PRACTICE ALERT

Luna-Torres v. Lynch

An Alert for Practitioners

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national IMMIGRATION project of the National Lawyers Guild

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Practice Advisories published by the National Immigration Project of the National Lawyers Guild address select substantive and procedural immigration law issues faced by attorneys, legal representatives, and noncitizens.

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On May 19, the Supreme Court issued its latest crim-imm decision in *Luna-Torres v. Lynch*. Unfortunately, the Court majority ruled against Mr. Luna-Torres and affirmed the lower court (Second Circuit)'s ruling that he could be deemed convicted of an aggravated felony offense "described in 18 U.S.C. § 844(i)" (federal arson statute) even though the state statute of conviction lacked the element requiring an effect on interstate commerce, which Congress included to permit federal authorities to prosecute arson offenses and which the Court referred to as a "jurisdictional element."

Here is a link to the Supreme Court's decision:
http://www.supremecourt.gov/opinions/15pdf/14-1096_5hdk.pdf%20

In the 5-3 decision in *Luna-Torres*, the majority stated:

> In this case, we must decide if a state crime counts as an aggravated felony when it corresponds to a specified federal offense in all ways but one—namely, the state crime lacks the interstate commerce element used in the federal statute to establish legislative jurisdiction (i.e., Congress's power to enact the law). We hold that the absence of such a jurisdictional element is immaterial: A state crime of that kind is an aggravated felony.

Slip op. at 4.

The majority opinion lists several provisions in the aggravated felony definition that, similar to the federal arson provision, refer to offenses "described in" federal criminal statutes including a jurisdictional (interstate commerce) element, such as certain federal firearm offenses, various federal explosives offenses, and the federal money laundering statute. *Luna-Torres*, slip op. at 8, n.6. Given the Court's general language that "such an element is properly ignored when determining if a state offense counts as an aggravated felony," *Luna-Torres*, slip op. at 21, the Court's decision would also apply aggravated felony consequences to many state offenses otherwise matching these other cross-referenced federal crimes.

The decision does not limit in any way, however, the "categorical approach's rigorous requirements[,]" *Luna-Torres*, slip op. at 14, n.10, that in determining whether a state offense matches with a federal offense, a factfinder should presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). Thus, *Luna-Torres* does not alter the Court's strict

rules regarding divisibility and minimum conduct with a strict focus on the elements (non-jurisdictional) of the offense at issue. *See, e.g., Luna-Torres*, slip op. at 14, n.10.

Following are some other important points regarding the *Luna-Torres* decision that crim-imm defense practitioners, criminal defense practitioners, and immigrants facing similar or other aggravated felony charges should bear in mind:

- **For Third Circuit practitioners and immigrants**: The Supreme Court's decision puts in jeopardy the Third Circuit's decision in *Bautista v. Attorney General*, 744 F.3d 54 (3d Cir. 2014) in which the Third Circuit found that Mr. Bautista's New York state arson conviction - identical to Mr. Luna-Torres's - could not be deemed an aggravated felony because the state statute of conviction does not require a nexus with interstate commerce. Thus, criminal defense practitioners should be cognizant of this development in the law as they advise noncitizen defendants of the immigration consequences of certain criminal dispositions pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010); dispositions involving commerce element mismatches previously insulated by Bautista from aggravated felony charges will no longer be safe for noncitizen defendants placed later in removal proceedings in the Third Circuit. However, where the immigrant can argue that the commerce element is more than merely jurisdictional, it may still be possible to fight removal -- in fact, the favorable result in Bautista itself may arguably survive *Luna-Torres* on such a basis (see bullet point below).

