SUPPLEMENTAL BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 17-CM-578, 19-CO-19

ILIN M. INTRIAGO, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
CAROLINE BURRELL
* ERIC HANSFORD
D.C. Bar #1017785
Assistant United States Attorneys
* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Eric.Hansford@usdoj.gov
(202) 252-6829

Cr. No. 2016-CMD-20899

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* Authorities upon which we chiefly rely are marked with asterisks.

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SUMMARY OF ARGUMENT

Even after the decision in *Fallen v. United States*, 290 A.3d 486 (D.C. 2023), appellant Ilin Intriago cannot establish that the trial court plainly erred in failing, sua sponte, to order a jury trial. Unlike Fallen, Intriago was convicted of misdemeanor sexual abuse *of an adult*, a conviction that does not require sex-offender registration under D.C. law. Indeed, *Fallen* suggests that misdemeanor sexual abuse of a child is the lone D.C. misdemeanor charge newly entitled to jury trial based on sex-

offender registration. Maryland's decision to require Intriago to register has no bearing on the D.C. community's judgment about the seriousness of his offense—the key inquiry for triggering the Sixth Amendment jury-trial right. At the very least, Intriago cannot establish that his right to a jury trial is plain or obvious here.

Intriago's ineffectiveness claim likewise fails. Six years ago, trial counsel had no duty disregard then-binding precedent of this Court and predict this Court's overturning of precedent in *Fallen*. Nor could counsel be expected to foresee (contrary to our arguments even after *Fallen*) that the new jury right would extend to sex-offender registration imposed only by Maryland law. Intriago's conviction should be affirmed.

ARGUMENT

I. On Plain-Error Review, Intriago Cannot Earn a D.C. Jury Trial Based on Maryland's Sex-Offender Registration Requirements.

As we explained in our prior brief (see Brief of Appellee (Gov't Br.) 16-19), Maryland's sex-offender registration requirements cannot trigger a jury-trial right for a D.C. charge. At the very least, the trial court did not commit "clear" or "obvious" error by failing, sua sponte, to convene a jury trial.

The right to a jury trial under the Sixth Amendment turns on whether an offense is "petty" or "serious" (Gov't Br. 8-11). And "[t]he best indicator of society's views" of the seriousness of an offense "is the maximum penalty set by the legislature." *United States v. Nachtigal*, 507 U.S. 1, 3 (1993). An offense punishable by six months or less of incarceration—like Intriago's charge of misdemeanor sexual abuse of an adult—is presumptively "petty," constitutionally entitled to a jury trial only in the "rare case" where "the additional penalties, viewed together with the maximum prison term, are so severe that *the legislature* clearly determined that the offense is a 'serious' one." *Nachtigal*, 507 U.S. at 3-5 (emphasis added) (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989)). Assessing that question requires an appraisal of the penalties that "*a legislature* packs [for] an offense." *Blanton*, 489 U.S. at 543 (emphasis added). The Supreme Court has thus instructed 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 (emphasis added).

Here, the "statutory penalties" for Intriago's offense imposed by the "particular legislature" in question—the D.C. Council—do not include

sex-offender registration. *See also* Gov't Br. 19-28 (arguing, pre-*Fallen,* that sex-offender registration should not qualify as a "severe" "penalty" at all). Rather, *Fallen* explains, "[m]isdemeanor *child* sexual abuse is the only misdemeanor to qualify as a [sex-offender] registration offense." 290 A.3d at 499 (emphasis added). That decision "reflects the legislature's judgment that sex offenses involving minors 'are among the most serious of all crimes both in terms of their impact on victims and in terms of the degree of fear and concern they engender in the general public.'" *Id.* (quoting The Sex Offender Registration Act of 1999, D.C. Council Comm. on the Judiciary, Report on Bill 13-350 at 3 (Nov. 15, 1999)). By contrast, the D.C. Council specifically decreed that (absent a contrary agreement by the parties in a particular criminal case) "[a]ny misdemeanor offense committed against an adult" "do[es] not constitute [a] registration offense[ ]." D.C. Code § 22-4016(b)(3). In other words, the District's "legislative judgment as to the gravity of that particular offense," *Lewis v. United States*, 518 U.S. 322, 327 (1996), is that registration should *not* be a consequence of Intriago's conviction.

