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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 117

SAYLOR SUAZO,

Appellant.

20 Eagle Street
Albany, New York
October 10, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 117, the People of
2 the State of New York v. Saylor Suazo.

3 Counsel.

4 MR. ZENO: May it please the court, I am Mark
5 Zeno, and I represent appellant Saylor Suazo. I ask to
6 reserve two minutes for rebuttal, Your Honor?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. ZENO: Mr. Suazo asks this court to rule as
9 the en banc D.C. Court of Appeals did this past June in
10 Bado v. United States that the Sixth Amendment guarantees a
11 jury trial to a criminal defendant who faces the penalty of
12 deportation if convicted even if the maximum sentence that
13 the court can impose is less than six months.

14 JUDGE FEINMAN: So how is deportation punishment
15 if he's already deportable?

16 MR. ZENO: Let me - - - let me provide two
17 answers to that question. First of all, it was not clear
18 at the time that counsel made the motion that the
19 defendant, Mr. Suazo, was deportable. That his - - - his
20 lawful status or his out of status is actually not part of
21 the record on this appeal. So as a preservation matter,
22 the question is whether deportation - - - whether a
23 defendant who is deportable is entitled to a jury trial.
24 But - - -

25 JUDGE FEINMAN: So if we're fashioning a rule,



1 though, that's going to be applicable to beyond him - - -

2 MR. ZENO: I - - - I totally understand - - - I
3 understand where you're going, Judge, but I just wanted to
4 clear the air with the preservation piece of it first.

5 JUDGE STEIN: But let me ask you this, is this
6 the - - - is the rule tied to the crime, or is the rule
7 tied to - - - in other words, the deportability of - - - of
8 anyone who commits that crime? Or is the rule tied to the
9 individual defendant?

10 MR. ZENO: It is - - - it is necessarily tied to
11 the individual defendant because the defendant's status - -
12 - and there are a variety of statuses that a non-citizen
13 can hold, is a necessary function of determining whether a
14 crime will make them deportable.

15 JUDGE FAHEY: So how would you propose that the
16 court determine the defendant's immigration status? Would
17 there need to be a separate hearing? Would there need to
18 be certification or proof offered? How - - - how would it
19 be done?

20 MR. ZENO: Well, the first place would be the
21 defendant would - - - would ask for a jury trial because a
22 conviction would lead to deportation. If the People
23 challenge that question, then there could be further
24 inquiry on - - - on that issue. There could be further
25 lawful inquiry. The defendant could state under oath what



1 his status is, and there could be a determination of
2 whether and how a conviction of the charged crimes would
3 affect them and whether it would lead to their deportation
4 or whether it would - - -

5 JUDGE STEIN: What confuses me about that
6 argument, though, is that we're talking about the
7 seriousness of the crime I think. And I think the - - -
8 the Ninth Circuit once said that the offense isn't serious
9 because it's severely punished. It's severely punished
10 because it's serious. So I'm - - - I'm not clear about the
11 necessity of - - - I'm not sure I agree with you about the
12 necessity of the trial court getting into the weeds, if you
13 will, of each individual defendant who claims that they're
14 entitled to a jury trial of his or her status and what that
15 means for deportability or - - -

16 MR. ZENO: Well, I think there are some crimes
17 which - - - which - - - there are some categories of crimes
18 for which no further inquiry is warranted. For example, if
19 it's an aggravated felony, that's mandatory deportation.

20 JUDGE STEIN: Or a domestic violence crime?

21 MR. ZENO: Or a crime of domestic violence,
22 mandatory deportation regardless of status.

23 JUDGE STEIN: So only if it's not obviously a
24 crime of that nature then you would have to get into the
25 individual - - -



1 MR. ZENO: If it's not a deportable offense.

2 JUDGE GARCIA: But what about Judge Feinman's
3 point which I believe is what if he's deportable already
4 and this is a deportable offense? So then isn't the
5 punishment under your view of it the difference between the
6 terms of your deportation?