- For practitioners and immigrants everywhere fighting aggravated felony charges cross-referencing federal crimes including a jurisdictional (interstate commerce) element with a substantive component: The Supreme Court's decision undercuts arguments challenging aggravated felony consequences for state offenses that the government alleges are "described in" federal criminal statutes containing an interstate commerce element that is there only for federal authorities to have jurisdiction. However, the majority opinion acknowledges that there may be instances where the interstate commerce element is not simply a federal jurisdictional hook, but actually substantively defines the crime: "We do not deny that some tough questions may lurk on the margins—where an element that makes evident Congress's regulatory power also might play a role in defining the behavior Congress thought harmful." *Luna-Torres*, slip op. at 18. Practitioners and immigrants should research federal law to determine whether there is any argument that the cross-referenced federal crime commerce element at issue in a particular case has such a substantive component. For example, as the *Luna-Torres*, dissent pointed out, dissenting opinion at 14, the Supreme Court has held

that the commerce element in the federal arson statute at issue in the *Luna-Torres* case itself, 21 U.S.C. §844(i), has a substantive component in reaching only destruction of commercial property and not destruction of an owner-occupied residential house. *See Jones v. United States*, 529 U.S. 848, 855 (2000). But, according to the majority, Mr. Luna-Torres did not contest that the commerce element of this federal statute was of the standard, jurisdictional kind. *Luna-Torres*, slip op. at 21. Perhaps the result would be different where an immigrant affirmatively highlights any substantive nature – "defining the behavior Congress thought harmful" – of the commerce element of the cross-referenced federal statute at issue in his or her case. *Luna-Torres*, slip op. at 18. For example, in the *Bautista* case, the Third Circuit found that the commerce element in § 844(i) does have a substantive component, and thus that Court determined that there was a substantive element mismatch. *See Bautista v. Attorney General*, 744 F.3d 54, 66-67 (3d Cir. 2014) (interstate commerce element in § 844(i) "does more than provide a jurisdictional hook for Congress . . . . Under § 844(i), the jurisdictional element has a meaningful narrowing effect on the range of arson criminalized.").

- For practitioners and immigrants everywhere fighting aggravated felony charges based on ambiguous or unclear aggravated felony definitional provisions: Importantly, the Supreme Court's decision does not defer to the agency under, or even apply or mention the statutory interpretation framework of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), despite the government having argued for application of *Chevron*. See Point B in Brief for the Respondent in *Luna-Torres v. Lynch*, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-1096_resp.authcheckdam.pdf. This is important because there is a good argument that, when the reach of an aggravated felony is ambiguous, the adjudicator must apply the criminal rule of lenity to resolve the ambiguity in favor of the immigrant and not defer to the agency under *Chevron* given the criminal law implications of the aggravated felony definition (e.g., prior aggravated felony sentence enhancement for the federal crime of illegal reentry after removal). *See* Point I in Brief of National Association of Criminal Defense Lawyers, National Immigration Project of the National Lawyers Guild, Immigrant Defense Project et al as Amici in Support of Petitioner in *Luna-Torres v. Lynch*, available at http://immdefense.org/wp-content/uploads/2016/05/Amicus-Brief-of-NACDL-et-al-Luna-Torres-v.-Lynch.pdf. For support for this argument, see the following Supreme Court and Court of Appeals opinions:

- *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (finding that, if a statute has both criminal and noncriminal applications, the presence of ambiguity triggers the criminal rule of lenity "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context").

- Majority opinion in *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023 (6th Cir. 2016) ("An increasingly emergent view asserts that the rule of lenity ought to apply in civil cases involving statutes that have both civil and criminal applications.").

- Dissenting opinion of Judge Sutton in *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., dissenting) (calling for application of the criminal rule of lenity and rejecting deference to immigration agency interpretation of the ambiguous sexual abuse of a minor aggravated felony ground, stating that "*Chevron* has no role to play in construing criminal statutes.").

Thus, while some courts have deferred to the agency in cases involving aggravated felony charges based on ambiguous or unclear provisions in the aggravated felony definition, such as the sexual abuse of a minor ground, *see, e.g., Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014), cert. denied, 135 S. Ct. 2072 (2015), practitioners and immigrants should argue, or preserve arguments, that an immigration adjudicator must apply the criminal rule of lenity, not *Chevron* deference, in such cases.

The Immigrant Defense Project and the National Immigration Project of the National Lawyers Guild will provide more detailed information and guidance regarding these and other potential impacts of the Supreme Court's decision in *Luna-Torres v. Lynch* in future trainings and resource materials.