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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 17

CESAR GARCIA,

Appellant.

20 Eagle Street
Albany, New York
April 19, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE JOANNE M. WINSLOW

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay. Good afternoon,
2 everyone. Judge Rivera is appearing remotely for oral
3 argument. This is appeal number 17, The People of the
4 State of New York v. Cesar Garcia.

5 Counsel.

6 MR. ZENO: Good afternoon, Your Honors. My name
7 is Mark Zeno and I represent appellant Cesar Garcia. May I
8 reserve two minutes for rebuttal, please?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. ZENO: Thank you.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. ZENO: The only issue preserved by The People
13 below and reviewable by this court is whether Mr. Garcia
14 was entitled to a jury trial because a conviction for any
15 of the charged offenses would make him deportable. This
16 court's decision in Suazo answered that question. The
17 Sixth Amendment guarantees a jury trial to a noncitizen
18 facing trial on a charge that carries the potential of
19 deportation.

20 Respondent's primary claim on this appeal, that
21 Mr. Garcia failed to make a threshold showing that a
22 conviction would make him deportable, is unreserved and
23 unreviewable in this court.

24 JUSTICE WINSLOW: Counsel, what if we were to
25 assume that we reached the contention raised by the People



1 that the defendant failed to meet his burden and establish
2 that he was charged with an offense that carried the
3 potential for deportation and if we also assumed that the
4 Defendant must show that he was charged with offenses that
5 carried the possibility of deportation in his specific
6 circumstances? Did he preserve his argument that he was
7 charged with three separate crimes involving moral
8 turpitude and that this was not a single scheme of criminal
9 misconduct?

10 MR. ZENO: Well, yes, he did. For starters,
11 Suazo, which guarantees the right to a jury trial, had
12 precisely the same threshold showing of deportability.

13 JUSTICE WINSLOW: But Suazo was a bit different,
14 wasn't it? Because there, you had a domestic violence
15 offense and that automatically was going to be deemed a
16 deportable offense, wasn't it?

17 MR. ZENO: No. Mr. Suazo in his motion - - - and
18 I went back and I looked at the appendix - - - alleged only
19 this, this single sentence when he asked for a jury trial:
20 "As a noncitizen, should Mr. Suazo be convicted of any of
21 the misdemeanors for which he is charged, Mr. Suazo will be
22 deportable". No citation to what provision would make him
23 deportable. No citation to his circumstances. That was
24 it, just this will make me deportable.

25 And in Suazo, the Court of Appeals, this court,



1 found that that was sufficient to meet the threshold
2 showing of deportability. And I'll compare that to the
3 language of Mr. Garcia's motion, which is almost identical.
4 In his motion, he said: "Mr. Garcia is a noncitizen for
5 whom any of the charged B misdemeanors would result in
6 deportability under 8 USC 1227". So it's essentially the
7 same, but there's more; he cites the provision. And just
8 as in Suazo the court found that it was sufficient to make
9 that threshold showing, the same rule has to apply here.
10 It was enough in Suazo. It's enough here.

11 JUDGE WILSON: Well, Mr. Garcia also cited a
12 couple of district court cases, right?

13 MR. ZENO: He did.

14 JUDGE WILSON: And then cross-referenced those to
15 penal law statutes?

16 MR. ZENO: Yes, he did that. And the People
17 never challenged his allegation that those - - - that he
18 was deportable under that section of the United States
19 Code. And it's too late to make that challenge now, on
20 appeal. It - - - the threshold showing was stronger here
21 than it was in Suazo. There's just no distinction to be
22 made here.

23 JUDGE WILSON: I mean, some of the People's
24 argument, though, is that in a sense, it's a little unfair
25 to hold them to anything because Suazo hadn't been decided.



1 MR. ZENO: Well, there is unfairness to requiring
2 preservation, anticipation of a change in the law. But
3 this court's precedents for thirty years have required
4 that. I cite Reynolds in my brief where it's - - - where
5 it specifically says counsel is required to anticipate
6 changes in the law and make timely objections; that's
7 something this court has done over and over again.

