

CLINICAL LAW PROGRAM

IN SUPPORT OF SB 265

To: House Judiciary Committee
From: Gabriela Kahrl on behalf of the Maryland Carey Law Immigration Clinic
Date: January 31, 2022
Re: Written Testimony in Support of SB 265

We urge a favorable report on SB 265, because, without it, countless noncitizen Maryland residents will continue to face detention and deportation because they accepted probation in a Maryland court. Currently, if a non-citizen Maryland resident obtains a probation before judgment (“PBJ”), they can face loss of liberty, deportation, and permanent banishment from the United States. This is because both the Fourth Circuit and the Board of Immigration Appeals have held that a Maryland PBJ is a conviction under federal immigration law¹, notwithstanding the Maryland General Assembly's intent to the contrary. *U.S. v. Medina*, 718 F.3d 364 (4th Cir. 2013)²; *Matter of Ozkok*, 19 IN Dec. 546 (BIA 1988).

The General Assembly did not intend for a PBJ to carry with it the same consequences as a conviction. When it enacted the probation before judgment statute, the General Assembly acknowledged in the very language of the statute that a PBJ should afford lenience in situations where “the best interest of the person and welfare of the state” dictate an

¹ The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) 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, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. 8 U.S.C. 1101(a)(48)

² In *U.S. v. Medina*, 718 F.3d 364 (4th Cir. 2013), the court held that a diversionary disposition under the Maryland PBJ statute, in which the defendant pleads guilty and the court sentences the person but does not formally enter judgment against him, is a predicate conviction for purposes of sentence enhancement under the federal sentencing guidelines. The court held that the definition of conviction in the immigration statute, 8 USC 1101(a)(48)(A), “must control our reading” of the sentencing guideline language. 718 F.3d at 368. Medina’s diversionary disposition was a conviction because he “pled guilty to the charged offenses and was sentenced to some form or restraint on his liberty, namely probation for a period of eighteen months.” *Id.*

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outcome in a criminal matter that is not a conviction. Md. Crim. Proc. § 6-220 (b)(1)(i)³. The federal law thwarted this intent in 1996 when it enacted the “Illegal Immigration Reform and Immigrant Responsibility Act” (IIRAIRA) which substantially broadened the definition of a conviction. The effect was that the Maryland PBJ, and other non-convictions like it, were then treated as convictions.

SB 265 protects the intent of the General Assembly “that a grant of probation before judgment, unless subsequently altered by a violation of that probation, should have the effect of wiping the criminal slate clean.” *Jones v. Baltimore City Police*, 326 Md. 606 (2008). SB 265 adds an **additional, alternative** process for imposing a PBJ. The defendant enters into a probation agreement with the court, which does not require the entry of a guilty plea. The defendant waives trial rights and defenses, and does not deny facts that would support a finding of guilt that are read into the record. The court then makes a “finding of facts sufficient to support a finding of guilt”, which gives the court jurisdiction to later find guilt and impose a sentence, if there is a violation of probation.

SB 265 does not disturb, erode, replace or remove the current method for obtaining a PBJ. Practically, the two processes will appear and function virtually indistinguishably from one another, and the consequences of failing to abide by probation, the same. This bill does not provide additional benefits, merely ensures that noncitizens can have what citizens have already: The ability to take responsibility for one's mistakes, without suffering lifelong consequences, like deportation. This bill merely ensures that a noncitizen is

³ “By this 1975 amendment [to the PBJ statute], the General Assembly expressed its unmistakable intent that the disposition of probation before judgment not be a conviction.” *Myers v. State*, 303 Md. At 645, 496 A.2d at 312.

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not deported for a one-time relatively minor mistake that would have a minimal effect on the life of a similarly-situated citizen⁴.

This bill fills an important gap in Maryland criminal law by ensuring that all people have equal access to probation. Currently, there is no existing Maryland law or disposition that can both hold the defendant accountable and provide a resolution of a criminal case without triggering federal immigration consequences. Under the Immigration and Nationality Act (“INA”), a PBJ, a plea of *nolo contendere*, an *Alford* plea, and a “Not Guilty Agreed Statement of Facts” (“NGASF”) plea all constitute a conviction.

A *nolo contendere* plea, an *Alford* plea, and an NGASF plea are all convictions for both Maryland state purposes and federal immigration purposes under the INA. The INA states in pertinent part that the term “conviction” is:

(...) 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.” See 8 U.S.C. 1101(a)(48)(A)(i).

