



## POSITION ON PROPOSED LEGISLATION

BILL:	HB559, Criminal Procedure – Probation Before Judgment – Probation Agreements – Probation Not Deportation
POSITION:	SUPPORT
DATE:	February 11, 2022

The Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 559. We endorse without reservation this important legislation and write to outline why the revised law is needed to correct an unintended but nevertheless consequential inequality in the law.

### ***Current PBJ law is broken***

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 § 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 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*. 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.

House Bill 559 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 House Bill 559, a court, after determining that the facts support a finding of guilt, may enter into a probation agreement with the defendant whereby the court agrees to not to make the finding of guilt if the defendant successfully

*For further information, please contact Krystal Williams, Director, Government Relations Division, by email at [krystal.williams@maryland.gov](mailto:krystal.williams@maryland.gov) or by phone at 410-209-8682; or Brian Zavin, Chief Attorney, Appellate Division, by email at [brian.zavin@maryland.gov](mailto:brian.zavin@maryland.gov) or by phone at 410-767-8523.*

completes probation. If the defendant adheres to the conditions of 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.

### ***HB559 is not unprecedented***

Maryland already recognizes the authority of a court to order probation or probation-like conditions on defendants 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 House Bill 559 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.

House Bill 559 is not unprecedented in another sense. For years, neighboring jurisdictions like Virginia and New York have had laws similar to House Bill 559 on their books. Like these states, Maryland should adopt a commonsense procedure which holds individuals responsible for their actions without subjecting them to draconian and unintended consequences.

### ***HB559 does not create a windfall for criminal defendants***

An individual who is not eligible to receive PBJ under current law remains ineligible under House Bill 559.<sup>1</sup> By the same token, House Bill 559 does not make an individual who receives PBJ where the court agrees to defer a finding of guilt any better off than a defendant who receives PBJ after a finding of guilt, guilty plea, or plea of *nolo contendere*. If the defendant successfully completes probation and is discharged, restrictions otherwise imposed by law on persons who receive PBJ will attach.<sup>2</sup> If, on the other hand, a court finds that the

---

<sup>1</sup> See § 6-220(d) (listing crimes for which PBJ may not be ordered).

<sup>2</sup> See, e.g., Crim. Proc. Art. § 11-702; Educ. Art. § 9.5-414; Public Safety Art., § 5-101.

defendant violated a condition of probation and that the violation warrants revocation, the court may enter the deferred finding of guilt and impose up to the maximum sentence for the crime.

***HB559 does not make the mistake of former Article 27, § 641***

A final point bears mentioning. Former Article 27, § 641, the predecessor to § 6-220, authorized the imposition of “probation without finding a verdict” but did not specify what a court could do in the event of a violation of probation. The omission was critical. In *Bartlett v. State*, 15 Md. App. 234 (1972), *aff’d*, 267 Md. 530 (1973), the Court of Special Appeals held that the circuit court erred when it revoked probation and imposed sentence without making a finding of guilt.

House Bill 559 accounts for the defect in § 641. In order for a court to impose probation before judgment, the court finds facts sufficient to support a guilty verdict but defers entering a guilty finding. In exchange, the defendant agrees that, in the event of a violation of probation, the court may enter a finding of guilt and impose sentence based on that finding. The court thus derives the authority to sentence from the deferred finding of guilt entered with the previously-obtained consent of the defendant.

The current statute authorizing PBJ has failed to carry out the Legislature’s intent of removing conviction-related barriers to defendants who have shown the capacity for rehabilitation. House Bill 559 is a carefully-tailored corrective measure. It confers no special benefit on recipients of PBJ with a deferred finding of guilt; instead, it remedies the fact that non-citizens who receive PBJ under current law are not treated the same as citizens who receive PBJ.

For the above reasons, the Office of the Public Defender urges a favorable report on the Bill.