

IN SUPPORT OF HB 559

To: House Judiciary Committee
From: The Honorable Lisa Dornell, Retired Immigration Judge
Date: February 11, 2022
Re: Written Testimony in Support of House Bill 559

I am submitting this written testimony to offer my unequivocal support for House Bill 559. I served as a United States Immigration Judge at the Baltimore Immigration Court for 24 years. I retired in 2019. Prior to my time on the bench, I was a Senior Litigation Counsel with the Justice Department's Office of Immigration Litigation, where I argued many cases before federal circuit courts including the Fourth Circuit Court of Appeals.

Right now, immigrants who receive the benefit of probation for the same crime will face radically different outcomes, depending on if the probation is imposed by the State of Maryland or Commonwealth of Virginia. If the probation is imposed in Virginia pursuant to VA Code Ann. § 18.2-251, the immigrant's probation will not be treated as a conviction under federal immigration law. In *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011), the Fourth Circuit considered a Virginia adjudication under *Virginia Code § 18.2-251*, and the court said:

After such a plea, "if the facts found by the court would justify a finding of guilt," the court may, "without entering a judgment of guilt," instead "defer further proceedings and place" the offender on probation. *Id.* In his case, Crespo pled *not* guilty to the offense and the judge **found facts justifying a finding of guilt** and deferred adjudication over the Commonwealth's objection. Crespo was sentenced to one year of probation, which he served without incident.

Because Mr. Crespo had not pled guilty or admitted facts related to the simple possession of marijuana charge, but instead the court had *found facts justifying a finding of guilt*, the imposition of probation was not considered a conviction under federal immigration law and he was not deported.

But had Mr. Crespo's case occurred in Maryland, and had he received the benefit of probation before judgment, this Maryland equivalent to Virginia's probation statute would have rendered him deportable. This is because to receive the benefit of probation before judgment in Maryland, the judge would have had to follow the procedure as it is currently laid out in Md. Crim. Proc. § 6-220 which requires an admission of guilt and a formal finding of guilt by the judge before the benefit of probation may be extended. Although the Maryland legislature did not intend for a PBJ to be a conviction, it is just that for federal immigration purposes. Consequently, an immigrant with probation for the same crime will face radically different outcomes if the probation was imposed in Virginia versus Maryland. We refer to this unforeseen and arbitrary intersection between state and federal law as being a "jurisdictional happenstance." It is highly unfair and as a sitting Immigration Judge, it was very painful to render findings of deportability against individuals with a Maryland PBJ, knowing full well that, but for the fact that they agreed to a PBJ on the wrong side of the Potomac, they were sealing their fate under the federal immigration law, something that was not the desired or anticipated result of, and in fact, contrary to the purpose of the granting of the PBJ.

Not only is the current regime *prima facie* unjust, it also creates unequal and inconsistent law within the Fourth Circuit, which presides over both Maryland and Virginia. My experience in litigating before the Federal Circuit Courts of Appeals and my experience as an Immigration Judge cement my view that conflicting rulings from the Circuit Court, in addition to being unfair, cast an unnecessary shadow of confusion and uncertainty, something that in this instance can easily be remedied by House Bill 559.

This Bill presents an opportunity for the State of Maryland to ensure that the Federal Immigration Statute does not subvert the true intention of the Maryland State statute, which

is to truly give all who rely on the Maryland law the benefit of a probation *before* judgment, a benefit that tempers justice with mercy. The State of Maryland need not and ought not wait for a federal bureaucracy, with its mind-boggling array of priorities, to address this important matter over which the State has control.

COMMENTARY JUSTICE

Judge Lisa Dornell: Not Every 'Win' Under the Law Is a Win for Justice

By Guest Commentary

February 2, 2022



Unsplash.com photo.

By Lisa Dornell

The writer is a retired U.S. immigration judge.

Twenty-nine years ago, as a Justice Department lawyer advocating the U.S. Attorney General's position in an immigration case, I stood before a distinguished panel of the Fourth Circuit Court of Appeals and argued in favor of a man's deportation from the United States. The man in that case was the recipient of a probation before judgment, entered by a Maryland state court judge.

Even though he was not considered to have a conviction under Maryland law, I persuaded the court that he still stood convicted under federal law. In Maryland criminal cases, first-time offenders and individuals charged with minor offenses are often given "probation before judgment," wherein they are not convicted but rather given a period of probation.

For U.S. citizens who successfully complete their probation, a PBJ has no further consequences. For noncitizens, however, the consequences are far more dire, as many convictions render noncitizens deportable from the United States and do, in fact, result in deportation and a permanent separation from U.S. citizen family members including spouses and children.

My argument in that federal circuit court case resulted in a final order of deportation and resulted in a binding decision that now affects every Maryland noncitizen with a PBJ who is summoned to appear before an immigration court.

Because of a quirk in the language in the Maryland PBJ statute, the only result that the court could have reached at the time was the conclusion that the man had a conviction under federal law, notwithstanding the fact that a state court judge had already deemed him to be both worthy of probation and a successful probationer without a conviction.

Looking back over an almost 36-year career in the immigration field, which includes time as an INS prosecutor, as a former Civil Division Justice Department attorney, and more than 20 years as a U.S. immigration judge before my retirement, it has become clear to me that not every "win" on the law is a win for justice.

For justice to win, there must be fundamental fairness for everyone who is subject to our laws, regardless of citizenship status. Fairness includes the honoring of expectations and promises made to people who appear in our courts of law.

While our state statute clearly provides that people who successfully complete their probationary period do not have "a conviction for the purpose of any disqualification or disability imposed by law because of conviction of a crime" (Md. Code, Crim. Proc. § 6-220), the current disconnect between our state PBJ statute and the federal immigration law essentially results in a "bait and switch," a situation that is profoundly unjust.

As a sitting immigration judge, it was painful to issue deportation orders against Marylanders with PBJs because they had benefitted from probation in Maryland and not, for example, in Virginia, where the legislature has more precisely drafted its PBJ statute such that its noncitizens are not deportable under federal law.

The time for legislative action is long overdue.

Once again, our state legislature has the ability to amend the PBJ statute in a manner that would require the federal government to give full faith and credit to the legislative intent behind the statute and would enable federal jurisdictions to recognize the discretion, power and authority of our state court judges.

The proposed, simple revision of the Maryland PBJ statute would remove the grant of a Maryland PBJ from the federal definition of conviction in the immigration statute and would result in fairness, consistency and a “win” for justice.

I urge the Maryland General Assembly to pass [House Bill 559](#)/[Senate Bill 265](#) to ensure justice for all.

Guest Commentary

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