

CHAPTER FIVE

The Importance of the Criminal Record of Conviction in Determining Immigration Consequences¹

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5.1 THE NEXUS BETWEEN CRIMINAL & IMMIGRATION PROCEEDINGS: THE CATEGORICAL APPROACH

A. Why the Rules of the Categorical Approach Matter

Not all state criminal convictions trigger removal or denial of immigration benefits. Nor does proof of the mere existence of a potentially removable conviction suffice to enter an order of removal against a noncitizen.² In the majority of cases, immigration officials will use the analytical framework known as the “**categorical approach**” (and its derivative the “**modified categorical approach**”), discussed below, to determine the specific immigration consequences of a criminal conviction.

The categorical approach framework provides strict guidelines that the immigration judge must follow to decide whether a conviction for a state criminal offense is a sufficient match to the elements of the deportation or inadmissibility ground at issue.³ As a general rule, this approach limits the analysis to the statute of conviction and, in some cases, may rely on a specified set of documents known as the record of conviction.

In addition to applying statutory construction, courts also limit the use of evidence from the criminal proceedings in subsequent immigration proceedings based on fairness and judicial efficiency.

- **Fairness:** A defendant in a criminal proceeding lacks notice that it is important to correct or dispute a particular non-element fact (e.g. the exact age of a minor victim) when doing so would not affect guilt or punishment.⁴ Permitting the immigration judge in removal proceedings to search for and rely on any facts contained in the criminal record, regardless of whether they were relied upon to obtain the conviction, risks unfairly depriving the defendant of the benefit of a negotiated plea to a lesser or different offense.⁵
- **Judicial Efficiency:** Long before the present removal system was contending with its current burgeoning volume of cases, it was an established tenet of immigration law that efficient administration of removal proceedings required the immigration judge to give

² The government is permitted to introduce a range of materials to establish the existence of a noncitizen's conviction. This range of materials is outlined by statute at 8 U.S.C. § 1229a(c)(3)(B) and in *United State v. Felix*, 561 F.3d 1036, 1042-43 (9th Cir. 2009).

³ Both the U.S. Supreme Court and the Ninth Circuit have held that the categorical analysis applies in both immigration proceedings and federal criminal proceedings as the method by which to determine whether a defendant's conviction can be classified as an immigration violation, e.g. crime of moral turpitude, deportable firearms offense or aggravated felony. See *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007); *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *Chang v. I.N.S.*, 307 F.3d 1185, 1189 (9th Cir. 2002).

⁴ *Li v. Ashcroft*, 389 F.3d 892, 900-01 (9th Cir. 2004) (Kozinski, J., concurring). See also *Navarro-Lopez v. Gonzalez*, 503 F.3d 1063, 1073 (9th Cir. 2007) overruled by *U.S. v. Aguila-Montes de Oca*, 655 F.3d 1063 (9th Cir. 2011).

⁵ *Taylor*, 495 U.S. at 601-602.

full faith and credit to determinations made in criminal proceedings.⁶ Immigration judges have been precluded from going behind a criminal conviction to decide removability and in most cases are only permitted to consult the record of conviction for limited purposes discussed herein.⁷

B. The Categorical Approach Often Determines Whether Immigration Consequences Are “Clear” or “Unclear,” Informs Effective Plea Negotiations and Impacts the Creation of the Record of Conviction

Given the importance of a judge’s role in creating the criminal record that will follow a noncitizen defendant into immigration proceedings, it is important that judges presiding over criminal cases have a basic understanding of how the records developed in state court criminal proceedings play a critical role in subsequent immigration proceedings. Additionally, in many cases, applying the categorical and modified categorical approach is essential to determine whether a conviction’s immigration consequences (such as removal) are “clear” or “unclear” as articulated by the U.S. Supreme Court in *Padilla v. Kentucky*.⁸

Under the Supreme Court’s decisions in *Padilla* and *Missouri v. Frye*,⁹ defense counsel representing noncitizen clients has a duty to advise his/her client regarding immigration consequences and a duty to seek to avoid or mitigate potential adverse immigration consequences.¹⁰ Where relevant, defense counsel will need to create a record that not only comports with Washington law, but that also ensures that the noncitizen defendant is not at risk of losing a crucial benefit of the plea bargain, namely avoiding or mitigating the subsequent immigration consequences.¹¹

EXAMPLE: Noncitizen Defendant, George, Convicted by Plea of Assault 4th Degree – DV

⁶ See generally Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688-1698 (2011) (discussing the origins of the categorical approach in immigration law).

