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Using Pleas under *In Re Barr* and *State v. Zhao* to Avoid/Mitigate The Immigration Consequences of a Guilty Plea

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I. Overview: The What, Why & How of Doing An *In Re Barr* Plea

It is important that defense counsel seeking to use these types of pleas to help a noncitizen defendant read this memo in its entirety as it contains important information that will be useful in your advocacy with courts and prosecutors. We recommend that you also consult the WDA's Immigration Project Advisory: *Understanding How Convictions Are Analyzed Under Immigration Law & Strategies To Craft Pleas & Create A Criminal Record To Avoid/Mitigate Immigration Consequences* (2012), available on the WDA website.

What is a *Barr* Plea? *In Re Barr*, and its companion case *State v. Zhao*, let an accused person plead to a substitute charge that is a legal fiction in order to receive the benefit of a plea bargain.[1] The plea must be knowing and voluntary. The defendant must acknowledge that there is a realistic or significant risk of conviction of the original charge, and the court must find that enough of a factual basis exists for the *original dismissed charge*, that the risk of conviction is significant enough. A *Barr* plea is not the same as an *Alford* (*Newton*) plea because the defendant is not explicitly asserting actual innocence.

Why might a *Barr/Zhao* plea be a useful alternative for a noncitizen defendant? In *U.S. v Aguila-Montes de Oca*, the 9th Circuit ruled that noncitizens can be deportable for convictions for crimes that lack elements of a removal ground, if the facts on which a conviction "necessarily rests" establish facts that *do* meet the elements of a removal ground definition.[2] An example could be an assault conviction, where use of a weapon is not an element of the crime, but the record of conviction and factual basis show that the assault was necessarily committed with a firearm. The conviction could be charged by DHS as a deportable firearms conviction, even though use of a gun was not an element of the offense.

[<u>PLEASE READ:</u>] What is the downside to a *Barr/Zhao* plea? Recent poorly-reasoned decisions by an Immigration Judge (IJ) in Tacoma, Washington, hold that in the case of a *Barr/Zhao* plea the evidence pertaining to the dismissed charge, which is reviewed by the trial judge to assure that pleading to a substituted charge is knowing, voluntary and intelligent, constitutes an admission to a factual basis for the negotiated charge. The IJ noticed no difference between a *Barr* plea and a regular plea or submittal where a CPC is stipulated to as establishing the factual basis *for the pleaded offense*. This reasoning caused the IJ to hold, for example, that a guilty plea to Communicating with a Minor for an Immoral Purpose constituted for immigration purposes a conviction for possession of child pornography (!), an aggravated felony. That is despite the fact that: 1) a conviction for the one could seemingly never *rest on facts* establishing the other; 2) the pornography possession charges were dismissed as part of a plea negotiation; and 3) the accused had never admitted guilt or the sufficiency of the evidence for the dropped charges for any purpose other than establishing that his decision not to risk trial and plea bargain was informed and rational.

What does this mean? It means that a *Barr/Zhao* plea should be a very last resort. It means that the stipulation which allows the trial judge to approve the pleading as a whole must be very carefully phrased, to underline the limited purpose for which the potential evidence for the dropped charge was allowed in. But it also means that a person who relies on such a plea to avoid being deportable has only preserved a legal argument. They are still likely to be put into removal proceedings, may need to appeal an

[1] *In re Barr* 102 Wn.2d 265, 684 P.2d 712 (1984); *State v. Zhao* 157 Wash.2d 188, 137 P.3d 835 (Wash.,2006).
[2] *U.S. v Aguila-Montes de Oca* 655 F.3d 915 (9th Cir.2011)(en banc).

Immigration Judge decision up to a federal court, and it means that that skilled immigration legal help will be required.

How to do a Barr Plea:

To the extent possible, maintain control of the factual basis regarding the original charge. In order to plead to an alternate charge under *In Re Barr* & *State v. Zhao* the accused must acknowledge *only* that there is enough evidence that he or she *could be* found guilty by a jury. The accused does not have to admit she committed the more serious offense, or concede that the alleged conduct occurred as described, or that the evidence was actually sufficient to find guilt on the original charge-- only that it was sufficient to make plea bargaining a rational and informed decision.

