

# The DV Protection Order (NCO) Violation

## Ground of Deportation

Washington Defender Association Immigration  
Project

Jonathan Moore & Stacy Taeuber

[www.defensenet.org](http://www.defensenet.org)



# Presentation Roadmap

- Immigration status; intake
- Conviction-based grounds of removal
- DV-VNCO ground unique; conviction not required
- Orders that do or don't trigger ground
- "Portion of an order" & *Alanis –Alvarado*
- BIA key decisions: *Matter of Obshatko*
- VNCO as bar to relief (cancellation of removal)
- What can we do?
- Pleading to alternatives
- Sanitizing record; *In re Barr*
- SOC's & diversions?
- Safety clause language
- Summary of tactics



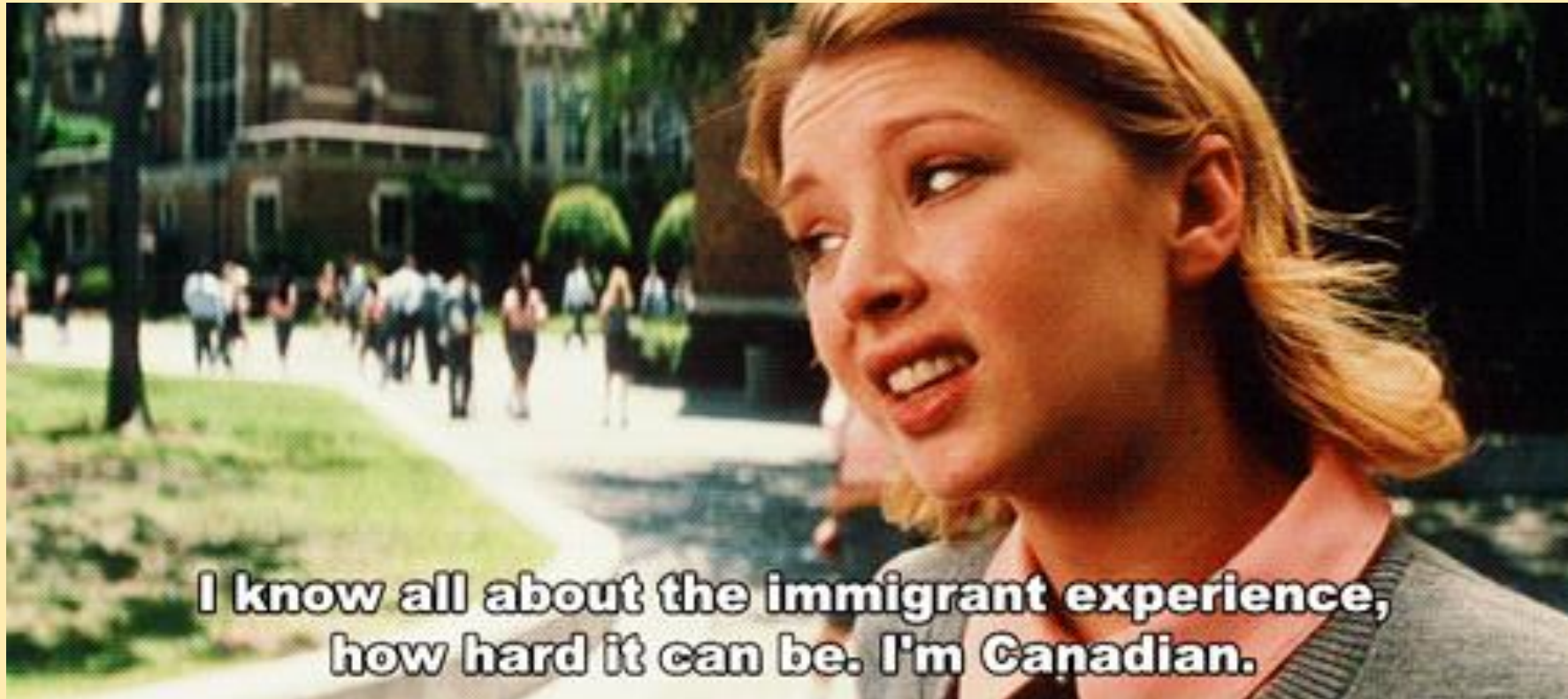
**“Categorical approach”** = elements-based, abstract comparison of state crime to a federal definition. Minimum culpable conduct that meets elements of crime, becomes test.

**“Relief”** [from removal]= a way to get legal status or to legally avoid removal

**“Removal”** = deportation, legal expulsion







**I know all about the immigrant experience,  
how hard it can be. I'm Canadian.**

To help you figure out immigration consequences, we need the information our intake asks for. None of the questions are there without a reason.

**WDA's Immigration Project - Adult Immigration Intake Form**  
Scan and email to: support@wdaip.freshdesk.com OR fax to: 206-462-1111

Defendant Identifier: (optional) \_\_\_\_\_ Today's Date: \_\_\_\_\_

Attorney: \_\_\_\_\_ County: \_\_\_\_\_ WDA Member: \_\_\_\_\_

Email and/or Phone: \_\_\_\_\_ Public Defender/Assigned Counselor: \_\_\_\_\_

Need Response By: \_\_\_\_\_

**Immigration Status:**

☐ LPR - Lawful Permanent Resident (Green Card holder)  
Since when: \_\_\_\_\_

☐ Refugee (approved before arrival in U.S.)  
Since when: \_\_\_\_\_

☐ Asylee (granted after arrival in U.S.)  
Since when: \_\_\_\_\_

☐ Undocumented (entered w/o inspection or visa expired)  
Date of entry: \_\_\_\_\_

☐ Previously deported or now in removal proceedings  
☐ By ICE ☐ By Immigration Court