7 MR. ZENO: No, because even someone who is
8 deportable already may have passed to lawful status. If my
9 client is from Honduras, for example, he has a - - - even
10 though he overstayed his visa and was out of status, he may
11 have had a lawful path to legal status as a - - - as an
12 asylee. And - - -

13 JUDGE FAHEY: Would the court have an obligation
14 to notify ICE?

15 MR. ZENO: No. I - - -

16 JUDGE FAHEY: Someone comes in on the record,
17 says I broke this law, and you - - - you don't have any
18 obligation?

19 MR. ZENO: I'm sure that the court has no
20 obligation. I think there are policies in New York state
21 that at the very least discourage courts from contacting
22 ICE.

23 JUDGE GARCIA: But would the client then have to
24 come in and prove that they have this path to not being
25 deported, say a visa overstay, they're fairly limited in



1 what they can claim so it's the chance to avoid deportation
2 incrementally over the fact that you are deportable? You
3 start to get into very different shades of punishment
4 there, don't you?

5 MR. ZENO: Well, the punishment is ultimately the
6 same. The punishment is deportation. They're depending on
7 the - - - on the defendant's status. There are different
8 paths and different likelihoods of - - - of whether
9 deportation will result depending on the crime.

10 JUDGE GARCIA: So just - - - just step back just
11 for a minute. This would be a very different application
12 of this precedent in that most of the cases, or all, seem
13 to speak to what the State has determined is a serious
14 crime by looking at how it's punished. In this case, if we
15 go with your rule, it would seem that the federal
16 government is making that determination for the states
17 because - - -

18 MR. ZENO: I - - -

19 JUDGE GARCIA: - - - they're saying these crimes
20 are deportable offenses. So now the U.S. Government is
21 saying that's a serious crime.

22 MR. ZENO: I agree with you, and that is because
23 Blanton leaves open the question of if a - - - even - - -
24 even crimes that are punishable by six months or less
25 imprisonment may be serious crimes if the legislature deems



1 them to be serious by the nature of the penalty. And here
2 Congress - - -

3 JUDGE FEINMAN: And - - - and you're interpreting
4 legislature to mean Congress or the New York State
5 Legislature?

6 MR. ZENO: For sure. Congress is our national
7 legislature. It specifically - - - and in the legislative
8 history beginning in 1917 when it identified crimes that
9 should be deportable, said - - - has used words like we
10 deem the deportation appropriate because these are serious
11 offenses. And that's precisely what Blanton - - - what in
12 Blanton the Supreme Court - - -

13 JUDGE RIVERA: So where - - -

14 MR. ZENO: - - - asked us to look at.

15 JUDGE RIVERA: Where does that rule leave us?
16 There are many other kinds of consequences of - - - of this
17 type of conviction that are penalties imposed by the
18 federal government, not the State, or perhaps imposed by
19 both. So where do we draw the line? Is it just at
20 deportation?

21 MR. ZENO: Well, I don't think we have to draw
22 that line today, but since 1989 no appellate court has
23 found another collateral consequence to be serious
24 punishment.

25 JUDGE RIVERA: What makes deportation different?



1 MR. ZENO: Deportation is different and - - - and
2 that's I think what Padilla - - - the Supreme Court said in
3 Padilla v. Kentucky that - - - that it has become since
4 1997 an inseparable part of a criminal conviction for a
5 non-citizen. It is - - - it is often more important to the
6 defendant that they avoid deportation than even lengthy
7 prison terms that span years or decades. Staying in the
8 country close to family, close to their home is more
9 important to them than the - - - than the prison term, and
10 particularly in a - - - in a shorter prison term, it's far
11 more important than - - - I mean the U.S. Supreme Court set
12 the - - - set the line at six months' imprisonment as - - -

13 JUDGE RIVERA: Do they end up in immigration
14 hold?

15 MR. ZENO: And they can often end up in
16 immigration hold if you have been convicted - - - as I talk
17 about in my brief if you've been convicted of a deportable
18 offense, detention is mandatory. And they can spend months
19 and months, and in fact, my client spent more than six
20 months in detention.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. ZENO: Thanks.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MR. CHAMOY: May it please the court, Noah Chamoy
25 for the People. This court should decline to adopt Bado on



1 principle that it is not persuasive authority. Bado is in
2 fact the first court to ever look beyond the legislature
3 that passed a criminal statute to decide whether or not a
4 right to jury trial is - - -

