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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 38

CESAR GARCIA,

Appellant.

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20 Eagle Street  
Albany, New York  
May 4, 2021

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

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 38, The People of  
2 the State of New York v. Cesar Garcia.

3 Good afternoon, Counsel.

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

7 CHIEF JUDGE DIFIORE: You may, sir. Three  
8 minutes.

9 MR. ZENO: Thank you.

10 CHIEF JUDGE DIFIORE: Um-hum.

11 MR. ZENO: The People contend that the  
12 preservation rule does not apply here, because they are not  
13 the party claiming error on appeal. But this court has  
14 repeatedly required the People to preserve arguments, even  
15 when they are respondent in this court. It's the People's  
16 contention that they did not need to challenge Mr. Garcia's  
17 claim in his written motion papers that a conviction for  
18 any of the offenses would make him deportable, because now  
19 they are respondent on appeal. But as I said, this court  
20 has repeatedly required preservation from the People, even  
21 when they're respondents.

22 JUDGE STEIN: But Counsel, don't we have to apply  
23 - - - so when - - - when the case was in the trial court,  
24 Suazo hadn't been decided yet. And by the time they got up  
25 to the Appellate Division, it had. So didn't Suazo then



1 have to be applied to the case, with however the - - - the  
2 record was before the Appellate Division at that time?

3 MR. ZENO: Well, this court has never looked at  
4 preservation that way, and the People complain about un - -  
5 - unfairness to them. That unfairness would be just  
6 flipped to Mr. Suazo, if that were required. Mr. Suazo - -  
7 - I mean, Mr. Garcia, here, was in no better position to  
8 anticipate the court's ruling, which required the People to  
9 make - - - the defendant to make a threshold - - -

10 JUDGE STEIN: Well - - - well, that - - -

11 MR. ZENO: - - - showing.

12 JUDGE STEIN: - - - that's an important - - - an  
13 important point there, and - - - but it works both ways,  
14 because I - - - it seems that Mr. Garcia said very, very  
15 little about his right to a jury trial, vis-à-vis federal  
16 immigration law, and what the requirements are for crimes  
17 involving moral turpitude and single scheme, and you know -  
18 - - and all the things that we're now talking about. So  
19 couldn't that go against him in terms of whether he met his  
20 burden as - - - as we said in Suazo, it is his burden to  
21 establish his right to a jury trial in the first place?

22 MR. ZENO: No, I think it was incumbent upon the  
23 People to challenge his statement that "Mr. Garcia is a  
24 noncitizen for whom conviction on any of the charged B  
25 misdemeanors would result in deportability." And then he



1 cites a statute and cases. It's no different than - - -

2 JUDGE STEIN: So - - - so it's your position that  
3 the defendant meets that burden just by simply making a  
4 blanket statement, any of these charges would render me  
5 subject to deportation?

6 MR. ZENO: Yes, just as in the standing cases  
7 that I cited, Stith and Hunter, where a defendant alleges  
8 standing, doesn't prove it, then is denied a hearing on  
9 other grounds. And the People on appeal tried to say that,  
10 wait a minute, he should never have - - - they want to  
11 reargue the standing issue, when all the defendant - - -  
12 maybe the defendant didn't even say anything about  
13 standing. It wasn't even raised in the court below.

14 JUDGE RIVERA: But I thought here you were  
15 arguing that he did more than make a blanket assertion.

16 MR. ZENO: He - - -

17 JUDGE RIVERA: I mean - - -

18 MR. ZENO: That's correct. I mean, what I'm  
19 saying is this is even a stronger - - -

20 JUDGE RIVERA: No, no, but just to be - - - yes,  
21 what you said he cited to the federal statutes and case  
22 law, so it's not like the People didn't have some idea of  
23 what was the basis of the argument.

24 MR. ZENO: Absolutely, and they - - -

25 JUDGE RIVERA: Or the court. Apparently the



1 court understood the issue very well.

2 MR. ZENO: And the court denied it solely on the  
3 basis that immigration consequences didn't matter for Sixth  
4 Amendment purposes.