Within that legal framework, the Maryland General Assembly's decision to require Intriago to register as a sex offender as long as he

resides in Maryland is "irrelevant." *Nachtigal*, 507 U.S. at 4. True, this Court in *Bado v. United States*, 186 A.3d 1243 (D.C. 2018) (en banc), considered the deportation "penalty" imposed by Congress. *Id.* at 1257-58. But *Bado*'s reasoning on that score was specific to Congress. The "penalties mandated by public officials and elected representatives" act "as a gauge of [the] social and ethical judgments" "of the community." *Id.* at 1257 (quoting *Blanton*, 489 U.S. at 541 n.5). So, *Bado* reasoned, "Congress, as the national legislature, is presumed to reflect the nation's social and ethical judgments," making its penalties just as important in "*Blanton*'s penalty-based analysis" as those penalties imposed by "the local legislature." *Id.* at 1257-58. By contrast, the opinions of the Maryland General Assembly reflect the views of Maryland citizens, and in no way establish the judgments of the local D.C. "community" or the Nation. Indeed, the Maryland General Assembly's judgment is exactly the opposite of the D.C. Council's, which concluded that a conviction for misdemeanor sexual abuse of an adult should *not* require registration. *See* D.C. Code § 22-4016(b)(3).

Intriago's demand for a jury trial here would lead to absurd results and open the door to manipulation. 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. That is particularly true because the Maryland resident can always move to the District and shed their registration requirement, and vice versa. Under Intriago's logic, he should have gotten a jury trial as a Maryland resident at the time of trial, even though he could have immediately moved to the District upon conviction and avoided registration. On the other hand, accepting Intriago's claim would permit a D.C. resident charged with the same offense to be convicted at a bench trial, even if he later moves to Maryland and is subject to the Maryland registration regime.

Intriago cites no cases in which one State's "penalty" justified a jury trial on another State's criminal charge. *See Nachtigal*, 507 U.S. at 4 ("the statutory penalties in other States are irrelevant"). And indeed, while many defendants convicted of D.C. misdemeanor sexual abuse of a child have challenged their non-jury convictions after *Fallen*, Intriago is the only defendant we are aware of who has challenged his conviction for misdemeanor sexual abuse of an adult. At the very least, Intriago has not shown that the *Blanton* framework clearly and obviously requires

consideration of consequences imposed by one sovereign but rejected by the prosecuting sovereign. He thus cannot show plain error.

II. Intriago Shows No Ineffectiveness.

Intriago also shows no ineffectiveness in counsel's failure to move for a jury trial. *Fallen* has little relevance for this argument. Whereas the plainness of error on appeal depends on the state of law at the time of appellate review, *see Malloy v. United States*, 186 A.3d 802, 815 (D.C. 2018), the effectiveness of counsel depends on the state of the law at the time counsel is making decisions, *see Dubose v. United States*, 213 A.3d 599, 603 (D.C. 2019).

As explained in our prior brief (Gov't Br. 28-33), Intriago's trial counsel reasonably declined to request a jury trial in 2017. At the time, any jury-trial demand based on registration—even D.C. registration—was foreclosed by binding precedent. *See Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008). A demand by Intriago's counsel would have been quickly denied. And counsel had no duty "to anticipate a change in the law," particularly "[g]iven this [C]ourt's prior rulings" and "the obligation of the Superior Court to follow those precedents." *Dubose*, 213 A.3d at 603. Further, even if counsel had tried to read the tea leaves of

the en banc *Bado* proceedings, there was no reason to think that *Thomas*'s holding was at risk, let alone to suppose that persons charged with adult misdemeanor sexual abuse could somehow get a jury trial. Indeed, this panel explained in a thorough and compelling opinion that *Thomas* remained binding even after the en banc *Bado* decision. *See* Memorandum Opinion & Judgment (MOJ), *Intriago v. United States*, Nos. 17-CM-578, 19-CO-19 (D.C. May 12, 2020). Intriago's 2017 trial counsel did not render deficient performance by failing to anticipate the circuitous path of this Court's Sixth Amendment case law. Intriago's conviction should be affirmed.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
CAROLINE BURRELL
Assistant United States Attorneys

/s/
ERIC HANSFORD
D.C. Bar #1017785
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Eric.Hansford@usdoj.gov
(202) 252-6829

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 a 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.

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/s/
Signature

Eric Hansford
Name

Eric.Hansford@usdoj.gov
Email Address

17-CM-578, 19-CO-19
Case Number(s)

June 30, 2023
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Gregory M. Lipper, Esq., on this 30th day of June, 2023.

/s/
ERIC HANSFORD
Assistant United States Attorney