

# Washington Defender Association's Immigration Project

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## Crafting Pleas for Noncitizen Defendants: What Every Defender Needs to Know 2007

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### Contacting WDA's Immigration Project

- **WDA's Immigration Project provides case-by-case technical assistance to defenders representing noncitizen defendants. Technical assistance requests are provided free of charge to WDA members.**
- **We accept requests by telephone, email, or our online intake form (online form preferred.) The form is also available to print out and fax in. We generally respond to requests within 72 hours. Please indicate if your case is requiring a more urgent response.**
- **In order to provide you with the information that you need, we will need you to provide us with certain background. For the quickest response to your question, please fill out this form on our website: <http://www.defensenet.org/immigration-project/immigration>  
We will respond as quickly as possible.**

**Additional Immigration Project resources are available on the WDA website at [www.defensenet.org](http://www.defensenet.org).**

## Summary of Top Ten Best Practices For Representing Noncitizen Defendants

1. Identify your client's immigration status and complete criminal history (including misdemeanors and sentences). This is essential to devise a strategy to minimize immigration consequences.
2. Contact WDA's Immigration Project to ensure that you are pursuing the course of action that will have the least immigration consequences to defendant.
3. Advocate for a sentence imposed (regardless of time suspended) of less than 365 days.
4. Remember that numerous misdemeanors can be deemed "aggravated felonies" under immigration law, a classification that triggers the harshest immigration consequences. Thus, do not assume that simply negotiating a felony to a misdemeanor will be the best course of action and avoid immigration consequences (e.g. Third degree felony assault with a three month sentence is better for a noncitizen than an a fourth degree assault with 365 days).
5. Keep specific acts involving the use of force *out* of the "record of conviction" - the criminal complaint, judgment & sentence, plea agreement and statement - whenever possible.
6. Keep information identifying the age of any victims as minors out of the record of conviction whenever possible.
7. Do not stipulate to the admissibility of the police report or affidavit of probable cause as the factual basis for the plea or sentence. This includes Alford pleas.
8. Remember that deferred sentence agreements will constitute convictions in perpetuity for noncitizens even if plea is subsequently withdrawn and case dismissed in State court.
9. When negotiating for a deferred adjudication (other than a deferred prosecution under RCW 10.05) be sure to use "immigration safe" language to ensure that the agreement does not contain "admissions to facts sufficient" that would render it a "conviction" under immigration law.
10. Keep in mind, and advise clients, that a conviction (or deferred prosecution) for *any* offense will be a significant negative factor in any application for immigration benefits such as lawful status (a greencard) or citizenship. Immigration authorities will consider all convictions and arrests in adjudicating applications for immigration benefits. So even where an arrest results in something less than a conviction, or a conviction does not directly trigger deportation, immigration authorities can use it as a basis to deny immigration benefits.

## I. The First Step – Determining your Client’s Immigration Status

### **PRACTICE POINT:**

**Identifying that your client is a noncitizen and determining his/her immigration status are the critical first steps to effective representation of a noncitizen client.<sup>1</sup> You and any immigration practitioner that you consult with will need to know the person’s immigration status to fully understand potential immigration consequences and develop appropriate strategies.**

- Whether a conviction will trigger removal (a.k.a. deportation), or render your client ineligible for immigration benefits, depends upon your client’s current immigration status. A person’s immigration status is often the most important aspect of determining what immigration consequences she will face due to a criminal conviction.
- Defense counsel should ascertain the whether the client is undocumented or has lawful status, such as a lawful permanent residency (a.k.a. a greencard), refugee or asylum status, or was lawfully admitted with some other status (e.g. a student or tourist visa).
- If your client has no lawful immigration status and is, therefore undocumented, defense counsel should determine whether s/he is undocumented because they entered the U.S. illegally or because they entered lawfully on some type of status that is no longer valid (e.g. overstayed a tourist visa).
- Criminal convictions, dispositions and arrests can violate immigration law provisions and trigger deportation. They can also render a noncitizen ineligible for immigration benefits such as lawful permanent resident status (a greencard), asylum and citizenship. All arrests and convictions will constitute negative discretionary factors that will impact any application for immigration benefits even if they do not trigger deportation.

