

# Ninth Circuit Judicially Noticeable Documents

## A. Judge Murry's Functional Approach

The primary concern driving the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) is ensuring that the defendant has been found guilty of committing the elements of the generic offense by either the judge or jury. As such, when reviewing criminal documents in the record, the Court should determine whether the judge or jury actually made the factual findings necessary to convict the defendant of the generic offense. For example, the signature of the judge on a Judgment of Conviction evidences that the judge made the factual findings contained therein in convicting the defendant.

## B. Types of Documents

### 1. Judicially Noticeable Standing Alone

- **Written plea agreements.** *Shepard v. United States*, 544 U.S. 13, 16, 26 (2005); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005) (relying on defendant's statement in his signed plea agreement, "[o]n March 13, in Yakima City, I helped another person take property without permission from a residence where no one was home"); *Chang v. INS*, 307 F.3d 1185, 1190-91 (9th Cir. 2002) (relying on written plea agreement); *United States v. Sweeten*, 933 F.2d 765, 769-70 (9th Cir. 1991) (same).
- **Written Plea and Waiver of Rights Form.** *United States v. Vidal*, 504 F.3d 1072, 1087, 1089 (9th Cir. 2007) (relying on Written Plea and Waiver of Rights Form).
- **Transcripts of plea colloquy.** *Shepard v. United States*, 544 U.S. 13, 16, 26 (2005); *United States v. Almazan-Becerra*, 482 F.3d 1085, 1089-91 (9th Cir. 2007) (relying on defendant's admission during plea colloquy for 1993 conviction that he did "either transport or sell or offer to sell marijuana . . .") (relying on defendant's admission during plea colloquy for 1998 conviction of "guilty" in response to judge's statement, "It's alleged that you did transport a controlled substance, methamphetamine. To that charge, how do you plead?"); *United States v. Lopez-Patino*, 391 F.3d 1034, 1038 (9th Cir. 2004) (relying on change of plea transcript showing that defendant pled guilty to count two of the Indictment and that defendant admitted to spanking a child causing her injury); *United States v. Smith*, 390 F.3d 661, 664-65 (9th Cir. 2004), amended by 405 F.3d 726 (9th Cir. 2005) (relying on transcript of change of plea hearing); *United States v. Bonat*, 106 F.3d 1472, 1476-77 (9th Cir. 1997) (relying on transcript of plea proceedings).

A colloquy is "[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." Black's Law Dictionary 211 (7th ed. 2000).

- **Judgment of Conviction:** plea of guilty or no contest. *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (relying on judgment of conviction); *United States v. Lopez-Solis*, 447 F.3d 1201, 1211-12 (9th Cir. 2006) (finding that defendant's judgment of conviction was the only judicially noticeable document in the record); *United States v. Bonat*, 106 F.3d 1472, 1476-77 (9th Cir. 1997) (relying on Judgment on a Plea of Guilty). *Cf. Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887-88 (9th Cir. 2003) (declining to consider label describing conviction as "possession of stolen vehicle" on judgment).

- **Formal rulings of law and findings of fact of a bench-trial judge.** *Shepard v. United States*, 544 U.S. 13, 20 (2005).

- **Jury instructions.** *Taylor v. United States*, 495 U.S. 575, 602 (1990).

A jury instruction is “[a] direction or guideline that a judge gives a jury concerning the law of the case.” Black’s Law Dictionary 693 (7th ed. 2000).

- **Stipulations to factual basis of plea.** *United States v. Espinoza-Cano*, 456 F.3d 1126, 1131-33 (9th Cir. 2006) (relying on the contents of a police report where defense counsel stipulated during the taking of his plea that the factual basis for his plea was set forth in the report); *United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1218-20 (9th Cir. 2005) (relying on the statement of facts found in a prior motion where defense counsel had stipulated in a change of plea hearing colloquy that it formed the factual basis of his plea); *United States v. Smith*, 390 F.3d 661, 666 (9th Cir. 2004), amended by 405 F.3d 726 (9th Cir. 2005) (relying on the factual basis for the charge, as set forth by the prosecutor at the change of plea hearing, where defense counsel did not object and offered further explanation of factual basis of plea). *Cf. United States v. Almazan-Becerra*, 482 F.3d 1085, 1091 (9th Cir. 2007) (refusing to consider effect of defense counsel’s stipulation because DHS did not initially raise issue on appeal, but finding that because the defendant’s plea was disjunctive, he could have only stipulated to those facts in police report supporting the non-generic offense).

A stipulation is “a voluntary agreement between opposing parties concerting some relevant point.” Black’s Law Dictionary 1146 (7th ed. 2000).

- **Minute Orders.** *United States v. Snellenberger*, No. 06-50169 (9th Cir., Oct. 28, 2008) (en banc) (district courts may rely on clerk minute orders that conform to certain “essential procedures” in applying the modified categorical approach. In this case, the clerk’s minute order easily falls within the category of documents described in *Shepard*: it’s prepared by a court official at the time the guilty plea is taken (or shortly afterward), and that official is charged by law with recording the proceedings accurately. The clerk presumably exercises that duty as faithfully and diligently as, for example, court reporters, upon whose transcripts we regularly depend.)

