InvalidDeportationNotAggravatedFelony[2012]

1. California Vehicle Code Section 10851(a) is not an aggravated felony.

California Vehicle Code Section 10851(a) ("Section 10851(a)") is overbroad because it includes accessory liability for vehicle theft and CLIENT's conviction documents do not foreclose that he was convicted on an accessory theory. Thus, CLIENT's Section 10851(a) conviction is not an aggravated felony.[1]

a. Section 10851(a) is overbroad because it permits conviction for being an accessory to vehicle theft and CLIENT'S conviction documents do not establish that he was convicted as a principal.

The Ninth Circuit defines a theft offense as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *United States v. Vidal*, 504 F.3d 1072, 1077 (9th Cir. 2007) (en banc). In *Vidal*, the court held that a conviction under Section 10851(a) "is not categorically a theft offense . . . because whereas the generic theft offense encompasses only principals, accomplices, and others who incur liability on the basis of pre-offense conduct, section 10851(a) also reaches accessories after the fact." *Id*. Because Section 10851(a) does not categorically qualify as a generic theft offense, in this case the Court must conduct a modified categorical analysis and determine whether "the record confirms that the plea necessarily rested on the fact identifying the offense as generic." *Id.* (citations and quotations omitted).

In *Vidal*, the Ninth Circuit reiterated that "an indictment that merely recites the language

[1] He also contends that Section 10851(a) permits conviction for temporary deprivations of property that do not qualify as generic theft. Though this argument appears to have been foreclosed by *Arteaga v. Mukasey*, 511 F.3d 940, 947 (9th Cir. 2007), CLIENT raises it here to preserve the issue should the Ninth Circuit have occasion to revisit its decision.

of the statute . . . is insufficient to establish the offense as generic for purposes of a modified categorical analysis." *Id*. at 1088 (citing *United States v. Lopez-Montanez*, 421 F.3d 926, 931 (9th Cir. 2005)). Moreover, the Court has consistently held that " 'charging documents are insufficient alone to prove facts to which a defendant admitted.' " *Id*. (citations omitted). Indeed, as the Court recognized in *Vidal*, "California prosecutors regularly employ generic charging language . . . when prosecuting section 10851(a) offenses . . . [and] [i]n light of this apparently standard practice, [the Ninth Circuit could] not conclude from the 1994 charging document, which likewise simply recited the statutory elements of the offense and inserted the victim's name and car description, that Vidal admitted to the facts as generically alleged." *See id*. at 1088 n.1 and cases gathered therein. The complaint against Mr. Vidal charged him as follows: "On or about June 21, 1994 [Vidal] did willfully and unlawfully drive and take a vehicle, the personal property of GARY CRAWFORD, without the consent of and with intent to deprive the owner of title to and possession of said vehicle, in violation of Vehicle Code Section 10851(a)." *Id*. at 1075.

In light of the Ninth Circuit's *Vidal* analysis, CLIENT'S Section 10851(a) conviction does not qualify as an aggravated felony. The Ninth Circuit unequivocally held that Section 10851(a) is not categorically a crime of violence. Therefore, the Court must conduct a modified categorical analysis to determine if CLIENT'S conviction qualifies as an aggravated felony. It does not. On April 25, 2002, CLIENT was charged with, among other things, one count of violating Section 10851(a). The complaint charged CLIENT as follows: "On or about February 18, 2002, in the County of Los Angeles, the crime of unlawful driving or taking of a vehicle in violation of vehicle code section 10851(a), a Felony, was committed by CLIENT, who did unlawfully drive and take

a certain vehicle . . . without the consent of and with intent, either permanently or temporarily, to deprive said owner of title to and possession of said vehicle." (Ex. E at 2.) On May 7, 2002, CLIENT pled no contest to one count of "unlawful driving or taking of a vehicle in violation of vehicle code section 10851(a), a felony." (Ex. F (plea colloquy from May 7, 2002 conviction) at 8.) The complaint, and the Court in its colloquy, merely parroted the statutory language. This charging language is very close to the charging language used in *Vidal* -- language the Ninth Circuit held did not establish "that Vidal admitted to the facts as generically alleged." *Vidal*, 504 F.3d at 1088 n.1. Thus, the generic charging language used in the complaint against CLIENT, and confirmed by the state court in its plea colloquy, do not establish that CLIENT admitted to facts constituting a generic theft offense and, therefore, do not establish that CLIENT committed an aggravated felony.