☐ Other: \_\_\_\_\_

DOB: \_\_\_\_\_

POB: \_\_\_\_\_

First Date of Entry into US: \_\_\_\_\_

Last Date of Entry into US: \_\_\_\_\_

ICE Detainer: ☐ YES ☐ NO

**Family Ties:**

USC Grandparents? ☐ Yes ☐ No

Defendant's Goals

Please use the online intake form:

» [Online Immigration Intake Form - Washington Defender Association \(defensenet.org\)](https://defensenet.org)

# Really try to answer all the questions.

Email and/or Phone Number: \_\_\_\_\_  
Need Response By: \_\_\_\_\_

### Immigration Status:

- ☐ LPR - Lawful Permanent Resident (Green Card holder)  
Since when: \_\_\_\_\_
- ☐ Refugee (approved before arrival in U.S.)  
Since when: \_\_\_\_\_
- ☐ Asylee (granted after arrival in U.S.)  
Since when: \_\_\_\_\_
- ☐ Undocumented (entered w/o inspection or visa expired)  
Date of entry: \_\_\_\_\_
- ☐ Previously deported or now in removal proceedings  
☐ By ICE ☐ By Immigration Judge
- ☐ Other: \_\_\_\_\_

NOTE: WDA's Immigration Project staff cannot provide accurate advice about the immigration consequences of a client without knowing client's specific immigration status. Please communicate with your client to determine status before completing this form. If your client is unclear about her/his status, please contact WDA's Immigration Project at 206-623-5420 or [www.wda.org/immigration-project/determining-immigration-status](http://www.wda.org/immigration-project/determining-immigration-status).

### Family Ties:

- SPOUSE: ☐ USC ☐ LPR ☐ Undocumented  
PARTNER: ☐ USC ☐ LPR ☐ Undocumented  
CHILDREN: Number \_\_\_\_\_ Ages: \_\_\_\_\_  
☐ USC ☐ LPR ☐ Undocumented  
MOTHER: ☐ USC ☐ LPR ☐ Undocumented  
(if USC, since when?) \_\_\_\_\_  
FATHER: ☐ USC ☐ LPR ☐ Undocumented  
(if USC, since when?) \_\_\_\_\_  
USC Grandparents? ☐ Yes ☐ No

### Defendant's Goals Re: Immigration Consequences

- ☐ Avoid conviction that triggers deportation
- ☐ Preserve eligibility to obtain future immigration benefits (e.g. LPR status & stay in U.S.)
- ☐ Preserve ability to ask immigration judge for status & stay in U.S.
- ☐ Get out of jail ASAP
- ☐ Immigration consequences, including deportation are not a priority
- Other goals re: immigration consequences: \_\_\_\_\_

DOB: \_\_\_\_\_  
POB: \_\_\_\_\_  
First Date of Entry into US: \_\_\_\_\_  
Last Date of Entry into US: \_\_\_\_\_  
ICE Detainer: ☐ YES ☐ NO  
Defendant is: ☐ IN CUSTODY ☐ NOT IN CUSTODY  
Previous Criminal History: \_\_\_\_\_



Online Immigration Intake Form  
Secure | <https://defensenet.org/case-support/immigration-project>

## ONLINE IMMIGRATION INTAKE FORM

To contact WDA's Immigration Project for case assistance, please complete the brief form below. You are also welcome to call or email Nathan Moore and Sara Sluska provide primary assistance and can be reached by email. Nathan can be emailed as well and provides back-up for technical assistance.

First Name: \_\_\_\_\_  
Last Name: \_\_\_\_\_  
Email: \_\_\_\_\_  
Phone: \_\_\_\_\_



Absolutely *critical*, most important, key,  
essential, fundamental, totally necessary  
piece of information for a criminal defender to  
find out:

*the defendant's*  
*immigration status*



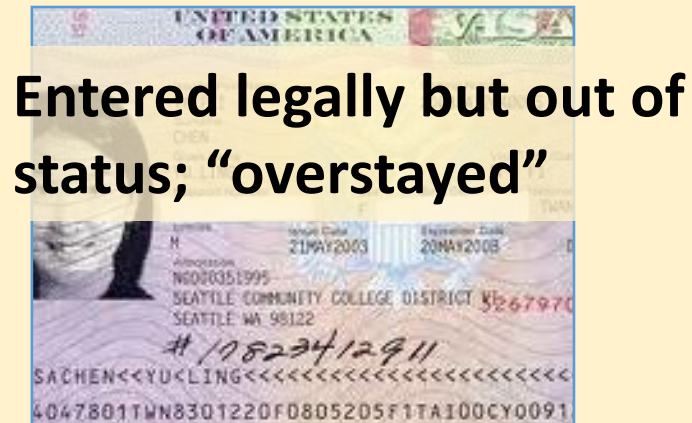
Many different kinds of legal status:

