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Immigration Consequences to a Charge of Simple Assault or Battery

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When an alien is convicted of, or has pled to, a charge of simple assault pursuant to R.I. Gen. Laws and placed in removal proceedings, the issue at the immigration court level is whether the alien is removable or inadmissible as a result of having been convicted of a crime of violence and/or a crime of domestic violence or a crime involving moral turpitude.

It is never an easy task determining whether an "alien's"[1] misdemeanor crime of simple assault or battery under RI Gen. Laws § 11-3-5 is an aggravated felony, a crime of moral turpitude or a domestic crime of violence according to the Immigration Nationality Act. This article focuses solely on misdemeanor dispositions,[2] under RI Gen. Laws § 11-5-3/12-29-5, and how these dispositions are viewed in the immigration context, as well as the consequences a client may face based on a conviction or plea pursuant to this statute. Issues reviewed include: 1) the consequences of a conviction or of accepting a plea for simple assault/domestic where the sentence falls outside the purview of a definition of an aggravated felony pursuant to 8 U.S.C. § 1101(a)(43)(F) and even some that do; 2) how Immigration Customs Enforcement (ICE) may consider such a conviction or plea to be a crime of domestic violence (CDV) and/or a crime involving moral turpitude (CIMT); and 3) suggestions as to how a client may fall outside the aggravated felony category even if the client must accept a one-year suspended sentence.

Crime of Domestic Violence pursuant to 8 U.S.C. § 1227(a)(2)(E) or Aggravated Felony pursuant to 8 U.S.C. § 1101(a)(43)(F) as defined in 18 U.S.C. § 16(a)

Section 1227(a)(2)(E)(i) of the Code renders any alien (documented or undocumented) removable if the alien at any time after admission (or entry) was convicted of a CDV, stalking, child abuse, child neglect or child abandonment. The term "domestic violence" means crime of violence as defined pursuant to section 16, Title 18 of the United States Code.[3]

Section 16, title 18 of the U.S.C. defines a crime of violence as: "(a) *an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another* or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." (emphasis added). Here, we will review only title 18 U.S.C. § 16(a), as it focuses on the misdemeanor offense of simple assault or battery/domestic in Rhode Island.[4]

RI Gen. Laws § 11-5-3 states as follows: (a) Except as otherwise provided in § 11-5-2, every person who shall make an assault *or* battery *or* both shall be imprisoned not exceeding one year or fined not exceeding one thousand dollars ($1,000), or both; (b) Where the provisions of "The Domestic Violence Prevention Act," chapter 29 of title 12, are applicable, the penalties for violation of this section shall also include the penalties as provided in § 12-29-5." (emphasis added)

Notably, this section does not charge a defendant with one crime, but with two distinct crimes: assault or battery or both. Although not defined by the statute, the terms assault and battery have different and distinct definitions and elements according to Rhode Island case law. Assault is defined it as "an unlawful attempt or offer, with force or violence, to do corporal hurt to another, whether with malice or wantonness." See **State v. McLaughlin**, 621 A.2d 170, 177 (R.I.1993).[5]

"[B]attery refers to an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another." See **McLaughlin**, 621 A.2d at 177, citing to **State v. Messa**, 594 A.2d 882, 884 (R.I.1991) (quoting **Proffitt v. Ricci**, 463 A.2d 514, 517 (R.I.1983)).

When an alien is convicted[6] of, or has pled to, a charge of simple assault pursuant to RI Gen. Laws § 11-5-3 and placed in removal proceedings, the issue at the immigration court level is whether the alien is removable or inadmissible as a result of having been convicted of a crime of violence and/or a crime of domestic violence (depending on the charge) or a crime involving moral turpitude.[7]

The issue of what acts constitute a crime of violence (COV) pursuant to 18 U.S.C. § 16 was brought to the United States Supreme Court in **Leocal v. Ashcroft**, 125 S.Ct. 377 (2004).

Josue Leocal, a lawful, permanent resident (LPR), was convicted under the Florida statute for driving under the influence in violation of Fla. Stat. § 316.193(3)(c)(2) (2004). The statute

required a showing of only negligence. The issue in Leocal became whether an offense that does not require a showing of intent is a COV pursuant to 18 U.S.C. § 16. See **Leocal v. Ashcroft**, 125 S. Ct. 377 (2004).

