

## Defending Noncitizens Charged with Assault in the First or Second Degree (RCW 9A.36.011, 9A.36.021)

This advisory is meant as a quick reference guide for defenders representing noncitizens. It is not a substitute for an individual case-specific analysis. For case-specific analyses, please [consult with the WDA Immigration Project](#) or a qualified immigration attorney.

### **STEP ONE: IDENTIFY IMMIGRATION STATUS AND DEFENSE GOALS**

Status	Goals
<b>Undocumented Person (UP):</b> <ul style="list-style-type: none"> <li>Entered without inspection, never had status.</li> <li>Entered lawfully with visa (e.g., student, tourist, employment) that has expired</li> </ul>	<ul style="list-style-type: none"> <li>Avoid jail/risk of ICE encounter and enforcement<sup>1</sup></li> <li>Preserve paths to obtain lawful status</li> <li>Preserve eligibility for relief from removal</li> <li>Avoid grounds of inadmissibility<sup>2</sup></li> </ul>
<b>Currently admitted in lawful status:</b> <ul style="list-style-type: none"> <li><b>Lawful Permanent Residents (LPRs)</b></li> <li><b>Asylees, Refugees</b></li> <li><b>COFA residents</b> (from a Pacific Island Compact nation)</li> </ul>	<ul style="list-style-type: none"> <li>Avoid triggering deportation grounds</li> <li>Avoid triggering inadmissibility grounds</li> <li>Preserve paths to LPR and relief from deportation</li> <li>Preserve eligibility for naturalization (LPRs cannot get citizenship if on probation; some crimes bar the required “good moral character”)</li> </ul>
<b>Visa Holders</b> (e.g., business, student, temporary employment, or tourist visas)	<ul style="list-style-type: none"> <li>If visa is current, goals = those for LPRs &amp; refugees</li> <li>If visa is expired, goals = those for UPs</li> </ul>
<b>DACA</b>	<ul style="list-style-type: none"> <li>Avoid bars to eligibility (one felony, one “significant misdemeanor,” or three or more misdemeanors)</li> </ul>
<b>Temporary Protected Status (TPS)</b>	<ul style="list-style-type: none"> <li>Avoid bars to eligibility (one felony, two or more misdemeanors)</li> </ul>

### **STEP TWO: DEFENSE STRATEGIES FOR ASSAULT 1 AND 2 CHARGES<sup>3</sup>**

#### **A. First-Degree Assault (RCW § 9A.36.011)**

Since the standard range for an A1 begins at over 12 months and includes the element of intent to inflict great bodily harm, an A1 conviction will be deemed a “crime of violence” (COV) “aggravated felony” (AF), and a “crime involving moral turpitude” (CIMT). AFs have the harshest immigration consequences: AFs bar eligibility for all forms of discretionary relief, including asylum and cancellation of removal, and result in virtually automatic deportation, even for LPRs. A1 cannot be made safe for a noncitizen.

<sup>1</sup> See RCW § 10.93.160, for bar on jail compliance with voluntary ICE detainer requests.

<sup>2</sup> *Inadmissibility* grounds apply to noncitizens seeking admission to the U.S. and to those applying for immigration status. *Deportability* grounds apply to anyone who entered the U.S. lawfully, even if now undocumented (e.g., status expired).

<sup>3</sup> See [WDAIP advisory on Assault 3](#) (usually a preferable alternative).

**B. Second-Degree Assault (RCW § 9A.36.021)**

Immigration Consequences of Assault 2	
<p><b>Crime involving moral turpitude (CIMT):</b></p> <p>ICE may charge A2 as a CIMT, even though there are strong arguments it should not be, since the minimum conduct under §(e) does not require harm, intent to harm, or use of force.</p>	<p><b>A2 is not a “crime of violence” (COV) in the 9th Circuit,<sup>4</sup> so it is:</b></p> <ul style="list-style-type: none"> <li>• <b><i>not an aggravated felony COV:</i></b> Under current case law, A2 with a sentence of 12 months or more is not an AF COV because it is a single crime with alternate means, and § 9A.36.021(e) does not require the actual, attempted, or threatened use of violent force.<sup>5</sup></li> <li>• <b><i>not a deportable crime of domestic violence (CODV)</i></b> regardless of sentence, and even with DV designation.</li> </ul>
<p><b>Assault 2 risks being deemed a “particularly serious crime” (PSC) which is a bar to asylum and “withholding of removal,”<sup>6</sup> or a “violent or dangerous crime,”</b> an ill-defined discretionary standard. These determinations are made case by case and are fact-and-circumstance-based.</p>	
If You MUST Plead to Assault 2	
<p><b>To mitigate risk of a CIMT charge:</b></p> <ul style="list-style-type: none"> <li>• Plead to §(e) (“With intent to commit a felony, assaults another”)</li> <li>• Do not specify the intended felony. If you must, identify a felony that is not a CIMT (e.g., Malicious Mischief 2)</li> <li>• Plead explicitly to a common-law assault by “offensive touching”</li> </ul>	<ul style="list-style-type: none"> <li>• <b>To avoid an (erroneous) AF charge (or one under another circuit’s case law<sup>7</sup>):</b> Avoid a sentence of one year or more. Consider multiple counts with consecutive sentences of less than one year each vs. concurrent sentences.</li> <li>• <b>Remove the DV designation:</b> Although Assault 2-DV is not a removable DV offense, the DV label is worse for discretionary purposes.</li> </ul>
<p><b>BEST PLEA LANGUAGE:</b> “On [date] I offensively touched [alleged victim] with the intent to commit [a felony] or [felonious Malicious Mischief].”</p> <p><b>DAMAGE CONTROL:</b> A2 can have serious negative consequences in any application for lawful status or for relief from removal. These applications generally involve the exercise of discretion, and the adjudicator is not limited to the formal record of conviction but can consider the underlying facts of the case. For these reasons, we always recommend that counsel <b>avoid stipulating to police reports or the CDPC for purposes of a factual basis or for sentencing purposes.</b><sup>8</sup></p>	
<p><b>The safest felony assault is Assault 3 under the (d) or (f) negligence prongs. Malicious Mischief 2 is the best alternative felony property crime.</b></p>	

<sup>4</sup> See *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017); *United States v. Door*, 917 F.3d 1146, 1149 (9th Cir. 2019); *United States v. Vederoff*, 914 F.3d 1238, 1244-46 (9th Cir. 2019). The U.S. sentencing COV definition in these cases, and of “force,” virtually mirrors 18 U.S.C. § 16(a), the immigration definition. See, e.g., *Matter of Osman*, 2018 WL 1872000, n.1 (“DHS concedes that [A2-DV] is not a removable offense.”).

<sup>5</sup> *State v. Smith*, 154 P.3d 873, 876 (2007) (*en banc*) (the A2 statute “articulates a single criminal offense and then provides six separate subsections by which the offense may be committed.”).

<sup>6</sup> An aggravated felony (AF) is a *per se* “particularly serious crime” for asylum, but a non-AF can be a PSC as well. “Withholding of removal” is a backup provision to asylum that is both harder to prove and does not lead to LPR status.

<sup>7</sup> We are not currently aware of any contrary circuit court or Board of Immigration Appeals decisions.

<sup>8</sup> For more information on the immigration impacts of the facts behind a conviction, see WDAIP advisory [Just Say No! to “Real Facts.”](#)