State of New York
Court of Appeals

MEMORANDUM

No. 74
The People &c.,
Appellant,
v.
Mouhamed Thiam,
Respondent.

Katherine Kulkarni, for appellant.
Will A. Page, for respondent.
The Bronx Defenders, et al., amici curiae.

MEMORANDUM:

The order of the Appellate Term should be affirmed.

Even if the accusatory instrument properly sets out a lower-grade offense, a defendant's challenge to a conviction based on the jurisdictional deficiency of a higher-grade crime of a multi-count complaint is not waived by the defendant's guilty plea. The

Appellate Term properly reversed the judgment of conviction and sentence on the ground "that it was jurisdictionally defective as to the crime of which defendant was actually convicted" (People v Hightower, 18 NY3d 249, 254 [2011]).

People v Mouhamed Thiam

No. 74

DiFIORE, Chief Judge (concurring):

The issue presented by this appeal is whether a local court has the authority to accept a guilty plea to a jurisdictionally defective top count of a multi-count misdemeanor accusatory instrument wherein counts of lesser grade offenses are sufficiently pleaded. I would hold that it does not.

I.

On June 24, 2016, defendant was charged by a three-count "Misdemeanor" accusatory instrument with criminal possession of a controlled substance in the seventh degree (an A misdemeanor), criminal possession of marijuana in the fifth degree (a B misdemeanor) and unlawful possession of marijuana (a violation). In the accusatory instrument, the arresting officer alleged, based on his personal knowledge, that "at about 3:30 P.M., at the south west corner of Broadway and West 29[th] Street in the County and State of New York, the defendant knowingly and unlawfully possessed a controlled substance; [and] the defendant knowingly and unlawfully possessed marijuana in a public place and such was burning or open to public view." In support of the marijuana counts, the officer alleged that he knew the substance was marijuana based on his training and experience – as well as the odor, the packaging, and a field test. In support of the criminal possession of a controlled substance count, the officer alleged he recovered eight pills from the right front pocket of defendant's pants and that he recognized the pills as oxycodone based on his professional training and prior experience in making drug arrests.

At defendant's arraignment in criminal court, defense counsel stated that he thought the accusatory instrument was facially deficient because there were insufficient facts alleging that the marijuana crime occurred in a public place and an insufficient basis for the officer's conclusion that the pills he seized were oxycodone. Defense counsel, nonetheless, did not move to dismiss the accusatory instrument or any count therein pursuant to CPL 170.30 or CPL 170.35. Rather, counsel asked the court to consider a

sentence of time served. The court then inquired, despite the allegation that defendant was at the southwest corner of Broadway and West 29th Street, whether the People were going to move to amend the complaint to state that the specified location was a public sidewalk (see CPL 170.35 [1]). They responded that they could not amend the factual portion of the complaint without the verification of the deponent – i.e., the arresting officer. After the court indicated its willingness to impose a sentence of time served, defendant waived his right to prosecution by information and pleaded guilty to the top count of the accusatory instrument – the A misdemeanor of criminal possession of a controlled substance in the seventh degree – and the sentence of time served was imposed.

On appeal, defendant sought dismissal of the accusatory instrument on the basis that it was jurisdictionally defective due to insufficient factual allegations in violation of CPL 100.40 despite his failure to seek dismissal in the court of first instance. The Appellate Term reversed, holding that the misdemeanor complaint was jurisdictionally defective because the arresting officer's allegation that he believed the pills in defendant's possession were oxycodone was conclusory and insufficient to establish reasonable cause to believe that defendant was guilty of criminal possession of a controlled substance in the seventh degree (59 Misc 3d 126[A], 2018 NY Slip Op 50339[U] [App Term, 1st Dept 2018]). The court, rather than remanding the case to the local court for further proceedings on the valid counts of the accusatory instrument, dismissed the entire instrument, as a matter of discretion in the interest of justice, observing that, since defendant had completed his sentence, there would be no penological purpose served by such a remand.

A Judge of this Court granted the People leave to appeal (31 NY3d 1153 [2018]).

II.

A local court accusatory instrument consists of two parts: an accusatory part containing the legal allegations of the offenses charged – concededly sufficient in this case – and a factual part that is the focus of this appeal (CPL 100.40; 100.15). To pass muster as a legally sufficient accusatory instrument, the sworn factual allegations in the instrument combined with supporting depositions must "provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of such instrument" (CPL 100.40 [4] [b]). The allegations in the factual portion must be in substantial compliance with the requirements of CPL 100.15, in that the allegations must provide "facts of an evidentiary character supporting or tending to support the charges" (CPL 100.40 [1], [4]; 100.15 [3]). "[T]he test for facial sufficiency 'is, simply, whether the accusatory instrument failed to supply defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy'" (People v Aragon, 28 NY3d 125, 128 [2016], quoting People v Dreyden, 15 NY3d 100, 103 [2010]).[1]

A misdemeanor accusatory instrument that fails to state a crime or fails to recite each element of the offense is jurisdictionally defective and a guilty plea does not waive the right to challenge the accusatory instrument on this ground for the first time on direct

[1] Although inapplicable to this defendant because he waived prosecution by information, a valid information must also contain nonhearsay allegations establishing every element of the charged offense and the defendant's commission thereof (CPL 100.40 [1] [c]). This is known as the prima facie case requirement (see People v Kalin, 12 NY3d 225, 229 [2009]).

appeal (see People v Case, 42 NY2d 98, 100 [1977]; Dreyden, 15 NY3d at 103). However, a defendant who elects to plead guilty forfeits "'the right to appellate review of any nonjurisdictional defects in the proceedings'" (People v Konieczny, 2 NY3d 569, 572 [2004], quoting People v Fernandez, 67 NY2d 686, 688 [1986]). Since a voluntary and knowing guilty plea generally "removes the issue of factual guilt from a case," issues that do not impact the jurisdiction of the court or "impinge on rights of constitutional dimension" do not survive the entry of the judgment (People v Taylor, 65 NY2d 1, 5-6 [1985]; see People v Callahan, 80 NY2d 273 [1992]). Notably, in the felony context, a defendant's guilty plea waives any argument as to the sufficiency of the evidence presented to the grand jury (see People v Dunbar, 53 NY2d 868, 871 [1981]). Further, an indictment is facially jurisdictionally defective only if it fails to "effectively charge the defendant with the commission of a particular crime" – i.e., if the acts alleged do not constitute an offense or if the indictment fails to allege a material element of the crime (People v Iannone, 45 NY2d 589, 600 [1978]).

Where a local court accusatory instrument containing factual allegations of every element of the crime contains only conclusory factual allegations of an item of contraband, such as an illegal drug or weapon, we have held that the conclusory description of the contraband is a jurisdictional defect (see People v Dumas, 68 NY2d 729, 731 [1986]; Kalin, 12 NY3d at 229). Specifically, the conclusory allegations are considered insufficient to satisfy "the requirement for factual allegations of an evidentiary character" (68 NY2d at 731).

Here, defendant waived prosecution by information, and our review is limited to reviewing the sufficiency of the misdemeanor complaint under the reasonable cause standard (see Kalin, 12 NY3d at 229).[2] In People v Dreyden, although we observed that "[t]he distinction between jurisdictional and nonjurisdictional defects 'is between defects implicating the integrity of the process . . . and less fundamental flaws, such as evidentiary or technical matters,'" we held that the arresting officer's conclusory allegations that the weapon in defendant's possession was a gravity knife was a "violation of the 'reasonable cause' requirement amount[ing] to a jurisdictional defect" (15 NY3d at 103, quoting People v Hansen, 95 NY2d 227, 231 [2000]). On the other hand, in Aragon, we held that the officer's observation of metal knuckles – an object whose character was evident on its face – did not require the officer's allegation that professional skill or expertise supported the conclusion (28 NY3d at 129-130).

