

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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ERNESTO PALACIOS-MARTINEZ,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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**BALLI LAW OFFICE**  
P.O. Box 1058  
Laredo, Texas 78042-1058  
Tel: (956) 712-4999  
Fax: (956) 724-5830

*/s/ Roberto Balli*

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ROBERTO BALLI  
Federal Bar No. 22668  
Texas State Bar No. 00795235  
Attorney for Defendant-Appellant

## **QUESTION PRESENTED**

Whether *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) was wrongly decided, allowing for the provisions of 8 U.S.C. § 1326(b)(1) and (2) dealing with “felony” and “aggravated felony” to increase the statutory maximum sentence from two years to twenty years, even if the aggravating factors are not pleaded in the indictment nor proven by a jury beyond a reasonable doubt, in violation of Supreme Court precedent *Apprendi v. New Jersey* and the Sixth Amendment of the U.S. Constitution?

## LIST OF PARTIES

ERNESTO PALACIOS-MARTINEZ,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Ernesto Palacios-Martinez, Defendant-Appellant.
2. Roberto Balli, Counsel for Ernesto Palacios Martinez.
3. United States of America, Plaintiff-Appellee.
4. Renata Gowie, Counsel for Plaintiff-Appellee.
5. The Honorable Elizabeth Barchas Prelogar, Office of the Solicitor General of the United States.

*/s/ Roberto Balli*  
ROBERTO BALLI

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## **OPINIONS BELOW**

A copy of the Fifth Circuit's unpublished opinion issued in this case on December 30, 2021, is attached as Appendix A. A copy the District Court's judgment is attached as Appendix B. The district court did not issue a written opinion.

## **JURISDICTION**

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked in 28 U.S.C. § 1254(1), as an appeal from final judgment of conviction in the United States Court of Appeals for the Fifth Circuit on June 11, 2021.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment of the United Sates Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

Title 8 United States Code § 1326 provides:

(a) any alien who— (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) . . . the Attorney General has expressly consented to such alien's reapplying for admission; . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) . . . Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection— . . . (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

## **STATEMENT OF THE CASE**

Ernesto Palacios-Martinez was charged by indictment with illegal entry after deportation, in violation of Title 8 U.S.C. § 1326. ROA.14-15. The indictment contained no language about Mr. Palacios-Martinez having and convictions for crimes. ROA.14-15. Mr. Palacios-Martinez entered guilty plea to the charged offense. ROA.28-36. The Government provided statements during the plea colloquy that Mr. Palacios-Martinez had been previously deported and reentered and that he had previous felony convictions. ROA.106-107. The District Judge made finding of guilt and accepted the plea made by Mr. Palacios-Martinez. ROA.108.

The District Court subsequently sentenced Mr. Palacios-Martinez to 63 months of imprisonment and two years of supervised release. ROA.125. Defendant-Appellant, Palacios Martinez, timely filed a notice of appeal on May 5, 2015. ROA.67. The Fifth Circuit Court of Appeals affirmed the sentence. *United States vs. Palacios-Martinez*, 2021 WL 6194363.

## **REASONS FOR GRANTING THE PETITION**

- I. *ALMENDAREZ-TORRES V. UNITED STATES*, 523 U.S. 224 (1998), WAS WRONGLY DECIDED, ALLOWING FOR THE PROVISIONS OF 8 U.S.C. § 1326(b)(1) AND (2) DEALING WITH “FELONY” AND “AGGRAVATED FELONY” TO INCREASE THE STATUTORY MAXIMUM SENTENCE FROM TWO YEARS TO TWENTY YEARS, EVEN IF THE AGGRAVATING FACTORS ARE NOT PLEADED IN THE INDICTMENT NOR PROVEN TO A JURY BEYOND A REASONABLE DOUBT, IN VIOLATION OF SUPREME COURT PRECEDENT *APPRENDI V. NEW JERSEY* AND THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION.

**A. Review Is Warranted Because The Increase In The Statutory Maximum Sentence Found In Palacios-Martinez' Case Was Not Pleaded In The Indictment Nor Proven Beyond A Reasonable Doubt; Therefore, The Statutory Maximum Is Two Years.**

Mr. Palacios-Martinez' indictment is absent of any specific statutory citation to 8 U.S.C. § 1326(b)(1) and (2) and failed to allege that his deportation resulted after a conviction for a felony or an aggravated felony. Yet the statutory maximum applied to him was increased from two years to twenty years by the sentencing Court using the enhancement provision of 1326.

This Court has ruled that “. . . other than the fact of prior conviction, any fact that increases the penalty for a crime beyond prescribed statutory maximum must be submitted to jury, and proved beyond reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* Court suggested that *Almendarez-Torres* was incorrectly decided. *Id.* at 489. The Court specifically noted that it is a serious constitutional problem by failing to treat prior convictions as elements that increase a statutory maximum penalty. *Id.* at 499-523; see also *Shepard v. United States*, 125 S. Ct. 1254, 1264 (2005).

