Appeal No. 12-CM-1509

Regular Calendar: June 14, 2016

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 REPLY BRIEF OF AMICI CURIAE PUBLIC DEFENDER SERVICE AND AMERICAN CIVIL LIBERTIES UNION

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ARGUMENT

In *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), the Supreme Court held that a criminal defendant charged with an offense carrying 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. The central question in this case is whether the civil consequences attached to appellant's conviction for misdemeanor sexual abuse of a child—mandatory detention and removal, and ten years of sex offender registration and public notification—count as "additional statutory penalties" that reflect the seriousness of the offense under *Blanton*. The answer to that question is yes. As the Supreme Court made clear in *Blanton* itself, "the seriousness with which society regards [an] offense" is evidenced by not only the criminal punishment authorized for the offense, but also "the other penalties that [a legislature] attaches to the offense," including civil penalties like the driver's license suspension at issue in *Blanton*, and the immigration consequences and sex offender registration requirements at issue here. *Id.* at 541-44.

Blanton's focus on the severity of all penalties attached to a criminal offense reflects the basic purpose of the jury trial guarantee—to protect the individual from government oppression. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). It also comports with the fact that legislatures have long attached civil penalties to criminal convictions as an expression of public opprobrium toward serious crimes. *See* Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1394 (2012). In attaching the severe civil penalties of automatic removal, mandatory detention, and sex offender registration to certain crimes, including sexual abuse of a child, our federal and local legislatures have expressed society's judgment that such crimes are so dangerous and destructive that those

offenders require not only criminal punishment, but permanent expulsion from the nation (for those who can be removed) and long-term monitoring (for those who cannot) to ensure that they do not endanger the public after serving their criminal sentences. Indeed, because the onerous burdens of deportation and sex offender registration last far longer than the maximum 180-day sentence for misdemeanor child sexual abuse, "the civil consequences of a conviction 'may be the most significant penalties resulting from a criminal conviction.'" *Id.* at 1394.

The government urges this Court to simply ignore these important civil consequences of conviction, arguing that they are not "penalties" under *Blanton* because they are not "criminal punishments" within the meaning of the Ex Post Facto and Double Jeopardy Clauses. Br. for Appellee at 9-15, 20-33. Although the Supreme Court has indeed held that deportation and sex offender registration are not "criminal punishments," it has never held that these consequences are not "penalties"—a broader term that encompasses both criminal and civil sanctions. *Smith v. Doe*, 538 U.S. 84, 95 (2003) ("both criminal and civil sanctions may be labeled 'penalties'"); *United States v. Ward*, 448 U.S. 242, 248 (1980) (distinguishing between "a civil penalty and a criminal penalty"). In fact, the Supreme Court recently emphasized in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that deportation is "a particularly severe 'penalty,'" even though "it is not, in a strict sense, a criminal sanction." *Id.* at 365; *see also 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." (citing *Padilla*, 559 U.S. at 365)).

This Court should reject the government's invitation to ignore the civil consequences of criminal conviction when deciding whether a crime is "serious" enough to require a jury trial, as that approach conflicts with the Supreme Court's analysis in *Blanton*, undermines the purpose of the jury trial guarantee, and ignores "objective indications of the seriousness with which society

regards the offense," *Blanton*, 489 U.S. at 541. Because appellant's misdemeanor child sexual abuse charge exposed him to 180 days of imprisonment and the "additional statutory penalties" of automatic removal, mandatory detention, and ten years of sex offender registration and public notification, and because the severity of those combined penalties "clearly reflect[s] a legislative determination that the offense in question is a 'serious' one," *id.* at 543, appellant was entitled to a jury trial, and his conviction must be reversed.

I. *BLANTON* HOLDS THAT CIVIL CONSEQUENCES OF CRIMINAL CONVICTION ARE "PENALTIES" THAT REFLECT THE SERIOUSNESS OF A CRIME.

