



Washington Defender Association's  
Immigration Project  
[www.defensenet.org/immigration-project](http://www.defensenet.org/immigration-project)

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## Washington Assault Offenses and the Sexual Motivation Enhancement January 2014<sup>1</sup>

**There is no case law on whether a Sexual Motivation Enhancement (S/M) will trigger immigration consequences when added to an assault offense that wouldn't otherwise do so. However, if pleading down from a sex crime, particularly one against a minor, it is generally worth the risk.**

### **I. THE SEXUAL MOTIVATION (S/M) ENHANCEMENT**

#### **A. Overview**

Under RCW § 9.94A.835, a sexual motivation (S/M) enhancement can be added to non-sex offenses in order to increase the culpability of an offense, and must be proven beyond a reasonable doubt.<sup>2</sup> “Sexual motivation” is defined by statute to mean “that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.” RCW § 9.94A.030(47). Once such a finding is made, it can increase the penalty (adding a mandatory 1 year to a sentence in the case of felonies) and “trigger[s] the same consequences as any other sex offense, such as higher offender points for subsequent sex offenses, civil commitment, and eligibility or ineligibility for SSOSA or SSODA.”<sup>3</sup> Where the underlying charge is a felony, S/M enhancements also require sex offender registration.<sup>4</sup>

#### **B. Issue: Immigration Consequences of Sex Crimes under RCW 9A.44**

Sex crimes, particularly ones where the victim's minor status is an element, carry a host of immigration consequences. Generally, almost all sex crimes under RCW § 9A.44 can (and usually do) trigger the following grounds:

- Aggravated felony deportation ground;
  - The aggravated felony ground of deportation consists of over 20 different provisions. The two most relevant here are Crime of Violence (COV) for which a sentence of a year or more is imposed, and crimes classified as Sexual Abuse of a Minor (SAM), regardless of the sentence.
- Crime Involving Moral Turpitude (CIMT) deportation ground and inadmissibility ground;<sup>5</sup>
- Crime of DV deportation ground, where explicit DV designation;
- Negative discretionary factor when applying for lawful status or U.S. citizenship;
- Harsh federal sentence enhancements if federally prosecuted for unlawful re-entry after deportation;
- Child sex crimes will also trigger the crime of child abuse (COCA) deportation ground.

<sup>1</sup> 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.

<sup>2</sup> See also, WDA's advisory on felony sentencing enhancements in general: [http://www.defensenet.org/resources/practice-advisories/sentencing/Enhancements\\_How\\_Applied\\_update031910.doc/view](http://www.defensenet.org/resources/practice-advisories/sentencing/Enhancements_How_Applied_update031910.doc/view); and on the S/M enhancement and good time: [http://www.defensenet.org/resources/practice-advisories/sentencing/Enhancements-%20Good%20time\\_Sex%20Mo.doc/view](http://www.defensenet.org/resources/practice-advisories/sentencing/Enhancements-%20Good%20time_Sex%20Mo.doc/view).

<sup>3</sup> Final Legislative Report, 52nd Leg. Sess. 143 (Wash. 1990).

<sup>4</sup> RCW 9A.44.128(10). See WDA's *Offenses Requiring Registration*: [http://www.defensenet.org/resources/practice-advisories/sentencing/Registration%20-Offenses%20Requiring\\_2011.doc/view?searchterm=registration](http://www.defensenet.org/resources/practice-advisories/sentencing/Registration%20-Offenses%20Requiring_2011.doc/view?searchterm=registration).

<sup>5</sup> In addition, failure to register (FTR) for a sex offense is a CIMT. See *Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007).

