WASHINGTON DEFENDER ASSOCIATION

PRACTICE ADVISORY | August 2023| Immigration Project

This advisory is meant as a general overview and is not a substitute for a case-specific consultation with an immigration expert. For free, individualized assistance from WDA's Immigration Project, please fill out our intake form here.

JUST SAY NO! TO "REAL FACTS"

Immigration Consequences of the Facts Behind the Conviction

There are various instances when the facts and circumstances underlying a conviction play a critical role in determining the immigration consequences a noncitizen client will face. Facts in the record can determine whether a person is removable, and whether they will be eligible to seek relief from removal or to apply for lawful status. And the facts always matter when it comes to the exercise of discretion by immigration adjudicators. This advisory describes those instances where the facts matter and urges defenders to protect their noncitizen clients by "just saying no" when it comes to stipulating to "real facts" for plea purposes.

I. WHAT ARE "REAL FACTS"?

This advisory uses the term "real facts" to refer to facts contained in police reports and probable cause statements.[1] The term is used in the context of defense stipulations to "real facts" for purposes of establishing the factual basis for a plea and for determining what facts the court may consider in imposing sentence. Some jurisdictions include a "real facts" box on the plea form, for the factual basis and/or for sentencing, while others do not use the term at all. The term "real facts" does not appear on the Washington Courts standardized plea forms, but the forms do include a checkbox allowing the court to consider police reports or probable cause statements to establish a factual basis.[2]

II. CONTROLLING THE FACTS

When providing a factual basis for a plea and in negotiating what facts may be considered for sentencing, defense counsel must keep in mind the potential immigration consequences that can arise from admissions made on the record. Extraneous negative facts may not matter when there is an agreed-upon sentence, or where the charge is a misdemeanor, but in subsequent immigration proceedings those facts could become critical.

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[1] The "real facts doctrine" is a separate issue, related only to the imposition of exceptional sentences, and is not addressed here. *See* RCW 9.94A.530; *State v. Reynolds*, 80 Wn. App. 851, 912 P.2d 494 (1996).
[2] See guilty plea forms here: Washington State Courts - Court Forms - Guilty Plea.

A. Factual Basis for the Plea

To accept a plea of guilty, the court must determine there is a factual basis for the plea. The court rules and standardized plea forms specifically allow for the accused person to provide the factual basis in the form of a statement of facts in their own words.[3] The stated factual basis is sufficient as long as it establishes the elements of the pled-to offense.[4] **Defense counsel should choose this option whenever possible and carefully craft a statement of facts that hews as closely as possible to the minimum conduct required to meet the statutory elements of the offense.** The factual basis requirement is a requirement of due process, designed to protect the accused person and ensure that pleas are voluntarily and knowingly made.[5] There is no legal reason for the prosecution to insist on facts beyond those necessary to establish the minimum elements of the offense. Insisting on additional facts may deprive the noncitizen of the benefit of the bargained-for plea by exposing them to various negative impacts described in Section III below.

> Counsel should carefully craft a statement of facts that hews as closely as possible to the minimum conduct required to meet the statutory elements of the offense.

B. Facts to be Considered at Sentencing

The same considerations apply in the sentencing context. Checking the box allowing consideration of "real facts" or otherwise stipulating to additional facts, for sentencing purposes, leaves the noncitizen client vulnerable to the immigration consequences that may be triggered by those facts. For any sentence within the standard range, a stipulation to "real facts" other than the criminal history is not required by law and is unnecessary to the plea and subsequent conviction.[6] A sentence within the standard range, where the trial judge has exercised normal discretion and the criminal history is correct, generally is not appealable.[7]

C. Push Back!

We recognize that prosecutors in plea negotiations may insist on stipulations to the probable cause statement or police reports. While the rules clearly do not require such stipulations, the decision whether to push back or reject a plea offer requires that counsel and their noncitizen clients understand the potential consequences of their choice. Consulting with WDA's Immigration Project or other experts may help counsel and their clients better understand the choices and consequences and may help counsel identify ways to limit or mitigate the immigration repercussions in a given case.[8]