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<sup>1</sup> Pages 4-8 of Immigration and Washington State Criminal Law (2005) contain a short guide to divining a person’s immigration status. The WDA Immigration Project is also available to help you figure it out. Immigration and Washington State Criminal Law is available on the WDA’s website at [www.defensenet.org](http://www.defensenet.org).

## II. The “Record Of Conviction” For Immigration Purposes

### **PRACTICE POINT:**

**In analyzing whether a conviction will trigger removal, the courts and immigration authorities will first look to the language of the statute (not the conduct of the defendant). If the statute is unclear, or includes both offenses which do and offenses which do not fall under the immigration provision(s) at issue then the reviewing authority will consult the “record of conviction” to determine the elements of the offense this defendant was convicted of to see whether they fall within the immigration statute provision.**

**Consequently, the documents contained in the “record of conviction” (ROC), particularly the plea statement, will often determine whether or not the conviction will trigger removal or bar a noncitizen from immigration benefits. Defense counsel should keep the ROC as vague/generic as possible. In particular, keep the ROC free of information that an offense involved violence (e.g., went beyond harm or infliction of damage, to specify the use of force).**

### **A. Understanding How Criminal Convictions Are Analyzed Under Immigration Law: The Categorical & Modified Categorical Analysis**

When the courts and the immigration authorities are reviewing a conviction to determine whether it triggers grounds of removal or statutory bars to obtaining immigration benefits (e.g. greencard, asylum, citizenship), they will engage in what is called the “categorical” and “modified categorical” analysis. Understanding the basics of this analysis is important in order to effectively represent a noncitizen defendant since it often determines when a conviction will trigger deportation/removal.

The key aspects of the categorical/modified categorical analysis are:

- **Under the categorical analysis the elements of the offense as defined by statute and case law, *not the actual or alleged conduct of the defendant*, are used to evaluate whether an offense falls within the relevant provisions of immigration law, i.e. whether the offense is an aggravated felony, a crime of domestic violence or crime involving moral turpitude, or some other immigration violation.**
- In theory, the “pure” categorical analysis test requires that the minimum conduct that could violate the statute must fit within the definition of the immigration provision at issue (e.g. the aggravated felony definition’s crime of violence provision). If it does not, then a criminal conviction under this statute cannot trigger this immigration provision.
- In practice, most immigration courts and federal circuit courts often bypass the “pure” categorical test and find that the statute (or caselaw defining it) is broad enough to include various offenses (or various ways of committing the offense), some of which fall within the scope of the crime-related immigration provisions while others do not (referred to in immigration proceedings as a “divisible” statute). This determination allows the court to engage in the “modified categorical” analysis.

- **Under the modified categorical analysis, to determine whether a conviction triggers a particular immigration provision (e.g. the crime of moral turpitude ground of deportation) the immigration judge or other reviewing authority may look to a strictly limited official set of documents known as the “record of conviction” to determine the elements of the offense of conviction and whether they trigger the crime-related immigration provisions.<sup>2</sup>**
- If the ROC does not clearly establish that the elements of the offense fall within the immigration provision at issue, then the noncitizen cannot be penalized under this provision, i.e. cannot be deported/removed or be held statutorily ineligible for an immigration benefit.
- In many cases, the BOP is on the government to establish through the ROC documents that the conviction falls within the scope of the immigration provision(s) at issue (e.g. an assault fourth degree is an aggravated felony under 8 USC 1101(a)(43)(F)). **Thus, carefully crafting an ROC is a crucial defense strategy for avoiding the immigration consequences of a conviction.**
- **Example of ROC using Assault 4th Degree**

Plea Statement A: “On July 4, 2006, I, Dick Cheney, punched and slapped Karl Rove.”

Plea Statement B: “On July 4, 2006, I Dick Cheney committed an assault against Karl Rove that didn’t amount to an assault 1, 2, or 3.”

