



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

H.B. NO. 1059, H.D. 1, RELATING TO COURT ADVISEMENT CONCERNING ALIEN STATUS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY.

DATE: Friday, March 1, 2013

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Rhoads 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.

This bill has the unanimous support of the Hawaii Law Enforcement Coalition. The Coalition is composed of the Chiefs of Police of all four counties, the Prosecuting Attorneys of all four counties, the Attorney General, and the United States Attorney for the District of Hawaii.

Section 802E-2, Hawaii Revised Statutes, requires courts, prior to the acceptance of a plea of guilty or nolo contendere to a criminal offense, to administer an advisement to defendants of how the criminal matter may affect their immigration status. The specified advisement, however, only warns a defendant that a conviction for the offense may have immigration consequences. This advisement is not consistent with federal law and Rule 11(c)(5) of the Hawaii Rules of Penal Procedure (HRPP). This bill addresses that inconsistency.

Under federal immigration law, a "conviction" is broader by definition than just a judgment of conviction or guilt. Section 1101(a)(48)(A), of Title 8, United States Code, provides:

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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Under this federal provision, a "conviction" could include a disposition without an adjudication of guilt. It could include just the entry of a plea of guilty or nolo contendere, provided the judge has ordered "some form of punishment, penalty, or restraint on the alien's liberty." It clearly could include a deferred plea under state law.

Rule 11(c)(5) of the Hawaii Rules of Penal Procedure addresses this federal provision by requiring a court to advise a defendant in open court about the possible immigration consequences of a plea of guilty or nolo contendere upon a defendant's entry of a plea.

This bill addresses this issue in two ways. First, on page 1, line 4, it requires the advisement to be given prior to entry of a defendant's plea, rather than prior to acceptance of the plea by the court. Because the entry of a plea could result in immigration consequences, the advisement should be given prior to entry of a plea, not prior to acceptance of a plea by the court. In the case of a deferred plea, the court defers acceptance of the plea. The plea is never accepted by the court, unless the defendant fails to comply with the conditions of the deferral.

This bill also addresses the issue by amending the advisement on page 1, lines 11-12, to provide that in addition to a conviction, "a plea of guilty or no contest, whether or not deferred by the court," may have immigration consequences.

The Department respectfully requests passage of this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawai'i

March 1, 2013

RE: H.B. 1059, H.D. 1; RELATING TO COURT ADVISEMENT CONCERNING ALIEN STATUS.

Chair Rhoads, Vice-Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of House Bill 1059, House Draft 1.

The purpose of H.B. 1059, H.D. 1, is to correct certain inaccuracies in the language that courts currently use to advise criminal defendants of potential immigration consequences that may result from a plea of guilty, no contest, deferred acceptance of a guilty plea, or deferred acceptance of a no contest plea. While current language informs defendants that they may face immigration consequences for a criminal conviction, it is our understanding that Immigration and Customs Enforcement ("ICE") not only considers convictions, but also considers pleas or deferrals.

Not only is this correction important for purposes of providing accurate information to defendants, but also to guard against potential costs and/or liability that can result from providing inaccurate information. Moreover, this amendment would bring section 802E-2, Hawaii Revised Statutes, in-line with similar amendments already adopted by the Judiciary's Standing Committee on the Rules of Penal Procedure and Circuit Court Criminal Rules.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports H.B. 1059, H.D. 1,. Thank you for the opportunity to testify on this matter.

A BILL FOR AN ACT

RELATING TO COURT ADVISEMENT CONCERNING ALIEN STATUS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 802E-2, Hawaii Revised Statutes, is amended to read as follows:

"~~[}]~~§802E-2~~[}]~~ Court advisement concerning alien status required. at arraignment and plea.

At a defendant's arraignment and plea hearing for an offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen of the United States, whether or not you have lawful immigration status, you have the right to receive advice from your attorney about the specific impact that this case will have, if any, on your immigration status. The entry of a guilty or nolo contendere plea, admission of guilt or sufficient facts, or conviction, deferred judgment or deferred sentence, may have the consequences of your immediate detention,

deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. In some cases, detention and deportation from the United States will be required. Your lawyer must investigate and advise you about these issues prior to the commencement of trial, entry of a plea of guilty or nolo contendere, or admission of guilt or sufficient facts to any offense. You are not required to disclose your immigration or citizenship status to the court.

