Appeal No. 12-CM-1509

DISTRICT OF COLUMBIA COURT OF APPEALS

JEAN BAPTISTE BADO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

EN BANC BRIEF OF AMICI CURIAE PUBLIC DEFENDER SERVICE AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT

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STATEMENT OF AMICI CURIAE

This case presents the question whether a noncitizen charged with misdemeanor child sexual abuse is constitutionally entitled to a jury trial when the possible statutory consequences of conviction include not only 180 days of imprisonment but also extended confinement at an immigration detention facility, removal from the United States, and ten years of sex offender registration and public notification. This issue is important to clients of the Public Defender Service for the District of Columbia (PDS) and members of the American Civil Liberties Union of the Nation's Capital (ACLU). The parties have consented to the filing of this brief.

PROCEDURAL BACKGROUND

Appellant Jean Baptiste Bado entered the United States on February 8, 2005, seeking political asylum from his native country of Burkina Faso. 7/26/12 Tr. 127. On March 12, 2012, Mr. Bado was charged with misdemeanor sexual abuse of a child, R.16—an offense that carries up to 180 days of imprisonment, D.C. Code § 22-3010.01(a); requires ten years of sex offender registration and public notification under the Sex Offender Registration Act (SORA), *id.* §§ 22-4001(8)(A), -4002(a), -4011; and falls within the federal definition of an "aggravated felony," 8 U.S.C. § 1101(a)(43)(A), conviction of which automatically renders a noncitizen deportable, *id.* § 1227(a)(2)(A)(iii), ineligible for asylum, *id.* § 1158(b)(2)(B)(i), and subject to mandatory detention pending removal proceedings, *id.* § 1226(c)(1)(B).

Because misdemeanor child sexual abuse carries a maximum prison term of 180 days—just a few days short of six months[1]—it is not jury-demandable under D.C. Code § 16-705(b), and presumptively falls within "a category of petty crimes or offenses" that are not covered by the constitutional guarantee of a jury trial, unless "any additional statutory penalties, viewed in

[1] *Turner v. Bayly*, 673 A.2d 596, 597-98 (D.C. 1996) ("[T]he number of days in any consecutive six calendar month period varies from 181 to 184 days.").

conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541, 543 (1989).[2] Mr. Bado demanded a jury trial, arguing that the immigration consequences and sex offender registration requirements that he would face upon conviction were such severe "penalties" that he was constitutionally entitled to trial by jury. R.21. The motions court rejected the jury demand, citing *Foote v. United States*, 670 A.2d 366 (D.C. 1996), and *Thomas v. United States*, 942 A.2d 1180 (D.C. 2008), for the proposition that "collateral consequences" such as deportation and sex offender registration are not "penalties" reflecting the seriousness of an offense. R.25. Following a bench trial, Mr. Bado was convicted of one count of misdemeanor child sexual abuse and sentenced to 180 days in prison. R.36.

A divided panel of this Court reversed Mr. Bado's conviction. The panel held that the ten years of sex offender registration and public notification mandated by SORA did not amount to "an additional penalty" because such requirements are "regulatory" and "not penal in nature." *Bado v. United States*, No. 12-CM-1509, slip. op. at 13-14 (D.C. July 16, 2015) (citing *Thomas*, 942 A.2d at 1186-87). A majority of the panel held, however, that this Court's prior case law characterizing immigration consequences as "collateral," *e.g.*, *Foote*, 670 A.2d at 372, had been undermined by the Supreme Court's recent pronouncement in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that "the penalty of deportation" is "uniquely difficult to classify as either a direct or a collateral consequence" of conviction because of its "close connection to the criminal process," *Bado*, slip op. at 20-23 (quoting *Padilla*, 559 U.S. at 365-66). In an opinion authored by Judge

[2] D.C. law provides for a jury trial when the defendant is constitutionally entitled to one, D.C. Code § 16-705(a); when the defendant is charged with an offense punishable by a fine exceeding $1,000 or imprisonment for more than 180 days, *id.* § 16-705(b)(1)(A); and when the defendant is charged with multiple offenses punishable by a total fine exceeding $4,000 or a total term of imprisonment exceeding two years, *id.* § 16-705(b)(1)(B).

Thompson and joined by Senior Judge Ruiz, the majority explained that *Padilla* leaves "no doubt" that "deportation is a 'particularly severe penalty,'" the "avoidance of which may be more important to the defendant than 'any potential jail sentence.'" *Id.* at 24, 28 (quoting *Padilla*, 559 U.S. at 365, 368). Emphasizing that conviction of an aggravated felony not only exposes a noncitizen to the "drastic measure" of removal by making him "deportable," but also makes his removal "virtually inevitable" by closing off certain avenues of discretionary relief, such as cancellation of removal and asylum, the Court concluded that such "severe" immigration consequences "*clearly* reflect a legislative determination" that aggravated felonies are "serious" crimes for which noncitizens are entitled to trial by jury. *Id.* at 21, 24-27.

Judge Thompson opined in a separate concurrence that, in her view, the inclusion of a crime on the "long list" of deportable offenses in 8 U.S.C. § 1227(a)(2) does not "clearly" signal that Congress views the crime as "serious" when Congress has also provided avenues of relief from removal for certain noncitizens, such as cancellation of removal for longtime permanent residents, *id.* § 1229b(a), and asylum for refugees facing persecution in their native countries, *id.* § 1158(b)(1)(A)—neither of which is available upon conviction of an aggravated felony. *Bado*, slip op. at 32-34 (Thompson, J., concurring). "By contrast, Congress's harsh treatment of non-citizens convicted of aggravated felonies, admitting of no exceptions, leaves no room for doubt that Congress views these as serious offenses, no matter the status of the offender." *Id.* at 34.

Senior Judge Ruiz explained in a separate opinion that the possibility of discretionary relief from removal is "irrelevant" to whether a deportable offense is "serious," as the Supreme Court has instructed that it is the severity of the "*maximum authorized* penalty"—not the actual, likely, or "mandatory minimum" penalty—that "clearly reflect[s] a legislative determination that the offense in question is a 'serious' one." *Id.* at 35-38 (Ruiz, J., concurring) (quoting *Blanton*,

489 U.S. at 541, 543). Thus, in determining whether Congress views an offense as "serious," it is enough that conviction exposes a noncitizen to the "particularly severe penalty" of deportation, and any consideration of possible discretionary relief from that penalty is both unnecessary and contrary to Supreme Court precedent. *Id.* at 37-39 (quoting *Padilla*, 559 U.S. at 365).