On this appeal, the People do not challenge the Appellate Term's conclusion that the arresting officer's allegation, based on his professional training and experience as a police officer, of a reasonable belief that the eight pills recovered from defendant's right front pants pocket were oxycodone, was facially insufficient. Clearly, where the defendant has waived prosecution by information (and therefore has assented to the more lenient

[2] The statutory definition of "reasonable cause to believe" a person has committed a particular offense does not require "competent evidence" (see CPL 70.10 [1], [2]), and instead "requires only apparently reliable evidence or information of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience 'that it is reasonably likely'" that the accused committed a particular offense (People v Hetrick, 80 NY2d 344, 350 [1992], quoting CPL 70.10 [2]).

reasonable cause standard), these legal and factual allegations are sufficient to particularize the crime charged and protect against a constitutional double jeopardy violation (see Ashe v Swenson, 397 US 436 [1970]). Given that the People are not contesting the insufficiency of the A misdemeanor count, we have no basis to review that determination and, instead, address the People's argument that, because there was a jurisdictionally sufficient B misdemeanor count in the multicount accusatory instrument, the court could accept a plea bargain whereby defendant enters a guilty plea to an insufficiently pleaded misdemeanor count of higher grade.[3]

First, defendant's novel argument that his conviction was jurisdictionally defective because the local court lacked subject matter jurisdiction over the offense for which he was convicted is without merit. The jurisdiction of the New York City Criminal Court is established in the State Constitution. "The court of city-wide criminal jurisdiction of the city of New York shall have jurisdiction over crimes and other violations of law, other than those prosecuted by indictment" (NY Const, art VI, § 15 [c]). Here, the plea "court had jurisdiction of the offense charged and acquired jurisdiction of defendant's person by the filing of [a complaint] and an appearance by defendant" (People v Grant, 16 NY2d 722, 723 [1965], cert denied 382 US 975 [1966]; CPL 1.20 [7], [9], [24]; see also People v Ford, 62 NY2d 275, 282-283 [1984]). The more apt question is whether the legally sufficient B misdemeanor count in the same accusatory instrument provided the court of first instance

[3] I agree with the dissent's thorough analysis that the allegations in the complaint are jurisdictionally sufficient to establish the public place element of criminal possession of marijuana in the fifth degree (see dissenting op. at 7).

with authority to accept a plea bargain to an invalid count of a higher grade offense, which the Appellate Term found was never legally charged.

III.

In New York, felony prosecutions are subject to express constitutional procedural restrictions pursuant to article I, section 6 of the State Constitution as well as legislatively enacted procedures set forth in the CPL. By contrast, procedures for local court accusatory instruments are legislatively delineated in the CPL. And, quite importantly, criminal defendants also enjoy Sixth Amendment protections including the right to a jury trial for felony and other serious crimes, including class A misdemeanors (see People v Suazo, 32 NY3d 491 [2018]). Defendants, in waiving guaranteed rights and entering counseled guilty pleas in exchange for favorable sentences, are not without recourse in narrow circumstances to raise for the first time on appeal fundamental defects in the plea process which are clear on the face of the record (see People v Lopez, 71 NY2d 662, 666 [1988]; People v Louree, 8 NY3d 541, 545 [2007]; People v Williams, 27 NY3d 212 [2016]; see generally People v Lee, 58 NY2d 491 [1983]). It is axiomatic that when a defendant waives the fundamental right to a jury trial, due process demands that the waiver be knowing and voluntary (see People v Hill, 9 NY3d 189, 191 [2007], cert denied 553 US 1048 [2008]). Equally so, plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor" (Santobello v New York, 404 US 257, 261 [1971]) and "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances" (404 US at 262).

Plea bargain agreements have defined parameters. The court provides a check on the plea process, ensuring the balance between the interests of the defendant and the government, as well as preventing inequity that may arise through abuse of the process (see People v Selikoff, 35 NY2d 227, 243 [1974], cert denied 419 US 1122 [1975]). Limitations created by the legislature to essentially curb certain reduced plea bargain agreements to indictments are set forth in CPL 220.10 (see Peter Preiser, 1993 Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 220.10). Under that statute, for a multi-count indictment, a defendant can plead guilty to the entire indictment, a particular count (or counts), or, with the permission of the court and the consent of the People, a lesser included offense of a charged offense in a particular count.[4] These statutory requirements are applicable – "to the extent that they can be so applied" – to guilty pleas to misdemeanor informations and complaints (see CPL 340.20 [1]; People v Keizer, 100 NY2d 114, 118 [2003]). In Keizer, we held that, where there was a jurisdictionally sufficient accusatory instrument, a claim of error based on a guilty plea in violation of CPL 220.10 to a crime that is of a lesser grade, but not a lesser included offense (CPL 1.20 [37]) of a crime charged in the accusatory instrument was forfeited by the guilty plea (see 100 NY2d at 119). Such a reduced plea bargain poses "no constitutional impediment" and presents no "statutory noncompliance rising to the level of a jurisdictional defect" (100 NY2d at 119). Unlike the present case, in Keizer, the plea bargain allowed defendant to plead guilty in satisfaction of a jurisdictionally sufficient count and to an offense that was of a lesser grade than the

[4] The statute also sets forth certain specified lesser offenses that are authorized for plea purposes (see CPL 220.10 [5]).

valid count in the accusatory instrument. Under these circumstances, although the defendant in Keizer pleaded guilty to a crime that was never legally or factually pleaded pursuant to CPL 100.40 or 100.15 in the instrument, there was no fundamental defect in the process, as he was lawfully charged with a higher crime and thus no jurisdictional impediment to the court's acceptance of that plea bargain to a lesser offense.

Significantly, People v Hightower (18 NY3d 249 [2011]) presented the same fundamental defect that we now address. As relevant here, the defendant in Hightower was charged by local court accusatory instrument with the A misdemeanor of petit larceny and the B misdemeanor of unauthorized sale of certain transportation services. He pleaded guilty to the petit larceny count in satisfaction of all charges. We held that the accusatory instrument was "jurisdictionally defective as to the crime of which defendant was actually convicted – petit larceny" in that it was not properly pleaded pursuant to CPL 100.40 or 100.15 because it failed to provide reasonable cause to believe defendant committed that offense (18 NY3d at 254). Although we specifically concluded that the factual allegations in a separate count of the information were sufficient to provide reasonable cause to believe the defendant committed the lesser B misdemeanor, we reversed the conviction and dismissed the accusatory instrument.

While we did not specifically state that the validly pleaded B misdemeanor count could not serve as the basis for the court to accept a guilty plea to the defective, higher

grade A misdemeanor count, that is the import of the reversal of the conviction.[5] And, that conclusion is in keeping with our prior precedent that a defendant must be legally charged in the accusatory instrument with a crime of a higher degree than an offense which was not legally charged and for which the guilty plea is entered. Indeed, we have upheld the validity of a bargained-for guilty plea to a technically nonexistent offense – attempted manslaughter in the second degree – where the plea was taken "in satisfaction of an indictment charging a crime carrying a heavier penalty. In such case, there is no violation of defendant's right to due process" (People v Foster, 19 NY2d 150, 153 [1967]). Stated otherwise, where the defendant seeks to resolve a misdemeanor action by a reduced plea bargain and agrees to plead guilty to a lesser offense "as part of a bargain which was struck for [his or her] benefit" there is no jurisdictional or constitutional invalidity in the plea to

[5] The dissent's attempt to distinguish Hightower is unconvincing (see dissenting op. at 16-18). Regardless of whether the People on appeal in that case failed to ask for the "remedy" of allowing the jurisdictionally sufficient B misdemeanor count to support the court's authority to accept a guilty plea to the defective A misdemeanor count, the opinion rejected that justification to sustain the conviction. Further, there is no cause to address whether People v Allen, which recognized that we have on occasion dismissed an accusatory instrument without "supporting rationale for the unusual result," provides broad authority for this Court to engage in the arguably discretionary analysis of whether a penological purpose is served by further criminal proceedings (39 NY2d 916, 918 [1976]). As the dissent recognizes, the proper remedy, where there is a remaining jurisdictionally sufficient charge, is remittal for further proceedings (see dissenting op. at 18 n 10) – a remedy that is foreclosed in *this* case by the Appellate Term's discretionary dismissal of the remainder of the accusatory instrument in the exercise of its interest of justice jurisdiction.