***TPS; DACA; COFA; SIJS; U-visa; F-1; H-1B; CAT/Withholding; CPR; parolee***

***“Undocumented”***



**Entered Without Inspection**



**Entered legally but out of status; “overstayed”**

***Highest best status***



**LPR**



**Has unexpired visa and still within period of authorized stay (NIV)**



**Came to U.S. with *Refugee visa*; (I-94); or granted *political asylum* in US: an Asylee**

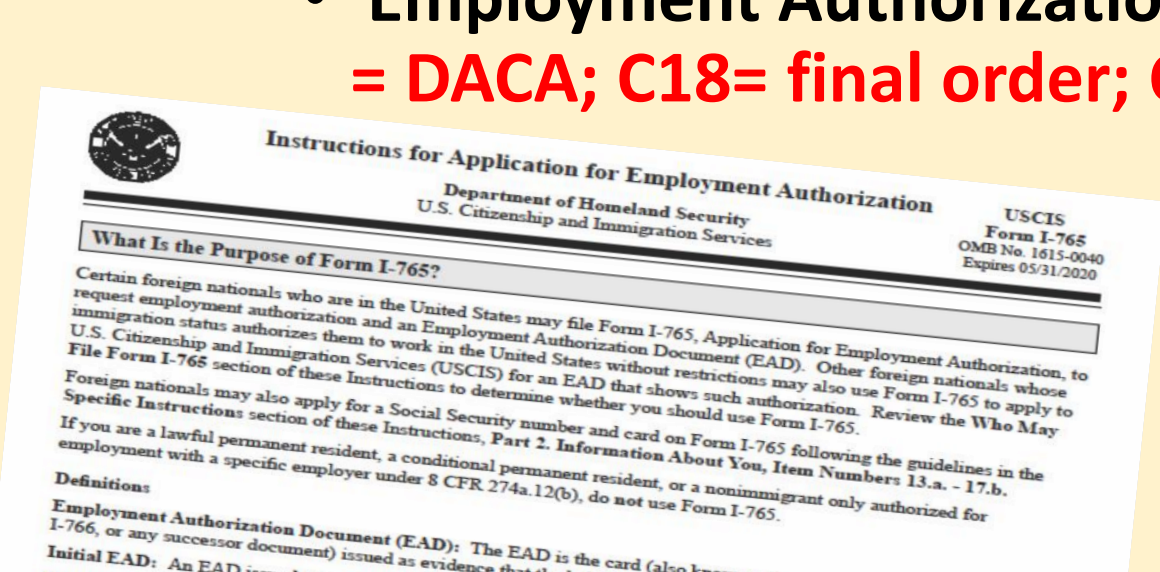
**Goals: Identify/preserve paths to legal status.  
Many have paths to status (even multiple).  
Convictions can make UPs ineligible**

**Goals: Avoid conviction triggering crime-based deportation grounds; preserve paths to keep lawful status, or become LPR**



# “Work Permit” (EAD) is not an immigration status

- Eligibility categories can be found here:
- <https://www.uscis.gov/i-765> (Instructions for form I-765) or here:  
[https://save.uscis.gov/web/media/resourcesContents/EAD\\_Code\\_Table.pdf](https://save.uscis.gov/web/media/resourcesContents/EAD_Code_Table.pdf)
- Employment Authorization Document Codes (**Examples: C33 = DACA; C18= final order; C08 = asylum applicant; etc.**)



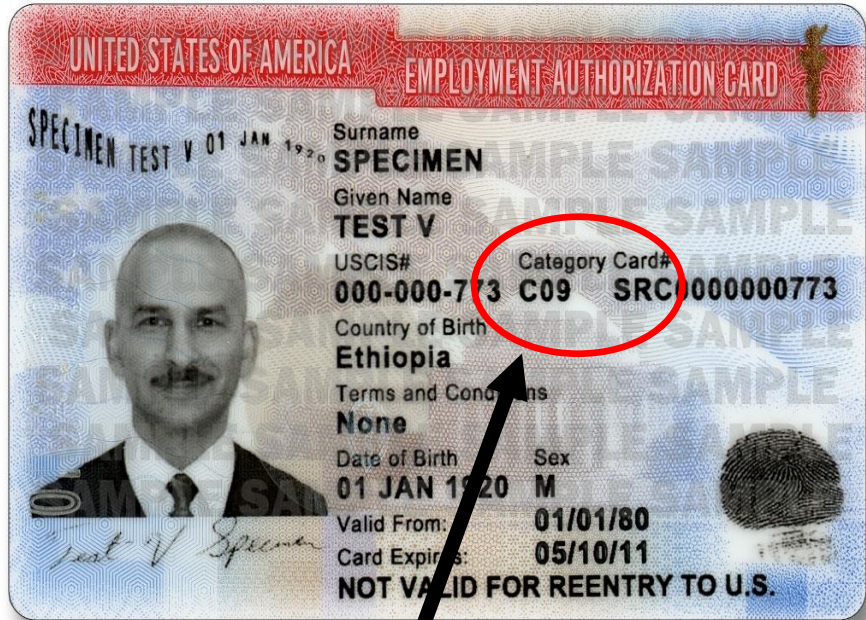
# “Green card” vs “EAD”

## Permanent Resident card (I-551)



Date when permanent resident status granted is on the 'green card.'

# Employment Authorization Document



Category code  
indicates why (how)  
they got work permit





# The Grounds of Removal





# Two sets of immigration “removal grounds”:

*(Proceedings under either can result in detention and removal.)*

## Deportation Grounds

Apply if you were lawfully admitted and now you’re being kicked out.

## Inadmissibility grounds

Apply if you are “seeking admission” and if you are within U.S. but were not lawfully admitted.

In order to know what grounds of removal apply to someone, you must know their **immigration status**.

It tells us which set of grounds apply and what “RELIEF” they might be eligible for.

A non-citizen can be subject to one set or the other, both or neither.

**RELIEF FROM REMOVAL** = a way to get legal status or to legally avoid removal. A defense to being deported.



## GROUND OF REMOVAL: Conviction-based and Conduct-based

### Deportation Grounds

- Crimes Involving Moral Turpitude (CIMT)
- Drug Crimes
- Firearms offenses
- Crime of domestic violence
- Crimes of Child Abuse
- Aggravated Felonies (long list)
- Inadmissible at time of entry (sets a trap)
- Violating a DV protection order

### Inadmissibility Grounds

- Crimes Involving Moral Turpitude (CIMT)
- Drug Crimes
- “Reason to Believe” drug trafficker
- Mental health/drug abuse
- Lifetime sentence total
- Public charge
- Terrorist activity

*Each removal ground has its own definition & requires its own analysis.*

The DV-VNCO deportability ground does not have a parallel ground of inadmissibility.

Technically, a person who was never legally admitted (who “entered without inspection”) is not deportable (removable) for a DV-VNCO finding.



Person applying for green card, to be admitted, or admitted in a higher status, does *not* become statutorily inadmissible just for violating a DV protection order.



