The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Transportation and International Affairs

Senator J. Kalani English, Chair
Senator Donovan M. Dela Cruz, Vice Chair

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State Capitol, Conference Room 224

By
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Bill No. and Title: House Bill No. 1059, H.D. 2, Relating to Court Advisement Concerning Alien Status.

Purpose: Requires the court to advise a criminal defendant of the effects of a guilty or no contest plea on alien status at the defendant's arraignment and plea hearing, and again prior to the entry of a guilty or no contest plea or the commencement of trial. Effective July 1, 2013. (HB1059, HD2)

Judiciary's Position:

1. The Judiciary takes no position on the accuracy or correctness, in legal terms, of the advisements embodied in H.D. 2.

2. For the reasons expressed below, the Judiciary respectfully opposes the language in H.D. 2 that arguably requires the court to administer the advisements verbatim. The Judiciary much prefers the wording of the original bill and H.D.1 – i.e., "the court shall administer an advisement on the record to the defendant, which shall substantially contain the following information."

3. The Judiciary respectfully opposes subsection (a), which requires the reading of the advisement at the arraignment and plea hearing of every defendant, whether the offense charged is a felony, a misdemeanor, or a petty misdemeanor. While we agree with the Office of the Public Defender that advisement at the arraignment and plea stage will "give the defendant sufficient time to consult with an attorney about how a conviction or deferral will affect his

immigration status," we are not sure that the benefit to be derived justifies the cost of the dramatic increases in court time that will be required to process the hundreds of defendants arraigned daily in the circuit and district courts if the entire advisement must be administered to each defendant individually.

We do not oppose the requirement that the advisement be given prior to trial or the entry of a guilty or nolo contendere plea. We note that when the advisement is given at either of those points in the proceeding, the bill provides: "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," which would seem to obviate the need to give the advisement at the arraignment and plea hearing.

Further, we would point out that under Padilla v. Kentucky, 130 S.Ct. 1473 (2010), discussed below, the duty to advise the defendant of immigration consequences rests on defense counsel rather than the court. Yet, under House Bill No. 1059, H.D. 2, when read with § 802E-3 (which is left untouched by the bill), it would appear that the court's failure to administer the advisement, either at the arraignment and plea hearing or prior to trial or the entry of a plea, will entitle the defendant to vacation of the judgment and withdrawal of the plea even if defense counsel has adequately advised the defendant of the applicable immigration consequences.

Background on Alien Advisement Proposals

According to House Standing Committee Report No. 913, the purpose of House Bill No. 1059, is "to protect the rights of non-citizens and allow a non-citizen defendant the opportunity to make a knowing, voluntary, and intelligent plea of guilty or no contest," by amending HRS § 802E-2 to require "the court to advise criminal defendants of the effects of a guilty or no contest plea on their alien status in the United States prior to the entry of a guilty or no contest plea."

§ 802E-2 is part of chapter 802E, a three-section chapter that was enacted in 1988. § 802E-1 indicates that the legislative intent behind the chapter is to address the unfairness inherent in a non-citizen defendant pleading guilty or nolo contendere to a criminal offense "without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." § 802E-2 deals with the problem by requiring the court, prior to accepting a plea of guilty or nolo contendere, to "administer the following advisement on the record to the defendant:"

> 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

> consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

That section also requires the court, upon request, to allow the defendant additional time to consider the appropriateness of the plea in light of the advisement. § 802-3 provides that, if the court fails to administer the advisement and the defendant is able to show that conviction of the offense to which he or she 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," the court, on the defendant's motion, must vacate the judgment and allow the defendant to withdraw the plea. In the absence of a record that the court provided the advisement, it is presumed that the advisement was not given.

