



Washington Defender Association's
Immigration Project
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Defending Noncitizens Charged With Washington ID Theft Offenses¹

RCW 9.35.020 ID-Theft is unsafe for immigration purposes. Regular WA Theft is safer.

STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<p>Undocumented Person (UP):</p> <ul style="list-style-type: none"> Entered illegally and has never had status. Came lawfully with temporary visa (e.g. student or tourist) that has since expired. Identify how long been in the U.S. and any U.S. citizen or LPR family members. <p>Note: many UPs (except those w/prior deportations) have avenues for obtaining lawful status.</p>	<ul style="list-style-type: none"> Avoid ICE apprehension by getting/staying out of jail. A UP who goes to jail for even one day risks exposure to ICE, getting a detainer imposed, and ending up in ICE custody & removal proceedings. Preserve avenues to lawful status for, e.g., UPs who are married to U.S. citizens or have been in U.S. for over 10 years or who entered as children.
<p>Lawful Permanent Residents (LPR or green card holders) & Refugees: Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status.</p>	<ul style="list-style-type: none"> Avoid a conviction that triggers deportation. Even so, advise not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney. If this is not possible, preserve path to relief from deportation. There are waivers available to LPRs with 7 years of residency, and refugees/asylees who've not yet become LPRs.
<p>Visa Holders (e.g. student & tourist visas): If current, goals = LPRs & refugees. If expired, goals = UPs. See above</p>	
<p>Deportation Is Permanent – Once removed, it is virtually impossible to legally obtain/regain lawful immigration status.</p>	
<p>Criminal History Critical – Obtaining complete criminal history is essential to provide accurate advice.</p>	

STEP TWO: DEFENSE STRATEGIES FOR ID THEFT CHARGES

Immigration Consequences of ID Theft	
<p><u>Crime involving moral turpitude (CIMT):</u> IDT1 is always a CIMT.²</p> <p>IDT2 is likely to be charged as a CIMT. However it seemingly lacks intent to defraud. Minimum conduct does not require obtaining anything of value, and the only intent is to commit “any crime.” But there is no published case on IDT2 as a CIMT, yet.</p>	<p><u>Aggravated Felony (AF):</u></p> <ul style="list-style-type: none"> Theft offense AF: ID Theft with a 12 month or more sentence will likely be a “theft offense” AF. Fraud or Deceit AF: If there is a loss of \$10,000 or more (or restitution amounts to more than \$10,000), IDT can be charged as a “fraud or deceit” AF. Loss amount is “circumstance-specific” and can be derived from sentencing-only or other non-record sources.

¹ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible defenders are advised to consult specifically with WDA's Immigration Project on individual cases.

² See unpublished 9th Circuit case *Juarez-Romero v. Holder*, 359 Fed.Appx. 799 (9th Cir. 2009). (RCW IDT1 is *always* a CIMT).

Immigration Consequences of ID Theft (cont'd)

Crime involving moral turpitude (CIMT):

- **LPRs:** *One* CIMT conviction *will not trigger* the CIMT deportation ground for LPRs/Refugees, *unless* the felony offense was committed within 5 years of admission. But any 2 CIMTs will trigger a deportation ground. CIMT inadmissibility ground still triggered, resulting in obstacles for applying for citizenship and re-entering the country.
- **UP:** Even 1 felony CIMT bars paths to lawful status.

Aggravated Felony (AF):

- **LPRs & UP:** An AF will result in virtually automatic deportation, even for LPRs, as well as a permanent bar to ever re-entering the country lawfully.

If you MUST plead to ID Theft

To mitigate the risk of a CIMT for IDT2³:

- Plead only to “possess” ID or information of another.
- Do not specify the “any crime” intended.
- Specify that crime was committed “without intent to defraud.”
- Do not specify that possession of ID was unconsented, or that owner of ID was harmed or intended to be harmed.
- Do not specify that information was from a living as opposed to a dead person.

To mitigate the risk of a “fraud or deceit” AF:

- Pleading to a loss amount <\$10k is needed but not enough. If sentencing documents state loss or restitution of \$10k, *or* if other non-record documents indicate factually a loss of \$10k: specify in plea that:
 - parties agree loss from crime of conviction is < \$10k;
 - **and** that loss amounts or amounts agreed to as restitution **above \$10k are specifically tied to dismissed counts and uncharged conduct**, and not to the count of conviction.⁴

To avoid “theft offense” AF:

- Keep sentence under 12 months.

Best plea language: DO NOT DO AN ALFORD PLEA.

For IDT1: “Without the intent to defraud, I possessed the identification of another with intent to commit a crime and obtained something of value in excess of \$1500.”

For IDT2: “I possessed the identification of another with intent to [commit a crime] [commit a crime of mis-identification solely for the otherwise legal purpose of working without authorization⁵], without the intent to defraud.”

- A plea statement setting forth the elements of the statute provides a sufficient factual basis to make the plea knowing, voluntary & intelligent under WA law.⁶ Elaborating additional specific facts is not required and should be avoided.
- **Warning!** If you plead to ID theft, advise *all* noncitizen clients (undocumented and LPRs, etc.) not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.

Best Alternatives to Avoid Immigration Consequences

Viability of any alternative depends upon defendant’s specific immigration status & criminal history.

- ❖ **Theft:** RCW theft does not require intent to permanently deprive and should no longer be deemed a CIMT. To avoid “theft offense” aggravated felony (AF), keep the sentence under 12 months. If loss is \$10k or more, but sentence is under 12 months, this can be best option for certain LPRs to avoid an AF. Do not plead to theft by deception.
- ❖ **Malicious Mischief 2:** A “safe” felony crime against property; does not trigger criminal removal grounds. Consult Malicious Mischief immigration advisory. Given the overlap in conduct, counsel should strongly pursue this option.
- ❖ **Attempted IDT2 (GM).** Follow plea language suggestions above.
- ❖ **If Gross M/D plea:** Where no CIMT priors, negotiating a 180 day sentence (regardless of suspended time) is key precaution to qualify for the CIMT inadmissibility exception.

³ “[I]dentity theft only ‘requires use of a means of identification with the *intent* to commit an unlawful act.’” *State v. Baldwin*, 150 Wash.2d 448, 455, 78 P.3d 1005, 1009 (Wash. 2003); see also *Tijani v. Holder*, 628 F.3d 1071, 1078 (9th Cir.2010) (“[I]dentity theft is a crime that may not involve fraud. The statute criminalizes identity theft for ‘any unlawful purpose.’”). The above optimum plea language will help to underscore the so-far *unresolved* legal argument that IDT2 is not a CIMT.

⁴ See *Nijhawan v. Holder*, 557 U.S. 29, 42, 129 S.Ct. 2294, 2303 (U.S.,2009).

⁵ See *Beltran–Tirado v. INS*, 213 F.3d 1179 (9th Cir.2000) (false SSN crime not CIMT if only for “otherwise lawful” purpose of work.)

⁶ *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (2000) (citing *In re Personal Rest. of Hews (Hews II)*, 108 Wash.2d 579, 589 (1987)). *State v. Codiga*, 162 Wash.2d 912, 923-924 (2008); *State v. Zhao*, 157 Wash.2d 188, 200 (2006); *In re Pers. Restraint Hews*, 108 Wash.2d at 590-591. *State v. Schaupp*, 111 Wash.2d 34 (1988). See also, R.C.W. 9.94A.450(1).