As amicus Public Defender Service (PDS) explained in its main brief (at 10-11), *Blanton* instructs that the civil or "collateral"[1] consequences of a criminal conviction are relevant to the seriousness of the crime, as the Court itself treated the administrative suspension of a driver's license as one of the "additional statutory penalties" for the crime of driving under the influence of alcohol (DUI), *Blanton*, 489 U.S. at 544, even though that measure was designed to protect the public from drunk drivers, and not to impose criminal punishment for DUI, *see Yohey v. State*, 747 P.2d 238, 240 (Nev. 1987). The government argues (at 43) that *Blanton*'s "brief" discussion of the license-suspension provision is "unilluminating" because the Court "was not asked to decide what types of consequences are considered 'penalties' for purposes of the Sixth Amendment jury-trial right." But as PDS explained in its main brief (at 10 & nn.9-10), that very question was raised by both the Nevada Supreme Court's opinion below and the briefs submitted to the United States Supreme Court by the respondent and the United States as amicus curiae. In holding that DUI was not a serious offense, the Nevada Supreme Court rejected the petitioner's

[1] "Collateral" consequences are "those matters not within the sentencing authority of the state trial court." *Padilla*, 559 U.S. at 364. Because most "collateral" consequences are "civil," and vice versa, this Court has used the terms interchangeably to refer to consequences of a criminal conviction that are mandated by statute and not imposed by the sentencing court as part of the criminal punishment for the offense. *See Foote v. United States*, 670 A.2d 366, 372 (D.C. 1996).

argument that the license suspension was a relevant consideration, 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 punishment as the sole criterion for characterizing offenses as 'serious' or 'petty.'" *Blanton v. N. Las Vegas Mun. Court*, 748 P.2d 494, 500 (Nev. 1987). In its amicus brief on certiorari, the United States argued that "the Nevada Supreme Court properly focused on the maximum *punishment*," and that "the collateral consequences of a conviction" do not "provide an accurate indicator of the seriousness of the offense." Br. for the United States as Amicus Curiae Supporting Resp't at 6, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (No. 87-1437), 1988 WL 1026099 (emphasis added). In support of that position, the United States cited several lower court decisions holding that the suspension of a driver's license is not a "penalty" for DUI that reflects the seriousness of the offense because it is "regulatory rather than punitive," *State v. Henderson*, 491 So. 2d 647, 650 (La. 1986), it is "not a criminal sanction," *State v. Morrill*, 465 A.2d 882, 886 (N.H. 1983), and it is "not a part of the punishment" for DUI, *United States v. Fletcher*, 505 F. Supp. 1053, 1054 (W.D. Va. 1981). Br. for the United States as Amicus Curiae Supporting Resp't at 21, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (No. 87-1437), 1988 WL 1026099. Although the United States noted that several other courts had "relied on the collateral consequences of a DUI conviction as the reason for holding the jury trial right applicable," *id.* at 21 (citing cases),[2] it

[2] *E.g.*, *United States v. Craner*, 652 F.2d 23, 26 (9th Cir. 1981) ("Although a license revocation is itself a regulatory, not a punitive action, the threat of loss of a license as important as a driver's license, a deprivation added to penal sanctions, is [a] sign that the DUI defendant's community does not view DUI as a petty offense." (citation omitted)); *United States v. Woods*, 450 F. Supp. 1335, 1346 (D. Md. 1978) ("[T]he revocation of a driver's license . . . is only a collateral or incidental consequence, mandated 'not as punishment but in a proper concern for public safety on the highways.' Nevertheless, the Court believes that it is appropriate to consider a collateral consequence of such impact in an effort to gauge 'the social and ethical judgments' of Maryland with regard to this offense and thus to aid in its categorization as either 'petty' or 'serious.'").

argued that such reasoning was "inconsistent" with the Supreme Court's prior decisions, and urged the Court to categorically disregard the collateral consequences of a DUI conviction, arguing that the "confusion wrought by" their consideration would be "immense," *id.* at 21, 25.

Thus presented with the question whether collateral consequences of criminal conviction should be considered in evaluating the seriousness of an offense, the *Blanton* Court rejected the government's answer to that question. Although *Blanton* did not explicitly spell out that civil consequences count as "statutory penalties," that conclusion was implicit in its reasoning. In listing the penalties for DUI, the Court specifically cited the separate Nevada statute requiring a 90-day suspension of the DUI offender's driver's license, *Blanton*, 489 U.S. at 539 (citing Nev. Rev. Stat. § 483.460(1)(c)); and in "[c]onsidering the additional statutory penalties" for DUI, the Court separately analyzed the severity of the "90-day license suspension" and concluded that it was not severe enough to merit a jury trial because "a restricted license may be obtained after only 45 days," and the impact of the suspension "will be irrelevant if it runs concurrently with the prison sentence," *id.* at 544 & n.9. As the Supreme Court of New Jersey later observed, "the [*Blanton*] Court did not dismiss the idea of a license revocation as being 'non-punitive'; rather, this particular period was viewed as insignificant due to its brevity." *State v. Hamm*, 577 A.2d 1259, 1266-67 (N.J. 1990).