a technically nonexistent offense in satisfaction of a valid charge (19 NY2d at 154), although there would be a statutory invalidity in felony cases (see CPL 220.10 [3]).[6]

Determinatively to the case at hand, we have held that a court does not have the authority to accept a guilty plea to a count that is of a higher grade than any valid count in the accusatory instrument (see e.g. People v Johnson, 89 NY2d 905, 908 [1996]). We have only considered this fundamental defect in the framework of a felony prosecution. In concluding that it is a jurisdictional defect in that context, we observed that the protections of article I, § 6 of the State Constitution relating to the court's authority to try felony offenses only upon a grand jury indictment "'is not a limitation directed to the courts, but rather to the State, and its function is to prevent prosecutorial excess'" (Keizer, 100 NY2d at 119, quoting Ford, 62 NY2d at 282; Iannone, 45 NY2d at 594 ["The requirement of indictment by Grand Jury is intended to prevent the people of this State from potentially oppressive excesses by the agents of the government in the exercise of the prosecutorial authority vested in the State"]; People v Perez, 83 NY2d 269, 273 [1994]). Similarly, a

[6] Although CPL 220.10 is not the linchpin of this opinion, it does inform the analysis of the court's authority to accept a plea bargain, as it did in Keizer. Indeed, a plea bargain entered with the consent of the People and the court, but in violation of CPL 220.10, if unpreserved in the trial court, fails to present a question of law for our review, as we have held it is not a jurisdictional defect (see 100 NY2d at 119). In this regard, I disagree with Judge Fahey as to the issue presented. It is not merely "whether a facial sufficiency challenge under CPL 100.40 survives the plea" (concurring op. at 2), but whether a jurisdictionally sufficient lower count provides the court with the authority to accept a guilty plea to a jurisdictionally defective higher count in the same accusatory instrument. It should go without saying that claims falling within the narrow class of errors involving fundamental flaws in the proceedings do not require preservation and can be raised in this Court in the first instance (see People v Patterson, 39 NY2d 288, 295 [1976]; People ex rel. Battista v Christian, 249 NY 314, 319 [1928]).

defendant cannot plead to a count in a superior court information that charges an offense of a higher grade than an offense charged in the felony complaint for which the defendant was held for the action of the grand jury and waived prosecution by indictment (see People v Zanghi, 79 NY2d 815, 816-817 [1991]). Although misdemeanor prosecutions are not governed by that state constitutional provision, they can certainly implicate Sixth Amendment protections and our state due process concerns as the waiver of the jury trial must be knowingly and voluntarily entered. Accordingly, there is no cognizable basis to disregard the same fundamental unfairness presented by such lopsided plea bargains – where a defendant is actually pleading guilty to a greater crime than that legally charged by the State. Nor is there any reason to ignore public policy concerns of prosecutorial overreaching in a criminal action commenced by a local court accusatory instrument.

Akin to Keizer, the question ultimately presented is whether, despite the court's jurisdiction over defendant's prosecution, the authority to accept the guilty plea was subsequently abrogated based on the guilty plea to an offense of a *higher* grade than any jurisdictionally sufficient count in the accusatory instrument (see 100 NY2d at 119).[7] The answer is yes – the court's authority was abrogated by its acceptance of a guilty plea to an A misdemeanor that was not properly charged by the People in the accusatory instrument

[7] As the dissent points out, Judge Fahey's broad assertion that a guilty plea to a defective charge in violation of CPL 100.40 voids the judgment of conviction is inconsistent with our precedent, and particularly with Keizer (see concurring op. at 9; dissenting op. at 10 n 6). To be sure, the concurrence endorses the illogical prospect that, in a multi-count accusatory instrument with a jurisdictionally sufficient A misdemeanor count, a defendant could not plead guilty to a deficiently pleaded B misdemeanor charge, but could plead guilty to that same charge if it had not been pleaded at all (see concurring op. at 9).

in violation of defendant's right to due process. A guilty plea to a defective top count of a multi-count misdemeanor complaint, without an equal grade offense properly pleaded, lacks the hallmarks of essential fairness and amounts to an unfair bargain (see e.g. People v Seaberg, 74 NY2d 1, 11 [1989]).

"It is well settled that plea bargaining is a vital part of our criminal justice system. In addition to permitting a substantial conservation of prosecutorial and judicial resources, it provides a means where, by mutual concessions, the parties may obtain a prompt resolution of criminal proceedings with all the benefits that enure from final disposition" (People v Bradshaw, 18 NY3d 257, 264 [2011] [citations and quotation marks omitted]). This process is typically a mutually beneficial exercise and, as a result, a defendant forfeits the right to appellate review of most flaws in the process after receiving the benefit of the bargain struck by the parties (see e.g. Foster, 19 NY2d at 154). However, defendant's guilty plea to a higher grade offense than any offense legally charged in the accusatory instrument is not a bargain struck for his benefit, does not comport with due process, and negatively impacts the basic fairness of the criminal justice system (compare People v Francis, 38 NY2d 150, 155 [1975]). In short, it is a fundamental flaw in the process, as defendant waived his guaranteed rights, including the right to a jury trial, and was convicted of an A misdemeanor despite the fact that he was not legally charged with such a serious crime.

There is a legitimate concern that defendants charged in multicount local court accusatory instruments should not be able to thwart the system by obtaining a swift and

favorable plea agreement, only to belatedly raise a "jurisdictional" challenge on direct appeal to the sufficiency of the factual allegations of one count in the instrument in order to seek a dismissal by the intermediate appellate court of the whole instrument in the interest of justice. As the legislative scheme strongly favors an amendment of factual allegations of the defective count, as opposed to dismissal of the entire proceeding (see CPL 170.35 [1]; People v Casey, 95 NY2d 354, 367 [2000]), it is worth restating that the alleged pleading defects *were* brought to the parties' attention in this case, whereupon the People noted that they were unable to amend the accusatory instrument to cure the defect in the absence of the deponent before the plea was quickly entered and sentence imposed. To avoid such gamesmanship, the proper corrective remedy, plainly afforded by CPL 470.55, is a remittal to the trial court for further proceedings on the accusatory instrument (see n 6 supra). The criminal action is then restored to prepleading status and, in so doing, the People may have the opportunity to properly replead the defective count (see CPL 40.30 [3], [4]).

Nonetheless, we must acknowledge that the plea bargaining process so integral to our system has both federal and state constitutional safeguards to protect a defendant who is waiving guaranteed rights and must be fundamentally fair. "[A] Judge, a prosecutor and a defendant cannot by agreement restructure substantive law to fit their notion of what is more appropriate in a particular case" (People v Lopez, 28 NY2d 148, 152 [1971]). The requirement of providing a properly pleaded accusatory instrument rests with the People and it is not an undue burden to ensure that a plea bargain does not entail a conviction for

a crime of a grade offense higher than one sufficiently charged in the local court accusatory instrument.

People v Mouhamed Thiam

No. 74

FAHEY, J. (concurring):

A challenge to the sufficiency of an accusatory instrument under CPL 100.40 survives a guilty plea in certain narrow circumstances delineated in our precedents. We have characterized such circumstances as involving a "jurisdictional defect" in the

instrument. In doing so, we have invoked a court's jurisdiction over the offense of which the defendant has been convicted, not its jurisdiction over the defendant's person. This appeal poses the question whether, as the People maintain, a conceded jurisdictional defect in a charge contained in a misdemeanor complaint is cured by the fact that a separate charge in the same complaint is jurisdictionally sound. Because the People's contention lacks merit, I vote to affirm the order of the Appellate Term.

I take no position on the question whether a due process challenge to defendant's plea based on the plea bargaining statute CPL 220.10 (4) would have survived his plea. This issue was not raised by either party at the Appellate Term, and the parties in their briefs before this Court focus on a different jurisdictional question, whether a facial sufficiency challenge under CPL 100.40 survives the plea. Nevertheless, the dissent and the concurring opinion of the Chief Judge address CPL 220.10. This is contrary to the normal practice of this Court. "[I]n making and shaping the common law--having in mind the doctrine of stare decisis and the value of stability in the law--this Court best serves the litigants and the law by limiting its review to issues that have first been presented to and carefully considered by the . . . intermediate appellate court[]" (Bingham v New York City Tr. Auth., 99 NY2d 355, 359 [2003]). Moreover, the concurrence ignores the well-established principle of construction and interpretation that "[o]rdinarily a court will not pass on a constitutional question if there is any other way of disposing of the case" (McKinney's Cons Laws of NY, Book 1, Statutes, § 150 [a], comment at 307).