A plea of *nolo contendere* is, by the explicit language of the statute, a conviction under federal immigration law. Similarly, even though there is no plea of guilt during a NGASF, it is still a conviction under federal immigration law because (1) there is an admission by the defendant as to facts sufficient to warrant a finding of guilt and (2) there is a formal finding

⁴ This bill will not make it easier for an immigrant to become a U.S. citizen, nor does it treat noncitizens more favorably than citizens. SB 265 categorically will not make it easier for an immigrant to become a citizen. A PBJ—even if not a conviction—would still affect eligibility for citizenship. To become a United States citizen, an applicant must demonstrate good moral character. The PBJ, like all other contact with the criminal legal system, would still have to be disclosed on a noncitizens’ naturalization application. The PBJ would thus be taken into consideration when determining whether the noncitizen meets the good moral character requirement for citizenship.

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of guilt at the conclusion of the NGASF. Even Maryland courts treat NGASF as a conviction, holding that a NGASF is the functional equivalent of guilty plea. *Sutton v. State*, 289 Md. 359, 366, 424 A.2d 755, 759 (1981). Similarly, an *Alford* plea qualifies as a conviction under federal immigration law because there is a formal finding of guilt, thus meeting the requirements for the definition of a “conviction.”

The Maryland General Assembly cannot wait for or rely on federal immigration reform. This issue is squarely in the jurisdiction of the Maryland General Assembly.

We are living in unprecedented times. Immigrants have suffered four long years under the harsh, xenophobic, and racist policies of the prior administration and that suffering is not going to stop any time soon. President Trump issued over 400 executive actions which directly targeted immigration and immigrants of all backgrounds⁵. Even though Joe Biden is now president, immigrants are still, right now, under attack. Trump's changes to both the immigration policies and the agencies that enforce those policies will take years to fix⁶. The Guardian published a report on February 8, 2021, showing how Trump policies continue to result in cruel deportations of babies and children: “ICE deported at least 72 people to Haiti on Monday, including a two-month-old baby and 21 other children, as the Biden administration made clear it would press on with expulsions of newly-arrived migrants, pending a review of immigration policy. The children were deported to Haiti on

⁵ Dany Bahar, *The road to fix America's broken immigration system begins abroad*, BROOKINGS, (Dec. 8, 2020), <https://www.brookings.edu/blog/up-front/2020/12/08/the-road-to-fix-americas-broken-immigration-system-begins-abroad/>.

⁶ Sarah Stillman, *The Race to Dismantle Trump's Immigration Policies*, THE NEW YORKER, (Feb. 1, 2021), <https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies>

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two flights chartered by ICE from Laredo, Texas, to the Haitian capital Port-au-Prince. The removals sent vulnerable infants back to Haiti as it is being roiled by major political unrest.⁷ The Biden Administration is struggling to undo the horrible policies of the Trump Administration and, issued the following statement: “As this administration has stated from the very outset, our capacity at the border will not transform overnight, due in large part to the damage done over the last four years to our asylum system and infrastructure.”⁸ The federal and immigration courts, filled with Trump appointees, are also preventing Biden's attempts to roll back Trump policies. On January 29, 2021, a three-judge panel comprising conservative judges appointed by Trump overturned a lower court decision to block the rule from applying to unaccompanied minors.⁹

This bill promotes racial justice. This bill is necessary to ensure racial equity in the consequences for such low-level first-time offenders. Detention and deportation disproportionately impact Black immigrants¹⁰. Black immigrants continue to be detained in large numbers, exposing them to harm **including use of force and lack of access to medical care**¹¹. Because communities of color are over-policed, charged, and prosecuted, Black and brown noncitizens are more likely to face adverse—and often severe—immigration consequences as a result of low-level crimes where a PBJ is warranted.

⁷ Ed Pilkington, *Outcry as more than 20 babies and children deported by US to Haiti*, THE GUARDIAN, (Feb. 8, 2021, 6:21 PM), <https://www.theguardian.com/us-news/2021/feb/08/us-ice-immigration-customs-enforcement-haiti-deportations>.

⁸ *Id.*

⁹ Tanvi Misra, *Revealed: US Citizen newborns sent to Mexico under Trump-era border ban*, THE GUARDIAN, (Feb. 5, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/feb/05/us-citizen-newborns-mexico-migrant-women-border-ban>.

¹⁰ Juliana Morgan-Trostle, Kexin Zheng & Carl Lipscombe, *The State of Black America*, (2018), <http://stateofblackimmigrants.com/wp-content/uploads/2018/09/sobi-fullreport-jan22.pdf>.

¹¹ Southern Poverty L. Ctr., (Aug. 26, 2020) https://www.splcenter.org/sites/default/files/8.26.20_crcl_letter.pdf.

Conclusion

The proposed amendment to the Maryland PBJ statute provides an additional avenue of granting a PBJ so that all people, regardless of citizenship status, have meaningful access to it. This amendment would allow for the efficient and final resolution of the criminal cases and preserve the Maryland General Assembly's intent to render a PBJ a second chance for first-time low-level criminal offenders in Maryland. For the foregoing reasons, The Maryland Carey Law Immigration Clinic urges a favorable report on SB 265.