⁷ *Aguliar-Turcios v. Holder*, 656 F.3d 1025, 1032 (9th Cir. 2012) (“We have identified two important goals service by this limited inquiry into a past conviction: First, I confines our inquire to the fact of conviction and avoids the need to rummage through the ‘actual proof at trial’ to see ‘whether the defendant’s conduct constituted [a] generic [immigration offense], preventing possible ‘trial over trials’. Second, by relying exclusively on the crime of conviction, we avoid situations where the government arguably could prove that the defendant actually committed a greater offense, one that would satisfy the generic [immigration] crime, but would deprive the defendant of his conviction (or plea to) a lesser charge.”) (internal citations omitted).

⁸ 130 S.Ct. 1473, 1483 (2010).

⁹ 132 S.Ct. 1399 (2012).

¹⁰ *Padilla*, 130 S.Ct. at 1486 (“[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process....The severity of deportation-“the equivalent of banishment or exile,” only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation) (internal citations omitted); *Frye*, 132 S.Ct. at 1403 (“The [*Padilla*] Court made clear that negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel); *Frye* at 1407 (“criminal defendants require effective counsel during plea negotiations.”).

¹¹ The *Padilla* Court recognized that it is a legitimate consideration for defense counsel, prosecutors and courts to factor immigration consequences into the various stages of the criminal proceedings, including plea negotiations and sentencing. *Padilla*, 130 S.Ct. at 1480.

George's conviction will clearly trigger the domestic violence (DV)-related deportation ground if it is classified as a "crime of violence" (COV) under federal law's 18 U.S.C. § 16(a), which requires that the offense have as an element the use or threatened use of force.¹² George's conviction will clearly not trigger this deportation ground if it lacks the requisite use of force. The immigration judge in removal proceedings will review George's record of conviction, in particular the factual basis for his plea, to determine whether it matches the federal COV definition.

Under Washington law, a defendant can be convicted of Assault 4th degree in one of three ways, two of which match the COV definition's requisite use of force and one that does not (offensive touching).¹³ If George's plea statement reveals that he was convicted of "offensive touching," or does not specify the manner in which the assault was committed¹⁴ it will clearly not be classified as a COV and cannot trigger this deportation ground.¹⁵ Conversely, where the plea (or other documents used as the factual basis for the conviction) reveal that George punched, slapped, choked or otherwise used more than *de minimis* force, the conviction will clearly will trigger the DV-deportation ground.¹⁶

5.2 HOW IMMIGRATION JUDGES USE THE CATEGORICAL APPROACH TO DETERMINE WHETHER A NONCITIZEN'S CONVICTION TRIGGERS IMMIGRATION PENALTIES, SUCH AS REMOVAL

Crime-related penalties under immigration law include loss of lawful immigration status (such as a green card or refugee status), bars to obtaining future lawful immigration status, or ineligibility for certain immigration benefits such as U.S. citizenship. As highlighted in Chapter One, most, but not all, crime-related penalties under the immigration statute require a conviction in order to apply.¹⁷

Consequently, in most removal proceedings involving criminal convictions, immigration authorities will use the categorical and modified categorical analysis outlined below to determine whether the conviction triggers the immigration penalty. As this framework often relies upon the

¹² See 8 U.S.C. § 1227(a)(2)(E)(i).

¹³ *State v. Hupe*, 50 Wn.App. 277, 282, 748 P.2d 263 (1988) ("Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.") .

¹⁴ E.g., plea language that states "On August 8th 2010, I committed an assault against the victim that did not amount to Assault 1, 2, or 3."

¹⁵ *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1227 (9th Cir. 2008).

¹⁶ See *U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002) (Nevada conviction for battery causing substantial bodily harm was COV under 18 U.S.C. § 16 and therefore an aggravated felony).

¹⁷ As highlighted in Chapter 2, most, but not all, crime-related provisions of the immigration statute require convictions in order to apply. The crime-related immigration provisions that do not require a conviction are not subject to the strict evidentiary standards of the categorical approach framework. See *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009). While criminal court records can play an important role in non-conviction-based removal provisions, the lower evidentiary standards that govern these determinations generally make them less critical to the outcome. Consequently, the information in this chapter will focus on conviction-based immigration provisions that are subject to the categorical approach.

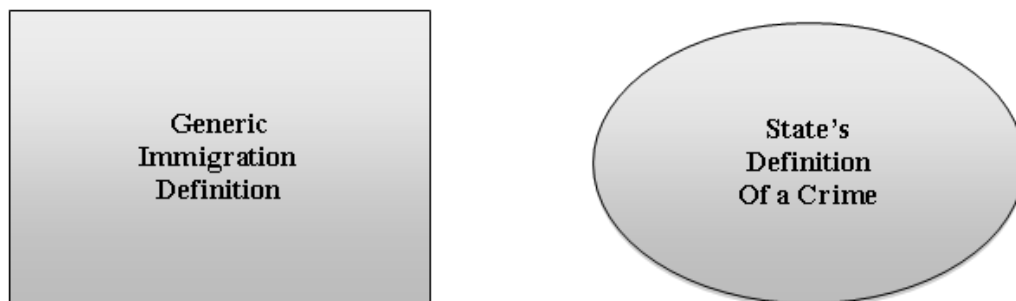
documents developed in the criminal court that become the “reviewable record of conviction” for immigration purposes, those documents can, and often do, play a critical role in subsequent immigration proceedings.