5 JUDGE GARCIA: Counsel, is - - - sorry, up here.  
6 Is that different than Suazo? I - - - this case seems very  
7 similar to me to Suazo, because the - - - the argument was  
8 made, as you say, by defense counsel. It - - - it was  
9 preserved by defense counsel. And it's on direct appeal.  
10 It's a Constitutional rule. And we look at it - - - and in  
11 Suazo, it seems to me this court addressed that issue. We  
12 did it - - - was there a difference in the record in Suazo  
13 that made that reviewable by us, the deportability issue,  
14 as opposed to this case?

15 MR. ZENO: That's a good question, Your Honor.  
16 There's no difference in the record, and I would say that  
17 the court did address the deportability information in  
18 Suazo, but as a function of showing its work. Essentially,  
19 saying defendant not only said he would be deportable here,  
20 but it appears that he was, in fact, deportable, or could  
21 have been deportable.

22 JUDGE GARCIA: Then why wouldn't we do that here?

23 MR. ZENO: Because the law precludes that - - -  
24 that being a basis - - - it's un - - - that decision is  
25 unreviewable. So essentially what I'm saying, in Suazo,



1 when this court addressed the facts about what made Suazo  
2 deportable, it was essentially dicta. It was - - - the  
3 court was making a bold decision in Suazo and wanted to  
4 legitimize that decision, by showing its work.

5 JUDGE WILSON: Are you saying that we can't - - -  
6 over here, sorry - - - are you saying that we can review  
7 it, for the purpose of reversing a conviction, but not for  
8 the purpose of affirming one? That is sort of a LaFontaine  
9 issue.

10 MR. ZENO: Well, I think there are two separate  
11 issues here. There's the - - - there's the preservation  
12 issue, which is more basic than the LaFontaine issue. The  
13 LaFontaine issue, they only matter because of the remedy.  
14 If it's not preserved, then the remedy is the conviction  
15 gets reversed. If it's solely a LaFontaine error, then it  
16 can go back to the criminal court to review that issue.

17 JUDGE FAHEY: So - - - so is there a LaFontaine  
18 problem here?

19 MR. ZENO: There is both a preservation and a  
20 LaFontaine problem here.

21 JUDGE FAHEY: And - - - and out - - - outline for  
22 us how you see the LaFontaine problem. Which - - -

23 MR. ZENO: Well, the LaFon - - - LaFontaine bars  
24 this court from reaching an issue that was not decided by  
25 the court below. So the issue here that was not decided by



1 the court below was whether, in fact, Mr. Garcia was  
2 deportable. So - - -

3 JUDGE GARCIA: It - - - it seems to me in - - -  
4 in - - - I'm sorry; you had - - - in Suazo, we did cite to  
5 LaFontaine for - - - but in a footnote, I think - - - but  
6 only for the issue of whether the defendant actually was  
7 subject to deportation anyway or something like that, not  
8 for whether what he would be convicted of was a deportable  
9 offense. How - - - what's the difference there? Why would  
10 we apply LaFontaine to deport - - - you know, was he  
11 deportable anyway, and not - - - it seems we were  
12 distinguishing that on - - - as a LaFontaine basis, from  
13 the issue of, were these crimes deportable offenses, which  
14 we addressed.

15 MR. ZENO: Well, Your Honor, if I recall the  
16 footnote to which you're referring, the court pointed out  
17 that that information was not even before the court when it  
18 rendered its decision, that it wasn't until after the trial  
19 that the issue about whether our - - - Mr. Suazo was  
20 already deportable came up. So that, you know, there's a  
21 factual distinction there.

22 Am I one hundred percent persuaded that the court  
23 should have essentially reached the deportability grounds  
24 in Suazo? I don't think it was necessary for it to reach  
25 those grounds. It - - - that issue is not joined in the



1 opinion. The opinion doesn't say, even though this issue  
2 is unpreserved or subject to LaFontaine, we're going to  
3 reach it anyway. So I don't think that the - - - that  
4 Suazo can be read to dismiss the preservation in a  
5 LaFontaine issue.

6 JUDGE FAHEY: Does the fact that - - - I had  
7 thought that the - - - the defendant here had already - - -  
8 had had an order of a removal entered against him. Is that  
9 true? Did - - - was there an order of removal that  
10 predated this conviction?