8 In the depraved indifference line of cases,
9 Feingold not just recognized the new right, but overruled
10 existing precedent, naming mens - - - naming depraved
11 indifference as a mens rea element and - - - going forward
12 and parties - - - defense lawyers were required, if they
13 wanted to challenge that element of an offense, to have
14 preserved it, even in cases before Feingold was decided.

15 JUDGE RIVERA: Counsel, I'm on the screen.

16 MR. ZENO: Yes.

17 JUDGE RIVERA: Good afternoon.

18 So but wasn't the issue already percolating
19 below? I mean, it's not a surprise to the District
20 Attorney's Office.

21 MR. ZENO: No. Of course it's not a surprise.
22 These motions were made relatively contemporaneously in
23 Suazo and in Garcia in two different counties. It was
24 nothing new to the parties. Again, putting them on notice
25 that this is an issue percolating out there and they have



1 an obligation to make every objection they have.

2 You know, the objection rule usually works in the
3 defendant's - - - to the defendant's detriment. Here, it's
4 working to the People's detriment. There is unfairness
5 there, but part of reviewability, and especially in this
6 court, is that we require lawyers to anticipate arguments
7 so that a full record can be made. Here, for example, if
8 that objection had been made, if the prosecutor had
9 challenged that threshold showing, Mr. Garcia might have
10 been able to point to circumstances as to why he would be
11 deportable if he was convicted of these offenses, explain -
12 - -

13 JUDGE CANNATARO: Counsel - - - over here; I'm
14 sorry. I think the unfairness that Judge Wilson was just
15 alluding to comes from the fact that as you say, the motion
16 papers make a sort of blanket statement that conviction of
17 any of these offenses could lead to deportability, and
18 there is a little more than that. There's some citations
19 to cases, one involving forcible touching and one involving
20 sexual abuse, but there is no elaboration on the argument
21 about the scheme or - - - or about the moral turpitude
22 dimension to all of this.

23 And what seems difficult for me to grasp, at
24 least mentally, is that there was a requirement that they
25 address arguments that were actually not made in the papers



1 or at oral argument. Is that the - - - is that the
2 preservation requirement you're saying exists?

3 MR. ZENO: That's absolutely the preservation
4 requirement that's applied every day in the courts, Your
5 Honor. I point in my briefing to People v. Hunter, a
6 decision from this court in 2011, relating to standing.
7 Defendant made an omnibus motion. There was a hearing
8 granted. Never made any allegation of standing, never
9 tried to prove standing. and there's black letter law from
10 this court that says it's the defendant's obligation to
11 prove standing. The People never challenged it. They were
12 - - - therefore, it was waived. You can't - - - you can't
13 raise issues for the first time in this court, particularly
14 where the party against whom the objection would be posed
15 has to make a factual showing of something.

16 JUDGE CANNATARO: I guess the issue, though, is
17 one could take a view that the issue was never raised. You
18 know, it wasn't raised by the defendant. It wasn't
19 addressed by the People. It doesn't even really become an
20 operable issue until Suazo is decided and you're at the
21 appellate term.

22 MR. ZENO: I disagree, Your Honor. It was
23 raised. He said a conviction for this offense would make
24 me deportable; that's raising it. That's putting everyone
25 on notice that if he's convicted of this offense or more



1 than one of these offenses, he will be deportable. That's
2 all that's required, is to put the parties on notice that -
3 - - that a result will happen. And the People chose to - -
4 -

5 JUDGE TROUTMAN: So Counsel, is it your argument
6 that it's simply the mere possibility of a conviction
7 that's sufficient?

8 MR. ZENO: It's simply the possibility that
9 should there be a conviction, the person will be
10 deportable, the client will be deportable. Yes, that's
11 what Suazo says.

12 CHIEF JUDGE DIFIORE: Thank you, Counsel.
13 Counsel?

14 MR. COHN: Good afternoon, Your Honors, may it
15 please the court. David Cohn for the People.

16 This court has never applied either the
17 preservation rule or the LaFontaine rule against a
18 respondent in a criminal appeal where there has been an
19 intervening change in the law. That rule makes sense
20 because courts and parties should be permitted to rely on
21 the law as it stands. They should be permitted to rely on
22 this court's precedents when they're making decisions. And
23 even where a new rule applies retroactively on appeal, as
24 here, the courts do not grant relief to the party based on
25 the change of the law unless that party has met the



1 standard that is required by the new change in the law.
2 And Suazo provides a perfect example, Suazo itself.