The **Leocal** Court noted that the language "use of physical force against the person or property of another," found in 18 U.S.C. § 16(a), required a higher degree of intent than merely negligent or accidental. **Leocal** 125 S. Ct. at 382. The Supreme Court, however, never defined the term "physical force," until 2010 in **Johnson v. US**, 130 S.Ct. 1265 (2010).

In 2007, the First Circuit in **Lopes v. Keisler**, 505 F.3d 58 (1st Cir 2007) was asked to answer the question of whether a conviction/plea pursuant to RI Gen. Laws § 11-5-3-/12-29-5 is considered a COV pursuant to 18 U.S.C. § 16(a), thereby possibly rendering a foreign national removable as an aggravated felon, pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).

Lopes, a lawful permanent resident, was charged with violation of RI Gen. Laws § 11-5-3. The criminal complaint stated that Lopes "commit[ted] assault and battery upon the body of [name omitted]." **Lopes**, 505 F.3d at 62. The Department of Homeland Security submitted as evidence the criminal complaint and the criminal docket sheet. The criminal docket sheet listed the charge as "simple assault-domestic," along with the various docket entries and the final disposition.[8] The Court in **Lopes** relied on the criminal docket sheet, holding that "[t]he criminal docket report states that a plea of nolo contendere was entered on a count of simple assault-domestic. On the basis of these two documents, it is clear that Lopes was convicted of assault." **Lopes**, 505 F.3d at 62

The Court in **Lopes** also found that the physical force required to commit an assault, which, as defined in Rhode Island, does not require touching at all,[9] is sufficient to be considered a crime of violence pursuant to 18 U.S.C. § 16(a); and therefore, an aggravated felony for immigration purposes, as an assault in Rhode Island requires a higher degree of intent than negligent or mere accidental conduct. See **Lopes**, 505 F.3d at 63; see also Immigration Nationality Act (hereinafter INA) § 101(a)(43)(F).

As a result of the **Lopes** decision, a charge of removal pursuant to INA's crime of domestic violence statute (8 U.S.C. § 1227(a)(2)(E)(I); INA § 237(a)(2)(E)(i)) likely will be sustained if the alien has a conviction pursuant to RI Gen. Laws § 11-5-3/12-29-3, even if the alien received probation or a filing and no suspended sentence.

In 2010, the US Supreme Court in **Johnson v. US**, 130 S. Ct. 1265 (2010) was tasked with deciding whether the Florida misdemeanor offense of battery of "actually and intentionally touching" another person has as an element "the use…of physical force against the person of another" pursuant to the definition of "physical force" in 18 U.S.C. § 924(e)(2)(B) (i), and whether the Florida conviction constitutes a "violent felony" under the Armed Career Criminal Act, § 924(e)(1).

Violent felony pursuant to 18 U.S.C. § 924(e)(2)(B):

1. *Has an element of use, attempted use, or threatened use of physical force against the person of another*; (emphasis added) or
2. Is burglary, arson or extortion involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The elements of a "violent felony" pursuant to § 924(e)(2)(B)(i) mirror the elements of a "crime of violence" pursuant to 18 U.S.C. § 16(a), which may or may not necessarily refer to a felony.

The **Johnson** Court then defined the term "physical force" as follows: "'physical'…plainly refers to the force exerted by and through concrete bodies," *id at 1270*; and "force" as power, violence or pressure directed against a person or thing." *Id*. The Court ultimately held that the force required to meet the definition of "physical force" in the context of a violent felony is force that would not be satisfied by a mere touching, which is all that is required for a violation of the Florida battery statute. See Fla. Stat. § 784.03(2), see also **State v. Hearns**, 961 So.2d 211(FL 2007); **Johnson**, 130 S.Ct. 1265 (2010). The Court reiterated that it was interpreting "physical force" in the context of a violent felony and not in the context of a battery. **Johnson**, 130 S.Ct. at 1270, *citing* **Leocal v. Ashcroft**, 543 US 1, 11 (2004).

Unfortunately, the definition of "physical force" in **Johnson** does not resolve the question of what "physical force" means in the context of 18 U.S.C. § 16. In

2011, the First Circuit in **US v. Booker**, 644 F.3d 12 (1st Cir 2011) refused to use the definition laid out in **Johnson**. **Booker** 644 F.3d at 19.