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[3] Wash CrR 4.2(d) and (g) (para. 11 of Statement of Defendant).
[4] *Matter of Keene*, 95 Wash.2d 203, 209, 622 P.2d 360 (1980).
[5] *State v. Codiga*, 162 Wash. 2d 912, 922, 175 P.3d 1082, 1086–87 (2008); *Boykin v. Alabama*, 395 U.S. 238, 242–43, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969); *State v. Zhao*, 157 Wash. 2d 188, 198, 137 P.3d 835, 840 (2006).
[6] RCW 9.94A.530(2) (codifying "real facts" doctrine).
[7] RCW 9.94A.585(1).
[8] For example, in some cases where the prosecution has insisted on "real facts" stipulations, defense counsel have been able to qualify the stipulation, as in the following: "The parties stipulate that the facts set forth in the certification for determination of probable cause and prosecutor's summary may be considered as material facts for the court's consideration for purposes of sentencing only. The defendant contests some of the facts contained in those documents but agrees that the State may submit those documents for sentencing purposes only." While this

III. WHEN THE FACTS MATTER

A. As a Matter of Law: Removability and Eligibility for Relief

In contrast to the general rule that the "facts don't matter" when analyzing state crimes for immigration consequences,[9] several grounds of removal allow, or even require, consideration of the facts and circumstances underlying a conviction to determine if they apply.[10] For these grounds, controlling the facts is critical.

a. Removability: Grounds of Deportability and Inadmissibility

Some removal grounds have been interpreted to include a "circumstance-specific" element, meaning the facts and circumstances underlying the offense may be considered to determine whether a state crime meets the federal definition of the crime for immigration purposes. The following is a list of the most common circumstance-based grounds.[11]

The facts matter most when the issues of removability and eligibility for relief are at stake.

- **Crimes of domestic violence.**[12] "The circumstance-specific approach is properly applied to determine the domestic nature of the offense," and all probative evidence in the record may be considered.[13] Whether an offense is a "crime of violence," however, is a categorical determination.[14]
- **Violation of a domestic violence protection order.**[15] This ground does not require a conviction at all. Rather, any determination by the court that the person has engaged in conduct that violated the order is sufficient.[16]

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stipulation is not ideal, it preserves an argument that these facts should not be considered in future immigration proceedings because they were not specifically acknowledged or admitted by the accused and were not part of the finding of guilt.

[9] This analysis is known as the "categorical approach," in which consideration of the facts is prohibited. *See, e.g., Mathis v. U.S.*, 579 U.S. 500, 136 S. Ct. 2243, 2251, 195 L. Ed. 2d 604 (2016) ("How a given defendant actually perpetrated the crime . . . makes no difference."); *Descamps v. U.S.*, 570 U.S. 254, 261, 133 S. Ct. 2276, 2283, 186 L. Ed. 2d 438 (2013) ("The key . . . is elements, not facts."); *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990).

[10] *See, e.g., Nijhawan v. Holder*, 557 U.S. 29, 129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009) (Whether offense involved loss of more than $10,000 is a "circumstance-specific" inquiry, and consideration of sentencing stipulations and restitution order were proper).

[11] This is not an exhaustive list. Please consult WDA's Immigration Project for information specific to your case.

[12] 8 U.S.C. § 1227(a)(2)(E).

[13] *Matter of Estrada*, 26 I. & N. Dec. 749 (BIA 2016); *but see Tokatly v. Ashcroft*, 371 F.3d 613, 623 (9th Cir. 2004) (Immigration judge was not entitled "to examine the facts behind the conviction" to determine if the offense was "domestic.").

[14] *Estrada*, 26 I. & N. Dec. at 750.

[15] 8 U.S.C. § 1227(a)(2)(E)(ii).

[16] *Matter of Obshatko*, 27 I. & N. 173 (BIA 2017) ("Immigration Judge should consider the probative and reliable evidence regarding what a State court has determined about the [noncitizen's] violation" of a protection order); *Matter of Medina-Jimenez*, 27 I. & N. 399 (BIA 2018) (for immigration purposes, categorical approach does not govern the determination of whether noncitizen violated protection order); *Diaz-Quirazco v. Barr*, 931 F.3d 830, 835 (9th Cir. 2019) (deferring to the BIA's decisions in *Obshatko* and *Medina-Jimenez*).

