WASHINGTON DEFENDER ASSOCIATION

PRACTICE ADVISORY | 9/18/2020 | Immigration Project

DEFENDING NONCITIZENS CHARGED WITH RESIDENTIAL BURGLARY

STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS

Status	Goals
Undocumented Person (UP): • Entered without inspection; never had status. • Came lawfully with temporary visa (e.g. student or tourist) that has since expired. (Identify how long they have been in the U.S., if any LPR or USC family, and prior deportations or ICE contact.)	• Avoid jail. UPs in jail for even a day risk exposure to ICE by (illegal[1]) jail communication, and risk ICE enforcement. • Preserve paths to legal status (relief).[2] Convictions and some conduct can bar relief. • Asylum-seekers must avoid conviction for "particularly serious crimes" (PSCs)
Currently admitted in lawful status: • **Lawful Permanent Residents** (LPR or green card holders); • **Asylees** and **Refugees**; • **COFA** residents (from a Pacific Island Compact nation) (Identify *how long* person has had lawful status.)	• Avoid triggering deportation grounds. • Avoid triggering inadmissibility. • Preserve paths to LPR and relief from deportation.[3] • Preserve eligibility for naturalization. (LPRs cannot get US citizenship while on probation, and certain crimes bar "good moral character") • Asylees must avoid PSCs
Visa Holders (e.g. business, student, temporary employment or tourist visas):	• If current, goals = LPRs & refugees. • If expired, goals = UPs. *See above*
DACA recipients: Felony, 3rd misd., or 1 "significant misd." is bar; ("DV" + any misd. is probably a bar) **Temporary Protected Status (TPS) holders:** Any second misdemeanor is a bar. **Non-citizen US Nationals** (American Samoa): Not "aliens," not deportable; need GMC for citizenship.	

STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES BASED ON IMMIGRATION STATUS[4]

Immigration Consequences of Residential Burglary (RCW 9A.52.025)
Crime involving moral turpitude (CIMT): Residential burglary may risk being charged as a CIMT.[5] • **LPRs:** *One* CIMT conviction will not trigger the CIMT deportation ground for LPRs/refugees/COFAs, *unless* offense was both a felony and committed within 5 years of admission. However, *any two CIMTs* will trigger a deportation ground. CIMT *inadmissibility* ground is still triggered, resulting in obstacles for applying for citizenship and re-entering the country. • **UP:** Even a single felony CIMT will bar paths to lawful status.
Aggravated Felony (AF): If a sentence of 12 months or more is imposed, a conviction for residential burglary risks being charged as a "burglary"[6] AF.[7] • **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. • **Asylum:** An AF will be deemed a *per se* bar to asylum, as a "particularly serious crime."
DACA & TPS: As a felony, residential burglary will be a bar to obtaining or renewing DACA or TPS.
Particularly Serious Crime: If triggered, this would bar asylum and withholding of removal, and is based on underlying facts and sentence.
Violent or Dangerous Crime: There is some possibility that residential burglary would trigger this heightened threshold standard, for any discretionary or hardship-based application for lawful status.

