

Using *Barr/Zhao* Pleas to Mitigate Immigration Consequences

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I. Introduction

A “*Barr* plea,” or “*Barr/Zhao* plea,” allows an accused person to “plead guilty to amended charges for which there is no factual basis” as long as there is a factual basis for the original charge, and the plea is made knowingly and voluntarily.² For noncitizens facing charges with negative immigration consequences, a *Barr/Zhao* plea widens the pool of available immigration-safe plea alternatives. However, defenders must also be aware of the potential pitfalls of a *Barr/Zhao* plea. This advisory lays out background on the nature of *Barr/Zhao* pleas, explains the benefits and potential risks for noncitizens using *Barr* pleas, and provides practice guidance and model plea language for crafting and entering *Barr/Zhao* pleas.

II. Background

In re Barr, 102 Wn.2d 265, 267, 684 P.2d 712 (Wash. 1984)

Mr. Barr was originally charged with one count of second-degree statutory rape and one count of third-degree statutory rape. Mr. Barr was permitted to plead to indecent liberties, *even though there was no factual basis for the substituted charge*.

Mr. Barr brought a post-conviction motion arguing that the court had accepted his plea without obtaining a sufficient factual basis for the indecent liberties charge and that he was not properly informed of the elements of that charge. The Washington Supreme Court rejected Mr. Barr’s claim and held that the plea to the substituted offense, negotiated by plea bargaining, was sufficiently voluntary and intelligent.³ At his plea proceeding Mr. Barr had acknowledged that he understood the original charges, had received copies of the police reports filed and understood that the evidence was sufficient to support conviction on those charges, and stated he wished to plead to the substituted charge in exchange for dismissal of the original charges and to obtain treatment.⁴ The *Barr* Court stated:

A plea does not become invalid because an accused chooses to plead to a related lesser charge *that was not committed* in order to avoid certain conviction for a greater offense. . . .

The choice to plead to such lesser charges is voluntary if it is based on an informed review of all the alternatives before the accused. . . . What must be shown is that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest.⁵

Given the complexity of immigration law and the uncommon nature of *Barr* pleas, we encourage you to seek assistance from WDA’s Immigration Project when considering a *Barr/Zhao* plea.

¹ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible defenders are advised to consult with WDA’s Immigration Project on specific individual cases.

² *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (Wash. 2006); *In re Barr*, 102 Wn.2d 265 (Wash. 1984).

³ *Barr*, 102 Wn.2d at 270.

⁴ *Id.*

⁵ *Id.* at 269-70 (internal citations omitted) (emphasis added); *see also North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

State v. Zhao, 157 Wn.2d 188, 137 P.3d 835 (Wash. 2006)

Mr. Zhao was originally charged with two counts of first-degree child molestation. In order to take advantage of a plea bargain, Mr. Zhao pleaded guilty to two counts of conspiracy to commit indecent liberties, even though there was no co-conspirator.⁶

Mr. Zhao subsequently sought to withdraw his plea, arguing that the court should not have accepted his plea to the conspiracy charges in the absence of a factual basis. The *Zhao* Court reaffirmed that an accused person may plead guilty to a charge for which there is no factual basis, as long as “the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole.”⁷

The *Zhao* Court noted that the purpose of the factual basis requirement, both in case law and in the court rule, is to ensure the voluntariness of the plea.⁸ In finding a factual basis for the original charge, for purposes of a *Barr* plea, the court does not need to “be convinced beyond a reasonable doubt that defendant is in fact guilty.”⁹ Rather, the court must be satisfied that the risk of conviction on the original charge (as evidenced by the factual basis) is such that the accused person’s choice to plead guilty to the (fictional) amended charge represents a rational decision.¹⁰

The *Zhao* Court also held that there is no absolute requirement that the trial court engage in a colloquy with the accused person on the record, so long as the record clearly establishes that the accused person “was aware that he was pleading guilty to charges for which there was no factual basis in order to receive the benefit of a plea bargain.”¹¹

Updates and Modifications to *Barr/Zhao* Pleas

- ***Matter of Hews***: The accused person must be informed of, and understand “the critical elements” of the amended charge, and the record must reflect the person’s understanding of the “defect” in that charge (i.e., the lack of factual basis).¹²
- ***State v. Robinson***: A *Barr/Zhao* plea cannot be used to plead to multiple counts if the original information charged only a single criminal act: “We hold that *Zhao* does not provide a basis to avoid double jeopardy and convict a person for two crimes based on one criminal act.”¹³

⁶ *Zhao*, 157 Wn.2d at 190.

⁷ *Id.* at 200.

⁸ *Id.*; *Barr*, 102 Wn.2d at 269 n.2.

