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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent, (Papers Sealed)

-against-

No. 154

MATTHEW P.,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 13, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

AMY DONNER, ESQ.  
THE LEGAL AID SOCIETY  
Attorneys for Appellant  
199 Water Street  
New York, NY 10038

RYAN GEE, ADA  
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Respondent  
One Hogan Place  
New York, NY 10013

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 154, People v.  
2 Matthew P.

3 Counsel, hold on for one second.

4 Okay, counsel, you want any rebuttal time,  
5 counsel?

6 MS. DONNER: Yes, Your Honor, I would like  
7 two minutes for rebuttal, please.

8 CHIEF JUDGE LIPPMAN: Okay, go ahead.

9 MS. DONNER: Thank you. May it please the  
10 court, my name's Amy Donner, and I represent  
11 appellant Matthew P. A defendant can't - - -

12 CHIEF JUDGE LIPPMAN: Tell us - - - tell us  
13 how the - - - the two causes of actions here are - -  
14 - are the same or different as our earlier precedents  
15 in terms of these kinds of situations, the - - - the  
16 - - - the seft - - - theft of services as opposed to  
17 the first cause. Go ahead.

18 MS. DONNER: Okay, if I'm - - - we're - - -  
19 we're speaking about point one of my brief - - -

20 CHIEF JUDGE LIPPMAN: Yes.

21 MS. DONNER: - - - I gather. Okay.

22 CHIEF JUDGE LIPPMAN: Go ahead.

23 MS. DONNER: Thank you.

24 CHIEF JUDGE LIPPMAN: Go for it.

25 MS. DONNER: That's what I wanted to talk

1 about. Thank you. Okay. Well, basically, my case -  
2 - -

3 CHIEF JUDGE LIPPMAN: You know, because  
4 we've been here before.

5 MS. DONNER: Yes.

6 CHIEF JUDGE LIPPMAN: In this general  
7 vicinity. Go ahead.

8 MS. DONNER: In - - - right, well, in  
9 Nappo, certainly.

10 CHIEF JUDGE LIPPMAN: Okay, go ahead.

11 MS. DONNER: And basically, the cases do  
12 sort of fall into two categories, and basically, one  
13 of them is where there is an actual pre-existing  
14 business relationship with the customer; that's  
15 Spatarella. And in that situation, where the  
16 complainant in Spatarella, complainant garbage  
17 company A, had this pre-existing business  
18 relationship with a customer, garbage had been  
19 hauling, they admitted there was a stream of money,  
20 it's interrupted by the defendant's extortion. So  
21 the defendant stole the customer, this existing  
22 business relationship in this transaction; there's  
23 larceny.

24 Then you have the cases like Nappo which is  
25 just like my case, and you als - - - and Hightower is

1 based on Nappo and my case where you have this  
2 potential business relationship, but the complainant  
3 does not have actual possession of that transaction -  
4 - -

5 JUDGE PIGOTT: Be - - - bef - - - you're  
6 conf - - - you're confusing me with that stuff.

7 MS. DONNER: I'm sorry.

8 JUDGE PIGOTT: It's okay. What did this -  
9 - - what did your defendant do wrong? I mean, it  
10 seems to me when he takes, you know, money and lets  
11 people in and - - - that there's a violation of the  
12 Penal Law somewhere.

13 MS. DONNER: Oh, yes, definitely.

14 JUDGE PIGOTT: And what do you call it?

15 MS. DONNER: He committed a violation of  
16 the general theft of services which - - - statute,  
17 which is - - - doesn't use the term owner, it doesn't  
18 use the larceny law concepts, it specifies MTA.

19 JUDGE FAHEY: But the problem is, in petty  
20 larceny, property is defined - - - could be defined  
21 as including this exact activity. I mean, it says in  
22 the statute, a sub - - - you're taking a substance or  
23 anything of value in the last section, including  
24 "gas, steam, water, electricity which is provided for  
25 a charge or compensation."

1 MS. DONNER: But - - -

2 JUDGE FAHEY: So the subway fares - - -  
3 you're taking a - - - I - - - I don't get why that  
4 isn't a - - - a taking.

