17-CM-0578 & 19-CO-0019

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

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT ILIN INTRIAGO

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INTRODUCTION

The government does not dispute that solely as a result of his conviction in this case, Intriago is required to register as a sex offender in Maryland—and that, as a result, his name will appear on Maryland's public registry for between ten and fifteen years. *See* Supp. Br. 5–7. But the government ignores the effects of the sex-offender registration regime to which Intriago is subject—not once does the government address the severity of the collateral, state-imposed consequences triggered by the factfinder's verdict. Likewise, the government's discussion of *Fallen v. United States*, 290 A.3d 486 (D.C. 2023), offers no hint that the Court considered the defendant's misdemeanor offense to be serious because of the severe consequences suffered by those placed on a government's public sex-offender registry. Even the government, however, does not suggest that the consequences of spending ten years on the District's public registry are more severe than the consequences of spending at least ten years on Maryland's public registry.

Instead of addressing *Fallen*'s practical analysis of the consequences facing the defendant before the Court, the government recycles arguments that the en banc Court already has rejected in *Bado v. United States*, 186 A.3d 1243 (D.C. 2018) (en banc). In *Bado*, the Court already declined to distinguish between penalties

imposed by the D.C. Council and penalties imposed by other legislatures. Now, the government tries to distinguish penalties imposed by Congress from penalties imposed by other states. But the government grounds that argument in a misleading quotation of *United States v. Nachtigal*, 507 U.S. 1 (1993)— the same misleading quotation on which the government grounded its argument in *Bado*.

Ultimately, neither the cases nor any other consideration supports the government's effort to distinguish severe out-of-state penalties from severe federal penalties. And a post-*Bado* plain-error case, *Miller v. United States*, 209 A.3d 75 (D.C. 2019), confirms that an error may be obvious even if the government's appellate lawyers can identify a theoretical difference in circumstances.

Even if denying Intriago a jury trial were not plain error, his trial counsel was deficient in failing to demand a trial by jury. The government suggests that trial counsel made a reasoned decision, but the undisputed record reveals that trial counsel had not even realized that Intriago was subject to public registration. Trial counsel not only failed to understand the law; he also failed to discovery the circumstance that would have prompted a reasonable lawyer to request a jury trial.

ARGUMENT

I. Under *Bado* and *Fallen*, it was plain error to deny Intriago a jury trial.

Fallen made the Court's task plain: "Our task is to determine whether what

helps to protect the public, conversely, imposes serious negative consequences on the registrant to such an extent that the protection of the Sixth Amendment guarantee to a jury should be interposed before the registration requirement is triggered by conviction." 290 A.3d at 499. As compared to the District's public registry, nothing about Maryland's public registry leads to a different answer—or to less serious consequences for the defendant.

Although barely addressed in the government's brief, *Fallen*'s practical analysis confirms that placement on another state's public registry produces consequences just as severe as placement on the District's public registry. In *Fallen*, 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" posed in cases like these. *Id.* at 497 (quotation marks omitted). In evaluating those real-life effects of sex-offender registration, *Fallen* elaborated:

- "Sex offender registration and notification have serious consequences for registrants and their families, including for their social relationships, education, employment, and psychological health." *Id.* at 496.
- "Sex-offender registrants experience humiliation and isolation, lost or jeopardized employment, employment opportunities, and housing opportunities." *Id.* (quotation marks omitted).
- "Even if it does not entail custodial segregation, as does incarceration, or geographical separation, as does deportation, 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 continued: "Extensive social science research—unchallenged by the government—supports the conclusion that sex offender registration has serious negative consequences for registrants." *Id.* at 497; *see also id.* at 497 n.5 (quoting studies); *id.* at 497–98 (quoting state supreme courts).

Rather than directly address this analysis, the government offers variations of the arguments rejected in *Bado*. For one, the government claims that it would be "anomalous to deny jury trials to local D.C. residents who commit crimes in the District but grant jury trials to visiting Maryland residents." Gov. Supp. Br. 5–6. It would not be anomalous at all—if convicted Maryland residents are required to register as sex offenders but convicted District residents are not. In *Bado*, the government identified a related "'anomaly' if a noncitizen would be entitled to a jury trial but a citizen would not." 186 A.3d at 1255–56. *Bado* disagreed: "because citizens can never be deported," it is "hardly anomalous" that there would be "a different result for citizens than for noncitizens who face the additional, and concededly serious, penalty of deportation." *Id.* at 1256.

Like the defendant in *Bado*, Intriago requests no windfall. As a Maryland resident, he seeks Sixth Amendment protection correlated to the severe penalty that he faced—and continues to experience—due to his Maryland residency.

Similar arguments are even more farfetched. To begin, the government appears to blame Intriago for failing to relocate—in the government's view, "the Maryland resident could always move to the District and shed their registration requirement, and vice versa." Gov. Supp. Br. 6. Unsurprisingly, the government cites no authority. *Cf. Saenz v. Roe*, 526 U.S. 489, 499 (1999) (explaining that "a classification that [has] the effect of imposing a penalty on the exercise of the right to travel violate[s] the Equal Protection Clause unless shown to be necessary to promote a compelling governmental interest"). Of course, few defendants—especially indigent defendants like Intriago—have time or money to shuttle between D.C. and Maryland to maximize their rights and minimize their penalties.

More generally, nothing in *Bado* and *Fallen* distinguishes among identical penalties imposed by the District's government, the federal government, and another state's government. *Bado* not only declined to distinguish District-based consequences from federally based consequences, but it also stressed that the Sixth Amendment requires "(1) identification of the penalties for conviction of an offense, and (2) an evaluation of whether the penalties, viewed together, are sufficiently severe to warrant a jury trial." 186 A.3d at 1252. As another appellate court explained, "the *Bado* court noted [that] *Blanton* does not exclude consideration of penalties imposed by some legislative body other than the one who

enacted the crime of conviction." *City of Wichita v. Grasty*, 500 P.3d 1201, 1210 (Kan. Ct. App. 2021) (citing *Bado*, 186 A.3d at 1258).

