

**Defending Noncitizens Charged with Attempting to Elude (A2E), RCW § 46.61.024¹
March 2022**

STEP ONE: IDENTIFY IMMIGRATION STATUS AND DEFENSE GOALS

| Status | Goals |
|---|--|
| Undocumented Person (UP): <ul style="list-style-type: none"> Entered without inspection; never had status. Entered lawfully with temporary visa (e.g., student, tourist, employment) that expired. | <ul style="list-style-type: none"> Avoid jail/risk of ICE encounter and enforcement² Preserve paths to obtain lawful status Preserve eligibility for relief from removal Avoid grounds of inadmissibility³ |
| Currently admitted in lawful status: <ul style="list-style-type: none"> Lawful Permanent Resident (LPR) Asylee, Refugee Temporary Visa Holder (e.g., student, tourist, employment) | <ul style="list-style-type: none"> Maintain lawful status and ability to renew status Preserve eligibility for relief from removal Preserve eligibility to gain status (become LPR or USC) Avoid grounds of deportability <i>and</i> inadmissibility |
| DACA | Avoid bars to eligibility (one felony, one “significant misdemeanor,” or three or more misdemeanors) |
| Temporary Protected Status (TPS) | Avoid bars to eligibility (one felony, two or more misdemeanors) |

STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES AND DEFENSE STRATEGIES

| Immigration Consequences of Attempting to Elude | |
|--|---|
| <u>Crime Involving Moral Turpitude (CIMT)</u> <ul style="list-style-type: none"> Assume A2E could be charged as a CIMT.⁴ Although there is a strong argument the offense is not a CIMT after 5/1/03, when the statute was amended, there is no published case yet and noncitizens without counsel may be unable to make such arguments. | <u>Aggravated Felony (AF)</u> Even with a 12-month sentence, A2E should not be an aggravated felony. ⁵ |

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 RCW § 10.93.160, prohibiting jail employees’ compliance with ICE detainer requests.

³ *Inadmissibility* grounds apply to noncitizens seeking admission into the U.S. and to anyone applying for immigration status. *Deportability* grounds apply to anyone who entered the U.S. lawfully even if currently undocumented (e.g., status expired).

⁴ The Board of Immigration Appeals held that an earlier version of RCW § 46.61.024 was a CIMT in *Matter of Ruiz-Lopez*, 25 I. & N. Dec. 551 (BIA 2011). That version required driving with “wanton or willful disregard.” As of 5/7/2003, the *mens rea* is driving “in a reckless manner.” Recklessness is generally insufficient to support a CIMT finding. However, ICE and IJs may still rely on *Ruiz-Lopez* without being aware of the change in language or they may try to deny the change is meaningful.

⁵ A2E should not be a “crime of violence” ag fel because it lacks as an element the intentional use or threat of violent force. It should not be an “obstruction of justice” ag fel because it lacks any element of interference with judicial proceedings.

Consequences of Felony CIMT:

For LPR

- Triggers deportability if committed within five years of admission.
- Prevents a finding of “good moral character” for purposes of applying for citizenship.
- Triggers inadmissibility, which applies to LPRs re-entering the U.S. after travel abroad.

For UP

- Triggers inadmissibility, barring ability to obtain lawful status.
- Is a bar to “cancellation of removal,” the most common relief available to UPs in removal proceedings.

If Your Client MUST Plead to Attempting to Elude

Best plea language (do NOT do *Alford* plea). A plea statement setting forth the elements of the statute provides a sufficient factual basis to make the plea knowing, voluntary, and intelligent under state law.⁶ Elaborating additional facts is not required and should be avoided. Avoid stipulating that a CDPC, arrest report, or other police narrative be used as the factual basis for the plea, if at all possible.

Best Alternatives to Avoid Immigration Consequences⁷

- **Reckless Driving (GM)**
- **Failure to Obey (M) (RCW §§46.61.015, -.020, -.022)**
- **Malicious Mischief (any degree)**
- **Assault 3 under the (d) or (f) negligence prongs**
- **Obstructing**
- **Attempted A2E (GM) with 180-day or less imposed sentence** (still risks being CIMT but qualifies for single-CIMT exception to removability)
- **Reckless Endangerment (GM) with 180-day or less imposed sentence** (probable CIMT but qualifies for single-CIMT exception to removability)
- **Attempted Vehicular Assault per DUI prong (RCW 46.61.522(b) or (c))** (ONLY for LPRs; contact WDAIP staff if considering this alternative).
- ***In Re Barr/Zhao* plea** to any of the above or other safe alternative. Consult WDAIP staff and [Barr/Zhao advisory](#) before pleading.

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

⁷ Practice advisories for most of these offenses may be found on the [WDAIP website](#) and should be consulted prior to pleading.