



NATASHA DARTIGUE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN
CHIEF OF EXTERNAL AFFAIRS

ELIZABETH HILLIARD
ACTING DIRECTOR OF GOVERNMENT RELATIONS

POSITION ON PROPOSED LEGISLATION

BILL: Senate Bill 211 – Probation Before Judgment – Probation Agreements

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: February 7, 2023

The Maryland Office of the Public Defender (“MOPD”) respectfully requests that the Committee issue a favorable report on Senate Bill 211.

MOPD endorses without reservation this important legislation, which meets the concerns voiced by prosecutors and the Judiciary to prior versions of the Bill and is needed to correct an unintended but consequential inequality created by current law.

Current PBJ law does not protect Maryland residents

Through the authorization of probation before judgment (“PBJ”), the General Assembly sought to provide deserving individuals the opportunity to avoid the collateral consequences and stigma of having a conviction on their record in exchange for their completion of probation. Under Criminal Procedure Art. § 6-220(g)(3), a defendant who receives PBJ and is discharged successfully from probation shall not be deemed to have a conviction “for the purpose of any disqualification or disability imposed by law because of conviction of a crime.”

Notwithstanding the unambiguous language in § 6-220(g)(3), the benefits of PBJ are not conferred equally on its recipients. For purposes of federal law, and in particular federal immigration law, PBJ is tantamount to a conviction where, as is presently required by § 6-220, it is preceded by a finding of guilt or a plea of guilty or nolo contendere. *See* 8 U.S.C.A. § 1101 (48)(A)(i) (defining conviction as “a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where ... a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a

finding of guilt”). As a result, non-citizens who receive PBJ face loss of liberty, deportation, and banishment just as if they had been convicted of a crime.

Senate Bill 211 fixes the law by ensuring that the General Assembly’s intent in authorizing the imposition of PBJ – to enable deserving individuals to avoid the stigma and collateral consequences of a conviction – is carried out. The Bill does this by permitting a court to impose probation in the absence of a guilty plea, nolo contendere plea, or finding of guilt. Under the procedure authorized by Senate Bill 211, a defendant enters a not guilty plea and enters into an agreement with the court pursuant to which the court, after determining that the facts support a finding of guilt, defers making that finding of guilt. If the defendant successfully completes probation, the court discharges the defendant, who then has neither a conviction on their record nor the equivalent of a conviction for federal immigration purposes. On the other hand, if the defendant violates probation, the court, pursuant to the agreement, enters a finding of guilt and imposes sentence.

Other laws provide precedent for Senate Bill 211

Maryland law already recognizes the authority of a court to order probation or probation-like conditions in cases where the defendant is not found guilty. Court rules provide that, upon accepting a plea of nolo contendere, a court “shall proceed to disposition as on a plea of guilty, but without finding a verdict of guilty.” Md. Rule 4-242(e). Similarly, Criminal Procedure Article § 6-229 allows for the entry of a nolle prosequi or stet with the requirement of drug and alcohol treatment.

The key difference between the procedure authorized by Senate Bill 211 and a plea of nolo contendere is that only the former does not lead to a conviction for federal immigration purposes. And while the State currently may enter a nolle prosequi or stet to dispose of charges against an individual whom everyone agrees should not be subject to removal, this is not a one-size-fits-all disposition. In order to ensure that individuals can remain in the community with their families, courts also must have the ability to place them on probation in appropriate cases.

Senate Bill 211 protects Maryland residents in a manner recognized by federal courts

For years, neighboring jurisdictions like Virginia and New York have had laws similar to Senate Bill 211 on their books. Over a dozen years ago, the Fourth Circuit Court of Appeals held,

in *Crespo v. Holder*, 631 F.3d 130 (2011), that a defendant who entered a probation agreement under Virginia’s deferred-finding-of-guilt law did not have a conviction for purposes of federal immigration law. Maryland should adopt a similar commonsense procedure which holds individuals responsible for their actions without subjecting them to draconian and unintended consequences.

Senate Bill 211 does not supplant or significantly alter current PBJ law

Under Senate Bill 211, Maryland law will permit two forms of PBJ: the current form, which requires a guilty plea or finding or a plea of nolo contendere, and a new form, which involves a not guilty plea and a deferred finding of guilt. Aside from this difference, the two forms of PBJ will operate similarly. An individual who is not eligible to receive a traditional PBJ would be ineligible to receive the new form of PBJ. By the same token, Senate Bill 211 is explicit that an individual who receives the new disposition will be considered to have received PBJ for all purposes under state law. Apart from the way in which federal law views the individual who receives the new form of PBJ, that individual would thus be no better nor no worse off than an individual who receives traditional PBJ.

Importantly, Senate Bill 211 also continues to entrust our courts with determining when PBJ is appropriate. Before imposing PBJ – of either variety – a court must find that “the best interests of the defendant and the public welfare would be served.” This is consistent with the broad sentencing discretion Maryland affords judges in almost all other contexts, and it permits judges to act in accordance with what they deem best for defendants and public safety.

For these reasons, MOPD urges this Committee to issue a favorable report on Senate Bill 211.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.

Authored by: Brian L. Zavin, Chief Attorney, Appellate Division
brian.zavin@maryland.gov, (410) 767-8523