

SUPPORT PROBATION, NOT DEPORTATION

HB*** / SB***

Proposed addition to the Probation Before Judgment (“PBJ”) statute to advance Racial Justice and Equality

FAQs

Who would primarily benefit from this addition to the PBJ statute?

- Maryland residents who are not U.S. citizens, including legal permanent residents, who have been charged with an offense, and their families.
- Bill would eliminate the unintended immigration consequences triggered by a Maryland PBJ because the federal immigration law treats a MD PBJ as a conviction.

How does this bill advance racial justice?

- Currently, if a non-citizen Maryland resident obtains a PBJ, they can face loss of liberty, deportation, and permanent banishment from the United States. The disposition is considered a conviction under federal immigration law, notwithstanding the Maryland General Assembly's intent to the contrary, because the noncitizen admits guilt under the existing PBJ procedure, and the judge makes a finding of guilt. The burden of this disparate effect is disproportionately borne by Black and brown people who are over-policed, arrested, and end up deported for even minor criminal contacts.
- Adding this language to the Maryland Probation Before Judgment statute would protect, without cost to anyone else, some of our most vulnerable Maryland residents from persistent institutional racism in both the criminal justice and immigration systems.

Aren't there already solutions to this problem in Maryland law, like an *Alford* plea or a Not Guilty Agreed Statement of Facts (“NGASF”)?

- No. Courts have held that an *Alford* plea is a guilty plea and matches the federal immigration definition of a conviction because there is a formal finding of guilt.¹
- A NGASF also matches the federal immigration definition of a conviction because there is either an admission of sufficient facts by the defendant to warrant a finding of guilt and/or, typically, a formal finding of guilt entered by the court. In addition, Maryland courts have held that NGASF are the functional equivalent of a guilty plea,² so they are not the equivalent of a PBJ.
- *Stet* or *nolle prosequi* are not convictions under federal immigration law, so they would not trigger deportation. However, with both dispositions, the defendant is not held responsible for their actions. Under this proposed addition of the PBJ statute, there

¹ United States v. King, 673 F.3d 274, 281-82 (4th Cir. 2012); See also *Abimdola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2002) (holding directly that an *Alford* plea is a guilty plea and therefore a conviction under the Immigration and Nationality Act, 8 U.S.C. Sec. 1101 (a)(48)(A)).

² *Sutton v. State*, 289 Md. 359, 366, 424 A.2d 755, 759 (1981); See also 8 USC 1101 (a)(48)(A)

is a criminal disposition of the case, specifically the imposition of probation in the form of a PBJ. If the defendant does not comply with the conditions of his/her probation, which can include provisions like anger management or substance abuse counseling, the court can impose the finding of guilt based on the previously submitted statement of facts sufficient and the defendant will have a conviction.

Is this a loophole designed to thwart the jurisdiction of the federal government?

- No. When the Maryland General Assembly codified probation before judgment in 1975, it was because Maryland legislators recognized the importance and value of a criminal disposition that is not a conviction. The federal law thwarts the Maryland General Assembly's intent by treating a PBJ as a conviction, despite the fact that this is not how Maryland treats it.
- The proposed addition preserves the legislative intent of the Maryland General Assembly by creating an alternative process for imposing a PBJ. This Bill does not thwart federal law; rather, it aids the federal law in correctly interpreting Maryland's PBJ statute. By preventing unintended deportation consequences of a PBJ, it not only preserves legislative intent but also keeps Maryland families and communities whole.

Could the PBJ imposed under this bill still be revoked and a conviction imposed in the event of a violation of probation?

- Yes. Just as now, failure to comply with the terms of the agreement can result in the revocation of the PBJ, the imposition of a conviction, and the initiation of deportation proceedings or any other legal consequences.³ This addition does not alter the standard for finding a violation of probation.

Will this bill make it easier for an immigrant to become a U.S. Citizen?

- No. Even if the PBJ is no longer considered a conviction for immigration purposes, it could still delay eligibility for citizenship. All criminal contacts, whether they result in convictions or not, must be reported on the naturalization application and will be considered by the naturalization officer when assessing good moral character, a critical eligibility requirement.

Will this change make it easier for people to obtain a PBJ or expand the categories of crimes eligible for a PBJ?

- No. This addition to the statute will not in any way expand the categories of crimes that are PBJ eligible.
- It will make more people willing to accept a PBJ to resolve their criminal charges, easing the burden on courts and prosecutors.

Is this bill unfair to U.S. citizens?

- This bill would not disadvantage U.S. citizens in any way. To the contrary, it would help U.S. citizens with immigrant family members who are deserving of a PBJ.
- Adding the proposed addition to the PBJ statute allows the statute to function as the legislature intended it to for all Maryland residents when it is in the best interest of both the defendant and the general public to do so.

³Md. Code Ann., Crim. Proc. § 6-220(f).

- This is an addition to the statute – not a revision. Prosecutors and judges could still use the original process for imposition of PBJ, at their discretion.

Is this bill helping undocumented immigrants avoid punishment?

- No. The state court judge will impose any and all punishment just as before. This addition to the PBJ statute is another tool at the disposal of State’s Attorneys, judges, and defense counsel so that they can negotiate just outcomes in those cases where criminal conduct warrants some adjudication but not a conviction that could trigger deportation.
- It is also important to note that PBJ dispositions are often imposed for lawful permanent residents and other immigrants in lawful status, many of whom have U.S. citizen family members.

Why would we want to help someone accused of a crime?

- Individuals who receive PBJ are normally first-time offenders.⁴ Maryland has already determined that it is fair to create a way for deserving defendants to avoid these harsh consequences.⁵ Currently, Maryland immigrants can be deported because the *federal government* treats their PBJ as a conviction, even though that was not what Maryland law intended. This bill would bring Maryland’s PBJ in line with its legislative intent by changing the process slightly so a PBJ is no longer a conviction under federal immigration law.
- Additionally, this bill helps the court system run efficiently by eliminating unnecessary trials and appeals, and by providing robust dispositions that are less likely to be challenged than a conviction that triggers deportation.

Would this form of PBJ make it easier to obtain an expungement?

- This form of PBJ would not affect expungement qualifications.⁶

Would this form of PBJ be eligible for appeal?

- No, as with other forms of PBJ, appeal is waived as part of the PBJ agreement.⁷

Would it be easier to do a post-conviction/coram nobis?

⁴ Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 3 (explaining that PBJ is primarily used for non-violent drug and theft offenses, and that most recipients are first-time offenders).

⁵ See Md. Code Ann., Crim. Proc. § 6-220(b)(1)(i) (reasoning that probation before judgment shall only be granted where it is in the best interest of the defendant and the public welfare).

⁶ See MARYLAND JUDICIARY, EXPUNGEMENT: INFORMATION ABOUT REMOVING CRIMINAL AND CIVIL OFFENSE OR INFRACTION RECORDS FROM PUBLIC ACCESS IN MARYLAND, 1 <https://mdcourts.gov/sites/default/files/court-forms/ccdccc072br.pdf> (explaining that court records may be expunged if the charge resulted in probation before judgment, excluding charges of driving while under the influence or driving while impaired)

⁷ Md. Code Ann., Crim. Proc. § 6-220(e).

- No. However, this proposed amendment would reduce the number of collateral attacks on PBJs and contribute to the finality of judgments, because the resulting PBJs would not trigger unanticipated immigration consequences. This would further conserve judicial and prosecutorial resources.