Plea Statement C: “On July 4, 2006, I, Dick Cheney, committed an offensive touching against Karl Rove.”

Statement A establishes the intentional use of force against the victim. Consequently, it would constitute a crime of violence under 18 USC 16. Thus, a record of conviction containing this plea statement would put the defendant at risk of triggering deportation under both the “aggravated felony crime of violence” ground and, if the requisite relationship is established, under the DV deportation ground.

Statements B & C do not establish the requisite use of force, so even though there is a conviction, the government could not establish deportability under either provision.

## **B. Criminal Documents that Constitute the “Record of Conviction”**

The documents that a court, or other immigration authority, is permitted to review as part of the record of conviction are a limited set of documents. The information contained in these documents is often the key to whether or not a conviction will trigger removal for a noncitizen defendant.

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<sup>2</sup> *United States v. Rivera-Sanchez*, 247 F.3d at 908 (9<sup>th</sup> Cir. 2001) (en banc), quoting from *Taylor v. United States*, 495 U.S. 575 (1990). See also, e.g., *Chang v. INS*, 307 F.3d 1185 (9<sup>th</sup> Cir. 2002); *Matter of Sweetser*, Int. Dec. 3390 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

**The record of conviction INCLUDES the following documents:**

- Information in the charging papers (however, only the count that has been pled to or proved, not original charges that have been amended or dismissed charges);
- The judgment of conviction;
- Jury instructions;
- A signed guilty plea or a written plea agreement;
- The transcript from the plea proceedings; and
- The sentence and transcript from sentence hearing.

**The record of conviction DOES NOT INCLUDE:**

- Prosecutor’s remarks during the hearing;
- Police reports;
- The affidavit of probable cause;
- Probation or “pre-sentence” reports;
- Statements by the noncitizen outside of the judgment and sentence transcript (e.g., to police or immigration authorities or the immigration judge)<sup>3</sup>;
- A court docket summary prepared by clerical staff<sup>4</sup>;
- Information from a co-defendant’s case.<sup>5</sup>

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<sup>3</sup> See, e.g., *Taylor v. U.S.*, *infra* n. 247. This doctrine applies across the board in immigration cases and has been upheld regarding moral turpitude (see e.g., *Matter of Mena*, 7 I&N Dec. 38 (BIA 1979); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989)(co-defendant’s conviction is not included in reviewable record of conviction); *Matter of Y*, 1 I&N Dec. 137 (BIA 1941) (report of a probation officer is not included); *Matter of Cassisi*, 120 I&N Dec. 136 (BIA 1963) (statement of state’ attorney at sentencing is not included)); firearms (see e.g., *Matter of Madrigal*, 21 I&N Dec. 323 (BIA 1996)(transcript of plea and sentence hearing *is* included); *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996)(police report is not included); *Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996)(admission by respondent in immigration court is not included)). See also *Abreu-Reyes v. INS*, 350 F.3d 966 (9th Cir. 2003)(withdrawing and reversing *Abreu-Reyes v. I.N.S.*, 292 F.3d 1029 (9th Cir. 2002) to reaffirm that probation report is not part of the record of conviction for this purpose, in accord with *US v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(*en banc*).

<sup>4</sup> *U.S. v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004).

<sup>5</sup> *Matter of Short*, 20 I&N Dec. 136 (BIA 1989).

***WARNING! The police report and/or affidavit of probable cause WILL BE INCLUDED in the ROC if it is incorporated into the plea statement as the factual basis for the plea. Consequently, DO NOT do Alford pleas or any other agreement where such agreements require that these documents be incorporated into the plea as the factual basis for the plea or sentence (e.g. stipulations to “real facts”).***

### III. General Guidelines for Crafting Noncitizen Plea Statements and Other Documents

One of defense counsel’s most important goals is to keep the record of conviction as clean as possible of damaging information that will trigger grounds of removal (or other negative consequences). In particular, it is imperative that defense counsel maintain control of the content used as the factual basis for a plea.