5 MS. DONNER: Okay, the prob - - - okay, but  
6 there are three things that property can't be; and it  
7 can be broad, as Your Honor said. But there are  
8 three things that Nappo and Hightower say it can't  
9 be, which is money that the complainant does not yet  
10 possess. Here, the undercovers and the - - -

11 JUDGE FAHEY: But they're not taking - - -  
12 he's not taking - - - he - - - he's - - - what he's  
13 taking is access to services.

14 MS. DONNER: But that - - - that - - -  
15 there's this potential business relationship.  
16 Appellant, had he not been given - - - had the  
17 undercovers and appellant not had this great deal,  
18 all right, two bucks, get in all three people instead  
19 of 2.50 a head at that time - - - it's now 2.75 - - -  
20 but, you know, they might have decided to walk or  
21 take a bike.

22 JUDGE FAHEY: Um-hum. They - - -

23 MS. DONNER: They didn't - - - they had  
24 free will. They didn't - - -

25 JUDGE FAHEY: Weren't they undercover

1 police officers?

2 MS. DONNER: Well, police offi - - - police  
3 officers you would think would get in for free, but  
4 the bottom line, if it's 2.50 a head, certainly  
5 appellant, it was 2.50, and instead the choice - - -  
6 they had free will, they didn't have to do it that  
7 way. There's only a potential relationship.

8 JUDGE PIGOTT: If they had charged him with  
9 stealing the key, would this be not a case now?  
10 Because didn't he have a key that he - - -

11 MS. DONNER: He did, but there was no  
12 charge about larc - - - there wasn't a charge about -  
13 - - about larceny of the key, and we don't know how  
14 he - - - we don't know how he got the key. And  
15 definitely, there's illegality here.

16 JUDGE RIVERA: Well, considering the nature  
17 of the crime, when - - - when is it not a potential  
18 business relationship? When they're about to swipe  
19 the card and I say, don't swipe that card, I've got  
20 something better for you?

21 MS. DONNER: It's a - - -

22 JUDGE RIVERA: When - - - when - - - when  
23 is it not potential anymore?

24 MS. DONNER: When they go through the gate  
25 and the MTA has the money.

1 JUDGE RIVERA: I understand, but then  
2 there's no reason to offer someone to go through,  
3 right?

4 MS. DONNER: Well - - -

5 JUDGE RIVERA: Position has to be that  
6 there's no way to ever read Spatarella to apply to  
7 someone like this who does this.

8 MS. DONNER: Well, when there's - - -

9 JUDGE RIVERA: It can't be that it's after  
10 they've go through, because now they've gone through.  
11 They're not going to give him any money.

12 MS. DONNER: But - - -

13 JUDGE PIGOTT: He's - - - he's not going to  
14 give the money to the MTA.

15 MS. DONNER: But Hightower - - - that was  
16 the - - - that was the exact situation in Hightower  
17 also.

18 JUDGE RIVERA: Well, it said in Hightower  
19 there'd already been money that had been paid for  
20 someone to go through.

21 MS. DONNER: But the very next sentence,  
22 what's interesting - - - and that certainly made  
23 Hightower an easier case. But Hightower - - - the  
24 very next sentence distinguishes Spatarella and  
25 Hightower. And it says "By contrast, in Spatarella,

1 the victim was compelled to give up a business  
2 customer whom unl" - - -

3 JUDGE PIGOTT: This - - - this aside, those  
4 are all really great and they're academic and I'm not  
5 that far ahead.

6 MS. DONNER: I'm sorry.

7 JUDGE PIGOTT: It - - - it just seems to me  
8 that if - - - if your client is standing there and -  
9 - - and people are coming through for 2 bucks and  
10 they should be paying 2.75 now, or whatever it is,  
11 and he does it all afternoon, your argument is, well,  
12 that money was - - - was never given to the MTA so  
13 it's not a larceny. So, you know, you can't charge  
14 him with petty larceny; you can only charge him with  
15 the theft of services?