Moreover, in explaining what it meant by the term "penalty," the *Blanton* Court did not refer to any of its well-developed jurisprudence defining the term "criminal punishment," as the government asks this Court to do here. Br. for Appellee at 13-14 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). Rather, in holding 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 (emphasis added), the Court

specifically cited footnote three of the Fourth Circuit's opinion in *United States v. Jenkins*, 780 F.2d 472 (4th Cir. 1986), which states in its entirety:

> We agree that the collateral consequences are helpful in evaluating the community's views of the offense. A crime involving a lesser maximum punishment than required by the *Baldwin* bright-line test can be classified as "serious" in light of the collateral consequences of the crime. *Cf. Baldwin* [*v. New York*, 399 U.S. 66, 70, 73 (1970)]. The collateral consequences in the instant case, however, are not sufficiently severe to make up for the penalty's significant deficiency in not meeting the bright-line test.

Id. at 474 n.3 (cited in *Blanton*, 489 U.S. at 542). By referring to footnote three of *Jenkins* to describe what "other penalties" reflect "a legislature's view of the seriousness of an offense," *Blanton*, 489 U.S. at 542, the Supreme Court clearly adopted the Fourth Circuit's view that the collateral consequences attached to a criminal offense are "helpful" in determining whether the legislature views the offense as "serious," and that an offense carrying no more than six months of imprisonment can be "serious" enough to require a jury trial if its collateral consequences are "sufficiently severe." *Jenkins*, 780 F.2d at 474 n.3.[3] Indeed, as the Fourth Circuit pointed out in *Jenkins*, the Supreme Court had previously recognized the relevance of collateral consequences in *Baldwin*, where it noted 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).[4] Thus, this Court need not look beyond *Blanton* itself to conclude that civil consequences of criminal conviction are "additional statutory penalties" that are relevant to whether a crime is "serious" enough to require a jury trial.

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[3] Although the government notes (at 44) that *Blanton* rejected the Fourth Circuit's consideration of "the intrinsic nature of the offense itself," that point is inconsequential, given how clearly *Blanton* adopted the Fourth Circuit's consideration of collateral consequences.

[4] Furthermore, in instructing lower courts on what "other penalties" should be considered, the *Blanton* Court specified that "only penalties resulting from state action, e.g., those mandated by statute *or regulation*, should be considered," 489 U.S. at 543 n.8 (emphasis added)—a point reinforcing its view that "penalties" can be "regulatory" rather than "punitive" in nature.

II. *BLANTON*'S CONSIDERATION OF CIVIL PENALTIES REFLECTS THE PURPOSE OF THE JURY TRIAL GUARANTEE AND MODERN LEGISLATIVE PRACTICE.

Even if this Court were to conclude that it is not bound by *Blanton* to consider the civil consequences of criminal conviction, it should nevertheless do so here, as that approach more closely aligns with the purpose of the jury trial guarantee and the reality of the modern criminal justice system. The government contends (at 9-15) that a statutory consequence of conviction is not a "penalty" under *Blanton* unless it constitutes "criminal punishment" under the Ex Post Facto and Double Jeopardy Clauses, but it offers no constitutional analysis or Supreme Court authority to support its position. The Supreme Court has long held that the "distinction between a civil penalty and a criminal penalty is of some constitutional import," as certain constitutional provisions—such as the Ex Post Facto Clause and the Double Jeopardy Clause—apply only to "criminal punishments." *United States v. Ward*, 448 U.S. 242, 248 (1980). Under that well-established precedent, "the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction" that turns primarily on legislative intent. *Id.* If "the legislature meant the statute to establish 'civil' proceedings," the Court will "ordinarily defer to the legislature's stated intent," unless "a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the legislature's] intention' to deem it 'civil.'" *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *Ward*, 448 U.S. at 248-49). The government claims (at 25-26), without any supporting analysis, that it would be "incongruous" for a "penalty" under *Blanton* to mean something other than a "criminal punishment" under the Ex Post Facto and Double Jeopardy Clauses. But any apparent incongruity is easily explained by the differences in the constitutional provisions and doctrinal questions at issue. *See, e.g.*, *Austin v. United States*, 509 U.S. 602 (1993) (holding that *in rem* civil forfeiture implicates the Excessive Fines Clause of the Eighth Amendment, even