5 JUDGE STEIN: Has that issue - - - has ever been
6 raised before?

7 MR. CHAMOY: In fact, it has many times. Four
8 states, three state supreme courts, New Jersey, Nevada, and
9 Arizona, and an intermediate court in Kansas all said we do
10 not look to Congress. We look to our state. The federal
11 circuits are unanimous. We only cite to two of them in our
12 brief, but in fact, many more have said the same thing,
13 what's called the Assimilative Crime Act. And basically,
14 it's reversed, which is that statute requires the
15 procedures of the federal government to basically match the
16 state, to protect - - - to make sure they're not being
17 treated differently depending on who chooses to prosecute.

18 And so many defendants said, well, in our state,
19 say South Carolina as an example, there was a jury trial
20 for everything. Consequently, the federal government must
21 give me a jury trial, and the circuits have said
22 unanimously, no, for jury trial rights we look to Congress
23 because the federal government is the one prosecuting, not
24 the state of South Carolina.

25 JUDGE RIVERA: Well, here we're looking to the



1 constitutional right to - - - to a jury trial, so let's
2 just stick with that one and this division that the court
3 has set up between petty and serious offenses. So why - -
4 - why shouldn't we consider this national consensus, what
5 the Supreme Court has set out is how serious deportation
6 is, it is an exile from this country never to return. Why
7 - - - why isn't that serious enough to distinguish
8 deportation from other kinds of consequences?

9 MR. CHAMOY: Well, there are two answers to that.

10 JUDGE RIVERA: Yes.

11 MR. CHAMOY: First is that the penalty authorized
12 by the law of the locality is what is taken as a gauge of
13 its social and ethical judgment of the crime in question.

14 JUDGE RIVERA: Where - - - where does it say
15 that?

16 MR. CHAMOY: Duncan v. Louisiana citing Clawans.

17 JUDGE RIVERA: Yeah, but didn't the court in
18 subsequent cases, Baldwin and Blanton, isn't the court
19 looking at the nationwide consensus?

20 MR. CHAMOY: No, it is not. Interestingly
21 enough, it looked at the nationwide consensus up through
22 Baldwin to determine the objective standard that it was
23 going to create. It was a long history of removing the
24 common law and ultimately coming to an objective test. But
25 it never crossed the line of saying that objective test

1 goes anywhere further than the locality.

2 JUDGE STEIN: But - - - but isn't the federal
3 government the only legislature that can impose the - - -
4 the penalty of deportation? So - - -

5 MR. CHAMOY: That is true.

6 JUDGE STEIN: So that's not something that a
7 state ever could do, and yet both the Supreme Court and
8 this court have recognized immigration consequences as
9 being very, very serious.

10 MR. CHAMOY: Well, that is true, Your Honor.
11 However, the fact is that what Congress has chosen to do in
12 this case is to create an immigration - - - oh, I'm sorry.
13 Let me answer first the initial part of your question which
14 is deportation being unique. It is only unique in the
15 sense that it is one of many things Congress has exclusive
16 authority over. It has exclusive authority over interstate
17 commerce, the military. There are - - - there are
18 collateral consequences that can attach that through
19 preemption they can pass laws that would govern states for
20 many different things. And as a consequence - - - such as
21 federal housing, which in reality controls housing for New
22 York, all of these things become consequences that once we
23 say, well, something in the control of Congress, states
24 don't actually have that specific control so we can look
25 beyond the line they become - - -



1 JUDGE STEIN: But that doesn't mean that all of
2 those things rise to the same level of severity or
3 seriousness.

4 MR. CHAMOY: Which is the next part of my answer
5 which is courts have declared it to be a severe penalty.
6 Padilla did, and it was relying on a line of cases - - -
7 and Peque even did. However, there was a recognition in
8 every one of those cases that when it was defining it as a
9 severe penalty, it was looking to the individual. It was
10 looking exactly the way Blanton doesn't. It was flipping
11 the analysis. It was looking at the individual, and
12 subjectively to an individual it can be a severe penalty.

13 JUDGE STEIN: Well - - -

14 MR. CHAMOY: The Supreme - - -

15 JUDGE STEIN: Well, one of those decisions said
16 that the - - - that the court has to inform the defendant
17 that there may be immigration consequences, right? Peque?