- **"Reason to believe" person is a "drug trafficker."**[17] This ground also does not require a conviction. If facts in the record indicate sale or "trafficking" of drugs, the person will be permanently inadmissible as a person the adjudicator "has reason to believe" is or has been a drug trafficker.[18] There is no waiver of this ground.
- **Possession of 30 grams or less of marijuana for personal use.**[19] A "single offense involving possession for one's own use of 30 grams or less of marijuana" is an exception to the controlled substance ground of removal. The amount of marijuana and whether the possession was for personal use are circumstance-specific elements.[20]
- **Crimes involving fraud or deceit where loss to the victim(s) exceeds $10,000.**[21] Here, the amount of loss to the victim can be determined by reference to any evidence in the record, including restitution orders.[22]

In addition to the above, a noncitizen "who admits having committed, or . . . admits committing acts which constitute the essential elements" of a "crime involving moral turpitude" or a drug crime is inadmissible, even without a state conviction.[23] Such admissions also may bar a person from establishing "good moral character,"[24] which is required for some immigration applications.[25]

Every fact admitted or stipulated to in a police report or statement of probable cause becomes evidence in the immigration proceeding.

b. Eligibility for Relief

The rules governing determination of eligibility for relief from removal, and for affirmative applications for lawful status, differ from those governing removability. A given offense may not make a person removable, but it may make them ineligible for relief or trigger a heightened standard for the granting of relief. For example, a "particularly serious crime" is a bar to asylum and withholding of removal,[26] while a "violent or dangerous" crime triggers a heightened standard for various waivers of criminal removal grounds.[27] Whether a given offense is "particularly serious" or

[17] 8 U.S.C. § 1182(a)(2)(C).
[18] *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1211 (9th Cir. 2004) (review of police reports and facts in plea stipulation support finding "reason to believe" noncitizen was involved in drug trafficking).
[19] 8 U.S.C. § 1227(a)(2)(B)(i).
[20] *Matter of Dominguez-Rodriguez*, 26 I. & N. Dec. 408, 413 (BIA 2014).
[21] 8 U.S.C. § 1101(a)(43)(M)(i).
[22] *Nijhawan*, 129 S. Ct. at 2294; *Matter of F-R-A-*, 28 I. & N. Dec. 460 (BIA 2022) ("we 'are generally free to consider any admissible evidence' to determine the loss amount," including the amount of forfeiture).
[23] 8 U.S.C. § 1182(a)(2)(A)(i).
[24] 8 U.S.C. § 1101(a)(f)(3).
[25] *E.g.,* 8 U.S.C. § 1229b(b)(1)(B) (cancellation of removal for nonpermanent residents, also known as "10-year cancellation"); 8 U.S.C. § 1427 (naturalization [citizenship]).
[26] 8 U.S.C. § 1158(b)(2)(A)(ii) (asylum), 8 U.S.C. 1231(b)(3)(B)(ii) (withholding of removal).
[27] Waivers for cases involving "violent or dangerous crimes" will be granted only in "extraordinary circumstances." *See, e.g.,* 8 C.F.R. § 1212.7(d) (adjustment of status to lawful permanent resident); *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002) (asylee adjustment of status); 8 C.F.R. § 212.16(b)(3) (application for visa for trafficking victim).

"violent or dangerous" is a factual determination in which the adjudicator can go beyond the formal record of conviction.[28]

B. As a Matter of Discretion: Applications for Relief and Release from Custody

a. Immigration Applications

Almost all immigration applications – whether defensive applications for relief from removal or affirmative applications for lawful status – have a discretionary component. When exercising discretion, the adjudicator is not limited to facts admitted or stipulated to in the criminal proceeding.[29] The rules of evidence do not apply in immigration proceedings, and the adjudicator can and will consider information in police reports and statements of probable cause.[30] Defense counsel still has a role to play in influencing discretionary decisions, however. By creating a narrow factual basis, and perhaps even disavowing certain facts in the record, counsel can arm their noncitizen clients with arguments to rebut the excess of negative "facts" in the record.

b. Release from Detention

Noncitizens in immigration detention who are eligible to seek release on bond must prove to the immigration judge they do not pose a "danger to the community."[31] Immigration judges may consider any facts in the record, including the circumstances of any criminal charges, in making this determination.[32] The "danger to society" determination is a broad, discretionary standard.[33] As is the case with immigration applications, defense counsel's narrowing of facts admitted to can bolster the noncitizen's argument before the immigration judge.