It is not necessary to, and so DO NOT, admit guilt to the dismissed charge. It is not necessary that the judge believe the accused is guilty of the dropped charge. It is merely a realistic risk of conviction that makes the plea voluntary, and so a true bargain.

See Section IV, for specific sample plea language and particular points of advocacy for assisting a client to enter an *In Re Barr* plea.

II. Introduction – Why This Matters to Noncitizen Defendants

On August 11, 2011, the Ninth Circuit Court of Appeals issued an opinion in *U.S. v. Aguila-Montes de Oca*[3] holding that when it is not clear from a state statute whether a conviction triggers a ground of removal (a.k.a. deportation), immigration authorities may now use facts from a noncitizen's record of conviction (ROC[4]) to characterize the conviction as a removable offense even if the particular fact was not an element of the crime. (For example, a defendant convicted of 3rd Degree Assault under RCW. 9A.36.031(f) may now be removable under the firearms deportation ground where the record of conviction reveals that she or he used a firearm to commit the assault.) However, a fact used for this purpose must be one on which the conviction *necessarily rests*.[5]

As a result, in order to avoid negative immigration consequences, the focus in many cases has now shifted from the *statute* under which a defendant pleads to the exact *factual basis* for a defendant's plea as evidenced by the record of conviction.

This means that in many cases it will be critical for defenders to give careful attention to the factual basis for the plea as established in the ROC, and, where appropriate, consider doing *In Re Barr* pleas.[6] It also further underscores the importance for an individualized assessment of a noncitizen's case.

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[3] *U.S. v Aguila-Montes de Oca* 655 F.3d 915 (9th Cir.2011)(en banc). Because the court also ruled in favor of Mr. Aguila-Montes de Oca on his specific issue, he will not file for certiorari at the Supreme Court, nor will the government, since it won a significant victory in moving the deportation goalposts.

[4] The Supreme Court defined the ROC to include only the following documents: The statutory definition of the crime; the charging document related to the offense of conviction; jury instructions that actually required the jury to find all the elements of the removal ground in order to convict the defendant; a bench-trial judge's formal rulings of law and findings of fact; written plea agreement; admissions at a colloquy between judge and defendant; and any explicit factual finding by the trial judge to which the defendant assents or some "comparable judicial record" of information about the factual basis for the plea. The ROC does not include the following documents: pre-sentence report; certificate of probable cause; arrest reports; statements by prosecutor only; dropped or dismissed complaints or information. See *Taylor v. United States*, 495 U.S. 575 (1990).

[5] It remains unclear exactly how immigration courts will determine this in the wake of *Aguila-Montes*. However, what is clear is that heighted attention to the factual basis for a noncitizens plea is imperative.

[6] For more information on the legal framework for how a conviction is analyzed under immigration law to determine whether it triggers removal (or other immigration consequences) please see the WDA advisory

III. What is an *In Re Barr* plea?

In *In re Personal Restraint of Barr*,[7] a defendant was permitted to plead to a charge different and less serious than the one originally charged, even though there was no factual basis for the substituted charge. Mr. Barr was originally charged with one count of second degree statutory rape and one count of third degree statutory rape. He pled guilty to one substituted count of indecent liberties.

Barr brought a post-conviction motion arguing that the court had accepted the plea without obtaining a sufficient factual basis for the indecent liberties charge. Barr asserted that the plea was invalid because it did not comply with court rule CrR 4.2(d) and that the plea was constitutionally invalid, since without knowing the elements of indecent liberties he could not have made a voluntary and intelligent plea.[8]

The Washington Supreme Court dismissed Barr's claim and held that the plea to the substituted offense (negotiated by plea bargaining) was sufficiently voluntary and intelligent because the record established a factual basis for the crimes originally charged and the defendant was aware that the evidence available to the State on the original offense would have been sufficient to convince a jury of his guilt.[9] At his plea proceeding Mr. Barr had acknowledged that he understood the charge and had received copies of the police reports filed and that he understood that the evidence was sufficient to support conviction on the original charges.[10] 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."[11]

The Washington Supreme Court again reaffirmed this holding of *Barr* October, 2011, in its decision in *State v. Robinson*.[12]

IV. In *State v. Zhao* the Supreme Court Clarified the Minimum Requirements for a *Barr* Plea

In *State v. Zhao*[13] the accused 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

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Understanding How Convictions Are Analyzed Under Immigration Law & Strategies To Craft Please & Create A Criminal Record To Avoid/Mitigate Immigration Consequences (2012), available at the Immigration Project Resources link of the WDA website: *www.defensenet.org*.