I.

Defendant was charged in a misdemeanor complaint with criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), criminal possession of marijuana in the fifth degree (former Penal Law § 221.10 [1]), and unlawful possession of marijuana (Penal Law § 221.05). The controlled substance charge is a class A misdemeanor, while the criminal possession of marijuana and unlawful possession of marijuana charges are, respectively, a class B misdemeanor and a violation. The arresting officer alleged in the misdemeanor complaint that he had observed defendant on a particular corner of two specified streets in Midtown Manhattan, "holding marijuana in a public place and open to public view." A field test confirmed that the material was marijuana. With respect to the controlled substance count, the arresting officer wrote in the complaint that he had recovered "eight pills" from defendant's person and that he knew "that the pills were oxycodone based on [his] professional training as a police officer in the identification of drugs, and [his] prior experience as a police officer making drug arrests." The complaint made no reference to any test performed on the pills to verify the substance, and did not describe their outward appearance in any way.

At arraignment in Criminal Court, defense counsel orally challenged both misdemeanor charges as facially insufficient. When the court offered a sentence of time served, however, defendant waived his rights to a formal allocution and to prosecution by information and pleaded guilty to the controlled substance charge in exchange for the offered sentence.

Defendant appealed his conviction, arguing that the misdemeanor complaint was jurisdictionally defective with respect to the crime of conviction because it failed to establish "reasonable cause" (CPL 100.40 [4] [b]) to believe that he had possessed oxycodone, rather than pills of some other kind. The complaint "did not allege any facts regarding the packaging, appearance, or identifying characteristics of the pills to supplement the officer's statement about his training and experience, and was therefore insufficient to establish reasonable cause." Defendant also challenged the criminal possession of marijuana charge, on the ground that it failed to make out the "public" nature of the place of possession within the meaning of former Penal Law § 221.10 (1) and Penal Law § 240.00 (1). Defendant did not claim that his guilty plea was in violation of CPL 220.10, the statute that governs plea bargaining.[1]

In response, the People argued that the controlled substance and criminal possession of marijuana charges were both facially sufficient. The People also maintained that the misdemeanor complaint was jurisdictionally valid as a whole because, even conceding a substantial defect in the controlled substance charge, the criminal possession of marijuana count was sufficient.

The Appellate Term reversed the judgment of conviction and sentence, based on the jurisdictional deficiency of the controlled substance charge (59 Misc 3d 126[A], 2018 NY Slip Op 50339[U], *1-2 [App Term, 1st Dept]). The appellate court concluded that "the arresting officer presented nothing more in the accusatory instrument than a conclusory

[1] Defendant did not mention CPL 220.10 in either his brief to the Appellate Term or his brief to this Court.

statement that he used his experience and training as the foundation in drawing the conclusion that he had discovered illegal drugs," and failed to state "any facts relied upon by [him] in reaching the conclusion that the substance seized was an illegal drug" (id. at *1). The court did not reach the sufficiency of the criminal possession of marijuana count nor did the court consider whether, if facially sufficient, that charge would render the accusatory instrument valid as a whole. Finally, the Appellate Term dismissed the accusatory instrument "as a matter of discretion in the interest of justice, since defendant has completed his sentence and no penological purpose would be served by remanding for further proceedings" (id. at *2).

A Judge of this Court granted the People leave to appeal (31 NY3d 1153 [2018]).

II.

It is well established that "[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (People v Case, 42 NY2d 98, 99 [1977]; see e.g. People v Afilal, 26 NY3d 1050, 1051 [2015]; People v Hightower, 18 NY3d 249, 253 n 5 [2011]; People v Dreyden, 15 NY3d 100, 103 [2010]). Defendant waived his right to be prosecuted by misdemeanor information, making the facial sufficiency of the charges against him reviewable under the standard applicable to a misdemeanor complaint (see People v Kalin, 12 NY3d 225, 228 [2009]; see generally People v Jones, 9 NY3d 259, 262 [2007]; People v Weinberg, 34 NY2d 429, 431 [1974]). "The factual part of a misdemeanor complaint must allege 'facts of an evidentiary character' (CPL 100.15 [3]) demonstrating 'reasonable cause' to believe the defendant

committed the crime charged (CPL 100.40 [4] [b])" (People v Dumas, 68 NY2d 729, 731 [1986]; see also CPL § 70.10 [2]).

A violation of the statutory "reasonable cause" requirement survives a guilty plea if "the accusatory instrument fail[s] to supply defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy" (Dreyden, 15 NY3d at 103; see generally Kalin, 12 NY3d at 228-232, People v Casey, 95 NY2d 354, 362-367 [2000] [establishing the jurisdictional principles with regard to misdemeanor informations]). For example, a misdemeanor complaint is jurisdictionally defective to the extent that, in describing the arresting officer's conclusion that defendant possessed a particular illegal substance or weapon, it "fail[s] to give any support or explanation whatsoever for the officer's belief" (Dreyden, 15 NY3d at 103; see also People v Jackson, 18 NY3d 738, 746 [2012]; Dumas, 68 NY2d at 731). Such a jurisdictional challenge is not waived by a guilty plea (see People v Scott, 3 NY2d 148, 152 [1957]).

The People concede before this Court that the violation of the "reasonable cause" requirement in the controlled substance count, if evaluated on its own, rises to the level of a jurisdictional deficiency.[2] Instead, they assert that the Appellate Term erred in reversing the judgment of conviction and sentence solely on the basis that the charge of conviction was jurisdictionally defective. The People maintain that the accusatory instrument as a

[2] The People explain their position as follows. "In cases . . . where the accusatory instruments contain only a single misdemeanor count, the sufficiency of the pleadings underlying that count are jurisdictional in nature. But . . . where a defendant is charged in a multicount complaint that does contain at least one properly pled misdemeanor count, a defendant has no legitimate basis to claim that there is a 'jurisdictional defect' in his accusatory instrument barring his guilty plea." (Brief for Appellant at 30.)

whole was sound and defendant's conviction should be reinstated because the instrument contained at least one facially sufficient misdemeanor charge, i.e., fifth-degree criminal possession of marijuana. For the reasons set out below, I reject the People's contentions and, along with the other Judges in the majority, I conclude that the Appellate Term made no error.

III.

The reasonable cause requirement on which defendant based his challenge to the controlled substance charge is contained in Criminal Procedure Law § 100.40 (4). "A misdemeanor complaint or a felony complaint, or a count thereof, is sufficient on its face" if, along with one other condition, "[t]he allegations of the factual part of such accusatory instrument and/or any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of such instrument" (CPL § 100.40 [4] [b] [emphasis added]). As the statute makes clear, a defendant who is charged in a multi-count misdemeanor complaint may challenge the facial sufficiency of individual counts in the complaint, and the resulting judicial inquiry assesses whether the challenged counts are, when considered singly, facially sufficient.

If a charge to which a defendant has pleaded guilty failed to supply sufficient notice of the basis for the charged crime to satisfy due process and double jeopardy, then upon appeal the accusatory instrument is considered "jurisdictionally defective as to the crime of which defendant was . . . convicted" (Hightower, 18 NY3d at 254), and the corresponding judgment must be reversed. The defect in the individual charge is considered jurisdictional because "it would be improper for any court to issue a judgment

of conviction [when] there is a substantive deficiency in the cause of action" (People v Correa, 15 NY3d 213, 228 n 3 [2010] [emphasis added]).