11 MR. ZENO: That - - - that's one of the problems  
12 with the lack of preservation here, is there's nothing in  
13 the record. The appellate record before this court,  
14 there's nothing in the record before the court below, to  
15 address that. So - - -

16 JUDGE FAHEY: But I had thought that he was - - -  
17 that - - - that there was an order of removal that predated  
18 it by two years.

19 MR. ZENO: Well, if there was, it was not brought  
20 to the attention of the court below, so it's not actually  
21 part of the record.

22 JUDGE FAHEY: Well, the question I suppose for us  
23 would be, is it in the record, right?

24 MR. ZENO: And I would say that if it was not  
25 before the court below when it made its decision - - -



1 JUDGE FAHEY: It's in the respondent's brief at 5  
2 and note 4, and the develop - - - the - - - the defendant's  
3 appellate brief, that's you, at 2 - - - note 2.

4 MR. ZENO: Right, and - - - and I addressed it,  
5 because the People raised it, but that doesn't make it part  
6 of the record. That - - - that's the problem with failing  
7 to preserve the issue, is - - -

8 JUDGE FAHEY: I see.

9 MR. ZENO: - - - had it been properly preserved,  
10 these issues could have all been fleshed out, addressed - -  
11 -

12 JUDGE FAHEY: Okay, no, I have your - - - I have  
13 your - - - thanks. I - - -

14 MR. ZENO: Thank you.

15 JUDGE FAHEY: I understand what you're saying.  
16 Okay.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
18 Counsel?

19 MR. COHN: Thank you, Chief Judge. My name is  
20 David Cohn and I represent the People, good afternoon.

21 We are asking this court to apply the exact same  
22 template to this case that it applied in Suazo.

23 JUDGE RIVERA: So - - - so what was lacking in  
24 the motion - - - in the motion for the right to a jury  
25 trial?



1 MR. COHN: Well, what was lacking in the defense  
2 motion?

3 JUDGE RIVERA: Yes, what - - - what else did the  
4 defendant had - - - in your opinion, what else did the  
5 defendant have to present?

6 MR. COHN: Well, Your Honor - - -

7 JUDGE RIVERA: He cited cases. He cited the  
8 federal statute. He made the assertion. What do you say  
9 is missing?

10 MR. COHN: Right. Well - - - well, Your Honor,  
11 there are some aspects of the current appellate claim that  
12 are unpreserved. For instance, the argument that public  
13 lewdness is a crime involving moral turpitude. That  
14 argument is unpreserved for this court's review.

15 In the motion for a jury trial, the defendant  
16 cited two federal cases, but they dealt with the other  
17 charges, the forcible touching and the sexual abuse  
18 charges, of which the defendant was ultimately acquitted,  
19 so those charges are out of the case now. There was no  
20 argument made below that public lewdness, the only crime of  
21 which he stands convicted, was a crime involving moral  
22 turpitude.

23 In addition, the defense motion for a jury trial  
24 did not address the notion that you must have a conviction  
25 of two crimes involving moral turpitude, if they're



1           misdemeanors, in order for them to be deportable.

2                   JUDGE RIVERA: But - - - but why didn't you point  
3           - - - why didn't the ADA point that out in opposition?

4                   MR. COHN: Well - - - well, Your Honor, if we  
5           look at the way this case unfolded in the trial court - - -

6                   JUDGE RIVERA: And the ADA point out, look, the -  
7           - - the citations, the argument that he's relying on that's  
8           made in those cases, looking at the statutory language,  
9           don't support the motion. Why - - - why didn't the ADA say  
10          that?

11                  MR. COHN: Your Honor, I - - - of course, I don't  
12          know what was in the ADA's mind, but I think from the  
13          record, what we can glean is - - - is that the court had  
14          made clear that it was going to just deny this motion  
15          summarily, in accordance with this court's prior precedent,  
16          and the standard practice throughout the state.

17                  JUDGE RIVERA: Yes, I understand that. If you  
18          have a series of arguments, and the ADA relies on one, the  
19          court is ruling on one, even though indicating if the law  
20          was different, he would have a claim, right?