# Main goals for defenders

❑ **Avoid** criminal removability (deportability or inadmissibility):

conviction (or admission of facts) that triggers a criminal ground of removal;

❑ **Preserve** (avoid bars to) relief eligibility:

Conviction (or admission of facts) that triggers a criminal ground that is a bar to relief;

(“Relief” could be asylum, “cancellation of removal”; family visa petition; U-visa, etc., etc., etc.)



Whew.



# The DV-VNCO Ground of Deportability

8 USC 1227(a)(2)(E)(ii); INA 237(a)(2)(E)(ii) **Violators of protection orders**

Any alien who at any time after admission is enjoined under a protection order issued by a court and **whom the court determines has engaged in** conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.

For purposes of this clause, **the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence**, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.



# *The deportation ground for violating a DV order is unique.*

It requires a state court finding, but does *not* require a conviction, to be triggered.



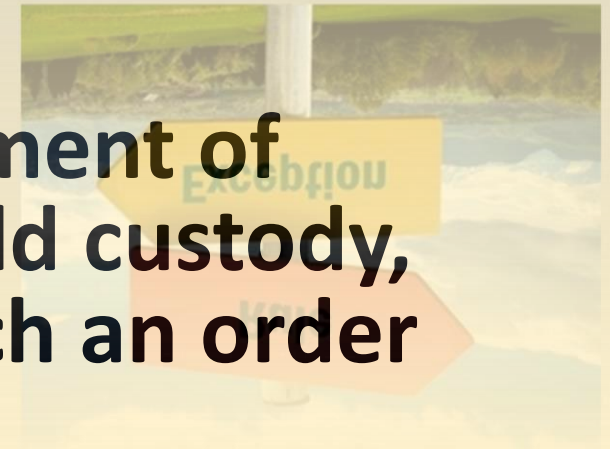
The client must have been enjoined under a court-issued NCO;

and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury.. .

Orders with purposes other than preventing DV, do not trigger this ground.



**Provisions requiring counseling, payment of costs for supervised visitation, or child custody, are not made to prevent DV, and such an order should not trigger deportation.**



# Orders, violation of which, **should** or should not trigger this ground

7.92 (stalking protection order),

7.90 (sexual assault protection order)

9A.40 (Trafficking victim NCO)

9A.46 (Anti-harassment order)(AHO),

9A.88 (promoting prostitution-related),

9.94A.703(3)(b)? (**depends on order**)

**10.99 (orders to prevent DV)**

26.09 (dissolution-related orders) **But** if contains an NCO “portion” need to look at carefully;

26.10 (Child custody-related, **other than** “a domestic violence protection order under chapter 26.50 RCW,” requested under RCW 26.10.115(3)

26.26A (Parentage- order for testing)

26.26B.050 (Miscellaneous Parentage Act Restraining order (unless labeled as DV)

26.50.110(1)(a)(iv)(prohibits interfering with protected party's efforts to remove a pet)

7.34 Abuse Of Vulnerable Adults order; or temp. protection order under 7.40 (injunctions) pursuant to 74.34

foreign protection order defined in 26.52.020 (“injunction or other order **related to domestic or family violence**, harassment, sexual abuse, or stalking, for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to another person.”)

**Canadian domestic violence protection order as defined in RCW 26.55.010**





## Chapter 26.50 orders that trigger the DV-VNCO ground

26.50.110(3) Contempt of court (depends on order violated)

26.50.030 (petition shall allege “existence of domestic violence”)

26.50.070 Temporary order (application alleges “Irreparable injury could result from domestic violence.”)

10.99 (Domestic Violence—official Response)

*Seattle Muni Code*

12A.06.155 - Domestic violence prevention

12A.06.165 Protection order—Relief.

# Conviction just for violating “order under 26.50.110(1)” would not be enough, by itself. . . .?

Client convicted of “‘Violation of Order’ in violation of [RCW]§ 26.50.110(1) (2016) . . . Based on this offense, the DHS initiated removal proceedings . . . .”

*In Re: Jesus Fernando Villanueva-Ozuna* TAC, 2017 WL 8787211, at \*1

[T]he record contains **the Statement of Defendant on Plea of Guilty and the Judgment and Sentence .... Both documents indicate that the respondent was convicted of a “no contact order violation (DV)” . . . .** In the Statement of Defendant on Plea of Guilty, the respondent wrote, “On 8/7/16, I was within 100 yards of [the petitioner's] residence in violation of an outstanding no-contact order” [and] also admitted, “I committed this crime against a family or household member as defined in RCW 10.99.020” *Id* \*2.

**What about that  
“portion of a  
protection order”  
language?**



[A]n injunction against making a telephone call (and all the other enumerated acts . . . ) “involves protection against” violence, threats, or harassment, even if it is possible that Petitioner's violative conduct did not independently constitute violence, threats, or harassment.

*Alanis-Alvarado v. Holder*, 558 F.3d 833 \_ (9th Cir. 2009)



But *Alanis* still required a “conviction” . . .

If the information in the record **of conviction** does not establish that **the petitioner's conviction** meets the requirements of the INA provision, then **the conviction** is not a removable offense under that provision.

