

## TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 845, RELATING TO COURT ADVISEMENT OF ALIENS.

**BEFORE THE:**

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

**DATE:** Friday, February 6, 2009 **TIME:** 9:00 AM

**LOCATION:** State Capitol, Room 016

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or Lance M. Goto, Deputy Attorney General

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Chair Taniguchi and Members of the Committee:

The Attorney General strongly supports this bill.

The purpose of this bill is to clarify the requirement that courts advise pleading defendants of the possible consequences of the plea upon alien status, such that the focus is on the defendant's understanding of the possible consequences of the plea, and not on how the court reads the advisement.

Section 802E-2, Hawaii Revised Statutes, requires courts to administer an advisement concerning alien status to defendants who plead guilty or nolo contendere. Some courts have interpreted this to mean that courts must read the statutory advisement verbatim, and that upon any deviation from the statutory wording, the judgment must be vacated and the defendant allowed to withdraw the plea.

This bill makes the statutory language more consistent with Rule 11(c) of the Hawaii Rules of Penal Procedure, and clarifies that the focus of the statute is not on verbatim reading, but on careful determination that the defendant understands the possible consequences of the plea upon the defendant's alien status. The purpose of the statute has always been to ensure a defendant's understanding, not a verbatim reading.

We respectfully request passage of this measure.

Testimony of the  
Office of the Public Defender, to  
The Senate Committee on Judiciary and Government Operations

February 6, 2009

Re: S.B. No. 845: Relating to Court Advisement of Aliens

Sen. Taniguchi and Members of the Committee:

The Office of the Public Defender has reviewed the above-entitled legislation and is opposed to the proposed change to our current statute for Court Advisement Concerning Alien Status Required, Hawaii Revised Statutes (HRS) §802E-2.

The change proposed in this bill appears to be an attempt to fix something that is not broken. Our present statute calls for the following advisement to be given to a defendant prior to acceptance of a plea:

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

This simple, yet important, advisement makes sure that a defendant is informed before entering a plea that there may be immigration consequences for the plea if the defendant is not a United States citizen. It is important that the advisement occur before the plea, so that there is not a later challenge by the defendant, claiming that he or she was not aware of such consequences before entering the plea.

The changes proposed in this bill would not require that the advisement occur prior to the plea but would allow for the advisement to come after the plea. This would undoubtedly give rise to problems during a change of plea if the defendant, having entered the plea, was then informed by the court of the immigration advisement and started asking questions or raising concerns about it.

Of greater concern, is that the proposed change in the law would give rise to appeals on the basis that the court, using its own words and explanation, confused the defendant or misstated something or, in some way, did not correctly advise the defendant. In this type of situation, it is when one goes “off script”, so to speak, that problems, and the resulting challenges, occur.

This bill is not necessary and will create more problems than it would solve. We do not support its passage.

Thank you for the opportunity to submit testimony on this legislation.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
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**THE HONORABLE BRIAN TANIGUCHI, CHAIR**  
**SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS**  
**Twenty-fifth State Legislature**  
**Regular Session of 2009**  
**State of Hawai'i**

February 6, 2009

**RE: S.B. 845; RELATING TO COURT ADVISEMENT OF ALIENS.**

Chair Taniguchi and members of the Senate Committee on Judiciary and Government Operations, the Department of the Prosecuting Attorney submits the following testimony in support of Senate Bill 845.

The purpose of this bill is to clarify that that the court need not read advisements verbatim to non-citizen defendants regarding the consequences of pleading guilty or no contest to a charge, but must simply address the defendant personally in open court and determine that he or she understands the potential impact on the defendant's immigration status.

As currently drafted, Hawaii Revised Statute (HRS) section 802E-3 has sometimes been interpreted to require that a court read a specific statutory advisement regarding immigration consequences verbatim to non-citizen defendants who are considering pleading guilty or no contest. A deviation from the statutory advisement can result in the court vacating the judgment. Since the most important issue is informing the defendant of the potential consequences to pleading guilty or no contest, SB 845 would clarify that a verbatim reading is not required. All that would be required is that the court determine that the defendant understand the possible consequences of his plea. This result would bring HRS section 802E-3 in line with the current requirements of Hawaii Rules of Penal Procedure Rule 11(c).

For this reason, we support the passage of S.B. 845 and thank you for this opportunity to testify.

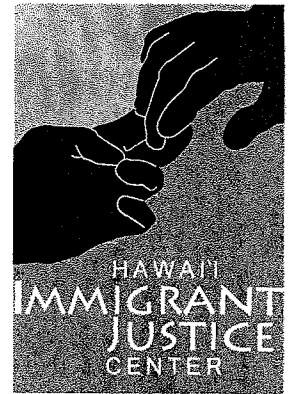
February 2, 2009

TESTIMONY IN OPPOSITION TO  
SENATE BILL 845

TO: The Honorable Brian T. Taniguchi, Chair  
The Honorable Dwight Y. Takamine, Vice Chair  
Members of the Committee on Judiciary and Government Operations

FROM: Robin H. Kobayashi, Hawaii Immigrant Justice Center f/k/a Na Loio

RE: Commentary on SB 845



EQUALITY  
OPPORTUNITY  
HOPE

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The Hawaii Immigrant Justice Center (“the Justice Center”) f/k/a Na Loio is a 501(c)(3) non-profit corporation that provides legal services to and advocates for the rights of indigent immigrants and their families. The Justice Center provides comments to Senate Bill No. 845.