16 MS. DONNER: Which is the same - - - which  
17 is the same level crime, but it's - - -

18 JUDGE PIGOTT: No, no, is that a yes?

19 MS. DONNER: My que - - - my - - - yes,  
20 because of the definition of owner, which is a  
21 larceny concept, and lar - - - and own is possess and  
22 it - - -

23 JUDGE PIGOTT: So - - - so your - - - your  
24 complaint on - - - on - - - on Count I is, I stole  
25 services, I didn't steal money, therefore you should



1           throw out the steal money count?

2                   MS. DONNER: That's - - - that is part of  
3 my argument, and that's certainly what - - -

4                   JUDGE FAHEY: But larceny is - - - this is  
5 not just - - - it does - - - stealing services is not  
6 the same as stealing money. What - - - what about  
7 Cablevision? What if I steal cable? What am I  
8 stealing there? Am I stealing the cable fee, or am I  
9 stealing access to the cable services? You could be  
10 charged with both petty larceny there or theft of  
11 services. And - - -

12                   MS. DONNER: It all goes - - - oh, I'm  
13 sorry. I don't want to interrupt Your Honor.

14                   JUDGE FAHEY: Go ahead. No, you - - - you  
15 make your point.

16                   MS. DONNER: It all goes down to the  
17 definition of owner, and owner is possess. And in  
18 Napp - - - and Hightower relies on Nappo; if you - -  
19 - if you haven't possessed something, like in the - -  
20 - the taxes had not yet been paid - - -

21                   JUDGE PIGOTT: Okay, so in the two dollars  
22 - - -

23                   MS. DONNER: - - - in Nappo.

24                   JUDGE PIGOTT: In the two dollars the - - -  
25 the - - - the petty larceny was not - - - the

1 complainant should not have been the MTA, it should  
2 have been the person he took the two dollars from?

3 MS. DONNER: No, that's - - -

4 JUDGE PIGOTT: He's got two - - -

5 MS. DONNER: No, I'm sorry, I don't think  
6 that - - -

7 JUDGE PIGOTT: He's got two dollars that he  
8 - - - that he - - - that he shouldn't have, right?

9 MS. DONNER: Um-hum.

10 JUDGE PIGOTT: All right, so he took them  
11 from somebody.

12 MS. DONNER: That's - - - yeah, but that's  
13 - - -

14 JUDGE PIGOTT: All right, so who can go to  
15 the police and say he took my two dollars? The M - -  
16 - you're saying the MTA can't, right, because it's  
17 not their money.

18 MS. DONNER: Well, I'm saying that the MTA  
19 does not - - - hasn't - - - isn't an owner because  
20 it's like the unremitted taxes.

21 JUDGE PIGOTT: So you're - - -

22 MS. DONNER: Yes.

23 JUDGE PIGOTT: So you're saying the MTA  
24 can't because - - -

25 MS. DONNER: Exactly.

1 JUDGE PIGOTT: - - - it's not their two  
2 dollars even though - - -

3 MS. DONNER: Right.

4 JUDGE PIGOTT: - - - even though for those  
5 two dollars, he got on the train. The guy that got  
6 on the train, can he say he stole my two dollars?

7 MS. DONNER: I don't think he would.

8 JUDGE PIGOTT: Can he?

9 MS. DONNER: I don't - - - I don't know. I  
10 mean, he could say - - - he certainly could say the  
11 petty larceny wasn't satisfied because the MTA was  
12 not the owner.

13 JUDGE PIGOTT: So - - - so your - - - so  
14 your client didn't - - - didn't commit a crime?

15 MS. DONNER: He did commit a crime. He  
16 committed theft of services, which was specifically  
17 meant for subway services as property. That's what  
18 the legislative history says, but it also doesn't use  
19 the larceny concept of ownership.

20 JUDGE ABDUS-SALAAM: Counsel, could I just  
21 ask you - - -

22 MS. DONNER: Yes.

23 JUDGE ABDUS-SALAAM: - - - I - - - I - - -  
24 you said something in your brief about, if we don't  
25 remit or we don't reverse the petty larceny, that we

1 shouldn't send this back? Or if we do - - - I guess  
2 if we do reverse the pett - - - petty larceny, we  
3 shouldn't - - - and I'm not suggesting that we will,  
4 but we shouldn't send this back because it would  
5 serve no purpose?