**BUT** not any more:

*Alanis-Alvarado at \_*



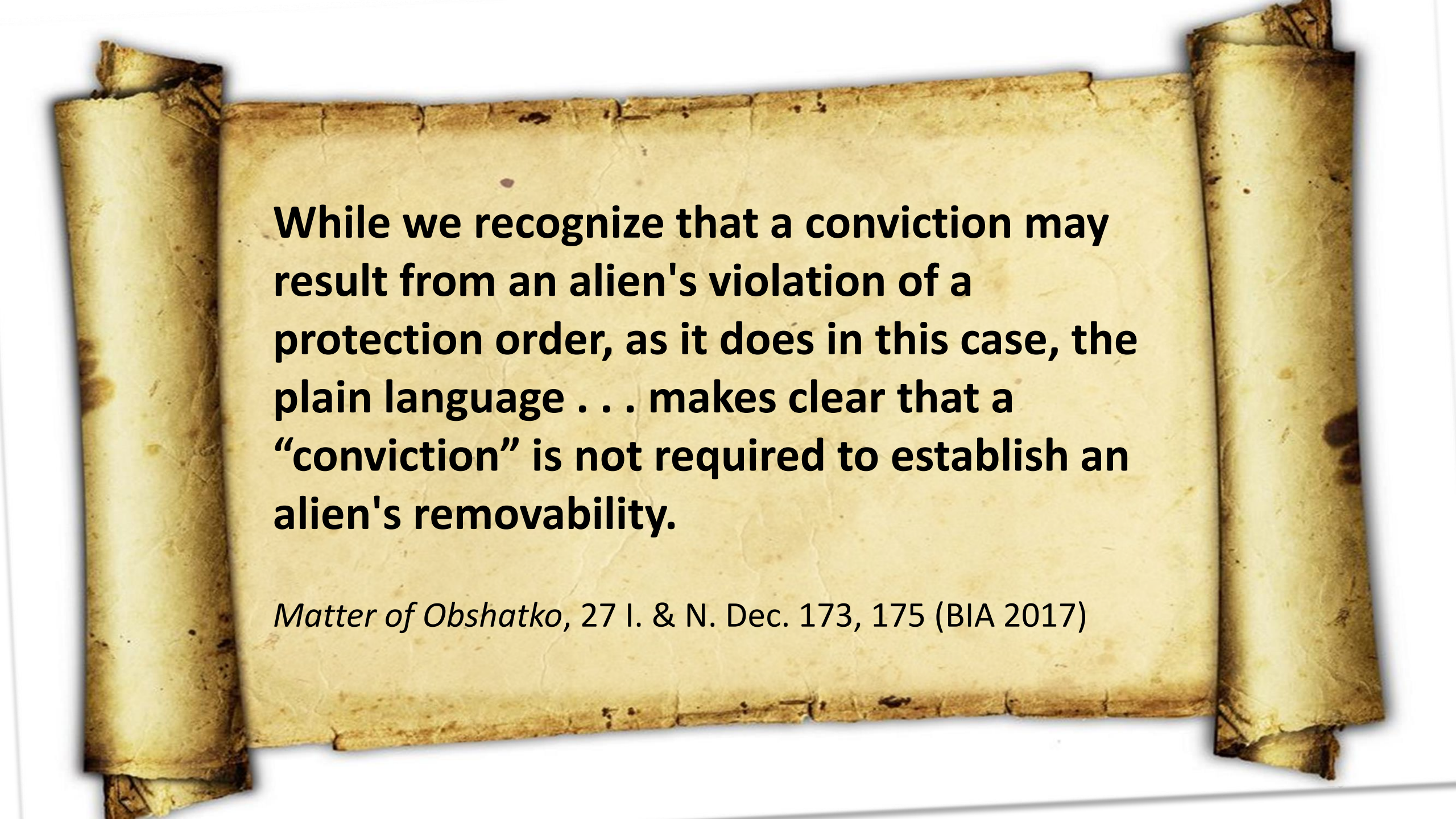
*In the Year of Our Lord 2017  
Immigration Appeals (BIA)*

*Anno Domini, the Board of  
had a revelation, in*

# ***Matter of Obshatko***





A scroll of aged parchment, slightly unrolled, with a light tan color and visible texture. The text is written in a bold, black, sans-serif font. The scroll is set against a white background.

**While we recognize that a conviction may result from an alien's violation of a protection order, as it does in this case, the plain language . . . makes clear that a “conviction” is not required to establish an alien's removability.**

*Matter of Obshatko*, 27 I. & N. Dec. 173, 175 (BIA 2017)



**Whether a violation of a protection order renders an alien removable . . . is not governed by the categorical approach, even if a conviction underlies the charge; instead, **an Immigration Judge should consider the probative and reliable evidence regarding what a State court has determined** about the alien's violation.**

*Obshatko*, at 173

**A DV-VNCO finding bars the main form of relief from removal for long-term undocumented residents, called “10-year- Cancellation of Removal”---**

**--- *regardless* of how the person entered.**

**It is a bar to relief, even though it is *not* a ground of inadmissibility. . .**

**BUT**



# The DV-VNCO bar to Cancellation of Removal

Eligibility requires that the person “has not been **convicted** of an offense under section . . . (It does not say “has been found deportable under.”) But the BIA had another. . .





# ***Matter of Medina-Jimenez***

**Although a conviction is necessary in the context of cancellation of removal, it would be incongruous to apply the elements-based categorical approach to [the DV-VNCO ground] which focuses on a court's determination regarding an alien's conduct**

***Matter of Medina-Jimenez*, 27 I. & N. Dec. 399, 403 (BIA 2018)**

*Diaz-Quirazco v. Barr*, 931 F.3d 830, 835 (9th Cir. 2019) 9<sup>th</sup> Circuit Defers to BIA.



## To SUMMARIZE: DV-VNCO ground of deportation:

- Any violation of order, if the purpose is to prevent DV
- No conviction required: just 'determination' of conduct in violation by court
- Even non-violent violation is a trigger
- LPR, student visa, entered legally: Deportable regardless of sentence or when committed
- UP, not inspected at entry (entered unlawfully): DV-VNCO not a ground of inadmissibility *but* bars relief for cancellation









## QUESTIONS?

*"He who asks a question is a fool for five minutes; he who does not ask a question remains a fool forever."*

*Alleged, internet* – Chinese Proverb



*Okay, sounds tricky.*

What can we do?

# How do we give advice to defenders about this??



# Plead to alternative, non-NCO misdemeanor; could work *if*:

Neither a **protection order's existence, nor its alleged violation**, are mentioned in the charging document, judgment, plea statement, nor in anything constituting the factual basis, nor admitted nor stipulated to; ***and***

**Domestic relationship** to alleged victim is not mentioned in charging document, judgment, plea statement, or anything constituting the factual basis (victim's identity is not an element of A4).

