

Washington Defender Association's Immigration Project

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Practice Advisory for Representing Noncitizen Defendants In King County Expedited Theft Cases – December 2008¹

IDENTIFY IMMIGRATION STATUS & CRIMINAL HISTORY

- **Undocumented Persons (UP):** Note many UP (except those w/prior deportations) have avenues for obtaining lawful status, particularly if they have U.S. citizen spouse or parents and have never left the U.S. Two types of UP: 1. Entered illegally and have never had status; 2. Came lawfully with a temporary visa (e.g. student or tourist) that has since expired.
- **Lawful Permanent Residents (LPR or greencard holders) & Refugees²:** Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status.
- **Temporary (non-immigrant) Visa Holders (e.g. student & tourist visas):** Identify if person's status is current or expired. If current, goals are same as LPRs & refugees. If expired, goals are same as UPs.

KEY CONCEPTS

- **GENERAL RULE:** An expedited process resulting in a conviction for attempted theft 2nd degree or theft 3rd degree can trigger removal/deportation and inadmissibility³ for noncitizen defendants unless negotiated within the parameters set forth herein.
- **Theft as a "crime involving moral turpitude" (CIMT):** Theft offenses – including attempted theft offenses - and other crimes which have an element of fraud and deceit trigger deportation/inadmissibility as CIMTs under immigration law.
- **CIMT deportation exception:** One CIMT conviction (including for Att'd Theft 2nd) will not trigger deportation/removal for persons lawfully admitted (LPRs, refugees, noncitizens who entered on temporary visas (e.g. student & tourist visas) IF the offense was not *committed* w/in five years of their admission.⁴ But any two separate CIMT convictions "after admission" trigger deportability.
- **CIMT inadmissibility exception:** The CIMT inadmissibility ground triggers removal for most UPs. It is also a basis to deny (re)admission/entry into the U.S., as well as LPR status, citizenship and other immigration benefits. This ground will not be triggered where there is only one CIMT conviction

¹ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible defenders are advised to consult specifically with WDA's Immigration Project on individual cases and our more extensive advisories available at www.defensenet.org.

² People who come to the US in refugee status must apply for LPR status after one year, although many take longer to do so. People granted asylum in the U.S. can also apply to be LPRs.

³ Noncitizens seeking entry into the U.S. or applying for many immigration benefits (e.g. citizenship, permanent residency (greencards) must establish that they do not trigger legal grounds of inadmissibility.

⁴ This exception also applies (regardless of when committed) if the CIMT offense carries only a maximum possible sentence of less than one year, which unfortunately doesn't apply to attempted theft 2nd or any gross misdemeanor (but would to attempted theft 3rd or another simple misdemeanor).

with a maximum possible sentence of not more than one year and where the actual sentence imposed (regardless suspended time) was not more than 180 days. The exception does not apply if 2 CIMTs.

- **Theft offenses as aggravated felonies (AF):** Two AF grounds to avoid: 1. Theft offense w/sentence of one year (365 days) or more imposed (regardless of time suspended); 2. Crime of fraud or deceit where record shows loss to victim of \$10K or more. **365 days suspended for a theft is always bad.**

DEFENSE GOALS AND STRATEGIES FOR UNDOCUMENTED PERSONS (UPs):

1. **Avoiding ICE apprehension by getting/staying out of jail.** A UP who goes to jail for even one day is likely to encounter ICE, get a detainer imposed and end up in ICE custody & removal proceedings. If defendant does not yet have ICE detainer, getting out of jail may be highest priority. **However**, if US citizen spouse (or partner whom they could marry), preserving avenues to obtain LPR status through marriage may be a higher priority than immediate release from jail.
2. **Preserve avenues to obtain lawful status.** Many UPs have avenues to obtain lawful status. CIMT convictions, like theft offenses, can render them inadmissible and ineligible for lawful status. Try to avoid this by negotiating to an alternative non-CIMT offense such as malicious mischief (MM)⁵; trespass; disorderly conduct; & rendering criminal assistance 9A.76.050 (1)-(3) w/364 day sentence.
3. **First-time CIMT inadmissibility EXCEPTION:** A single conviction for attempted theft 2 or theft 3 *where the actual sentence (including suspended time) imposed is 180 days or less*, or where deferred sentence (that does not specify a term of incarceration) is imposed, will not trigger removal or bar eligibility for lawful status. A single simple misdemeanor attempted theft 3 falls w/in this exception..

DEFENSE GOALS / STRATEGIES FOR LAWFUL PERMANENT RESIDENTS & REFUGEES

1. **Avoid a theft conviction**, which triggers deportation as a CIMT. Non-CIMT alternative offenses include malicious mischief (MM)⁶; trespass; disorderly conduct; and rendering criminal assistance per 9A.76.050 (1)-(3) w/364 day or less sentence.
2. **CIMT deportation EXCEPTION:** A *first-time* att'd theft 2, theft 3 (or att'd theft 3) conviction will not trigger deportation *if committed more than 5 years after date of lawful admission* (and sentence of 364 days or less is imposed). Determine D's date of admission to see if exception applies.⁷
3. **Preserve avenues for relief from deportation.** Immigration judges have the power to grant *discretionary* "relief from removal" to certain qualifying LPRs and refugees. If a gross misdemeanor theft conviction is unavoidable, the availability of this relief can/may be preserved where a sentence of 180 days or less (including suspended time) is imposed or by obtaining a deferred sentence (that does not specify a term of incarceration).

FOR BOTH GROUPS:

- A deferred adjudication with "immigration-safe" language (e.g., an SOC) should avoid being a conviction that triggers deportation, or inadmissibility grounds, if defendant has NOT pleaded guilty or "admitted sufficient facts to warrant a finding of guilt."⁸
- If theft conviction is unavoidable, it is critical to get sentence of less than 365 days imposed (regardless of suspended time) to avoid immigration classification as an aggravated felony.

⁵ MM's property damage definition at 9A.48.010(b) includes "any diminution in the value of any property as a consequence of an act", so could factually overlap with a theft.

⁶ *Id.*

⁷ Admission = initial lawful entry, or if unlawful entry, date became LPR. Subsequent departures by LPRs do not re-start 5 year admission clock unless gone >180 days or *re-entry* is after commission crimes.

⁸ See *Deferred Adjudications memo* at immigration section of WDA's website: www.defensenet.org.

If you cannot negotiate one of these alternatives, it may be more important for a noncitizen – depending on her/his defense goals - to decline the expedited misdemeanor offer and proceed w/felony filing since the immigration consequences are in most cases, no worse.