KEY POINT: The information contained in the documents that make up the record of conviction is often the determining factor as to whether or not the state conviction triggers removal (or some other immigration penalty).

A. The Categorical Approach: Do the Statutory Elements or Facts Necessary to the Conviction Sufficiently Match the Immigration Removal Ground at Issue?¹⁸

The basic idea behind the categorical approach is that federal immigration law uses a single definition for certain types of removable offenses (such as “theft” or “domestic violence”) in order to promote consistency. This definition is known as the “generic definition” of the immigration provision and is either expressly defined by Congress in the immigration statute or by federal caselaw.¹⁹ However, state criminal codes often use a different set of elements to define the criminal offense that may or may not sufficiently match up with the immigration statute’s generic definition. Making the determination as to whether (or not) the elements of the state offense of conviction sufficiently match the generic definition of the ground of deportation or ground of inadmissibility at issue is the primary task of the immigration judge when applying the categorical analysis in removal proceedings.

It helps to conceive of this visually. Here, the square represents the generic immigration definition of an offense while the circle represents the state’s definition:



If all of the criminal conduct covered by the state’s definition of its crime falls within the generic immigration definition, all convictions under the state statute will “categorically” trigger the immigration provision at issue.

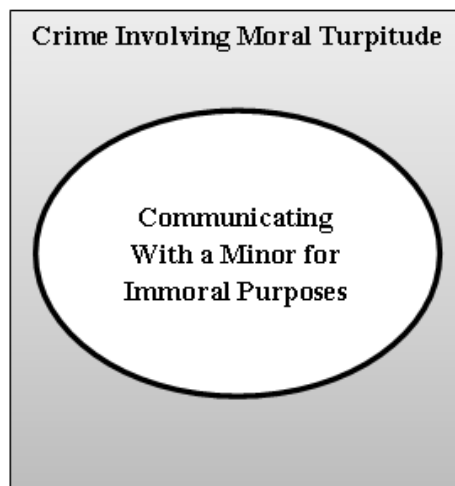
¹⁸ This section was adapted and used with permission from Kara Hartzler, *Surviving Padilla: A Defender’s Guide To Advising Noncitizens on the Immigration Consequences of Criminal Convictions*, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT (2011), available at <http://www.firrp.org/resources/criminaldefense/>.

¹⁹ See, e.g., 8 U.S.C. § 1101(a)(43)(F) (defining a crime of violence by referencing 18 U.S.C. § 16); *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc) (establishing a generic definition of “theft offense” under 8 U.S.C. § 1101(a)(43)(G)).

CATEGORICAL MATCH

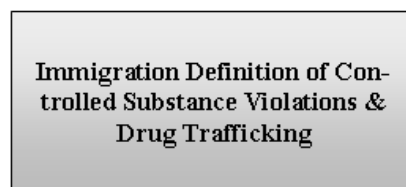
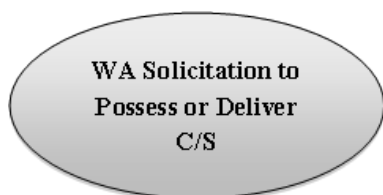


EXAMPLE: Communicating With A Minor For Immoral Purposes (CIMP) under R.C.W. 9.68A.090. The Ninth Circuit has held that all conduct prohibited under this statute comes within the generic definition of what constitutes a “crime involving moral turpitude” (CMT) under immigration law. Thus, CIMP will be deemed “categorically” a CMT for immigration purposes and, unless one of the statutory exemptions apply, all convictions under this statute will trigger the CMT grounds of deportation and inadmissibility *regardless of what information is contained in the criminal record.*²⁰



NOT A CATEGORICAL MATCH

Conversely, some criminal statutes punish conduct that falls completely outside the scope of the immigration statute’s generic definition. Convictions under these statutes are deemed to not “categorically” match the generic definition of the immigration provision at issue and, thus, cannot trigger grounds of deportation or inadmissibility.



EXAMPLE: The Ninth Circuit has held the generic immigration definition of the removal grounds relating to controlled substance violations²¹ does not include solicitation-related drug offenses.²² As such, *regardless of what is contained in the criminal record*, a conviction under R.C.W. 9A.28.030 for solicitation to either possess or deliver a controlled substance is categorically not a match to these drug-related immigration provisions and will not trigger these removal grounds.