3 In Suazo, the People did not dispute the defense
4 assertions that he was a noncitizen or that the charges
5 against him included deportable offenses. Instead, the
6 People opposed the defendant's motion on the sole ground
7 that deportation was a collateral consequence rising out of
8 federal law that did not constitute a criminal penalty for
9 the purpose of the Sixth Amendment right to a jury trial.

10 This court, before granting the defendant relief
11 in Suazo, applied the new Suazo standard and held that the
12 defendant, under federal law, was entitled - - - would be
13 deportable, based on the conviction of the domestic
14 violence offense of obstruction of breathing or blood
15 circulation, so therefore, there was a deportable offense
16 charge and under the Suazo rule, a jury trial is required.

17 The defense in this case cannot cite a single
18 case where the preservation rule or the LaFontaine rule was
19 applied against the respondent on appeal in this
20 circumstance, where there was an intervening change in the
21 law. And this court should do in this case exactly what it
22 did in Suazo and review the merits of the defendant's claim
23 that he's entitled to a jury trial because of the
24 deportation consequences.

25 JUDGE WILSON: So you did - - - you did have a -



1 - - sorry. Over here.

2 MR. COHN: Yeah, hi, Judge.

3 JUDGE WILSON: You did have an opportunity in the
4 appellate term to submit supplemental briefing on Suazo.
5 And I don't believe you made the arguments you're making
6 now there. That is, you defended on a different ground,
7 which was that it was really only the crime of conviction
8 that mattered.

9 MR. COHN: Your Honor, we raised all the
10 arguments in - - - in the appellate term. And the
11 appellate term brief is in - - - in our supplemental
12 appendix, so Your Honor can look at that if he would like.

13 JUDGE WILSON: Okay.

14 MR. COHN: But we raised all the same arguments
15 in the appellate term that we are raising to this court;
16 that not only was the - - - the op - - - the operable crime
17 here is the one of which he was convicted, but also that
18 even if you consider all five crimes with which he was
19 charged, he was not subject to deportation because this was
20 a single scheme. And therefore, even if you consider all
21 five crimes, there are not two crimes involving moral
22 turpitude that would subject the defendant to the penalty
23 of deportation in this case. And you could take a look at
24 our appellate term brief and the appendix if you would
25 like, Your Honor.



1 JUSTICE WINSLOW: Is it your argument that the
2 reason that you didn't make an anticipated argument of what
3 the change in the law might be in the future because the
4 trial judge made it pretty clear what his perspective was
5 and that there was no incentive or any reason to make any
6 further argument there?

7 MR. COHN: Absolutely, Your Honor. The trial
8 judge in this case and the People in this case do what
9 litigants do in the trial courts all the time, they rely on
10 precedents of this court. And the trial judge said point
11 blank that he believed the court of appeals had taken this
12 issue out of his hands. I think that was the trial judge's
13 exact quote; that this court had taken the issue out of his
14 hands.

15 And he speculated that yes, maybe the court of
16 appeals would reconsider at some point what it - - - what
17 it meant for the criminal penalties to render the crime
18 serious, but under the Urbaez standard, which was the court
19 of appeals case cited by the People below, the trial judge
20 said, look. My hands are tied. There's nothing I can do
21 at this point. And didn't even ask the People to submit
22 responsive papers. In fact, the same day that the defense
23 filed their request for a jury trial, the judge said I just
24 want to have an oral conference about this. Didn't even
25 give the People the opportunity to submit responsive



1 papers.

2 So Your Honors, what we submit is that if this
3 court believes that there should have been further
4 development of this issue, that a limited remand for that
5 purpose would be an appropriate remedy, that the trial
6 judge - - - without reversing the conviction, send the case
7 back to the trial judge. Let the trial judge decide, under
8 the circumstances of this case, was the Suazo standard met
9 and if so, then the defendant would be entitled to a jury
10 trial. Or alternatively, if this court believes that the
11 record is sufficient to review the issue on the merits, it
12 could do what the appellate term did and say that the
13 record in this case does not establish that the defendant
14 was convicted of a crime of moral turpitude or even charged
15 with two or more crimes of moral turpitude that would
16 require a jury trial under the Suazo standard.