18 MR. CHAMOY: Yes, Your Honor, Peque.

19 JUDGE STEIN: Right. So that didn't say that it
20 - - - that the court had to do a - - - make a determination
21 as to what the consequences were for that individual
22 defendant.

23 MR. CHAMOY: Correct. Peque, interestingly
24 enough, limited itself to felonies. It didn't address
25 what's at issue here which is B misdemeanors and



1 violations, and it actually states why which is unlike an
2 aggravative felony which is almost all felonies in New York
3 - - -

4 JUDGE RIVERA: Well, how - - - how can we square
5 the following? First, that outside of New York City any
6 other defendant would get a right to a trial for the crimes
7 charged, right?

8 MR. CHAMOY: Yes.

9 JUDGE RIVERA: For those - - - the B misdemeanor.
10 And that New York, with another small number of states, are
11 outliers, right? Most states do provide jury trials. How
12 can we square that in the analysis here? Or do you think
13 it's completely irrelevant to the analysis?

14 MR. CHAMOY: Well, as for the geographic issue
15 regarding New York City versus the surrounding areas, this
16 court previously decided that issue in Hogan v. Rosenberg
17 and said there is no equal protection or other problem with
18 that citing to a U.S. Supreme Court case that actually
19 considered the - - -

20 JUDGE RIVERA: Yeah, but there's not an equal
21 protection argument here?

22 MR. CHAMOY: Correct.

23 JUDGE RIVERA: No, the - - - the question is
24 whether or not the legislature - - - let's say that we
25 agreed with you that we can't look outside of the



1 boundaries of New York State and Albany for our
2 legislature's sensibility about whether or not it's a
3 serious crime. How - - - how do we get past the fact that
4 everywhere outside of New York City it's serious enough
5 that you get a jury trial?

6 MR. CHAMOY: Well, in New York, as I said, that
7 is a dis - - - a distinction that the legislature was
8 allowed to make, authorized to make, and did make. And the
9 Supreme Court has even recognized that jurisdictionally it
10 may be, for purposes of efficiency, that large cities
11 require different judicial - - -

12 JUDGE RIVERA: Yeah, I'm - - - I'm not making
13 myself clear. Yes, I'm not making myself clear that I'm
14 not - - - I'm not asking you to - - - to discuss the
15 lawfulness of the legislature's choice or the
16 constitutionality of it or - - - or otherwise whether it's
17 as a legal matter problematic. My question is having made
18 that choice, that as you correctly point out has been
19 upheld, doesn't that give us a basis to say the New York
20 Legislature thinks it's a serious crime? Even if it is a
21 Class B misdemeanor it's serious.

22 MR. CHAMOY: Well, the New York Legislature was
23 very careful - - - and in fact, its history of how it came
24 to writing the statute - - -

25 JUDGE FAHEY: Sort of the other side of your



1 argument - - - one side of your argument says that a non-
2 citizen would have a greater right under the - - - under
3 the appellant's theory than a citizen. That's one side of
4 your argument. The other side of the argument is, well,
5 why should someone who lives in Binghamton have a different
6 right to a trial than someone who lives in Queens?

7 MR. CHAMOY: Well, as to the latter issue, that
8 is actually not an issue presented by the parties to this
9 litigation to be clear. That was actually - - -

10 JUDGE FAHEY: Well, answer it anyway.

11 MR. CHAMOY: Absolutely.

12 JUDGE FAHEY: Okay.

13 MR. CHAMOY: The fact is, as I was just saying,
14 basically it comes down to this: legislatures have the
15 authority to create petty offense exceptions. We know
16 this. We also know from Blanton and the language in it
17 that it is what that legislature attaches to the offense -
18 - -

19 JUDGE WILSON: But - - - but why isn't this a
20 reasonable conclusion that the legislature decided to give
21 everybody in the state the right to a jury trial for this
22 sort of a crime because they determined it was serious
23 enough that it required a jury trial except in New York
24 where things were so congested that they couldn't do what
25 they wanted to do even though it was that serious?