21                  MR. COHN: Right. So - - - so, Your Honor - - -

22                  JUDGE RIVERA: So - - - so why isn't that like a  
23          typical, as he's arguing, preservation issue? You had lots  
24          of arguments you could have made; you only made a  
25          particular argument. You're foreclosed from now making the



1 other ones.

2 MR. COHN: Well, Your Honor, this court has never  
3 applied the preservation rule to a respondent in order to  
4 say that the respondent was required to anticipate a change  
5 in the law. All of the - - - the cases that the defendant  
6 cites, those are arguments that the respondent absolutely  
7 could have made based on existing law, and in fact, most of  
8 the cases that the respond - - - that the - - - that the  
9 defendant cites about preservation being applied to the  
10 respondent, are about factual matters that should have been  
11 raised to the court by - - - by the - - - the People below.

12 By the way, there is - - -

13 JUDGE RIVERA: So - - - so you're saying there  
14 was no hint that the issue was percolating below.

15 MR. COHN: There - - - there was no hint that the  
16 trial judge was even considering that he would grant this  
17 motion. And the judge, in fact, didn't ask the People to  
18 submit written papers. The defense submitted written  
19 papers. The trial judge only asked the People to make a  
20 short oral argument, and at that point, that was signaling  
21 to the - - - to the ADA, just make your quick argument, and  
22 I'm going to deny the motion.

23 JUDGE FAHEY: But wouldn't - - - wouldn't - - -  
24 wouldn't - - - I thought the People had conceded that Suazo  
25 was retroactive.



1 MR. COHN: The People concede that Suazo applies  
2 retroactively to this case - - -

3 JUDGE FAHEY: Okay. So let me - - - let me - - -  
4 let me just - - - let me just stop you then.

5 MR. COHN: Yes.

6 JUDGE FAHEY: If that's conceded, then really,  
7 shouldn't we be about the business of clarifying if the  
8 right to a jury trial rests on the potential penalty of  
9 deportation, or a conviction that it resolves itself in  
10 deportation? And then we have to clarify the difference  
11 between charges versus convictions.

12 MR. COHN: Your Honor, I agree that this court  
13 needs to address the merits of - - - of the claim that that  
14 - - -

15 JUDGE FAHEY: So if we address the merits, then  
16 we - - - then we're in essence conceding that Suazo is  
17 retroactive?

18 MR. COHN: It is - - - applies retroactively to  
19 cases that were pending on direct appeal at the time of the  
20 decision. That - - - that is - - - that is the law, and we  
21 concede that that is the law. The defense argument is that  
22 this court can't even get there, can't even engage - - -

23 JUDGE GARCIA: But - - - but Counsel, before you  
24 get to that, I think - - - if I'm re - - - understanding  
25 Judge Fahey's other part of his question is, when we're



1 looking back and applying Suazo retroactively, and we say,  
2 okay, here's the decision point for do you - - - are you  
3 entitled to a jury or not, it's based on the charges at the  
4 time, not based on a retroactive look that he was only  
5 convicted of one thing.

6 MR. COHN: Okay.

7 JUDGE GARCIA: Right?

8 MR. COHN: Oh, so, I - - - Your Honor, perhaps I  
9 misunderstood the question. So - - - so there - - - so  
10 there is the issue of do we -- - when we're on appeal, do  
11 we look at the charges of which the defendant was convicted  
12 or - - - or do we look at the charges that were pending at  
13 the time - - -

14 JUDGE GARCIA: Right.

15 MR. COHN: - - - of the motion for a jury trial.  
16 Now this court has not addressed that question. Lower  
17 courts in this state have uniformly said that once a  
18 defendant has been acquitted of a charge that's out of the  
19 case - - -

20 JUDGE STEIN: Well, I think arguably, there's two  
21 questions here, okay. One is, was it error, based on what  
22 existed before the trial in denying him a jury trial, and  
23 the other is, let's assume that it was error. And now,  
24 here we are today, but the charges that everybody - - - not  
25 everybody agrees - - - but argue - - - were ar - - - were



1 easily identified as being - - - rendering somebody  
2 deportable, those are the two on which he was acquitted.  
3 So now we're looking back, and we're saying, okay, it was  
4 error to deny the jury trial, but here we are.