17 JUDGE WILSON: Since you've gone to the question
18 of relief, can I ask you just a practical question? My
19 understanding is that Mr. Garcia is - - - has - - - is not
20 in the United States any longer. He's been removed. So
21 his counsel would like to have the indictment - - -
22 accusatory instrument dismissed. And is there any
23 practical difference between doing that and simply vacating
24 the conviction and allowing reprosecution?

25 MR. COHN: Well, Your Honor, this was a sex crime



1 on the subways.

2 JUDGE WILSON: Right.

3 MR. COHN: This is a serious offense that - - -
4 that the People do not believe that this would be an
5 appropriate case - - -

6 JUDGE WILSON: No. I got that. I'm just asking,
7 as a practical matter, because he's not here, you can't
8 really retry him anyway.

9 MR. COHN: I suppose he could potentially be - -
10 - be retried in absentia; that's another issue that would
11 have to be resolved by the courts below, whether the trial
12 could proceed in the defendant's absence under these
13 circumstances. Certainly, if the defendant ever returns to
14 the country, then there should be the ability to try him
15 for the charge. I'm not prepared to address the issue of
16 trying in absentia. I don't know what the answer to that
17 question would be on this record.

18 Your Honors, just turning briefly to the - - -
19 the merits of this case, the defendant has not met his
20 burden under Suazo and this court placed the burden
21 squarely on the defendant to show that the crimes that he's
22 charged with would carry the possibility of deportation.
23 Here, if we just look at the crime of which he was
24 convicted, which we submit, Your Honors, that's the only
25 crime that's actually a live controversy in this case



1 anymore, that - - -

2 JUDGE WILSON: Well, how can that be, though?
3 Because you have to determine the jury trial right before
4 the trial occurs. So you're not going to know the crime or
5 crimes of which he's convicted at the point where you've
6 got to determine the jury trial.

7 MR. COHN: Yes, Your Honor. So - - - and there's
8 a difference between what an appellate judge does after the
9 fact and what a trial judge does at the time of trial. Of
10 course, a trial judge looks at all the charges and says,
11 considering all the charges together, is this defendant
12 entitled to a jury trial. An appellate court doesn't
13 reverse for - - - for errors that are no longer relevant to
14 the appeal. For instance, if there was evidence admitted
15 in a criminal trial which was relevant to one count only
16 and the defendant was acquitted of that count, this court
17 will say, well, that error in admitting that evidence was
18 harmless.

19 THE COURT: Yes, but of course, if you have a
20 jury trial right as to any one of the charged offenses, you
21 have a jury trial right period.

22 MR. COHN: That's a statutory right, which is
23 merely an issue of court efficiency. It's not the Suazo
24 constitutional right to a jury trial. This court said in
25 Suazo that there's a Sixth Amendment constitutional right



1 to a jury trial in the circumstance where a defendant is
2 charged with a deportable offense. The 340.40(3) statutory
3 right basically says we don't want trial judges doing very
4 unwieldy things like saying, well, there are five counts in
5 this information. One of them is a violation and four of
6 them are A misdemeanors. We're going to have a jury trial
7 on the A misdemeanors and then the judge makes a fact
8 finding decision on the - - - on the violation. It's
9 basically just a single fact finder rule for the
10 organization of the counts.

11 JUDGE RIVERA: Remember, Counsel, I think - - -
12 cou - - - I'm on the screen. Good afternoon. We know how
13 that works, but you just said it yourself, you quoted it
14 yourself. Suazo says that it looks to - - - the court
15 looks to the crime that's charged. It doesn't say
16 conviction.

17 MR. COHN: Right. Right, Your Honor. And that's
18 - - -

19 JUDGE RIVERA: I mean, it's in the opening
20 paragraph and we were very clear.

21 MR. COHN: Right. You're right. Absolutely,
22 Your Honor. And that is directed towards the trial judges,
23 that's giving guidance to the trial judges. The question
24 of what an appellate court is going to do after the fact -
25 - - of course the appellate court isn't going to reverse on



1 an error that is harmless or moot at the end of the day.
2 And we submit, Your Honor, that in this case, anything
3 relating to the four acquitted counts is moot or at least
4 harmless at the end of the day, in this case.