1 MR. CHAMOY: There would have to be evidence of
2 legislative intent behind that. But I mean - - -

3 JUDGE WILSON: Is there not?

4 MR. CHAMOY: There is evidence that they consider
5 it worthy of a jury trial that's out of New York City, yes.
6 But there's also evidence that they don't consider it truly
7 to be a serious offense because they chose to create the
8 petty offense exception.

9 JUDGE FEINMAN: I want to ask you a practical
10 question which is how many prosecutions are we actually
11 even talking about in a given year? Because it is limited
12 to the City of New York, and frankly, based on my
13 experience in the City of New York before I got to be here
14 in Albany, this is really a Bronx-specific remedy in most
15 instances for dealing with congestion or whatever
16 motivations may motivate the prosecutor to move to reduce
17 it. And then even within that sub-group of cases, you're
18 talking about only those that are prosecuted against non-
19 citizens. So give me a best estimate. We're not talking
20 scores and scores of cases here - - -

21 MR. CHAMOY: I won't engage in - - -

22 JUDGE FEINMAN: - - - that would be required to
23 now get jury trials.

24 MR. CHAMOY: I'm not going to engage in
25 guesswork. I can say because we previously filed the brief



1 - - - that there are tens of thousands of defendants who
2 are charged with Class A misdemeanors in New York whose
3 cases are reduced, upwards almost to 100,000 back in the
4 day. I can't answer for now. However, of those, the
5 reduction to a B misdemeanor for purposes of trial is
6 actually common in all of the jurisdictions in New York
7 City. And the number of non-citizens is conservatively
8 estimated at over 500,000, and that's a very conservative
9 estimate of the population of New York. So all told, it is
10 an extremely large number, and it only takes a few of them
11 because - - -

12 JUDGE RIVERA: I'm sorry. The - - - what was the
13 500,000? Non-citizens total?

14 MR. CHAMOY: Of non-citizens in the City.

15 JUDGE RIVERA: Not those who are charged?

16 MR. CHAMOY: No, no, no.

17 JUDGE RIVERA: Okay.

18 MR. CHAMOY: That's a conservative number in the
19 - - -

20 JUDGE RIVERA: That's I think the number Judge
21 Feinman is asking you.

22 MR. CHAMOY: Correct. But that - - - but we
23 couldn't say, because we wouldn't know that information,
24 how many of the non-citizens are charged with crimes.
25 Because that's not part of our investigation. That's not



1 information - - -

2 JUDGE FEINMAN: So what I'm getting at is - - -

3 CHIEF JUDGE DIFIORE: So, counsel speak to the
4 procedure about - - -

5 JUDGE FEINMAN: - - - are you really opening a
6 floodgate if you allow jury trials in this limited category
7 of cases?

8 MR. CHAMOY: I think the bigger problem is when
9 one is offered that those who could claim to be a non-
10 citizen - - - which includes, unfortunately, because
11 there's no database of it - - - citizens who either believe
12 they're non-citizens or simply want to cause delay can
13 actually - - -

14 JUDGE FEINMAN: No, but that becomes a practical
15 question that I'm going to ask him when he stands up about
16 - - -

17 MR. CHAMOY: Correct. Okay.

18 JUDGE FEINMAN: - - - how to fashion this rule.

19 CHIEF JUDGE DIFIORE: So, counsel, would you
20 speak to the procedure that would be required or proposed
21 to be used for the judges?

22 MR. CHAMOY: Well, if I may? It's going to take
23 a moment.

24 CHIEF JUDGE DIFIORE: Yes, please. Go ahead.
25 Yes.



1 MR. CHAMOY: Because this case epitomizes the
2 problem. In this particular case, as I understand it, my
3 adversary's position is his admissible client is charged
4 with what's called a particularly serious offense. The
5 problem there is in order to determine a particularly
6 serious offense under federal law unless it's an aggravated
7 felony, for which we're not dealing with here, you need the
8 record of the court below, meaning you'd actually have to
9 have your trial first. So you would have your trial to
10 find out the facts. Then you'd have to find out the
11 immigration consequences. And then if it turns out it was
12 - - - he was deportable as a particularly serious offense
13 because those are the facts that you found by the
14 immigration court - - -

15 JUDGE STEIN: Well, why can't you just tell by
16 determining the nature of the crime with which the
17 defendant is charged?