[7] *In re Barr* 102 Wn.2d 265, 684 P.2d 712 (1984) *holding modified by Matter of Hews*, 108 Wash. 2d 579, 741 P.2d 983 (1987). *Hews* clarified that the accused still must understand the critical elements of the charge to which he is pleading, but a technical infirmity does not invalidate a plea. *Hews* at 592-93. The defendant in *Barr* erroneously believed that the victim was 14 and that the crime of indecent liberties encompassed victims of 14 years *or* less. In fact, the crime required that the victim be *under* 14 (and so the information was potentially defective.) *Id.; Barr at 270.* The *Barr* court held that although the defendant's understanding of the law and facts was technically deficient, the defendant did understand the essential nature of the charges, and was not misled. *Hews* at 593-94.

[8] *Id*. at 715. The Court only directly addressed the alleged constitutional violation, holding that Barr could not collaterally challenge a merely procedural requirement in his Personal Restraint Petition.

[9] *Id* at 270, *modified by Matter of Hews*, 108 Wash. 2d 579, 741 P.2d 983 (1987).

[10] *Id.*

[11] *Id at* 269-270 (internal citations omitted) (italicization added); *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

[12] *State v. Robinson* 172 Wash.2d 783, 788; 263 P.3d 1233, 1235 (Wash. 2011).

commit indecent liberties and one count of second degree assault, even though there was no co-conspirator.[14]

The plain language of CrR 4.2(d) does not define what constitutes a factual basis for a plea nor does it preclude a trial court from finding a sufficient factual basis for the pleading as a whole based only on evidence related to the original, dismissed charges.[15] The *Zhao* court held that "[t]he factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty." There must only be sufficient evidence, from any reliable source, such that a jury could find guilt on the original charge.[16]

Zhao pleaded to conspiracy which was a legal fiction since no conspiracy existed. The Court observed that in *Barr* "the plea was valid because Barr was fully aware of the technical infirmity with the amended indecent liberties charge and knew that there was sufficient evidence to support conviction for the original statutory rape charges."[17] **When pleading to an amended charge "for which there is no factual basis" (or insufficient factual basis), the validity of the plea turns on both the trial judge's and the defendant's understanding of the infirmity in the amended charge and the voluntariness of the plea**.[18] Underpinning this validity is the acknowledgement that the defendant is knowingly getting an actual benefit from the plea (avoiding the danger of conviction on the original charge).[19]

Zhao clarified that, since the purpose of the factual basis requirement, both in case law and in the court rule, is to ensure voluntariness, a defendant can plead guilty to amended charges for which there is no factual basis, but only when "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."[20] Given that the courts presume that plea deals are validly negotiated contractual agreements,[21] the court's primary role in accepting the plea is to ensure that the defendant is making an informed choice.

Zhao's plea to the amended charge was additionally an *Alford* plea. This highlights that what confirms the voluntary quality of a *Barr* plea is not a concession or near-concession of guilt to the original charges. Rather, the voluntariness requirements in a Barr plea are satisfied where the court simply determines that

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[13] *State v. Zhao* 157 Wash.2d 188, 137 P.3d 835 (Wash.,2006). *State v. Zhao* was a direct appeal, and unlike *Barr*, the Court addressed the requirements of CrR 4.2(d).

[14] *Id.* at 190.

[15] CrR 4.2(d) requires that the trial court find a factual basis supporting a plea, *to ensure voluntariness*:

> **Voluntariness**. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

[16] *State v. Zhao* 157 Wash.2d 188, 198 (Wash.,2006)(internal citations omitted). Mr. Zhao then entered an *Alford* plea to the amended, legally fictitious charges. An *Alford* plea allows a defendant to plead guilty in order to take advantage of a plea-bargain even if he or she is unable or unwilling to admit guilt. See *State v. Newton*, 87 Wash.2d 363, 372, 552 P.2d 682 (1976) (citing *N. Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 1602 (1970)). When entering a *Barr* plea, however, the additional step of an *Alford* plea is generally not desirable for noncitizens.