⁹ *Id.* at 198 (citing *State v. Newton*, 87 Wn.2d 363, 370, 552 P.2d 682, 685-86 (Wash. 1976)).

¹⁰ *Barr*, 102 Wn.2d at 269-70; see *State v. Robinson*, 263 P.3d 1233 (Wash. 2011) (given that the courts presume plea deals are validly negotiated contractual agreements, the court’s primary role in accepting the plea is to ensure the defendant is making an informed choice); see also *U.S. v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979).

¹¹ *Id.* at 203-4.

¹² *Matter of Hews*, 108 Wn. 2d 579, 741 P.2d 983 (Wash. 1987); *Zhao*, 157 Wn.2d at 200.

¹³ *State v. Robinson*, 8 Wash. App. 2d 629, 631, 439 P.3d 710, 712 (Div. I 2019).

- *State v. Wilson*: A *Barr* plea may be made to a charge that is greater than the original charge, as long as the plea benefits the accused person and the person understands the consequences of the plea.¹⁴

III. Guidelines for Negotiating and Crafting a *Barr* Plea

STEP ONE: Determine Immigration Status and Client Goals

Step one is universal – you must do this in *every case* involving a noncitizen in order to provide complete and accurate advice to your client regarding immigration consequences.¹⁵ Defenders should ask *every* client whether the client is a U.S. citizen; you cannot make assumptions based on client attributes. If your client is not a U.S. citizen, the first step in determining immigration consequences is knowing the client’s immigration status. *This step is critical*: without knowing the person’s status, it is impossible to accurately assess what immigration consequences the person may face. A person’s immigration status will also help define the person’s immigration goals. It is vital that you ask your client about priorities and goals in resolving his or her criminal case. Your client’s highest priority may be to preserve his or her immigration status and avoid deportation.

WDA’s Immigration Project can help you determine your client’s immigration status.

IMMIGRATION STATUS and GOALS	
Undocumented	Documented
<ul style="list-style-type: none"> • Entered the U.S. unlawfully and has never obtained any type of status • Entered the U.S. lawfully, with some type of temporary visa (e.g. student or tourist) but then “overstayed” that visa and currently has no valid status <p style="text-align: center;">↓</p> <p style="text-align: center;">Goals</p> <ul style="list-style-type: none"> • Preserve path to legal status--avoid grounds of inadmissibility • Preserve eligibility for relief from removal if put into removal proceedings • Avoid detection by ICE 	<ul style="list-style-type: none"> • Currently has valid immigration status, whether temporary or permanent, e.g. <ul style="list-style-type: none"> ○ Lawful permanent resident (LPR) ○ Refugee/Asylee ○ DACA, Temporary Protected Status (TPS) ○ Employment Visa, Student Visa, etc.¹⁶ <p style="text-align: center;">↓</p> <p style="text-align: center;">Goals</p> <ul style="list-style-type: none"> • Maintain legal status--avoid grounds of deportability • Preserve eligibility for relief from removal if put into removal proceedings • Preserve path to permanent residence; if LPR, preserve ability to travel (avoid grounds of inadmissibility) • For LPRs, preserve path to naturalization (U.S. citizenship)

¹⁴ *State v. Wilson*, 481 P.3d 614, 618 (Wash. Ct. App. 2021).

¹⁵ *Padilla v. Kentucky*, 559 U.S. 356, 373–74, 130 S. Ct. 1473, 1486 (2010).

¹⁶ These are the most common types of lawful immigration status; there are many more.

Grounds of Removal: Deportability and Inadmissibility

The Immigration Act creates two categories of “removability”: deportability and inadmissibility. The grounds of **deportability** apply to any noncitizen who was lawfully admitted to the U.S., even if the person is no longer in valid status.

The grounds of **inadmissibility** apply to anyone who has not been lawfully admitted to the U.S. This includes people within the U.S., no matter how long they’ve been here, if they entered unlawfully. Inadmissibility grounds also apply to those seeking admission into the U.S. at a border crossing or port of entry (in some cases including LPRs returning from travel abroad). The grounds of inadmissibility also apply when a noncitizen is applying to gain lawful status.

Both grounds of deportability and grounds of inadmissibility may affect a noncitizen’s eligibility for relief from removal or to obtain lawful status.

Remember that undocumented individuals are already removable simply because they are undocumented.

The Key Questions in Analyzing Immigration Consequences

- Removability: will a given conviction make your client “removable” (i.e., deportable or inadmissible)?
- Relief from removal: will the conviction make the client ineligible for relief from removal (e.g., cancellation of removal, asylum) if put into removal proceedings?
- Obtain future status/benefits: will a conviction impact the client’s ability to seek or change immigration status in the future (e.g., apply for lawful permanent residence or U.S. citizenship)?
- If your client is an LPR, will the conviction affect the client’s ability to travel outside the U.S. (will the person be made inadmissible)?