though it is not a "criminal punishment" under the Ex Post Facto and Double Jeopardy Clauses); *Padilla*, 559 U.S. at 365-66 (holding that the Sixth Amendment right to effective assistance of counsel encompasses "reasonable professional" advice on the immigration consequences of criminal conviction, even though deportation "is not, in a strict sense, a criminal sanction"); *Fushek v. State*, 183 P.3d 536, 541 (Ariz. 2008) (en banc) ("The issue before us is not whether sex offender registration is criminal punishment for ex post facto purposes, but rather whether it is a statutory consequence reflecting a legislative determination that Fushek's alleged offenses are 'serious.' As the Supreme Court has noted, the *Mendoza-Martinez* test addresses only whether a sanction is civil or criminal. The test does not measure whether a sanction is sufficiently severe to trigger the right to jury trial under the Sixth Amendment.").[5]

The Supreme Court's holding that only "criminal punishments" implicate the Ex Post Facto and Double Jeopardy Clauses is rooted in the historical understanding of those specific constitutional protections. In holding that the Ex Post Facto Clause does not apply to civil penalties, the Court has explained that the term "ex post facto law" is "a term of art with an established meaning at the time of the framing of the Constitution," which was limited to "laws that 'retroactively alter the definition of *crimes* or increase the *punishment* for criminal acts.'" *California Dep't of Corr. v. Morales*, 514 U.S. 499, 504-05 (1995) (emphases added) (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *see Calder v. Bull*, 3 U.S. 386, 391-92 (1798). Likewise, in holding that the Double Jeopardy Clause does not apply to civil penalties or civil proceedings, the Court has emphasized the historical understanding that "the double jeopardy

[5] Contrary to the government's speculation (at 35), treating deportation as a "penalty" under *Blanton* does not mean that a jury must decide whether the defendant is an alien: "[A] fact is by definition an element of the offense and must be submitted to the jury" only "if it increases the *punishment* above what is otherwise legally prescribed." *Alleyne v. United States*, 133 S. Ct. 2151, 2158 (2013) (emphasis added) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

clause 'prohibits merely *punishing* twice, or attempting a second time to *punish criminally*, for the same offense.'" *One Lot of Emerald Cut Stones v. United States*, 409 U.S. 232, 235-36 (1972) (emphases added) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)).

In interpreting the Sixth Amendment right to a jury trial, the Supreme Court has taken a decidedly different approach. Although the text of the Sixth Amendment guarantees a jury trial in "all criminal prosecutions,"[6] the Supreme Court has long held that the right to a jury trial extends only to "serious" criminal prosecutions, as "petty offenses were tried without juries both in England and in the Colonies" at the time the Constitution was adopted. *Duncan*, 391 U.S. at 160. Here, there is no question that appellant was subject to a "criminal prosecution"; the only question is whether it was a "serious" one. In answering that question, the Supreme Court looks to "objective indications of the seriousness with which society regards the offense," the "most relevant" of which is "the severity of the maximum authorized penalty." *Blanton*, 489 U.S. at 541. In conducting that analysis, the Court has never cited its well-developed framework for determining whether a statute imposes "criminal punishment," *see Ward*, 448 U.S. at 248-49; *Mendoza-Martinez*, 372 U.S. at 168; nor has it ever suggested that the civil penalties attached to a criminal offense are irrelevant to the seriousness of the offense. Rather, the Court's focus on the *severity* of the statutory penalties attached to a criminal offense—and not their punitive nature—comports with both the purpose of the jury trial guarantee and the reality of the modern criminal justice system. This Court should reject the government's invitation to hold otherwise.[7]

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[6] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."); *see also id.* art. III, § 2, cl. 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury . . . .").