IV. CASE EXAMPLES

The following cases illustrate the negative impact factual admissions the criminal case can have in subsequent immigration proceedings.

- *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005)
  Defendant checked box on plea form indicating: "I understand the Court will review the certification for determination of probable cause in determining if there is a factual basis

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[28] *See, e.g., Anaya-Ortiz v. Holder*, 594 F.3d 673, 678 (9th Cir. 2010) ("[A]ll reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction.").
[29] *Tokatly*, 371 F.3d at 621 (agency may "look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of [a] crime in order to determine whether a favorable exercise of *discretion* is warranted") (emphasis in original); *Matter of Chairez-Castrejon*, 27 I. & N. Dec. 21, 26 (BIA 2017).
[30] *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair"); *Espinoza v. I.N.S.*, 45 F.3d 308, 310 (hearsay is admissible in immigration proceedings and "information on an authenticated immigration form is presumed to be reliable"). *See generally*, 8 U.S.C. § 1229a.
[31] *Matter of Drysdale*, 20 I. & N. Dec. 815 (BIA 1994).
[32] *Matter of Guerra*, 24 I. & N. Dec. 37, 41 (BIA 2006).
[33] *Id*. ("An Immigration Judge has broad discretion in deciding the factors that he or she may consider in custody redeterminations…. In the present matter, the Immigration Judge determined that evidence in the record of serious criminal activity, even if it had not resulted in a conviction, outweighed other factors, such that release on bond was not warranted.")

for this plea and for sentencing." The court found that "police reports and complaint applications . . . may be considered if specifically incorporated into the guilty plea or admitted by a defendant," and found the conviction met the definition of "sexual abuse of a minor," an aggravated felony.

- *Agni v. Holder*, 350 F. App'x 131 (9th Cir. 2009)
  Noncitizen was convicted in Washington of Assault 4-DV. Assault 4, even with a domestic violence tag, does not itself trigger any criminal removal grounds: it is not a "crime involving moral turpitude" or a "crime of domestic violence." But because the "facts set forth in the Certification for the Determination of Probable Cause—a document that was expressly incorporated into the plea agreement with Agni's consent," established the existence of a DV order and its violation, the noncitizen was deportable for violating a DV protection order.

- *Busev v. Barr*, 784 F. App'x 511, 513 (9th Cir. 2019)
  Defense used an *In re Barr* plea to violating an antiharassment order in an attempt to avoid the client being deportable for violation of a DV protection order. But "since the trial court was required to find a factual basis . . . for the original charges," and "the undisputed factual basis for the original charges involved Busev's violation of two stay-away provisions," Mr. Busev still was found to be deportable.

- *Ferreira v. Ashcroft,* 390 F.3d 1091, 1098–1100 (9th Cir. 2004), *recognized as overruled on other grounds by Kawashima v. Mukasey,* 530 F.3d 1111, 1116 (9th Cir. 2008)
  The court found it was permissible to rely on the restitution order that was referenced in the plea agreement in finding loss to the victim of more than $10,000 for purposes of finding "aggravated felony" fraud offense.

- *United States v. Espinoza-Cano*, 456 F.3d 1126 (9th Cir. 2006)
  The court found that a police report could be considered in determining whether defendant's prior conviction qualified as an "aggravated felony" because the report was incorporated by reference into the charging document and stipulated to as part of the factual basis for the guilty plea.

- *Garcia-Gonzalez v. Holder*, 737 F.3d 498, 500–1 (8th Cir. 2013)
  The court found that because the defendant agreed, as part of his plea, that the Government could have proved the factual basis for his racketeering conviction beyond a reasonable doubt, and he admitted the existence of, and his participation in, a conspiracy to distribute controlled substances, Mr. Garcia–Gonzalez was correctly found inadmissible for a controlled substance offense and ineligible for adjustment of status.