6 MS. DONNER: Yes, I - - -

7 JUDGE ABDUS-SALAAM: You said that so - - -

8 MS. DONNER: - - - I requested Burwell  
9 relief, yes, as in Hightower.

10 JUDGE ABDUS-SALAAM: Yeah, could you - - -  
11 could you just explain that?

12 MS. DONNER: Well, in several of this  
13 court's cases, you've held that where the defendant  
14 has already served their sentence and it's a minor  
15 crime, this court has granted Burwell relief rather  
16 than have yet another case in the system, you know,  
17 Burwell, Flynn, Hightower, Dreyden, there's been a  
18 lot of cases like that.

19 JUDGE ABDUS-SALAAM: And - - - and you said  
20 if - - - if we don't reverse, then you would want to  
21 affirm on the other - - - on the theft of services?

22 MS. DONNER: Well, I had two independent -  
23 - - I mean, there's another and - - - there are two  
24 informations, so point two was an independent claim.  
25 In either one, we requested Fuggaz - - - we requested

1 Fuggazzatto relief - - -

2 JUDGE ABDUS-SALAAM: Okay.

3 MS. DONNER: - - - and Bur - - - and  
4 Burwell relief too. I don't know if I'm - - -

5 CHIEF JUDGE LIPPMAN: Thanks, counsel.

6 MS. DONNER: Okay, sure.

7 CHIEF JUDGE LIPPMAN: You'll have your  
8 rebuttal.

9 MS. DONNER: Okay.

10 MR. GEE: Good afternoon, and may it please  
11 the court, my name is Ryan Gee, and I'm here on  
12 behalf of the People.

13 CHIEF JUDGE LIPPMAN: Counsel, what's your  
14 petty larceny claim?

15 MR. GEE: My petty larceny claim - - - Your  
16 Honor, this is not - - - these were not just  
17 potential customers and this was not just a theft of  
18 services.

19 CHIEF JUDGE LIPPMAN: How does it different  
20 from - - - different - - - differ from our other  
21 cases in this area?

22 MR. GEE: Sure, what sets this apart from  
23 Hightower - - -

24 CHIEF JUDGE LIPPMAN: On the larceny, yeah.  
25 Go ahead.

1 MS. DONNER: - - - on the larceny is here  
2 because defendant used a stolen Transit Authority key  
3 to open an exit gate that he had no right to open,  
4 and allow people into the subway system whom he had  
5 no right to allow in, all without the MTA receiving a  
6 penny whatsoever in return, he took - - -

7 JUDGE ABDUS-SALAAM: But you're focusing,  
8 counsel, on the mechanism, right, but that's not what  
9 I understood our High - - - Hightower case to focus  
10 on; it was focused on the definition of owner.

11 MR. GEE: Well, I - - - I'm foc - - - I'm  
12 sorry.

13 JUDGE ABDUS-SALAAM: Because I believe the  
14 court said the MetroCard, which was a valid - - -  
15 that was a valid form of getting into the subway, and  
16 you're saying now that the difference here is that he  
17 had a key that he wasn't authorized to have, but  
18 that's - - - I didn't think that was the focus of  
19 Hightower.

20 MR. GEE: Well, the mech - - - why the  
21 mechanism matters, Your Honor, is because it gets to  
22 whether the MTA actually lost anything. Because as  
23 this court - - - and I - - - if I could just quote  
24 this one sentence from Hightower: "We decline to  
25 extend the reasoning of Spatarella to these facts

1           because here we must assume that the Transit  
2           Authority voluntarily transferred this valid  
3           MetroCard in a manner consistent with its ordinary  
4           course of business by selling the card and receiving  
5           the price it set." So - - -

6                         JUDGE STEIN: When does a potential  
7           customer become a customer?

8                         MR. GEE: When - - - in this case when they  
9           went into the subway system. They went past a gate  
10          which separates nonpaying perhaps potential customers  
11          who might just be, you know, wondering if they should  
12          get onto the subway station, and people who have  
13          actually accessed the subway services once they - - -

14                        JUDGE STEIN: Is that before or after they  
15          paid the money?

16                        MR. GEE: I - - - I - - - I'm not sure on  
17          this record; it seems rather contemporaneously but -  
18          - -

19                        JUDGE RIVERA: Well, if they go through the  
20          gate, they're not potential - - - I mean, they - - -  
21          they're on, they've done - - -

22                        MR. GEE: Exactly.

23                        JUDGE RIVERA: Think they've gotten through  
24          and paid the money and they're going to get on the  
25          train.