STEP TWO: Determine Whether a *Barr/Zhao* Plea is an Appropriate Alternative

You should generally consider a *Barr/Zhao* plea only as a last resort, when there is no factually related, immigration-safe alternative that the prosecutor will agree to. It may also be a good option if the prosecutor insists on a certain level of offense or length of sentence and the normal alternatives are not immigration safe. Because a *Barr/Zhao* plea does not require a factual basis for the pleaded offense, you can get creative in finding alternatives that will satisfy both parties. However, you must first ensure that a *Barr/Zhao* plea is appropriate and effective given your client’s specific circumstances.

Whether a *Barr/Zhao* plea will be effective for immigration purposes depends on the specific grounds of inadmissibility and/or deportability at issue. A *Barr* plea works best when the grounds at issue are *conviction*-based, rather than *conduct*-based. This is because a *Barr/Zhao* plea requires the court to find, and the accused person to acknowledge, that there is a factual basis for the original charge, and thus the record cannot be purged of the prior charge and there will be potentially damaging facts in the record.

For *conviction*-based grounds, whether a given offense triggers removability depends on a purely statutory analysis. The immigration adjudicator compares the essential elements of the state statute of conviction with the definition of the federal ground of removability to see if they match (the “categorical approach”). The facts underlying the conviction are irrelevant to this stage of analysis. In the case of a

Barr/Zhao plea, this means that the existence in the record of facts pertaining to the original charge will not impact the analysis.

For *conduct*-based grounds, the immigration adjudicator is not limited to the statute of conviction but may look at record facts and evidence to determine if a removal ground has been triggered. There are also conduct-based bars to some forms of relief. In these circumstances, the adjudicator may consider the factual basis and record evidence relating to the original charge. So, in these circumstances, a *Barr/Zhao* plea is unlikely to be helpful.¹⁷

As an example, the “Controlled substances” ground of deportability makes a noncitizen deportable if “*convicted* of a violation of a law” relating to a controlled substance at any time after admission to the U.S.¹⁸ This subsection clearly requires that there be a conviction to trigger deportability. A *Barr/Zhao* plea to a non-drug related charge would be effective, as the facts in the record relating to the original charge could not be considered by the immigration adjudicator.

In contrast, the ground of deportability titled “Violators of protection orders” provides that any noncitizen whom “the court determines has engaged in conduct that violates” a domestic violence protection order is deportable. The word *conviction* does not appear. This ground is conduct based, meaning the immigration adjudicator may examine any relevant evidence in the record to determine if the ground applies. A *Barr/Zhao* plea will generally not be effective here, no matter how benign the substituted charge is, because the record will contain a factual basis for the DV-VNCO charge and that may be sufficient to sustain a charge of deportability.¹⁹

DEFENDERS ARE STRONGLY ENCOURAGED TO CONSULT WITH
WDA’S IMMIGRATION PROJECT TO CLEARLY IDENTIFY
IMMIGRATION CONSEQUENCES AND ENSURE THAT A *BARR/ZHAO*
PLEA WILL BE EFFECTIVE. FILL OUT AND SUBMIT OUR ONLINE
INTAKE FORM [HERE](#).

STEP THREE: Draft and Enter the *Barr* Plea

Once you have determined that a *Barr/Zhao* plea is appropriate and you have found an alternative offense that is immigration safe and that will satisfy the agreed upon sentence recommendation and other conditions, then it’s time to craft the plea agreement. You must carefully consider the language of the plea, both in terms of acknowledging the factual basis for the original charge and in terms of demonstrating your client’s understanding of the plea. These same considerations inform the language used during the plea colloquy in court.

¹⁷ It’s not *impossible* for a *Barr/Zhao* plea to work in these circumstances, but it must be done with great caution and will require the cooperation of the prosecutor and the judge. Defenders should always contact WDAIP before going forward with any *Barr/Zhao* plea.

¹⁸ 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added).

