

## Defending Noncitizens Charged with Attempting to Elude, RCW § 46.61.024

This advisory is meant as a quick reference guide for defenders representing noncitizens. For case-specific analysis, defenders should [consult with the WDA's 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 temporary visa (e.g., student, tourist, employment) that 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>Lawful Permanent Resident (LPR)</li> <li>Asylee, Refugee</li> <li>Temporary Visa Holder (e.g., student, tourist, employment)</li> </ul>	<ul style="list-style-type: none"> <li>Maintain lawful status and ability to renew status</li> <li>Preserve eligibility for relief from removal</li> <li>Preserve eligibility to gain status (become LPR or USC)</li> <li>Avoid grounds of deportability <i>and</i> inadmissibility</li> </ul>
<b>DACA</b>	Avoid bars to eligibility (one felony, one “significant misdemeanor,” or three or more misdemeanors)
<b>Temporary Protected Status (TPS)</b>	Avoid bars to eligibility (one felony, two or more misdemeanors)

### STEP TWO: IDENTIFY IMMIGRATION CONSEQUENCES AND DEFENSE STRATEGIES

Immigration Consequences of Attempting to Elude	
<b>Crime Involving Moral Turpitude (CIMT)</b> <ul style="list-style-type: none"> <li>The Board of Immigration Appeals found the pre-2003 version of RCW 46.61.024, which required a “willful and wanton” mental state, to be a “crime involving moral turpitude” (CIMT). In June 2023, however, the Ninth Circuit held that the <i>mens rea</i> in the current RCW statute, which is mere recklessness, is materially different and remanded for the Board to determine whether the offense is still a CIMT.</li> <li>While we believe that it will be held not to be a CIMT, it is still safest safest to avoid A2E until the issue is firmly settled.</li> </ul>	<b>Aggravated Felony (AF)</b> Even with a sentence of one year or more, A2E should not be an aggravated felony. <ul style="list-style-type: none"> <li>A2E should not be a “crime of violence” AF because it lacks as an element the intentional use or threat of violent force.</li> <li>It should not be an “obstruction of justice” AF because it lacks any element of interference with judicial proceedings</li> </ul>

<sup>1</sup> See RCW § 10.93.160, prohibiting jail employees’ compliance with ICE detainer requests.

<sup>2</sup> *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).

## **Consequences of Felony CIMT:**

### **For LPR**

- Triggers deportability if committed within five years of admission.
- Prevents a finding of “good moral character” for purposes of applying for citizenship.
- Triggers inadmissibility, which applies to LPRs re-entering the U.S. after travel abroad.

### **For UP**

- Triggers inadmissibility, barring ability to obtain lawful status.
- Is a bar to “cancellation of removal,” the most common relief available to UPs in removal proceedings.

## **If Your Client MUST Plead to Attempting to Elude**

**Best plea language** (do NOT do *Alford* plea). A plea statement setting forth the elements of the statute provides a sufficient factual basis to make the plea knowing, voluntary, and intelligent under state law.<sup>3</sup> Elaborating additional facts is not required and should be avoided. Avoid stipulating that a CDPC, arrest report, or other police narrative be used as the factual basis for the plea, if at all possible.

## **Best Alternatives to Avoid Immigration Consequences<sup>4</sup>**

- **Reckless Driving (GM)**
- **Failure to Obey (M) (RCW §§46.61.015, -.020, -.022)**
- **Malicious Mischief (any degree)**
- **Assault 3 under the (d) or (f) negligence prongs**
- **Obstructing**
- **Attempted A2E (GM) with 180-day or less imposed sentence** (still risks being CIMT but qualifies for single-CIMT exception to removability)
- **Reckless Endangerment (GM) with 180-day or less imposed sentence** (probable CIMT but qualifies for single-CIMT exception to removability)
- **Attempted Vehicular Assault per DUI prong (RCW 46.61.522(b) or (c))** (ONLY for LPRs; contact WDAIP staff if considering this alternative).
- ***In Re Barr/Zhao* plea** to any of the above or other safe alternative. Consult WDAIP staff and [Barr/Zhao advisory](#) before pleading.

<sup>3</sup> *In re Personal Rest. of Hews (Hews II)*, 108 Wash.2d 579, 589 (Wash. 1987); *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (Wash. 2000); *State v. Codiga*, 162 Wash.2d 912, 923-924 (Wash. 2008); *State v. Zhao*, 157 Wash.2d 188, 200 (Wash. 2006); *State v. Schaupp*, 111 Wash.2d 34 (Wash. 1988). See also, RCW § 9.94A.450(1).

<sup>4</sup> Practice advisories for many of these offenses may be found on the [WDAIP website](#) and should be consulted prior to pleading.