[7] Although the government relies heavily (at 12) on this Court's opinion in *Thomas v. United States*, 942 A.2d 1180 (D.C. 2008), which held that sex offender registration does not elevate a presumptively "petty" offense to a "serious" one for purposes of the Sixth Amendment jury trial guarantee because it is not a "criminal punishment" under the Ex Post Facto Clause, *id.* at 1186

The purpose of the constitutional guarantee of a jury trial is to protect the individual from "oppression by the Government." *Duncan*, 391 U.S. at 155; *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) ("Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching."). Fearful of placing "plenary powers over the life and liberty of the citizen" in the hands of the judiciary, *Duncan*, 391 U.S. at 156, the Framers of the Constitution relied on "the populist and local institution of the jury" to "keep agents of the central government under control." Amar, *supra*, at 1183 ("Guaranteed in no less than three amendments, juries were at the heart of the Bill of Rights."); *see also Baldwin*, 399 U.S. at 72 ("[T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him."). By interposing the judgment of ordinary citizens between the criminal defendant and the powerful machinery of the state, the jury trial safeguards the liberty of the individual against the "the corrupt or overzealous prosecutor" and "the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. Moreover, by forcing the government to pay the "hefty price" of a jury trial whenever it exposes a criminal defendant to a severe deprivation of liberty, the jury trial guarantee serves the "important social function" of

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(citing *In re W.M.*, 851 A.2d 431, 441 (D.C. 2004)), that cursory opinion, issued on plain error review, neither grappled with *Blanton*'s contrary analysis nor recognized the Supreme Court's different approaches to different constitutional provisions. Rather, *Thomas* simply relied on this Court's decision in *Foote*, which in turn relied on the D.C. Circuit's decision in *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990)—a case that was subsequently abrogated by the Supreme Court's decision in *Padilla*. *See* Br. for Amicus PDS at 9 & n.8. Thus, *Thomas* is not persuasive and should be abandoned by this Court sitting en banc. The other cases cited by the government (at 11-13) are similarly unhelpful, as they simply assume without any analysis that *Blanton*'s use of the term "statutory penalties" refers only to "criminal punishments."

directing "government resources toward the most destructive conduct within the polity," thus providing an inherent check on excessive law enforcement. Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL'Y 7, 15 (1994). These important functions are undermined, however, when courts disregard the civil consequences of criminal conviction in determining whether a crime is "serious" enough to require a jury trial.

The rationale underlying the Supreme Court's jury trial jurisprudence is that, when a criminal defendant faces a "serious" charge that exposes him to a severe deprivation of liberty, he is entitled to have his fate decided by "the common-sense judgment of a jury" rather than the "more tutored but perhaps less sympathetic reaction of the single judge," as his strong liberty interest in avoiding "judicial or prosecutorial unfairness" outweighs the high cost of a jury trial. *Duncan*, 391 U.S. at 156, 158. By contrast, when a defendant faces the prospect of only a minor penalty for a "petty offense," his diminished liberty interest is "outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." *Baldwin*, 399 U.S. at 73. Under this framework, it is the *severity* of the potential liberty deprivation—and not its punitive purpose—that determines whether the benefit of a jury trial to the individual is worth the cost to society. After all, when an individual faces severe penalties as a consequence of criminal conviction, his interest in having a jury decide his guilt or innocence does not depend on whether the threatened penalties are punitive or regulatory in purpose.[8]

Indeed, the civil penalties for misdemeanor child sexual abuse—months or years of confinement at an immigration detention facility, permanent removal from the United States, and ten years of sex offender registration and public notification—"may be more important to the [defendant] than any potential jail sentence." *Padilla*, 559 U.S. at 368. As PDS explained in its

[8] Nor does that interest depend on whether the penalty is authorized by the federal or the local legislature, as both can threaten "oppression by the Government." *Duncan*, 391 U.S. at 155.

main brief (at 15-16), civil confinement at an immigration detention facility is virtually identical to criminal incarceration at a prison, and often lasts longer than the criminal sentence imposed for the underlying offense. Deportation permanently separates the individual from his home, family, property, and "all that makes life worth living," *Bridges v. Wixon*, 326 U.S. 135, 147 (1945), making it "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants," *Padilla*, 559 U.S. at 364. Finally, sex offender registration "has stigmatizing and far-reaching consequences into every aspect of the registrant's life," *People v. Dodds*, 7 N.E.3d 83, 97 (Ill. App. Ct. 2014), and lasts *twenty times* longer than the maximum prison term for misdemeanor child sexual abuse. Because the civil penalties attached to a criminal conviction are often more onerous to the individual than the criminal punishment itself, ignoring these penalties when determining the right to a jury trial undermines the Sixth Amendment's goal of ensuring heightened procedural protections when heightened individual liberty interests are at stake.[9]

Ignoring the civil penalties for a criminal offense also allows the government to pursue additional restraints on individual liberty without enduring the additional cost of a jury trial, thus circumventing the inherent check on government overreaching that the Sixth Amendment was designed to instill. As one former Assistant United States Attorney for the District of Columbia

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[9] The government does not dispute that, if the immigration consequences of criminal conviction are considered "penalties" under *Blanton*, they are "severe" enough to overcome the presumption that misdemeanor child sexual abuse is a "petty" offense.