²⁰ *Morales v. Gonzalez*, 472 F.3d 689, 694 (9th Cir. 2007). See §4.2 for more information regarding crimes of moral turpitude and the immigration consequences of having a crime that is classified as such under immigration law.

²¹ 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i), 1227(a)(2)(A)(iii), 1101(a)(43)(B).

²² A conviction for a drug-related solicitation offense under R.C.W. 9A.28.030 cannot be classified as a drug-trafficking aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *Leyva Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *U.S. v Rivera Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc). It also does not trigger deportation as a controlled substance violation. *Coronado Durazo v. INS*, 123 F.3d 1322, 1323 (9th Cir. 1997). WA’s solicitation statute is on par with the Arizona solicitation statute considered in these cases.

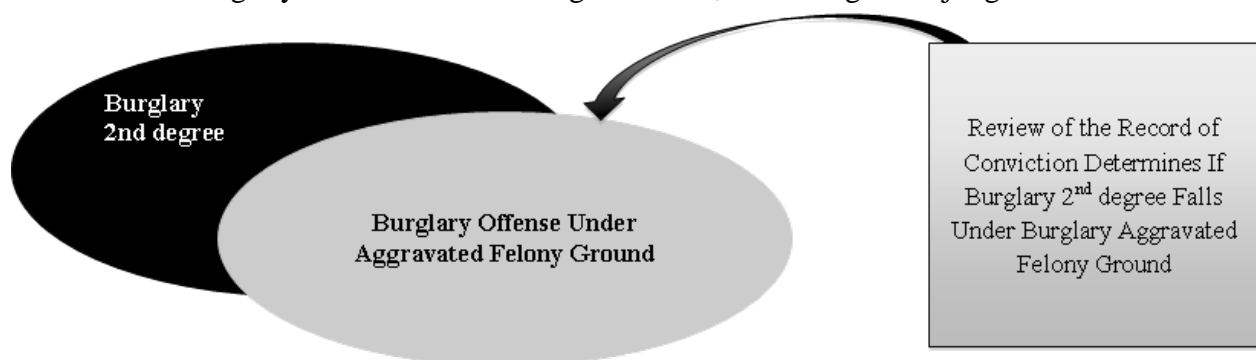
B. The Modified Categorical Approach: The Importance of the Criminal Record of Conviction

In many cases it is unclear whether the conviction is clearly or “categorically” a match (or not) to the removal ground at issue because the statute of conviction is “broader” in that it covers multiple crimes, only some of which match the elements of the generic immigration definition of the removal ground. Under these circumstances, U.S. Supreme Court caselaw directs immigration courts to engage in the “**modified categorical approach.**”²³

The modified categorical approach permits the immigration judge to consult the limited set of documents from the record of the criminal proceedings, known as the “reviewable record of conviction” to clarify whether (or not) the defendant’s conviction matches the definition of the removal ground at issue. See §6.2(A) *supra* for an outline of the documents that do and do not make up the record of conviction. In cases involving the modified categorical approach, the specifics of what happened in criminal court - as contained in the reviewable record of conviction - will determine whether the conviction triggers the ground of deportation or inadmissibility.

EXAMPLE #1: The Modified Categorical Approach & Burglary 2nd Degree

Federal courts have defined the “generic” definition of burglary “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”²⁴ Since Washington’s definition of “building” under R.C.W. 9A.04.110 is broader than this generic definition (it includes, e.g., cargo containers and fenced areas), it does not categorically match. As such, to determine whether a particular noncitizen’s Burglary 2nd degree conviction constitutes a “burglary offense” under immigration law, the immigration judge will consult the



