
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 607 **Hearing Date:** July 2, 2019
Author: Carrillo
Version: April 3, 2019
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Probation: Eligibility: Crimes Relating to Controlled Substances*

HISTORY

Source: California Public Defender's Association
Drug Policy Alliance

Prior Legislation: SB 1025 (Skinner), not taken up on the Assembly floor
SB 1010 (Mitchell), Ch. 749, Stats. 2014
AB 1667 (Condit), Ch. 1135, Stats. 1989
SB 1960 (Seymour), Ch. 1044, Stats. 1986
SB 268 (Robbins), Ch. 1087, Stats. 1975

Support: ACLU of California; Americans for Safe Access; California Attorneys for Criminal Justice; Californians for Safety and Justice; Center on Juvenile and Criminal Justice; Consumer Attorneys of California; Ella Baker Center for Human Rights; Friends Committee on Legislation of California; Initiate Justice; Legal Services for Prisoners with Children; National Association of Social Workers, California Chapter; San Francisco Public Defender; Tides Advocacy; UDW/AFSCME Local 3930

Opposition: None known

Assembly Floor Vote: 53 - 22

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 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 by 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:

- Possession for sale or sale of a substance containing 28.5 grams or more of cocaine or cocaine base.
- Possession for sale, selling, transporting, importing, furnishing, administering, giving away a substance containing 28.5 grams or more of methamphetamine.
- Manufacture of specified controlled substances, except 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 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).)

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

COMMENTS

1. Need for This Bill

According to the author:

Mandatory minimum sentences for nonviolent drug crimes force judges to incarcerate individuals who would be better treated and supervised in the community. Leaders of both parties want to end mandatory minimums as part of the incremental unwinding of over-sentencing and mass incarceration. Mass incarceration costs California billions of dollars that the state should instead invest in schools, infrastructure, healthcare and other areas to make our communities and economy stronger.

AB 607 is an incremental reform to return discretion to the courts. The bill provides defendants with probation supervision and programming when it is in the interest of justice, the interest of public safety and consistent with the values of local communities.

Current law ties the hands of judges, requiring courts to order incarceration for nonviolent drug offenses, even when public safety and public health would be better served by ordering probation supervision and services. This bill will repeal mandatory minimum sentences, allowing judges appropriate discretion to grant probation to persons convicted of specified nonviolent drug offenses. It will not change the maximum penalty, affect sentencing triads or impact 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; (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).) 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.

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