

HB 817 FAV House of Ruth cross.pdf

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TESTIMONY IN SUPPORT OF HOUSE BILL 817
March 23, 2022
DOROTHY J. LENNIG, LEGAL CLINIC DIRECTOR

The House of Ruth Maryland is a non-profit organization providing shelter, counseling, and legal services to victims of domestic violence throughout the State of Maryland. House of Ruth has offices in Baltimore City, Prince George’s County, Montgomery County, and Baltimore County. House Bill 817 would prevent a conviction for violation of a protective order from merging with a conviction for the underlying assault that led to the violation. **We urge the Senate Judicial Proceedings Committee to issue a favorable report on House Bill 817.**

Under current law, criminal defendants who are charged and convicted of violation of a protective order may be convicted of two crimes – the violation of the protective order and a separate crime of assault which gave rise to the violation. Even if the defendant is convicted of both the violation and the assault, under the rule on mergers of sentencing, the defendant can only be sentenced for the crime which carries the shorter sentence. In this situation, the violation of protective order charge carries a much lower sentence than the assault charge, specifically 90 days as opposed to up to 10 years. Thus, a defendant who is convicted of both an assault against an intimate partner and violation of a protective order can only be sentenced for up to 90 days.

The Court of Special Appeals confronted this issue in a recent case. In order to prevent the defendant-abuser from receiving the lenient sentence of 90 days for violation of protective order, as opposed to the longer sentence associated with the assault charge, the Court vacated the violation conviction so that the defendant could be sentenced for the assault. However, this means that if the defendant is convicted in the future of another violation of protective order, he would not be subject to the enhanced penalty available for a subsequent violation of protective order offense.

House Bill 817 would prohibit the merger of the crimes of violation of a protective order and the underlying assault, thus holding abusers accountable to a much higher potential sentence. It would also prevent defendant from receiving a “second bite at the apple” for subsequent conviction of violation of protective order.

The House of Ruth urges the Senate Judicial Proceedings to issue a favorable report on House Bill 817.

HB817_DeShetty_FAV.pdf

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THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

HB817

**Criminal Law - Violation of a Protective Order - Merger Prohibition and Separate Sentence
Authorization
Testimony in SUPPORT**

Chair Smith, Vice Chair Waldstreicher and members of the esteemed Senate Judicial Proceedings Committee, thank you for the opportunity to provide testimony in support of House Bill 817, a bill that will prohibit a conviction for the violation of a protective order from merging with a conviction for certain other crimes when the underlying facts of the case are the same. This bill passed the House unanimously as presented before you today.

The idea for this bill was brought to us by several advocates as a result of the recent Court of Special Appeals decision in *Morgan v. State*.¹ In *Morgan v. State*, a defendant was found to have violated a protective order by committing a second degree assault. Due to the rules of lenity and merger, the court ultimately dismissed the violation of protection order so that the defendant could be sentenced pursuant to the finding of guilt for the second degree assault.

The rule of lenity requires that a court examine whether two charged offenses arose out of the same criminal conduct, and whether the Legislature intended to impose multiple punishments for the separate crimes. Absent specific guidance from the legislature, if a court deems that two offenses have arisen out of the same criminal conduct, then the crimes merge for the purposes of sentencing. In these instances, the lower sentence of the two crimes is applied, so as not to unfairly punish the defendant for legislative ambiguity.

The General Assembly has identified several areas of criminal law that do not necessarily require sentences to merge, including child abuse and rape.² In these instances, where two crimes are being charged and convicted for, the sentences imposed are not always merged and can be served consecutively or concurrently. The court is granted the discretion to determine what the appropriate sentence should be and is not constrained by the merger doctrine

Currently in Maryland, if a defendant has violated a protective order by physically assaulting an individual, the law is ambiguous and sentences are merged. A violation of a protective order carries a sentence of up to 90 days incarceration for a first offense or up to one year for a second or subsequent

¹ 252 Md.App. 439 (2021)

² Md. Code Ann., Crim. Law § 3-601 and Md. Code Ann., Crim. Law § 3-303.

offense,³ while a second degree assault carries a penalty of up to ten years incarceration, a fine of up to \$2,500 (potentially higher depending on the victim), or both.⁴ When the two are merged, a defendant convicted of both is only required to serve the lower sentence of 90 days to one year.

HB817 would correct this to allow for courts to sentence an individual convicted of both to an appropriate sentence based on the unique facts of the case and defendant's criminal history. This bill will effectively ensure that those who are under a protective order sentenced appropriately for committing an act of violence that is also a violation of a protective order

I respectfully request a favorable report on HB817.

³ Md. Code Ann., Crim. Law § 4-509.

⁴ Md. Code Ann., Crim. Law § 3-203.