5 What's the remedy, okay, and you know, can it - -  
6 - can we apply harmless error or mootness? So, you know,  
7 because arguably we can't give him a jury trial now, but -  
8 - - but I - - - I think we prefer not to render him  
9 remediless, right, so - - - so - - -

10 MR. COHN: Well, Your Honor, I think other courts  
11 have looked at this as either a harmless error or a  
12 mootness type analysis. But that - - -

13 JUDGE STEIN: But where does the authority to - -  
14 - to apply harmless error analysis to this particular  
15 scenario come from?

16 MR. COHN: Well, Your Honor - - -

17 JUDGE STEIN: Or - - - or would we be deciding it  
18 in the first instance?

19 MR. COHN: There are other cases, other lower  
20 court cases, that have applied harmless error in this  
21 context. It would be an issue of first impression for this  
22 court. But there are three Appellate Term cases that we  
23 cited in our brief, where the defendant would have been en  
24 - - - entitled - - - was - - - was actually given the - - -  
25 a jury tri - - - sorry - - - would have been entitled to a

1 bench trial, was wrongly denied a jury trial on other  
2 charges of which he was ultimately acquitted, and then the  
3 Appellate Term said in those cases, because the only  
4 remaining charge of which he was convicted was a petty  
5 offense, for which a jury trial would not be required, that  
6 any error was harmless, because the only remedy that he  
7 would be entitled to, would be a new bench trial, and it  
8 doesn't - - -

9 JUDGE RIVERA: Wait a minute. Why is that true?  
10 I mean, look, it - - - if - - - if under Suazo, he would  
11 have been entitled to a jury trial, that's what you're  
12 trying to remedy. The fact that he's acquitted of the  
13 others doesn't matter. The point is, he would have had the  
14 opportunity to try to persuade a jury, not a judge, to  
15 acquit him.

16 MR. COHN: Well, Your Honor, I think the  
17 distinction - - -

18 JUDGE RIVERA: That's what you're trying to  
19 remedy.

20 MR. COHN: Yeah.

21 JUDGE RIVERA: So how - - - how can it possibly  
22 be harmless?

23 MR. COHN: So Judge Rivera, I think that this  
24 distinction is - - - is that in this case, to the extent  
25 that the defendant might have been entitled under the CPL



1 to a jury trial on the public lewdness charge, that's not a  
2 Constitutional right to a jury trial. That's purely a  
3 derivative statutory right to a jury trial, which was the  
4 legislature saying, because of judicial economy, or because  
5 we think it would just be a very unusual set up - - -

6 JUDGE RIVERA: Your analysis renders Suazo almost  
7 meaningless.

8 MR. COHN: No, Your Honor, because if - - - if -  
9 - - it - - - it would just say that the Constitutional  
10 right to a jury trial doesn't mean that a defendant who's  
11 convicted of a petty offense gets a windfall because of  
12 some other offense because of some other offense that  
13 happened to be in the case where they were ultimately  
14 acquitted of that charge. The - - - what - - - what we're  
15 saying - - -

16 JUDGE RIVERA: I don't know that it's a windfall  
17 when you're trying to comply with what the court in Suazo  
18 says he's entitled to.

19 MR. COHN: Right. Well, Your Honor, I - - -  
20 please forgive me if I'm - - - I'm wrong, but I believe  
21 this court in Suazo was concerned about the Constitutional  
22 right to a jury trial.

23 JUDGE RIVERA: Yes, no, I understand that.

24 MR. COHN: Right? The Sixth Amendment right to a  
25 jury trial. And I - - - I think all - - - everyone here



1 agrees that if public lewdness - - -

2 JUDGE RIVERA: Yes, but as a consequence, that  
3 meant that all the charges - - - right - - - all the  
4 charges - - -

5 MR. COHN: Right.

6 JUDGE RIVERA: - - - even the ones that would not  
7 have otherwise gotten you the jury trial right are now  
8 subject to that coverage.