18 MR. CHAMOY: Your Honor, I was - - -

19 JUDGE STEIN: Isn't that the issue? I mean it
20 doesn't make sense to me that you'd have to hold the trial
21 first.

22 MR. CHAMOY: I was getting right there, Your
23 Honor.

24 JUDGE STEIN: There's a - - - there's an
25 accusatory instrument.



1 MR. CHAMOY: Yes.

2 JUDGE STEIN: And that to me would be the basis,
3 and then in some cases, it seems to me that it would be
4 pretty easy to determine whether this is a deportable crime
5 or not, and in other cases, it might not be so easy. And
6 the burden, I think, is on the defendant to establish that
7 it is a deportable crime because that defendant has to show
8 - - - has to rebut the presumption that it is not a serious
9 crime. So - - -

10 MR. CHAMOY: Your Honor, actually, I was getting
11 right there which is the complaint in this case, if you
12 read it, does not actually state a crime of domestic
13 violence. Ex-boyfriend is not under federal law domestic
14 violence. And - - -

15 JUDGE STEIN: Well, maybe here the defendant
16 didn't make an adequate showing. You know, that - - -
17 that's a different story.

18 MR. CHAMOY: I'm sorry, Your Honor. I don't mean
19 a showing. I mean that if we're saying we can rely on
20 what's happening before trial the answer to that question
21 is not really once you get into the weeds of B misdemeanors
22 and violations. The fact of the matter is in this case it
23 said on the complaint ex-boyfriend. That is not an
24 intimate partner for domestic violence law. It also
25 identified two children but did not identify them as in



1 common.

2 JUDGE STEIN: Then why can't the trial judge do
3 one of two things, if the proof is not there then you deny
4 the jury trial. It's not - - - you don't go ex post facto
5 to figure out if indeed it's - - - you're - - - it's based
6 on what it is known to the judge at the time the argument
7 is made or the judge can err on the side of caution and
8 give the defendant a jury trial.

9 MR. CHAMOY: Well, Your Honor, I believe the
10 answer actually could be found in Bado because in Bado when
11 they actually decided it's okay, we can do this, they said
12 the following - - - I still - - - if I'm permitted.

13 "Government counsel are part of the Department of Justice
14 which has deep expertise in immigration matters and is part
15 of the same executive branch as the Department of State and
16 Homeland Security which have responsibility for enforcing
17 immigration laws. Defense counsel has an obligation to
18 advise their clients competently on the question and if
19 necessary, the court providing over the current prosecution
20 can appoint its own expert advisor on immigration law."

21 That is now the standard in the District of Columbia to
22 have basically a massive hearing on immigration in every
23 case. That is the only way to reach that conclusion here.
24 Only, we have none of those experts.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 MR. CHAMOY: Thank you, Your Honor.

2 CHIEF JUDGE DIFIORE: Mr. Zeno. Mr. Zeno, did
3 defense counsel have to have an expertise in immigration
4 law under this?

5 MR. ZENO: Did defense counsel? Defense counsel
6 worked for Bronx Defenders, and since Padilla was decided
7 every defender office in New York City, which is the only
8 place where this issue arises, has a staff of immigration
9 lawyers. That's a constitutional mandate. And their
10 purpose is to advise defense lawyers about the consequences
11 of convictions, whether they be Class B misdemeanors or
12 felonies.

13 JUDGE GARCIA: But, counsel, to that - - - and
14 Padilla has some very strong language that we've talked
15 about. But Padilla itself also says there may be some
16 cases where this is clear and you have to say this is
17 deportable. But the language I think is that: "There are
18 undoubtedly numerous situations in which the deportation
19 consequences of a particular plea are unclear or uncertain
20 and all that's required in that case is an advice that they
21 may - - - that the charges may carry a risk of adverse
22 immigration consequences." So that's the professional
23 standard set by the Supreme Court, and I think that would
24 be the majority of cases. They may carry adverse
25 immigration consequences. So whatever this is going to



1 show, that's the standard under Padilla. Wouldn't the rule
2 ultimately just come down to every non-citizen gets a jury
3 trial?