2. California commercial burglary is not an aggravated felony.

CLIENT'S second-degree burglary conviction likewise does not qualify as an aggravated felony. A conviction for California commercial burglary does not qualify as generic burglary, because it lacks the generic element of an unlawful or unprivileged entry. Moreover, it does not qualify as an attempted theft offense. Finally, CLIENT'S burglary conviction does not qualify as a crime of violence under 18 U.S.C. §16, because California burglary does not have as an element the use, attempted use, or threatened use of force or involve a substantial risk of physical force.

a. California burglary is categorically overbroad as generic burglary.

CLIENT'S burglary conviction does not qualify as generic burglary. California burglary is unique in that it does not require an unlawful or unprivileged entry. The California statute includes consensual entries with intent to write a bad check, *see, e.g., People v. Nguyen*, 46 Cal.

Rptr. 2d 840, 841, 844 (Ct. App. 1995), consensual entries with intent to commit stock fraud, *see, e.g., People v. Salemme*, 3 Cal. Rptr. 2d 398, 399, 402 (Ct. App. 1992), and consensual entries with intent to "con" the resident in some other way, *see, e.g., People v. Parson*, 187 P.3d 1, 17 (Cal. 2008). Offenses of this sort do not create the risk of a face-to-face confrontation between the burglar and a third party that is created by generic burglary – which requires a nonconsensual entry. Moreover, the state's definition of an "unlawful" entry only requires entry with a criminal intent that jeopardizes the owner's possessory rights. *See People v. Frye*, 959 P.2d 183, 212-13 (Cal. 1998), *disapproved on other grounds in People v. Doolin*, 189 P.3d 11 (Cal. 2009).

Consequently, California burglary does not categorically qualify as generic burglary. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 944 (9th Cir. 2011) (en banc) ("burglary under California Penal Code § 459 is categorically broader than generic burglary because California's definition of 'unlawful or unprivileged entry,' unlike the generic definition, permits a conviction for burglary of a structure open to the public and of a structure that the defendant is licensed or privileged to enter"). Because California prosecutes under its "burglary" statute "both where the premises are open to the public and where the person is licensed or privileged to enter," it is broader than the generic offense of 'burglary,' which requires the entry be unprivileged. *Id.*; *see Taylor v. United States*, 495 U.S. 595, 598 (1995) (generic burglary involves "an unlawful or unprivileged entry"). Since offenses under Cal. Penal Code § 459 lack either required element, it is categorically overbroad. *Id.*

Nor does CLIENT's conviction qualify under the modified categorical approach. That is because, as in *Aguila-Montes de Oca*, the charging document, plea colloquy, and abstract of judgment here fail to narrow the offense to an unprivileged or unlicensed entry, as required by the

generic offense. *See id.* at 946. Because "conviction records for California burglary cannot demonstrate that a defendant was convicted of generic burglary unless they do something more than simply repeat the elements of California burglary," *id.*, and that is all that CLIENT's documents do, "the documents produced by the government do not demonstrate that [CLIENT's] conviction necessarily rested on facts satisfying the elements of the generic crime." *Id.* Since his conviction cannot be shown to be generic burglary, it fails to qualify as an aggravated felony under that prong of § 1101(a)(43)(G).

b. CLIENT'S burglary conviction is not an attempted theft offense.

