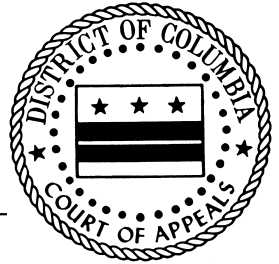


17-CM-0578 & 19-CO-0019



Clerk of the Court
Received 06/28/2023 01:30 PM
Resubmitted 06/28/2023 01:58 PM

**IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS**

ILIN M. INTRIAGO,
Appellant,

v.

UNITED STATES,
Appellee.

On Appeal from the Superior Court of the District of Columbia
Criminal Division

**[CORRECTED] SUPPLEMENTAL BRIEF
FOR APPELLANT ILIN INTRIAGO**

Gregory M. Lipper
LEGRAND LAW PLLC
1100 H Street NW, Suite 1220
Washington DC 20005
(202) 996-0919
glipper@legrandpllc.com

Counsel for Appellant

TABLE OF CONTENTS

| | |
|---|----|
| Table of Authorities | ii |
| Introduction..... | 1 |
| Argument | 3 |
| I. Under <i>Bado</i> and <i>Fallen</i> , it was plain error to deny Intriago a jury trial given that he faced the collateral consequence of sex-offender registration. | 4 |
| A. Under <i>Fallen</i> , the collateral consequence of sex-offender registration entitles a defendant to a jury trial. | 4 |
| B. Under <i>Bado</i> , collateral consequences imposed by another jurisdiction are treated the same as collateral consequences imposed by the D.C. Council. | 7 |
| II. Even if the error were not plain, trial counsel was ineffective in failing to request a jury trial..... | 12 |
| Conclusion | 12 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------------------------|
| <i>*Bado v. United States</i> , 186 A.3d 1243 (D.C. 2018) (en banc)..... | 1, 8, 9 |
| <i>Doe v. Department of Public Safety & Correctional Services</i> , 62 A.3d 123 (Md. 2013) | 2, 11 |
| <i>*Fallen v. United States</i> , 290 A.3d 486 (D.C. 2023) | 2, 3, 4, 5, 7, 9, 10, 11 |
| <i>Fortune v. United States</i> , 59 A.3d 949 (D.C. 2013) | 4 |
| <i>Graves v. State</i> , 772 A.2d 1225 (Md. Ct. App. 2001) | 10 |
| <i>Gundy v. United States</i> , 139 S. Ct. 2116 (2019) | 9 |
| <i>Haye v. United States</i> , 67 A.3d 1025 (D.C. 2013) | 5 |
| <i>*Miller v. United States</i> , 209 A.3d 75 (D.C. 2019)..... | 4, 5 |
| <i>United States v. Nachtigal</i> , 507 U.S. 1 (1993) (per curiam)..... | 9 |

Statutes

| | |
|-----------------------------|------|
| D.C. Code § 22-3006 | 5, 6 |
| Md. Code § 3-308..... | 5 |
| Md. Code § 3-308(b)(1)..... | 6 |
| Md. Code § 11-707(c) | 6 |

| | |
|----------------------------------|---|
| Md. Code § 11-701(l)(1) | 5 |
| Md. Code § 11-701(n)..... | 6 |
| Md. Code § 11-701(o)(1) | 5 |
| Md. Code § 11-704(a)..... | 6 |
| Md. Code § 11-705(b)(2) | 6 |
| Md. Code § 11-707(a)(4)(I) | 6 |
| Md. Code § 11-717(b) | 6 |

Other

| | |
|---|---|
| Md. Dep't of Public Safety & Correctional Servs., <i>Offender Search: Offender Details: Ilin Manuel Intriago-Valero</i> , https://tinyurl.com/yc8dh7md | 7 |
|---|---|

Appellant Ilin Intriago submits this supplemental brief following the Court’s rehearing order of April 27, 2023. In addition, Intriago requests that the division hold oral argument.

