

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Joseph M. Getty
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 559
Probation Before Judgment – Probation Agreements – Probation
Not Deportation
DATE: February 11, 2022
(2/15)
POSITION: Oppose

The Maryland Judiciary opposes House Bill 559. The Judiciary appreciates the concerns the bill is attempting to address and takes no position on the policy aims of the legislation. However, the bill as drafted raises several fundamental and very serious concerns.

The bill creates a new way to place a person on probation, without first having to enter a guilty finding, but it is unclear whether this is a new type of plea or a new type of disposition/sentencing alternative. This is a serious and fundamental flaw in the bill, which must be addressed. A defendant must enter a plea before the Court can simply proceed to sentencing. The Court is required to conduct a full examination of the defendant, on the record, to ensure that the defendant is freely and voluntarily entering the plea with a full understanding of the nature of the charge and the consequences of the plea. These are rudimentary and fundamental constitutional principles. Based on the language in the bill, and the purpose behind the legislation, this “new plea” cannot be a guilty plea or a plea of nolo contendere which currently have federal immigration consequences. Is it a plea of not guilty? Is it akin to proceeding by way of a not guilty agreed statement of facts with stipulated facts? Is it akin to a plea of nolo contendere but instead called as a plea of “not guilty with facts justifying a finding of guilt”? The bill is entirely unclear.

Moreover, pursuant to lines 18-22 on page 3 of the bill, it appears that the Court **MUST** impose a probation before judgment after finding facts justifying a finding of guilt. The Judiciary traditionally opposes legislation that include mandatory provisions, believing it critical for judges to weigh the unique facts and circumstances of the case and that of the defendant when making a sentencing determination. It is entirely possible that a defendant could enter this “new plea” and, at the conclusion of the reading of the facts, the sentencing judge could have serious concerns for the safety of the victim or the

community. Does this legislation allow the withdrawal of the plea? Is the Court bound to enter a PBJ and place the person on probation, despite those safety concerns, because it has accepted this “new plea?” Again, the bill is silent on these issues.

If this is not a plea but a new type of disposition/sentencing alternative, what is the plea entered? Again, the bill is silent on this critical issue. These basic procedural questions cannot go unanswered if this new plea/sentencing alternative is to be either effective or constitutionally sound.

Additionally, the bill as drafted raises other constitutional concerns. If the bill would allow the court to find facts justifying a finding of guilt without requiring a finding of guilt beyond a reasonable doubt (the constitutional standard), it raises due process problems. This was echoed in the Attorney General’s letter dated March 9, 2021 which states “although the bill and amendments are not clearly unconstitutional, they appear to raise due process and enforcement concerns.” Those concerns remain in this current iteration. The standard of proof at a violation of probation proceeding is a civil standard – preponderance of the evidence. It is difficult to understand how an individual could be found guilty at a violation of probation proceeding, which requires only proof by a preponderance of evidence. The bill seems to contemplate the defendant waiving that constitutional right when entering into the probation agreement – but that would occur after the waiver litany of the plea. Given that an individual’s liberty is at stake at a violation of probation proceeding, the “due process” concerns are significant.

cc. Hon. Wanika Fisher
Judicial Council
Legislative Committee
Kelley O’Connor