A minute order is “[a]n order recorded in the minutes of the court rather than directly on a case docket.” Black’s Law Dictionary 899 (7th ed. 2000).

“Although practice varies, traditionally, when a trial judge is sitting officially, with or without a court reporter, a clerk or deputy clerk keeps minutes. When the judge makes an oral order, the only record of that order may be in the minutes. It is therefore referred to as a minute order.” Black’s Law Dictionary 899 (7th ed. 2000).

## **2. Judicially Noticeable Only if Incorporated into Factual Basis of Plea or Admitted by Defendant**

- **Police reports.** *Shepard v. United States*, 544 U.S. 13, 16 (2005) (declining to rely on police reports attached to application for issuance of complaint); *United States v. Almazan-Becerra*, 482 F.3d 1085, 1091 (9th Cir. 2007) (declining to rely on police reports, even though defense counsel stipulated that they provided the factual basis of the plea, where defendant’s plea was disjunctive, the police reports “did not necessarily contain either the defendant’s own account of the events or a mutually agreed-upon statement of fact,” and therefore the stipulation could have only been to those facts in police report supporting non-generic offense); *Matter of Sanudo*, 23 I&N Dec. 968, 974-75 (BIA 2006) (declining to rely on police report standing alone where “no indication that it was incorporated into the charging instrument under the

convicting state's rules of criminal procedure"). *Cf. Perez v. Mukasy*, No. 06-73523, 2008 WL 170316 (9th Cir. 2008) (publication pending) (relying on police report where, in a section of his written plea, petitioner checked a box by which he agreed that "the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea"); *United States v. Espinoza-Cano*, 456 F.3d 1126, 1131-33 (9th Cir. 2006) (relying on police report where defense counsel stipulated during the taking of his plea that the report set forth the factual basis of the plea) (distinguishing *Almazan-Becerra*); *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2003) (finding that contents of police report may be considered "if specifically incorporated into the guilty plea or admitted by a defendant").

- **Complaint applications.** *Shepard v. United States*, 544 U.S. 13, 16-17 (2005) (declining to consider "application for issuance of complaint"); *United States v. Melton*, 344 F.3d 1021, 1029 n.4 (9th Cir. 2003) (declining to rely on police affidavit submitted in support of the original criminal complaint). *Cf. Parilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2003) (considering contents of "Certification for Determination of Probable Cause" where defendant expressly states in guilty plea, "I understand the Court will review the certification for determination of probable cause in determining if there is a factual basis for this plea and for sentencing").

- **Charging papers:** Complaint, Information, or Indictment. *United States v. Vidal*, 504 F.3d 1072, 1087-89 (9th Cir. 2007) (declining to rely on Complaint where Written Plea and Waiver of Rights Form did not contain "the critical phrase 'as charged in the Information,'" where the Complaint merely recited the language of the statute, and where defendant entered into a *People v. West* plea whereby he could have pled to a lesser offense without requiring the prosecution to have formally amended the Complaint); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078-79 (9th Cir. 2007) (declining to consider information in charging documents where defendant pled guilty to offense not charged therein); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393-94 (9th Cir. 2006) (same); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028-29 (9th Cir. 2005) (same); *United States v. Melton*, 344 F.3d 1021, 1025 (9th Cir. 2003) (finding no judicially noticeable qualifying facts where only documents in the record were a charging instrument and a presentence report); *United States v. Franklin*, 235 F.3d 1165, 1170-71 (9th Cir. 2000) (declining to rely on charging papers alone); *United States v. Wenner*, 351 F.3d 969, 974 (9th Cir. 2003) (same) *United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993) (declining to rely on charging paper where jury verdict form merely recited that the jury found the defendant guilty of violating the statute). *Cf. United States v. Reina-Rodriguez*, 468 F.3d 1147, 1154 (9th Cir. 2006) (relying on Information and judgment of conviction); *United States v. Weiland*, 420 F.3d 1062, 1079 (9th Cir. 2005) (relying on Information and "Judgment and Sentence on a Plea of Guilty"); *United States v. Lopez-Patino*, 391 F.3d 1034, 1038 (9th Cir. 2004) (relying on count two of the Indictment where change of plea transcript showed that defendant pled guilty to that count); *United States v. Bonat*, 106 F.3d 1472, 1477-78 (9th Cir. 1997) (relying on Information where Judgment on a Plea of Guilty showed that defendant pled guilty to offense, as charged in the Information); *United States v. Alvarez*, 972 F.3d 1000, 1005-06 (9th Cir. 1992) (per curiam) (relying on Information where jury verdict form stated that jury found defendant guilty, "as charged in the Information").

A complaint is "[a] formal charge accusing a person of an offense." Black's Law Dictionary 229 (7th ed. 2000).

An information is "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." Black's Law Dictionary 625 (7th ed. 2000).

An indictment is “[t]he formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.” Black’s Law Dictionary 620 (7th ed. 2000).