Although the government argues that sex offender registration is not "severe" enough to trigger the Sixth Amendment right to a jury trial because it does "not approximate the severe loss of liberty caused by imprisonment for more than six months," Br. for Appellee at 27-28 (quoting *United States v. Nachtigal*, 507 U.S. 1, 5 (1993)), it ignores the fact that the maximum penalty for misdemeanor child sexual abuse includes 180 days of imprisonment (just a few days short of six months), *in addition* to ten years of sex offender registration—a total penalty far more severe than the five years of probation "as *an alternative* to a term of imprisonment" that the Supreme Court found insufficient in *Nachtigal*, 507 U.S. at 2, 5 (emphasis added).

has observed, civil penalties like deportation and sex offender registration "are often the most important goal of a criminal prosecution," as they achieve the same purpose as incarceration—"reducing threats to public safety" by restricting the offender's liberty—and "almost always last longer than the defendant's term of incarceration." Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 794-95 (2016); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699-700 (2002) ("[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process."). Thus, when courts refuse to treat the civil consequences of misdemeanor convictions as "additional statutory penalties" that elevate a presumptively petty offense to a serious one, prosecutors have "strong incentives to charge a borderline case as a misdemeanor rather than a felony" so that they can reap the law-enforcement benefits of those civil penalties without paying the price of a jury trial. Crane, *supra*, at 778-79; *see also id.* at 806-07, 811-15 (noting that prosecutors strongly prefer bench trials to jury trials because they require less time and effort, and they more often result in conviction). To avoid that distortion of the jury trial guarantee, this Court should consider all statutory consequences of criminal conviction when assessing whether a crime is "serious."

Such an approach would also provide a more accurate answer to the doctrinal question at hand: whether "society regards the offense" as "serious." *Blanton*, 489 U.S. at 541. Although the maximum prison term authorized for a criminal offense is "the most powerful indication whether an offense is 'serious,'" *id.* at 542, the civil penalties that a legislature attaches to an offense can also reflect society's view of the offense. Our society has a long history of imposing severe civil penalties on those convicted of certain serious crimes to express opprobrium toward those breaches of the social contract:

> Collateral consequences, or civil consequences that follow a criminal conviction, stem from England's notion of 'civil death' following conviction. The concept of civil death was that, once a citizen had been convicted of a serious crime, he was effectively excluded from the functioning of civil society, whether by physical banishment or by complete deprivation of his rights and privileges.

Shanahan, *supra*, at 1394; *see also* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("'Civil death' entailed, among other things, the permanent loss of the right to vote, to enter into contracts, and to inherit or bequeath property."). Modern civil penalties for criminal conviction include the loss of the right to vote, exclusion from jury service, disqualification from firearm possession, deportation, and sex offender registration. *See* Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002).

When *Blanton* was decided in 1989, most collateral consequences of conviction applied only to felonies; thus it was "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.'" *Blanton*, 489 U.S. at 543. But in the decades following *Blanton*, "legislatures have increasingly attached severe collateral consequences to misdemeanor offenses—consequences that formerly were triggered only by felonies." Crane, *supra*, at 778. In doing so, legislatures have expressed the societal view that certain misdemeanors, despite their limited jail time, are "serious" crimes warranting severe (and costly) regulation to ensure that such offenders do not endanger public safety after completing their criminal sentences.

For example, in enacting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which made "sexual abuse of a minor" a deportable offense and mandated the detention of most noncitizens convicted of deportable offenses pending removal, Congress expressed its view that "criminal aliens"—noncitizens "who commit serious crimes for which

they may be deportable"—"are a serious and growing threat to public safety." S. REP. NO. 104-48, at 1-2 (1995). Similarly, in enacting the Sex Offender Registration Act (SORA) of 1999, the D.C. Council emphasized that "[s]ex 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." COUNCIL OF THE DIST. OF COLUMBIA, COMM. ON THE JUDICIARY, REP. ON BILL 13-350, at 3 (1999). The regulatory justification for such legislation—to reduce the special threat to public safety posed by certain offenders—reflects society's view that these offenses are "serious." *See In re W.M.*, 851 A.2d 431, 436, 445 (D.C. 2004) (SORA was enacted to protect the public from the "frightening and high" risk of recidivism presented by those convicted of "serious sex offenses"); *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"). After all, it would hardly be worth the tremendous expense of detaining, deporting, and monitoring such offenders if society did not view their crimes as serious. Because our federal and local legislatures have clearly expressed society's view that sexual abuse of a child is a "serious" crime, even when it is punishable by no more than 180 days in prison, it would be myopic to ignore such "objective indications of the seriousness with which society regards the offense." *Blanton*, 489 U.S. at 541.