Judge Fisher dissented, maintaining that deportation is not a "penalty" that "counts for purposes of determining the right to a jury trial" under *Blanton* because it is not a "punishment" that the sentencing court may impose as "part of the criminal process." *Id.* at 47, 49-50 (Fisher, J., dissenting) (citing *Foote*, 670 A.2d at 372). He argued that this Court's reasoning in *Foote* was not undermined by *Padilla*, which involved the right to effective assistance of counsel and not the right to trial by jury, and he found it "awkward" and "startling" that, under the majority's approach, the seriousness of a D.C. offense is determined by federal law rather than D.C. law, and the right to a jury trial depends on whether the defendant is a noncitizen. *Id.* at 46, 50-51.

On November 15, 2015, this Court granted the government's petition for rehearing en banc, vacated the division's opinion, and ordered new briefing by the parties.

ARGUMENT

In *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), the Supreme Court held that a defendant charged with an offense punishable by no more than six months of imprisonment is not constitutionally entitled to a jury trial, unless "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 543. In applying the *Blanton* test, this Court has assumed, without any analysis or citation to Supreme Court precedent, that the "collateral consequences" of a criminal conviction, such as deportation and sex offender registration, do not count as "penalties" reflecting the seriousness of the offense because they are not criminal "punishments" that can be imposed by the sentencing court. That

premise should be rejected by the en banc Court, as it is contrary to the Supreme Court's analysis in *Blanton*, which itself treated the administrative suspension of a driver's license as one of the "penalties" for driving under the influence of alcohol, despite the government's contention that such "collateral consequences" do not reflect the seriousness of the offense. *Id.* at 544.

Even if *Blanton* left any room for this Court to distinguish between direct and collateral consequences in determining the "penalties" for an offense, that distinction does no meaningful work here. Deportation and immigration detention, although "civil in nature," are "particularly severe 'penalt[ies]'" that are "intimately related to the criminal process" and mandated by statute as "nearly an automatic result" of conviction, making them "difficult to classify as either a direct or a collateral consequence." *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010). The same is true of sex offender registration. *E.g.*, *People v. Fonville*, 804 N.W.2d 878, 894 (Mich. Ct. App. 2011) ("Like the consequence of deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty" that is "difficult to classify as either a direct or a collateral consequence." (quoting *Padilla*, 559 U.S. at 366)). In designating certain crimes as warranting severe measures extending beyond the criminal sentence—civil detention, exile, infamy, long-term monitoring—both Congress and the D.C. Council have clearly expressed their judgment that such crimes are "serious," even when the maximum term of imprisonment falls just shy of the six-month mark separating "serious" offenses from presumptively "petty" ones. S. REP. NO. 104-48, at 1 (1995) (characterizing deportable offenses as "serious crimes"); COUNCIL OF THE DIST. OF COLUMBIA, COMM. ON THE JUDICIARY, REP. ON BILL 13-350, at 3 (1999) ("Sex offenses are among the most serious of all crimes . . . ."). "Considering that the Sixth Amendment would guarantee a jury trial if the maximum authorized incarceration were six months and one day, it would blink reality to conclude that, viewed together, the exposure to 180 days of incarceration"

plus any of the other penalties appellant faced upon conviction—months or years of immigration detention, deportation, and ten years of sex offender registration and public notification—"are somehow insufficient to deem the offense serious so as to entitle appellant to a jury trial." *Bado v. United States*, No. 12-CM-1509, slip op. at 39 (D.C. July 16, 2015) (Ruiz, J., concurring).

I. LEGAL BACKGROUND

The right to trial by jury in a criminal prosecution is guaranteed by both Article III and the Sixth Amendment of the United States Constitution. U.S. CONST. art. III, § 2, cl. 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."). Designed "to prevent oppression by the Government," the right to trial by jury is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149, 155 (1968). The Framers of the Constitution "knew from history and experience" that "plenary powers over the life and liberty of the citizen" could not be entrusted to "judges too responsive to the voice of higher authority," and that the right of the accused "to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. The constitutional right to trial by jury thus reflects our nation's "insistence upon community participation in the determination of guilt or innocence" as a basic "defense against arbitrary law enforcement." *Id.*

The Supreme Court has long recognized, however, that the jury trial guarantee does not extend to "[s]o-called petty offenses," which "were tried without juries both in England and in the Colonies" at the time the Constitution was adopted. *Id.* at 160. In classifying an offense as "petty" or "serious," the Court historically examined "the nature of the offense" and whether it was triable by jury at common law. *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930). But as that approach proved unworkable for statutory offenses lacking common-law antecedents, the

Court eventually shifted its focus to "objective indications of the seriousness with which society regards the offense," the "most relevant" of which is "the severity of the penalty authorized for its commission." *Frank v. United States*, 395 U.S. 147, 148 (1969).

In *Baldwin v. New York*, 399 U.S. 66 (1970), the Supreme Court considered whether a misdemeanor punishable by up to one year of imprisonment was "serious" enough to require a jury trial "on the basis of the possible penalty alone." *Id.* at 72. Citing the prevailing nationwide practice of providing a jury trial when the possible sentence exceeds six months' imprisonment, the Court concluded from this "near-uniform judgment of the Nation" that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69, 71-72 ("In the entire Nation, New York City alone denies an accused the right to interpose between himself and a possible prison term of over six months, the commonsense judgment of a jury of his peers."). Subsequently, in *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), the Court held that, although an offense carrying a maximum prison term of six months or less is not "automatically" considered "petty," it is "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'" *Id.* at 543. "A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.*

At the time *Blanton* was decided, D.C. Code § 16-705(b) provided for a jury trial "in any case involving a fine of more than $300 or imprisonment for more than ninety days." *Burgess v. United States*, 681 A.2d 1090, 1094 (D.C. 1996). Following *Blanton*, in an effort to improve judicial efficiency through "misdemeanor streamlining," the D.C. Council amended § 16-705(b)