1 MR. GEE: Exactly. That's exactly right,  
2 Your Honor.

3 JUDGE RIVERA: So they - - - so - - - so  
4 they're not potential, so, right? The potential is  
5 right before one does that, or am I misunderstanding  
6 your argument?

7 MR. GEE: No, no, no, no. I - - - I - - -  
8 I believe that we're on the same page, Your Honor,  
9 and that's the - - - that's where I differ with  
10 opposing counsel.

11 JUDGE RIVERA: When he goes to them and  
12 says I can let you through, are they potential  
13 customers at that moment?

14 MR. GEE: Yes, at that moment, right. If  
15 they - - - if - - - if they have not yet entered the  
16 subway system - - -

17 JUDGE RIVERA: Are they potential customers  
18 before he goes up to them but they're close to the  
19 gate?

20 MR. GEE: Correct, they're close to the  
21 gate.

22 JUDGE RIVERA: Are they potential customers  
23 when they're on the last step to walk onto the area  
24 where you have the tollbooth? In - - - in other  
25 words, at what point are you a potential customer,



1 which is the same question I asked before, same  
2 question that Judge Stein is asking you?

3 MR. GEE: I think they would be a potential  
4 customer up to the point that they've entered the - -  
5 - entered through the gate into the system.

6 JUDGE STEIN: So - - -

7 JUDGE RIVERA: But now do you - - - what -  
8 - - how far back are you going?

9 MR. GEE: Well, I - - - I mean, I guess  
10 anyone in theory could be a potential customer, but -  
11 - - but if I could just clarify - - -

12 JUDGE RIVERA: Certainly by the time  
13 they're up near the tollbooth? That seems like  
14 you're pretty serious about getting on the train.

15 MR. GEE: Right, right. But we're not  
16 arguing here that defendant stole a potential  
17 customer, of course. We're arguing that - - - and  
18 what the Appellate Term found is that defendant stole  
19 business that was exc - - -

20 JUDGE RIVERA: Um-hum.

21 MR. GEE: - - - presently and exclusively  
22 within control of the MTA and that's how we get to  
23 owner. And - - -

24 JUDGE STEIN: That's why I asked when they  
25 paid the money, because if they paid the money before

1           they went through the gate, is - - - is there an  
2           issue there?

3                       MR. GEE:  No, because they went into the  
4           gate, and so - - - so they were customers of the MTA  
5           who are accessing the MTA services because defendant  
6           used a stolen key to allow them in and the MTA  
7           received nothing in return.  And if I could just - -  
8           -

9                       JUDGE STEIN:  What - - - what if - - - what  
10          if the defendant had given them a stolen MetroCard  
11          and they didn't go through the gate at that point,  
12          they, you know, maybe took it and stuck it in their  
13          pocket?  Then what do we have?

14                      MR. GEE:  Well - - -

15                      JUDGE STEIN:  If anything?

16                      MR. GEE:  In your hypothetical it would be  
17          - - - it's a stolen MetroCard but it has value on it?

18                      JUDGE STEIN:  Yes.

19                      MR. GEE:  I mean, obviously that's a  
20          different case, but I - - - I guess what I would say  
21          here is that I think - - -

22                      JUDGE STEIN:  And - - -

23                      MR. GEE:  - - - there's still the theory  
24          for why that could be larceny because even if they  
25          don't go onto the - - - they - - - even if they don't

1 go into the subway system at that point in time, they  
2 have this card which would allow them to when they  
3 want, and part of the MTA's business is - - -

4 JUDGE STEIN: Why are they not at that  
5 point just a potential customer? They haven't  
6 decided they're going to take the train or not take  
7 the train?