9 MR. COHN: Under the CPL. So there would be a  
10 statutory right to a jury trial on the public lewdness  
11 charge, but - - -

12 JUDGE RIVERA: Well, of course, in Suazo, we  
13 could have said, you're only entitled to a jury trial,  
14 right, on some of the counts, not the other ones, but we  
15 didn't say that - - -

16 MR. COHN: Well - - -

17 JUDGE RIVERA: - - - because that's what the CPL  
18 requires.

19 MR. COHN: Your Honor, right, a statutory right,  
20 but there was no violation - - - if it - - - if public  
21 lewdness is not a crime involving moral turpitude, there  
22 was no violation of the defendant's Sixth Amendment right  
23 to a jury trial in this case. So what we are arguing is -  
24 - -

25 JUDGE WILSON: Well, that's only - - - that's



1           only true if he were tried solely on the public lewdness  
2           charge, no?

3                     MR. COHN:  It's - - -

4                     JUDGE WILSON:  Let me try it this way.

5                     MR. COHN:  Yes.

6                     JUDGE WILSON:  If he'd been tried in - - - for  
7           the case that the People presented, which was on all the  
8           charges, he would have been entitled to a jury, yes?

9                     MR. COHN:  Right, Your Honor.

10                    JUDGE WILSON:  Right.  So if - - - if that's the  
11           case, is there some chance that the jury might have  
12           acquitted him on everything?

13                    MR. COHN:  There - - - there might be.  I mean,  
14           you never know what a jury would have done.  Ob - - -  
15           obviously, we believe the proof was very strong in this  
16           case, but - - -

17                    JUDGE WILSON:  In this - - - in this circumstance  
18           when someone is convicted of a crime, has served the time,  
19           and all that's - - - you - - - you can't retry him on the  
20           charges he was con - - - acquitted of, don't we ordinarily  
21           just dismiss the accusatory instrument?

22                    MR. COHN:  Well, not, Your Honor, if - - - if  
23           it's a charge that - - - those are only for petty - - -  
24           petty offenses where - - - where this court believes that  
25           it's not in the public interest to subject the defendant to



1 a new trial.

2 JUDGE WILSON: I thought your whole argument was  
3 this lewdness charge was a petty offense.

4 MR. COHN: It - - - it was not a serious offense  
5 for Sixth Amendment purposes. We - - - we are arguing  
6 that. But it - - - it cer - - - was the type of conduct  
7 that we certainly think the State has an interest in  
8 prosecuting, and - - - and we would want to proceed with a  
9 new trial, if - - - if there - - -

10 JUDGE RIVERA: Well, he's been deported. You - -  
11 - you - - -

12 MR. COHN: Right, that's - - - well - - -

13 JUDGE RIVERA: I mean, you're not going to be  
14 able to do that.

15 MR. COHN: Yeah, well, that - - - that is another  
16 issue, Your Honor. That's correct.

17 JUDGE RIVERA: That's the wrinkle in the case,  
18 another wrinkle in the case - - -

19 MR. COHN: Yeah. That - - -

20 JUDGE RIVERA: - - - of course.

21 MR. COHN: That's correct, Your Honor.

22 JUDGE FAHEY: So - - - so Judge Rivera's point, I  
23 - - - I'm having a - - - isn't it a really a point in favor  
24 of mootness, rather than any other remedy at this point?

25 MR. COHN: Yes, Your - - - Your Honor, it - - -



1 it - - - it's - - - it could be an argument either mootless  
2 - - - mootness or harmless error, and if you look at the  
3 cases cited in our brief, suppose for instance, there's - -  
4 -

5 JUDGE FAHEY: Well, I - - - the reason I ask is  
6 because harmless error, I think, is a more difficult  
7 analysis, than mootness may be in this situation.

8 MR. COHN: Ah.

9 JUDGE FAHEY: That's why I'm asking you the  
10 question.

11 MR. COHN: Right, no, I - - - I understand you -  
12 - - it might be simpler and cleaner to say mootness, as  
13 opposed to harmless error. I - - - Your Honor, I - - - as  
14 an analogy - - -

15 JUDGE RIVERA: But again, how - - - how is it  
16 moot, if - - - if indeed it might foreclose him from trying  
17 to lawfully reenter the United States? That conviction.  
18 Because he has no other criminal history.