STEP THREE: USE DEFENSE STRATEGIES FOR RESIDENTIAL BURGLARY CHARGES

Best Alternatives to Avoid Immigration Consequences[8]
For LPRs, refugees and some UPs (felony will be a worse discretionary factor, especially for UPs.): • **Criminal Trespass 1st Degree under RCW 9A.52.070:** Safe, even w/ DV label. • **Malicious Mischief (MM) (any degree):** At least "physical damage to the property of another" prong is not a CIMT. • **Theft (any degree):** To clearly avoid "theft offense" aggravated felony, keep the sentence under 12 months. To avoid CIMT, plea statement should ideally say there was no intent to permanently deprive or substantially erode property rights of another. (See separate Theft Advisory for more details) • **Assault 3rd under the (d) or (f) negligence prongs:** Because of negligence *mens rea*, cannot be classified as a CIMT or aggravated felony. • **Making or Having Burglary Tools RCW 9A.52.060:** Should not be a CIMT. • **Vehicle Prowl 2nd Degree RCW 9A.52.100:** Should not be a CIMT. • **Burglary 2nd 9A.52.030** (for LPR) is not CIMT & with <12m avoids AF risk. Plead "property" only. **For DACA or TPS recipient:** You must avoid any felony and any DV label. Plead to MM3, CT1, Theft 3.
If you MUST plead to Residential Burglary
• **Plead to the minimum conduct of the statute only**. 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.[9] Elaborating additional specific facts is not required and should be avoided. o **Ideal language:** "I entered or remained unlawfully in an unoccupied fenced area/portion of a dwelling, with intent to commit a crime against property therein." o Specify that the dwelling was unoccupied[10] and that burglary was of an area not itself ordinarily used for lodging.[11] o Do not specify what the intended crime was (the intended crime is not an element of the offense). o If you must specify, identify a property crime that is not a CIMT (e.g., Mal. Misch). • It is best practice to avoid incorporating the charging documents, police report, or CDPC as the basis for the plea. For this reason, you should generally avoid *Alford* pleas.[12] This is especially important if the police report contains allegations of gang involvement or drug activity.
Sentence: To avoid an aggravated felony, seek sentence of less than one year. Consider multiple counts with consecutive sentences (<1 yr each) vs. concurrent sentences. If no CIMT priors and plea is to single count, seek sentence of 180 days or less (to arguably fit "petty offense" exception). A lower sentence will also lower the likelihood of the conviction being a PSC, but it will also depend on facts of the case.
Warning! 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.

[1] Under RCW 10.93.160, jails can no longer honor ICE detainers or notify ICE of release dates, but some jails may not be in compliance. Also, if a person is already in ICE's records (e.g. they have a prior deportation), ICE will be notified when they are booked into jail when their fingerprints are sent to the NCIC.

[2] UPs may have paths to lawful status. See, e.g., WDAIP advisory on "10-year cancellation of removal," the principal form of relief, but there are many others: https://defensenet.org/resource-category/cancellation-of-removal-for-undocumented-persons/

[3] There are waivers for some crimes, for LPRs with 7 years residence, and refugees/asylees seeking LPR status.

[4] This advisory is intended to serve as a quick-reference guide for criminal defense attorneys representing noncitizens. Whenever possible, defenders are advised to consult specifically with WDA's Immigration Project on individual cases. When submitting an intake, obtaining a complete criminal history, including sentences, is essential for us to provide accurate advice.

[5] There are arguments that it is not a CIMT, and it should not be conceded in an immigration case context. For purposes of criminal defense, there is still a risk of it being charged. For decades, burglary was a CIMT only if the crime intended to be committed at the time of entry was itself a CIMT. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA, A.G. 1946); *Cuevas-Gaspar v.*

Gonzales, 430 F.3d 1013, 1019 (9th Cir. 2005). In 2009, the BIA expanded this definition, in *Matter of Louissaint*, 24 I&N Dec. 754, 754 (BIA 2009) (Florida statute whose elements required burglary of an occupied dwelling with intent to commit a felony was a CIMT). The BIA further expanded the definition in 2017, in *Matter of J-G-D-F-*, 27 I. & N. Dec. 82, 86–87, 88 (BIA 2017) (Oregon burglary under "dwelling" prong of ORS 164.225 is a CIMT; a dwelling that is even only "regularly or intermittently occupied," but not actually occupied at the time of the burglary, is sufficient to make burglary of such dwelling a CIMT; "This requirement raises the probability of a person's presence at the time of the offense and involves the same justifiable expectation of privacy and personal security as the Florida burglary offense we considered in *Louissaint*."). It does not appear that RCW 9A.52.025 or its accompanying definitions expressly require the dwelling to be occupied (actually, regularly, or intermittently) for a conviction. RCW 9A.04.110(7) defines "Dwelling" as: "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging" (emphasis added). ("Lodging" is not further defined, and whether a building is a dwelling "turns on all relevant factors and is generally a matter for the jury to decide." *State v. McDonald*, 123 Wash. App. 85, 91, 96 P.3d 468 (2004); *see also State v. Hall*, 430 P.3d 289, 291 (Wash. Ct. App. 2018) (listing relevant factors).) Washington's definition of "dwelling" appears close to Oregon's definition, cited in *Matter of J-G-D-F-*, 27 I&N Dec. at 84 (Under section 164.205(2), the term "dwelling" means "a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present."), but should be distinguishable, and we encourage immigration counsel to research and make any possible arguments. There are at least a few cases that seem to indicate there *is* a realistic probability of prosecution for conduct that falls outside the definition of "regularly or intermittently occupied" in *Matter of J-G-D-F-*, though further research is needed. *See, e.g*., *State v. McPherson*, 186 Wash.App. 114, 344 P.3d 1283 (2015) (affirming conviction for residential burglary even though burglary was of a jewelry store that was not used for lodging, and burglary only took place in unoccupied portion, because an apartment that was not secured as a separate unit was above the store); *State v. Moran*, 181 Wash.App. 316, 324 P.3d 808 (2014) (By entering lighted utility access area under victim's house for the purpose of tampering with plumbing in house, defendant entered into a "dwelling" within meaning of residential burglary statute; although utility access area was not accessible from inside the house and nothing was stored in that space, access area was located beneath house's living space such that it constituted a portion of the house….).