INTRODUCTION

In June 2018, the Court held that “the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.” *Bado v. United States*, 186 A.3d 1243, 1246–47 (D.C. 2018) (en banc). Although this collateral immigration consequence was imposed by the federal government, not the District of Columbia, there was “no reason to exclude from Sixth Amendment consideration the serious penalty of removal that attaches to a criminal conviction, and to which the accused is exposed, because it has been imposed by Congress rather than the local legislature.” *Id.* at 1258.

Like the defendant in *Bado*, Ilin Intriago faced an additional statutory penalty that made his misdemeanor conviction—and its collateral consequences—especially serious. As a Maryland resident, Intriago was required to register as a sex offender if convicted of misdemeanor sex abuse under D.C. law. Yet he was tried by a judge, not a jury. In its original decision, however, the Court rejected

Intriago’s argument that the trial court plainly erred by failing to provide a jury trial; the Court’s non-precedential opinion concluded that Intriago’s “jury-trial claim is foreclosed by this court’s [pre-*Bado*] decision in *Thomas*.” MOJ 5.

While Intriago’s rehearing petition was pending, the Court decided *Fallen v. United States*, 290 A.3d 486 (D.C. 2023). *Fallen* held that, combined with the other penalties for misdemeanor child sex-abuse, the District’s sex-offender-registration law “triggers the Sixth Amendment right to a trial by jury.” *Id.* at 499. The concurring opinion noted Intriago’s case and observed that, in light of *Fallen*, the Court would “need to address [Intriago’s rehearing] petition.” *Id.* at 500 (McLeese, J., concurring).

Indeed, *Fallen* changes the outcome of this appeal. Because *Fallen* extended *Bado* to cover defendants facing the collateral consequence of sex-offender registration, denying Intriago a jury trial was plain error.

First, because he resided in Maryland, Intriago’s sex-offender-registration requirement arose directly from his D.C. misdemeanor conviction. As a direct and necessary consequence of that conviction, he became subject to Maryland’s registration statute, which “places a registrant’s information, including his or her address, on the Internet for anyone with Internet access to see.” *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 142 (Md. 2013) (quotation marks omitted).

Not only is Intriago subject to virtually the same public disclosures as was Fallen, but Intriago may be on the public registry for up to fifteen years—five years more than Fallen faced.

Second, *Bado* confirms that the error was plain even though Intriago's registration requirement arose from Maryland law rather than D.C. law. In *Bado*, the Court held that the Sixth Amendment required a jury trial even though the collateral consequence came from Congress, not the D.C. Council; in so doing, the Court rejected the government's argument that only D.C.-based consequences matter. If anything, sex-offender registration under Maryland law follows far more directly from a qualifying conviction than does removal under federal law.

More fundamentally, *Bado* and *Fallen* stressed that jurisdictional formalities yield to practical consequences. In *Fallen*, the Court detailed how “social science research—unchallenged by the government—supports the conclusion that sex offender registration has serious negative consequences for registrants.” 290 A.3d at 497. Although Intriago happens to live across the D.C.-Maryland border, his consequences are just as serious, and just as negative, as those faced by Fallen. Under the Sixth Amendment, he is entitled to the same relief.

ARGUMENT

I. Under *Bado* and *Fallen*, it was plain error to deny Intriago a jury trial given that he faced the collateral consequence of sex-offender registration.

A. Under *Fallen*, the collateral consequence of sex-offender registration entitles a defendant to a jury trial.

Although Intriago’s trial counsel did not request a jury trial, it was plain error to deny him one. Under the plain-error standard, Intriago must show “(1) error, (2) that is plain, and (3) that affected his substantial rights.” *Fortune v. United States*, 59 A.3d 949, 954 (D.C. 2013) (alteration and quotation marks omitted). If he meets these conditions, he then must establish that “(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quotation marks omitted). In a post-*Bado* plain-error case, the Court held that improper denial of the Sixth Amendment jury right necessarily affects the defendant’s substantial rights and (absent unusual circumstances) compromises the fairness, integrity, or public reputation of judicial proceedings. *See Miller v. United States*, 209 A.3d 75, 80 (D.C. 2019) (affects substantial rights); *id.* at 80–81 (seriously affects the fairness, integrity, or public reputation of judicial proceedings).

