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**“Real Facts” for Sentencing and Immigration Consequences
Just Say No – April 2013**

I. “Real Facts” Agreements Unnecessary for Standard Range Sentences¹

If the sentence will be within standard range, a stipulation to “real facts” other than to the criminal history is not required by law and is unnecessary to the plea and subsequent conviction. A sentence within the standard range where the trial judge has exercised normal discretion and the criminal history is accurate is not appealable.²

The “real facts” doctrine, codified under Washington law at RCW 9.94A.530(2), governs exceptional sentences. The “real facts” doctrine bars reliance on facts that are wholly unrelated to the current offense, or that would elevate the degree of crime charged to a greater offense than charged. Under the real facts doctrine, a trial court may not impose a sentence based on elements of a more serious crime the State did not charge or prove, or that is not admitted or acknowledged by the defendant.

- **Unless the case involves an exceptional sentence outside of the standard range, additional “real facts” stipulations are unnecessary for sentencing.**
- **A plea agreement alone is sufficient for a standard range sentence.**

II Recommendations for Counsel:

Do not agree to check “Real Facts” box on plea form, or make any other agreement that permits admission of the CDPC (Certificate of Determination of Probable Cause) or the Police Report as basis for sentencing.

¹ This advisory does not pertain to sentencing enhancements that must be found beyond a reasonable doubt or increase the maximum possible punishment. Such enhancements should be assumed to contain elements that could result in the conviction triggering a removal ground (e.g., firearms).

² RCW 9.94A.585(1). Prosecutors may more strenuously seek to rely on real facts stipulations where they are advocating for the higher end of the standard range. However, again, this is unnecessary and should be avoided.

Where prosecutor is immovable and a real facts stipulation at sentencing is unavoidable to obtain the plea bargain, advocate to include the following limiting language in the plea statement:

Sample Plea Statement Language: “The conduct to which I plead guilty and of which I am convicted, and the factual basis thereof, is only that which is described in my plea statement. I do not object to the judge reviewing other documents related to my case for sentencing purposes only.

Sample Colloquy Language: “The factual basis for the conviction to which defendant pleads guilty is only that specified and described in his plea statement. The defense does not otherwise object to the Court’s review of additional documentation, including the state’s Pre-sentence report and the probable cause certification, for sentencing purposes only.”

Such limiting language preserves a legal argument that a real facts stipulation cannot be used determine the immigration consequences of the conviction. However, if the case turns on this, the likelihood of success on such an argument is unclear (particularly since your client will not be provided with appointed counsel).

III. “Real Facts” Admissions Can Trigger Immigration Consequences

Contesting the removal charges against them is often an important defense for noncitizens and, where successful, can mean the difference between winning their case (getting proceedings terminated or relief granted) and losing (having an order of removal entered against them and getting deported).

Under current Ninth Circuit case law, in order for a conviction to trigger the conviction-based removal grounds and trigger deportation or ineligibility for relief from removal (i.e., staying here in lawful status), immigration authorities will review the statute of conviction and various aspects of the criminal record to determine whether the “facts upon which the conviction necessarily rests” sufficiently match the removal ground at issue.³

What portions of the criminal record will be reviewed will depend on the particular removal grounds at issue in the individual’s case. Different analytical frameworks govern different classes of removal grounds.⁴ While the actual sentence imposed is always admissible in the immigration proceedings, whether the actual sentencing documents and any stipulations beyond the facts contained in the plea statement are admissible to establish the applicability of a removal ground will depend upon which removal ground is at issue.

Since this is difficult to know with certainty at the time of the criminal proceedings (and since real facts stipulations are not required), careful attention to the information provided at sentencing – and, in particular, ensuring that there is no real facts stipulation -- can be a crucial factor to ensure that the defendant avoids potentially severe immigration consequences in the future.

³ See *U.S. v. Aguila Montes de Oca*, 655 F.3d. 915 (9th Cir. 2011)(en banc). This framework is known as the “categorical” and “modified categorical” approach.

⁴ See *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), outlining distinct analytical frameworks for removal grounds that are subject to the categorical approach, and those that are analyzed under a “circumstance specific” approach. See *Matter of Silva-Trevino* 24 I&N Dec 687 (A.G. 2008), and *Matter of Ahortalejo* 25 I&N Dec. 465 (BIA 2011) for the distinct analytical framework applied only to the crime involving moral turpitude (CIMT) removal grounds.