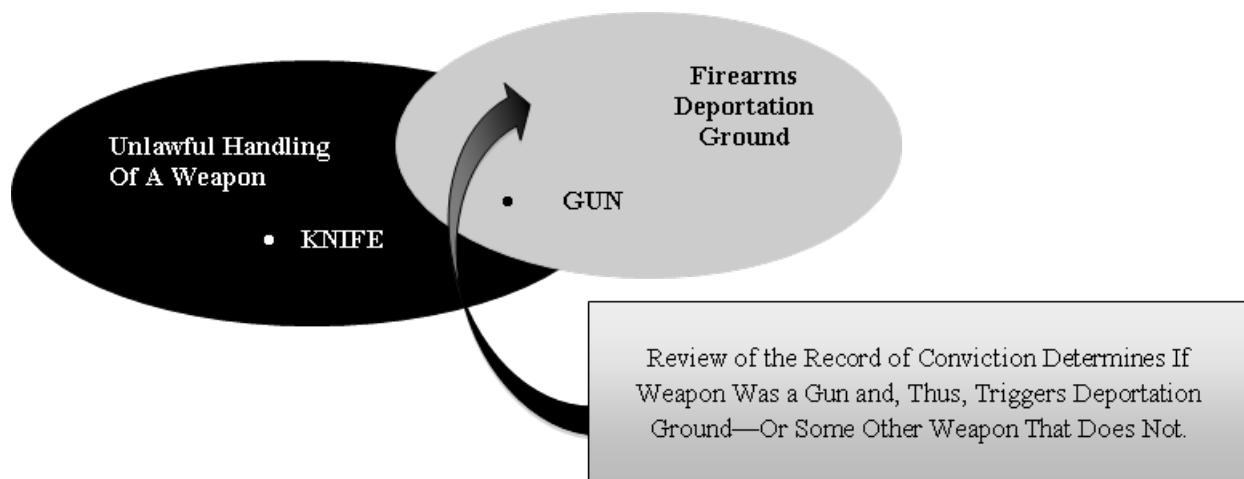
²³ *Nijhawan v. Holder*, 557 U.S. 29, 31 (2009). In *Nijhawan v. Holder*, the U.S. Supreme Court stated that the immigration court can apply a “modified categorical” analysis where a state statute contains “different crimes, each described separately” (either in the statute itself or in caselaw interpreting it), at least one of which has elements that are a categorical match with the generic definition. In *Johnson v. United States*, 130 S.Ct. 1265, 1273 (2010), the Court stated that “[w]hen the law under which the defendant has been convicted contains *statutory phrases that cover several different generic crimes*... the ‘modified categorical approach’ that we have approved permits a court to determine *which statutory phrase* was the basis for the conviction by consulting the trial record...” (internal citations omitted) (emphasis added).

²⁴ 8 U.S.C. § 1101(a)(43)(G); *Taylor v. United States*, 495 U.S. 575, 598 (1990).

reviewable record of conviction to identify what type of structure the defendant was convicted of unlawfully entering or remaining in. Where the record indicates that the conviction is predicated upon entry of a space (e.g., a railway car or fenced yard), or where the record is unclear, the conviction clearly will not be classified as an aggravated felony.²⁵

EXAMPLE #2: Modified Categorical Approach & Unlawful Handling of a Weapon

Unlawful Carrying/Handling of a Weapon under R.C.W. 9A.12.270 is another example of a state statute that includes some offenses which can trigger removal and some that do not since it lists numerous types of weapons that can be unlawfully displayed, one of which is a gun (firearm).²⁶ If the noncitizen defendant is convicted of this offense using a gun he will trigger this deportation ground. If he is convicted using a knife (or any weapon other than a gun) he will not. To clarify whether a specific conviction involved a gun, an immigration judge will consult the reviewable record of conviction. If the record of conviction clearly shows that the defendant was convicted for unlawful display of a firearm it will clearly trigger the firearms ground of deportation; whereas if the conviction was for display of a knife, or the record only indicates “weapon” but does not specify what type, it clearly will not.



²⁵ See *Taylor v. U.S.*, 495 U.S. at 599-602. Note that Burglary 1st degree (R.C.W. 9A.52.020) and Residential Burglary (R.C.W. 9A.52.025) will always be deemed “crime of violence” aggravated felonies under 8 U.S.C. 1101(a)(43)(F) where the term of imprisonment is at least one year (regardless of time suspended). See *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).

²⁶ The deportation ground relating to firearms violations are at 8 U.S.C. § 1227(a)(2)(C).

C. The Record of Conviction Documents for Immigration Purposes

The “record of conviction” (ROC) for immigration purposes is limited to a specific universe of documents from the criminal proceedings. It is this list of documents that follow the noncitizen defendant into removal (or other immigration) proceedings, and that the immigration judge is permitted to consult when applying the categorical and modified categorical approach framework outlined below.²⁷ The U.S. Supreme Court has made clear which documents do, and do not, comprise the reviewable record of conviction for immigration purposes.²⁸

- **The ROC in a conviction by plea includes the following documents:**

- ✓ The statutory definition of the crime (including caselaw defining elements of an offense);
- ✓ Charging documents related to the offense of conviction;²⁹
- ✓ Written plea agreements;
- ✓ Admissions at a colloquy between judge and defendant;³⁰ and
- ✓ Any explicit factual finding by the trial judge to which the defendant assents; or
- ✓ Some other “comparable judicial record” of information about the factual basis for the plea.³¹

Where the conviction was by jury, the Supreme Court has held that the complaint, jury instructions, and verdict can be used to the extent that they clearly establish that the defendant was convicted of an offense containing the elements of the “generic definition” of the immigration provision at issue.³² Where a court conducts a bench trial, the judge’s formal rulings of law and findings of fact will be part of the reviewable record of conviction.³³

- **The record of conviction does NOT include the following:**

- ✓ A Presentence Report³⁴;
- ✓ Certificate of Probable Cause;
- ✓ Arrest reports³⁵;

²⁷ Distinct from determinations regarding whether a conviction triggers removal grounds or renders a noncitizen ineligible for discretionary relief, immigration authorities are permitted to consult any relevant, credible evidence in order to make determinations as to whether a noncitizen deserves to be granted relief.

