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Washington Defender Association's Immigration Project

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Defending Noncitizens Charged With Washington Theft Offenses¹

STEP ONE: IDENTIFY IMMIGRATION STATUS & OVERALL DEFENSE GOALS

Status	Goals
Undocumented Person (UP): <ul style="list-style-type: none"> Entered without authorization and never had status. Came lawfully with a temporary visa (e.g. student or tourist) that has since expired. Identify how long they have been in the U.S. and whether they have LPR/USC family. 	<ul style="list-style-type: none"> Staying out of jail should lower, but not eliminate risk of ICE apprehension. (Current stated DHS policy is to go after all UPs in criminal justice system, even if not convicted.) Preserve avenues to obtain lawful status (many UPs have avenues for obtaining lawful status).
Lawful Permanent Residents (LPR or green card holders) & Refugees: Identify how long the person has had lawful status.	<ul style="list-style-type: none"> Avoid triggering deportation grounds; & Avoid triggering inadmissibility if you depart the United States.
Visa Holders (e.g. student, work & tourist visas):	<ul style="list-style-type: none"> If current, goals = LPRs & refugees. If expired, goals = UPs. See above.
General Considerations	
Misdemeanors bar some types of status: Temporary Protected Status (cannot have felony or two misdemeanors); Deferred Action for Childhood Arrivals (cannot have felony or three "non-significant" misdemeanors)	
Deportation is permanent: Once removed, it is virtually impossible to legally obtain/regain lawful immigration status.	
Criminal history is critical: Getting complete criminal history <i>including sentences</i> is essential to obtain accurate advice.	

STEP TWO: LEARN AND USE DEFENSE STRATEGIES AGAINST THEFT CHARGES – RCW 9A.56.030-050

Immigration Consequences of Theft as Defined in RCW 9A.56.020	
Crime Involving Moral Turpitude (CIMT): CIMT convictions can make an LPR deportable or a UP inadmissible (and deportable) and ineligible for relief.	Aggravated Felony (AF) Theft Offense: An AF will result in virtually automatic deportation, even for LPRs, as well as a permanent bar to ever re-entering the country.
Washington Theft as CIMT: <ul style="list-style-type: none"> Theft now risks being classified as a CIMT. For the past few years, the law was clear that theft in Washington could not be classified as a CIMT, because it does not have "intent to permanently deprive" as an element. On November 16, 2016, the Board of Immigration Appeals (BIA) published decisions "updating" the 	Washington Theft as AF: <ul style="list-style-type: none"> Theft with a 12 month sentence may risk being charged as a deportable and unwaivable AF.² An AF theft offense is defined as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent."³

¹ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen clients. Defenders are advised to consult specifically with WDA's Immigration Project on individual cases by completing an intake form online at: <http://www.defensenet.org/immigration-project/case-assistance>. (This advisory does not analyze RCW 9A.56.030(1)(b), theft by taking "from the person of another.")

² For pre-2011 Theft 3rd convictions with 365 day sentences, modifications to 364 days imposed are highly desirable since they eliminate the danger of erroneous AF classification. Sentence modifications are effective for immigration purposes.

³ *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S. Ct. 815, 820, 683 (2007); statutory definition is at 8 USC 1101(a)(43)(G).

<p>definition of a CIMT for thefts.</p> <ul style="list-style-type: none"> • The new definition is that theft is a CIMT “if it involves an intent to deprive the owner of his property either permanently <i>or under circumstances where the owner’s property rights are substantially eroded.</i>”⁴ • The WDAIP analysis⁵ is that RCW theft does not meet the new definition— it does not have intent to deprive the owner of his or her property “under circumstances where the owner’s property rights are substantially eroded,” as a required element.⁶ • However, until there is a decision from the BIA or the Ninth Circuit, ICE can— and we believe has or will— charge theft as a CIMT. • Therefore, despite our analysis, the safest stance for defense counsel is to assume theft could be a CIMT. 	<ul style="list-style-type: none"> • RCW 9A.56.010 (1) defines theft as 1 crime with alternate means,⁷ and each alternate means defines “property or services” as a single element. • In the 9th Circuit, theft of services (including theft of labor⁸) is <i>outside</i> the AF definition.⁹ RCW’s definition of theft is both broader than the AF “theft offense” definition and is of a single, indivisible crime, so it should be ruled categorically <i>not</i> an AF.¹⁰ • There is not yet a published case <i>directly</i> on point for WA, and there is a split in the Circuits (see n.9). Clients might not be able to make legal arguments, or may move to a Circuit with unfavorable rulings. • Therefore, despite our analysis, safest stance for defense counsel is to assume theft with a 12-month sentence could be an AF.
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If you MUST plead to Theft