Similarly, CLIENT's commercial burglary conviction is neither an actual nor attempted theft offense under the other prong of § 1101(a)(43)(G). The offense does not have larceny as a required element nor does it require a specific intent and overt act toward stealing to qualify as an attempted theft crime. Therefore, it does not qualify as an aggravated felony.

In *Hernandez-Cruz v. Holder*, 651 F.3d1094 (9th Cir. 2011), the Court considered California's second-degree (commercial) burglary statute as a predicate conviction supporting an order of deportation. In light of the fact that California burglary criminalizes entries for the purpose of committing *any* felony, not just larceny, it is not categorically a generic theft offense. *See id.* at 1100 (citing *Ngaeth v. Mukasey*, 545 F.3d 796, 801 (9th Cir. 2008) (per curiam)).

The court also rejected the BIA's reasoning that the conviction was for a generic *attempted* theft offense, because the information alleged entry into the business "with the intent to commit larceny and any felony." *Id.* at 1101. *Hernandez-Cruz* held that entering a business open to the public did not constitute a substantial step toward completion of a theft offense, even if the intent is not in dispute. *See id.* at 1102-03. That is distinct from the situation in *Ngaeth*, where entry

into a locked vehicle was found to be a substantial step toward an attempted theft, since the manner of entry indicated an intention to carry through to completion of the offense. *See id.* at 1104. Mere entry into a business establishment was significantly more equivocal, and so insufficient to constitute an attempt. *See id.*

Similarly here, CLIENT's plea documents show only that, at most, he entered a business with the intent to steal. But the required element of a substantial step for an attempt is equally lacking as in *Hernandez-Cruz.* Again, since the noticeable documents proffered to the IJ do not establish both required elements, CLIENT's conviction was not an aggravated felony as an attempted theft offense.

c. CLIENT's conviction is not a crime of violence

Finally, CLIENT's commercial burglary conviction does not qualify as a generic crime of violence, nor do the documents indicate otherwise.

It is true that both the Supreme Court and this Court have noted in general terms that "burglary" can be a crime of violence. *See, e.g., Leocal*, 543 U.S. at 10; *Estrada-Rodriguez v. Mukasey*, 512 F.3d 517, 521 (9th Cir. 2007); *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1084 (9th Cir. 2007). The reason that some burglaries are crimes of violence is because of "the possibility of a face-to-face confrontation between the burglar and a third party – whether an occupant, a police officer, or a bystander – who comes to investigate." *James v. United States*, 550 U.S. 192, 203 (2007). *See also United States v. Mayer*, 560 F.3d 948, 960 (9th Cir. 2009) (quoting *James*); *Malta-Espinoza*, 478 F.3d at 1084 (noting "risk that in the course of committing the crime [the burglar] will encounter one of [the dwelling's] lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension"

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(citation omitted).

The reasoning of *James* regarding the Florida attempted burglary statute at issue in that case makes clear the risk that was present in the Florida burglary statute is not present in the California burglary statute. The Florida attempted burglary statute, unlike the California statute, uses the generic definition of burglary that requires a nonconsensual entry. *See James*, 550 U.S. at 197 (quoting Fla. Stat. § 810.02(1) (1993)). In addition, as interpreted by case law, the Florida statute requires not just mere preparation, but an "overt act directed toward entering or remaining in a structure or conveyance." *James*, 550 U.S. at 202 (quoting *Jones v. State*, 608 So. 2d 797, 799 (Fla. 1992)). Based on these statutory requirements, the Supreme Court explained:

> Attempted burglary poses the same kind of risk [as completed generic burglary]. Interrupting an intruder at the doorstep while the would-be burglar is attempting a break-in creates a risk of violent confrontation comparable to that posed by finding him inside the structure itself. As one court has explained:
>
> > "In all of these cases, the risk of injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring. This is just as likely to happen before the defendant succeeds in breaking in as after. Indeed, the possibility may be at its peak while the defendant is still outside trying to break in, as that is when he is likely to be making noise and exposed to the public view. . . . [T]here is a serious risk of confrontation while a perpetrator is attempting to enter the building."