19 MR. COHN: Well, Your Honor, I'm not sure that  
20 that was discussed on the record, so I'm - - - I'm not sure  
21 - - -

22 JUDGE RIVERA: That's fair.

23 MR. COHN: - - - that I know the answer to that  
24 question, given the state - - -

25 JUDGE RIVERA: That's fair.



1 MR. COHN: - - - given the state of the record.

2 JUDGE RIVERA: Um-hum.

3 MR. COHN: If I may, by analogy, this court has,  
4 in other cases, said, like for instance - - - for instance,  
5 let's say there is evidence admitted that relates only to  
6 one of two crimes at trial. The defendant is acquitted of  
7 that crime. He is convicted of another crime. And on  
8 appeal, argues that the admission of evidence, of that  
9 evidence, was improper. This court, in those types of  
10 cases, and appellate courts throughout the state, will say  
11 that that error was harmless, because it had no effect on  
12 the conviction of the separate count. And - - -

13 JUDGE WILSON: Yeah, but of course, here, you're  
14 arguing that all of these things are a part of a single  
15 scheme, so your analogy doesn't work, given what you're  
16 arguing.

17 MR. COHN: Well, Your Honor, that - - - that's  
18 not - - - a different question from the guilt or innocence  
19 determination. That's - - - that's a - - - an immigration  
20 question for, are these so related and - - - that the fact  
21 that the defendant was convicted of multiple counts - - -  
22 and - - - and the argument is, that if he was convicted of  
23 all five counts, still there would only be one crime  
24 involving moral turpitude, under the federal immigration  
25 law, because this was a thirty-minute incident where the



1 defendant was continuously fulfilling his sexual  
2 gratification by performing a lewd act on the subway  
3 platform, immediately following women into a train, looping  
4 around, going back. It's a very cabined, thirty-minute  
5 incident.

6 The cases cited by the defense involve situations  
7 that happened as a matter of hours or even a matter over a  
8 period of years. So this is different. This is - - - even  
9 under the more restrictive BIA interpretation of scheme, we  
10 believe this is only a - - -

11 JUDGE FAHEY: Yeah.

12 MR. COHN: - - - single scheme - - -

13 JUDGE FAHEY: - - - the problem is, just add more  
14 complexity to - - - to what you would think would be a  
15 straightforward case.

16 MR. COHN: Yeah.

17 JUDGE FAHEY: The way I - - - I see it, is you  
18 got arguably three separate acts: a station platform, one  
19 train, and then a different train. So I don't know the  
20 answer sometimes - - -

21 MR. COHN: Yeah.

22 JUDGE FAHEY: - - - but it - - - it does seem to  
23 me that it doesn't lend itself to an easy analysis.

24 MR. COHN: Right.

25 JUDGE FAHEY: Yeah.



1 MR. COHN: No, Your Honor, and - - - and - - -  
2 and Congress used the word scheme, instead of act or crime,  
3 and I believe that is relevant.

4 I - - - I would also say that given that this  
5 court changed the law in Suazo during the pendency of this  
6 particular appeal, if this court believes that the record  
7 and arguments below were not sufficiently developed and  
8 more development was necessary, then the proper remedy  
9 would be a limited remand for the purpose of fully fleshing  
10 out the immigration issue, rather than giving the defendant  
11 a default judgment, for the fact that the court and the  
12 People did not anticipate the change in the law, which we  
13 believe, in all fairness, is not the proper remedy.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. COHN: Thank you.

16 CHIEF JUDGE DIFIORE: Mr. Zeno?

17 JUDGE RIVERA: Why - - - why - - - why hasn't he  
18 got a compelling point - - - let's - - - in this last  
19 argument that's he's made, to just send it back for further  
20 record development?

21 MR. ZENO: So - - -

22 JUDGE RIVERA: Is he - - - is it possible to  
23 decide this without record development?

24 MR. ZENO: Well, it's possible to preserve - - -  
25 it's possible to decide this case on preservation grounds,



1 which are the clear grounds here. The - - - the remedy for  
2 an unpreserved claim has always been in this court that you  
3 don't consider it. You don't send it back for a fact-  
4 finding hearing. In Wardius v. Oregon, the Supreme Court  
5 said reciprocity is a fundamental ingredient of due  
6 process. So why do the People get a second bite to - - -