[17] *Zhao* at 157 Wash.2d 199; *State v. Majors* 94 Wash.2d 354, 358, 616 P.2d 1237, 1238 (Wash., 1980)("When a technical defect is not jurisdictional, plea agreements have been upheld where the plea was entered into voluntarily and knowingly, and the defendant was fully apprised of the consequences. *United States ex rel. Amuso v. LaVallee*, 291 F.Supp. 383, 385 (E.D.N.Y.1968); *Johnson v. Beto*, 466 F.2d 478, 480 (5th Cir. 1972) (holding plea bargaining analogous to promissory estoppel; the law sanctions the bargain if 'real' and not a mere figment.)" *id.*)

[18] *Zhao* at 199. "The advisory committee drafting Fed.R.Crim.P. 11 was of the unanimous view 'that a specific finding in the record (of a factual basis) is unnecessary, and that the pronouncement of judgment is sufficient indication that the required determination has been made.'" *id.* (internal citations omitted).

[19] *Barr* at 269-270.

[20] *Zhao* at 200.

[21] *Robinson*, 263 P.3d at 1233. *U.S. v. Arnett* 628 F.2d 1162, 1164 (9th Cir.1979)

defendant has made a rational assessment that conviction is possible and a knowing decision to avoid that risk though plea negotiation.[22] As the Washington Supreme Court has noted, "[t]he factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty."[23]

V. How Could a *Barr* Plea Help a Noncitizen?

In its recent decision in *U.S. v. Aguila-Montes de Oca*, the Ninth Circuit altered the legal framework for assessing whether a state criminal conviction will trigger removal for a noncitizen defendant. Under the new rules, when it is not clear from the state criminal statute alone whether a conviction triggers a ground of removal, immigration authorities may now use a "non-element fact" from the record of conviction (ROC) to determine whether the conviction falls within the scope of the removal ground.[24] A "non-element" fact is a fact that is not required for guilt under the statute (or the provision of the statute at issue) in every case.[25] **As a result, in trying to avoid immigration consequences, the focus has now shifted from the *statute* under which a defendant pleads, to the <u>exact *factual basis*</u> for a defendant's plea derived from the record of conviction**.

In light of the *Aguila-Montes* rule, there are two important limiting factors under Ninth Circuit case law that will now make *In Re Barr* for pleas a useful (and in some cases imperative) tool for noncitizens.

- **Non-element Fact Must Be "Necessary" to Conviction**: Under the *Aguila-Montes* rule, any non-element fact used from the ROC to make the person removable must be a fact upon which the state conviction *necessarily rests.*[26]

- **Facts from Dismissed Charges Cannot be Used**: There is a well-established rule in immigration law that information from dismissed charges can never be used to establish that a

[22] However an *Alford* plea is never recommended for a noncitizen if it results in a police report being incorporated as the factual basis for charge being pleaded to. See. e.g. *Parrilla v. Gonzales* 414 F.3d 1038, 1044 (9th Cir.,2005) ("[B]y explicitly incorporating the CDPC into his guilty plea, Parrilla in context admitted the facts in the CDPC and rendered it judicially noticeable for the purpose of applying the modified categorical approach.")

[23] *State v. Newton* 87 Wash.2d 363, 370, 552 P.2d 682, 685 - 686 (Wash.,1976)

[24] *U.S. v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Circuit 2011) (en banc). Judge Bybee's decision appears to go beyond what the US Supreme Court has permitted. *Taylor v. U.S.* 495 U.S. 575, 601 (1990) ("The Courts of Appeals uniformly have held that . . . a formal categorical approach [requires] looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions. . . We find the reasoning of these cases persuasive." (internal citations omitted).) The Supreme Court explicitly described its categorical approach as only permitting a later court categorizing an earlier conviction to go beyond the mere fact of conviction "in a narrow range of cases where a jury was actually required to find all the elements" of the generic offense, in this case a removal ground . *Taylor* at 602

[25] To use one of the examples from above, under R.C.W. 9A.36.031(f), a defendant is guilty of felony assault-3rd if , "with criminal negligence,[he or she] causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." The traditional modified categorical approach could be used to ascertain that the conviction was under §(f) of R.C.W. 9A.36.031 (and not one of the statute's seven other provisions). However, the government could not sustain a charge of removal based upon the deportation ground relating to firearms violations for someone convicted of this offense, even if the defendant used a firearm to commit the assault. This is because use of a firearm would be considered a "non-element" fact, i.e. a fact that is not required for guilt under the statute in every case. Under the new rule announced in *Aguila-Montes*, this is no longer the case; the government could now sustain removal charges under the firearms deportation ground where the ROC shows that the assault was committed with a gun.

