**RONALD P. MONDELLO, P.C.**

# **A PROFESSIONAL CORPORATION**

###### ATTORNEY AT LAW

0-100 27th Street

Fair Lawn, New Jersey 07410

(201) 703-9400

**Telecopier (201) 703-9430**

[www.municipalcourt.com](http://www.municipalcourt.com)

##### MEMBER

NJ, NY & FL BARS

January 25, 2011

Re: State v. Joe JONES

Immigration Consequences of Sexual Abuse of a Minor

Dear Mr. Attorney:

Thank you for referring the above defendant with respect to the immigration consequences of his pending New Jersey criminal violations. I appreciate the time that you and Mr. Jones have spent with me on the telephone and in my office.

Although I am not presently aware of any proposed plea in Mr. Jones's case, I thought I would take this opportunity to opine as to the immigration consequences with respect to the current charges. If Mr. Jones pleads guilty to ANY of the charges and provides a factual basis that involves ANY sexual contact with a minor, he will placed in removal proceedings. The immigration charge will be sexual abuse of a minor, an aggravated felony for which there is simply no relief.

My opinion is based on the recent United States Court of Appeals, Third Circuit decision in Restrepo v. Attorney General of the United States, 617 F.3d 787 (C.A.3) decided on August 16, 2010. Mr. Restrepo pled guilty to a violation of NJSA 2C:14-3(a) Criminal Sexual Contact. Although a different violation, Mr. Restrepo's plea colloquy consisted of an admission to fondling his daughter about the breast and vagina. This was considered sexual abuse of a minor and as such is an aggravated felony for immigration purposes. Conviction of an aggravated felony eliminates most (if not all) relief (defenses) from removal.

The Third Circuit adopted a very expansive definition of sexual abuse of a minor using 18 U.S.C.A. § 3509. I have included the code below:

**Sexual Abuse of a Minor**

§ 3509. Child victims' and child witnesses' rights

(a) Definitions.--For purposes of this section--

(1) the term “adult attendant” means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

(2) the term “child” means a person who is under the age of 18, who is or is alleged to be--

(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

(B) a witness to a crime committed against another person;

(3) the term “child abuse” means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(4) the term “physical injury” includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(5) the term “mental injury” means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

(6) the term “exploitation” means child pornography or child prostitution;

(7) the term “multidisciplinary child abuse team” means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

(8) the term “sexual abuse” includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term “sexually explicit conduct” means actual or simulated--

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

You can readily see that Mr. Jones's alleged conduct falls with § 3509(a)(9). Mr. Jones's case is similar to Mr. Restrepo's case in that similar New Jersey Statutes are implicated and Mr. Jones is related to the victim. The Department of Homeland Security (DHS) and United States Customs and Immigration Service (USCIS) is taking the position that an alien who engages in such behavior, engages in the sexual abuse of a minor. This could of course change in the future should someone challenge DHS's and USCIS's position in the Court of Appeals. I am planning to do so depending on the outcome of a similar case before the Board of Immigration Appeals.

The obvious "safe haven" to plead Mr. Jones to is a violation of NJSA 2C:24-4(a) Endangering the Welfare of a Child without a "sexual contact" allocution or factual basis from Mr. Jones. There are two disjunctive sections to NJSA 2C:24-4(a) without a sexual conduct element that are "safe havens" for Mr. Jones. Namely, "...or who causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3 and P.L.1974, c.119, § 1 (C.9:6-8.21)". In addition, "Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16...". The "safe haven" must be supported by an allocution that is completely devoid of sexual contact. There is a risk that Mr. Jones could be charged by ICE with child abuse but this is not an aggravated felony.

I have attached a copy of the Restrepo case and a copy of Stubbs v. Attorney General of the United States, 452 F.3d 251 (3d Cir. 2006). The Court of Appeals in Stubbs found that a violation of NJSA 2C:24-4(a) Endangering the Welfare of a Child was NOT an aggravated felony. However, the record was devoid of any "sexual contact" allocution. The Government was only able to produce the Judgment of Conviction, not the plea colloquy.

Thank you again for referring Mr. Jones to my office. Please contact me at the above number should you wish to discuss Mr. Jones's case further.

Very truly yours,

Ronald P. Mondello

RPM/cab

Enc.

cc: Joe Jones