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What Every Maryland Criminal Defense Attorney Should Know About Immigration

September – October 2007

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- Funded by The Open Society Institute of Baltimore
- Co-sponsored by:
 - University of Maryland School of Law
Small Firm Practice: Immigration Clinic
 - Maryland Office of the Public Defender
Training Division
 - Maryland Criminal Defense Attorneys Association
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September 26, 2007

Principles of Analysis of Convictions for Immigration Purposes

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Crim Rule 4-242(e)

- (e) Collateral Consequences of a Plea of Guilty or Nolo Contendere.
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- Before the court accepts a plea of guilty or nolo contendere, the court, the State's Attorney, the attorney for the defendant, or any combination thereof shall advise the defendant
 - (1) that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship and
 - (2) that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea.
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- The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.

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Crim Rule 4-242(e)

- Committee note. -- In determining whether to accept the plea, the court should not question defendants about their citizenship or immigration status. Rather, the court should ensure

- that all defendants are advised in accordance with this section....
- 7  **Crim Rule 4-242(e) (continued)**
 This Rule does not overrule
Yoswick v. State, 347 Md. 228 (1997)[failure to advise of collateral consequences does not render plea involuntary] and
Daley v. State, 61 Md. App. 486 (1985)[failure to advise of collateral deportation consequences does not render plea involuntary].
- 8  **Duty of criminal defense counsel**
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 • competent representation → advice ahead of the plea
 – ABA standard 14-3.2(f) collateral consequences of plea
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- 9  **6 steps to address immigration consequences**
 1) Find out client's immigration status *and potential status* – thorough intake.
 2) Was there a conviction?
 3) Identify the category/ies of the crime – aggravated felony? CIMT? Firearms? etc.
 4) Identify the immigration consequences.
 5) Identify potential immigration relief.
 6) Craft a solution that avoids consequences and/or preserves relief.
- 10  **Conviction:
defined by the statute (INA)**
 • INA §101(a)(48)(A) [8 USC 1101(a)(48)(a)]
 The term "conviction" means, with respect to an alien,

 formal judgment of guilt of the alien entered by a court
 OR....
- 11  **Conviction: INA 101(a)(48)(A)**
If adjudication of guilt has been withheld, where –

 (i)
 • a judge or jury has found the alien guilty or
 • the alien has entered a plea of guilty
 • or nolo contendere
 • or has admitted sufficient facts to warrant a finding of guilt,
 AND....
- 12  **Conviction: INA 101(a)(48)(A) (cont.)**
 AND (ii) the judge has ordered

 some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

 [including probation, fine, or restitution,
 But NOT court costs]
- 13  **No Conviction in Maryland:**
 • Not guilty
 • Juvenile
 • Pre-plea diversion (with no admission or finding of guilt)
 • Stet / conditional stet
 • Vacated conviction

14 **Stet**

- Rule 4-248. Stet.

(a) Disposition by stet. On motion of the State's Attorney, the court may indefinitely postpone trial of a charge by marking the charge "stet" on the docket....
A stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of court for good cause shown.

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Stet ≠ conviction

(No finding or admission of guilt)

16 **Vacated judgment**

- A judgment, if vacated because of a constitutional defect – and not just for immigration purposes – is not a conviction for immigration purposes.

Matter of Pickering, 23 I. & N. Dec. 621 (BIA 2003)

17 **Convictions in Maryland**

- Guilty plea
- Nolo Contendere plea
- Alford plea with any sentence, even suspended
- Juvenile tried in adult court
- Probation before judgment (PBJ)
- Not criminally responsible (NCR)

18 **Md. Crim. Pro. § 6-220. Probation before judgment**

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- (b) (1) When a defendant pleads guilty or nolo contendere or is found guilty of a crime, *a court may* stay the entering of judgment, defer further proceedings, and *place the defendant on probation* subject to reasonable conditions if:

(i) the court finds that the best interests of the defendant and the public welfare would be served; and

(ii) the defendant gives written consent after determination of guilt or acceptance of a nolo contendere plea.

