

Date of Hearing: June 15, 2021
Counsel: Sandy Uribe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

SB 73 (Wiener) – As Introduced December 10, 2020

SUMMARY: Authorizes the court to grant probation for specified drug offenses which are currently either ineligible or presumptively ineligible for probation, except in cases where a minor is used as an agent, in which case probation could only be granted in the unusual case where the interests of justice would be served.

EXISTING LAW:

- 1) 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).)
- 2) Prohibits the granting of probation to any person who is convicted of violating the following drug crimes:
 - a) Possession for sale of 14.25 grams or more of a substance containing heroin;
 - b) Sale of, or offering to sell, 14.25 grams or more of a substance containing heroin;
 - c) Possession for sale, sale, or offering to sell heroin, with one or more prior convictions for those offenses;
 - d) Possession for sale of 14.25 grams or more of any salt or solution of phencyclidine (PCP), or any of its analogs or precursors;
 - e) Transporting for sale, importing for sale, administering, or offering to transport for sale, import for sale, or administer, or attempt to import for sale or transport for sale, PCP or any of its analogs or precursors;
 - f) Sale of, or offering to sell, PCP or any of its analogs or precursors;
 - g) Manufacture of PCP or any of its analogs or precursors, as specified;
 - h) Using, soliciting, inducing, encouraging, or intimidating a minor to act as an agent to manufacture or sell any specified controlled substance;
 - i) 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;

- j) Possession of specified substances, with intent to manufacture PCP or any of its analogs; and,
 - k) Possession for sale, sale, or offering to sell cocaine, cocaine base, or methamphetamine, with one or more prior convictions for those offenses. (Pen. Code, § 1203.07. subd. (a).)
- 3) 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).)
- 4) 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:
- a) Possession for sale or sale of a substance containing 28.5 grams or more of cocaine or cocaine base;
 - b) Possession for sale or sale of a substance containing 28.5 grams or more of methamphetamine;
 - c) Manufacture of specified controlled substances, except PCP;
 - d) Using, soliciting, inducing, encouraging, or intimidating a minor to manufacture, compound, or sell heroin, cocaine base, cocaine, or methamphetamine; and,
 - e) Manufacture or sale of methamphetamine, with one or more specified prior convictions involving methamphetamine. (Pen. Code, § 1203.073, subs. (a) & (b).)
- 5) Requires the existence of any fact which makes the defendant presumptively 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).)
- 6) Prohibits the granting of probation to any person convicted of specified drug offenses if the person has a prior felony conviction for possession of a controlled substance. (Health & Saf. Code, § 11370, subd. (a).)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "Senate Bill 73 will repeal mandatory minimum sentences for persons convicted of specified nonviolent drug offenses and provides judges with the discretion to grant probation. 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 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 weapon during the commission of a crime (Pen. Code, 1203, subd. (e)(2)); infliction of great bodily injury during the commission of the offense crime (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).) Finally, the court may also 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 to treatment that would be required as a condition of probation. (Cal. Rules of Court, rule 4.413(c)(2).) 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.)¹

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. In cases involving the use of minors, a defendant remains presumptively ineligible for probation, except in the unusual case where the interests of justice would best be served. If the court were to grant probation in such a cases, the circumstances supporting the finding must be stated on the record and entered into the minutes.

- 3) **Argument in Support:** According to the Drug Policy Alliance, the sponsor of this bill, “This legislation 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....

“SB 73 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

¹ After the trial court determines that the presumption against probation is overcome, it then must evaluate whether or not to grant probation using the suitability factors listed in the Rules of Court. (See Cal. Rules of Court, rule 4.414.)

outcome of a case other than to ensure justice is done and rights are respected.”

- 4) **Argument in Opposition:** According to the *California Police Chiefs Association*, “SB 73 would allow a judge the discretion to grant probation or to suspend a sentence for a person convicted of drug offenses, included but not limited to, possession or agreement to sell or transport opiates or cannabis, forging or altering prescriptions, possessing or selling a substance containing heroin, PCP or any of its analogs and more.

“The bill goes further, allowing a court to grant probation in an unusual case where the interests of justice would be served, for possessing or selling substances containing 28.5 grams or more of cocaine or methamphetamine, in a case involving a minor to act as an agent to manufacture or sell controlled substances, and the bill disregards previous drug-related offenses for these sentencing purposes as well.

“SB 73 sets a dangerous precedent in California court of law, and would jeopardize the health and safety of the communities we are sworn to protect.”

5) **Related Legislation:**

- a) AB 1542 (McCarty) authorizes Yolo County to offer a pilot program, known as the Secured Residential Treatment Program (SRTP), for individuals suffering from substance use disorders (SUDs) who have been convicted of drug-motivated felony crimes. As part of the program, prohibits the court from placing a defendant on probation for the underlying offense, but requires, for the period in which an individual is participating in the pilot program, the individual shall be on supervision with the probation department. AB 1542 is pending referral by the Senate Rules Committee.
- b) AB 1351 (Petri-Norris) imposes an additional enhancement when a person is convicted of specified drug offenses involving fentanyl. The hearing for AB 1351 in the Assembly Public Safety Committee was cancelled at the request of the author.
- c) SB 75 (Bates) adds fentanyl to the list of drugs eligible for purposes of an enhancement for drug sales based on the weight of the controlled substance. The hearing for SB 75 in the Senate Public Safety Committee was cancelled at the request of the author.

6) **Prior Legislation:**

- a) SB 378 (Wiener), of the 2019-2020 Legislative Session, was identical to this bill. SB 378 was held in the Assembly Rules Committee.
- b) AB 607 (Carrillo), of the 2019-2020 Legislative Session, would have allowed 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 minor was used as an agent. AB 607 was held in the Senate Appropriations Committee.
- c) SB 1025 (Skinner), of the 2017-2018 Legislative Session, would have authorized the court to grant probation for specified drug offenses which are currently either ineligible or presumptively ineligible for probation, except in cases where a minor was used as an agent, in which case probation would remain prohibited. SB 1025 was not taken up on

the Assembly Floor.

REGISTERED SUPPORT / OPPOSITION:

Support

Drug Policy Alliance (Sponsor)
ACLU California Action
Asian Solidarity Collective
California Association of Alcohol and Drug Program Executives, INC.
California Attorneys for Criminal Justice
California for Safety and Justice
California Public Defenders Association (CPDA)
California Religious Action Center of Reform Judaism
Ella Baker Center for Human Rights
Essie Justice Group
Famm
Fresno Barrios Unidos
Friends Committee on Legislation of California
Initiate Justice
League of Women Voters of California
Los Angeles County District Attorney's Office
Mayor of City & County of San Francisco London Breed
Pillars of The Community
Prosecutors Alliance California
San Francisco Public Defender
Showing Up for Racial Justice (SURJ) San Diego
Showing Up for Racial Justice North County San Diego
Smart Justice California
Team Justice
Think Dignity
Uprise Theatre
We the People - San Diego

Oppose

California Association of Highway Patrolmen
California District Attorneys Association
California Family Council
California Police Chiefs Association
Peace Officers Research Association of California (PORAC)

Analysis Prepared by: Sandy Uribe / PUB. S. / (916) 319-3744