

Law Offices of Norton Tooby

# Crimes & Immigration

eNewsletter

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## 1. ARTICLE: BELLESS APPLIED TO CRIMES OF VIOLENCE AS GROUNDS OF REMOVAL

By: Norton Tooby and Joseph Justin Rollin

A recent Ninth Circuit decision, *United States v. Belless*, 338 F.3d 1063 (9th Cir. Aug. 11, 2003), has significant implications for noncitizens charged with removal for domestic violence offenses and aggravated felony crimes of violence. *Belless* holds that the Wyoming battery statute encompasses less violent behavior than that required to sustain a finding of use or attempted use of physical force, to serve as a predicate offense under the 18 U.S.C. § 922(g)(9) illegal possession of a firearm statute's definition of a crime of domestic violence. The case unfortunately also holds that the government can go outside the elements of the conviction to prove the domestic relationship necessary to constitute a crime of domestic violence for illegal firearm possession purposes. This article will address the implications of *Belless* to arguments that certain state assault and battery convictions do not constitute aggravated felony crimes of violence or crimes of domestic violence.

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2. ONLINE RESOURCES: *United States v. Belless* may be viewed without charge at:  
<http://caselaw.lp.findlaw.com/data2/circs/9th/0230089p.pdf>.

For a discussion of crimes of violence, see N. Tooby & K. Brady, *Criminal Defense of Immigrants* § 6.37 et seq. (3d ed. 2003), online at:  
[http://www.criminalandimmigrationlaw.com/CH6\\_6.37.php](http://www.criminalandimmigrationlaw.com/CH6_6.37.php).

For capsule summaries of all case law related to crimes of violence, see the Aggravated Felony Crime Index at:  
[http://www.criminalandimmigrationlaw.com/AG\\_crime\\_main.php](http://www.criminalandimmigrationlaw.com/AG_crime_main.php), and the Aggravated Felony Category Index at:  
[http://www.criminalandimmigrationlaw.com/AG\\_cat\\_main.php](http://www.criminalandimmigrationlaw.com/AG_cat_main.php).

D. Kesselbrenner & L. Rosenberg, *Immigration Law and Crimes* is online at [www.westlaw.com](http://www.westlaw.com). C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* (2002) is online at LexisNexis.

**3. ARTICLE: CRIMINAL OFFENSES FOR WHICH MINIMAL FORCE IS SUFFICIENT DO NOT RISE TO THE LEVEL OF VIOLENCE NECESSARY TO CONSTITUTE A CRIME OF VIOLENCE OR CRIME OF DOMESTIC VIOLENCE FOR DEPORTATION PURPOSES.**

Under 8 U.S.C. § 16, the force used to constitute an aggravated felony crime of violence or a domestic violence offense for immigration purposes must be "destructive or violent force." *In re Small* 23 I. & N. Dec. 448, 449, fn. 1 (BIA 2002); see also *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (quoting *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 n.10 (7th Cir. 2000) ("[T]he force necessary to constitute a crime of violence [ ] must actually be violent in nature.")). A recent Ninth Circuit decision illustrates the distinction between 'force' as that term is used in state statutes defining minor assault and battery offenses and 'physical force' as that term is used under federal law immigration. *United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003).

In *Belless*, the court examined whether defendant's prior Wyoming conviction for domestic violence was one that had as an element the use or attempted use of "physical force," as that term is construed under federal law. Specifically, the Court examined 18 U.S.C. § 921(a)(33)(A)(ii), which defines "crime of violence" for purposes of 18 U.S.C. § 922(g)(9), a federal criminal offense, which prohibits those who have been convicted of a misdemeanor crime of domestic violence from possessing a firearm. The Wyoming statute provided that one could be convicted if "he unlawfully touches another in a rude, insolent or angry manner." *Id.* at p. 1067. The court held that the kind of force contemplated by this statute did not rise to the level required to deem the offense one that had "the use of physical force" as an element. *Id.* at p. 1067. The court explained, "[a]ny touching constitutes 'physical force' in the sense of Newtonian mechanics. Mass is accelerated, and atoms are displaced." *Id.* at p. 1067-1068. However, for 18 U.S.C. § 921(a)(33)(A)(ii), force must not be "de minimis" but rather the statute requires the "violent use of force against the body of another individual." *Id.* at p. 1068. The court pointed out that, under the Wyoming statute, merely jabbing a finger into another's chest in an "ungentlemanly manner" (as Nixon did to Khrushchev in a 1959 meeting) would be sufficient to sustain a conviction. *Id.* at p. 1068. It held that his minimal level of force was insufficient, however, to constitute a crime of domestic violence under the federal firearm statute, which is equivalent to the 18 U.S.C. § 16(a) definition of crime of violence used as a requirement for crimes of domestic violence and aggravated felony crimes of violence for immigration purposes.