*In other words:*





*Sanitize the record of conviction*

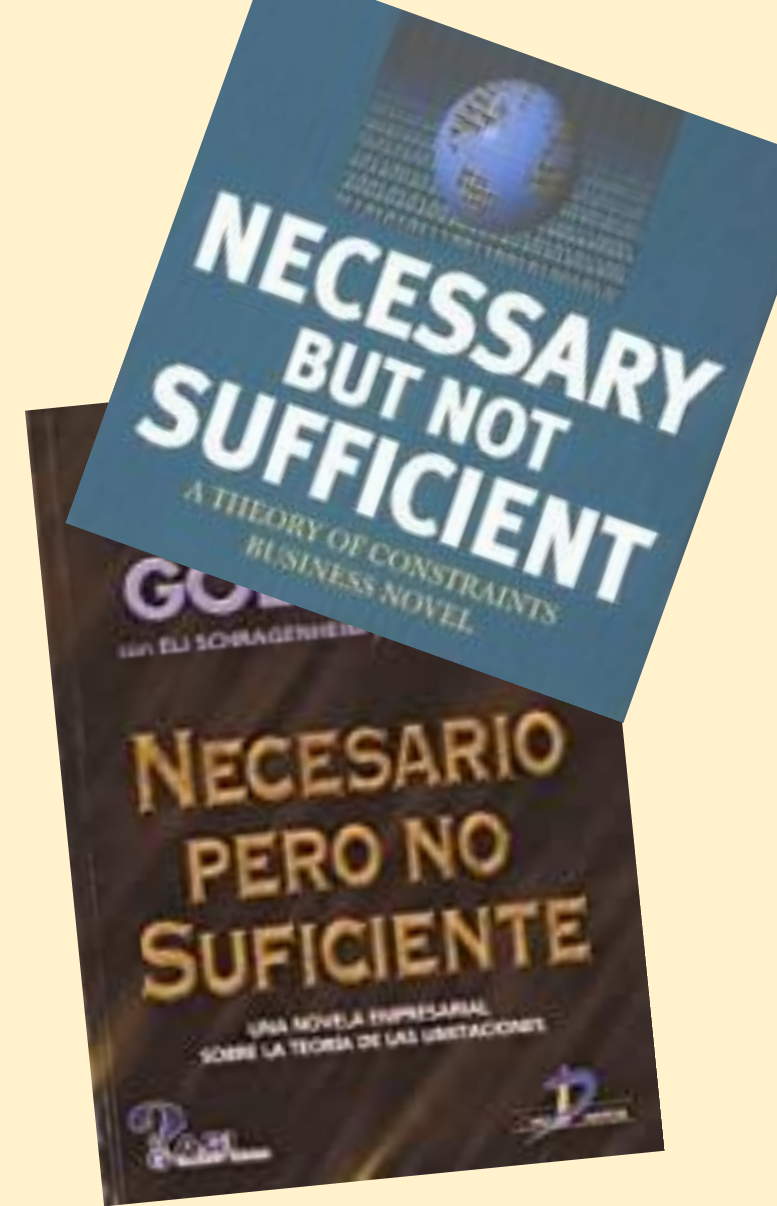
# **Cleaning & Sanitizing**

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**Alternatives that will not trigger any *conviction-based* removal ground by themselves.**

**Misds. (even w/ DV, but better without):**  
CT1; DisCon; MM3; Obstr.; A4 (esp. “offensive touching”); non-DV Anti-Harassment order??

**Felony (even w/ DV):** Assault 3 (f) or (d) or Att. A3 will not trigger deportability or inadmissibility conviction ground, even w/DV label, due to negligence *mens rea*.  
MM2 is not trigger: not a CIMT or COV.



**“NBNS”**

# Get DV-VNCO charge dismissed and refiled, or amended, as “safe charge”

- MM3
  - Trespass
  - Obstructing
  - Domestic Violence
  - Assault
- Could work as alternatives ideally without “DV” label, but should still work if that is the *only* DV Indicia.
- Domestic Violence Report, summary, as basis for plea, existence a DV-VNCO or a violation of an NCO.
  - Keep all links to prior underlying order out (e.g. case# of prior order)
  - Keep out name, address of protected person.





# Assault 4's factual basis can = DV-VNCO

Agni's conviction . . . . for fourth degree **domestic violence** assault does not make him removable [as a “crime of domestic violence”]. . . However, Agni is removable under [DV-VNCO]. [T]he record of conviction shows that Agni was enjoined under a “protection order ... issued for the purpose of preventing violent or threatening acts of domestic violence.” . . . . In his guilty plea, Agni admitted that the order was issued to protect his domestic partner.

Furthermore, facts set forth in the Certification for the Determination of Probable Cause—a **document that was expressly incorporated into the plea agreement** . . . —establish that the order was issued as a result of Agni's domestic violence assault conviction and that it required him to maintain a distance of 500 feet from his domestic partner.

*Agni v. Holder*, 350 F. App'x 131, 133 (9th Cir. 2009)



So *just* pleading to something else is not enough . . . .



(Do opposite of what Agni did)

## *In Re Barr Pleas*

### • ***In Re Barr (1984) – State v. Zhao (2010)***

- Plead to an alternative offense with no or insufficient factual basis
- Def. concedes was factual basis to bring original (dismissed) charge.
- Makes plea “knowing intelligent & voluntary” despite defect in charge.

*This is not going to work* to avoid deportability for violating a DV protection order if original charge or its factual basis is a DV order with violative conduct.

## *Alford/Newton Pleas*

*This is also not going to work* to avoid deportability for violating a DV protection order, for the same reason: even if plea is to alternative charge, if original charge or its factual basis that is used as FB for the plea establishes DV NCO & violative conduct.