8 MR. GEE: Because part of the MTA's  
9 business is also selling the MetroCards themselves  
10 because, of course, once you have the MetroCard,  
11 which you buy outside of the gate, then you can go  
12 into the subway system or use the bus or, you know,  
13 use whatever other public transportation system that  
14 one can use with a MetroCard. So I think - - - I  
15 think it would be at least arguable that that would  
16 still constitute larceny.

17 But again, if I - - - what - - - why this  
18 case is even more stark is because, of course, they  
19 entered the system. And what, again, sets this case  
20 apart from Hightower is that essentially, in  
21 Hightower, the MTA did receive the business of the  
22 other person who went in because, as this court made  
23 sure to note throughout its decision in Hightower,  
24 that case was spec - - - solely about a valid paid-  
25 for transferrable unlimited MetroCard.

1                   JUDGE PIGOTT: We're getting into the  
2 Internal Revenue Code, I swear, with the  
3 technicalities on these. But - - - but as Ms. Donner  
4 says, I mean, why isn't it just theft of services?  
5 You've got a whole statute says that.

6                   MR. GEE: Well, because - - - well, it - -  
7 - it would not just a theft of services, Your Honor,  
8 because again, theft of services is really about - -  
9 - would be about the ent - - - the - - - the other  
10 people going into the subway, the - - - they're  
11 usually is - - - I'm sure this court is aware,  
12 they're usually turnstile jumpers, or like in the  
13 second case, someone who goes through an exit gate  
14 without paying. And so could defendant have been  
15 charged here as an accomplice to theft of services?  
16 Possibly; this court, I would just note, left that  
17 question open specifically in Hightower, and again,  
18 it's not before this court in - - - in this case.  
19 But - - -

20                   JUDGE PIGOTT: So you don't think he was  
21 guilty of theft of services?

22                   MR. GEE: Well, I - - - I think, again, it  
23 - - - it's - - - I'm not sure if he could have been  
24 charged with that. This court left that open with  
25 Hightower but even if - - -

1                   JUDGE PIGOTT: I'm just - - - I'm - - - I'm  
2 asking you; you're - - - you're the People of State  
3 New York and you say this guy did something, what did  
4 he do, and you're saying he did not steal services,  
5 that much we're sure about. What we think he did is  
6 steal money that belonged to us.

7                   MR. GEE: Well - - -

8                   JUDGE PIGOTT: Is that your - - - is that  
9 the thinking that went into this?

10                  MR. GEE: Well, no what I'm saying is even  
11 if he was an accomplice to stealing services, he did  
12 something more, he did something additional, because  
13 it wasn't just facilitating - - -

14                  JUDGE FAHEY: But couldn't theft of  
15 services also be a petty larceny?

16                  MR. GEE: Yes, it could be. And so - - -

17                  JUDGE FAHEY: This happens all the time in  
18 - - - in the criminal law where, you know, they're -  
19 - - they're close to each other.

20                  MR. GEE: Exactly.

21                  JUDGE FAHEY: They're a simi - - - similar  
22 transaction.

23                  MR. GEE: Exactly, and as this court found  
24 in Mattocks, in another transit-fraud related case,  
25 overlapping offenses does not mean that only one

1 offense - - -

2 JUDGE FAHEY: Of course, Judge Pigott's got  
3 a good point; you probably should have charged him  
4 with both, huh?

5 MR. GEE: Well, no, I mean I think we  
6 charged him with the - - - with the crimes that were  
7 most appropriate to his offense. And I would just -  
8 - - just to quickly correct the record - - -

9 JUDGE PIGOTT: Why - - -

10 JUDGE FAHEY: We don't see - - - don't - -  
11 - we don't see too few charges. Usually we see too  
12 many.

13 JUDGE PIGOTT: Yeah.

14 MR. GEE: Well - - -

15 JUDGE PIGOTT: I don't know why you didn't  
16 charge him with the key. You know - - -

17 MR. GEE: He was - - - was charged with the  
18 key.

19 JUDGE PIGOTT: Oh, was he?

20 MR. GEE: He was charged with criminal  
21 possession of stolen property, which was based on the  
22 key, possession of burglar's tools, which was based  
23 on the key, and there's never been any dispute - - -

24 JUDGE PIGOTT: So you did overcharge; that  
25 makes me feel better.

1 MR. GEE: Well, no, we charge - - - we  
2 charged him with - - - with all of the - - - the - -  
3 - the most appropriate offenses. And so of course  
4 there's been never any challenge whatsoever to the  
5 sufficiency of the - - - of the stolen key specific.