7 JUDGE RIVERA: So if we disagree on that, then  
8 why isn't he right about this last point.

9 MR. ZENO: If we disagree about - - -

10 JUDGE RIVERA: Preservation.

11 MR. ZENO: Preservation?

12 JUDGE RIVERA: Yes.

13 MR. ZENO: Then - - - then the record, as - - -  
14 as Judge Fahey observed - - -

15 JUDGE RIVERA: Disagreed with you about the  
16 preservation.

17 MR. ZENO: - - - there are a lot of layers to  
18 this - - -

19 JUDGE RIVERA: Um-hum.

20 MR. ZENO: - - - to this. The record is  
21 sufficient, based on what we have now, to - - - to show  
22 that my client faced the possibility of deportation,  
23 because of the three separate occurrences, as Judge Fahey  
24 pointed out, the subway platform, the downtown train, the  
25 uptown train. Three crimes involving moral turpitude that



1 made him deportable. The record is - - -

2 JUDGE RIVERA: Well, the public lewdness doesn't  
3 fit within what the BIA or the federal statute would  
4 otherwise deem an offense - - - let's just say it this way,  
5 a deportable offense, right? That leaves you then the  
6 other two, and I think there's a real argument for why the  
7 public lewdness is different from the other two.

8 MR. ZENO: The public lewdness is - - -

9 JUDGE RIVERA: The other two then, it - - - he  
10 has a stronger argument that that might very well fall in,  
11 if we defer to the BIA, to what the BIA would construe as  
12 these acts. Right?

13 MR. ZENO: If I un - - - I understand your  
14 question correctly - - -

15 JUDGE RIVERA: As a single scheme.

16 MR. ZENO: This single transaction or occurrence.

17 JUDGE RIVERA: Yes, yes.

18 MR. ZENO: I think the BIA is very clear that  
19 those were two completed - - - three completed crimes, the  
20 platform, the - - - the - - - the downtown train, and the  
21 uptown train. They were each completed once he walked off  
22 the train, and waited around and got on another train. The  
23 BIA, which is entitled to their chevron deference, makes it  
24 very clear, that those are separate completed crimes, when  
25 each one - - - each one of them is completed. So to get



1 back to the answer to your original question, there is  
2 enough on this record, even with - - - even if we were to  
3 reach it, to find that he was entitled to a jury trial.

4 Get - - - if I could just quickly address the  
5 sort of the next question, and that is, assuming he was  
6 entitled to a jury trial, is it appropriate to give him one  
7 now, or to dismiss the case for the failure to afford him  
8 the jury trial to which he was entitled? And I think that  
9 there are two reasons that he's entitled to that. The  
10 first is, as a remedy for the Sixth Amendment violation.  
11 It's clear if he was entitled to a jury trial on one, he  
12 was entitled to a jury trial on all, and that is an  
13 extremely important right to him. Evidence of that is the  
14 vigorousness with which he sought the jury trial, and the  
15 vigorousness with which the - - - the prosecution tries to  
16 rebut the right to a jury trial.

17 Having a - - - having a claim decided by a jury  
18 rather than a judge is an extremely significant right, and  
19 there should be a remedy for it. But even putting that  
20 aside, CPL 340.40(3) says that if you're entitled to a jury  
21 trial on one charge in a single information, you're  
22 entitled to a jury trial on all of them. And the People  
23 cite cases where multiple informations were charged.  
24 That's not the case here. It's a single information. He  
25 was entitled to a - - - to a jury trial on all of the



1 charges, joined together, and he's entitled to a remedy  
2 under the CPL or the Constitution.

3 JUDGE RIVERA: Well, he's been deported. How are  
4 you going to have a jury trial?

5 MR. ZENO: Can you repeat that?

6 JUDGE RIVERA: He's been deported.

7 MR. ZENO: He's been deported, so therefore the  
8 remedy we ask for is dismissal, rather than that right.  
9 He's entitled to a remedy. It's not moot. He has that  
10 conviction on his record permanently, whether he's in  
11 Mexico, whether he ultimately returns to the United States.  
12 To say that it's moot, when there's this criminal  
13 conviction on your record, there's just no basis for that -  
14 - - that argument.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MR. ZENO: Thank you.

17 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Cesar Garcia, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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