[26] *Aguila–Montes de Oca*, 655 F.3d at 940. Again, it is unclear exactly how immigration courts will make such a determination, but presumably the government will be required to show that the conviction could not be sustained without it.

particular conviction is a sufficient match to a charged ground of removal.[27] Immigration authorities making a removability determination are limited to the charge of conviction.

Given the uncertainty surrounding how the courts will apply the *Aguila-Montes* decision (or whether it will withstand Supreme Court scrutiny), much remains to be seen regarding how *Barr* pleas will be interpreted by the immigration courts and the federal circuit courts who review their decisions. A local Immigration Judge hearing detained cases in Tacoma has now held that such a plea essentially amounts to a conviction for the dismissed charge, disregarding much of the above. However, ~~what is clear is that~~ in many cases, negotiating a *Barr* plea may be the ~~safest~~ only alternative which preserves a legal argument that avoids or mitigates the risk of removal.

VI. Determining When a *Barr* Plea Is the Best Alternative

There are three possible circumstances when a *Barr* plea is likely to be the best, or "least bad" alternative to avoid/mitigate the risk of deportation.

A. When the offense with which the accused is charged *always* fits a removal ground and there is no safe, factually-related alternate charge.

Example: Noncitizen defendant is charged with Rape of a Child 3rd Degree , always a deportable offense, and enters a *Barr* plea to Computer Trespass 2nd Degree (CT2) even though no computer was accessed.[28] This is a pure legal fiction and could only be done as a *Barr* plea. Defendant admits there is real danger of conviction for the rape charge, but not that he is guilty or that the evidence is true. Under Ninth Circuit case-law there's no way that the probable cause statement should provide a direct factual basis for the CT2 conviction, and no way a CT2 plea could necessarily rest on the fact of a rape. Such a resolution should avoid triggering removal grounds, or at least preserve a legal argument to that effect.

B. When the charged offense *could* be made safe with clean, narrowed plea language, but the prosecution is insisting on stipulations to facts that make the plea unsafe.

Example: Noncitizen defendant is charged with Theft 2nd Degree, which is classified as a crime involving moral turpitude (CIMT) under immigration law and clearly triggers removal grounds. Prosecution agrees to a plea to Malicious Mischief 2nd Degree (MM2), which is not a CIMT offense. The person pleads to MM2, stating, "I wrongfully without just cause or excuse committed an act that had, as a consequence, a diminution in the value of the property of another in excess of $250." No other factual basis is provided or stipulated to, and the information does not allege an unlawful taking. This should not be a CIMT. But what if prosecution insists on or defense counsel permits a plea with a factual basis admitting that the property damage occurred *as a result of theft or an unlawful taking?*

Under *Aguila-Montes*, such an admission will likely transform the MM2 conviction into a CIMT offense since it will "necessarily rest" on an unlawful taking, which constitutes a CIMT under immigration law. Unless MM2 pleas can be carefully crafted to only recite the statutory language (per

[27] *Ruiz-Vidal v. Gonzales*, 473 F. 3d 1072, 1079 (9th Cir. 2007). (Even though dismissed charges indicated that defendant was originally charged with drug crimes involving methamphetamine, defendant pleaded to another offense and "there is simply no way for us to connect the references to the methamphetamine in the [original, dismissed] charging document." id.); see also *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir.2005). The 2011 *en banc* decision in *U.S. v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Circuit 2011) did not overturn this rule.

[28] While such a scenario may seem odd, it is important to emphasize that it is entirely legally viable under the cases outlined here.

above), it may be much safer to do a *Barr* plea to MM2 with theft being the original charges. The defendant should only admit to a realistic risk of conviction for Theft 2, and that the plea to MM2 is being done to take advantage of a plea bargain. As much as possible the accused wants to underline that the factual basis for the dropped charge is *not* actually the factual basis for the charge of conviction, although it serves to legitimize the pleading as a whole.