Unpublished 2019 9th Circuit case, *Busev v. Barr* shows AHO plea that *didn't* work to avoid the DV-VNCO ground. It was an *In Re Barr* plea, a mistake in this context, but is an example of how the factual basis and record of conviction are critically important for an alternative plea to a violation of a DV protection order.

*fail*

*Busev v.  
Barr*, 784  
F. App'x  
511 (9th  
Cir. 2019)

"That Busev was ultimately convicted of two counts of violating an antiharassment order pursuant to an *In re Barr* plea under a different statute . . . is immaterial since the trial court was required to find a factual basis from a reliable source for the original . . . [T]he undisputed factual basis for the original charges involved Busev's violation of two stay-away provisions. The inference . . . is buttressed by the annotations of "DV" next to each substituted count." *id.*

# Contempt not a good alternative



**Wait, where is the domestic relationship to victim mentioned?**

[Client] was confined under a protection order issued by the Criminal Court of the State of New York . . . [and] was convicted . . . of Criminal Contempt in the First Degree [and] in the Second Degree . . . DHS presented copies of the . . . protection orders and records relating to the stay away provision including for criminal contempt in the second . . . [which] requires "intentional disobedience or resistance to the lawful process or other mandate of a court." . . . The purpose of the stay away provision in the respondent's . . . protection orders was to protect the respondent's victim from further victimization and is therefore one that ""involves protection against credible threats of violence..." etc.

*In Re: Adrian Fernando Gomez* 2018 WL 7435813 (2018)

# A case where *the judge* sanitized the record



[In 2016] the respondent was convicted of [A2-DV]. . . To support its charge of removability . . . the DHS relies on findings and conclusions by a State court in the respondent's divorce proceedings. . . . [which] found that:

The respondent has committed multiple serious acts of domestic violence against the petitioner. He has inflicted serious injuries . . . He has used weapons . . . He has committed some of these acts in the presence of children. He has committed these acts despite the existence of a valid protection order.

... Given the pending charges, **the State court advised the respondent of his right not to testify and that his testimony could be used against him in the criminal case, and ordered that he not be questioned about the March 1, 2016, incident underlying the criminal charges**

. . .



***the State court “stopped short” of determining that the respondent's conduct violated the terms of the protection order and, in fact, was careful to avoid any such finding***

[He] was convicted of [A2-DV] but the other two charges, including the [DV-VNCO], were dismissed . . . **DHS did not establish by clear and convincing evidence that a State court “determine[d]”** that the respondent “has engaged in conduct that violates the portion of a protection[etc.]” . . . The State court found that [he] committed various acts of violence against his now ex-wife “despite the existence of a valid protection order” ...

**We agree with the Immigration Judge that the State court “stopped short” of determining that the respondent's conduct violated the terms of the protection order and, in fact, was careful to avoid any such finding given the pending criminal charges against the respondent ....** Therefore, . . . DHS did not meet its burden to show that the respondent is removable as charged and terminated proceedings.

*In Re: Rasheed A. Osman*, TAC, 2018 WL 1872000, at \_(Jan. 31, 2018)





## Deferred Adjudications (SOCs & diversions)

**Will be convictions for immigration purposes, IN PERPETUITY, *if***

the SOC, specialty CT, PTD, or other deferred disposition agreement , requires a plea, or:

- ✗ admission of guilt or
- ✗ admission of “facts sufficient to warrant a finding of guilt.”
- ✗ **Deferred Sentence & Deferred prosecution** = permanent convictions, even after dismissal.

**“Immigration-Safe”** agreements normally OK to avoid removable conviction.

See WDAIP advisory at: <https://defensenet.org/resource-category/deferred-adjudication-agreements/>

*But, the DV-VNCO deportation ground  
does not require a conviction.*

# An “immigration-safe” diversion is, once again:

Pre-plea and without formal judgment of guilt;

Says that agreement by itself is not admission of guilt or of factual sufficiency; and

Police evidence for submittal in future bench trial to NOT be in the record (until a violation is found); and

*for a DV-VNCO-related charge, uses*

**Affirmative negative<sup>©</sup> VNCO language**

(disavowal or safety clause language)



Coming  
up!



In WDAIP basic advisory on deferred adjudications, is model language

I understand that if I fail to comply with the conditions of this Agreement, a hearing will be held in the future at which evidence will be presented against me which the judge will review to determine whether I am guilty or not guilty beyond a reasonable doubt of the charge(s) specified above. I give up the right at any future hearing to contest the admissibility of any evidence presented against me and to present evidence on my own behalf.

- **I understand that the police report in this case has been marked as an exhibit for administrative efficiency, but has not yet been admitted into evidence.** I understand that this Agreement and the statements contained in this agreement are not an admission of guilt, and are not sufficient by themselves to warrant a finding of guilt.

<https://defensenet.org/wp-content/uploads/2017/11/WDAIP-Immig-Safe-Defd-Adjudications-memo-FINAL-REVISED-5-26-18.pdf>

# Is an AHO a good alternative?

(or, e.g., 26.50.110(1)(a)(iv)(prohibits interfering with protected party's efforts to remove a pet)

- 1) What about a straight plea to an AHO?
- 2) As a straight plea with a sanitized record?
- 3) As a straight plea with a sanitized record, and explicit disavowal of any DV-VNCO 'determination' language? ✓
- 4) What if they label the VAHO conviction "DV," anyway?!

Since it is a counterfactual plea to a non-existent order, **what if ICE goes and gets the actually existing order** and proves up the DV relationship to victim *and* nature of real order? Too close for comfort?

TODAY:

# AMBIGUITY

USING LANGUAGE OR LINGUISTIC STRUCTURES WITH MORE THAN ONE MEANING TO MISLEAD OR MISREPRESENT THE TRUTH.