This task often presents defenders with two potentially conflicting mandates: to make a sparse or vague record for immigration purposes, and to state a factual basis for the plea under criminal law requirements. Because the government often bears the burden of proving deportability based on a conviction record, a crucial criminal defense strategy to avoid immigration consequences is first, to direct a plea to a “divisible” statute that covers at least one offense that would not trigger the feared immigration consequence (e.g., fourth degree assault), and second, to keep the record of conviction vague enough so that it does not preclude the possibility that this offense was the offense of conviction.

While the law here is complex and conflicted, there is some clear advice for defense counsel:

#### **1. Do not incorporate the police report or affidavit of probable cause into the plea statement as the factual basis for the plea.**

- **ALFORD PLEAS**<sup>6</sup> – At present there is a conflict in the Ninth Circuit as to whether the factual basis used in a nolo contendere or Alford plea will be included in the ROC.<sup>7</sup> This opinion was modified and reprinted at 2006 U.S. App. LEXIS 2900 (9th Cir. February 7, 2006). Until the issue is definitively resolved, counsel must conservatively assume that it will be included and avoid such pleas in favor of straight pleas where counsel can exercise greater control over the factual basis for the plea. However, where it is in defendant’s best interest to do an ALFORD plea, Washington caselaw does not require the defendant to stipulate to police reports or affidavits of probable case as the underlying factual basis and, when representing *noncitizens*, *it is critical to avoid doing so*. Counsel

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<sup>6</sup> Sometimes a defendant can accept conviction without admitting having committed the crime, by pleading “nolo contendere” to a charge, or offering a plea patterned after *North Carolina v. Alford*, 400 U.S. 25 (1970). This disposition is a “conviction” for immigration purposes. The statutory definition of conviction in the immigration statute specifically includes a conviction based on a “plea of guilty or nolo contendere.” See 8 USC 1101(a)(43)(A). At present there is a conflict in the Ninth Circuit as to whether the factual basis used in a nolo contendere or Alford plea will be included in the ROC. See *United States v. Dalvan Nguyen*, 465 F.3d 1128 (9th Cir. October 18, 2006); *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. January 19, 2006). This opinion was modified and reprinted at 2006 U.S. App. LEXIS 2900 (9th Cir. February 7, 2006). Until the issue is definitively resolved, counsel must conservatively assume that it will be included and avoid such pleas in favor of straight pleas where counsel can exercise greater control over the factual basis for the plea.

<sup>7</sup> See *United States v. Dalvan Nguyen*, 465 F.3d 1128 (9th Cir. October 18, 2006); *United States v. Guerrero-Velasquez*, 434 F.3d 1193 (9th Cir. January 19, 2006).

should be familiar with the recent Washington Supreme Court case *State v. Zhao*, 157 Wn.2d 188; 137 P.3d 835; 2006 Wash. LEXIS 503.

- Deferred prosecution agreements under RCW 10.05 in DUI cases require that the defendant admit guilt. This admission of guilt will become part of the record of conviction for immigration purposes. Consequently, these agreements constitute a conviction in perpetuity under immigration law.<sup>8</sup>

**2. Avoid having the defendant provide the factual basis, because it surrenders control of the record of conviction.**

- Defense counsel should always provide the factual basis, and should try to negotiate a factual basis for a plea that minimizes or avoids the adverse immigration consequences of a conviction.

**3. Defendant’s statement regarding the offense should (unless advised otherwise by competent immigration counsel) as vague/generic as possible and simply recite the language of the statute, not specifics of defendant’s conduct.**

Three Examples of sample language for a defendant’s plea statement for fourth degree assault charges under RCW 9A.31.041 (in order of preference for immigration purposes):

**Example 1:** “On December 8, 2006, I, John Lennon, [intentionally] placed the victim in reasonable fear of unwarranted [or offensive] touching.”

**Example 2:** “On December 8, 2006, I, John Lennon, committed an assault against the victim that did not amount to an assault 1, 2 or 3.