Here, the Appellate Term concluded that the controlled substance charge was jurisdictionally invalid and reversed the judgment of conviction and sentence based on defendant's plea to that charge. Contrary to the People's contention, it was proper for the court to reverse without considering whether a separate charge in the misdemeanor complaint was valid. The validity of a separate charge does not cure the invalid charge to which defendant pleaded guilty. Defendant did not claim that the misdemeanor complaint, as a whole, was so deficient that Criminal Court had failed to "acquire . . . control over his person" at arraignment (CPL 1.20 [9]) and could not commence a criminal action against him (see CPL 1.20 [7], [25]; CPL 100.10 [4]). Consequently, I cannot agree with the People that defendant's challenge to the misdemeanor complaint may be rebutted by showing that one of the charges against him was sufficiently pleaded.

The People rely on People v Keizer (100 NY2d 114 [2003]), in which this Court held that no jurisdictional defect occurs when a defendant charged by misdemeanor complaint pleads guilty to a lesser crime that is "neither charged in the complaint nor included as a lesser included offense for purposes of plea bargaining" (id. at 117). The People would have us infer from Keizer that a guilty plea is not void simply because the charge to which a defendant pleads guilty is jurisdictionally defective. Keizer does not stand for this proposition. Unlike the defendant in the present case, defendant Keizer raised no jurisdictional challenge under CPL 100.40 to the misdemeanor complaint by which he was charged, but rather challenged his guilty plea pursuant to CPL 220.10, asserting that

Criminal Court had no authority to accept his plea.[3] Whereas the present appeal involves a challenge to the validity of the charges in a complaint, in Keizer "[t]here [wa]s no dispute . . . that the complaint was valid" (id. at 118), and the Court framed the issue as "whether Criminal Court's jurisdiction, validly established, was subsequently abrogated by acceptance of a guilty plea to a lesser offense not charged in the complaint" (id. at 119). In rejecting Keizer's argument, the Court analyzed whether any statutory noncompliance in the guilty plea pursuant to CPL 220.10 would rise to the level of a jurisdictional defect. This inquiry is not instructive with respect to the question whether facial insufficiency in a misdemeanor complaint under CPL 100.40 rises to the level of a jurisdictional defect. There is a significant difference between challenging the facial sufficiency of an accusatory instrument and attacking the validity of plea bargaining. When a defendant pleads guilty to a jurisdictionally defective charge in a misdemeanor complaint, the judgment of conviction and sentence is void. By contrast, a defendant who pleads guilty to an uncharged crime is not pleading guilty to a jurisdictionally defective instrument.[4]

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[3] In People v Johnson (89 NY2d 905 [1996]), this Court held, in the indictment context, that a jurisdictional defect occurs under CPL 220.10 if a defendant pleads guilty to uncharged crimes equal to, or higher than, those for which he was indicted. Keizer argued similarly that Criminal Court had no jurisdiction to accept a guilty plea to counts that were neither charged in the misdemeanor complaint nor included as a lesser included offense. As noted above, defendant in the appeal before us did not raise any challenge to his guilty plea under CPL 220.10.

[4] An accusatory instrument is facially sufficient if it is valid on its face, i.e., on the surface of the document. A court's inquiry into facial sufficiency examines the validity of the instrument with which a defendant is charged, and not the circumstances of a subsequent plea. Contrary to the dissent, our case law allowing a defendant to plead guilty "to a lesser crime for which there is no factual basis or a hypothetical crime" does not imply that "the accusatory instrument cannot be facially sufficient with respect to that count" (dissenting op at 10 n 6). Our jurisprudence regarding the constraints on plea bargaining is analytically

The People also cite People ex rel. Ortiz v Commissioner of N.Y. City Dept. of Correction (93 NY2d 959 [1999], affg 253 AD2d 688 [1st Dept 1998]) for the proposition that an accusatory instrument is jurisdictionally valid if at least one charge is valid. Ortiz interpreted CPL 170.70, and specifically the statute's reference to a defendant "who has been confined . . . for a period of more than five days . . . without any information having been filed in replacement of [a] misdemeanor complaint." The Court held that the statute contemplated an inquiry into whether at least one count in a misdemeanor complaint has been converted, for purposes of holding the defendant in custody. The significance of Ortiz is limited to the interpretation of the words "any information" (see generally Ortiz, 253 AD2d 688; People ex rel. Mack v Warden, 145 Misc 2d 1016 [Sup Ct, Kings County 1989]). To the extent Ortiz has a wider import, it is that "[e]ach count of an accusatory instrument is deemed as a matter of law to be a separate and distinct accusatory instrument" (Ortiz, 253 AD2d at 689; see Mack, 145 Misc 2d at 1017-1019). I do not draw the inference that one count in an accusatory instrument may validate a separate count.

A conviction by guilty plea may be challenged, notwithstanding the plea, if the charge to which the defendant pleaded guilty was jurisdictionally defective. Whether another charge in the accusatory instrument was sufficient is immaterial. Consequently, the Appellate Term properly reversed the judgment of conviction and sentence upon its ruling that the charge to which defendant pleaded guilty was jurisdictionally defective.

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distinct from our jurisprudence regarding facial sufficiency. Accordingly, no "illogical prospect" (concurring op of DiFiore, C.J., at 13 n 7) results from the distinction between pleading guilty to an uncharged crime and pleading guilty to a deficiently alleged charge.

IV.

In light of my rejection of the People's contention that the jurisdictionally defective charge of conviction can be cured by the validity of another count, I would not decide whether the criminal possession of marijuana charge was adequately pleaded.

People v Mouhamed Thiam

No. 74

STEIN, J. (dissenting):

In satisfaction of a misdemeanor complaint containing a facially sufficient class B misdemeanor charge, Criminal Court allowed defendant to "plead up" to a class A misdemeanor that lacked a factual basis. The question before us is whether there was error

of a jurisdictional nature such that defendant may challenge the plea on appeal, despite knowingly, intelligently and voluntarily requesting that Criminal Court accept it. We conclude that the complaint, containing a facially sufficient misdemeanor charge in compliance with the reasonable cause requirement of CPL 100.40, could serve as the basis for prosecution here. Moreover, even assuming for purposes of argument that Criminal Court lacks statutory authority under CPL 220.10 to accept a plea to an insufficiently pleaded higher grade offense in a multi-count misdemeanor complaint that properly sets forth lower grade offenses, any error in that regard is not jurisdictional in nature. Thus, defendant forfeited any challenge to the plea on that basis when he pleaded guilty. Therefore, we respectfully dissent from the concurrences.[1]

I.

Defendant was charged in a misdemeanor complaint with criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03 [a class A misdemeanor]), criminal possession of marihuana in the fifth degree (former Penal Law § 221.10 [1] [a class B misdemeanor]), and unlawful possession of marihuana in the second degree (Penal Law § 221.05 [a violation]). The misdemeanor complaint alleged:

[1] Today, the Court holds that, "[e]ven if the accusatory instrument properly sets out a lower-grade offense, a defendant's challenge to a conviction based on the jurisdictional deficiency of a higher-grade crime of a multi-count complaint is not waived by the defendant's guilty plea" (Mem, at 1 [emphasis added]). We note that the Court's holding leaves open the broader question of whether a jurisdictional error is presented whenever a defendant pleads up to a class A misdemeanor in satisfaction of a valid class B misdemeanor in cases where the class A charge was not pleaded at all.

> "On or about June 24, 2016 at about 3:30 p.m., at the south west corner of Broadway & West 29 Street in the County and State of New York, the defendant knowingly and unlawfully possessed a controlled substance; the defendant knowingly and unlawfully possessed [marihuana] in a public place and such was burning or open to public view; the defendant knowingly and unlawfully possessed marijuana."

The deponent, a police officer, swore that he observed defendant holding marihuana "in a public place and open to public view at the above location." He also took a bag of marihuana from defendant's pocket. The officer averred that he knew the substance was marihuana based on his professional training as a police officer in identifying marijuana, his experience in making marihuana arrests, the odor emanating from the substance, its packaging in a manner characteristic of marihuana, and a field test confirming the substance was marihuana. He further stated that he "recovered eight pills from the defendant's right front pants pocket" that he knew "were oxycodone based on [his] professional training as a police officer in the identification of drugs, and [his] prior experience as a police officer in making drug arrests."