III. THAT DEPORTATION IS A FEDERAL PENALTY APPLICABLE ONLY TO NONCITIZENS DOES NOT EXCLUDE IT FROM THE *BLANTON* ANALYSIS.

Although the government contends (at 34-35) that deportation is not a "penalty" for misdemeanor child sexual abuse because it does not apply to citizens convicted of that offense, that claim finds no support in the Supreme Court's case law, which has repeatedly characterized

deportation as a "penalty" for the criminal offenses listed in 8 U.S.C. § 1227(a)(2).[10] As PDS explained in its main brief (at 19-20), nothing in the Supreme Court's case law suggests that a statutory penalty must "apply uniformly to all persons convicted of a particular offense" to be considered in the *Blanton* analysis. Br. for Appellee at 35 (quoting *Fushek*, 183 P.3d at 540). Rather, in holding that criminal contempt may be jury-demandable in some cases but not in others, depending on the actual penalty faced by the individual defendant, *see Frank*, 395 U.S. at 149-50; *Bloom v. Illinois*, 391 U.S. 194, 211 (1968), the Supreme Court has readily accepted the "anomalous situation . . . where some persons would be entitled to a jury trial and others would not, although charged with exactly the same substantive . . . crime." Br. for Appellee at 35 (quoting *Fushek*, 183 P.3d at 540). Any apparent "anomaly" merely reflects the cost-benefit analysis embedded in the Supreme Court's interpretation of the jury trial guarantee: those who are exposed to more severe penalties are entitled to the more costly protections of a jury trial. *See supra* p. 11; *see also Bado v. United States*, No. 12-CM-1509, slip. op. at 42 (D.C. July 16, 2015) (Ruiz, J., concurring) ("The analysis that *Blanton* and *Nachtigal* mandate, by focusing on the severity of the penalties that attend conviction, necessitates that the disparate penalty faced by the noncitizen be taken into account. Since a citizen does not face—and could not face—the same penalty of deportation that a legislature may impose on a noncitizen, the interests at stake for the noncitizen clearly outweigh those of a citizen . . . . The stakes simply are not as high for the citizen."). Moreover, because Congress simply has no power to deport citizens, no matter

[10] *See Padilla*, 559 U.S. at 364 ("deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who [are convicted of] specified crimes"); *id.* at 365 ("We have long recognized that deportation is a particularly severe 'penalty' . . . ." (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)); *id.* at 365-66 ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century." (citation omitted)); *Bridges*, 326 U.S. at 154 ("That deportation is a penalty—at times a most serious one—cannot be doubted.").

how serious their crimes, the fact that citizens cannot be deported for misdemeanor child sexual abuse does not reflect a legislative judgment that the crime is not serious.

Nor does the fact that deportation is mandated by Congress rather than the D.C. Council change its reflection of the "seriousness with which society regards the offense." *Blanton*, 489 U.S. at 541. As PDS explained in its main brief (at 20-21), both Congress and the D.C. Council represent the people of the District of Columbia and voice their "social and ethical judgments" about which crimes are "serious." *Blanton*, 489 U.S. at 541 n.5. Only Congress, however, has the power to impose the penalty of deportation, which applies to all crimes involving "sexual abuse of a minor," including those created by the D.C. Council. *See* 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii). Thus, unlike in *Blanton*, where "the statutory penalties for drunken driving in other States" did not apply to the petitioner's DUI charge in Nevada, 489 U.S. at 545 n.11 (cited in Br. for Appellee 36), and unlike in *Brown v. United States*, 675 A.2d 953 (D.C. 1996), where the one-year prison term authorized by Congress for the federal offense of cocaine possession did not apply to the D.C. offense of cocaine possession with which appellant was charged, *id.* at 955 (cited in Br. for Appellee at 36), here the federal penalty of deportation was one of the "additional statutory penalties" that appellant faced for his D.C. charge of misdemeanor child sexual abuse. *Blanton*, 489 U.S. at 543. Ignoring that additional penalty simply because it was enacted by Congress rather than the D.C. Council would thwart the purpose of the jury trial guarantee, which is to "prevent oppression by the Government," *Duncan*, 391 U.S. at 155, whether federal or local. *See supra* p. 11 & n.8.