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Probation before judgment
IS a conviction.

(plea of guilt/nolo contendere plus probation or fine)

20 **Not criminally responsible (NCR)**

Md. Crim. Pro. § 3-110.

- (c) If the trier of fact finds that the State has proved beyond a reasonable doubt that the defendant committed the criminal act charged, *then*, ... the trier of fact separately shall find whether the defendant ... was at the time criminally responsible or not criminally responsible by reason of insanity

If it results in confinement to hospital or other restrictions, NCR is a conviction.
§3-112(c) allows release if State agrees and defendant poses no danger .

21 **Term of imprisonment:**
INA 101(a)(48)(B) [8 USC 1101(a)(48)(B)]

Any reference to a term of imprisonment of a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

22 **A brief history....**

- Crimes involving moral turpitude have long held immigration-related consequences for non-US-citizens (1952 INA).
- §212(c) waiver was widely used as relief from deportability. Allowed immigration judge to weigh the severity of the criminal offense against the respondent's equities and ties to the U.S.

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- In 1988, Congress invented aggravated felons. Ag fels included murder, drug trafficking, weapons offenses.
- IMMACT 90 expanded definition of ag fel, limited §212(c) relief for ag fels who served > 5 years.

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- AEDPA, 1996, expanded ag fel and mandatory detention of convicted individuals. Eliminated §212(c) waiver for convicted individuals.
- Long line of litigation led to *INS v. St. Cyr*, 533 U.S. 289 (2001), which restored §212(c) for those who had made plea agreement prior to April 24, 1996.

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- In 1996, IIRAIRA
 - Defined conviction and sentence to incarceration.
 - Established mandatory detention for accused criminal aliens.
 - Eliminated §212(c) entirely and replaced it with cancellation of removal for LPRs, but anyone convicted aggravated felony is ineligible.
 - Restricted §212(h) and §212(i) waivers.

26 **Categorical analysis of charges**

- Analysis is based on statutory and common law elements of the charge – not the actual facts.
 - Formalistic analysis.
 - Immigration judge should not be in a position of having to “retry” the facts of the case.
 - Can work in respondent's favor. Court will look at the least egregious conduct that could sustain a conviction.

27 **For crimes involving moral turpitude (CIMTs), courts developed a strict categorical analysis:**

- (1) Statutory and common law elements of the crime determine whether a crime involves moral turpitude:

“the inherent nature of the crime as defined by statute and interpreted by the courts,” *Matter of Short*, 20 I. & N. Dec. 136 (BIA 1989).

Court may reference statute, caselaw, jury instructions.

28 **Divisible statutes**

- (2) Only where a statute has divisible sections (one that involves moral turpitude and one that does not), the court will look to the record of conviction.

- Sole purpose is to determine which section the conviction was under.
- Unless statute is divisible, court should only look to legal elements, not the facts.

29 **Record of conviction**

- Includes:
 - Charging document
 - In Md. Circuit Court, the Indictment
 - In Md. District Court, Statement of Charges (including affidavit of police or complaining witness).
 - Where charges are amended, facts alleged for stricken charges cannot be taken into account.
 -
 - (cont....)
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30 **Record of conviction includes:**

-(cont.)
 - Record of plea
 - Transcript of plea,
 - written plea agreement,
 - statement of facts supporting the plea
 - Record of verdict
 - Docket entries
 - Record of sentencing
 - Transcript of sentencing
 - Docket entries
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31 **Record of conviction does NOT include:**

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- Police reports
 - (except in Md as incorporated into the Statement of Charges)
- Pre-sentencing reports

32 **Examples of categorical analysis:**

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- Does a conviction under Md Crim. Law §3-203, "Assault in the second degree," involve moral turpitude?
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- (Moral turpitude refers to acts that are considered to be "inherently" evil, base, vile or depraved – *malum in se* – and generally involve specific knowledge or intent to do harm.)