"to authorize a jury trial only when the offense carries a possible fine of more than $1,000 or possible imprisonment for more than 180 days," and "reduced the maximum penalties for a variety of crimes" from one year to 180 days "so as to make them non-jury-demandable." *Id.* These provisions "distinguish the District from the vast majority of the fifty states in our union who afford . . . a right to a jury trial to anyone charged with a crime where there is a possibility of imprisonment for any period of time." *Fretes-Zarate v. United States*, 40 A.3d 374, 378 n.3 (D.C. 2012). "Indeed, only nine states (Delaware, Louisiana, Mississippi, Nebraska, Nevada, New Jersey, New York, Pennsylvania, and Rhode Island) and the District limit the right to a jury trial to individuals charged with crimes carrying a sentence of more than 180 days." *Id.* Of these jurisdictions, only the District of Columbia denies a jury trial for sexual abuse of a child.[3]

Several years after the Supreme Court observed in *Blanton* that it is "the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line,'" 489 U.S. at 543, both Congress and the D.C. Council did just that. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which made "sexual abuse of a minor" a deportable offense by classifying it as an "aggravated felony," and mandated the detention of noncitizens convicted of most deportable offenses pending removal proceedings.[4] In 1999, the D.C. Council enacted the Sex Offender Registration Act (SORA),[5] which "imposes registration requirements on sex offenders" and "authorizes the Metropolitan Police Department to inform the community about

[3] In all nine other jurisdictions, the least serious degree of child sexual abuse carries more than 180 days in prison. Del. Code Ann. tit. 11, § 768; La. Rev. Stat. Ann. § 14:81(H)(1); Miss. Code Ann. § 97-5-23; Neb. Rev. Stat. § 28-320.01; Nev. Rev. Stat. § 201.263; N.J. Stat. Ann. § 2C:14-2; N.Y. Penal Law § 130.60; 18 Pa. Cons. Stat. § 3126(a)(8); R.I. Gen. Laws § 11-37-8.3.

[4] Pub. L. No. 104-208, §§ 303, 321, 110 Stat. 3009-546, 3009-585, 3009-627 (1996) (codified at 8 U.S.C. §§ 1101(a)(43)(A), 1226(c)(1)(B)).

[5] D.C. Law 13-137, 47 D.C. Reg. 797 (1999) (codified at D.C. Code §§ 22-4001 to -4017).

them through various means of public notification, including posting their photographs, names, and other personal information on the Internet." *In re W.M.*, 851 A.2d 431, 434 (D.C. 2004). In 2006, against this legal backdrop, the D.C. Council created the new offense of "misdemeanor sexual abuse of a child or minor" and set the maximum term of imprisonment at 180 days.[6]

II. COLLATERAL CONSEQUENCES QUALIFY AS "PENALTIES" REFLECTING THE SERIOUSNESS OF AN OFFENSE.

In determining whether a 180-day misdemeanor is "serious" under *Blanton*, this Court has assumed, in a line of cases beginning with *Foote v. United States*, 670 A.2d 366 (D.C. 1996), that the "collateral consequences" of conviction—sanctions imposed in "civil or administrative proceedings" and not "by the sentencing judge as punishment" for the criminal offense—do not count as "penalties" reflecting the seriousness of the offense. *Id.* at 372 & n.18 (citing *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1990), *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010)).[7] This distinction between direct and collateral consequences—borrowed from nonbinding case law that has been abrogated by *Padilla*[8]—is contrary to the Supreme Court's analysis in *Blanton* and should be abandoned by this Court sitting en banc.

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[6] D.C. Law 16-306, § 216, 53 D.C. Reg. 8610 (2006) (codified at D.C. Code § 22-3010.01(a)).

[7] *See also Young v. United States*, 678 A.2d 570, 571 (D.C. 1996) (per curiam) (driver's license revocation); *Smith v. United States*, 768 A.2d 577, 580 (D.C. 2001) (employment termination); *Olafisoye v. United States*, 857 A.2d 1078, 1084 (D.C. 2004) (deportation); *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008) (sex offender registration); *Fretes-Zarate v. United States*, 40 A.3d 374, 378 (D.C. 2012) (deportation).

[8] *Padilla* explained that, although lower courts like the D.C. Circuit had held that the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel" because "collateral consequences are outside the scope of representation required by the Sixth Amendment," 559 U.S. at 364-65 & n.9 (citing *Del Rosario*), the Supreme Court itself has "never applied a distinction between direct and collateral consequences to define the scope" of counsel's constitutional duties," and any such distinction is inapt because deportation is "difficult to classify as either a direct or collateral consequence," *id.* at 365-66. Thus, although *Padilla* "says nothing about the right to a jury trial," *Bado*, slip op. at 46 (Fisher, J., dissenting), its rejection of the authority on which *Foote* relied in distinguishing between direct and collateral consequences undermines the force of *Foote* and its progeny.

In *Blanton*, the Supreme Court considered whether the Nevada offense of driving under the influence of alcohol (DUI), punishable by no more than six months of imprisonment, was a "serious" offense based on the other penalties attached to conviction. The Nevada DUI statute, Nev. Rev. Stat. § 484.3792, provided for a term of imprisonment ranging from two days to six months, a fine ranging from $200 to $1000, and a mandatory alcohol abuse education course. *Blanton*, 489 U.S. at 539-40. A separate statute, Nev. Rev. Stat. § 483.460(1)(c), required the Department of Motor Vehicles to suspend for 90 days the driver's license of anyone convicted of DUI—a measure that, according to the Nevada Supreme Court, was a civil remedy designed to protect the public, and not a criminal punishment for DUI. *Yohey v. State*, 747 P.2d 238, 240 (Nev. 1987). The petitioners argued in both the Nevada Supreme Court and the U.S. Supreme Court that the collateral consequences of a DUI conviction, combined with the six-month prison term and other penalties authorized in the DUI statute, indicated that the Nevada legislature viewed DUI as a "serious" offense. *Blanton v. N. Las Vegas Mun. Court*, 748 P.2d 494, 499 (Nev. 1987).[9] The Nevada Supreme Court rejected that argument, noting that "the collateral consequences of a conviction have not been a criterion relied upon in the recent decisions of the [U.S.] Supreme Court," which focus instead on the maximum term of imprisonment "as the sole criterion for characterizing offenses as 'serious' or 'petty.'" *Id.* at 500. In their briefs to the U.S. Supreme Court, both the respondent and the United States as amicus curiae urged the Court to hold that the maximum prison term authorized for an offense is the only "accurate indicator" of its seriousness, and that any "collateral consequences" should be disregarded entirely.[10]

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[9] *See also* Br. for Pet'rs, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (No. 87-1437), 1988 WL 1026089.