- **Presentence reports.** *Abreu-Reyes v. INS*, 350 F.3d 966, 967 (9th Cir. 2003) (order) (finding reliance on presentence report alone improper); *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153-54 (9th Cir. 2003) (same); *Hernandez-Martinez*, 343 F.3d 1075 (2003) (order) (same); *Chang v. INS*, 307 F.3d 1185, 1191-92 (9th Cir. 2002) (same).

A presentence investigation report is “[a] probation officer’s detailed account of a convicted defendant’s educational, criminal, family, and social background, conducted at the court’s request as an aid in passing sentence.” Black’s Law Dictionary 963 (7th ed. 2000).

- **Probation reports.** *Penuliar v. Gonzales*, 435 F.3d 961, 969 (9th Cir. 2006), judgment vacated by 127 S.Ct. 1146 (2007).

### 3. Judicially Noticeable in Certain Instances

- **Jury verdict forms.** *United States v. Alvarez*, 972 F.3d 1000, 1005-06 (9th Cir. 1992) (per curiam) (relying on jury verdict form stating that jury found defendant guilty “as charged in the Information”). *Cf. United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993) (declining to rely on jury verdict form that did not “reflect the facts found by the jury in convicting the defendant”).

- **Judgment of Conviction:** jury trials. *United States v. Melton*, 344 F.3d 1021, 1026 (9th Cir. 2003) (relying on judgment). *Cf. Li v. Ashcroft*, 389 F.3d 892, 898 (9th Cir. 2004) (declining to rely on judgment that recited that “[the defendant:] was found guilty of Counts one-eight of the Superseding [Information],” but did not contain the “critical” phrase, “as charged in the Information,” where statute did not require proof of generic element and no jury instructions, verdict form, or other comparable document were available to prove that jury was actually called upon to decide generic element).

- **Restitution Orders.** *Ferreira v. Ashcroft*, 390 F.3d 1091, 1098-1100 (9th Cir. 2004) (relying on restitution order in plea agreement setting amount consistent with the complaint where California law requires that orders be calculated on the basis of actual loss). *Cf. Chang v. INS*, 307 F.3d 1185, 1190-91 (9th Cir. 2002) (declining to rely on restitution order that contradicted explicit terms of plea agreement where Federal Sentencing Guidelines allow for consideration of conduct not charged in an indictment or proven to a jury in setting restitution amount).

- **Sentences.** *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 393-94 (9th Cir. 2006) (declining to rely on defendant’s sentence of domestic violence counseling and stay-away order to establish the “domestic” element of a “crime of domestic violence” where California law “lodges broad discretion in sentencing judges with regard to probation conditions and does not require that the conditions be directly connected to the crime of conviction”); *Li v. Ashcroft*, 389 F.3d 892, 898 (9th Cir. 2004) (declining to rely on sentencing judge’s determination by a preponderance of the evidence that petitioner was responsible for losses amounting to more than \$10,000 because this finding did not prove he was convicted of that element of the generic crime, but also declining to express an opinion “as to whether a sentencing fact found beyond a reasonable doubt by either a jury or a judge would qualify as a ‘conviction’ of that fact” or “as to whether a defendant’s admission of a specific sentencing fact would suffice”).

A sentence is “[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer.” Black’s Law Dictionary 1097 (7th ed. 2000).

#### 4. Never Judicially Noticeable

- **Testimony of a crime victim in removal proceedings.** *Tokatly v. Ashcroft*, 371 F.3d 613, 623-24 (9th Cir. 2004) (declining to rely on testimony of crime victim as to her prior relationship with the respondent in a removal hearing).
- **Testimony and admissions of respondent in removal proceedings.** *Tokatly v. Ashcroft*, 371 F.3d 613, 623-24 (9th Cir. 2004) (declining to consider petitioner’s admissions through counsel regarding nature of relationship between petitioner and victim in removal hearing); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (declining to consider petitioner’s description of her prior crime in a brief filed with the BIA); **Matter of Pichardo**, 21 I&N Dec. 330, 334-35 (BIA 1996) (declining to consider respondent’s testimony detailing the incident underlying his weapons conviction in removal hearing).
- **Abstract of Judgment.** *United States v. Narvaez-Gomez*, 489 F.3d 970, 977 (9th Cir. 2007) (finding that the district court erred in relying only on the abstract of judgment); *United States v. Navidad-Marcos*, 367 F.3d 903, 908-09 (9th Cir. 2004) (declining to rely on description of offense as “Transport/sell cont. sub.” in abstract of judgment where the abbreviation “may have merely summarized the title of the statute of conviction,” rather than representing a “conscious judicial narrowing of the charging document,” which only charged defendant with the generic offense) (“Under California law . . . [a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize. Preparation of the abstract of criminal judgment in California is a clerical, not a judicial function . . . . The form simply calls for the identification of the statute of conviction and the crime, and provides a very small space in which to type the description . . . .”) (internal citations and quotation marks omitted).

An abstract of conviction is “a summary of the court’s finding on an offense.” Black’s Law Dictionary 7 (7th ed. 2000).