[802E-3] Court advisement concerning alien status required prior to the commencement of trial or the entry of a plea of guilty or nolo contendere. Prior to the commencement of trial, [acceptance] a defendant's entry of a plea of guilty or nolo contendere or admission of guilt or sufficient facts to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following [the following] an advisement on the record to the defendant:

If you are not a citizen of the United States, whether or not you have lawful immigration status, you are hereby advised that a plea of guilty or nolo contendere, admission of guilt or sufficient facts, deferred plea or sentence, or conviction of the offense for which you have been charged may have the consequences of your immediate detention,

deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. In some cases, detention and deportation from the United States will be required. Your lawyer must investigate and advise you about these issues prior to the commencement of trial, entry of a plea of guilty or nolo contendere, or admission of guilt or sufficient facts to any offense. Upon request, the Court will allow you and your lawyer additional time to consider your decision to enter a plea or commence with trial in light of this advisal. You are not required to disclose your immigration or citizenship status to the court.

~~Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section."~~

[\$802E-34] Failure to advise; vacation of judgment. If the court fails to advise the defendant as required by section 802E-2 and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, on defendant's motion, the court shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and

enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect on July 1, 2013.

Report Title:

Judiciary; No Contest Plea; Guilty Plea; Alien; Criminal Defendants

Description:

Requires the court to advise criminal defendants of the effects of a guilty or no contest plea on alien status. Effective July 1, 2013. (HB1059 HD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

ALAN M. ARAKAWA
Mayor



JOHN D. KIM
Prosecuting Attorney
ROBERT D. RIVERA
First Deputy Prosecuting Attorney

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TESTIMONY

ON

HB 1059, HD 1 - RELATING TO COURT ADVISEMENT CONCERNING ALIEN STATUS

February 6, 2013

The Honorable Karl Rhoads
Chair
The Honorable Sharon E. Har
Vice Chair
and Members
House Committee on Judiciary

Chair Rhoads, Vice Chair Har and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, is in **STRONG SUPPORT** of the passage of HB 1059, HD 1, Relating to Court Advisement Concerning Alien Status. The introduction of this bill was also unanimously supported by the State Law Enforcement Coalition.

HB 1059, HD 1 proposes to amend the advisement given to criminal defendants relating to immigration consequences they may face when entering a plea of guilty, no contest, a deferred acceptance of a guilty plea, or a deferred acceptance of a no contest plea. Currently, the advisement required by Hawaii Revised Statutes § 802E-2 only states that the defendant may face immigration consequences upon a conviction. This information is incorrect, because the Immigration and Customs Enforcement (ICE) officials now look to the plea or deferral as triggering the potential for immigration consequences.

We also have problems with the failure of the courts to give the advisement verbatim as required, or to give the advisement correctly. This resulted in the reopening of several cases. These cases usually occur when a defendant is not deported, but later travels abroad and is detained by ICE upon return for exclusion from the United States. This usually happens several

years (i.e., more than ten) after the cases are finished, when the evidence is gone and the witnesses are difficult to locate. This results in time and expense incurred, not only by the defendants, but also by the prosecution. The Standing Committee on the Rules of Penal Procedure and Circuit Court Criminal Rules approved an amendment to the advisement given on the Guilty Plea/No Contest Plea form, and will do so again to mirror the language of this bill if it becomes an act. However, HRS § 802E-2 needs to be amended because it is a verbatim requirement giving incorrect information.

We understand that the Office of the Public Defender supports the intent of this bill, and may propose to amend it with recommended language from their training on immigration consequences. We appreciate their cooperation with this bill.

We ask that HB 1059, HD 1 be PASSED.

Thank you very much for the opportunity to provide testimony on this bill.



ALAN M. ARAKAWA
MAYOR

OUR REFERENCE

YOUR REFERENCE

POLICE DEPARTMENT

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March 01, 2013



GARY A. YABUTA
CHIEF OF POLICE

CLAYTON N.Y.W. TOM
DEPUTY CHIEF OF POLICE

The Honorable Karl Rhoads, Chair
And Members of the Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

**RE: HB 1059, HD1 - RELATING TO COURT ADVISEMENT
CONCERNING ALIEN STAUS**

Dear Chair Rhoads and Members of the Committee:

The Maui Police Department **supports** the passage of House Bill No. 1059, HD1.