Booker and a second defendant, Wayman, had both been convicted pursuant to the Lautenberg Amendment to the Gun Control Act of 1968 (18 U.S.C. § 922(g)(9)), which makes "unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence to … possess… any firearm or ammunition." Both defendants had been convicted of Maine's misdemeanor simple assault statute, which provides that a person "is guilty of an assault if the person intentionally, knowingly or recklessly causes bodily injury or offensive contact to another." Me.Rev.Stat.Ann. Tit 17-A § 207(1); **US v. Booker**, 644 F.3d 12, 16 (1st Cir 2011).

The Lautenberg Amendment defines "misdemeanor crime of domestic violence as: "(1)…;(2) has as an element, the use, attempted use of physical force, or threatened use of a deadly weapon; and (3)...." 18 U.S.C. § 921(a)(33)(A).

The **Booker** court refused the definition of "physical force" set out in **Johnson** because the Supreme Court in **Johnson** had specifically stated that it was only defining a violent felony, not defining the meaning of "physical force" within the context of a misdemeanor. See **Johnson**, 130 S.Ct. at 1270, citing **Leocal v. Ashcroft**, 543 US 1, 11 (2004). The **Booker** court also refused to use the definition of a crime of violence under 18 U.S.C. § 16 or violent felony under 18 U.S.C. § 924(e) of the ACCA, because the Court found that § 922(g)(9) of the Lautenberg Amendment has a distinct focus and singular purpose not covered in any other statute. See **Booker**, 655 F.3d at 19, citing to **US v. Mead** 175 F.3d 215 at 211, 221 (1st Cir 1999).

The **Booker** court noted that Congress expressly rejected § 16's definition of COV, adopting a definition for misdemeanor crime of domestic violence that was "probably broader" than that of COV under § 16. The **Booker** court further held that it would not interchange the use of the definition of COV and physical force between two distinct statutes. See **Booker**, 644 F.3d at 19 citing to 142 Cong.Rec. S11872-01, S11877 (daily ed. Sept. 30, 1996). As such, the practitioner is again left with the rulings in **Leocal** and **Lopes**, which only require that the elements of the crime carry a higher degree of intent than merely negligent. Notably, the court in **Lopes** never reached the question as to whether a battery in Rhode Island is a crime of violence (**Lopes**, 505 F.3d at 62).

As there is no element of physical force in the definition of a battery in Rhode Island, and seeing as the "offensive contact" and/or the "unconsented touching" could be of a negligent or accidental nature, an Immigration Court charged with removing an alien on the basis of a battery conviction in Rhode Island could likely rule in favor of an alien of not having been convicted of a COV or CDV.

Practice Tip: Based on the above, it would behoove a criminal practitioner who is going to have his client plea to a charge of simple assault and battery/domestic to have the prosecution first amend the charge specifically to simple battery/domestic and request that the judge amend the record of conviction to read the charge to be battery and not assault if, of course, the facts support such a finding.

Crime of Moral Turpitude

DHS will charge an individual with removability pursuant to the CIMT statute of INA if the individual has a conviction[10] for simple assault/battery, even where there is no domestic sentence enhancement, especially if the individual has more than one offense on his/her record. DHS can impose several charges of either inadmissibility or removability against an alien on the basis of CIMTs, such as:

- 8 U.S.C. § 1182(a)(2)(A)(i)(I); INA § 212(a)(2)(A)(i)(I) – any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime of moral turpitude is inadmissible;
- 8 U.S.C. § 1227(a)(2)(A)(i)(I); INA § 237(a)(2)(A)(i)(I) any alien who is convicted of a crime involving moral turpitude committed within 5 years ([…]) after the date of admission and (II) is convicted for a crime for which a sentence of one year or longer may be imposed is deportable;
- 8 U.S.C. § 1227(a)(2)(A)(ii); INA § 237(a)(2)(A)(ii) any alien who at any time after admission has been convicted

of two (2) or more crimes involving moral turpitude, not arising from a single scheme of criminal misconduct regardless of whether confined or whether a single trial is deportable.