And in *Fallen v. United States*, 290 A.3d 486 (2023), the Court confirmed that *Bado* applies to misdemeanor defendants whose convictions require them to

publicly register as a sex offender. The combined penalties, “including ten years of sex offender registration and community notification mandated by the Sex Offender Registration Act of 1999 (SORA), is a severe penalty that warrants a jury trial under the Sixth Amendment.” *Id.* at 489. Although *Fallen* had not been decided when Intriago went to trial, “[a]n error is plain if it is clear or obvious at the time of appeal.” *Haye v. United States*, 67 A.3d 1025, 1030 (D.C. 2013). Accordingly, the Court “must take [the new decision] into account in determining whether there is obvious error.” *Miller*, 209 A.3d at 78.

Under these standards, *Bado* and *Fallen* control this appeal. Because Intriago is a Maryland resident, Maryland law required him to publicly register as a sex offender upon his conviction for misdemeanor sex abuse under D.C. Code § 22-3006. For Intriago, public sex-offender registration “is a direct, statutorily mandated requirement that follows ineluctably from conviction.” *Fallen*, 290 A.2d at 494. In particular, Maryland’s registration law applies to Maryland residents convicted of “an offense committed in another state or in a federal, military, or tribal jurisdiction that, if committed in [Maryland], would require the person to be classified as a tier I sex offender, tier II sex offender, or tier II sex offender.” Md. Code § 11-701(l)(1). Tier I offenses include those identified in Maryland Code § 3-308 (*id.* § 11-701(o)(1)), which prohibits “sexual contact with another without the

consent of the other” (*id.* § 3-308(b)(1)). That Maryland offense is analogous to Intriago’s charged offense, misdemeanor sex abuse, which D.C. law defines as “sexual contact with another person [by someone] who should have knowledge or reason to know that the act was committed without that other person’s permission.” D.C. Code § 22-3006.

Once Intriago was convicted of this Tier I offense, Maryland law dictated that he “shall register” —even before he concluded his sentence in the D.C. jail— with the Maryland “agency or person that is responsible for collecting the information for the initial registration as a sex offender.” Md. Code § 11-701(n); *id.* § 11-704(a); *id.* § 11-705(b)(2). It further dictated that the state’s Department of Public Safety and Correctional Services “shall post on the Internet” his “name and other identifying information” and a “plain language” description of the crime “that is the basis for the registration.” *Id.* § 11-717(b). Because the Maryland code classifies Intriago as a tier I offender, this information will remain on the Internet for no fewer than ten years, and as many as fifteen years. *See id.* § 11-707(a)(4)(I) & (c).

During those ten to fifteen years, Intriago is subject to virtually the same regime described in *Fallen*. There, the Court described “public disclosure of the offender’s full name and aliases, date of birth, sex and race, height and weight, eye

and hair color, identifying marks, home, work, and school addresses, a photograph, the offense requiring registration, court case number, date of registration, date of last verification, and whether there are any outstanding warrants for failure to comply.” *Fallen*, 290 A.3d at 493. Intriago’s outcome is nearly identical: Public disclosure of his full name; aliases; date of birth; sex and race; height and weight; eye and hair color; whether he has any scars or tattoos; all known addresses, including home, work, and school; a photograph; the offense requiring registration; the date of his conviction and a description of the offense; date of registration; and the make, model, year, color, and license-plate number of his vehicles. *See* Md. Dep’t of Public Safety & Correctional Servs., *Offender Search: Offender Details: Ilin Manuel Intriago-Valero*, <https://tinyurl.com/yc8dh7md> (last visited June 1, 2023).

