



Washington Defender Association's
Immigration Project
www.defensenet.org/immigration-project

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Defending Noncitizens Charged With Washington Possession/Trafficking of Stolen Property Offenses¹

STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
<p>Undocumented Person (UP):</p> <ul style="list-style-type: none"> Entered illegally and never had status; or 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. 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 PSP – TSP (RCW 9A.56.150 – 170) CHARGES

Immigration Consequences of Trafficking in Stolen Property (TSP) 1 st & 2 nd Degree	
<p><u>Crime Involving Moral Turpitude (CIMT):</u></p> <p>TSP 1st or 2nd Degree² will always be deemed a CIMT.</p> <ul style="list-style-type: none"> LPRs: One CIMT conviction <i>will not trigger</i> CIMT deportation ground for LPRs/Refugees, <i>unless</i> 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 to gaining U.S. citizenship and re-entering the country. UP: Even 1 felony CIMT bars paths to lawful status. 	<p><u>Aggravated Felony (AF):</u></p> <p>“Theft offense” AF: TSP with a 12 month sentence will be a deportable and unwaivable AF.</p> <ul style="list-style-type: none"> 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.

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 Although TSP 2nd degree has only a reckless *mens rea*, some crimes of recklessness have been found to involve moral turpitude.

Immigration Consequences of Possession of Stolen Property (PSP)

Crime involving moral turpitude (CIMT):

Under current caselaw, PSP is not a CIMT.⁴ However, there is a slight risk that it can be charged as a CIMT.

- **LPRs:** *One* CIMT conviction will not trigger CIMT deportation ground for LPRs/Refugees, *unless* 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 to gaining U.S. citizenship and re-entering the country.
- **UP:** Even 1 felony CIMT bars paths to lawful status.

Aggravated Felony (AF):

“Theft offense” AF: PSP with a 12 month or more sentence will be a deportable and unwaivable “theft offense” 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 PSP or TSP

To mitigate the risk of a CIMT for PSP:

- Plead that the property was knowingly possessed, but without the intent to permanently deprive the owner;
- Plead only to “possess” (e.g. not conceal);
- Do not stipulate to CDPC/ police report as a factual basis.
- For PSP 2nd *do not* plead to “stolen access device”.

To avoid an AF conviction:

- Keep sentence under 12 months.
- Consider multiple counts with consecutive sentences (<1 yr each) vs. concurrent sentences.

TSP will always be a CIMT.

Best plea language for PSP: “I possessed stolen property in the amount of \$xxx without the intent to permanently deprive the owner.”

- 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.⁵ Elaborating additional specific facts is not required and should be avoided.
- **DO NOT DO AN ALFORD PLEA.**

Warning! If you plead to PSP or TSP 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.

- ❖ **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.
- ❖ **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.⁶ Case-specific.
- ❖ **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. Do not plead to theft by deception.
- ❖ **Barr/Zhao plea⁷ to Assault 3rd under (d) or (f) negligence prongs:** A negligent *mens rea* means these prongs cannot be classed as a CIMT or AF. They do not trigger grounds of inadmissibility or deportation.

⁴ *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1158-61 (9th Cir. 2009) (“[A] conviction for receipt of stolen property is not categorically a crime of moral turpitude [when] it does not require an intent to permanently deprive the owner of property.”).

⁵ *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).

⁶ See WDAIP advisory *Negotiating 180-day Sentences for Gross Misdemeanors*.

⁷ See WDAIP advisory *Using In Re Barr Pleas as a Strategy for Noncitizen Defendants*.”