IV. TREATING DEPORTATION AND SEX OFFENDER REGISTRATION AS "PENALTIES" UNDER *BLANTON* IS NOT "IMPRACTICABLE."

The government argues (at 44-47) that treating deportation and sex offender registration as "additional statutory penalties" reflecting the seriousness of an offense would be mired in

"practical difficulties and uncertainties." That claim is overblown. Although in some cases it might be unclear or debatable whether the charged offense exposes a noncitizen defendant to removal, *Padilla* already requires criminal defense attorneys to understand the immigration consequences of a criminal conviction, and few noncitizens would be willing to effectively concede deportability solely for the sake of demanding a jury trial. *See Bado*, slip op. at 34-35 (Thompon, J., concurring). Likewise, although the requirement of sex offender registration may depend on the factual basis of conviction in a small minority of cases, Br. for Appellee at 47 n.36, in most cases the requirement depends solely on the offense of conviction, *see* 28 C.F.R. § 811, App. A (listing registration offenses), and D.C. Code § 22-4003 already requires the trial court to determine whether the defendant is subject to sex offender registration, regardless of whether the case is tried by judge or jury.

Moreover, contrary to the government's admonition (at 45), treating deportation and sex offender registration as "additional statutory penalties" under *Blanton* does not mean that all other civil consequences will require jury trials for 180-day misdemeanors. Some consequences may not be "severe" enough to indicate that the offense is "serious," while others may not be sufficiently "enmeshed" with the criminal conviction to be considered a penalty for the offense.[11]

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[11] *Compare Padilla*, 559 U.S. at 365-66 ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it 'most difficult' to divorce the penalty from the conviction in the deportation context."), *and Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010) (holding that sex offender registration, like deportation, is "enmeshed" with the criminal process, making it "'most difficult' to divorce the requirement of registration from the underlying criminal conviction" (citing *Padilla*, 559 U.S. at 366)), *with Smith v. United States*, 768 A.2d 577, 580 (D.C. 2001) (holding that the termination of employment with the Metropolitan Police Department (MPD) was not a penalty for a drug offense because it "did not follow automatically upon conviction," and instead depended on other "discretionary" factors, such as "MPD's assessment that the underlying conduct 'would affect adversely the employee's or the agency's ability to perform effectively,' and bring 'discredit upon [appellant] or the department'").

Even if a handful of 180-day misdemeanors were to become jury-demandable because of the severity of their civil consequences, not all of those cases would result in jury trials, as most would be resolved by plea negotiations. Any fear that D.C. Superior Court would be flooded with an "impracticable" number of jury trials, Br. for Appellee at 44, is easily dispelled by the fact that "the vast majority of the fifty states in our union"—including California, Massachusetts, and Illinois, which contain cities just as populous as the District of Columbia—grant 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); *see also Baldwin*, 399 U.S. at 74 n.22 ("Experience in other States, notably California where jury trials are available for all criminal offenses including traffic violations, suggests that the administrative burden is likely to be slight, with a very high waiver rate of jury trials." (citation omitted)). Indeed, prior to the Misdemeanor Streamlining Act of 1994, most misdemeanors in the District of Columbia were jury-demandable, at a time when crime was much higher than it is today. In any event, it is precisely the high cost of a jury trial that makes it such an effective stalwart against government overreaching, *see supra* p. 13, and ignoring important deprivations of liberty simply to avoid that cost would be anathema to the constitutional principles that this Court is duty-bound to honor.

This Court must follow the Supreme Court's analysis in *Blanton* and treat all statutory consequences of criminal conviction as "penalties" that reflect the seriousness of the crime. Here, where appellant's misdemeanor child sexual abuse charge exposed him to the "severe" penalties of mandatory detention and removal, and ten years of sex offender registration and public notification—in addition to 180 days of imprisonment—there can be no doubt that his criminal charge was sufficiently "serious" to trigger the Sixth Amendment right to a jury trial.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply 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 1st day of June, 2016.

Alice Wang