6 JUDGE ABDUS-SALAAM: But he - - - he pled  
7 guilty to the theft of services charge and - - - and  
8 the petty larceny to get the concurrent sentence,  
9 right?

10 MR. GEE: Correct, correct.

11 JUDGE PIGOTT: And - - - and - - - and the  
12 other ones were dismissed?

13 MR. GEE: Right, they were - - - right, and  
14 then there was also a third case unrelated.

15 JUDGE PIGOTT: What - - - what's the scoop  
16 with that? I - - - I'm - - - I'm thinking, you know,  
17 we - - - we could send it back and he could find  
18 himself facing felony murder. I don't - - - what - -  
19 - what's the - - - what's the third one that's - - -

20 MR. GEE: Well, I'm not sure if I can disc  
21 - - - they're - - - those records are under seal, so  
22 I'm not sure if I can discuss them now. But - - -  
23 but yes, I mean, obviously I believe our argument  
24 should carry.

25 JUDGE ABDUS-SALAAM: So - - - so I'm clear,

1           you're saying that this case is more like Spatarella  
2           as opposed to Hightower because this was the use of a  
3           key as opposed to a valid MetroCard?

4                       MR. GEE: Well - - -

5                       JUDGE ABDUS-SALAAM: And it has nothing to  
6           do with whether the - - - the MTA or the New York  
7           City Transit owned the two dollars that he received  
8           from these undercover cops?

9                       MR. GEE: I'm actually - - - I'm actually  
10          saying both. If I could just - - - just explain.  
11          The reason why it matters that he used a stolen key  
12          is because by using that mechanism to allow other  
13          people into the subway system, he prevented the MTA  
14          from receiving anything. So people got into the  
15          subway system for free, and the business of those  
16          people, the revenue from those people entering the  
17          subway system was owned by the MTA because they went  
18          into the system.

19                      And what's different from Hightower, of  
20          course, is that the business of the other - - - of  
21          the person who went into the subway system by - - -  
22          by means of a valid MetroCard had, in fact, been  
23          received by the MTA. What the defendant in Hightower  
24          did wrong, if I can put it this way, is he just built  
25          his own business on top of the MTA's business. And



1           whatever other offense that might be, that did not  
2           deprive the MTA of any property, because the MTA had  
3           already said here, you have this valid, unlimited  
4           MetroCard; you can swipe anyone you wish into the  
5           subway system within the, you know - - - time  
6           restriction, I see my - - - if I can just - - -

7                       CHIEF JUDGE LIPPMAN:   Okay, counsel.

8                       MR. GEE:    Okay.

9                       CHIEF JUDGE LIPPMAN:   We - - - I think we  
10           understand your argument.  Let's hear from your  
11           adversary.

12                      MR. GEE:    Thank you.

13                      CHIEF JUDGE LIPPMAN:   We think we  
14           understand her argument, too, but we'll find out.

15                      MR. GEE:    That's all we can ask for.  Thank  
16           you.

17                      CHIEF JUDGE LIPPMAN:   Counselor.

18                      MS. DONNER:   There's a lot of language in  
19           Hightower.  I mean, there is that - - - there is the  
20           one line and that makes Hightower a much easier case  
21           for Your Honors, because happily, the MTA did get  
22           money out of that but - - -

23                      JUDGE PIGOTT:   When you say - - -

24                      MS. DONNER:   Oh.

25                      JUDGE PIGOTT:   When you say, if we - - - if

1 we - - - if we find in your favor, we should not send  
2 it back, is it - - - I - - - I stand corrected, I now  
3 looked at the record, he was charged with resisting  
4 arrest, false impersonation. I mean, shouldn't we  
5 send it back and vacate the plea and - - - and let  
6 him go forward on all those other ones?