INA does not define the term "moral turpitude." Moral turpitude is a vague concept referring to conduct which shocks the conscience as being inherently base, vile or deprived, contrary to rules of morality. **Matter of Danesh**, 19 I&N Dec. 669, 670 (BIA 1988).

Prior to 2008, no set methodology existed for determining whether a predicate offense fell within the purview of a CIMT. However, in 2008, the US Attorney set to clarify for the Immigration Judges and the BIA a methodology to be used when determining whether a predicate offense involves moral turpitude. See **Matter of Silva-Trevino**, A13-014-303 (BIA Aug 8, 2006).

Mr. Silva-Trevino, a Mexican, was admitted to the US in 1962. In 2004, Silva-Trevino pled to the criminal offense of "indecency with a child" pursuant to the Texas Penal Code, title 5, Section 21.11(a)(1). This statute makes it illegal for a person to engage in sexual conduct with a child under 17 who is not the spouse. The statute defines sexual conduct as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child, or any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person if committed with the intent to arouse or gratify the sexual desire of a person." Section 21.11(a)-(c). Mr. Silva-Trevino received five years probation plus fines and counseling.

Mr. Silva-Trevino was placed in removal proceedings and charged as removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii); INA § 237(a)(2)(A)(iii), as an alien having been convicted of an aggravated felony. He sought to adjust his status to a lawful permanent resident, but was found to be inadmissible pursuant to 8 U.S.C. § 1182(a)(2)(A)(i); INA § 212(a)(2)(A)(i), as a person who has been convicted of a CIMT.

Silva-Trevino appealed to the BIA. The BIA reversed, finding that the Texas statute involved morally reprehensible conduct, and also some conduct not morally reprehensible. The BIA held that Silva-Trevino had not been convicted of a CIMT. See **Matter of Silva-Trevino**,

A13-014-303 (BIA Aug 8, 2006).

In his opinion, the US Attorney General (AG) in **Matter of Silva-Trevino**, 24 I&N Dec. 687 (AG 2008) reversed the BIA's decision and set out a methodology to analyze these offenses by using three separate, but not distinct, methods. First, the AG states that the court/adjudicator needs to decide if, categorically, the predicate offense is a CIMT[11] using a "realistic probability approach."

The "realistic probability approach" focuses on the actual scope of the criminal statute by asking whether, at the time of removal proceedings, any cases existed where the criminal statute was applied to conduct that does not involve moral turpitude. If there has been a state case that applied the criminal statute to conduct that does not involve moral turpitude, then the inquiry ends and the predicate offense cannot be deemed a CIMT. However, if no such case exists, the AG instructs the adjudicator to use the modified approach. See also **Shepard v. US**, 544 US 13 (2005).[12]

The AG goes a step further than the modified approach, holding that since most criminal statutes do not have moral turpitude as an element, and seeing as though this classification of charge can only be made with additional information, it only makes sense to allow the adjudicator to go beyond the record, transcript and plea agreement, and the adjudicator is allowed to review *all other documents necessary* to determine if the crime is one that involves moral turpitude. **Silva-Trevino**, 24 I&N Dec at _.

The AG clarifies that, whatever the definition of a CIMT, it must involve at the very least both reprehensible conduct and some form of scienter, such as willful or reckless. **Silva-Trevino**, 24 I&N Dec at __ fnt5 (AG 2008).

In summary, the offense must involve both reprehensible conduct and some form of scienter. The methodology used to determine if the offense qualifies as a CIMT is to first use the categorical/realistic probability approach. If that does not answer the question, use the modified categorical approach by reviewing all documents that may help answer the inquiry (such as the police report, witness statements, etc).[13]

As of this writing, at least four circuits have rejected **Silva-Trevino: Prudencio v.**

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Holder, __ F.3d__ (4th Cir. Jan 30, 2012); **Jean-Louis v. Holder**, 582 F.3d 462 (3rd Cir 2009); **Guardado-Garcia v. Holder**, 615 F.3d 900 (8th Cir. 2010); and **Fajardo v. US Attorney General**, 659 F.3d 1303 (11th Cir 2011). The 3rd, 4th and 11th Circuits held that the statute (INA § 212(a)(2)(A)(i)) was not ambiguous. The 8th Circuit held that Attorney General's decision did not merit deference.