**Example 3:** “On December 8, 2006, I, John Lennon, assaulted the victim.

**5. In domestic violence cases, only include victim’s name where the judge requires it. Case law does not require it.<sup>9</sup>**

**6. Defendant’s guilty plea statement should reflect a plea to only the portions of a statute that do not trigger immigration consequences, or, if not possible, disjunctively (using “or”) include both the problematic offense (e.g. giving false information to an officer) with innocuous portions of conduct listed in the statute (e.g. refusal to stop).**

Often in practice, prosecutors charge defendants in the conjunctive (“and”) to allege all of the offenses contained in the statute.

Where a statute uses disjunctive language (“or”) to incorporate multiple offenses, some which trigger removal and some which do not, the government will only be able to establish removability (e.g. deportation) for a conviction under the statute where the defendant’s plea of guilty clearly establishes that she was convicted under the portion of the criminal statute that

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<sup>8</sup> For more information on deferred prosecutions under 10.05, DUI offenses and driving offenses see *The Dukes of Hazard Meet the Border Patrol - Representing Noncitizens Accused of Driving-Related Offenses under RCW Title 46*, Benson and Moore (2007), available at the Immigration Project section of the WDA website [www.defensenet.org](http://www.defensenet.org).

<sup>9</sup> *State v. Johnston*, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000), citing *State v. Plano*, 67 Wn. App. 674, 679-680 (Wash. Ct. App. 1992). Cf. *State v. Clowes* 104 Wn. App. 935, 942 (2001).

triggers removal/deportation. Where the statute contains separate ways of committing an offense but the defendant's plea does not make clear which of the offenses he committed, the government cannot prove that defendant violated the portion of the statute that triggers removal/deportation.

Consequently, where a statute (or caselaw interpreting it) disjunctively lists multiple ways to violate the provision, it will matter a great deal how the language of the statute is incorporated into the defendant's plea statement.

**Example:** Refusal to give information under RCW 46.61.020 indicates disjunctively that you can violate this law by either refusing to give information to an officer OR refusing to stop OR giving false information to an officer. Refusing to give information to an officer and refusing to stop are not a deportable offense under the immigration laws. Giving false information, on the other hand, has been held (sometimes) to be a crime of moral turpitude under immigration law and, thus, a conviction under that portion of RCW 46.61.020 could trigger deportation/removal.

In order to avoid triggering the bad immigration consequences that could flow from a conviction under this statute, a plea statement should:

- Specifically contain plea language indicating that the defendant is admitting to either the portion of the statute that involves a failure to stop or a refusal of information (not the portion of the statute that involves giving false information);
- Where the plea will unavoidably involve the portion(s) of a statute that triggers removal/deportation, whenever possible, defense counsel should construct a plea statement in the disjunctive (using "or") to also include innocuous portions of the statute, such as plea language that articulates a failure to stop *or* providing false information.

**7. Where defendant is pleading to an amended charge, make as clear a record as possible to reflect that the plea is to the amended charge, not the original or other charges.**

- Information alleged in a Count is not part of the record of conviction absent proof that the defendant specifically pled guilty to that Count. A charge coupled with only general proof of conviction under the statute is not sufficient. There must be proof not only that the person pled to the specific charge, but also proof of the specific allegations contained in the charge *at the time of plea*.
- Information from dismissed charges should never be considered in a modified categorical analysis.

**8. Negotiate wherever possible to omit any reference to the age or relationship to defendant of any alleged victims in the defendant's guilty plea statement, the charging document and any other documents in the record of conviction.**

- Where possible always obtain a sanitized and amended charging document.

**9. Omit and/or avoid any reference to the use/threatened use of force in defendant's guilty plea statement whenever possible.**

**10. Contact WDA’s Immigration Project for assistance and to review any proposed strategies BEFORE defendant enters a plea and is sentenced.**

#### IV. Brief Overview of Sentences Under Immigration Law<sup>10</sup>

**PRACTICE POINT: For immigration purposes the sentence that matters is the amount of time imposed by the court, regardless of time suspended. So if a sentence of 364 days is imposed, with 363 suspended, the sentence for immigration purposes will be 364 days.**

The Immigration and Naturalization Act defines a “sentence” as:

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.<sup>11</sup>

This statutory definition was provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and applies to “sentences entered before, on, or after the date of enactment” of IIRIRA.<sup>12</sup>

- This language refers to **the sentence actually imposed**, not to a potential sentence. It governs almost all provisions of the immigration statute that deal with sentences. There are several important exceptions, the most relevant being the deportability and inadmissibility provisions dealing with crimes involving moral turpitude;
- It does not include the period of probation or parole;
- It includes the entire sentence imposed even if all or part of the *execution* of the sentence has been suspended. Where *imposition* of suspension is suspended, **it includes any period of jail time ordered by a judge** as a condition of probation;
- Time imposed by recidivist sentence enhancements (e.g., Felony Harassment under RCW 9A.46.020(2)(b)(i) for “previously [having] been convicted in this or any other state of any crime of harassment”) is not counted as part of the sentence imposed;<sup>13</sup>
- The time served after a probation or parole violation is included within the “sentence imposed.”<sup>14</sup>

**Example:** The judge suspends imposition of sentence (a.k.a. deferred sentence), orders two years probation, and requires jail time of six months as a condition of probation. The defendant is

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<sup>10</sup> For a more detailed analysis of sentences under Washington State law and how they relate to immigration law and representing noncitizen defendants, see Chapter Three of *Immigration and Washington State Criminal Law*, Benson, Brady, Moore (2005).

<sup>11</sup> 8 USC § 1101(a)(48)(B); INA § 101(a)(48)(B).

<sup>12</sup> IIRIRA Pub.L. 104-208, 110 Stat. 3009, Div. C, §§ 322(c), 304(a)(3) (Sept. 30, 1996).

<sup>13</sup> *United States v. Corona-Sanchez*, 291 F.3d 1201 (9<sup>th</sup> Cir. 2002)(en banc).

<sup>14</sup> See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9<sup>th</sup> Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

released from jail after three months with time off for good behavior. For immigration purposes the “sentence imposed” was six months. However, if this defendant then violates probation and an additional 6 months is added to the sentence, she will have a total “sentence imposed” of 12 months. If this offense would become an aggravated felony by having a one-year sentence imposed, the defendant would do better to take a new conviction instead of the probation violation and have the time imposed for that.

**Example:** The judge imposes a sentence of 365 days but suspends execution of 363 days and gives credit for two days served (a.k.a. suspended sentence). For immigration purposes the “sentence imposed” was 365 days (1 year). To ensure that the offense does not trigger any of the aggravated felony provisions involving sentences of one year or more, defense counsel should always request a sentence of 364 days or less, regardless of time suspended.<sup>15</sup>

## V. Deferred Prosecutions and Other Types of Deferred Adjudication Agreement

### A. The Immigration Statute’s Definition of “Conviction”

The immigration statute contains a specific definition of what constitutes a conviction under immigration law. That definition states:

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—

- A judge or jury has found the alien [noncitizen] 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
- The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>16</sup>

The crux of the issue here is what constitutes a conviction for immigration purposes. In short, even though the deferral scheme may allow for a dismissal under Washington state law of the offense(s), *any deferral scheme which requires the defendant, at the time of the deferral, to agree to admissibility of the police report, and/or stipulate to facts and/or enter a guilty plea puts a non-citizen at risk that the deferral scheme will be a conviction for immigration purposes regardless of whether the case is subsequently dismissed by the Court after defendant complies with the condition(s).*

In the case *Matter of Roldan*,<sup>17</sup> the Board of Immigration Appeals interpreted the statutory language so broadly that any admission of guilt will constitute a conviction in perpetuity for immigration purposes. The Ninth Circuit decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) tempers this broad interpretation only for first-time simple possession and lesser drug offenses.

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<sup>15</sup> “‘And if you take one from three hundred and sixty-five, what remains?’ ‘Three hundred and sixty-four, of course.’ Humpty Dumpty looked doubtful. ‘I’d rather see that done on paper,’ he said”. --- Through *the Looking Glass*, by Lewis Carroll.

