



POSITION ON PROPOSED LEGISLATION

BILL: HB 213 - Criminal Procedure - Probation Before Judgment - Facts Justifying a Finding of Guilt and Suspension of Sentence

POSITION: SUPPORT

DATE: January 28, 2020

This bill proposes two things:

- #1. To provide an additional alternative to judges seeking to impose probation before judgment, specifically, authorizing a court to find facts justifying a finding of guilt and then enter probation before judgment; and
- #2. To expressly state that as part of the PBJ process under CP 6-202, as a condition of probation, the court may order a specified sentence of suspended time.

Need for this change

Currently, the result of a PBJ is different for different Maryland residents. It is *not* a conviction for Maryland law purposes but *is* a conviction under immigration law. Anyone who is not a U.S. citizen has been convicted of the charge when they accept a PBJ, including permanent residents (“green card”).

This bill does not disturb the familiar process for entering PBJ or imposing conditions; it adds a third option to follow if the court and the parties agree: *that the court finds facts justifying a finding of guilt* before placing the defendant on probation.

This change will mean that all Maryland residents will have the same result with a PBJ: not a conviction. This change will allow Maryland judges and parties to follow the same procedure as has been followed in Virginia since 2011.

Why a Maryland PBJ is considered a conviction by the immigration law

Immigration law defines “conviction” as including a finding of guilt by a judge or jury; or a

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plea of guilt or no contest (*nolo contendere*); or an admission by the defendant of facts sufficient to find guilt. 8 USC 1101(a)(48)(A).

The Maryland PBJ statute requires the defendant to either plead guilty or no contest or to be found guilty. Case law has confirmed that a Maryland PBJ is a conviction for immigration law, and brings all the consequences of a conviction.

This addition to the PJB statute would allow the Maryland law to be consistent with immigration law

If the judge *finds facts justifying a finding of guilt* and then imposes probation, this is *not* a conviction for immigration law or Maryland law. *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011). 8 U.S.C. 1101(a)(48)(A):

Subsection (i) specifies five sufficient findings: a finding of guilt by a judge or jury (i.e., a trial), a plea of guilt, a plea of no contest, or an admission *by the alien* of facts sufficient to find guilt. As Crespo correctly notes, *none* of these five possibilities occurred in his case because neither a judge nor a jury found him guilty after a trial and he did not plead guilty or no contest or admit to any facts, let alone facts sufficient to warrant a finding of guilt.

631 F.3d at 134 [citations and internal quotations omitted, emphasis in original].

If the defendant does not plead guilty but the judge “finds facts justifying a finding of guilt,” the procedure is not a conviction under the immigration law definition, 1101(a)(48)(A). *Jacquez v. Sessions*, 859 F.3d 258 (4th Cir. 2017).

This bill will prevent the harsh, disparate practical results of the Maryland PBJ in immigration courts:

Deportation even for long-time lawful permanent residents (“green cards”) even though the court entered a PBJ for minor offenses. Examples:

First-time possession of less than two ounces of marijuana used in a drug-free zone. 8 U.S.C. 1227(a)(2)(B). *Matter of Martinez Zapata*, 24 I.&N. Dec. 424 (BIA 2007).

Disorderly conduct (involving prostitution) *Rohit v. Holder*, 670 F.3d 1085 (9th Cir. 2012).

Use of fraudulent driver’s license, *Montero-Ubri v. INS*, 229 F.3d 319 (1st Cir. 2000).

Trafficking in counterfeit goods where person did not know that action was criminal and did not intend to defraud *Matter of Kochlani*, 24 I.&N. Dec. 128 (BIA 2007).

Contempt of court for violating a protection order. *Matter of Obshatko*, 27 I. & N. Dec. 173 (BIA 2017).

Malicious destruction of property, CR 6-301. *Matter of Shaikh*, A90-646-350 (BIA March 2, 2006).

ICE custody: no release on bond

PBJ for any of the above charges and many others makes the person subject to mandatory ICE custody: not eligible for release on bond. 8 U.S.C. 1226(c)(1)(B). *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (rejecting claim that U.S. Constitution imposes six-month limit on such detention or requires bond hearings). *Ventura v. Mumford*, 2017 W.L. 4098763 (D. Md. 9/15/2017) (at the time the petition was filed, Ventura had been held in ICE custody for nearly a year, pending completion of removal proceedings. Court finds no constitutional violation).

PBJ for a DUI also can make noncitizen subject to ICE custody and not able to be released on bond while deportation case proceeds, taking many months or years. *Matter of Sinauskas*, 27 I. & N. Dec. 207 (BIA 2018).

Articulating that courts have the authority to specify a suspended sentence

This bill also would make express that, as part of the PBJ process, courts have the authority to impose a specified sentence of suspended time as a condition of probation. This additional language does not change existing law. Lastly, this bill does not repeal the requirement for written consent of the defendant before a PJB is entered.