At arraignment on the same day that defendant was arrested, the prosecutor recommended that defendant be sentenced to a five-day jail term if he pleaded guilty to seventh-degree possession of a controlled substance. Defendant argued that the factual allegations in the complaint were "inadequate to make out a possession of controlled substance"—i.e., oxycodone—and "facially insufficient" to establish that defendant possessed marihuana in a public place. However, perhaps aware of the dubiousness of his challenge to the facial sufficiency of the marihuana charge, defendant did not seek

dismissal of the accusatory instrument; rather, defense counsel asked the judge if he would consider offering defendant a sentence of time served if he pleaded to the controlled substance charge. The judge agreed. Defendant then waived prosecution by information, pleaded guilty to the controlled substance charge, and was sentenced as requested.

On defendant's appeal, Appellate Term concluded that, assessed under the liberal standard required of a misdemeanor complaint, "the accusatory instrument was jurisdictionally defective" because it "failed to allege 'facts of an evidentiary character' (CPL 100.15 [3]) demonstrating 'reasonable cause' to believe (CPL 100.40 [4] [b]) that defendant was guilty of criminal possession of a controlled substance in the seventh degree" (59 Misc 3d 126[A], 2018 NY Slip Op 50339[U], *1 [App Term 1st Dept 2018]). Rather than reinstate the remainder of the complaint, the Court "dismiss[ed] it, as a matter of discretion in the interest of justice, since defendant ha[d] completed his sentence and no penological purpose would be served by remanding for further proceedings" (id. at *2). A Judge of this Court granted the People's application for leave to appeal.

The People do not press any challenge to Appellate Term's decision that the controlled substance charge was not supported by facially sufficient allegations; for the sake of argument, they assume that the Court was correct on that point. However, the People challenge the Court's failure to address their argument that, because the charge of criminal possession of marihuana in the fifth degree was facially sufficient, the accusatory instrument was jurisdictionally valid. Thus, they contend, Criminal Court had jurisdiction over defendant's prosecution, and the court was authorized to accept defendant's plea to

criminal possession of a controlled substance in the seventh degree in satisfaction of the facially sufficient marihuana charge, even if the controlled substance charge was insufficiently pleaded in the complaint.

II.

Where a defendant waives prosecution by information, the facial sufficiency of the accusatory instrument must be assessed according to the standards applicable to a misdemeanor complaint (see People v Dumay, 23 NY3d 518, 524 [2014]). A "'misdemeanor complaint' is a verified written accusation by a person, filed with a local criminal court, charging one or more other persons with the commission of one or more offenses, at least one of which is a misdemeanor and none of which is a felony" (CPL 100.10 [4]; 1.20 [7]). CPL 100.40 (4) (b) provides that "[a] misdemeanor complaint or a felony complaint, or a count thereof, is sufficient on its face" if "[t]he allegations of the factual part of such accusatory instrument and/or any supporting depositions which may accompany it, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of such instrument." In addition, the complaint must "substantially conform[] to the requirements prescribed in [CPL] 100.15"; as relevant here, the factual part must allege "facts of an evidentiary character supporting or tending to support the charges" (CPL 100.15 [3]).

Thus, to meet the jurisdictional standard for facial sufficiency, a misdemeanor complaint or a count thereof must "set forth facts that establish reasonable cause to believe that the defendant committed the charged offense" (Dumay, 23 NY3d at 522; see People v

Kalin, 12 NY3d 225, 228 [2009]).[2] The reasonable cause standard of CPL 100.40 is less demanding than the "prima facie case requirement for the facial sufficiency of an information," which, in turn, "is not the same as the burden of proof beyond a reasonable doubt required at trial, [and] does [not] rise to the level of legally sufficient evidence that is necessary to survive a motion to dismiss based on the proof presented at trial" (People v Smalls, 26 NY3d 1064, 1066 [2015] [internal quotation marks and citation omitted]). Nevertheless, a misdemeanor complaint will be deemed jurisdictionally defective for failure to meet the reasonable cause standard if it "fail[s] to supply defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy" (Dreyden, 15 NY3d 100, 103 [2010]; Casey, 95 NY2d 354, 366 [2000]).

We accept solely for the purpose of considering the particular arguments made in this case the People's concession that the charge of criminal possession of a controlled substance in the seventh degree was jurisdictionally insufficient. We note that, if that were the sole misdemeanor charge in the complaint, the plea to that charge would be invalid because the entire complaint would have been infected with a jurisdictional "defect[] implicating the integrity of the process" (Dreyden, 15 NY3d at 103, quoting People v

[2] We have long held that this requirement that an accusatory instrument "factually describe the elements of the crime and the particular acts of the defendant constituting its commission . . . [is] of constitutional dimension [and] not waivable" by a plea (People v Casey, 95 NY2d 354, 363 [2000]; see People v Scott, 3 NY2d 148, 152 [1957]). Stated differently, "[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution" (People v Dreyden, 15 NY3d 100, 103 [2010], quoting People v Case, 42 NY2d 98, 99 [1977]; see Dumay, 23 NY3d at 522; People v Jackson, 18 NY3d 738, 741 [2012]).

Hansen, 95 NY2d 227, 231 [2000]; see People v Afilal, 26 NY3d 1050, 1051-1052 [2015] [dismissing the misdemeanor complaint as jurisdictionally defective where the only misdemeanor charge contained in the complaint was facially insufficient]). Under those circumstances, there would be "a fundamental defect in [the] accusatory instrument"—which is a "jurisdictional issue"—and "it would be improper for [the] court to issue a judgment of conviction because there is a substantive deficiency in the cause of action" (People v Correa, 15 NY3d 213, 228 n 3 [2010]).

Here, however, the fifth-degree marihuana charge was sufficiently pleaded in the misdemeanor complaint. Along with a field test and a description of the odor of the drug, "the officer's account of his experience [and] the packaging of the drugs . . . supplied the basis for [the officer's] belief that the substance[] in question" was marihuana in order to adequately state reasonable cause (Smalls, 26 NY3d at 1067 [internal quotation marks and citation omitted]). Contrary to defendant's argument, the complaint further alleged sufficient facts to establish reasonable cause to believe that defendant possessed marihuana in a "public place" within the meaning of former Penal Law § 221.10 (see People v Kasse, 22 NY3d 1142, 1143 [2014]). Giving the allegations in the misdemeanor complaint "a fair and not overly restrictive or technical reading" (Casey, 95 NY2d at 360), and "drawing reasonable inferences from all the facts set forth" therein (Jackson, 18 NY3d at 747), the accusatory instrument contains sufficient facts to demonstrate "reasonable cause" to believe (CPL 100.40[4][b]) that defendant was guilty of fifth-degree marijuana possession.

Thus, even accepting that—as defendant argued during the plea colloquy—the criminal possession of a controlled substance charge was jurisdictionally defective, the remainder of the accusatory instrument (i.e., the facially sufficient fifth-degree marihuana possession charge) was unaffected by that defect.[3] Notably, "[a] trial court's jurisdiction to commence a criminal action is obtained in the case of a misdemeanor offense by means of a complaint" (Keizer, 100 NY2d at 117-118). Thus, the complaint, containing a facially sufficient charge in compliance with CPL 100.40's reasonable cause requirement, may "serve as a basis for prosecution" (Dumay, 23 NY3d at 522).

III.

While a criminal court may be presented with a jurisdictionally sufficient misdemeanor complaint, the "court's authority to accept a [particular] plea agreement is a different matter, and that authority is conferred by statute and common law" (Keizer, 100 NY2d at 118).[4] Defendant concedes that, under Keizer and People v Ford (62 NY2d 275

[3] As Judge Fahey explains in his concurrence, "[e]ach count of an accusatory instrument is deemed as a matter of law to be a separate and distinct accusatory instrument" (People ex rel. Ortiz v Commissioner of NY City Dept. of Corr., 253 AD2d 688, 689 [1st Dept 1998], affd 93 NY2d 959 [1999]). Thus, just as one count in an accusatory instrument cannot validate a separate count, the facially insufficiency of one count cannot invalidate a separate, jurisdictionally adequate count. The question before us concerns the resolution of the valid marihuana count (i.e., the "plead up" to a class A misdemeanor lacking a factual basis), not the facially insufficient controlled substance count.