<sup>16</sup> 8 USC § 1101(a)(48)(A); INA § 101(a)(48)(B).

<sup>17</sup> *Matter of Roldan*, 21 I&N Dec. 512 (BIA 1999).

Meanwhile, as a practical matter, the DHS treats virtually all diversionary schemes as convictions for immigration purposes where, at a minimum, the police report was admitted into evidence at the time of the deferral and/or the defendant stipulated to facts.

## B. Deferred Prosecutions Under RCW 10.05

**PRACTICE POINT: A defendant’s plea of guilty will remain a conviction in perpetuity for immigration purposes. Thus, a guilty plea pursuant to a deferred sentence agreement will *not* be eliminated for immigration purposes regardless of whether s/he has subsequently been permitted to withdraw such plea pursuant to a successful completion of the conditions imposed (unless the offense involves first time simple possession of drugs).**

RCW 10.05 allows for "deferred prosecution" in certain misdemeanor cases. Deferred prosecution under this provision is available to defendants whose wrongful conduct was caused by alcoholism, drug addiction, or mental problems.<sup>18</sup>

Deferred prosecution under RCW10.05.020 establishes the procedure whereby the defendant does not plead guilty to the charges against her/him. Instead, the defendant is required to submit a statement that contains, *inter alia*, "... (c) a stipulation to the admissibility and sufficiency of the facts contained in the written police report; and (d) an acknowledgement that the statement will be entered and used to support a finding of guilty if the court finds cause to revoke the order granting deferred prosecution." Additionally, the defendant is informed that the Court will not allow deferred prosecution if the defendant believes that s/he is innocent of the charges.<sup>19</sup>

The defendant also must agree to undergo treatment for alcoholism or drug addiction in accordance with the court's orders. If the defendant fails to comply with the court's orders, the court can revoke the deferred prosecution and enter a finding and judgment of guilt against the defendant based upon the record. Five years following the entry of the deferred prosecution order, the court shall dismiss the charges against the defendant if s/he has successfully completed treatment.<sup>20</sup>

The courts have held that because the defendant has pleaded guilty and the court has imposed the requisite imposition on liberty, DHS and the Immigration Courts will treat these deferred prosecutions as convictions under immigration law. The Ninth Circuit considers the difference between a deferred prosecution agreement and a guilty plea to be a formality, and it held the deferred prosecution requirements for treatment to be sufficient to meet the punishment prong of the immigration definition of conviction.<sup>21</sup> Note that this means that a deferred prosecution will be a conviction in perpetuity for immigration purposes, regardless of whether or not the defendant complies with the deferral agreement and the case is dismissed in the criminal court.

However, the Board of Immigration Appeals, the Ninth Circuit and the Supreme Court have all held that DUI convictions, such as those under RCW § 46.61.5055, do not trigger statutory

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<sup>18</sup> RCW § 10.05.020(1).

<sup>19</sup> RCW § 10.05.020(2).

<sup>20</sup> RCW § 10.05.120.

<sup>21</sup> *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998); see also, *U.S. v. Sylve*, 135 F.3d 680 (9<sup>th</sup> Cir. 1998); *Abad v. Cozza*, 128 Wash. 2d 575 (Wash. 1996).

grounds for deportation or inadmissibility.<sup>22</sup> Thus, even though the deferred prosecution will constitute a conviction under immigration law, as long as the record does not reflect a conviction for being under the influence of a controlled substance, there is neither a statutory basis for removal nor a statutory bar to obtaining immigration benefits.<sup>23</sup>

### C. Other Types of Pre-Plea Deferred Adjudications

**PRACTICE POINT: Deferred adjudication agreements that require a defendant to stipulate to the admissibility and sufficiency of the facts (usually contained in the police report or affidavit of probable cause) are not “immigration safe” and will likely be treated as a conviction by immigration authorities regardless of any subsequent dismissal. Thus, it is critical to ensure that the agreement uses “immigration safe” language.**

