

Defending Noncitizens Charged with Washington Theft Offenses¹

STEP ONE: IDENTIFY IMMIGRATION STATUS AND 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 expired. Defender must ask how long UP has been in US. 	<ul style="list-style-type: none"> Staying out of jail should lower, but not eliminate, risk of ICE apprehension. 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 such avenues).
Lawful Permanent Residents (LPRs or “green card” holders) and Refugees <ul style="list-style-type: none"> Defender must ask how long person has been in US 	<ul style="list-style-type: none"> Avoid triggering deportation grounds, Avoid triggering inadmissibility by traveling abroad and returning to US.
Visa Holders (e.g., student, work and tourist visas)	<ul style="list-style-type: none"> If current, goals = LPRs and refugees. If expired, goals = UPs.
General Considerations	
Misdemeanors bar some types of status: Temporary Protected Status (cannot have one felony or two misdemeanors); Deferred Action for Childhood Arrivals (cannot have one 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 a complete criminal history <i>including sentences</i> is essential to get 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 and 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, and be permanent bar to ever re-entering the US.
Washington Theft as CIMT: <ul style="list-style-type: none"> Theft risks being classified as a CIMT. Before Nov. 2016, RCW Theft was not charged as a CIMT, because it lacks “intent to permanently deprive” as an element. On Nov. 16, 2016, the Board of Immigration Appeals (BIA) “updated” the definition of a CIMT for thefts. 	Washington Theft as AF: <ul style="list-style-type: none"> Theft with a 12-month sentence risks 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 should consult with WDA’s Immigration Project on individual cases by completing an intake form at <https://defensenet.org/case-support/wda-immigration-project/>. This advisory does not analyze RCW 9A.56.030(1)(b), theft by taking “from the person of another.”

² For a pre-2011 Theft 3 convictions with a 365-day sentence, modification to 364 days is highly desirable to eliminate the risk of an erroneous “aggravated felony” charge. Sentence modifications must be based on a legal defect to be effective for immigration purposes.

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

<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 • Our analysis⁵ is that RCW theft does not meet the new definition. RCW theft 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, without a case on point, ICE has charged 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 one 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 a single, “indivisible” crime, so should be ruled categorically <i>not</i> an AF.¹⁰ • There is no published case directly on point for WA, and there is a split in the circuits.⁹ And, 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 charged as 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 safe alternative, such as Malicious Mischief (any degree), which is not a CIMT. • For Theft 3, seek a sentence (including suspended time!) of 180 days or fewer so that it fits the “petty offense exception.”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, in the disjunctive, to “property or services.” • Consider multiple counts with consecutive sentences (less than one year each) vs. concurrent sentences.
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Best plea language: A plea statement setting forth the statute’s elements provides sufficient factual basis to make a plea knowing, voluntary, and intelligent under WA law.¹² Elaborating additional facts is not required and should be avoided.

- 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 misdemeanor theft:** Negotiate a sentence of 180 days or fewer, regardless of suspension.¹¹

Warning! *Any* noncitizen client (including UPs, LPRs, those on temporary visas) should not to leave the United States or apply for LPR status or 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 https://defensenet.org/wp-content/uploads/2017/11/170105-WDAIP-AILA-WA-Advisory_Theft-as-a-CIMT-after-Diaz-Larraga.pdf.
⁶ *Diaz-Lizarraga* cannot be applied retroactively. *Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018).
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 *Garcia v. Lynch*, 786 F.3d 789 (9th Cir. 2015); *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 For advisory on 180-days-or-less issue, see <https://defensenet.org/wp-content/uploads/2017/11/WDAIP-180-Day-Sentence-Advisory-FINAL-Updated-11.14.2017.pdf>.
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.