Senate Bill 845 proposes to eliminate the verbatim requirement of Hawaii Revised Statute § 802E-2(J), and requires only that the court determine if a non-immigrant defendant understands the immigration implications of pleading guilty. The Justice Center is concerned that the removal of a verbatim requirement may create undue ambiguities that could cause confusion for immigrants. Additionally, the word, “determine,” is a subjective term that may foreclose any meaningful challenges on appeal.

While the Justice Center does not advocate maintaining HRS § 802E-2(J) for the sake of maintaining the status quo, we are concerned that the removal of the verbatim requirement may cause more confusion for individuals who are already unfamiliar with the American legal system and its interface with American immigration laws. The consequences of pleading guilty for a non-citizen are far greater than the imposition of reading one sentence verbatim. For these reasons, we hope the Senate will consider carefully the proposed changes to HRS § 802E-2(J).

Thank you for your time and opportunity to provide comments on this bill.



Delivered by Email to:  
jgotestimony@capitol.hawaii.gov  
February 4, 2009

Honorable Brian Taniguchi, Chair  
Senate Committee on the Judiciary and Government Operations  
Hawaii State Legislature 2009 Regular Session  
Regarding SB845 Relating to Court Advisement of Aliens

**Testimony of John Robert Egan, Chapter Chair**  
**American Immigration Lawyers Association Hawaii Chapter**  
**Contact: 808 927 0836 jregan@aloha.net**

Chair Taniguchi and members of the Judiciary and Government Operations Committee, as Chair of the American Immigration Lawyers Association Hawaii Chapter, I submit the following testimony opposing the adoption of Senate Bill 845.

Two important and apparently contradictory statutes must be part of any discussion of the Advisement of Aliens in the Hawai'i Court system. First is HRS 853-1, Deferred acceptance of guilty plea or nolo contendere plea; discharge and dismissal, expungement of records; parts (c) and (d) of which state:

*(c) Upon the defendant's completion of the period designated by the court and in compliance with the terms and conditions established, the court shall discharge the defendant and dismiss the charge against the defendant.*

*(d) Discharge of the defendant and dismissal of the charge against the defendant under this section shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is not a conviction. (Emphasis added)*

This is a common plea bargaining tool used in many cases where incarceration is deemed inappropriately harsh for the offense. The plain language shows that the intended disposition of this deferral is NOT A CONVICTION.

Contrast this with the Federal Immigration and Nationality Act:

*8 U.S.C. §1101 (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. (Emphasis added)*

State law offers an alien a disposition with the promise of no record of conviction, but Federal law will not recognize it. The result of accepting the State's offer of a plea bargain is directly opposite of the plain language of the law of the court of competent jurisdiction. And with the increasingly harsh enforcement of immigration law, accepting the contradictory disposition will often expose the alien defendant to a process of deportation from which there is no relief, no discretion and no judicial review.

Who explains this to the alien defendant? HRS 802E-1 explains the intent behind the advisal. Its intent is "promote fairness" by preceding any disposition with an "appropriate warning of the special circumstances" which may result from the plea.

I wish to express opposition to SB845 as presently written for two reasons: First, fairness is not promoted by relaxing the requirement of a warning to alien defendants. If any changes to the present advisal are made, they should improve the promotion of fairness, not withdraw such procedural protections as now exist.

Second, the wording of the proposed revision is severely prejudicial to alien defendants. In the present statute, the advisement is given "Prior to acceptance of a plea..." Under the proposed revision, the advisement is given "Upon entry of a plea..." A close reading of 8 U.S.C. §1101 (48) (a), excerpted above, shows that by moving the advisal to the far side of the entry of a plea, a federal conviction has already been triggered before the Judge even begins to offer her advisal to determine whether the defendant understands the consequences.

It is arguable that even if an alien, on hearing the advisal under the proposed text, then decided to forgo the plea bargain offer, he would still be subject to the full force of 8 U.S.C. §1101 (48) (a), and could be treated as if convicted by the immigration authorities. As an experienced immigration law practitioner, I have no doubt that if this revision is passed, we will see litigation on exactly that issue.

HRS 802E-2 can be improved, and made both more efficient to administer and better in the promotion of fairness, and the Hawai'i immigration bar is willing to offer support and its considerable experience to the process. The proposed text under SB 845 does not accomplish either of these goals and should not be passed into law in its present form.

Thank you for the opportunity to testify.

John Robert Egan, Chapter Chair  
American Immigration Lawyers Association, Hawai'i Chapter