



State of Maryland
Office of the Attorney General

Friday, February 11, 2022

TO: The Honorable Luke Clippinger, Chair, Judiciary Committee
FROM: Carrie J. Williams, Assistant Attorney General
RE: Attorney General's Support with Amendments for HB 559

The Attorney General urges the Judiciary Committee to report favorably with amendments on House Bill 559. House Bill 559 will help avoid devastating immigration consequences for people who commit minor crimes.

House Bill 559 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 any admission of guilt by the defendant, and any finding of guilt by the court, it is not considered a "conviction" for purposes of federal immigration law.

At the Senate hearing on SB 265, the cross-file to HB 559, concerns were raised that the "deferred finding" procedure created by the bills violates 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 never 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); *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011).

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.

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, HB 559 contains language that addresses the finding of guilt beyond a reasonable doubt should the defendant violate probation.

"*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.¹ *Hubbard v. State*, 76 Md. App. 228, 240-41 (1988).

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 HB 559 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) should the defendant violate 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

¹ 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.

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. House Bill 559 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. That guilty verdict would be based on the previous finding that there existed facts justifying a finding of guilt beyond a reasonable doubt.

Logistically, the proceeding created by HB 559 would look similar to a not guilty statement of facts. If the defendant and the court agree to proceed by way of a deferred finding, the defendant would plead not guilty and the State would proffer the evidence that the defendant stipulates would be presented by the State at trial. Instead of entering a guilty verdict if the court finds the facts sufficient, the court would defer the entry of a verdict and instead find that the proffered facts justify a finding of guilt beyond a reasonable doubt.

In short, although House Bill 559 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 House Bill 559 with amendments.

cc: Members of the Committee