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- § 3-203. Assault in the second degree
 - (a) Prohibited. -- A person may not commit an assault.
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- §3-201(b) Assault. -- "Assault" means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.

- Intentional, harmful or offensive contact (or attempted or threatened contact), no matter how slight.
- Can include unconsented, slight contact not intended to harm.

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If a statute is not divisible and includes some conduct that involves moral turpitude and some that does not, the immigration court must consider the least egregious conduct that would support conviction.

Simple assault is NOT a CIMT.

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Example 2:

- Does a conviction under Md. Crim. Law §4-101 “Dangerous weapons” involve moral turpitude?

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Md. Crim. Law §4-101

(c) Prohibited. –

(1) A person may not wear or carry a dangerous weapon of any kind concealed on or about the person.

(2) A person may not wear or carry a dangerous weapon, chemical mace, pepper mace, or a tear gas device openly with the intent or purpose of injuring an individual in an unlawful manner.

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- A conviction under Md. Crim. Law §4-101(c)(1) (carrying concealed weapon) does not involve moral turpitude.
- A conviction under Md. Crim. Law §4-101(c)(2) (carrying concealed weapon with intent to injure another) DOES involve moral turpitude.

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Where a statute is divisible,

The immigration court may look to the record of conviction, but only to determine – based on the facts alleged there – under which section the conviction occurred.

- If the record of conviction does not clarify, the court cannot hold that the crime involves moral turpitude.
- If the conviction is for the lesser offense, clarify the record to eliminate any doubt.

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Modified categorical analysis

- Less advantageous to respondent.
 - Govt has more leeway to use record of conviction to “narrow” the scope of the offense.
- Used to analyze:
 - Aggravated felonies
 - Controlled substance offenses
 - Crimes of domestic violence
 - Firearms offenses

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Crimes listed in the INA

(aggravated felonies, controlled substances, domestic violence, firearms, etc.)

- Include “analogous” state offenses
 - Uniformity across states
 - Elements must track the federal statute or a “generic” federal definition of the crime.
- Example: Simple possession is not a felony.
 - Can be a felony in Virginia – could make it an aggravated felony?
 - S.Ct. held offense must be a felony under federal law. *Lopez v. Gonzalez*, 127 S. Ct. 625 (2006)
- Example: Definition of burglary (aggravated felony).
 - In some states includes vehicles.
 - “Generic” definition does not. *Taylor v. U.S.*, 495 U.S. 575 (1990)

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- 42  **Modified categorical analysis**
 - Court compares the elements of a state charge with the elements of the federal statute or the “generic” definition to see if offense is “analogous.”
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 - Where the statute is unclear or includes conduct not in the generic definition, the court may look to record of conviction to see if, based on the facts alleged, the fact-finder was required to find all the generic or federal elements.
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- 43  **Example of modified categorical analysis: Burglary**
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 - Does state burglary conviction constitute an aggravated felony?
- 44  **Example of modified categorical analysis: Burglary**
 - State statute includes burglary of a building or a vehicle.
 - Generic federal definition does not include vehicles.
 - Court may look to record of conviction to see if defendant was only charged with entering a building, thus requiring jury or court to have found that fact to have supported conviction. *Taylor v. U.S.*, 495 U.S. 575 (1990)
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- 45  **Example of modified categorical analysis: Second degree assault**
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 - Is Md. second degree assault a crime of violence (and thus possibly an aggravated felony)?
- 46  **Example of modified categorical analysis: Second degree assault**
 - § 3-203 – can include either a use of force or any unconsented touch, no matter how slight.
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 - Under modified categorical analysis, immigration court may look at record of conviction to determine whether assault involved a use of force. *U.S. v. Kirksey*, 138 F.3d 120 (4th Cir. 1998).
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