[10] Br. for the United States as Amicus Curiae Supporting Resp't at 6, 17-21, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (No. 87-1437), 1988 WL 1026099; Br. for Resp't at 2, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (No. 87-1437), 1988 WL 1026098.

The Supreme Court declined to adopt that approach. Although the Court acknowledged that "the maximum authorized period of incarceration" is "the most powerful indication whether an offense is 'serious,'" it made clear that a "legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense." *Blanton*, 489 U.S. at 542. In explaining what it meant by "other penalties," the Court cited the Fourth Circuit's decision in *United States v. Jenkins*, 780 F.2d 472 (4th Cir. 1986), which held that "collateral consequences are helpful in evaluating the community's views of the offense," and that a crime punishable by no more than six months of imprisonment "can be classified as 'serious' in light of the collateral consequences of the crime." *Jenkins*, 780 F.2d at 474 n.3 (cited in *Blanton*, 489 U.S. at 542).[11] Thus, when the Supreme Court in *Blanton* analyzed the "additional statutory penalties" for DUI to determine whether they were "severe" enough to classify the offense as "serious," it explicitly considered "the 90-day license suspension" as one of those penalties, even though the suspension could be imposed only by the Department of Motor Vehicles and not by the sentencing court as part of the "punishment" for DUI. *Blanton*, 489 U.S. at 544.[12] Although the Court ultimately concluded that the penalty of a 90-day license suspension was not severe enough to demonstrate that the Nevada legislature regarded DUI as a "serious" crime, *id.* at 544 & n.9 (noting that the 90-day suspension may run concurrently with the prison sentence, and that a restricted license may be obtained after 45 days), it left open the possibility that a longer period of suspension, or a more onerous type of collateral penalty, could elevate a presumptively petty offense to a serious one. Indeed, the Eighth Circuit subsequently held that, although "a 90-day suspension was not

[11] In support of that holding, *Jenkins* cited the Supreme Court's observation in *Baldwin* that "the collateral consequences attaching to a felony conviction are more severe than those attaching to a conviction for a misdemeanor," which "reflect . . . that a felony conviction is more serious than a misdemeanor conviction." *Baldwin*, 399 U.S. at 69-70 (cited in *Jenkins*, 780 F.2d at 474 n.3).

[12] The Court noted that "only penalties resulting from state action, *e.g.*, those mandated by statute or regulation, should be considered" in this analysis. *Id.* at 543 n.8.

severe enough" to require a jury trial in *Blanton*, "a 15-year revocation is a substantial burden on the offender that is completely 'out of step' with a six month prison term," and that "resulted in a penalty severe enough to warrant a jury trial in this case." *Richter v. Fairbanks*, 903 F.2d 1202, 1205 (8th Cir. 1990). As explained below, the collateral penalties authorized for misdemeanor child sexual abuse are far more severe than the 90-day driver's license suspension in *Blanton*, and clearly reflect society's view that the offense is "serious." Thus, appellant was entitled to a jury trial, and his conviction must be reversed.

III. THE SEVERE PENALTIES OF REMOVAL AND DETENTION INDICATE THAT DEPORTABLE OFFENSES ARE SERIOUS.

The Immigration and Nationality Act (INA) provides that a noncitizen "is deportable" and "shall, upon the order of the Attorney General, be removed" from the United States upon conviction of any crime listed in 8 U.S.C. § 1227(a)(2), including: certain "crimes involving moral turpitude,"[13] crimes that meet the INA's definition of an "aggravated felony,"[14] certain federal crimes, all of which are punishable by more than one year of imprisonment,[15] crimes "relating to a controlled substance,"[16] certain "firearm offenses,"[17] and "crimes of domestic

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[13] An alien is deportable if he is convicted of: (i) a "crime involving moral turpitude" committed within five years of admission (or ten years for a lawful permanent resident), and punishable by at least one year in prison, or (ii) "two or more crimes involving moral turpitude" committed any time after admission and regardless of the possible sentence. 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).

[14] An alien is deportable if he is convicted of an "aggravated felony," as defined in 8 U.S.C. § 1101(a)(43). *Id.* § 1227(a)(2)(A)(iii).

[15] An alien is deportable if he is convicted under certain federal statutes relating to high-speed flight from an immigration checkpoint; failure to register as a sex offender; espionage, sabotage, and treason; and human trafficking. 8 U.S.C. § 1227(a)(2)(A)(iv)-(v), (D), (F).

[16] An alien is deportable if he is convicted under any state or federal law relating to a "controlled substance," as defined in 21 U.S.C. § 802, except for "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B).

[17] An alien is deportable if he is convicted under any law of transferring, using, owning, possessing, or carrying "a firearm or destructive device." 8 U.S.C. § 1227(a)(2)(C).

violence."[18] 8 U.S.C. § 1227(a)(2).[19] The INA further provides that noncitizens convicted of certain deportable offenses—multiple crimes involving moral turpitude, drug offenses, and aggravated felonies—"shall" be "take[n] into custody" and "detained pending a decision on whether [they are] to be removed from the United States," regardless of whether they pose a flight risk or a danger to society. *Id.* § 1226(a), (c)(1)(B).[20] These provisions are the result of immigration reforms over the last few decades that have expanded the class of crimes triggering removal and mandatory detention,[21] while eliminating broad judicial and executive authority to grant discretionary relief from these immigration consequences of conviction,[22] making removal and detention "nearly an automatic result for a broad class of noncitizen offenders." *Padilla*, 559 U.S. at 366. "Under contemporary law, if a noncitizen has committed a removable offense," his

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[18] An alien is deportable if he is convicted of a "crime of domestic violence," "stalking," or "child abuse." A "crime of domestic violence" is a "crime of violence," as defined in 18 U.S.C. § 16, committed against a spouse or someone "similarly situated." 8 U.S.C. § 1227(a)(2)(E)(i).