C. When the offense charged could be pleaded to a safer, alternate charge, but you would have to stipulate to a factual basis for the substituted charge that is derived from the original charge, and those "facts" are not safe.

Example: Noncitizen defendant is charged with Child Molestation 2nd degree (CM2), an offense which triggers automatic removal (and is classified as an aggravated felony under immigration law). Defense counsel negotiates to a plea to Communicating with a Minor for Immoral Purposes (CMIP). CMIP is a CIMT, but, if carefully pleaded, can avoid being classified as an aggravated felony "sexual abuse of a minor" (SAM) offense under immigration law. [29]

Thus, a CMIP conviction may not result in deportation for many individuals (particularly lawful permanent residents and refugees) if the *facts on which it rests* do not match the elements of the immigration law's definition of "sexual abuse of a minor". If defendant plea states, "I communicated for an immoral purpose with a person under the age of 18," and *the plea statement is the only factual basis* given, and the court is satisfied that it is a voluntary plea, the person does not have a conviction that constitutes a SAM offense and no *Barr* plea is necessary.[30]

However, where prosecution insists that defendant admit to facts that will classify the CMIP conviction as a SAM offense (e.g., an admission that defendant engaged in a sex act with a 14 year old victim, or stipulation to damaging "real facts" for sentencing purposes) it could be better to plead guilty to CMIP as a *Barr*. The *Barr* plea should be done so as only to admit that there was a significant risk of conviction for CM2, and that the plea to CMIP is to take advantage of a plea bargain. The CM2 is a dropped charge, and there should be no other required factual basis for the charge of conviction (CMIP) included in the analysis of whether the offense triggers a ground of removal.

VII. Practice Tips and Sample Language For Doing a *Barr* Plea

- ***Barr* Pleas Are Not *Alford* Pleas**.

Do not confuse a *Barr* plea with an *Alford* plea.[31] *Alford* pleas are not recommended for noncitizens. The distinguishing feature of an *Alford* plea is that the defendant does not confirm the factual basis for the plea, and so the Court locates a factual basis from a source other than the plea. But even though a defendant entering an *Alford* plea does not admit guilt, the evidence admitted and relied upon by the

[29] For many lawful permanent residents, even if the CMIP triggers deportation as a CIMT offense, they will still be eligible to ask the immigration judge for a discretionary waiver of their deportation (a.k.a. cancellation of removal) as long as they have not been convicted of an offense that is classified as an aggravated felony.

[30] Counsel should avoid stipulating to a probable cause certificate as establishing "real facts" for sentencing, since it is not necessary for a sentence within the standard range. RCW 9.94A.530(2). A discretionary sentencing decision within the standard range is not normally appealable. *See State v. Mail* (1992) 65 Wash.App. 295, 828 P.2d 70, *affirmed* 121 Wash.2d 707, 854 P.2d 1042. (Trial court has discretion to sentence anywhere within standard range without providing any reasons in support of its decision; therefore, there cannot be abuse of discretion with regard to sentence within standard range and consequently as matter of law there is no right to appeal amount of time imposed.)

[31] *North Carolina v. Alford* 400 U.S. 25, 91 S.Ct. 160 (1970); *State v. Newton*, 87 Wn.2d 363 (1976).

court pertains to the offense of conviction, to which the defendant did plead guilty. In a *Barr* plea the only evidence admitted is that supporting the *dismissed* charge and, with careful advocacy, even that evidence will be limited to minimal admissions by the defendant.[32]

- **Controlling the Factual Basis of the Plea is the Key**

State v. Zhao makes clear that in establishing the minimum factual basis to make a *Barr* plea knowing, voluntary and intelligent, it is enough if the court is satisfied that there was a factual basis for the original charge on which a jury might plausibly have found guilt, to render a defendant's "plea []voluntary, and rationally based on the alternatives before him."[33]

It is not necessary for the accused to admit, as Barr did, that he or she "probably would have been" convicted, nor that "the record establishes a factual basis for the two crimes originally charged *and* reveals defendant's understanding of his complicity in those crimes," as the court observed in *Barr*.[34]

