What Every Maryland Criminal Defense Attorney Should Know About Immigration

September – October 2007
© 2007 University of Maryland School of Law

• 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

• Presented by:
  – Fernando A. Nuñez
  – Maureen A. Sweeney
    University of Maryland School of Law
    Small Firm Practice: Immigration Clinic
  – Laura Kelsey Rhodes
    Albright and Rhodes, LLC

October 10, 2007

Consequences and Categories of Convictions (part 2)

5 Crimes of Domestic Violence
• INA §237(a)(2)(E)
• “Crime of domestic violence” defined as crime of violence (under 18 USC §16) against
  – Spouse, former spouse
  – Other parent of person’s child
  – Current or past live-in partner
  – Individual similarly situated to spouse under the jurisdiction’s domestic violence laws
  – Individual protected under domestic violence laws of US or state or local government

6 Categorical analysis of domestic violence offenses
• Court should look only to the elements of the crime to determine whether
  – it is a crime of violence (involving the use of force or a risk of the use of force) AND
  – a domestic relationship is an element of the crime.
• If charge includes some conduct that is and some that isn’t, the modified categorical
  approach allows court to look to the record of conviction.
Maryland domestic violence charges are brought under general assault and battery provisions.
- Case may not be identified as domestic.
- In the 4th Circuit, courts may look to the record of conviction to see whether 2d degree assault under (Md Crim Law § 3-203) is a crime of violence. Kirksey, 138 F3d 120 (4th 1998)
- As a practical matter, court will also look to information regarding the victim.

Consequences of a crime of domestic violence
- Removable under §237(a)(2)(E)
  - Potential waiver only for primary victim of abuse
- May or may not also be a crime of moral turpitude (CMT)
  - Any intent to harm will make it a CMT.
  - Simple assault in domestic context may not be.
  - CMT would be inadmissible under §212(a)(2)
    - No entry or re-entry to US
    - Unable to adjust status/ get green card
    - Subject to mandatory detention
    - CMT would be unable to show good moral character

Consequences of a crime of domestic violence (cont.)
- May also be an aggravated felony
  - If sentence imposed ≥ 1 year
  - Subject to all the consequences for an ag fel
    - Removable
    - Permanently barred from reentering
    - Mandatory detention
    - Barred from asylum, showing good moral character
- Likely will be found to lack good moral character
  - Ineligible for naturalization/ citizenship

Strategies for domestic violence offenses
- Keep the record clear of references to family or domestic relationship.
- Negotiate a re-papering by the state to avoid damaging facts in the charging documents.

Other offenses included with domestic violence in §237(a)(2)(E)
- Stalking
- Violation of a protective order
- Child abuse
- Child neglect
- Child abandonment

- All make the individual removable.

Firearms Offenses
- Violation of any law of
  - Purchasing
  - Selling
  - Offering for sale
  - Exchanging
  - Using
  - Owning
  - Possessing
– Carrying.....

13 Firearms Offenses (cont.)
• .... of a weapon, part or accessory which is a
  – Firearm or
  – Explosive device (as defined by 18 USC 921(a))
  –
  – Does NOT include an antique firearm.
  – Includes attempts and conspiracy to violate any of the above laws.

14 BEWARE
➢ A firearms offense may also be an aggravated felony:
  –
  – Trafficking in firearms or destructive devices
  – Receipt of stolen firearm
  – Use of firearm in a felony
  – Transfer of firearm, knowing it will be used in a felony
  – Possession of firearm by:
    • Convicted felon
    • Fugitive
    • Unlawful user of controlled substance
    • Adjudicated mentally ill
    • “illegal alien” or non-immigrant

•

15 Examples for firearms offense
Md Crim Law § 4-203.
Wearing, carrying, or transporting handgun

• Prohibited

(a)(1) Except as provided in subsection (b) of this section, a person may not:

(i) wear, carry, or transport a handgun, whether concealed or open, on or about the person....

•

16 Analysis of Md. Crim. L. §4-203
• Not an aggravated felony
  – Possession or carrying is not analogous to federal offenses listed in INA §101(a)(43)
  – State statute does not require proof of immigration status (so not analogous to 18 USC 922(g)(5)
• Not a CIMT
  – regulatory offense, no intent to use to harm
• YES, it is a firearms offense – a law of carrying or possessing a firearm.

•

17 Firearms example 2:
Md Crim Law § 3-202:
Assault in the first degree

• Prohibited

(a)(1) A person may not intentionally cause or attempt to cause serious physical injury to another.
(2) A person may not commit an assault with a firearm, including:

- (i) a handgun, antique firearm, rifle, shotgun, short-barreled shotgun, or short-barreled rifle, as those terms are defined in §4-201 of this article.
- (ii) assault pistol...
- (iii) machine gun...

18 Analysis of Md. Crim. L. §4-203
- Aggravated felony
  - IF sentence ≥ 1 year.
- CIMT
  - intent to injure or assault with deadly weapon.
- Firearms offense?
  - Divisible, because it includes antique firearm
  - Modified categorical approach allows court to look to record of conviction to see if facts alleged necessarily include firearms offense w/in federal definition

19 Consequences of firearms offense
- Requires a conviction (not just an admission)
  - Removability/ deportability (§237(a)(2)(C))
    - May be able to adjust status to “waive” offense
    - May be eligible for cancellation of removal
  - Mandatory detention

20 Consequences of firearms offenses (cont.)
- May also be aggravated felony:
  - Trafficking in firearms or destructive devices
  - Receipt of stolen firearm
  - Use of firearm in a felony
  - Transfer of firearm, knowing it will be used in a felony
  - Possession of firearm by:
    - Convicted felon
    - Fugitive
    - Unlawful user of controlled substance
    - Adjudicated mentally ill
    - “illegal alien” or non-immigrant
  - Subject to all the consequences of an aggravated felony

21 Consequences of firearms offenses (cont.)
- NOT a CMT, nor statutory bar to good moral character
  - BUT could be a discretionary factor in green card application or naturalization
- NOT a bar to asylum, but may be discretionary factor
- NOT a bar to naturalization
  - though resulting incarceration during the statutory 3 or 5 years could be