4 MR. ZENO: Well, if the court were to impose that
5 rule - - -

6 JUDGE GARCIA: How else would you practically do
7 it if the vast majority are being held to a Padilla
8 standard of this conviction may carry adverse immigration
9 charges?

10 MR. ZENO: Well, we're talking about a subset of
11 criminal cases, Class B misdemeanors, which is the lowest
12 level of - - - of conviction.

13 JUDGE GARCIA: Which may be even harder to
14 determine what the immigration consequences are.

15 MR. ZENO: And it may be harder to determine, and
16 I think that if you look at Blanton, it says if - - - if
17 the penalty is - - - the maximum penalty is a possibility.
18 It doesn't look to the penalty that's actually imposed. It
19 looks to what is the possible maximum penalty, and if it is
20 deportation - - - in that May situation that you're talking
21 about then you get a jury trial. And what is the - - - and
22 what is the harm? In the rest of New York state and most
23 of the rest of the country, you get a jury trial. It's
24 only in New York City that you don't get it.

25 JUDGE WILSON: Well, you're sort of saying you



1 don't need to look at the characteristics of the - - - of
2 the particular defendant, right?

3 MR. ZENO: I'm sorry?

4 JUDGE WILSON: You're saying you don't need to
5 look at the characteristics of the defendant.

6 MR. ZENO: It would be the extremely rare case
7 that - - - that you would need to look at the
8 characteristics.

9 JUDGE GARCIA: Well, you would look at one
10 characteristic because it seems like any rule other than
11 you're a non-citizen is unworkable.

12 JUDGE FEINMAN: As a practical matter, how is
13 this going to be implemented? Do you want - - - should we
14 put the burden on the - - - if we were to agree with you
15 that it's serious and so on, is the burden going to be on
16 the defendant when the People move to reduce to say - - -
17 or perhaps it was even charged at the outset with the B
18 misdemeanor. Judge, I move for a jury trial.

19 MR. ZENO: Absolutely the defense has to ask for
20 the jury trial as they did here.

21 JUDGE FEINMAN: Okay.

22 JUDGE FAHEY: So I always like to think about
23 what the next case is going to be whenever one of the cases
24 comes in front of us, particularly on an important and
25 interesting issue like this. And it seems to me the next



1 case is - - - if I'm - - - if myself, Eugene Fahey, was
2 convicted of a B misdemeanor in New York by a bench trial
3 the first thing I'd do is challenge the constitutionality
4 of a non-citizen getting a trial and - - - by jury and me
5 not getting a trial by jury. Wouldn't that be a
6 consequence that, really, inevitably we would be striking
7 down the non-jury caveat for the city by making this
8 decision?

9 MR. ZENO: No, I don't think so, Your Honor. The
10 - - - the State distinguishes between classes of
11 defendants. An indigent defendant gets a court - - - gets
12 - - - under the Sixth Amendment gets a lawyer assigned to
13 represent them if they can't afford it. A wealthy
14 defendant has no right to that lawyer. That doesn't
15 invalidate the wealthy lawyer that says - - - I mean the
16 wealthy defendant that says I'm entitled to a lawyer. It
17 doesn't invalidate the system. I mean Blanton says look at
18 the penalty and work backwards from there. Here the
19 penalty is deportation for a non-citizen, and that requires
20 a jury trial.

21 JUDGE GARCIA: Judge, may I ask just - - -

22 CHIEF JUDGE DIFIORE: Yes.

23 JUDGE GARCIA: I'm sorry. I know your time is
24 over, but I saw also in your papers below, and I think you
25 continued to press it here, you have made an independent



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state constitutional argument.

MR. ZENO: We didn't.

JUDGE GARCIA: You didn't? You don't know?

MR. ZENO: We are not pressing a state constitutional argument.

JUDGE GARCIA: Okay.

MR. ZENO: Because I think the state constitution is clear that it protects the right to a jury trial only where there has been an indictment, and I think that was the problem in Baldwin.

JUDGE GARCIA: So you're not making an independent state argument?

MR. ZENO: No.

JUDGE GARCIA: Okay. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

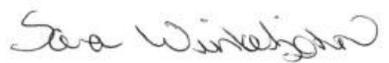
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Saylor Suazo, No. 117 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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