



**Defending Noncitizens Charged with Assault in the Third Degree (RCW 9A.36.031)¹
June 2021**

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 become LPR or USC Avoid grounds of deportability and 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 STRATEGIES⁴

A. RCW §§ 9A.36.031(d) and (f) Are Safest

Of the eleven Assault 3 subsections, (a)-(k), two criminal-negligence prongs, §§ (d) and (f), have been addressed by specific, on-point case law, which holds that convictions under these prongs are neither crimes involving moral turpitude (CIMTs)⁵ nor “crimes of violence” for purposes of the aggravated-felony crime of violence (AFCOV) ground and the crime of domestic violence (CODV) removal ground.⁶ Hence, **these are the safest subsections to plead to for immigration purposes.** All other subsections seem to be intentional assaults.

¹ This advisory is intended to serve as a quick reference guide for criminal defense attorneys representing noncitizens. Defenders are encouraged to consult with WDA’s Immigration Project in every case involving a noncitizen client. Please complete our [online intake form](#) and answer all questions.

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 This advisory conservatively assumes that each statutory subsection may be a separate offense.

⁵ *Matter of Perez-Contreras*, 20 I. & N. Dec. 615, 618–19 (B.I.A. 1992) (RCW § 9A.36.031(f) not a CIMT).

⁶ 18 USC § 16(a); see *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004) (one cannot “use” force negligently).

B. Immigration Consequences of Assault 3, by Ground of Removal

Crime Involving Moral Turpitude (CIMT)

Criminal negligence, §§ (d) and (f), are not CIMTs and do not trigger any other conviction-based removal grounds. These are the safest subsections.

Intentional, § (g) (police officer), should not be a CIMT because the offense is a simple, common-law assault lacking as an element harm, intent to harm, or threat or use of violent force.⁷ Plead to minimum conduct (“offensive touching”). Knowledge that victim is a law officer performing official duties is not an element; fact that victim is should not make offense a CIMT.⁸ Same analysis should apply to §§ (b) (transit-worker victim), (c) (school-bus driver), (e) (firefighter), and (i) (health provider). Still, these subsections risk being charged as CIMTs.

Intentional, § (a), includes two ways of committing assault—with intent to prevent or resist [the execution of a lawful process or mandate of a court officer] [or] [lawful apprehension or detention of defendant or another person]. Within § (a), “resisting arrest,” is the less-bad alternative. The “intent to prevent” element means this subsection risks being charged as a CIMT.

Intentional §§ (j) or (k), assault on a court employee or assault in a courtroom, risks being charged as a CIMT because of the court-related elements.

Intentional § (h), assault on peace officer with a projectile stun gun, is a separate offense because it has a higher statutory sentencing range. Intentionally assaulting an officer with a weapon would likely be charged as a CIMT.

Aggravated Felony Crime of Violence (if Sentence ≥ One Year); Crime of Domestic Violence

§§ (d) and (f) cannot be AFCOV or CODV because of the negligence *mens rea*.

§ (h) will be charged as a AFCOV if the sentence is one year or longer and will be CODV if the offense involves or is labeled as DV.

All other subsections not COVs because lack element requiring use, threatened or attempted use of violent force.

Aggravated Felony Offense Relating to Obstruction of Justice (OOJ) (if Sentence ≥ One Year)

§§ (a), (j), and (k) risk being charged as aggravated-felony obstruction of justice offenses (resisting lawful process, court-related assaults) if the sentence is one year or more. **A sentence of less than one year will eliminate this risk.**

Assault 3 risks being deemed a “particularly serious crime” (PSC), which is a bar to asylum and “withholding of removal,” or a “**violent or dangerous crime**,” which raises the burden of proof for some forms of relief from removal. These are case-by-case and fact- and circumstance-based determinations.

If Your Client MUST Plead to Assault 3

- Plead to §§ (d) or (f) because of negligence *mens rea*; if pleading to § (d), avoid specifying firearm as weapon
- Plead as closely as possible to assault by unconsented or offensive touching (as though it were Assault 4)
- For § (g) and other special-victim assaults, do not admit *knowledge* of victim’s status and performance of duties, which are not elements.
- Get sentence of less than one year for any intentional Assault 3 to avoid the risk of an aggravated felony charge.

⁷ *United States v. Sandoval*, 390 F.3d 1077, 1081 (9th Cir. 2004); *State v. Calvin*, 316 P.3d 496, 501 (2013).

⁸ See *Matter of Sanudo*, 23 I. & N. Dec. 968, 971 (B.I.A. 2006); *State v. Brown*, 998 P.2d 321, 326, 328 (2000).