Although *Fallen* discussed how the D.C. Council chose to punish misdemeanor child-sex abuse (Gov. Supp. Br. 4), that was to be expected, given that the defendant in *Fallen* was charged with that particular crime. Far from suggesting that the Sixth Amendment fails to protect a Maryland resident whose D.C. convictions subjects exposes him to public registration in Maryland, *Fallen* reiterated that the District's registration provisions "are comparable if not identical to those imposed by the sex offender registration laws enacted in numerous other jurisdictions." 290 A.3d at 498 (quotation marks omitted). The Court even noted these regimes' common origins: Federal law requires "each state and the District of Columbia, as a condition of receiving certain federal funds, to establish a program of sex offender registration and community notification." *Id.* at 492 (quoting *In re W.M.*, 851 A.2d 431, 435 (D.C. 2004)).

Second, *Bado* already rejected the government's out-of-context reliance on *Nachtigal* effort to distinguish federal collateral consequences from state collateral consequences. The government quotes *Nachtigal*, which quoted *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), to say that "the statutory penalties in other States are irrelevant to the question whether a particular legislature deemed a

particular offense 'serious.'" *Nachtigal*, 507 U.S. at 4 (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 545 n.11 (1989)). In its eight-page supplemental brief, the government quotes this language three times. *See* Gov. Supp. Br. 3, 4–5, 6.

The Court rejected this argument five years ago. In *Bado*, the government quoted "a sentence in a footnote in *Blanton* in which the Court refused to consider the penalties for DUI 'in other states.'" 186 A.3d at 1257 n.29 (alteration and quotation marks omitted). In response, *Bado* explained that "these were penalties that did not apply to the petitioners before the Court, who faced only penalties imposed by the state of Nevada." *Id.* For a defendant subject only to Nevada law, other states' penalties were "irrelevant," because the Sixth Amendment considers "only those potential penalties that are actually faced by the particular defendant." *Id.* at 1249 (citing *Blanton*, 489 U.S. at 545 & n.12).

Far from devising a tripartite hierarchy of collateral consequences imposed by different types of governments, *Blanton* focused on "penalties resulting from state action, *e.g.*, those mandated by statute or regulation." 489 U.S. at 543 n.8. And *Blanton*'s sentence about "state action" was, in turn, quoted by this Court in *Fallen*, 290 A.3d at 491. The *Blanton-Bado-Fallen* standard does not evince the state-action hierarchy on which the government's current argument depends.

The government's suggestion that the views of the District's "community"

or Council are reflected solely by "the national legislature" (Gov. Br. 18) is especially inapt, because the District has no voting representatives in either house of Congress. What is more, the common acronym DMV—"D for the District, M for Maryland, and V for Virginia." Paul Farhi, *After Initial Obscurity, "The DMV" Nickname for Washington Area Picks up Speed*, Wash. Post. (July 30, 2010), https://tinyurl.com/u4kleen—highlights that the relevant "community" includes someone like Intriago, who earned a living by cleaning an office building in the District and who went home just over the border in Maryland.

Finally, the government's asserted state-versus-Congress distinction does not suggest that the Sixth Amendment error was non-obvious (and hence not plain). *See, e.g.*, Gov. Supp. Br. 2. *Miller*, a post-*Bado* plain-error case, forecloses the argument that theoretical differences defeat a claim of plain error. In *Miller*, the defendant was subject to removal even before she was convicted of a misdemeanor that would have separately subjected her to removal. *See* 209 A.3d at 78. Given the plain-error posture, the government argued "that *Bado* could reasonably be read more narrowly, to afford a jury trial right to a noncitizen charged with a deportable offense only if the noncitizen had a preexisting right to remain in the United States." *Id.* at 79. There was in fact a practical difference between Mr. Bado, who had a pending asylum petition at the time of his trial, and Ms. Miller, who had no

actual or potential right to remain; this practical difference, the government argued, foreclosed a finding of plain error. *See id.* ("[T]he United States's proposed reading of *Bado* appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be.").

But *Miller* rejected the government's plain-error argument. Even a practical difference in the two defendants' immigration consequences did not undermine the conclusion that "the failure to provide Ms. Miller with a jury trial is obvious error." *Id.* at 78. The error in this case was equally plain. Although the D.C. Council, Congress, and the Maryland legislature are in fact different bodies, neither law nor logic supports the government's argument that when considering laws enacted by those three bodies, only Maryland's laws are categorically irrelevant.

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

In arguing that trial counsel was not ineffective, even if the Sixth Amendment error were not plain, the government assumes a strategic decision that trial counsel never made. It is undisputed that that trial counsel's file "contains no research or notes into whether Mr. Intriago is entitled to a jury trial given the collateral consequences, in the form of Maryland sex-offender registration, that he faced in this case." SR16 (Lipper Declaration ¶ 17). Before the trial court, the

government did not attempt to refute that evidence or otherwise claim that trial counsel made a strategic decision. *See, e.g.*, SR20 (Reply in support of 23-110 hearing) at 4. In sum, although the government continues to suggest that trial counsel made a reasoned decision to accept a bench trial (Gov. Supp. Br. 7), the undisputed record confirms that trial counsel failed even to appreciate that Intriago faced a severe collateral consequence—sex-offender registration—that would have supported the jury request.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 25, 2023, I served a copy of this supplemental reply brief, through the Court's electronic filing system, on:

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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.

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

(1) An individual's social-security number
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(6) Financial account numbers

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(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.

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