[4] We agree with Chief Judge DiFiore that the trial court was not deprived of subject matter jurisdiction over the offense for which defendant was convicted simply because that charge was not adequately pleaded in an otherwise sufficient misdemeanor complaint (see DiFiore, Ch. J. concurring op at 7). The question of whether a charge in a complaint is facially sufficient cannot go to subject matter jurisdiction because, by necessity, "a court must both have and exercise subject matter jurisdiction in order even to rule on the sufficiency of a pleading" (Casey, 95 NY2d at 366). The question presented by this appeal

[1984]), if an accusatory instrument contains a jurisdictionally sufficient charge, a guilty plea to particular lesser offenses forfeits any claim of error by the defendant that the court's acceptance of the plea was not authorized. However, in reliance upon this Court's decision in People v Johnson (89 NY2d 905 [1996]), defendant argues—and the Chief Judge agrees—that the due process protections served by accusatory instruments would be defeated if a sufficient lesser misdemeanor charge were permitted to provide a basis to convict a defendant of a higher level misdemeanor with its correspondingly higher penal consequences.[5] In other words, defendant argues that we should prohibit those charged with a valid class B misdemeanor from "pleading up" to a class A misdemeanor that has not been adequately pleaded in the accusatory instrument.

The CPL provides that "[t]he only kinds of pleas which may be entered to an indictment are those specified in . . . section" 220.10, which states that, "where the

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is whether there was a "defect[] implicating the integrity of the process" (Dreyden, 15 NY3d at 103, quoting People v Hansen, 95 NY2d 227, 231 [2000]) because defendant was permitted to "plead up" to a class A misdemeanor lacking a factual basis. In other words, we must determine whether there was a defect akin to a mode of proceedings error (see Casey, 95 NY2d at 366-367).

[5] Unlike Judge Fahey (see Fahey, J. concurring op at 2), we agree with the Chief Judge and the parties that Keizer and Johnson—and the provisions of the Criminal Procedure Law at issue in those cases, which govern a court's authority to accept a plea—are relevant to the parties' arguments. The parties briefed both cases extensively, and the analysis in both turns on a court's authority to accept a plea under CPL article 220. Because a defendant may raise an error of a jurisdictional nature for the first time on appeal to this Court (see e.g. Casey, 95 NY2d at 365), we must consider whether defendant's arguments implicate such an error, regardless of whether he raised the issue below. We conclude that, while defendant's arguments based on Keizer and Johnson implicate the scope of Criminal Court's authority under CPL article 220, any alleged error is not jurisdictional.

indictment charges two or more offenses in separate counts, a defendant may, with both the permission of the court and consent of the people, enter a plea of . . . [g]uilty of any combination of offenses charged and [certain] lesser offenses" (CPL 220.10 [4] [c] [emphasis added]). Assuming that this portion of section 220.10 is applicable to pleas to charges in a misdemeanor complaint (see generally CPL 340.20 [1]), this Court has long recognized exceptions to the limitations in that section where the "exceptions are not out of harmony with the statutory rationale limiting guilty pleas to actual lesser included offenses, or to crimes akin to such lesser included offenses" (Johnson, 89 NY2d at 908). Moreover, when a defendant enters "a negotiated plea to a lesser crime than one with which he is charged, no factual basis for the plea is required. Indeed, under such circumstances, defendants can even plead guilty to crimes that do not exist" (People v Johnson, 23 NY3d 973, 975 [2014] [citations omitted] [emphasis added]; see e.g. People v Tiger, 32 NY3d 91, 101 [2018]; People v Keizer, 100 NY2d 114, 118 n 2 [2003]; People v Moore, 71 NY2d 1002, 1006 [1988]; People v Francis, 38 NY2d 150, 155 [1975]; People v Clairborne, 29 NY2d 950, 951 [1972]; People v Foster, 19 NY2d 150, 153 [1967]; People v Griffin, 7 NY2d 511, 516 [1960]).[6] It is not an error, jurisdictional or otherwise, for a court to accept a plea under these circumstances.

[6] To the extent Judge Fahey would hold that a judgment of conviction is always "void" when "a defendant pleads guilty to a jurisdictionally defective charge in a misdemeanor complaint" (Fahey, J. concurring op at 9), he would, in effect, overrule this line of cases. The long-standing rule is that "a defendant may plead guilty to a crime for which there is no factual basis and even plead guilty to a hypothetical crime" (Keizer, 100 NY2d at 118 n 2). When a defendant pleads to a lesser crime for which there is no factual basis or a

In contrast, this Court, in the felony context, does not recognize "a plea to a crime . . . of equal or higher grade or degree to the crimes charged" because "a different result would undermine the legislative policy of article 220 to place limitations on plea bargains deviating from the crimes charged" (Johnson, 89 NY2d at 908). Thus, as a purely statutory matter, Criminal Court may have erred here in accepting a plea to a class A misdemeanor in satisfaction of a class B misdemeanor. Nevertheless, any such error was not jurisdictional.

Critically, the Court explained in Johnson that "[t]he provisions of CPL article 220 . . ., in some respects, are jurisdictional in nature because of the constitutional implications" (Johnson, 89 NY2d at 907 [emphasis added]). Johnson recognized that the acceptance of a plea that violates CPL article 220 constitutes a jurisdictional defect only to the extent that article I, § 6 of the New York Constitution is implicated (see id.). Article 1, § 6 states, in relevant part, that a defendant may not be tried for a felony absent indictment, stating: "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury." As the Court further elucidated in Keizer, "[a] prosecutor cannot bring an indictment or felony complaint and then attempt to avoid the protections of article I, § 6 by soliciting a plea to alleged criminal activity that has no common element (in law or fact) to the crimes alleged in the indictment or felony complaint" (Keizer, 100 NY2d at 119). It is the prosecutor's "attempt to abrogate that [constitutional] restriction

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hypothetical crime, that accusatory instrument cannot be facially sufficient with respect to that count.

through the plea process [that] raises fundamental jurisdictional issues" for the courts (id.).[7] However, article I, § 6 is addressed only to felonies and is not implicated here. That is, the "constitutional limitations, and their underlying policies that restrict the plea process for felony charges"—i.e., the constitutional limitations on our subject matter jurisdiction that were actually at issue in Johnson and discussed in Keizer—"are not present . . . [in] misdemeanors, jurisdiction over which is grounded in the [CPL]" (Keizer, 100 NY2d at 119; see William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 220.10 [The concern that the plea process could be used to avoid the protection of article I, § 6 "does not exist as to misdemeanors, which of course are not subject to a mandatory grand jury proceeding for prosecution"]).

The Chief Judge concludes that there is no reason not to apply the protections afforded by article I, § 6 to misdemeanors (DiFiore, Ch. J. concurring op at 12-13). In so concluding, she relies in part on our statement in Keizer and Ford that article I, § 6 "'is not a limitation directed to the courts, but rather to the State, and its function is to prevent prosecutorial excess'" (100 NY2d at 119, quoting Ford, 62 NY2d at 282). This reliance is based on a misconstruing of our precedent and overlooks the fundamental rule that article I, § 6 is a direct, jurisdictional limitation on the courts. We have long recognized that, absent waiver of indictment, "'[u]ntil the grand jury shall act, no court can acquire

[7] Here, of course, it was not the prosecutor that attempted to abrogate any restrictions—statutory or constitutional—on the plea process. Rather, it was defendant who knowingly and voluntarily sought to plead guilty to a higher grade offense than that charged in the accusatory instrument in exchange for a sentence of time served. Notably, the four judges who would affirm fail to acknowledge the significance of this fact.

jurisdiction to try'" (Ford, 62 NY2d at 282, quoting People ex rel. Battista v Christian, 249 NY 314, 319 [1928]). Moreover, article I, § 6 implicates subject matter jurisdiction. As the Court explained in Ford, a "trial court lack[s] subject matter jurisdiction [where] no indictment was returned" (62 NY2d at 282 [emphasis added]; see Correa, 15 NY3d at 228 ["Like every other court in New York State, Supreme Court may not convict a defendant of a felony absent compliance with the indictment and waiver of indictment provisions in article I, § 6 of the New York Constitution"]). That limitation on subject matter jurisdiction, which dictated the result in Johnson (89 NY2d at 907-908), is not present here.[8] Rather, the issue before us here is whether we should expand our mode of proceedings doctrine to encompass the alleged error in the acceptance of defendant's plea.