---

[A]n Immigration Judge should consider the **probative and reliable evidence regarding what a State court has determined about the alien's violation**. In so doing, **an Immigration Judge should decide (1) whether a State court “determine[d]”** that the alien “has engaged in conduct that violates the portion of a protection order that involve[d] protection against credible threats of violence, repeated harassment, or bodily injury” and **(2) whether the order was “issued for the purpose of preventing violent or threatening acts of domestic violence.”** *Obshatko* at 176–77.

The BIA has left some ambiguity here. What reliable and probative evidence of what a court has determined can there be, *other than* what that court explicitly says it determined, or is in the Judgment, or is incorporated into the plea statement, etc. ?

Or, what evidence of the purpose of an order, other than the statute it was issued under?

What *other* evidence is going to be reliable and probative evidence of what the court determined, other than what the court explicitly says it determined?





*Could there be a plea language*



***Safety Clause ?***

# *Safety clause?*



In pleading to an otherwise safer alternative, especially if it involves what is basically a legal fiction, we believe it could make the plea "safe," if you can keep violation of an NCO out of the record, *and* say in the plea statement that - - -

We think these *Magic Words* could work,  
together with a sanitized record, FB, etc.

**“the defendant understands  
that the Court has not made a  
determination that he or  
she has engaged in conduct  
that violated any portion of a  
protection order issued for the  
purpose of preventing violent  
or threatening acts of  
domestic violence.”**





CASE #:

KING COUNTY SUPERIOR COURT  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

Defendant.

Case No.

COURT'S FINDINGS ON  
PLEA

[PROPOSED]

THIS MATTER comes before the Court upon Defendant's plea pursuant to In re Personal Restraint of Barr, 102 Wn.2d 265 (1984), to two counts of violation of a protection order under RCW 26.50.110(1)(a)(iv). The Courts find that in light of the information contained in the certification for probable cause, there is a realistic chance that the defendant could be convicted of the original charges in this case if this case proceeded to a jury trial and that Defendant's plea is therefore knowing, intelligent, and satisfies the requirements of In re Barr. The Court has not made any findings or determinations that the defendant has engaged in conduct that violates that portion of a protection order that involves protection against credible threats of violence, repeated harassment or bodily injury to the person or persons for whom the protection order was issued.

DATED this 5 day of February, 2021.

cause, there is a realistic chance that the defendant could be convicted of the original  
his case if this case proceeded to a jury trial and that Defendant's plea is therefore  
satisfies the requirements of In re Barr. The Court has not made any  
defendant has engaged in conduct that violates that portion of  
protection against credible threats of violence, repeated  
son or persons for whom the protection order was issued.  
February, 2021.

Good  
Barr plea  
language

Good safety  
clause VNCO  
disavowal  
language!

County Superior Court Judge  
Judge David A. Steiner

ACK & ASKEROV, PLLC  
cond Avenue, Suite 1111  
Seattle, WA 98104  
3.1604 | Fax: 206.658.2401

FILED  
2021 FEB 05  
KING COUNTY  
SUPERIOR COURT CLERK

CASE #:

KING COUNTY SUPERIOR COURT  
STATE OF WASHINGTON

FILED  
COPY

of bodily injury to the person or persons for whom the protection order was issued.  
DATED this 5 day of February, 2021.

FINDINGS ON IN RE BARR PLEA- I

King County Superior Court Judge  
Judge David A. Steiner

BLACK & ASKEROV, PLLC  
705 Second Avenue, Suite 1111  
Seattle, WA 98101

STATE OF WASHINGTON,  
Plaintiff,

v.

Case No.

COURT'S FINDINGS ON IN RE BARR  
PLEA

[PROPOSED]

for probable cause, there is a realistic chance that the defendant could be convicted of the original charges in this case if this case proceeded to a jury trial and that Defendant's plea is therefore knowing, intelligent, and satisfies the requirements of In re Barr. The Court has not made any findings or determinations that the defendant has engaged in conduct that violates that portion of of a protection order that involves protection against credible threats of violence, repeated harassment or bodily injury to the person or persons for whom the protection order was issued

DATED this 5 day of February, 2021.



# Summary of tactics,

1) Plea to safe misdemeanor (A4, MM3, Obstructing):

- ❑ Straight (not *Barr*) plea;
- ❑ Sanitized record (nothing from original charge incorporated or stippled to);
- ❑ Victim not ID'd as in DV relationship;
- ❑ *Explicit disavowal language helpful*

2) SOC (pre- plea diversion) to safe alternative charge

- ❑ First, be generally immigration-safe (no admission to “facts”; see WDAIP SOC advisory)
- ❑ Want prosecutor’s evidence in abeyance;
- ❑ *Explicit disavowal language*



# Summary of tactics, 2.

*Barr* plea not recommended because of “factual basis” docs; but:

3) Plea to alternate charge with *Barr* plea *if only way possible*

- ☐ Must use minimal *Barr* plea language, and
- ☐ Must use disavowal language.

4) Above *especially* true if *Barr* plea is to alternative non-DV-NCO, like AHO or 26.50.110(1)(a)(iv)

5) SOC directly on DV-VNCO? (*definitely not* rec'd) but

- ☐ Must be immigration-safe (no stip to “facts”; see WDAIP SOC advisory)
- ☐ *Really* want prosecutor’s evidence “marked as an exhibit for admin. efficiency, but not yet admitted.”
- ☐ Must use disavowal language





# QUESTIONS?



**“And, by the way, I know it doesn't  
sound nice.  
But not everything is nice.”**



# Contact us for case assistance



Fill out an online intake (best) or get printed intake, at:

<https://defensenet.org/case-support/immigration-project/case-assistance/>

or scan printed intake and send it to us,

email (*not alternative to filling out worksheet*) at:

Lori Walls                      lori@defensenet.org

Stacy Taeuber                      stacy@defensenet.org

Jonathan Moore                      jonathan@defensenet.org

Ann Benson                      abenson@defensenet.org