The 1st Circuit did not explicitly reject **Silva-Trevino**, but it did so implicitly when it defined whether a conviction of reckless conduct in New Hampshire was a CIMT in **Idy v. Holder**, 674 F.3d 111 (C.A.1 2012), and did not use the methodology set out in **Silva-Trevino**. Most recently, in **Palmeira v. Holder**, the 1st Circuit very specifically stated that that it would not decide whether to follow the third step of **Silva-Trevino**, as the court considers this issue controversial. See **Palmeira v. Holder**, 2012 WL 1648909, fn 6, 7 (C.A.1).

So what does this all mean in the context of a client charged with committing a simple assault/battery pursuant to RI Gen. Laws § 11-5-3? The answer is… we will have to wait and see!

As noted, the IJ will now be able to look at *all* the documents, although maybe not in this Circuit, to determine if the predicate offense is a CIMT, keeping in mind, all the while, that the offense must possess reprehensible conduct and scienter.

In conclusion, if a defendant is facing the charge of simple assault, and what really occurred, based on the facts was a battery, and your client decides to plead to the offense, it behooves the client to plea to the correct offense of battery and to have the record of conviction/criminal complaint amended to read that the defendant is being charged with a battery under the statute and not an assault, and that the defendant is pleading to the battery portion of the statute.

ENDNOTES

1 *The term "alien" in this article does not refer to extra terrestrial beings. It is a term of art used by the Department of Homeland Security to refer to persons who are not citizens of the United States.*

2 *Although the resolution to a criminal charge of a filing and/or probation with no fines is not considered to be conviction in Rhode Island, see RI Gen. Laws §§ 12-10-12, 12-18-3, 12-19-36, these types of dispositions would most definitely be considered "convictions" for immigration purposes. See*

8 U.S.C. § 1101(a)(48)(A), definition of conviction.

3 *8 U.S.C. § 1227(a)(2)(E)(i).*

4 *R.I. Gen. Laws § 11-5-3*

5 *See also,* TOUCH THIS! OVER-CRIMINALIZATION OF OFFENSIVE CONDUCT, *infra ftnt 8*

6 *Conviction as defined by 8 U.S.C. § 1101(a)(48)(A).*

7 *Inadmissibility refers to an alien's undesirability to be granted lawful permanent residence or a non-immigrant visa as a result of some defect as enumerated in the Code § 1182. This is not the same as an alien's entry. Removability refers to Immigration's ability to remove (deport) an alien who has been admitted as a lawful permanent resident or nonimmigrant or an undocumented alien on the basis of a defect as enumerated in the Code § 1227. Again this does not refer to an alien's entry into the United States.*

8 *The criminal docket sheet is not an official document in RI and there is no legal rule as to how a clerk at the District Court inputs the information from a criminal complaint which is an official document. Information obtained by the District Court Clerk's Office on July 30, 2012*

9 *See* ***State v. McLaughlin****, 621 A.2d 170,177 (RI 1993), citing to* ***State v. Pope****, 414 A.2d 781 (RI 2980); see also* TOUCH THIS! OVER-CRIMINALIZATION OF OFFENSIVE CONDUCT, *Jan/Feb. 02:5(50) by David M. Zlonick and Carly Beauvais Iafrate.*

10 *Conviction is defined pursuant to the Code § 1101(a)(48)(A) as a formal judgment of guilt of the alien entered by a court or if adjudication of guilty has been withheld, where (i) a judge or jury has found the alien guilty or the alien entered a plea of guilty or nolo contendere or as admitted sufficient facts to warrant a finding of guilt and (ii) the judge has ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed.*

11 *This categorical methodology is set out in* ***Taylor v. US****, 495 US 575 (1990), which allows the sentencing court under the federal statute to look at the statutory elements, charging document, and jury instructions to determine whether the predicate offense qualifies as a violent felony.*

12 *The modified categorical approach allows the sentencing court to determine if a predicate offense is a violent crime/felony by looking not only at the record of conviction, but also transcript of the colloquy, and the terms of the plea agreement, or some other comparable judicial record.* ***Shepard v. US****, 544 US 13 (2005);* ***Taylor v. US****, 495 US 575 (1990).*

13 *Keep in mind that the Federal Rules of Evidence are VERY relaxed in Immigration Proceedings. See 8 CFR § 1 240.7(a).* V