**II. ARE ASSAULT CRIMES WITH S/M IMMIGRATION SAFE?**

**A. Assault 1<sup>st</sup> Degree (RCW 9A.36.011) and Assault 2<sup>nd</sup> Degree (RCW 9A.36.021) with a S/M enhancement Are NOT SAFE Alternatives to Avoid Immigration Consequences.**

Since the standard range for an Assault 1<sup>st</sup> degree with or without a S/M enhancement begins at over 12 months, a conviction will be classified as a COV aggravated felony. Because an Assault 2<sup>nd</sup> degree with the S/M enhancement would result in a sentence for over 1 year, a conviction under any prong would also be classified as a COV aggravated felony. Aggravated felonies have the most severe immigration consequences including virtually automatic deportation for both undocumented persons and lawful permanent residents (LPRs).<sup>6</sup>

**B. Safest Felony: Assault 3<sup>rd</sup> Degree (RCW 9A.36.031) under negligence-based prongs (d) & (f)<sup>7</sup> with S/M.**

Because the *mens rea* of these provisions is negligence, convictions under these prongs will not trigger any of the deportation or inadmissibility grounds listed in section I.B above. An Assault 3<sup>rd</sup> conviction with S/M under the negligence prongs will not be classified as an aggravated felony, even with a 12+ month sentence. Moreover, since the underlying *mens rea* for the crime continues to be negligence, the addition of a S/M enhancement should not render the conviction a CIMT. A negligent offense will also not trigger the Crime of DV ground of deportation if there is also a DV designation. And since the offense lacks a minor victim as an element, it would not trigger the COCA or SAM grounds.

➤ *Therefore, Assault 3rd (f) or (d) with S/M is the most strategic plea, if your client must plead to a felony.*

**C. Safest Misdemeanor: Pros and Cons for determining which conviction is best for your client.**

Attempted Assault 3 <sup>rd</sup> Degree - with S/M under (d) or (f) negligence prongs	Assault 4 <sup>th</sup> Degree - with S/M enhancement
<ul style="list-style-type: none"> <li>• <b>Pro:</b> Does not trigger any deportation or inadmissibility grounds listed in § I.B because <i>mens rea</i> is negligence.               <ul style="list-style-type: none"> <li>○ Not an aggravated felony, CIMT, Crime of DV, COCA, or SAM.</li> <li>○ Safer than Communicating with a Minor for Immoral Purposes (CMIP).</li> </ul> </li> <li>• <b>Con:</b> Since the underlying charge is a felony, the conviction still requires sex offender registration.               <ul style="list-style-type: none"> <li>○ <b>Pro:</b> Good bargaining piece with prosecutors.</li> <li>○ <b>Con:</b> Being a registered sex offender is a more onerous negative discretionary factor in applying for lawful status or citizenship.</li> <li>○ <b>Con:</b> Conviction for failure to register as a sex offender is a CIMT.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Pro:</b> Assault 4 conviction, even with a S/M enhancement, is not an aggravated felony, Crime of DV, COCA or SAM.               <ul style="list-style-type: none"> <li>○ Safer than CMIP.</li> <li>○ <b>Best Practice:</b> Plead to assault only by an “unconsented” or “offensive” touching.</li> </ul> </li> <li>• <b>Pro:</b> No sex offender registration (yet).</li> <li>• <b>Con:</b> Whether assault 4 with S/M is a CIMT is unclear. So <i>still a risk</i> that the addition of a S/M enhancement would transform an immigration-safe assault 4 conviction into a CIMT, though we have recently seen that ICE has not charged it as such.               <ul style="list-style-type: none"> <li>○ For LPRs, single CIMT will not trigger deportation, but can be an obstacle to applying for citizenship.</li> <li>○ <b>Best Practice:</b> Advocate for 180 day sentence (regardless of suspended time) to avoid triggering CIMT inadmissibility ground. This will ensure undocumented persons remain eligible for lawful status and LPRs remain eligible for citizenship.</li> </ul> </li> </ul>

<sup>6</sup> For advice on making an Assault 2<sup>nd</sup> without S/M safer for your client, consult our Felony Assault advisory at WDAIP’s resource page.

<sup>7</sup> Consult WDA’s Immigration Project staff for case assistance if your client’s case involves one of the other prongs of the statute.