[19] An alien is "inadmissible" if he is convicted of a crime listed in 8 U.S.C. § 1182(a)(2)—a list that overlaps with, but is not identical to, the list of deportable crimes in § 1227(a)(2). The term "deportable" refers to those "in and admitted to the United States," *id.* § 1227(a), while the term "inadmissible" refers to those not formally admitted to the United States. Both "deportable" and "inadmissible" aliens are subject to "removal" from the United States. *Id.* § 1229a(a)(2).

[20] The Attorney General may grant release only if "necessary to provide protection" to a witness or a cooperator in "an investigation into major criminal activity." 8 U.S.C. § 1226(c)(2).

[21] IIRIRA broadened the definition of "aggravated felony"; created new categories of deportable offenses, including "crimes of domestic violence"; and extended the provision for mandatory detention to most deportable offenses. Pub. L. No. 104-208, §§ 303(a), 321, 350, 110 Stat. 3009-546, 3009-585, 3009-627, 3009-639 (1996); *see Demore v. Kim*, 538 U.S. 510, 520-21 (2003).

[22] Whereas "the sentencing judge in both state and federal prosecutions [once] had the power" to issue a binding "judicial recommendation against deportation" (JRAD) to prevent deportation of noncitizens based on criminal convictions, *Padilla*, 559 U.S. at 361-62, Congress eliminated the JRAD in 1990. Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (1990). Similarly, whereas the Attorney General once had "broad discretion" to "waive" deportation for an "extremely large" group of noncitizens under § 212(c) of the INA, Congress "reduced the size of the class of aliens eligible for such discretionary relief" in 1996 by eliminating the § 212(c) waiver and replacing it with far more limited discretion to "cancel removal" for a "narrow" class of noncitizens, *INS v. St. Cyr*, 533 U.S. 289, 294-97 (2001). Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-587 (1996) (codified at 8 U.S.C. § 1229).

removal and concomitant detention are "practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General." *Id.* at 363-64.

The Supreme Court has "long recognized" that the immigration consequences of criminal conviction constitute a "penalty" for the criminal offense. *Id.* at 365 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)); *see Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[Deportation] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."). Although removal proceedings are "civil in nature," "[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century." *Padilla*, 559 U.S. at 365-66. Indeed, when Congress first made "conviction of certain serious crimes" a basis for deportation in the Immigration Act of 1917, it viewed deportation as "part of the penalty for the crimes" and gave criminal courts "conclusive authority to decide whether a particular conviction should be disregarded as a basis of deportation," so as "to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust." *Janvier v. United States*, 793 F.2d 449, 452, 453 (2d Cir. 1986) (quoted in *Padilla*, 559 U.S. at 361-62) (citing 53 Cong. Rec. 5165, 5170 (1916)). Such "judicial recommendation against deportation" (JRAD) was viewed by some courts as "'part of the sentencing' process, even if deportation itself is a civil action." *Padilla*, 559 U.S. at 363 (quoting *Janvier*, 493 F.2d at 452).

Although Congress circumscribed the JRAD in 1952 and entirely eliminated it in 1990, *id.* at 363; *see supra* note 22, it continued to view deportation as part of the penalty for a crime that could be imposed by the sentencing court. As part of the Sentencing Reform Act of 1984, Congress authorized federal district courts to "provide, as a condition of supervised release, that [an alien defendant] be deported and remain outside the United States" after completing his term of imprisonment for a deportable offense. Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987, 2000

(1984) (codified at 18 U.S.C. § 3583(d)). In 1994, Congress authorized federal district courts, at the request of the United States, "to enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable" under 8 U.S.C. § 1227(a)(2)(A) (covering crimes involving moral turpitude and aggravated felonies). Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322 (1994). In 1996, Congress expanded "judicial removal" to cover all deportable crimes, and authorized federal district courts to order removal as a condition of probation pursuant to the parties' stipulation. Pub. L. No. 104-208, § 374, 110 Stat. 3009-546, 3009-647, 3009-648 (1996) (codified at 8 U.S.C. § 1228(c)(1); 18 U.S.C. § 3563(b)).

Citing this "close connection" between deportation and the criminal process, the Supreme Court held in *Padilla* that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants" convicted of certain crimes. 559 U.S. at 364, 366 ("Deportation as a consequence of criminal conviction is . . . difficult to classify as either a direct or a collateral consequence."). The Court further emphasized that the "penalty" of deportation—which "necessarily" includes civil detention during the deportation process, *Carlson v. Landon*, 342 U.S. 524, 538 (1952))—is a "particularly severe" deprivation of liberty that "may be more important to the [defendant] than any potential jail sentence." *Padilla*, 559 U.S. at 365, 368. Deportation "involves—[f]irst, an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property." *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting). Civil confinement at an immigration detention facility, which is virtually indistinguishable from incarceration at a prison, can last for months or years, even exceeding the maximum prison term for the criminal offense. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1079-81 (9th Cir. 2015) (observing that noncitizens subject to mandatory detention under 8 U.S.C. § 1226(c) "are often detained for years without adequate process," and holding

that due process requires a bond hearing after mandatory detention exceeds six months); *id.* at 1073 ("Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors."); Br. for T. Alexander Aleinikoff et al. as Amici Curiae in Support of Resp't at 10, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31455523 ("Those detained under [8 U.S.C. § 1226(c)] are typically held in detention facilities under conditions that are largely indistinguishable from those in actual prisons (indeed, in many cases, detainees are held in prisons, although their confinement under [§ 1226(c)] is considered civil)."). Removal may result "in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *see Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."); *Fong Haw Tan*, 333 U.S. at 10 ("deportation is a drastic measure and at times the equivalent of banishment of exile"). The tolls on personal freedom imposed by the removal process unquestionably "approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542.