A *Barr* plea is knowing voluntary and intelligent if the defendant's belief that he faced a significant risk of conviction on the original charges has a sufficient factual basis which makes his decision to plead to something else voluntary and rational. The defendant must also understand the elements of the ultimate charge to which she is pleading.[35] Therefore a virtual confession of guilt to the original charges is not required. Consequently, when pleading under *Barr/ Zhao,* limit the concession about the factual basis for the original charge to an acknowledgement that the evidence was sufficient that one *could* have been convicted. Do not stipulate that the evidence or statements are correct or admit actual guilt for the original charge. **Pleading under *Barr* and *Zhao* should prevent the establishment of a direct factual basis for the substituted charge other than the minimum elements of the substituted charge.**[36]

Court rules and case-law do not require that a defendant make a detailed recital of facts.[37] There is no requirement that a judge orally engage the defendant in a detailed colloquy about the facts of the offense.[38] For the plea to be knowing, voluntary and intelligent " [t]he court must make sure the accused fully understands what the plea connotes and its consequences."[39]

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[32] See ft.nt. 14, *supra.*
[33] *Barr* at 265*; Zhao* at 198.
[34] *Barr* at 265.
[35] *Matter of Hews* 108 Wash.2d at 593-594.
[36] "The problem is that 'what the state court ... has been 'required to find' is debatable. In a nongeneric State, the fact necessary to show a generic [deportable] crime is not established by the record of conviction as it would be in a generic State . . . [W]ithout a charging document that narrows the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench-trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea." *Shepard v. U.S.* 544 U.S. 13, 25, 125 S.Ct. 1254, 1262 (U.S.,2005).
[37] "[T]he judge was justified in relying upon the plea statement. While the statement was typewritten and was prepared by the petitioner's attorney, he told the trial court that he had read it, and that the statements contained in it were true." *Matter of Keene* 95 Wash.2d 203, 206-207, 622 P.2d 360, 362 (Wash., 1980)
[38] "In *In re Personal Restraint of Keene*, 95 Wash.2d 203, 204–09, 622 P.2d 360 (1980), this court discussed the extent to which a trial judge must recite on the record the various elements of the plea. The *Keene* court concluded that the trial judge could rely on the written plea agreement where the defendant told the court he had read the agreement and that the statements contained therein were truthful. The court found no due process requirement that the court orally question the defendant to ascertain whether he or she understands the consequences of the plea and the nature of the offense. The *Keene* court emphasized that neither CrR 4.2 nor prior case law explicitly required oral inquiries. Knowledge of the direct consequences of the plea can be satisfied by the plea documents. *In re Pers. Restraint of Stoudmire*, 145 Wash.2d 258, 266, 36 P.3d 1005 (2001). The defendant must understand the facts of his or her case in relation to the elements of the crime charged, protecting the defendant from pleading guilty without understanding that his or her conduct falls within the charged crime.. But so long as the documents relied upon are

- **Sample Plea Language:**

The following language is proposed for a *Barr* plea:

> I have reviewed the original and amended charges, police reports and the anticipated evidence against me with my attorney. I believe that there is a significant risk of conviction of the original charge, although 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 amended charge of _____ to receive the benefit of a plea bargain, under *In re Barr* and *State v Zhao*. I have discussed the consequences of conviction of this charge with my attorney. I understand that I am not being convicted or found guilty or admitting factual guilt of the original 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 have received a copy of it. I am knowingly and voluntarily pleading guilty to the amended charge of _____. I have no further questions to ask the court.
>
> I agree that the court can review the Certification of Probable Cause or police report only for the specific purpose of determining that there is a realistic risk that I could be convicted on the original charge, which is now being dismissed, and that that risk is sufficient for me to make a knowing and voluntary plea to a different charge, under *In Re Barr* and *State v. Zhao.*

- **Sample Defense Colloquy With The Court**

Defense counsel should make the following points to the court in advocating for the court's acceptance of the defendant's *Barr* 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, certificate of probably cause and additional anticipated evidence;
- I have also 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;
- 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 amended charge.
- The court has previously found probable cause for the original charge(s), which are now being dismissed;
- That finding, combined with my client's statement 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 [potential evidence against me], for any other purpose.

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made part of the record, the trial court can rely on any reliable source . . ." *State v. Codiga* 162 Wash.2d 912, 923-924, 175 P.3d 1082, 1087 (Wash.,2008)(some internal citations omitted)

[39] *Keene*, 95 Wash.2d at 206-207, citing *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct.1709, 1712. (1969).