5 And Your Honors, even if you consider all of the
6 counts of which the defendant was charged at the time of
7 trial, still, under the federal law that the defendant
8 cited in his motion papers, there have to be two separate
9 convictions of crimes involving moral turpitude for there
10 to be deportation consequences.

11 Interestingly, in those very cursory motion
12 papers, the defendant did not even allege that there were
13 two crimes involving moral turpitude, did not even
14 recognize that that section of federal law that he cited
15 require that there be convictions of two crimes involving
16 moral turpitude. So the defendant didn't even put that
17 argument before the trial court, so everything that the
18 defendant is saying about how this was actually two or even
19 three different schemes, that was not raised in the trial
20 court.

21 Beyond that, Your Honors, the - - - even under
22 the stricter Board of Immigration Appeals standard, there
23 was only one intent here in this entire - - - this
24 thirty-minute episode, where the defendant is - - - is in
25 basically one constant frame of mind, where he's going to



1 gratify himself on the subways and - - - and he commits a
2 lewd act on the platform and - - - and then rubs up against
3 two women on subway trains in quick succession, there's no
4 Board of Immigration Appeals case that the defense cited
5 that said that something like this that happens with a
6 single intent over the course of thirty minutes constitutes
7 multiple schemes. The cases the defense cited appeal to -
8 - -

9 JUDGE RIVERA: No. But Counsel, if I can
10 interrupt you, I mean, the federal statute says convicted
11 of two or more crimes. It doesn't say two separate
12 convictions, which I think you were suggesting at the
13 beginning. But in any event, different victims, different
14 locations, right. I mean, it - - - there - - - time has
15 passed in between. It does seem hard to really look at
16 this as a single scheme under the bureau - - - right, the
17 BIA's view?

18 MR. COHN: Well, Your Honor, the statute says two
19 or more crimes not arising from a single scheme, right. So
20 it has to be more than one - - - one scheme.

21 And here, it all happens in very quick
22 succession. It's the same officer who is following the
23 defendant as he gratifies himself and then rubs up against
24 two women on the subway platform. So this is not something
25 that's consistent with the BIA cases cited by the defense,



1 where you had events that occurred after multiple hours in
2 between or even years. One of the cases they cited had a
3 credit card fraud scheme that went on for years. At the
4 very least, there has to be a separation of hours, not just
5 a few minutes.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 MR. COHN: Thank you, Your Honor.

8 CHIEF JUDGE DIFIORE: Counsel?

9 MR. ZENO: Beginning extremely briefly with that
10 last point, there is nothing in the BIA law that says that
11 there needs to be a time separation between events that - -
12 - that are - - - to make it a separate crime.

13 There were three completed incidents here, three
14 completed crimes. And under BIA law, there's really no
15 doubt that they're separate incidents. But I want to get
16 back to the first point that opposing counsel made because
17 it was said as if it was a reasonable request, but it's not
18 a reasonable request. The prosecutor is arguing that a
19 different standard of preservation should apply to the
20 People than to the defense.

21 In Reynolds, this court held: "Courts are
22 continually reconsidering old precedents and if no
23 objection or equivalent was required, objection would never
24 be necessary to raise a question of law where it is urged
25 that some former decisional law be changed".



1 Opposing counsel says, okay, that's good for the
2 defense. They have to anticipate changes in the law, but
3 not respondent. Respondent gets a different rule. This
4 court has never applied a different preservation rule for
5 the defense, for the prosecution because there isn't - - -
6 fairness is - - - is two-sided. What rules that apply to
7 the defense need to apply to the prosecution as well.

8 And respondent says I can't cite to a case where
9 it was held against - - - this preservation rule was held
10 against the respondent, the People; that may be correct,
11 but there are dozens of cases where it's held against the
12 defense, where the defendant is required to anticipate
13 changes in the law and make objections in anticipation of
14 those changes. And it would be grossly unfair to allow the
15 People, with their superior resources, not to follow the
16 same rules.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MR. ZENO: Thank you.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of Cesar Garcia v. The People of the State of New York, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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