<p>To mitigate the risk of a CIMT for theft:</p> <ul style="list-style-type: none"> • Seek a safer alternative, such as Malicious Mischief 2 or 3 which are not CIMTs. • For theft 3, this may mean trying to fit the <i>petty offense exception to inadmissibility for one CIMT</i>, of which a key requirement is that the sentence, suspended or not, not be over 180 days.¹¹ • Try to avoid pleading to theft “by deception.” 	<p>To avoid risk of AF charge for felony theft:</p> <ul style="list-style-type: none"> • Keep sentence under 12 months if at all possible (makes AF impossible). • Try to plead to theft of services or, more likely, in the disjunctive to “property or services.” • Consider multiple counts with consecutive sentences (<1 year each) vs. concurrent sentences.
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Best plea language: A plea statement setting forth the elements of the statute provides sufficient factual basis to make the plea knowing, voluntary & intelligent under WA law.¹² Elaborating additional specific facts is not required and should be avoided.

- This would be ideal language: “I wrongfully obtained or exerted unauthorized control over property of another exceeding [\$ ___] with the intent to deprive *but without the intent to permanently deprive or substantially erode the owner’s property rights.*”
- Avoid “theft by deception” and do NOT do *Alford* plea, **or stip to CPDC as factual basis for plea if at all possible.**
- **For misd. thefts:** Negotiating sentence of 180 days or less, regardless of suspension, may be critical in some cases.

Warning! If you plead to theft, advise *all* noncitizen clients (undocumented and LPRs, etc.) not to leave the United States or apply for LPR status/citizenship without first consulting an immigration attorney.

Normally Safe Misdemeanor Alternatives

- Malicious mischief, criminal trespass, disorderly conduct.

⁴ *Matter of Diaz-Lizarraga* 26 I&N Dec. 847, 853 (BIA 2016).

⁵ See *Theft as a Crime of Moral Turpitude Post–Diaz-Lizarraga* (2016), at <http://www.defensenet.org/immigration-project/immigration-resources>.

⁶ If RCW theft *were* a CIMT under the new definition: pre-11-16-2016 convictions should arguably not be covered by a new, changed definition, given how many pleas were taken in reliance on the former rule. Please contact WDAIP if retroactivity issue presents itself.

⁷ *State v. Linehan*, 147 Wn.2d 638, 56 P.3d 542 (2002).

⁸ Theft of labor is included in theft of services. See RCW 9A.56.010 (15).

⁹ *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003), *United States v. Corona-Sanchez*, 291 F.3d 1201, 1205, 1208 (9th Cir. 2002); *but see Abimbola v. Ashcroft*, 378 F.3d 173, 178-79 (2d Cir. 2004), *De Lima v. Sessions*, 867 F.3d 260, 267 (1st Cir. 2017)

¹⁰ *United States v. Cazaras*, No. 4:15-CR-6024-EFS, 2015 WL 5838826, at *5 (E.D. Wash. Oct. 7, 2015)

¹¹ There is an advisory on the 180-days-or-less question at: <http://www.defensenet.org/immigration-project/immigration-resources/property-crimes/180%20Day%20Sentence%20Advisory>

¹² See, e.g., *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (Wash. 2000); *State v. Codiga*, 162 Wn.2d 912, 923-924 (2008); *State v. Zhao*, 157 Wn.2d 188, 200 (2006); *In re Personal Rest. of Hews (Hews II)*, 108 Wash.2d 579, 589 (Wash. 1987); *State v. Schaupp*, 111 Wash.2d 34 (Wash. 1988); . See also, RCW 9.94A.450.