would best be served if the person is granted probation. Some examples include use of a deadly weapon during the commission of a crime (Pen. Code, § 1203, subd. (e)(2)); infliction of great bodily injury during the commission of the offense (Pen. Code, § 1203, subd. (e)(3)); defendants previously convicted of two or more felonies (Pen. Code, § 1203, subd. (e)(4)); theft cases involving over \$100,000 (Pen. Code, § 1203.045); using, soliciting, or encouraging a minor to commit a felony (Pen. Code, § 1203.046); and certain drug offenses (Pen. Code, § 1203.073). In such instances, the defendant bears the burden of demonstrating that his or her case is the unusual case in which justice would be served by a granting of probation.

The Rules of Court list certain factors that may indicate the existence of unusual circumstances warranting probation eligibility for such offenses. Specifically, the court may consider whether the factor giving rise to the probation limitation is less serious than typically present coupled with the defendant's lack of similar criminal history. (Cal. Rules of Court, rule 4.413(c)(1)(A).) The court may also consider whether the current offense is less serious than a prior conviction which is the basis for the probation limitation, coupled with the defendant remaining free from incarceration for a substantial time before the present offense. (Cal. Rules of Court, rule 4.413(c)(1)(B).) Additionally, the court may consider factors not amounting to a defense, but reducing culpability, including: (1) that the defendant participated in the crime under provocation, coercion, or duress and does not have a recent record involving crimes of violence; (2) that the defendant committed the crime because of a mental condition and there is a likelihood that he or she would respond favorably to treatment that would be required as a condition of probation; (3) that the defendant is youthful or aged, and has no significant record of prior criminal offenses. (Cal. Rules of Court, rule 4.413(c)(2).) Finally, the court may consider the results of a risk/needs assessment of the defendant, if one was performed. (Cal. Rules of Court, rule 4.4.13(c)(3).) The trial court may, but is not required to, find the case unusual if the relevant criteria is met. (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1587.) In this respect, the court has broad discretion and its decision will only be overturned if there was an abuse of discretion. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

This bill would allow a court to grant probation for controlled substance offenses that are currently either ineligible or presumptively ineligible for probation, except in those cases in which a person uses, solicits, induces, encourages, or intimidates a minor to act as an agent to manufacture or sell controlled substances. However, even in cases involving minors, the court may grant probation if it finds that the interests of justice would be served in doing so.

### 3. Argument in Support

According to the bill's sponsor, Drug Policy Alliance:

[SB 73] will grant judges appropriate discretion in sentencing for specified nonviolent drug offenses.

SB 73 will not change the upper penalty for any offense but will provide judges the discretion to grant probation or to suspend a sentence in the interests of justice, and consistent with local values and local resources. Current state law ties the hands of judges, prohibiting them from ordering probation or suspending a sentence for a person convicted of nonviolent drug offenses, including possessing or agreeing to sell or transport opiates or opium derivatives, possessing or transporting cannabis, planting or cultivating peyote, and various crimes relating to forging or altering prescriptions, if the person has previously been convicted of any one of an expansive list of drug felonies. Existing law also prohibits judges from granting probation or suspending a sentence for persons convicted of specified nonviolent drug offenses, including possessing for sale or selling 14.25 grams or more of a substance containing heroin and possessing for sale 14.25 grams or more of any salt or solution of phencyclidine or its analogs, even if it is their first offense.

Precluding probation eligibility for these offenses requires a mandatory term of incarceration ranging from two to seven or more years depending on the offense. By allowing judges the discretion to grant probation, this bill reflects the growing bipartisan consensus that mandatory minimum sentencing has failed to protect or enhance public safety, and robbed judges of their traditional and appropriate role in weighing the facts of each case before imposing a sentence. There is ample evidence that long sentences and mandatory minimums have had no effect on the availability, cost or potency of controlled substances. Controlled substances are cheaper, stronger and more widely available than in any time in our nation's history.

...

It is widely acknowledged that the war on drugs has been disproportionately waged against Black and Latinx families, separating parents from children and causing long-term collateral consequences, including loss of job opportunities, housing and education benefits. This continues to be true, even in light of evidence that drug use and drug sale rates between whites, Blacks and Latinx are approximately equal in our state and in our country. ...

SB 57 by Senator Wiener is an incremental step away from a costly, failed, and racist policy of locking up low-level nonviolent drug offenders for long periods of time. A fair and impartial criminal justice system, like all forms of good government, needs checks and balances. While prosecutors have charging discretion, the final say over a person's sentence must come from independent judges who have no personal or institutional stake in the outcome of a case other than to ensure justice is done and rights are respected.

#### 4. Argument in Opposition

PORAC writes:

SB 73 would delete various crimes relating to controlled substances from current prohibitions against granting probation or a suspended sentence if an individual has previously been convicted of a similar offense. Offenses would include, but are not limited to, possessing or agreeing to sell or transport opiates or opium derivatives, possessing or transporting cannabis, planting or cultivating peyote, and various crimes relating to forging or altering prescriptions, possessing for sale or selling 14.25 grams or more of a substance containing heroin and possessing for sale 14.25 grams or more of any salt or solution of phencyclidine or its analog. In addition, this SB 73 would authorize the remaining prohibitions on probation for those crimes to be waived by a court.

As officers who experience first-hand the impact drugs can have on individuals and those around them, PORAC has serious concerns with SB 73 and the concept of decriminalizing drug-related offenses. We believe many of the penalties related to controlled substances work as a deterrent or a reason for individuals to get the treatment they need to turn their lives around. Furthermore, we believe SB 73 will cause an increase in the selling and personal use of drugs, which will lead to greater crime and arrests in our communities. As we have seen so many times, it is often the most vulnerable populations, and those who have the weakest support systems, that will be most susceptible to the increased access and use of drugs.

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