In 1994, *Apprendi* fired several bullets into a family's home. Upon his arrest, *Apprendi* admitted that the criminal act was racially motivated. *Id.* at 466. A state grand jury indicted *Apprendi* on 23 counts, none of which cited the sentence enhancement of New Jersey's hate crime statute. Yet, *Apprendi* was still sentenced to an extended term under the state's hate crime statute. *Id.* Upon granting certiorari, the Court held that the application of the state's hate crime statute, which authorized increase in maximum prison sentence based on the *judge's*

*finding* that the defendant acted with purpose to intimidate the victim, violated due process clause of the Sixth Amendment. *Id.* at 477 (*emphasis added*). The Court reasoned, citing *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995), that trial by jury has been understood to require that “the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . .” *Id.*

Mr. Palacios-Martinez should have been properly sentenced under the provisions of 8 U.S.C. § 1326(a), to no more than two years of imprisonment and one year of supervised release rather than under 8 U.S.C. § 1326(b)(1) and (2) because the indictment failed to articulate facts alleging that his prior deportation occurred following a conviction for a felony or aggravated felony. In *Apprendi*, the Court suggested that sentencing enhancements must be alleged so the defendants have adequate notice of said enhancements. The Court praised the common law's determinate sentences because they allowed defendants to predict their sentences from the faces of the indictments.<sup>1</sup> In his concurring opinion, Justice Scalia alluded to notice as an essential part of fairness: The law should “tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years . . . [to ensure that] the criminal will never get more punishment than he bargained for when he did the crime.” *Id.* at 1140. Similar to *Apprendi*, Mr. Palacios-Martinez was charged by indictment with illegal reentry in violation of

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<sup>1</sup> Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancement in a World of Guilty Pleas*, 110 Yale L. J. 1097 (2001).

§ 1326(a), to which he pled guilty. The charge in Mr. Palacios-Martinez' indictment was silent as to the penalty enhancements under subsections (b)(1) and (2) of the aforementioned statute, mirroring the facts in *Apprendi* relating to the hate crime statute penalty enhancement.

Defendants need notice, not only to contest enhancements at sentencing, but to decide whether to plead guilty and on what terms. *Bibas*, supra at 1174. This is especially important because the law must guarantee defendants the information they need most and must be fully aware of the “direct consequences” before they enter a plea. *Id.* The “direct consequences” should include the maximum penalty to which the defendant is agreeing, including any enhancements. *Id.*

However, the Court held in *Almendarez-Torres* that an “indictment must set forth each element of the crime that it charges, it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime.” 523 U.S. 224, 228 (1998). The Court in *Apprendi* has abandoned this view on the constitutional issue regarding sentence enhancements. However, *Almendarez-Torres* misses the constitutional point. *Bibas*, supra at 1174. Nonetheless, these cases, *Almendarez-Torres* among others, remain the law and it is time to overrule them and to require pre-plea notice of all statutory maxima, including enhancements. *Id.*

In the indictment charging Mr. Palacios-Martinez, the Government failed to cite 8 U.S.C. § 1326(b)(1) and (2) as relevant factors enhancing Palacios-Martinez' sentence and failed to allege in that Palacios-Martinez' deportation occurred after a

conviction for a felony or an aggravated felony as per the above mentioned subsections of the statute. As such, the Court should avoid implementing the provisions in 8 U.S.C. § 1326(b)(1) and (2) and should revisit only 8 U.S.C. § 1326(a) to reform the judgment and remand for resentencing.

**B. Review Is Warranted Because The Government Did Not Prove To A Jury The Existence Of A Previous Deportation Resulting From A Felony Or An Aggravated Felony Beyond A Reasonable Doubt.**

Regardless of whether the statute or the facts were absent in the indictment, functional equivalents of elements must be tried before a jury and proved beyond a reasonable doubt. The term “sentencing factor” appropriately describes a circumstance, which may be either aggravating or mitigating in character, which supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. *Apprendi*, 530 U.S. at 494, n.19. On the other hand, when the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an additional element of a greater offense than the one covered by the jury's guilty verdict. *Id.* Indeed, it fits squarely within the usual definition of an “element” of the offense. *See Id.* at 499-501 (Thomas, J., concurring).