HB 817 - cross over hearing - FAV - Women's Law Ce

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Position: FAV

BILL NO.: House Bill 817 – Cross over hearing
TITLE: Criminal Law – Violation of a Protective Order – Merger Prohibition and Separate Sentence Authorization
COMMITTEE: Judicial Proceedings
DATE: March 23, 2022
POSITION: **SUPPORT**

House Bill 817 would provide that a sentence after conviction for violation of a protection order does not merge with any other sentence. The Women’s Law Center of Maryland (WLC) supports HB 817 as it would make clear that courts can exercise discretion to sentence a defendant consecutively or concurrently when a defendant has violated a protection order by committing another crime. Under HB 817, a conviction for a serious crime that carries a higher possible sentence does not get merged into the relatively low sentence for a violation of a protective order.

This bill arose as a result of a case in the Court of Special Appeals, *Morgan v. State*, an unreported decision. Under complicated doctrines that apply in criminal sentencing, the doctrines of merger, the required evidence test and the rule of lenity, the defendant’s sentence for assault, up to ten years and \$2500 fine, would merge into his sentence for violation of a protection order, 90 days, and the defendant would get only the lower sentence. The Court found that the offenses did not merge pursuant to the required evidence test because the mens rea for the violation of the protective order and the assault are different, and the violation of the protective order is not a lesser included offense of the protective order. The court opined that it was not the legislative intent to allow those that violate a civil protective order to avoid a sentence for underlying criminal conduct. However, the Court did find that the rule of lenity applied since *legislative intent was unclear* and both the violation of the protective order and the assault arose from the same acts. The Court also noted that it is entirely in the province of the legislature to make it clear that a sentence does not merge with any other sentence¹. Ultimately, the violation of the protective order was vacated and the sentence for the assault was upheld. Had the court not vacated the violation of protection order conviction, this defendant, who assaulted his victim while a court order was already in place, would have received a mere 90 day sentence.

Some acts that are prosecuted as violations of a protective order are not criminal in nature, such as contacting the victim, or not staying away from where they are ordered to stay away. But in a serious case such as *Morgan v. State*, where a defendant commits a crime even in the face of a court order, we want to make sure that a conviction for violation of a protective order does not shield the defendant from the potential of the higher sentence. In addition, a second conviction for a violation of a protective order carries a higher sentence. In *Morgan v. State*, because the court had to vacate the lesser crime to ensure the higher sentence, Mr. Morgan no longer has a conviction for his first violation of protective order. This nullifies the intent of the violation of a protective order statute.

Therefore, the Women’s Law Center of Maryland urges the Committee to make it explicit that convictions for violation of a protective order do not merge with other sentences. The discretion would then be in the hands of the sentencing judge.

¹ See for example, MD Code Ann. Criminal Law, §3-602.

We ask for a favorable report for HB 817.

The Women's Law Center of Maryland is a private, non-profit, legal services organization that serves as a leading voice for justice and fairness for women. It advocates for the rights of women through legal assistance to individuals and strategic initiatives to achieve systemic change, working to ensure physical safety, economic security, and bodily autonomy for women in Maryland.

PO - merger - testimony - house in senate - 2022 -

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Position: FAV



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Testimony Supporting House Bill 817
Lisae C. Jordan, Executive Director & Counsel
March 23, 2022

The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State's seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judicial Proceedings Committee to report favorably on House Bill 817.

House Bill 817 – Violations of Protective Orders and Merger Doctrine

HB 817 as it would make clear that courts can exercise discretion to sentence a defendant consecutively or concurrently when a defendant has violated a protection order by committing another crime. Under HB 817, a conviction for a serious crime, such as assault or rape, that carries a higher possible sentence does not get merged into the relatively low sentence for a violation of a protective order.

This bill arose as a result of a case in the Court of Special Appeals, *Morgan v. State*, an unreported decision. In this case, the court reviewed whether the defendant's sentence for assault in the second degree, up to ten years and \$2500 fine, would merge into his sentence for violation of a protection order, 90 days. While the Court found that the violation of the protective order is not a lesser included offense of the protective order, it also found that the rule of lenity applied since *legislative intent was unclear* and both the violation of the protective order and the assault arose from the same acts. The Court also noted that it is entirely in the province of the legislature to make it clear that a sentence does not merge with any other sentence.¹ Ultimately, the violation of the protective order was vacated and the sentence for the assault was upheld. Had the court not vacated the violation of protection order status, this defendant, who assaulted his victim while a court order was already in place, would have received a mere 90 day sentence.

¹ See for example, MD Code Ann. Criminal Law, §3-602.

