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# **A PROFESSIONAL CORPORATION**

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##### MEMBER

NJ, NY & FL BARS

July 19, 2013

Re: State vs. Mr. Jones

Dear Mr. Attorney:

Mr. Jones has been charged under Indictment S-0199-13, Second Count under NJSA 2C:20-3, Theft by Unlawful Taking or Disposition; Third and Fourth Count under NJSA 2C:5-11, 2C:18-2, Attempted Burglary; and Fifth Count under NJSA 2C:18-2, Burglary. I have had an opportunity to review the entire discovery in this matter.

Mr. Jones is an undocumented foreign national. There are several aggravated felony grounds of removal involved in this case:

1. Burglary Offense INA §101(a)(43)(6): “Burglary offense for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) isat least one year”. Definition: [T]he unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.”

Burglary might also be considered an attempted theft aggravated felony if the target offense of the burglary is theft. INA §101(a)(43)(4).

1. Theft Offense (including receipt of stolen property) INA §101(a)(43)(6): “a theft offense (including receipt of stolen property)…for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least one year.” Definition: [A] taking of property is a “theft” whenever there is criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent.
2. Crime of Violence INA §101(a)(43)(F): “a crime of violence (as defined in Section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least one year”.

(A). 18U.S.C. §16(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…”

Few theft offenses qualify under §16(a), because they do not have as an element use, attempt or threat to use force to commit the offense.

(B). 18 U.S.C. §16(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.”

Residential Burglary has been held to be a crime of violence under 18 U.S.C. §16(b) because courts have held there is a substantial risk that violence will be used to commit the offense if the homeowner arrives home during the offense. The actual chances that the homeowner will in fact arrive home during the burglary are not considered. *Leocal v. Ashcroft*, 543 U.S. 1, 125 5.ct.377 (November 9, 2004).

In conclusion, a guilty plea to the burglary, attempted burglary or theft offense with a one-year jail sentence would result in Mr. Jones being deported. A guilty plea with less than a one-year jail sentence (ex. 364 days) would result in Mr. Jones being convicted of a crime involving moral turpitude (CIMT). Mr. Jones is married to a United States Citizen and eligible to apply for permanent residence (i.e., receive a green card). However, a foreign national convicted of a CIMT is inadmissible and deportable.

**Crimes Involving Moral Turpitude, INA § 237(a)(2)(A)(i):**

1. **Burglary.**Where burglary is defined as entry with intent to commit theft or any felony, the statute is considered divisible.Where the entry is made with the intent to commit theft, the burglary conviction would be a CIMT. Where the entry is committed for the purpose of committing a non-theft offense that involves moral turpitude, the burglary conviction would be a CIMT. Where, however, the burglary is committed for the purpose of committing a non-CIMT offense, the burglary conviction is not considered a CMT.Finally, where the record of conviction does not establish whether the offense intended to be committed upon entry was a CIMT offense or not, then the burglary conviction would not be considered a CIMT for deportation purposes,since the DHS bears the burden of proving that the conviction falls within the ground of deportation.
2. **Theft.** Theft has traditionally been found to involve moral turpitude.This includes theft by deception or false pretenses. Offenses that do not require, as an essential element, an intent to permanently deprive the owner of the property are not classified as theft crimes involving moral turpitude.Where a theft statute prohibits both temporary and permanent taking, the statute is considered divisible, allowing the record of conviction to be examined in order to determine whether the conviction was under the portion of the statute relating to permanent taking and therefore involved moral turpitude, or under the portion of the statute prohibiting temporary taking, in which case it did not.

**SAFE HAVENS**

None of us are miracle workers but here are a few “Safe Havens”[[1]](#footnote-2). I am happy to construct the plea allocution for you.

* Any type of theft were the taking was NOT permanent (i.e., joy riding).
* Unlicensed entry of structure with NO intent to commit a morally turpitudinous act after entry. NJSA 2C:18-3a.
* Burglar’s Tools without intent to use them to commit a morally turpitudinous act such as larceny. NJSA 2C:5-5.

I recognize that the prosecutor may not be amenable to any of the above suggestions. Thank you for the referral. Please contact me in order to discuss more fully.

Very truly yours,

Ronald P. Mondello

RPM/cab

Cc: Mr. Jones

1. Please understand what is “safe” today can become “unsafe” tomorrow. This is a very dynamic area of the law constantly changing. [↑](#footnote-ref-2)