MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Matthew J. Fader
Chief Justice

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 193 Probation Before Judgment – Probation Agreements
DATE:	January 25, 2023 (2/7)
POSITION:	Oppose

The Maryland Judiciary opposes House Bill 193. 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 concerns.

First, it is important to note that the proposed bill differs from legislation addressing the issue in other states. In particular, the Virginia statute has been touted as effectively addressing the purported concerns. Unfortunately, this bill does not mirror the Virginia statute but, rather, differs in a number of significant ways. The Virginia statute is what is commonly referred to as a deferred disposition statute. In essence, it allows a court to withhold its verdict and sentence to see whether the Defendant complies with certain pre-disposition probationary terms. If the Defendant complies, the case is then dismissed. If not, the Court is free to impose a conviction. Additionally, this deferred disposition is only available in Virginia with the consent of both the State and the Defendant. HB 193 does not require such an agreement nor does it defer disposition. It is something else entirely – mixing various legal concepts in a way that is both hard to comprehend and hard to rectify with current law and procedure.

It appears to create a new type of plea, without expressly defining this new plea. It also appears to bind the Court to a certain disposition -- a PBJ – immediately upon the entry of the plea, rather than deferring disposition to ensure compliance. Moreover, there are no provisions within the bill itself outlining the exact plea to be entered nor are there any provisions regarding the manner in which the court would make the necessary factual findings. As drafted, it is unclear how the probationary agreement would dovetail with the entry of the plea itself. Rather than creating a section to outline the framework for this new plea type, the bill inserts the phrase "or a court finds facts justifying a finding of guilt" into existing language in Section 6-220(b)(1) on page 1, lines 22-23 of the bill. That placement does not work and will lead to confusion in its application.

Of course, a defendant must enter a plea before the Court can proceed so the lack of clarity on the plea itself is an important area of confusion that must be addressed. 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 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. As such, the bill beginning on page 2, line 27 through and including p. 3, line 2, allows the Court to enter into a probationary disposition *at sentencing* in which the Defendant pleads not guilty. Of course, that plea and the plea litany is required at the outset of the matter. That is likely one reason the Virginia statute requires an agreement between the State and the Defendant at the outset. This bill contains no such clarifying provisions, nor any such requirement.

Pursuant to lines 18-22 on page 3 of the bill, it also appears that the Court **shall** impose a probation before judgment after finding facts justifying a finding of guilt. However, on page 2, in line 21 and on page 2, lines 27-29 the bill provides that a court **may** make findings of fact and enter into a probationary agreement under this new procedure. It is unclear how to read these provisions together – with both mandatory and discretionary language as to the probation agreement and the sentence -- in light of the lack of clarity on the other procedural issues. If this legislation intends to bind the Court to enter a PBJ after the plea, the Judiciary would note its opposition. The Judiciary traditionally opposes legislation that includes mandatory provisions. It is critical for judges to weigh the unique facts and circumstances in each case when making sentencing determinations and when making decisions as to whether to accept any plea agreement. 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. There is no indication in the legislation that the sentencing judge would have the discretion to allow the withdrawal of the plea. Rather, the bill mandates that the judge enter a PBJ and place the person on probation, regardless of any safety concerns that may come to light.

Further, the bill as drafted raises constitutional concerns. There cannot be findings of fact in a criminal case that fall short of the constitutionally-mandated beyond a reasonable doubt standard. The bill provides, variously, that a court may "find facts justifying a finding of guilty" and "make findings of fact sufficient to support a finding of guilt." The language within the bill itself is not consistent. Moreover, anything short of a finding of fact *beyond a reasonable doubt* would be constitutionally infirm. This constitutional concern was previously echoed in the Office of the Attorney General's letter dated March 9, 2021, reviewing a similar bill, which noted that "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.

Additionally, the probation agreement provided in the bill notes that the defendant does not admit to the facts, and pleads not guilty, but that the court may find the defendant guilty of the underlying crime at a subsequent violation of probation proceeding. This

raises other concerns. 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 – beyond a reasonable doubt - at a violation of probation proceeding which requires only proof by a preponderance of evidence. Moreover, it is unclear how the Court would handle cases in which probationers attempt to contest the original underlying facts – to which they never admitted nor for which they were ever adjudicated guilty.

As such, while the Maryland Judiciary appreciates the objectives of the bill's proponents, the bill's drafting makes it difficult for the Judiciary to fully comprehend and to apply. The bill is neither in conformity with similar legislation in other states nor in conformity with substantive and procedural Maryland law.

cc. Hon. David Moon
Judicial Council
Legislative Committee
Kelley O'Connor