

IN SUPPORT OF SB 653

To: Senate Judicial Proceedings Committee
From: Maryland Carey Law Immigration Clinic
Date: February 19, 2020
Re: Written Testimony in Support of SB 653

INTRODUCTION

SB 653 is necessary because 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. SB 653 is not a technical loophole designed to evade the federal government's jurisdiction. SB 653 would not make it easier for immigrants to become U.S. citizens.

A. The Immigration and Nationality Act ("INA") Expressly States that a Plea of *Nolo Contendere* Constitutes a Conviction.

A plea of "nolo contendere" is, by the explicit language of the statute, a conviction under federal immigration law. 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) (emphasis added).

Because a plea to nolo contendere is a conviction under federal immigration law, Maryland immigrant residents cannot enter a plea to nolo contendere, as the MSAA suggested in its opposition testimony, and avoid collateral immigration consequences such as deportation. A nolo contendere plea, like a guilty plea, is a conviction under federal immigration law and can therefore trigger deportation.

B. A “Not Guilty Agreed Statement of Facts” Constitutes a Conviction Under Immigration Law.

Even though there is no plea of guilt during a NGASF, it is still a conviction under federal immigration law for at least two reasons: 1) there is an admission by the defendant as to facts sufficient to warrant a finding of guilt and/or 2) there is a formal finding of guilt at the conclusion of the NGASF. The immigration law defines “conviction” as follows:

(48) (A) 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.

See 8 USC 1101(a)(48)(A) (emphasis added).

Because there is an admission as to the facts and, usually, a formal finding of guilt by the judge, a NGASF is a conviction for federal immigration purposes. Similarly, Maryland courts also 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).

C. An *Alford* Plea is Also a Conviction under Federal Immigration Law.

Similarly, an *Alford* plea qualifies as a conviction under federal immigration law. An *Alford* plea is a guilty plea, and meets the federal definition of a conviction because there is a formal finding of guilt. *U.S. v. King*, 673 F.3d 274, 281-2 (4th Cir. 2012). *See also Abimdola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2002) (holding directly that an Alford plea is a guilty plea and therefore a conviction under the Immigration and Nationality Act, 8 U.S.C. Sec. 1101 (a)(48)(A)).

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D. The Bill Preserves Maryland State Rights and Protects Maryland Residents From Unintended Consequences

Maryland State Law should not be subservient to or distorted by the federal law.

When the Maryland General Assembly codified probation before judgment in 1975, it was because Maryland legislators recognized the importance and value of a criminal disposition that is not a conviction. The federal law thwarts the Maryland General Assembly's intent by treating a PBJ as a conviction, despite the fact that this is not how Maryland treats it. SB 653 preserves the legislative intent of the Maryland General Assembly by creating an alternative process for imposing a PBJ. This Bill does not thwart federal law; rather it keeps federal law from thwarting the express intent of Maryland's PBJ statute.

E. The Bill Will Not Make It Easier For an Immigrant to Become a U.S. Citizen.

SB 653 will not make it easier for an immigrant to become a citizen. That is factually incorrect. To become a United States citizen, an applicant must demonstrate good moral character. A PBJ *even if not a conviction* would still affect eligibility for citizenship. The PBJ, like all other criminal contacts, would still have to be disclosed on the naturalization application. Any contact with the criminal justice system, even dismissed charges and expunged cases, must be included in the application and will be considered by the naturalization officer when assessing eligibility for citizenship. Per the instructions on the naturalization application:

If you have ever been convicted or placed in an alternative sentencing program (such as diversion) or rehabilitative program (such as drug treatment or community service program, bring:

- (1) An original or court-certified sentencing record for each incident; and
- (2) Evidence that you completed your sentence, such as probation record, or evidence that you completed an alternative sentencing program or rehabilitative program. Copies must be certified by the issuing agency.

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If you have ever had an arrest or conviction vacated, set aside, sealed, expunged, or otherwise removed from your record, bring:

- (1) An original or court-certified court order vacating, setting aside, sealing, expunging or otherwise removing the arrest or conviction from your record or
- (2) An original statement from the court that no record exists of your arrest or conviction.

NOTE: You must provide the documentation even if someone including a judge, law enforcement officer, or attorney told you that you no longer have a record or told you that you do not have to disclose that information.

(See page 13 of 18, Form N-400 Instructions, Naturalization Application)

Under these instructions, a disposition of PBJ, whether deemed a conviction or not, must be disclosed in any application for naturalization. It will be weighed by the naturalization officer when making a decision about whether to grant the application, because it is relevant to a determination concerning good moral character and to whether the individual warrants a positive exercise of discretion, both of which are requirements for naturalization. Therefore, SB 653 does not make it any easier for an immigrant to become a citizen.

CONCLUSION

Probation before judgment, *as the code is currently written*, does support a finding of deportability under the technical language of the federal immigration law. 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. The proposed amendment to the Maryland PBJ statute will create the only option under Maryland law by which a prosecutor can offer an efficient resolution to a criminal case that carries a penalty, obviating the need for a trial, but does not trigger deportation.