²⁸ *Shepard v. U.S.*, 544 U.S. 13, 26 (2005) (citing *Taylor v. U.S.*, 495 U.S. 575, 602 (1990)).

²⁹ Charging papers alone are never sufficient, however. *U.S. v. Hernandez-Hernandez*, 431 F.3d 1212, 1223 (9th Cir. 2005); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2004); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (“charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment may suffice to document the elements of conviction...”); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc).

³⁰ *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 325 (BIA 1996).

³¹ *Shepard v. United States*, 544 U.S. 13, 26 (2005).

³² *Taylor v. United States*, 495 U.S. 575, 602 (1990).

³³ *Shepard*, 544 U.S. at 14 (“In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge’s formal ruling of law and finding of fact...”).

³⁴ See *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir. 2003); *United States v. Pimental-Flores*, 339 F.3d 959, 968 (9th Cir. 2003); *Abreu-Reyes v. I.N.S.*, 350 F.3d 966 (9th Cir. 2003) reversing 292 F.3d 1029 (9th Cir. 2002); *Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc).

- ✓ Statements by prosecutor only;
- ✓ Dropped or dismissed charges, complaints or informations.

However, **where these documents or facts are stipulated by the defendant as providing the factual basis for the plea, they will be deemed incorporated into the reviewable ROC.**³⁶

NOTE: Alford Pleas for Noncitizens. An *Alford* plea that specifically references any of the above documents as the factual basis for the plea will make these documents part of the record of conviction for immigration purposes.

D. Current Rules and Controversy Regarding Consultation of the Criminal Record in Removal Proceedings

The parameters for when, and for what purpose, immigration authorities can review the record of conviction under the modified categorical approach has been the subject of extensive litigation since it was officially incorporated into immigration proceedings over 20 years ago. However, the U.S. Supreme Court, along with most of the federal circuit courts, has consistently prevented courts from reviewing the record of conviction in search of *facts* to warrant triggering a removal ground where a criminal statute was not a sufficient match because it was missing an *element* of the removal ground. Prevailing case law only permitted immigration courts to engage in a review of the record of conviction for the limited purpose of *clarifying the elements of the specific statutory provision* under which the defendant was convicted when the statute at issue had multiple provisions or multiple means of committing an offense.³⁷

³⁵ *Matter of Teixeira*, 21 I&N Dec. 316, 319-20, n.2 (BIA 1996).

³⁶ “Although police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, the contents of these documents may be considered in removal proceedings if specifically incorporated into the guilty plea or admitted by a defendant.” *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor) (internal citation omitted); *see also United States v. Espinoza-Cano*, 456 F.3d 1126, 1132-33 (9th Cir. 2006) (police report could be considered in determining whether prior conviction qualified as an aggravated felony because report was incorporated by reference into the charging document and stipulated to formed the factual basis of a guilty plea).

³⁷ *See generally, Shepard v. United States*, 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). Traditionally, consultation of the record of conviction under the modified categorical approach has been limited to permitting the immigration judge to consult the record of conviction to clarify which specific provision of a criminal statute was the subject of the defendant’s conviction, or to identify the specific elements of the defendant’s conviction in order to compare them with the removal ground at issue. The U.S. Supreme Court has twice reaffirmed these limitations in recent decisions. *See generally U.S. v. Johnson*, 130 S.Ct. 1265 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009).

However, in a controversial opinion in *U.S. v. Aguila-Montes de Oca*³⁸ (*Aguila*), the Ninth Circuit recently altered this landscape when it held that immigration authorities and courts must consult the record of conviction *in all cases* where a criminal statute is deemed “broader” than the generic definition of the removal ground at issue, i.e., when there is any question as to whether the conviction categorically is or is not a match to the removal ground’s generic definition.³⁹

In these instances, the Ninth Circuit directed the immigration courts to consult the record of conviction to determine the following:

What are *the facts* upon which the conviction “necessarily rested” (that is, what facts the trier of fact was actually required to find); and

Whether these *facts* satisfy the elements of immigration law’s generic definition of the offense.⁴⁰

Under this new “revised” version of the modified categorical analysis, immigration courts will now be reviewing the record of conviction more frequently. More importantly, **the focus of this review has now shifted from the *elements of the statute of conviction*, to the *exact factual basis for a defendant’s plea as evidenced by the record of conviction***. Consequently, for many noncitizen defendants, the factual basis for the plea, as referenced in the record of conviction, will, in many cases, determine the immigration consequences of the conviction.

