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

ON THE FOLLOWING MEASURE:
H.B. NO. 1059, H.D. 2, S.D. 1, RELATING TO COURT ADVISEMENT CONCERNING ALIEN STATUS.

LATE TESTIMONY

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, April 2, 2013 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 016

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

Chair Hee and Members of the Committee:

The Department of the Attorney General ("Department") 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.

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), of Title 8, United States Code, provides:

> (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.
>
> (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

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 Senate Committee on Judiciary and Labor

April 2, 2013, 9:30 a.m.

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

Chair Hee and members of the committee:

The Office of the Public Defender supports H.B. 1059, S.D. 1, however, we ask that this committee amend this measure by requiring the warning to also be read prior to the entry of a guilty/no contest plea or the commencement of trial.

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 urge this committee to require that the advisement be read twice, at the defendant's arraignment and plea hearing, 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 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. After consulting with a circuit court judge, we ask that the court be allowed to read the advisement once at the arraignment and plea hearing to all of the defendants scheduled to appear on the calendar.

We have no objection to the Department of the Attorney General's proposal to use a single warning to be read at arraignment and plea and prior to the entry of a plea or trial.

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.