In sum, Intriago’s conviction subjected him collateral consequences at least as serious as those imposed on *Fallen*. Although Intriago’s registration requirement was not written in the trial court’s sentencing order, his misdemeanor conviction triggered his registration requirement just as directly.

B. Under *Bado*, collateral consequences imposed by another jurisdiction are treated the same as collateral consequences imposed by the D.C. Council.

The Sixth Amendment jury right applies fully and plainly to defendants, like Intriago, whose misdemeanor convictions subjected them to sex-offender

registration under the laws of other states, including Maryland, where Intriago resides now and resided at the time of trial. Although *Fallen* considered a registration requirement that happened to arise from the D.C. Code, *Bado* has already held that the Sixth Amendment jury requirement is likewise triggered by collateral consequences imposed by other jurisdictions.

On this point, *Bado* left no ambiguity. The government had argued that “removal should not be considered because it is imposed by Congress, not the Council of the District of Columbia, which created the offense.” *Bado v. United States*, 186 A.3d 1243, 1252 (D.C. 2018) (en banc). The Court declined to restrict the Sixth Amendment right to consequences arising from a single jurisdiction, and instead emphasized the consequence’s practical effect rather than its source. “There is no reason,” held the Court, “to exclude from Sixth Amendment consideration the serious penalty of removal that attaches to a criminal conviction, and to which the accused is exposed, because it has been imposed by Congress rather than the local legislature.” *Id.* at 1258.

In addressing the government’s argument, moreover, *Bado* treated Congress and other state legislatures interchangeably. In asking the Court to disregard collateral consequences imposed by Congress, the government quoted Supreme Court dicta stating that “the statutory penalties in other States are irrelevant to the

question whether a particular legislature deemed a particular offense ‘serious.’” *United States v. Nachtigal*, 507 U.S. 1, 4 (1993) (per curiam) (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 545 n.11 (1989)). Rather than distinguish Congress from other states’ legislatures, *Bado* clarified that the Supreme Court had not excluded collateral consequences imposed by other jurisdictions, including other states; the penalties cited in *Nachtigal* “did not apply to the petitioners before the Court, who faced only penalties imposed by the state of Nevada.” 186 A.3d at 1257 n.29 (citation omitted). In other words, *Bado* rejected any effort to distinguish D.C. laws from other laws—whether drafted by Congress or the legislatures of other states.

And for good reason. For one, “[t]he District of Columbia’s SORA registration and notification provisions are comparable if not identical to those imposed by the sex offender registration laws enacted in numerous other jurisdictions.” *Fallen*, 290 A.3d at 498 (quotation marks omitted). That is because Congress “condition[ed] federal funds on States’ adoption of registration laws meeting prescribed minimum standards.” *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (citing 42 U.S.C. § 14071 et seq. (1994 ed.)). The D.C. and Maryland registration regimes each reflect these common federal standards. *See, e.g., Fallen*, 290 A.3d at 491–92 (describing history of D.C. registration law); *Graves v. State*,

772 A.2d 1225, 1229–31 (Md. Ct. App. 2001) (describing history of Maryland registration law). And those subject to their requirements experience them in the same way.

Because *Fallen* involved a defendant subject to the District’s registration requirement, *Fallen* also includes certain language more specific to that specific law. *See, e.g.*, 290 A.2d at 499 (“The negative consequences that flow from registration as a sex offender are commensurate with the legislature’s expressed view that SORA applies to the most serious offenses.”). Like *Bado*, however, *Fallen* turned on the practical consequences facing the defendant. Reflecting this practical approach, the Court “consider[ed] the social stigma and other real-life consequences of sex offender registration to shed light on the distinct Sixth Amendment question.” *Id.* at 497 (alterations and quotations marks omitted).