- **Examples of Post-Aguila Application of the Modified Categorical Approach Where Defendant’s Factual Basis for Her Plea Determines Immigration Consequences**

EXAMPLE 1: Negligent Felony Assault Involving a Gun – Assault 3rd degree under R.C.W. 9A.36.031(f) (negligent assault) has traditionally never been classified as an offense that triggers any grounds of deportation or inadmissibility (even if DV-related).⁴¹ Under pre-*Aguila* caselaw, this offense also could never trigger the firearms ground of deportation, even if the record contained the fact that the assault was committed with a firearm, because use of a firearms was not an element of the crime.⁴² Now, the government can sustain removal charges under the

³⁸ 655 F.3d 915 (9th Cir. 2011).

³⁹ See *Flores-Lopez v. Holder*, 685 F.3d 857 (9th Cir. 2012) (summarizing *Aguila*’s new approach to the modified categorical analysis). It is not at all clear that *Aguila*’s new approach will survive Supreme Court scrutiny. The federal circuit courts of appeal agree that under recent U.S. Supreme Court precedent, the modified categorical approach only permits consulting the record of conviction to identify under which particular statutory provision the accused was actually convicted, but not, as *Aguila* directs, as a means of bringing a conviction within the scope of a removal ground where the statute of conviction lacks an element of the ground at issue. See generally *Nijhawan v. Holder*, 557 U.S. 29, 31 (2009); *U.S. v. Johnson*, 130 S.Ct. 1265, 1273 (2010).

⁴⁰ *Aguila*, 655 F.3d at 936.

⁴¹ Assault 3rd degree under §(f) cannot be deemed a crime involving moral turpitude (CMT), nor a crime of violence (COV), under immigration law due to its negligent mens rea. See *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008) (CMT offenses require mens rea of more than negligent); see also *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (COV under immigration law requires same).

⁴² *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617 (BIA 1992); see also 8 U.S.C. § 1227(a)(2)(C) (the deportation ground relating to firearms violations).

firearms deportation ground where the reviewable record of conviction shows that the assault was committed with the use of a gun.

EXAMPLE 2: Misdemeanor Assault Involving a Minor Victim – A conviction deemed to be a crime of “child abuse, abandonment or neglect” will trigger a ground of deportation. Assault 4th degree will qualify as “abuse” under the generic immigration law definition.⁴³ Consequently, even though a victim’s minor status is not an element of Assault 4th degree, under *Aguila*’s test, where the record of conviction includes the fact that the victim was a minor, an Assault 4th degree conviction will now trigger this grounds of deportation.

5.3 THE CRIMINAL COURT’S ROLE & PRACTICES IN LIGHT OF THE CATEGORICAL APPROACH

A. Providing Informed Consideration when Creating the Criminal Record

Giving informed consideration to the immigration consequences facing a noncitizen defendant may require paying attention to how the documents that comprise the record of conviction are created. These documents are part of immigration proceedings and serve as the critical link to determine whether the conviction triggers removal or some other immigration penalty.

The two primary ways in which the court’s actions can impact the record of conviction and the outcome of removal proceedings are:

- The creation of the record of conviction, particularly with regard to the factual basis requirements of a knowing and voluntary plea; and
- The sentence imposed.⁴⁴

B. The Importance of the Factual Basis for a Noncitizen’s Plea

When an immigration judge is reviewing the record of conviction under the modified categorical approach, the information that sets forth the factual basis for the conviction is, without doubt, the most important. In most cases, it will be the factual basis contained in the noncitizen defendant’s statement on plea of guilty that will identify the “facts upon which the conviction necessarily rests.” It will be these facts which determine whether the conviction is a categorical match to the generic definition of the removal ground at issue and, thus, triggers removal or other immigration penalties.

⁴³ 8 U.S.C. § 1227(a)(2)(E)(i). The Board of Immigration Appeals has defined the generic definition of “child abuse, abandonment or neglect” broadly to essentially include any crime, regardless of mens rea, that involves an “act or omission that constitutes maltreatment of a child.” See *Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010); *Matter of Velasquez-Herrera* 24 I&N Dec. 503, 512 (BIA 2008).

⁴⁴ See Chapter Seven.

Defense counsel complying with his/her Sixth Amendment obligations should address immigration issues prior to advising the client to enter a plea and negotiate accordingly with the prosecutor. As neutral decision-makers, judges should recognize that defense counsel and the prosecutor may have reached an agreement during plea negotiations as to what are the “facts upon which the plea rests” and this may in fact be a critical piece to the plea agreement.