While this case involved a second degree assault, the reasoning would apply equally to a rape or other sex crime. Where a defendant commits a violent act that would be a crime whether the order is in place or not, a conviction for violation of a protective order should not shield the defendant from the potential of the higher sentence. In addition, a second conviction for a violation of a protective order carries a higher sentence. In *Morgan v. State*, because the court had to vacate the lesser crime to ensure the higher sentence, Mr. Morgan no longer has a conviction for his first violation of protective order. This nullifies the intent of the violation of a protective order statute.

This bill makes it explicit that convictions for violation of a protective order do not merge with other sentences. The discretion would then be in the hands of the sentencing judge.

**The Maryland Coalition Against Sexual Assault urges the
Judicial Proceedings Committee to
report favorably on House Bill 817**

HB 817_MNADV_FAV_JPR.pdf

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Position: FAV



BILL NO: House Bill 817
TITLE: Criminal Law – Violation of a Protective Order – Merger Prohibition and Separate Sentence Authorization
COMMITTEE: Judicial Proceedings
HEARING DATE: March 23, 2022
POSITION: **SUPPORT**

The Maryland Network Against Domestic Violence (MNADV) is the state domestic violence coalition that brings together victim service providers, allied professionals, and concerned individuals for the common purpose of reducing intimate partner and family violence and its harmful effects on our citizens. **MNADV urges the Senate Judicial Proceedings Committee to issue a favorable report on HB 817.**

The Doctrine of Merger

The Double Jeopardy Clause of the Fifth Amendment that applies to states through the Fourteenth Amendment prevents a defendant from receiving multiple punishments for the same offense. The merger doctrine is the common law principle derived from the Fifth Amendment as well as federal and Maryland common law principles similarly stating that a criminal defendant should not receive “multiple punishment stemming from the same offense.”¹ The Court of Special Appeals of Maryland referred to this form of double jeopardy as “simultaneous jeopardy, involving largely issues of merger and multiple punishment and lying on the at-times blurred boundary between constitutional law and statutory construction.”² When there is merger of offenses then only one sentence can be imposed.

The Required Evidence Test

Maryland utilizes the required evidence test to determine if the merger doctrine applies. If offenses merge, then there is only one sentence imposed. Under the required evidence test, the court will look to the elements needed to prove each offense and whether the offenses stem from the same act or acts. If two offenses require proof of the same elements and are part of the same act, then they merge and there is one sentence. If two offenses require proof of different elements, they will not merge even though they stem from the same offense. In the case of lesser included offenses, where there are two offenses, and one has one additional element the lesser offense will merge into the offense that requires an additional element and one sentence can be

¹ *Moore v. State*, 198 Md.App. 655, 684 (2011) (internal quotations and citations omitted).

² *Id.* (internal quotations and citations omitted).

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imposed. “The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.”³

The Rule of Lenity

The required evidence is applied and followed by courts at sentencing unless the Legislature clearly indicates intent that offenses do not merge, and multiple sentences may be imposed.⁴ “[I]f the legislature precludes the merger of offenses it must explicitly say so in writing...”⁵ If legislative intent is unclear then the offenses merge pursuant to the “Rule of Lenity.” When legislative intent is clear courts will defer to the stated intent in determining whether two offenses arising from the same act merge or not for sentencing. However, if legislative intent is ambiguous, then a ruling will be made in favor of a defendant and offenses will merge. “The rule of lenity is a common law doctrine that directs courts to construe ambiguous criminal statutes in favor of criminal defendants.”⁶

Morgan v. State

In *Morgan v. State*, the Court of Special Appeals was faced with the question of whether a sentence for an assault in the second-degree merges with a violation of a protective order that was the result of the same second-degree assault. The Court found that the offenses did not merge pursuant to the required evidence test because the *mens rea* for the violation of the protective order and the assault are different, the violation of the protective order is not a lesser included offense of the protective order, and the court opined that it was not the legislative intent to allow those that violate a civil protective order to avoid a sentence for underlying criminal conduct. However, the Court did find that the rule of lenity applied since legislative intent was unclear and both the violation of the protective order and the assault arose from the same acts. Ultimately, the violation of the protective order was dismissed and the sentence for the assault was upheld.

³ *Id.* at 685 (internal quotations and citations omitted).

⁴ *Morgan v. State*, 252 Md.App. 439 (2021)

⁵ *Id.*

⁶ *Alexis v. State*, 437 Md. 457, 484 (2014).



House Bill 817

House Bill 817 will clarify the law to state unambiguously that it is the intent of the Legislature that a sentence for underlying criminal acts that also result in the violation of a protective order should not merge with a violation of a protective order. Courts will have the discretion to impose an appropriate sentence based on the facts of a case and defendant's history and not be limited to an up to 90-day sentence pursuant to a first violation of a protective order penalty or an up to one-year sentence for a second violation of a protective order penalty.

For the above stated reasons, the **Maryland Network Against Domestic Violence urges a favorable report on HB 817.**