For *Intriago*, the resulting social stigma and other real-life consequences are just as serious as they were for *Fallen*. In this case, no less than in *Fallen*, “[s]ex offender registration and notification have serious negative consequences for registrants and their families, including for their social relationships, education, employment, and psychological health.” *Id.* at 496. *Intriago*, no less than *Fallen*, “experience[s] humiliation and isolation, lost or jeopardized employment, employment opportunities, and housing opportunities.” *Id.* (quotation marks

omitted). And for Intriago, no less than for *Fallen*, “sex offender registration identifies the registrant as dangerous and disseminates information to the public that allows them to be shunned and denied opportunities to live and work in their communities.” *Id.*

Fallen even cited registration regimes in other states—including Maryland—to support its conclusion that “SORA registration results in harm to the registrant distinct from that resulting from the underlying conviction.” *Id.* at 497–98. In the first citation after this sentence, *Fallen* quoted a Maryland case, *Doe v. Department of Public Safety & Correctional Services*, 62 A.3d 123 (Md. 2013), concluding that “‘the harms caused by dissemination . . . rendered’ Maryland’s sex offender registration law ‘the equivalent of the punishment of shaming.’” 290 A.3d at 498 (quoting *Doe*, 62 A.3d at 142) (alteration in *Fallen*, *Fallen*’s emphasis omitted).

Far from suggesting that the Sixth Amendment right depends on whether the registration requirement comes from D.C. law or Maryland law, *Bado* and *Fallen* have reiterated their emphasis on the severity and certainty of the collateral consequences—not their jurisdictional source. Because Intriago’s collateral consequences were just as severe and just as certain as those faced by *Fallen*, it was plain error to deny him a jury trial.

II. Even if the error were not plain, trial counsel was ineffective in failing to request a jury trial.

If the Court were to conclude that denying Intriago a jury trial was error but not plain error, the Court must also revisit the merits of Intriago's § 23-110 appeal, which argues that trial counsel was ineffective in failing to demand a jury trial. In its original decision, the Court rejected the ineffective-assistance claim on the ground that the underlying jury-trial claim was "foreclosed by this Court's decision in *Thomas*." MOJ 5. Because *Fallen* superseded *Thomas*, the Court may now consider the merits of the ineffective-assistance claim, as detailed in Intriago's original opening and reply briefs.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

/s/ Gregory M. Lipper
Gregory M. Lipper (No. 494882)
LEGRAND LAW PLLC
1100 H Street NW, Suite 1220
Washington DC 20005
glipper@legrandpllc.com

Counsel for Appellant

CERTIFICATE OF SERVICE

On June 28, 2023, I served a copy of this corrected supplemental brief,
through the Court's electronic filing system, on:

Chrisellen Kolb
Eric Hansford
Assistant United States Attorneys
601 D Street NW, Room 6.232
Washington, DC 20530
(202) 252-6829
Eric.Hansford@usdoj.gov

Counsel for Appellee

/s/ Gregory M. Lipper
Gregory M. Lipper

District of Columbia Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a “CF” (criminal felony), “CM” (criminal misdemeanor), “CT” (criminal traffic), and “CO” (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being “pro se”), and not able to redact your brief, please initial the box below at “G” to certify you are unable to file a redacted brief. Once Box “G” is checked, you do not need to file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

- (1) An individual’s social-security number
- (2) Taxpayer-identification number
- (3) Driver’s license or non-driver’s’ license identification card number
- (4) Birth date
- (5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
- (6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

- (a) the acronym “SS#” where the individual’s social-security number would have been included;
- (b) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
- (c) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
- (d) the year of the individual’s birth;
- (e) the minor’s initials;
- (f) the last four digits of the financial-account number; and
- (g) the city and state of the home address.

- B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
- C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.
- D. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
- E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
- F. Any other information required by law to be kept confidential or protected from public disclosure.

| |
|-----------------|
| |
| Initial here |

G. I certify that I am incarcerated, I am not represented by an attorney (also called being “pro se”), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/ Gregory M. Lipper

Signature

Gregory M. Lipper

Name

glipper@legrandpllc.com

Email Address

17-CM-0578 & 19-CO-0019

Case Number(s)

6/28/23

Date