This new term, functional equivalent of an element, has been seized upon to explain why these quasi-elements must be submitted to a jury and proven beyond a reasonable doubt, but do not have to be charged in the indictment.<sup>2</sup> Justice Thomas, in his concurring opinion, undertook an extensive historical review and

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<sup>2</sup> Catherine M. Guastello, *The Tail That Wags The Dog: The Evolution Of Elements, Sentencing Factors, And The Functional Equivalent Of Elements—Why Aggravating Factors Need To Be Charged In The Indictment*, 37 Ariz. St. L.J. 199, 215 (2005).

argued that an element is any fact that provides the basis for a sentence, whether it is imposing or increasing the sentence. *Id.* Once a fact provides the basis for a sentence, it is an element and the U.S. Constitution requires that it be charged in the indictment or information, undergo a probable cause determination, and be submitted to a jury and proven beyond a reasonable doubt. *Id.* This is the most common-sense explanation of the difference between sentencing factors and elements and it should be adopted. *Id.*

In *Ring v. Arizona*, the defendant was convicted of first-degree murder and armed robbery, the jury deadlocked on premeditated murder, but found Ring guilty of felony murder occurring in the course of armed robbery. 536 U.S. 584 (2002). Based solely on the jury's verdict, finding Ring guilty of first-degree felony murder, the maximum punishment was life imprisonment and Ring could not be sentenced to death unless the judge found at least one statutorily enumerated aggravating circumstance as per Arizona law. *Id.* The Court held that “capital defendants, no less than non-capital defendants” are entitled under the Sixth Amendment “to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Id.* at 589. The trial judge, sitting alone, cannot determine the presence or absence of the aggravating factors required by Arizona law for the imposition of the death penalty. *Id.* The Court reasoned, citing *Apprendi*, that Arizona's enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense” and the Sixth Amendment requires that they be found by a jury. *Id.* at 597–99 (citing *Apprendi*, 530 U.S. at 494, n. 19).

Justice Thomas, in his concurrence in *Apprendi*, reasons that a sentencing factor supports a specific sentence within the range authorized by a finding of a defendant's guilt to a particular offense. Any increase beyond the statutory maximum is a functional equivalent to an additional element of a greater offense than the one covered by a guilty judgment and fits squarely within the usual definition of an element of the offense. Similarly, in *Ring*, the Court overruled *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty because enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," and shall be found by a jury. *See Walton v. Arizona*, 497 U.S. 639, 647–49 (1990).

Palacios Martinez' case mirrors *Ring* in that Mr. Palacios-Martinez was sentenced beyond the maximum authorized statutory sentence, just like *Ring*. Palacios Martinez' guilty plea to the charged offense of illegal entry after deportation (8 U.S.C. § 1326(a)) carried a statutorily authorized maximum sentence of two years in prison and one year of supervised release. Yet, Mr. Palacios-Martinez was sentenced beyond the statutory maximum prescribed by offense of conviction, when the District Judge sentenced him to 63 months of imprisonment, a two year term of supervised release, and a \$100 special assessment, in accordance with 8 U.S.C. § 1326(b)(1) and (2), an offense that Palacios-Martinez was not convicted of. Using the line of reasoning in Justice Thomas' concurrence in *Apprendi*, which was echoed in *Ring*, §§ 1326(b)(1) and (2) are functional

equivalents of an element of a greater offense than the one Mr. Palacios-Martinez was convicted of, § 1326(a). As such, §§ 1326(b)(1) and (2) should be weighed with the usual definition of “element” and shall be tried by jury under the Sixth Amendment.

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Date: March 30, 3021

Respectfully submitted,

**BALLI LAW OFFICE**  
P.O. Box 1058  
Laredo, Texas 78042-1058  
Tel: (956) 712-4999  
Fax: (956) 724-5830

*/s/ Roberto Balli*

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ROBERTO BALLI  
Federal Bar No. 22668  
Texas State Bar No. 00795235  
Attorney for Defendant-Appellant

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**PROOF OF SERVICE**

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I, Roberto Balli, a member of the Bar appointed under the Criminal Justice Act, do swear and declare that on this 30<sup>th</sup> day of March 2022, and pursuant to Rule 29.5, served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope for delivery by private third party commercial carrier for delivery within 3 calendar days and addressed to:

The Honorable Elizabeth Barchas Prelogar  
Office of the Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001

I declare under the penalty of perjury that the foregoing is true and correct.

*/s/ Roberto Balli*  
\_\_\_\_\_  
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**APPENDIX**

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EXHIBIT DESCRIPTION OF DOCUMENT

“A”	Opinion of the Court of Appeals in the <i>Ernesto Palacios-Martinez</i> No. 21-40492 (5 <sup>th</sup> Cir. December 30, 2021 (unpublished))
“B”	Judgment of the United States District Court in <i>United States v. Ernesto Palacios-Martinez</i> No. 1:20-CR00112-001 (S.D. Tex. June 11, 2021. (unpublished))
“C”	Order Appointing Roberto Balli as Counsel