Congress's decision to attach such severe penalties to certain crimes "clearly reflect[s]" a legislative judgment that those crimes are "serious." *Id.* at 543. Indeed, when Congress first authorized deportation as a penalty for "crimes involving moral turpitude" in the Immigration Act of 1917, it clearly expressed its view that such crimes are "serious." S. REP. NO. 64-352, at 15 (1916) (providing for "deportation of aliens who commit serious crimes within five years after entry" or a "second serious offense" at any time after entry). In the intervening century, Congress has attached the severe penalties of deportation and detention to other crimes it has

deemed "serious," including drug offenses, firearms offenses, domestic violence offenses, and "aggravated felonies." S. REP. NO. 104-48, at 1-2 (1995) (characterizing deportable offenses as "serious crimes" and aggravated felonies as "particularly serious crimes"); *see also Duvall v. Attorney Gen.*, 436 F.3d 382, 391 (3d Cir. 2006) ("A primary goal of several recent overhauls of the INA has been to ensure and expedite the removal of aliens convicted of serious crimes."); *Saysana v. Gillen*, 590 F.3d 7, 18 (1st Cir. 2009) ("Congress has determined that the specified offenses in the mandatory detention provision are of a particularly serious nature warranting greater restrictions on liberty pending removal proceedings"). Such evidence of legislative intent merely confirms what is already clear from the severity of the authorized penalties of deportation and detention: that misdemeanor child sexual abuse is a "serious" offense requiring trial by jury.

The fact that the Attorney General retains "limited remnants of equitable discretion" to "cancel removal for noncitizens convicted of particular classes of offenses" does not make the penalty of removal any less severe, or the legislative judgment about the seriousness of those deportable offenses any less clear. As Senior Judge Ruiz explained in her concurrence in this case, *Bado v. United States*, No. 12-CM-1509, slip op. at 35-38 (D.C. July 16, 2015) (Ruiz, J., concurring), the Supreme Court has instructed that "the relevant criterion" for determining the seriousness of an offense is "the severity of the penalty *authorized*"—"not the penalty actually imposed," the penalty likely to be imposed, or the penalty required to be imposed. *Frank v. United States*, 395 U.S. 147, 149 (1969) (emphasis added); *see Blanton*, 489 U.S. at 541, 544 (holding that, because a legislature expresses its "judgment about the seriousness of the offense" by "fixing the maximum penalty for a crime," "it is immaterial" that the DUI statute mandates a "minimum term of imprisonment," or that "a defendant may receive the maximum prison term because of the prohibitions on plea bargaining and probation"). Thus, an offense that exposes a

defendant to a "possible penalty" of more than six months in prison is categorically "serious," despite the trial court's broad discretion to impose a sentence of time served or to order probation instead of any term of incarceration. *Baldwin*, 399 U.S. at 74. Likewise, an offense that exposes a defendant to the "possible penalty" of deportation (and the mandatory penalty of detention) is categorically "serious," despite the Attorney General's limited discretion to cancel removal for certain longtime permanent residents,[23] and to grant asylum to refugees facing persecution in their countries of origin.[24] To be sure, Congress's decision to make such relief unavailable to noncitizens convicted of aggravated felonies may well reflect its judgment that aggravated felonies are "*particularly* serious crimes." S. REP. NO. 104-48, at 2 (emphasis added); *see also* 8 U.S.C. § 1158(b)(2)(B)(i) (providing that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime" that renders him ineligible for asylum under § 1158(b)(2)(A)(ii)). But any "gradations of seriousness that exist in the immigration statute," *Bado*, slip op. at 31 (Thompson, J., concurring), do not alter the conclusion that, by authorizing the unquestionably severe penalties of deportation and detention for certain crimes, Congress clearly expressed its view that those crimes are serious.[25]

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[23] The Attorney General "may cancel removal" of a noncitizen who has been a lawful permanent resident for at least five years and has resided in the United States continuously for seven years; cancellation is limited to 4,000 aliens each fiscal year. 8 U.S.C. § 1229b(a), (e). From 2008 to 2015, an average of nearly 360,000 aliens were removed each fiscal year. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, at 2 fig.1 (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf.

[24] The Attorney General "may grant asylum" to an alien who demonstrates that he is "unable or unwilling to return to" his country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

[25] To the extent that the possibility of relief from removal is relevant to whether a deportable offense is "serious," Congress's particularly "harsh treatment" of aggravated felonies, *Bado*, slip op. at 34 (Thompson, J., concurring), is of limited consequence, as both cancellation and asylum are purely discretionary remedies that are rarely granted and subject to stringent criteria that most noncitizens do not meet, *see supra* notes 23-24. As the Supreme Court noted in *Padilla*, removal

Contrary to the government's argument in its petition for rehearing en banc (at 4), the fact that deportation cannot be imposed on a *citizen* convicted of a deportable offense does not mean that deportation is not a penalty for that offense. It is not at all "startling," *Bado*, slip op. at 46 (Fisher, J., dissenting), for a legislature to authorize a penalty for an offense that can be imposed on some defendants but not on others. In *Blanton*, for example, the Supreme Court treated the 90-day suspension of a Nevada driver's license as a penalty for DUI, even though that penalty could not be imposed on DUI offenders who did not have a Nevada driver's license—such as those who were licensed in other states or those who had no driver's license at all. *Blanton*, 489 U.S. at 544. Moreover, although the "Supreme Court has never suggested that the identity of the defendant changes the seriousness of the offense," *Bado*, slip op. at 51 (Fisher, J., dissenting), it has repeatedly indicated that a particular defendant's entitlement to a jury trial can depend on the severity of the penalty to which he is personally exposed, even if other defendants charged with the same offense may be exposed to more (or less) severe penalties. In *Blanton*, for example, in determining whether the petitioners were entitled to a jury trial for a first-time DUI offense, the Court refused to consider the severity of "increased penalties for repeat offenses," as "petitioners do not face such penalties here." *Blanton*, 489 U.S. at 545 & n.12; *see also Foote*, 670 A.2d at 373 (holding that, because appellant "was not charged as a recidivist," his reliance on "recidivist penalties which he personally was not facing is foreclosed by *Blanton*"). Similarly, in deciding whether a defendant is entitled to a jury trial for criminal contempt—an offense that is typically

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is now "practically inevitable" for noncitizens convicted of any "removable offense." 559 U.S. at 363-64. Indeed, in explaining that petitioner's drug conviction subjected him to "automatic" or "presumptively mandatory" deportation, the Court cited 8 U.S.C. § 1227(a)(2)(B)(i), which "specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses," and not § 1227(a)(2)(A)(iii), which requires removal for aggravated felonies. 559 U.S. at 360, 368-69. In any event, even if a noncitizen is eligible for cancellation or asylum, his detention pending such relief is "automatic" and "presumptively mandatory" for most removable offenses, not just aggravated felonies. 8 U.S.C. § 1226(c)(i).

punishable by a term of imprisonment that is not limited by any statutory maximum, *e.g.*, 18 U.S.C. § 401—the Supreme Court has held that a defendant may be forced to endure a bench trial if the court refrains from imposing more than six months' imprisonment, even though a different defendant charged with the same offense is entitled to a jury trial if he is exposed to more than six months' imprisonment. *See Frank*, 395 U.S. at 149-50; *Bloom v. Illinois*, 391 U.S. 194, 211 (1968). Thus, it is entirely consistent with Supreme Court precedent for this Court to hold that a noncitizen defendant who faces severe immigration penalties for a deportable offense is entitled to have his fate decided by a jury of his peers, whereas a citizen defendant who does "not face such penalties" cannot assert them as a basis for a jury trial. *Blanton*, 489 U.S. at 545.