The passage of this bill requires the court to advise criminal defendants of the effects of a guilty or no contest plea on alien status.

To assist in the fair and equitable adjudication of criminal cases, this bill will give defendants the opportunity to understand the effects of a guilty or no contest plea on alien status. The Maui Police Department is in support of the Maui County Prosecutors position that this clarification of the existing bill will help to prevent issues of the reopening of cases due to incorrect trial instructions. In supporting this bill, the Maui Police Department will hope to improve the court process and show our commitment to the justice system for everyone equally under the law.

The Maui Police Department asks that you support the passage of House Bill No. 1059, HD1.

Thank you for the opportunity to testify.

Sincerely,


GARY A. YABUTA
Chief of Police



**Office of the Public Defender
State of Hawaii
Timothy Ho, Chief Deputy Public Defender**



**Testimony of the Office of the Public Defender, State of Hawaii
to the House Committee on Judiciary**

March 1, 2013, 2:00 p.m.

H.B. No. 1059, H.D.1: RELATING TO COURT ADVISEMENT CONCERNING
ALIEN STATUS

Chair Rhoads and members of the committee:

The Office of the Public Defender supports H.B. 1059, H.D. 2.

The United States Supreme Court ruled in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that the Sixth Amendment right to effective assistance of counsel extended to the immigration consequences of a criminal conviction. It held that defense attorneys have a duty to advise their clients on strategies to avoid deportation, and bars to relief from removal. Where the consequences of a criminal conviction are “truly clear”, defense attorneys have a duty to advise their clients of the specific immigration consequences of a conviction. Where the consequences of a criminal conviction are “unclear”, defense attorneys have a duty to warn of possible immigration consequences.

Furthermore, in *Nunes-Reyes v. Holder*, 646 F.3d 684 (2011), the United States Ninth Circuit Court of Appeals held that deferred judgments and/or convictions in state courts that are subsequently expunged are convictions for immigration purposes, and will not prevent a defendant from deportation proceedings and immigration consequences. The Court ruled that the Federal First Offender Act (FOFA), which defers prosecution in federal courts in a similar fashion California (and Hawaii’s) deferred prosecution statutes, was not applicable to defendant’s prosecuted in state courts.

The current court advisement in §802E-2, H.R.S. is deficient, and does not adequately advise a defendant of his Sixth Amendment right to competent and specific advise on immigration consequences of a criminal conviction, and that a deferred acceptance of a guilty or no contest plea (Chapter 853, H.R.S) has no effect on deportation or immigration proceedings. We support the language on page one, line 4 in this measure that replaces the word “acceptance” with the phrase “a defendant’s entry” (of a plea). When a defendant’s motion for deferred acceptance of a guilty or no contest plea is granted, the court does not accept the plea that was “entered” by the defendant. The substitution of the phrase “a defendant’s entry” acknowledges that while not all guilty or no contest pleas are accepted, there still may be immigration consequences. We also support the insertion of the phrase “a plea of guilty or nolo contendere, whether or not deferred by the court” on page one, line eleven. The defendant will be properly advised

that even if he is not convicted and has his plea deferred and subsequently expunged, there could be immigration consequences.

While we support this measure, we ask that this bill be amended to include two court advisements, one to be given at the defendant's arraignment and plea hearing, and one given prior to the entry of a guilty or no contest plea or the commencement of trial. The reason we ask for two advisements is that a defendant is under the most pressure during the change of plea hearing. A court advisement given at this late stage of a defendant's criminal case is one of many questions asked of a defendant in open court prior to the entry of a guilty or no contest plea, and may be disregarded, merely to "get through" the hearing. Furthermore, a defendant that elects to proceed to trial should receive the court advisement prior to its commencement. Moving the first warning to the start of the criminal proceedings at the arraignment and plea hearing will give the defendant sufficient time to consult with an attorney about how a conviction or deferral will affect his immigration status. We ask that the two advisements be included in an H.D. 2 version of this bill.

We urge you to pass this bill out of your committee, as we believe that the current law is constitutionally deficient. Thank you for the opportunity to be heard on this matter.