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February 8, 2023

TO: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

FROM: Jer Welter
Assistant Attorney General, Office of the Attorney General

RE: SB 211 - Probation Before Judgment - Probation Agreements
(SUPPORT)

The Attorney General urges the Judicial Proceedings Committee to report favorably on Senate Bill 211. This bill will help avoid devastating federal collateral consequences, particularly immigration consequences, for people who commit minor crimes.

For most purposes under State law, the entry of probation before judgment is not considered a conviction, and does not result in the consequences of a conviction. However, due to the way that a “conviction” is defined under federal immigration law, *see* 18 U.S.C. § 1101(a)(48)(A), a Maryland probation before judgment qualifies as a “conviction,” with all attendant consequences, for federal purposes.

Senate Bill 211 creates a probation before judgment disposition that allows a judge to find facts sufficient to support a guilty finding but defer entry of that guilty finding in lieu of probation. Because it avoids an admission of guilt by the defendant or a finding of guilt by the court (unless and until the defendant violates probation), it would not be considered a “conviction” for purposes of federal immigration law. However, the bill specifies that such a disposition “shall be considered as a probation before judgment for all purposes under State law.” (*See* page 3, lines 23–26 of the bill).¹

¹ The Office of the Attorney General understands that it is the sponsor’s intent to ensure that the form of probation before judgment established by this bill would have all of the same consequences under

This bill letter is a statement of the Office of Attorney General’s policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us

When this bill was proposed in prior years, concerns were raised that the “deferred finding” procedure created by the bills could violate due process. Specifically, concerns were raised regarding the court’s ability to find “facts justifying a finding of guilt without ... a trial,” and the ability to find a defendant guilty at a violation of probation hearing when there had not been a previous finding of guilt beyond a reasonable doubt.

In the event that similar concerns are raised before this committee, they appear to be unfounded. Although this would be a new procedure for Maryland, as discussed below, similar procedures have existed in Maryland for decades. Moreover, Virginia has had a remarkably similar statute in place since 1991. Virginia Code Ann., § 18.2-251 states that “if the facts found by the court would justify a finding of guilt,” a court may “without entering a judgment of guilt and with the consent of the accused defer further proceedings and place [the defendant] on probation[.]” “Upon violation of a term or condition, the court may enter an adjudication of guilty and proceed as otherwise provided.” *Id.* See also *Nunez v. Commonwealth*, 783 S.E.2d 62, 66-67 (Va. Ct. App. 2016). In *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011), the Fourth Circuit confirmed that this disposition under Virginia law does not constitute a “conviction” under the federal statute.

Regarding the court’s ability to find “facts justifying a finding of guilt” without a trial, judges currently do this all the time. When a defendant agrees to proceed by way of a not guilty statement of facts, the defendant pleads not guilty and waives his right to a trial. *Bishop v. State*, 417 Md. 1, 20 (2010). In lieu of a trial, the court hears a proffer of stipulated evidence or an agreed statement of facts. *Id.* The court then renders a verdict based upon the facts received.

Under this bill, similarly, the defendant would plead not guilty and would not admit the facts offered by the State. (*See* page 3, lines 1–2 of the bill). If the defendant and the court agree to proceed by way of a deferred finding, the State would proffer the evidence that the defendant stipulates would be presented by the State at trial—*i.e.*, a proceeding equivalent to the “stipulated evidence” proceeding described in *Bishop* and regularly used in Maryland courts under existing law. Instead of entering a guilty verdict if the court finds the facts sufficient, the court would simply defer the entry of a verdict and instead find that the proffered facts justify a finding of guilt beyond a reasonable doubt.

As for the ability of the court to find a defendant guilty at a violation of probation hearing when there had never been a previous finding of guilt beyond a reasonable doubt, there already exists a procedure in Maryland law that allows a judge to defer a finding of guilt and place a defendant on probation: a plea of *nolo contendere*. What is more, Senate Bill 211 contains language that addresses the finding of guilt beyond a reasonable doubt

Maryland law as a probation before judgment entered under current law. To the extent that any amendments to the bill may be necessary to ensure the same State-law treatment of the probation before judgment disposition authorized by this bill, the Office would support such amendments.

should the defendant violate probation. (See page 3, lines 5–14 of the bill).

“Nolo contendere,” Latin for “I do not wish to contend,” is sometimes referred to as a plea of “no contest.” The defendant pleading nolo contendere is not admitting guilt, but is not contesting the charges. Maryland Rule 4-242(e) describes the process for pleading nolo contendere. If the court accepts a plea of nolo contendere, the rule explains, “the court shall proceed to disposition as on a plea of guilty, *but without finding a verdict of guilty.*” Md. Rule 4-242(e) (emphasis added). There is no verdict entered in a plea of nolo contendere, and, thus, it is not considered a conviction under State law. *Hubbard v. State*, 76 Md. App. 228, 240-41 (1988).²

Even though a plea of nolo contendere does not result in a verdict of guilty, “[t]he plea of nolo, just as the plea of guilty, has the effect of submitting the accused to punishment by the court; following the entry of either plea the court shall proceed to determine and impose sentence.” *McCall v. State*, 9 Md. App. 191, 193-94 (1970). The defendant can be placed on probation and can be ordered to pay fines or restitution. Md. Code Ann., Crim. Pro. § 6-220(b).

The procedure proposed by Senate Bill 211 is similar to a plea of nolo contendere. One distinction, however, allows a court to find the defendant guilty of the underlying crime (based upon the previous finding of facts justifying a finding of guilty beyond a reasonable doubt) in the event that the defendant violates the terms of probation. This distinction addresses the procedural hurdles created by the Court of Special Appeals’ decision in *Bartlett v. State*, 15 Md. App. 234 (1972). In *Bartlett*, the Court explained that where probation is granted without the imposition of a guilty verdict, “[s]hould the probation thus granted be revoked at a subsequent hearing for that purpose, the case reverts to its status at the time the probation was granted, and determination of guilt [of the original charge], by plea or trial, must follow before any sentence may be imposed.” *Id.* at 241. Senate Bill 211 addresses this by requiring a defendant to agree that, if he or she is found in violation of probation, the court may find the defendant guilty of the underlying crime. (See page 3, lines 9–14 of the bill). That guilty verdict would be based on the previous finding that there existed facts justifying a finding of guilt beyond a reasonable doubt.

In short, although Senate Bill 211 creates a new procedure, similar procedures have been in place in Maryland for decades. A nearly identical procedure has been in place in Virginia for 30 years without raising due process concerns. The Attorney General urges a favorable report on Senate Bill 211.

cc: Members of the Committee

² A plea of nolo contendere cannot, however, be used to avoid the consequence of deportation because federal immigration law specifically defines pleas of nolo contendere as convictions that may result in deportation.