Finally, there is nothing "awkward" or inconsistent with Supreme Court precedent about relying on Congress's "legislative determination" that a D.C. offense is "serious." *Bado*, slip op. at 50 (Fisher, J., dissenting). It is the "seriousness with which *society* regards the offense" that determines whether a jury trial is required, *Blanton*, 489 U.S. at 541 (emphasis added) (quoting *Frank*, 395 U.S. at 148), and the Supreme Court has prioritized the judgment of "a legislature" because, as an elected body that most directly represents the people, a legislature "is far better equipped" than a court to gauge prevailing "social and ethical judgments" and is "likewise more responsive to changes in attitude," *id.* at 541 & n.5 (quoting *Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc); *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937)). As the federal legislature that speaks for the entire nation—and, in particular, retains plenary power to legislate for the District of Columbia, U.S. CONST. art. I, § 8, cl. 17; D.C. Code § 1-206.01—Congress is just as "equipped" as the D.C. Council to gauge societal views on crime. Indeed, the Supreme Court has explicitly relied on the "judgment of the Nation," as reflected by federal law and national practice, in drawing the line between "serious" and presumptively "petty" crimes at

six months' imprisonment. *Baldwin*, 399 U.S. at 72-73; *Duncan*, 391 U.S. at 161. To be sure, the Court noted in *Blanton* that the penalty for DUI in other states was irrelevant to whether the Nevada offense of DUI was "serious," but in that case the petitioners were not exposed to the severe penalties authorized by other states, as they had been charged under Nevada law only. *Blanton*, 489 U.S. at 545 n.11; *see also United States v. Nachtigal*, 507 U.S. 1, 4 (1993); *Brown v. United States*, 675 A.2d 953, 955 (D.C. 1996) ("The fact that Congress has fixed a maximum one-year penalty for possession of cocaine, while relevant to deciding whether the right to a jury trial attaches to the federal offense, is irrelevant to determining whether the local offense under which the government charged Brown is "serious" or "petty."). The same is not true here. Because Congress wields "plenary and exclusive" power over immigration law, *Toll v. Moreno*, 458 U.S. 1, 26 (1982), the immigration penalties that it attaches to state and local offenses affect all noncitizens, including those convicted of D.C. crimes. Because removal and detention are possible penalties for the charged offense of misdemeanor child sexual abuse, they are "objective indications of the seriousness with which society regards the offense." *Blanton*, 489 U.S. at 541.

IV. THE SEVERE PENALTY OF SEX OFFENDER REGISTRATION INDICATES THAT REGISTRATION OFFENSES ARE SERIOUS.

SORA and its accompanying regulations provide that anyone convicted of a "registration offense" who "lives, resides, works, or attends school in the District of Columbia" must: (1) register in person with the Court Services and Offender Supervision Agency (CSOSA), (2) provide a photograph, fingerprints, and any personal information required by CSOSA, including names and aliases; date of birth; physical description, including sex, race, height, weight, eye color, hair color, tattoos, and scars; social security number; driver's license number; description and license plate number of any motor vehicle; and home, school, and work addresses and phone numbers, (3) verify such information on an annual or quarterly basis, and (4) report to CSOSA

any change in address, employment, school enrollment, motor vehicles, or personal appearance, within three days. D.C. Code §§ 22-4001(9), -4007, -4008, -4009, -4014; 28 C.F.R. §§ 811.7, 811.9, 811.10. SORA also requires the Metropolitan Police Department (MPD) to publish the registration information of certain classes of sex offenders on the Internet, and authorizes MPD to "actively" warn schools, daycare centers, churches, and other institutions about sex offenders in their communities. D.C. Code § 22-4011(b)(1)(A)-(B). A sex offender's failure to comply with any SORA requirement is punishable by 180 days of imprisonment under D.C. law, *id.* § 22-4015, and ten years of imprisonment under federal law, 18 U.S.C. § 2250(a)(2)(A), (a)(3).

All "sexual abuse" offenses in the District of Columbia, except for misdemeanor sexual abuse of an adult, are "registration offenses." D.C. Code §§ 22-4001(8)(A), -4016(b)(3). The "most serious" offenses, *W.M.*, 851 A.2d at 436, such as first- and second-degree sexual abuse and first-degree child sexual abuse committed against a child under age twelve, are "Class A" offenses requiring lifetime registration, quarterly verification, and Internet publication. D.C. Code §§ 22-4001(6), -4002(b), -4011(b)(1)(B), (b)(2)(A); 28 C.F.R. § 811.9(a). Offenses that are not designated as Class A offenses but that involve sexual abuse of a minor, ward, patient, or client are "Class B" offenses requiring ten years of registration, annual verification, and Internet publication. D.C. Code §§ 22-4002(a), -4011(b)(1)(B), (b)(2)(B); 28 C.F.R. § 811.9(b). All other registration offenses are "Class C" offenses requiring ten years of registration and annual verification but not Internet publication. D.C. Code §§ 22-4002(a), -4001(b)(2)(C); 28 C.F.R. § 811.9(b). The registration period does not include any "time in which a sex offender is detained, incarcerated, confined, civilly committed, or hospitalized in a mental health facility." 28 C.F.R. § 811.6(b)(2)(ii). Misdemeanor child sexual abuse is a Class B offense. App. for Appellant 8.[26]

[26] Nearly all other registration offenses are jury-demandable under D.C. Code § 16-705(b).