7 MS. DONNER: Well, he pled - - - this is  
8 the one count he pled to and he - - -

9 JUDGE PIGOTT: I know, but it's the one  
10 non-jurisdictional one, at least you're saying  
11 there's no jurisdiction for this one, and it would  
12 seem to me that if that's the case, there were a  
13 bunch of others that there was jurisdiction for that  
14 he should have an opportunity to defend, don't you  
15 think?

16 MS. DONNER: This was - - - I mean, this  
17 was the way that - - - this was - - - I mean, the  
18 relief that was - - - that was requested. And he  
19 wasn't charged, by the way, with petty larceny of the  
20 - - - of the key, I just wanted to clarify that.

21 JUDGE PIGOTT: Criminal possession of  
22 stolen property in the fifth degree for the key, I  
23 think.

24 MS. DONNER: Right, possession of stolen  
25 property, but not the larceny, is what I - - -

1                   JUDGE PIGOTT: My - - - my point is that it  
2 seems to me that - - - I mean, if - - - if it was a  
3 really smart lawyer that said, you know, they don't  
4 have any jurisdiction on this one so we can plead out  
5 all of these and then raise on appeal the fact that  
6 there was no jurisdiction on this, and it just seemed  
7 to me that maybe that's not fair.

8                   MS. DONNER: Well, I mean, Your Honors can  
9 do whatever it is that - - - I mean, that you want to  
10 - - - I mean that you want to do on that. But he - -  
11 - actually, the way the plea was, it was for swiping  
12 a MetroCard, which didn't even make any sense, so - -  
13 -

14                   JUDGE PIGOTT: Okay.

15                   MS. DONNER: But I just did want to quote  
16 some - - - there's a lot of language in Hightower  
17 that doesn't have to do with that circumstance about  
18 the MetroCard. It says "The amount of money" - - -  
19 that - - - well, first of all we had - - - the very  
20 next sentence is distinguishing Spatarella about  
21 already being in the control and possession, but also  
22 the amount of money paid to Hightower "could have  
23 been due and owing to MTA." But as was the case in  
24 Nappo, which is my situation, that you don't possess  
25 something that you haven't got - - - that you've

1 never received, like the taxes, you know, that were  
2 due. The State didn't own them. But - - -

3 JUDGE ABDUS-SALAAM: So essentially you're  
4 saying there's no real difference here between the  
5 MetroCard and the key?

6 MS. DONNER: Yes, it - - - it has to do  
7 with whether or not - - - because there was only this  
8 pot - - - because there was only this possibility of  
9 a relationship.

10 JUDGE STEIN: Well, couldn't you say the  
11 same thing about the - - - the - - - the business  
12 relationship in Spatarella that yes, they had their  
13 past business, but they didn't have their future  
14 business?

15 MS. DONNER: But nothing would have been -  
16 - - there was a contract in Spatarella, and even if  
17 there wasn't - - -

18 JUDGE STEIN: They could have breached the  
19 contract?

20 MS. DONNER: But it was an ongo - - - it as  
21 an ongoing situation which would not - - - which was  
22 only interrupted. Here you still always had, you  
23 know, the possibly of walking or a bike ride if you  
24 didn't get this incredible deal. And all the  
25 language in - - - and, you know, and all the language

1 in Hightower is about how it's like Nappo and that  
2 Nappo only owed taxes but he didn't owe - - - he  
3 wasn't - - - the State didn't own the unpaid taxes.  
4 And the legislat - - - I mean, just that the theft of  
5 services specifies that MTA is the complainant, it  
6 gets you around the owner, subway service, and it's  
7 because the legislative history had said that subway  
8 services are not property.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MS. DONNER: Thank you.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 CHIEF JUDGE LIPPMAN: And there was no  
13 felony murder.

14 CHIEF JUDGE LIPPMAN: Thank you. We - - -  
15 we got that too. Okay, thank you.

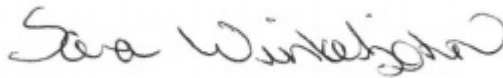
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Matthew P., No. 154 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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