

## SCOTUS Opinion: Undocumented Immigrants face Higher Hurdle To Challenge Prior to Deportation

26 May 2021

In 1988, a Mexican-national was convicted in California for felony DUI and then deported because at the time such a crime was an “aggravated felony” permitting removal. That same person illegally re-entered the United States and was indicted for unlawful reentry. The immigrant sought a collateral challenge of his prior removal order on the basis that the Court had since ruled in 2004 that felony DUI was not an aggravated felony. The statute permitting the collateral challenge, 8 U.S.C. sec. 1326(d), required that the challenger show (1) “any administrative remedies that may have been available” were exhausted, (2) “the opportunity for judicial review” was lacking, and (3) “the entry of the order was fundamentally unfair” in order for the challenge to proceed. The district court and the Ninth Circuit held that the immigrant did not have to prove the first two prongs to garner relief.

The Court, in a unanimous decision by Justice Sotomayor, reversed, and held that the plain language of 1326(d) required proof of all three prongs. In other words, the removal order’s error on the merits did not absolve the immigrant from having to exhaust administrative remedies available or seek judicial review that may have cured the error. The language of the statute being unambiguous, the immigrant would have to prove all three prongs of 1326(d) to escape criminal sanction.

A link to the decision in *United States v. Palomar-Santiago* is here:  
[https://www.supremecourt.gov/opinions/20pdf/20-437\\_bqmc.pdf](https://www.supremecourt.gov/opinions/20pdf/20-437_bqmc.pdf)

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**TAGGED:** unlawful reentry, collateral challenge, 8 US.C. sec. 1326, United States v. Palomar-Santiago