Following the Supreme Court's decision in *Padilla*, several courts have held that, like deportation, "sex offender registration is not a criminal sanction, but it is a particularly severe penalty" that is "difficult to classify as either a direct or a collateral consequence" of conviction. *People v. Fonville*, 804 N.W.2d 878, 894 (Mich. Ct. App. 2011) (quoting *Padilla*, 559 U.S. at 366); *see also United States v. Riley*, 72 M.J. 115, 120-21 (C.A.A.F. 2013); *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010); *People v. Dodds*, 7 N.E.3d 83, 96-98 (Ill. App. Ct. 2014). Not only is sex offender registration an "automatic" requirement attending any conviction of a registration offense, but it is "intimately related to the criminal process." *Fonville*, 804 N.W.2d at 894 (quoting *Padilla*, 559 U.S. at 365-66). When a defendant is convicted of a registration offense in D.C. Superior Court, the trial court is required to "enter an order certifying that the defendant is a sex offender . . . subject to registration," and "order the sex offender . . . to comply with the requirements of [SORA]." D.C. Code § 22-4003(a). This order is part of the judgment and entered into the docket for the criminal case. App. for Appellant 8; 1/3/13 Tr. 3 (amending the Judgment and Commitment Order "to include . . . the statutorily required obligation that Mr. Bado register as a Convicted Sex Offender"). Thus, although sex offender registration is not a criminal "punishment" because its aim is "regulatory" rather than "punitive," *W.M.*, 851 A.2d at 440-46; *Thomas*, 942 A.2d at 1186-87, it is nonetheless a "penalty" for the offense ordered by the sentencing court and "enmeshed" with the criminal process, making it "'most difficult' to divorce the requirement of registration from the underlying criminal conviction," *Taylor*, 698 S.E.2d at 388 (quoting *Padilla*, 559 U.S. at 365-66).

Like deportation, the penalty of sex offender registration "is a 'drastic measure' (albeit a totally understandable one) with severe ramifications for a convicted criminal." *Id.* (quoting *Padilla*, 559 U.S. at 360). "Mandatory registration under the SORA is arguably as severe as

involuntary commitment or deportation, since it has stigmatizing and far-reaching consequences into every aspect of the registrant's life." *Dodds*, 7 N.E.3d at 97. Not only must a registrant disclose his personal information for the world to peruse online, but he must inform CSOSA any time he moves to a new apartment, changes jobs or schools, buys a new car, or significantly changes his appearance. A registrant cannot even shave his beard, change his hairstyle, or lose twenty pounds without reporting the change to CSOSA within three days and submitting a new photograph for Internet display.[27] A registrant who lives, works, or attends school in another state must register in that state, D.C. Code § 22-4014; 42 U.S.C. § 16913, and comply with that state's registration laws, many of which restrict where registrants may live.[28] And a registrant who plans to travel abroad must notify CSOSA so that his destination country can be warned, and his passport will be marked with a "unique identifier" for registered sex offenders. Pub. L. No. 114-119, 130 Stat. 15 (2016). Unlike the Nevada statute in *Blanton*, which required a DUI offender's driver's license to be suspended for 90 days—a short-term disability that potentially "[ran] concurrently with the prison sentence," *Blanton*, 489 U.S. at 544—SORA requires a sex offender to be monitored by the government and the public for ten years after his release from confinement—a long-term burden "that is completely 'out of step' with a six month prison term," *Richter*, 903 F.2d at 1205; *see also Fushek v. State*, 183 P.3d 536, 542 (Ariz. 2008) (en

[27] Although this Court has held that SORA does not violate substantive due process because it does not burden "fundamental" rights that are "implicit in the concept of ordered liberty," it has recognized that SORA does impose "a burden" on autonomy and "an intrusion" on privacy—liberty interests that "are indeed important," even if not "fundamental." *W.M.*, 851 A.2d at 448, 450-51 (quoting *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (per curiam)).

[28] *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SEX OFFENDER RESIDENCY RESTRICTIONS, at 1 (2008), https://www.ncjrs.gov/pdffiles1/nij/222759.pdf. ("Laws that restrict where registered sex offenders may live have become increasingly popular . . . . As of 2007, some 27 states and hundreds of municipalities had enacted laws that bar sex offenders from residing near schools, parks, playgrounds and day care centers.").

banc) ("The duration of the registration requirement makes this statutory consequence much more severe than a comparatively short probation period."). "What is more, because a violation of the SORA is a [criminal] offense punishable by jail time," a ten-year registration requirement "places a severe constraint on a defendant's liberty." *Dodds*, 7 N.E.3d at 97.

The D.C. Council's decision to attach the severe penalty of sex offender registration to misdemeanor sexual abuse of a child—but not misdemeanor sexual abuse of an adult—clearly reflects its view that sexual abuse of a child, no matter what its maximum term of imprisonment, is a "serious" offense posing a substantial risk of recidivism that warrants long-term government monitoring and public vigilance. *See W.M.*, 851 A.2d at 436, 445 (holding that the purpose of SORA is to protect the public from the "frightening and high" risk of recidivism presented by those convicted of "serious sex offenses"); COUNCIL OF THE DIST. OF COLUMBIA, COMM. ON THE JUDICIARY, REP. ON BILL 13-350, at 3 (1999) ("Sex offenses 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."); *see also Fushek*, 183 P.3d at 543 ("The importance the bill places on protecting the public from sex offenders reflects a legislative view that those who commit [registration offenses] have engaged in more than simple petty crimes."); *id.* ("The statutory requirements of warnings to various communities about the identities and presence of sex offenders confirm that the legislature views sex offenses as serious crimes."). Indeed, nearly all other Class B offenses carry a maximum prison term of at least five years. "The authorization of registration for [misdemeanor child sexual abuse] strongly suggests that the legislature views [that offense] as similar to these other plainly serious offenses." *Id.*

CONCLUSION

For the foregoing reasons, appellant was constitutionally entitled to a jury trial, and his conviction must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing amicus brief has been served, by mail, upon Moses A. Cook, Esq., and Alfred D. Carry, Esq., DC Law Students in Court, 4340 Connecticut Avenue NW, Suite 100, Washington, DC 20001, and by hand, upon Lauren Bates, Esq., and Elizabeth Trosman, Esq., Chief, Appellate Division, Office of the United States Attorney, 555 4th Street, NW, Room 8104, Washington, DC 20530, this 7th day of March, 2016.

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