[6] Note: In light of the U.S. Supreme Court's ruling in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1207, 200 L. Ed. 2d 549 (2018) (holding that 18 USC 16(b) is unconstitutionally vague), residential burglary can no longer be a crime of violence AF.

[7] While there are arguments that it is not a "burglary" AF, and this should not be conceded in an immigration case context, for purposes of criminal defense, there is still a risk of it being charged. Under *United States v. Wenner*, 351 F.3d 969, 972-973 (9th Cir. 2003) (analyzing RCW § 9A.52.025), residential burglary of a fenced area was not a match to the generic "burglary" for federal sentencing purposes (and analogously, for removal purposes). ("[W]e agree with Wenner that the Washington statute is broader than federal law; burglarizing a fenced area that doubles as a dwelling is a residential burglary under Washington law, but not a 'burglary' under *Taylor*…" *id*.). However, residential burglary now has some risk of matching generic "burglary" after *U.S. v. Stitt*, 139 S. Ct. 399, 202 L.Ed.2d 364 (2018), abrogating *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (holding that burglarized building or structure must be unmoveable); *Mutee v. United States*, 920 F.3d 624, 626 (9th Cir. 2019) (recognizing *Grisel*'s abrogation by *Stitt)*. This is because it is not settled whether a fenced area in Washington that "has been adapted for or is customarily used for overnight accommodation" would be generic burglary under the current definition, after *Stitt*. There may be an argument that *Wenner* survives *Stitt* because a fenced area may be a "dwelling" but it is not a "building or structure" under *Taylor*, but further research is needed. *See U.S. v. Wenner*, 351 F.3d 969, 972-973 (9th Cir. 2003); *see also Chaney v. Von Blanckensee*, 804 F. App'x 579, 583 n. 4 (9th Cir. 2020) (rejecting petitioner's argument that Kentucky statute was overbroad even after *Stitt* based on *Wenner*, but distinguishing Washington State's statute, which the court notes expressly defines "building or structure" to include fenced areas, and implying that *Wenner* would still apply in Washington after *Stitt;* "…in *Wenner…*we held that the locational element of Washington burglary was overbroad because it included structures like fenced areas."). Washington courts have consistently held that where a building is used for lodging at the time of the offense, any portion of that building is a "dwelling" under RCW 9A.04.110(7). *State v. Ramos*-Avila,192 Wash. App. 1014 (2016). This provides some room to distinguish *Stitt.*

[8] Note: Viability of any alternative depends upon defendant's specific immigration status & criminal history. All convictions are a negative discretionary factor in an application for immigration benefits. For that reason, an immigration-safe deferred adjudication will be a better outcome if successfully completed.

[9] *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (2000); *State v. Codiga*, 162 Wash.2d 912, 923-924 (2008); *State v. Zhao,* 157 Wash.2d 188, 200 (2006); *See also*, RCW. 9.94A.450(1).

[10] This lowers risk that it will be found to be a CIMT. *See Matter of Louissant,* 24 I&N Dec. 754, 754 (BIA 2009).

[11] This lowers risk that it will be found to be an aggravated felony under *U.S. v. Stitt*.

[12] If there is a compelling reason for such a plea in your case, please contact us.