At some point,[1] federal immigration policy was understood to hold that adverse immigration consequences could result not only upon conviction, but also upon entry of a plea of guilty or nolo contendere that, as in the case of a deferral, might never result in a conviction. Accordingly, to the extent that chapter 802E – and § 802E-2 in particular – suggests that the entry of a plea will not trigger adverse immigration consequences and/or that only a conviction will, it is incorrect. Yet, because the language of § 802E-2 arguably leaves no room at all for modification of the advisement to account for changes in the law, it has been the case for several

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[1]It was likely before December of 2006 as, by an order filed on December 7, 2006 and effective on January 1, 2007, the Hawaii Supreme Court approved the following amendment to Rule 11(c)(5) of the Hawaii Rules of Penal Procedure (deleted material is bracketed and stricken; new material is underscored), which conformed the rule to this understanding of federal law:

> (c) **Advice to Defendant.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant in open court and determining that [~~he~~] the defendant understands the following:
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> * * *
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> (5) that if [~~he~~] the defendant is not a citizen of the United States, [~~a conviction of the~~] entry of a plea to an offense for which [~~he~~] 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.

years that the court is required to administer an advisement that may seriously mislead a non-citizen defendant as to the immigration consequences of his or her plea.[2]

House Bill No. 1059, as introduced, was a simple bill that sought to bring § 802E-2's advisement into conformity with federal law by clarifying that, in addition to a conviction, a plea of guilty or no contest, whether or not deferred by the court, could result in adverse immigration consequences. While the unamended version of § 802E-2 arguably requires the court to administer the advisement verbatim – i.e., the language of the section immediately preceding the advisement currently reads, "the court shall administer the following advisement on the record to the defendant" – House Bill No. 1059 replaced that language with, "the court shall administer an advisement on the record to the defendant, which shall substantially contain the following information."

Judiciary's Position on House Bill 1059 and H.D. 1

Although we submitted no testimony on the bill as introduced, the Judiciary fully supported the intent of House Bill No. 1059. The modification of § 802E-2's language arguably requiring a verbatim reading of the advisement was especially welcome as that language was thought to invite, and did in fact give rise to, challenges to judgments based on technical, non-substantive deviations from the advisement that did not prejudice the defendant. The Judiciary believes that a verbatim requirement is not necessary to protect the rights of non-citizen defendants and that it is sufficient that the statute require the substance of the advisement to be communicated to those defendants. Adopting this approach will provide the court with the flexibility to, for example, paraphrase the advisement into plain language so as to make it more comprehensible to a non-citizen who may have difficulty understanding English and should also discourage challenges to judgments based on technical, non-substantive grounds. In the event of a challenge, however, judicial review will be available to ensure that the purposes of the law have been met.

On second reading, the only substantive amendment to House Bill No. 1059 made by the House Committee on Veterans, Military, & International Affairs, & Culture and the Arts, was to specify that the advisement be given prior to the defendant's entry of a plea rather than prior to acceptance of the plea by the court. The Judiciary, although submitting no testimony one way or the other, had no objection to House Bill No. 1059 in its H.D. 1 form.

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[2]This undesirable set of circumstances might be avoided in the future by repealing chapter 802E and leaving the matter to the Judiciary's committee on the Hawaii Rules of Penal Procedure or, barring that, including language in the statute conditioning the giving of the advisement on its being compatible with federal immigration law.

Change in the Judiciary's Position on House Bill 1059 H.D. 2

Subsequently, the House Committee on Judiciary amended House Bill No. 1059, H.D. 1 to require the court to give an advisement twice, which differs substantially from the H.D. 1 version – at arraignment and plea and again at the commencement of trial or entry of a plea. In H.D. 2 of this bill, these changes appear to have been based on testimony submitted by the Office of the State Public Defender. That testimony began by pointing out that the United States Supreme Court in Padilla v. Kentucky, 130 S.Ct. 1473 (2010), had held that a defendant's right to the effective assistance of counsel included the right to advice on the immigration consequences of a criminal conviction. Presumably based on Padilla, the original § 802E-2 advisement was more than doubled in length to include, in addition to the changes approved in the H.D. 1 version, information about the defendant's right to advice from his or her attorney on the specific impact of the case on the defendant's immigration status. The public defender's testimony also included the following:

> 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.

The H.D. 2 version also reverts, from the more flexible wording of both House Bill No. 1059 as introduced and the H.D. 1 version, back to the language of § 802E-2 that arguably requires the court to administer the advisements verbatim – i.e., "the court shall administer the following advisement on the record to the defendant." This version, House Bill 1059, H.D. 2, passed third reading in the House and has raised the Judiciary's concerns discussed above.

Thank you for the opportunity to testify on this measure.