¹⁹ See the WDAIP advisory on DV-VNCO violations at <https://defensenet.org/wp-content/uploads/2018/01/WDAIP-DV-VNCO-Advisory-Revised-1.11.2018-FINAL-1.pdf>

- **Control the Factual Basis**

Counsel should carefully limit any admissions or stipulations regarding the factual basis for the original charge. Remember that *Zhao* makes clear that the trial court need not “be convinced beyond a reasonable doubt that the defendant is in fact guilty.”²⁰ Rather, the purpose of the factual-basis requirement is to ensure the voluntariness of the plea: does the evidence suggest that the risk of conviction is sufficient to justify the accused person’s choice to plead guilty to the amended offense?²¹ Does it appear the accused person is in fact receiving a benefit from the plea bargain?²² The key is to create a record that “amply supports the conclusion that petitioner’s plea was voluntary and rationally based on the alternatives before him.”²³

Similarly, the accused person need not admit (as Barr did) that he or she “probably would have been convicted,” or that he or she was in fact “complicit[] in those crimes.” The *Zhao* Court found that there was no absolute requirement that the court engage in an oral colloquy with the accused person in court so long as the record adequately demonstrates the accused person’s understanding of the risk of conviction on the original charge, and that the person is pleading guilty to a charge for which there is no factual basis in order to receive the benefit of the plea bargain.²⁴

- **Model Language for Noncitizen’s *Barr* Plea Statement and Proposed Findings of Fact**

The following recommended *Barr/Zhao* plea language makes explicit the limitation on the factual basis for the original charge and avoids any unnecessary admissions or concessions:

I have reviewed the original and amended charges, police reports, and the anticipated evidence against me with my attorney. I understand that if a jury believed the state’s evidence, there is a realistic risk that I could be convicted on the original charge. I do not stipulate to the accuracy or sufficiency of the potential evidence against me for any other purpose. I wish to plead guilty to the substituted charge of _____ to receive the benefit of a plea bargain under *In re Barr* and *State v. Zhao*. I understand there is no factual basis for the substituted charge. I have discussed the consequences of conviction of this charge with my attorney. I understand that I am not being convicted of or admitting guilt of the original charge, and the court is not finding me guilty of that charge. I have reviewed with my attorney the elements of the offense for which I was originally charged and the elements of the offense to which I am pleading guilty. I am knowingly and voluntarily pleading guilty to the substituted charge of _____.

Pursuant to *In re Barr* and *State v. Zhao*, I agree that the court can review the certification for determination of probable cause or police report only for the limited purpose of determining that there was a factual basis for the original charge and a realistic risk I could be convicted of the original charge, which is now being dismissed, and that my decision to accept the plea offer and plead guilty to the substituted charge in exchange for the benefit of the plea bargain is made knowingly and voluntarily.

²⁰ *Zhao*, 157 Wash. 2d at 198.

²¹ *Id.*; see also *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082, 1086–87 (Wash. 2008) (“Due process requires that a defendant’s guilty plea must be knowing, intelligent, and voluntary. . . . The criminal rules reflect this principle. . . . CrR 4.2(d).”)

²² *Zhao*, 157 Wn.2d at 200.

²³ *Barr*, 102 Wn.2d at 265; *Zhao*, 157 Wn.2d at 198.

²⁴ *Zhao*, 157 Wn.2d at 201.

- **Use Model Colloquy Language to Ensure Effective Entry of Plea**

Defense counsel should make the following points to the court in advocating for the court's acceptance of the accused person's *Barr/Zhao* plea:

- I have fully discussed with my client the elements of _____, the crime for which she was originally charged, and reviewed with her the police report, certification for determination of probable cause, and other relevant evidence.
- I have fully discussed with my client the elements of the crime of _____, the alternative charge, agreed upon through plea negotiations, to which she would now like to enter a plea of guilty. My client understands that there is no (or an insufficient) factual basis for the amended charge.
- Pursuant to the guidelines established by the Washington Supreme Court in *In re Barr* and *State v. Zhao*, my client wishes to plead guilty to the substituted charge of _____. My client has weighed the risk of conviction against the benefit of the plea bargain and has determined that the plea is in her best interest.
- The court has previously found probable cause for the original charge(s), which are now being dismissed, and my client has acknowledged that a jury could find her guilty of that charge based on the state's evidence. This establishes a sufficient basis for this plea as required under *In re Barr* and *State v. Zhao*. My client is not stipulating to the accuracy or sufficiency of the probable cause statement for any other purpose.

<p>NOTE: If unable to come to an immigration-safe agreement with the prosecutor, counsel should fully explore the trial option with the client. When facing near-certain deportation for a conviction, some noncitizens, especially those with significant family and community ties, have a stronger incentive to risk conviction at trial and a longer sentence.</p>

IV. Conclusion

Barr/Zhao pleas can be an important tool in assisting your noncitizen client to avoid severe immigration consequences. Effective assistance requires counsel to ensure that a *Barr/Zhao* plea is appropriate for the client's specific circumstances and to carefully craft the plea to work as intended. WDA's Immigration Project is available to provide counsel with the support needed to enter *Barr/Zhao* pleas that work for noncitizen clients. For assistance, please begin by completing our online [intake form](#).