This analysis is directly applicable to both the aggravated felony crime of violence, 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F), and the domestic violence ground for removal, 8 U.S.C. § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). Both these grounds of removal reference 18 U.S.C. § 16 to define the term "crime of violence." Section 16(a) looks to whether the underlying crime, "has as an element the use, attempted use, or threatened use of physical force." This language is very similar to the language examined in *Belless*, requiring that the underlying offense have, "as an element, the use or attempted use of physical force, or threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii).

In determining whether a state assault and battery offense is an aggravated felony (or domestic violence) offense, the examining court must use a "categorical approach," focusing on the elements of the offense to which the noncitizen entered a plea (as elucidated by the information in the record of conviction), rather than to the actions he took in commission of the offense. *Taylor v. United States*, 495 U.S. 575 (1990); see also *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2001). As the Court did in *Belless*, any state assault and battery statute must be examined to determine the minimum conduct that would be required to sustain a finding that the offense is a crime of violence. *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989). In *Belless*, the Court found that the minimum conduct punished by the Wyoming statute, unlawfully touching someone in a rude, insolent or angry manner, did not rise to the level of violent physical force required to constitute a crime of violence. *Belless*, 338 F.3d at 1067-70. The Court distinguished the Wyoming statute from the Maine assault and battery statute, which criminalized "offensive physical contact," because that latter statute had been limited by caselaw to

"require [ ] more than a mere touching of another." *Id.* at 1068 (quoting *United States v. Nason*, 269 F.3d 10, 16 (1st Cir. 2001)). Even the slightest touching can constitute the offense of simple battery under California Penal Code § 242. *People v. Rocha*, 3 Cal.3d 893 (1971).

Applying the holding in *Belles* to the immigration context, a state assault and battery statute under which a conviction may be sustained where the defendant merely touched another person (however rudely or offensively) cannot, by itself, sustain a finding that a noncitizen has committed a crime of violence under 18 U.S.C. § 16(a), and therefore cannot sustain a finding that the noncitizen is removable as an aggravated felon for a crime of violence under 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F), or as a noncitizen convicted of a domestic violence offense under 8 U.S.C. § 1227(a)(2)(E)(i), INA § 237(a)(2)(E)(i). This ruling may also have favorable implications for Sentencing Guidelines determinations regarding "crimes of violence" under various definitions.

4. PRINT RESOURCES: For a discussion of aggravated felony crimes of violence, see N. Tooby & K. Brady, *Criminal Defense of Immigrants* § 6.37 et seq. (3d ed. 2003); Norton Tooby, *Aggravated Felonies* § 5.13 (2003), which may be ordered at [CriminalAndImmigrationLaw.com](http://CriminalAndImmigrationLaw.com). See also C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 71.05[2][d][ii] (2003); Dan Kesselbrenner & Lory Rosenberg, *Immigration Law and Crimes*: § 7:28 (2003).

For more on domestic violence offenses see, N. Tooby & K. Brady, *Criminal Defense of Immigrants*, chapter 8 (3d ed. 2003), which may be ordered at [CriminalAndImmigrationLaw.com](http://CriminalAndImmigrationLaw.com). See also Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 71.05[4][d] (2003); Dan Kesselbrenner & Lory Rosenberg, *Immigration Law and Crimes*: § 2:20 (2003).