C. Knowing and Voluntary Plea

The purpose of knowing and voluntary requirements. The U.S. Constitution requires that a plea be voluntary, knowing, and intelligent. A defendant must understand the “essential elements of the charge to which he pleads guilty.”⁴⁵ A plea is not knowing if based on misinformation.⁴⁶ The only purpose of a factual basis requirement is to insure that a plea is truly voluntary and knowing.⁴⁷

A plea is knowing, voluntary, and intelligent where the accused understands the nature and elements of the *original* charges, the nature and elements of the charge to which she is pleading, and how the alleged conduct relates to those elements. This is true even if the defendant pleads to a charge that she knows to be a legal fiction or contain some technical deficiency, if she does so knowingly in order to receive the benefit of a bargain.

The Washington Supreme Court has articulated the standard for a knowing and voluntary plea as follows:

“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.”⁴⁸

1. Knowing & Voluntary Pleas in Light of Criminal Court Rule 4.2(d)

In accordance with criminal rule 4.2, a court shall not enter a judgment on the plea unless it is satisfied there is a factual basis for the plea. A judicial officer may rely upon the facts set forth in the plea agreement or in the defendant’s written statement in the plea agreement as the factual basis and need not incorporate the certification for probable cause or police reports if it is a straight plea for purposes of complying with criminal rule 4.2.

⁴⁵ *McCarthy*, 394 U.S. at 467–68 n.20.

⁴⁶ *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011).

⁴⁷ *State v. Zhao*, 157 Wash.2d 188, 200, 137 P.3d 835 (2006) (“Since the factual basis requirement, both in case law and in this court’s rule is founded on the concept of voluntariness, we hold that a defendant can plead guilty to amended charges for which there is no factual basis, but *only* if 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”) (emphasis in original).

⁴⁸ *Id.* at 269-270 (internal citations omitted) (italization added); See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

D. The Use of *In Re Barr* Pleas and Noncitizen Defendants

Where the original charges will clearly trigger removal grounds, counsel may negotiate with the prosecutor and advise her/his client to enter an *In Re Barr* plea to an alternative offense and it will not trigger removal grounds (or will preserve the noncitizens eligibility to seek discretionary relief from the immigration judge in removal proceedings).

1. What is an *In Re Barr* Plea?

In *In Re Barr*, the Washington Supreme Court upheld the trial court decision to permit an accused person to plead guilty to a substitute charge that was a legal fiction in order to receive the benefit of a plea bargain.⁴⁹ In *In re Personal Restraint of Barr*,⁵⁰ a defendant was permitted to plead to an offense 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.⁵¹

The Washington Supreme Court dismissed Barr's claim and held that the plea to the substituted offense was knowing and voluntary 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.⁵² At his plea proceeding Mr. Barr 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.⁵³

⁴⁹ *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984); *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006). *State v. Robinson*, 172 Wn.2d 783, 788 (2011) (he Washington Supreme Court reaffirmed *Barr*).

⁵⁰ *In re Barr*, 102 Wn.2d 265 (1984), *holding modified by Matter of Hews*, 108 Wn.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*, 108 Wn.2d 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*, 102 Wn.2d 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*, 108 Wn.2d at 593-94.

⁵¹ *Id.* at 268. 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.

⁵² *Id.* at 270.

⁵³ *Id.*

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

In *State v. Zhao*⁵⁴ 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 commit indecent liberties and one count of second degree assault, even though there was no co-conspirator.⁵⁵

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.⁵⁶

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.⁵⁷ 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).⁵⁸

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.”⁵⁹ Given that the courts presume that plea deals are validly negotiated contractual agreements,⁶⁰ the court's primary role in accepting the plea is to ensure that the defendant is making an informed choice.

⁵⁴ *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006) (*State v. Zhao* was a direct appeal, and unlike *Barr*, the Court addressed the requirements of CrR 4.2(d)).

⁵⁵ *Id.* at 190.

⁵⁶ *Zhao*, 157 Wn.2d at 198 (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 Wn.2d 363, 372, 552 P.2d 682 (1976) (citing *N. Carolina v. Alford*, 400 U.S. 25, 31 (1970)). When entering a *Barr* plea, however, the additional step of an *Alford* plea is generally not desirable for noncitizens.

⁵⁷ *Zhao*, 157 Wn.2d 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).

⁵⁸ *Barr*, 102 Wn.2d at 269-270.

⁵⁹ *Zhao*, 157 Wn.2d at 200.

⁶⁰ *Robinson*, 263 P.3d at 1233; see also *U.S. v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979).