James, 550 U.S. at 203-04 (quoting *United States v. Payne*, 966 F.2d 4, 8 (1st Cir. 1992)).

Where there is not an "intruder" attempting such a "break-in," but a consensual entry to

write a bad check or shoplift by secreting items, there is not "the risk of violent confrontation" that there is with a Florida attempted burglary. Any arguable risk posed by consensual entry burglaries such as those to which the California statute applies is far-fetched and speculative, and certainly does not rise to the level of "substantial" risk which § 16(b) requires. *See United States v. Snellenberger*, 548 F.3d 699, 707 (9th Cir. 2008) (en banc) (M. Smith, J., dissenting) ("California has created an entire class of burglaries that no longer fits the description of a 'prototypically violent' crime."); *United States v. Mayer*, 560 F.3d 948, 953 (9th Cir. 2009) (Kozinski, C.J., dissenting from the denial of rehearing en banc) ("[t]he special danger of a break-in is therefore absent" when a state eliminates the unlawful entry requirement of a burglary).

Consequently, the typical situation of a commercial burglary, where the premises are not only open to the public, but often experiencing entries by strangers throughout the course of a business day, and which is usually unoccupied at night, the objective chances of violent encounters is substantially reduced. By their nature, commercial burglaries do not carry with them the factors likely to lead to violence: the sudden, unexpected, and non-consensual appearance of a stranger within the confines of one's own private home. Whereas the presence of an unbidden stranger in a home most directly relates to some criminal purpose, that is far from the expectation in a business where entry by strangers for multiple purposes may be openly invited.

For these reasons, commercial burglary can be readily distinguished from the residential-type burglary which was the focus in *United States v. Park*, 649 F.3d 1175 (9th Cir. 2011). There, the Ninth Circuit held that California *first-degree* burglary qualified as a crime of violence under the felon in possession statute and associated sentencing guideline. Applying the two-prong test developed for use with the Armed Career Criminal Act, *Park* found that residential burglaries carry

a serious, potential risk of harm to another in the ordinary case, and are roughly similar in kind and degree to the other enumerated offenses. *See id.* at 1178-80. Looking to state and federal decisions describing residential burglary as violent, *Park* cited language stressing the likelihood of violent, face-to-face encounters between burglars and lawful occupants. *See id.* at 1179. Likewise, the potential of violence arises from " 'the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.' " *Id.* (quoting *People v. Davis*, 958 P.2d 1083, 1089 (Cal. 1998)). Likewise, the commercial burglary for which CLIENT stands convicted differs crucially from the burglary of a residence, which was found to be an aggravated felony in *United States v. Ramos-Medina*, 682 F.3d 852, 855-57 (9th Cir. 2012) (noting substantial degree of risk of violence for a first degree burglary).

Although *Park* stated that lack of unprivileged entry in California burglaries did not alter its holding, *see id.* at 1179, the fact is, the factors it cited for treating *residential* burglaries as inherently risky of violence are ones that arise particularly from the circumstances of the sudden, non-consensual appearance of a burglar in a home. In a business, open to the public and perhaps having a number of unknown individuals on the premises at any one time with multiple purposes for being there, the chances of an angry or panicked reaction from a clerk or other business employee are far less. It would only be if the burglar offered some specific violence toward another that a likelihood of an escalating encounter as described in *James* or *Park* would arise. In short, because the presence of strangers is unexpected and suspicious in the context of a residence, but normal and even invited in the commercial context, the reasoning of *Park* does not apply to commercial burglaries such as CLIENT's conviction. Certainly, nothing in the proffered documents establishes that CLIENT's commercial burglary was conducted in a way that

constituted, "by its nature," "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). As a result, CLIENT's conviction was not a crime of violence under § 1101(a)(43)(F).