Municipal and District Courts and prosecutors throughout Washington State make use of a wide variety of non-statutory pre-plea deferred adjudication schemes and procedures (i.e., Stipulated Orders of Continuance, Dispositional Continuance, Continuation For Dismissal). Additionally, the increasing prevalence of specialty courts such as Domestic Violence Court, Mental Health Court, and Drug Courts, often employ various deferred adjudications that do not require a formal plea of guilty. The specifics of each scheme vary somewhat, although all are designed to result in a dismissal of the charges if the defendant complies with certain conditions.<sup>24</sup>

Virtually all of the courts that permit some type of deferred adjudication process have boilerplate forms that are used to embody the agreements or stipulations. **For immigration purposes, the portion of these agreements that matters is where the defendant agrees to the admissibility of the police report into evidence with the understanding that if he violates the agreement the judge will rely (oftentimes solely) on the police report in determining the defendant’s guilt or innocence. Some agreements go further and require the defendant to actually stipulate to the accuracy of the facts contained in the police report.**

These admissions are very dangerous for noncitizen defendants since they risk falling within the immigration statute’s definition of conviction noted *supra*, which requires a mere admission of "facts sufficient to warrant a finding of guilt."<sup>25</sup> Defense attorneys should avoid agreeing to any deferred adjudication agreement that requires a stipulation to the sufficiency of the facts.

As an alternative, when negotiating deferred adjudication agreements for noncitizen defendants, counsel should seek to structure the relevant deferral language as:

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<sup>22</sup> See *Matter of Torres Varela*, 23 I&N Dec. 78 (B.I.A, 2001)(simple DUI not a crime of moral turpitude); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9<sup>th</sup> Cir. 2001)(DUI not a crime of violence and thus not an aggravated felony under INA 101(a)(43)(F)); see also *Montiel-Barraza v. INS*, 275 F.3d 1178 (9<sup>th</sup> Cir. 2002); *U.S. v. Portillo-Menodoza*, 273 F.3d 1224, 1228 (9<sup>th</sup> Cir. 2001)(with priors); *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004).

<sup>23</sup> It is important to remember that such deferred prosecution agreements will still be considered a negative discretionary factor against the noncitizen in any application with DHS for immigration benefits.

<sup>24</sup> These agreements are used in relation to a variety of offenses that can trigger deportation/removal, such as domestic violence assault and theft.

<sup>25</sup> 8 USC 1101(a)(48)(A)(i); INA (a)(48)(A)(i). Note that some deferral agreements may require the defendant to stipulate that the facts in the police report are true. However, such a stipulation does not constitute a determination as to their sufficiency to support a finding of guilty. However, these admissions and stipulations are very risky for noncitizen defendants and should be avoided.

Rather than admission of the police report at the time of the deferral, non-citizens would agree to waive their right to object and/or contest ANY evidence presented at any subsequent violation/revocation hearing and agree that the judge will review the evidence presented at that time (which would be the police report) and make a decision as to her/his guilt based solely on that evidence.

Thus, it would be understood at the time that the deferral scheme is agreed upon by the parties, that the prosecutor would present the police report at a *subsequent violation/revocation hearing* if the defendant does not comply with conditions. However, if the defendant complies with the conditions, the case is dismissed without any admissions by the defendant and the police report will not have been entered into evidence for purposes of determining guilt. This will (hopefully) avoid the offense being deemed a conviction for immigration purposes.

**D. Sample Alternative Immigration-Safe Language for Pre-Trial Diversion Agreements/SOCs**

*NOTE: If boilerplate forms are used, it is necessary to cross-out/eliminate language referencing admissions or stipulations of guilt/police reports/facts and substitute in the following language.*

**I understand that I have a right to contest and object to evidence presented against me. I give up the right to contest and object to any evidence presented against me as to my guilt or innocence regarding the underlying charge at any future hearings if I fail to comply with the conditions of this agreement. I also understand that I have the right to present evidence on my own behalf. I give up the right to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge.**

I understand that if I do not comply with the conditions of this agreement, evidence will be presented against me at a future hearing and I understand that the judge will read and review that evidence in determining my guilt or innocence.