



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

HOUSE COMMITTEE ON VETERANS, MILITARY, AND INTERNATIONAL AFFAIRS,
AND CULTURE AND THE ARTS.

DATE: Wednesday, February 6, 2013 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 312

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

Chair Takai and Members of the Committee:

The Attorney General strongly supports this bill with one amendment.

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 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.

To further clarify this issue, the Department recommends the following amendment to the bill at page 1, lines 4-7:

Prior to [~~acceptance~~] a defendant's entry of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer

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.

The Department respectfully requests passage of this bill.



DEPARTMENT OF THE PROSECUTING ATTORNEY
COUNTY OF MAUI
150 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
PHONE (808) 270-7777 • FAX (808) 270-7625

CONTACT: RICHARD. K. MINATOYA
Deputy Prosecuting Attorney
Supervisor, Appellate, Asset Forfeiture and Administrative Services Division

TESTIMONY

ON

HB 1059 - RELATING TO COURT ADVISEMENT CONCERNING ALIEN STATUS

February 6, 2013

The Honorable K. Mark Takai
Chair
The Honorable Ken Ito
Vice Chair
and Members
House Committee on Veterans, Military, & International Affairs, & Culture and the Arts

Chair Takai, Vice Chair Ito and Members of the Committee:

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

HB 1059 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 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. Often times, this happens several years (i.e., more than ten)

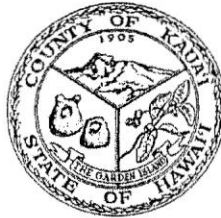
after the cases are finished. This results in time and expense incurred, not only by the defendants, but also by the prosecution. The Standing Committee on the Rules of Penal Procedure and Circuit Court Criminal Rules approved an amendment to the advisement given the Guilty Plea/No Contest Plea form, but HRS § 802E-2 also needs to be amended because it is currently a verbatim requirement giving incorrect information.

We understand that the Office of the Public Defender may have concerns about the wording of the advisement proposed in HB 1059. We also understand that some of the deputy public defenders received training on immigration consequences. We hope that they will submit proposed language for the advisement that will give criminal defendants correct information.

We ask that HB 1059 be PASSED.

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

Justin F. Kollar
Prosecuting Attorney



Kevin K. Takata
First Deputy

Rebecca A. Vogt
Second Deputy

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Lihu'e, Hawai'i 96766

808-241-1888 ~ FAX 808-241-1758

Victim/Witness Program 808-241-1898 or 800-668-5734

TESTIMONY IN SUPPORT OF
H.B. NO. 1059
A BILL FOR AN ACT RELATING TO COURT ADVISEMENT CONCERNING ALIEN
STATUS

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

House Committee on Veterans, Military, & International Affairs, & Culture and the Arts

Wednesday, February 6, 2013
8:30 a.m., Room 312

Honorable Chair Takai, Vice-Chair Ito, and Members of the House Committee on Veterans, Military, & International Affairs, & Culture and the Arts, the Office of the Prosecuting Attorney, County of Kaua'i submits the following testimony in support of House Bill No. 1059.

The purpose of House Bill No. 1059 is to amend Section 802E-2, Hawai'i Revised Statutes to include language that would **require** the courts to advise criminal defendants of how an entry of plea of guilty or no contest may affect their alien status.

Should this measure pass, it would be in alignment with Rule 11(c)(5), Hawai'i Rules of Penal Procedure which states:

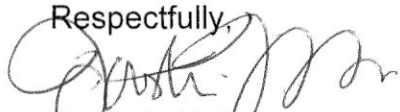
"The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the defendant understands the following...that if the defendant is not a citizen of the United States, entry of a plea to an offense for which the defendant has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

Seeing that the Supreme Court of Hawai'i saw fit to amend the Rule, we would respectfully urge the Legislature to consider and pass this bill not only to cohere with the Hawai'i Rules of Penal Procedure, but to also guarantee that a criminal defendant of alien status is indeed advised by the courts as to the possible consequences of their plea.

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For these reasons, we are in strong support of House Bill. No 1059. Thank you for the opportunity to testify on this matter.

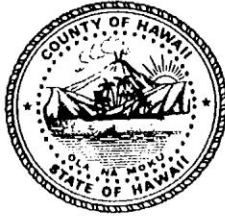
Respectfully,

A handwritten signature in black ink, appearing to read "Justin F. Kollar", written over the word "Respectfully,".

Justin F. Kollar
Prosecuting Attorney
County of Kaua'i

MITCHELL D. ROTH
PROSECUTING ATTORNEY

DALE A. ROSS
FIRST DEPUTY
PROSECUTING ATTORNEY



655 KĪLAUEA AVENUE
HILO, HAWAII 96720
PH: (808) 961-0466
FAX: (808) 961-8908
(808) 934-3403
(808) 934-3503

WEST HAWAII UNIT
81-980 HALEKI'I ST, SUITE 150
KEALAKEKUA, HAWAII 96750
PH: (808) 322-2552
FAX: (808) 322-6584

OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF HOUSE BILL 1059

RELATING TO COURT ADVERTISEMENT
CONCERNING ALIEN STATUS

COMMITTEE ON VETERANS, MILITARY &
INTERNATIONAL AFFIARS, & CULTURE AND THE ARTS

Rep. K. Mark Takai, Chair
Rep. Ken Ito, Vice Chair

Wednesday, February 6, 2013 at 8:30 AM
State Capitol, Conference Room 312

Chair Takai, Vice Chair Ito, and Members of the Committee:

The Office of the Prosecuting Attorney, County of Hawai'i supports House Bill 1059.

This bill would allow a non-citizen defendant to be informed that there may be possible consequences of a plea of guilty or no contest, whether or not it's deferred by the court, on his or her status in the United States. This information would further allow a defendant to make a knowing, voluntary, and intelligent plea. Failure to appropriately inform a non-citizen defendant of these rights could result in a reversal of a conviction and further judicial proceedings. These further proceedings will be costly in both time and money to all involved in the criminal justice system.

For the forgoing reasons, the Office of the Prosecuting Attorney, County of Hawaii, supports House Bill 1059. Thank you for an opportunity to provide testimony on this bill.

Mitchell D. Roth
Prosecuting Attorney
County of Hawaii