In that regard, the Chief Judge concludes that Criminal Court's acceptance of a guilty plea to a higher grade misdemeanor in satisfaction of a properly charged misdemeanor violates the Sixth Amendment of the United States Constitution as well as state due process considerations underlying article I, § 6 of the New York Constitution. Thus, she would hold that any such plea cannot be knowingly and voluntarily entered and that defendant may raise his challenge on appeal despite the failure to do so in Criminal Court (see DiFiore, Ch. J. concurring op at 13). We disagree.

[8] Johnson held that a plea to a higher grade felony would run afoul of the jurisdictional limitations imposed by article I, § 6 of the New York Constitution and the legislative policy underlying CPL article 220 (see 89 NY2d at 907-908). Johnson does not establish that a fundamental defect infects any guilty plea to a count that is of a higher grade than any valid count in the accusatory instrument. Thus, Johnson provides no support for the Chief Judge's conclusion that a mode of proceedings error is presented by the acceptance of a guilty plea to a higher-grade crime than the charges in an accusatory instrument.

"The pleading process necessarily includes the surrender of many guaranteed rights" that implicate both the Sixth Amendment and state due process concerns; nevertheless "when there is no constitutional or statutory mandate and no public policy prohibiting [waiver], an accused may waive any right which he or she enjoys" (People v Seaberg, 74 NY2d 1, 7 [1989]). A defendant who elects to plead guilty forfeits "'the right to appellate review of any nonjurisdictional defects in the proceedings'" (People v Konieczny, 2 NY3d 569, 572 [2003], quoting People v Fernandez, 67 NY2d 686, 686 [1986] [emphasis added]). Here, as the Chief Judge acknowledges, defendant requested the plea to the top charge in the misdemeanor complaint despite first expressly stating his belief that the charge was facially insufficient (see DiFiore, Ch. J. concurring op at 2-3)—that is, he knowingly, intelligently and voluntarily sought this particular plea. Indeed, defendant has never challenged the voluntariness of his plea and does not do so before us.[9] Therefore, defendant's plea can be challenged on due process grounds only if the alleged violation of due process amounted to a "defect in the proceedings, which could not be waived or cured and is fundamental"—i.e., a mode of proceedings error (Casey, 95 NY2d at 365 [internal quotation marks and citation omitted]).

[9] Even if defendant did challenge the voluntariness of his plea on this appeal, the preservation requirement would normally extend to such a challenge (see People v Williams, 27 NY3d 212, 219-220 [2016]). As this Court has previously explained, People v Louree (8 NY3d 541 [2007]) and the cases following it, do "not support the . . . conclusion that, because [a] defendant . . . attack[s] the voluntariness of [a] plea on due process grounds, [that] claim was categorically exempt from the preservation rule" if the error is clear on the face of the record (Williams, 27 NY3d at 221).

The Chief Judge does not explain why the alleged due process violation at issue and the waiver of Sixth Amendment protections here are akin to a mode of proceedings error, a designation "reserved for the most fundamental flaws" (People v Becoats, 17 NY3d 643 651 [2011]) that "'go to the essential validity of the process'" (People v Mack, 27 NY3d 534, 541 [2016], quoting People v Kelly, 5 NY3d 116, 119-120 [2005]). "Outside of this 'tightly circumscribed class,' we have 'repeatedly held that a court's failure to adhere to a statutorily or constitutionally grounded procedural protection does not relieve the defendant of the obligation to protest'" (Mack, 27 NY3d at 540, quoting Kelly, 5 NY3d at 120). Indeed, "most 'errors of constitutional dimension'" are excluded from this class (see People v Hanley, 20 NY3d 601, 605 [2011]), as are "judicially-devised concept[s] premised on fundamental fairness and an aversion to prosecutorial abuse" (id. at 606). This Court has long "been hesitant to expand the mode-of-proceedings-error doctrine" (Mack, 27 NY3d at 540), and the conclusory invocation of Sixth Amendment and state due process rights is not a compelling reason to expand the doctrine to prohibit voluntary plead-ups to class A misdemeanors.

Particularly in this case, expanding the mode of proceedings error doctrine to permit defendant's challenge to the plea conflicts with this Court's decision in People v Casey (95 NY2d at 366-367). The Casey Court explained that, "[f]rom its inception to this day, our mode of proceedings error case law has emphasized the importance of the curability of a particular procedural defect as a factor weighing in favor of requiring preservation" (id. at 367). Under CPL 170.35 (1), a complaint that is "not sufficient on its face pursuant to the

requirement of section 100.40 . . . may not be dismissed as defective, but must instead be amended where the defect is of a kind that may be cured by amendment and where the people move to amend." Thus, Casey concluded that, where the defect in an accusatory instrument is one that can be cured by amendment, a mode of proceedings error is not presented (see 95 NY2d at 367). Here, while the People did not move to amend the accusatory instrument, there is no dispute that the defect in the count to which defendant ultimately pleaded was readily curable. Although the complaint could not have been amended at arraignment because the deponent was not present to provide the amendment, the complaint could have been amended following an adjournment. Thus, any claim of error to the facial insufficiency of the criminal possession of a controlled substance count should not be deemed a mode of proceedings error, which would survive a guilty plea.

Nevertheless, defendant contends—and four Judges of this Court agree—that this Court's decision in Hightower mandates vacatur of the plea and dismissal of the accusatory instrument on appeal. In Hightower, the Court reversed the judgment of conviction and dismissed an accusatory instrument, holding that "[a]though the information in th[at] case described the events with enough clarity to provide reasonable cause that defendant was engaged in [the class B misdemeanors charged therein], . . . it was jurisdictionally defective as to the crime of which defendant was actually convicted—petit larceny," a class A misdemeanor (18 NY3d at 254). Hightower is distinguishable and, therefore, not dispositive. The dismissal of the entire accusatory instrument in Hightower was not premised on a holding that a defendant can never plead to an uncharged misdemeanor of

higher or equal grade in satisfaction of a properly charged misdemeanor. That conclusion can be reached only on a misreading of Hightower that overlooks or attempts to obfuscate the Court's explanation that its dismissal of the accusatory instrument was based solely on the fact that the "defendant ha[d] already served his sentence" (Hightower, 18 NY3d at 253).

Generally, when a defendant pleads guilty to only part of an accusatory instrument, and the charge or charges to which the defendant pleaded are dismissed on appeal but the remainder of the accusatory instrument is unaffected, "the criminal action is, in the absence of express appellate court direction to the contrary, restored to its pre-pleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those dismissed upon appeal" (CPL 470.55 [2]; see e.g. People v Washington, 50 Misc 3d 89, 93 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015]). However, when the defendant has served the sentence and the offenses charged are relatively minor, this Court has, at times, dismissed the entire accusatory instrument upon concluding that the charge underlying the crime of conviction is facially insufficient or upon vacating the plea for other reasons (see People v Tyrell, 22 NY3d 359, 366 [2013]; People v Hightower, 18 NY3d 249, 253 [2011]; see also People v Toro, 61 Misc 3d 26, 29 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018]; cf. People v Conceicao, 26 NY3d 375, 385 n [2015] [declining to dismiss the accusatory instrument on the ground that a penological purpose existed for remitting the case to the trial court for further proceedings]).

Hightower followed that practice. After determining that the petit larceny charge was facially insufficient, the Court dismissed the accusatory instrument (see Hightower, 18 NY3d at 253). The Court did not consider whether the plea should be upheld based on the facially sufficient class B misdemeanor charges because the People in Hightower did not ask for that remedy.

Rather, as is clear from the briefs in Hightower, the People argued that, if the petit larceny count was facially insufficient, remittal was required under People v Allen (39 NY2d at 917-918). However, the Hightower Court did not remit as the People requested, but instead decided to dismiss the accusatory instrument because "defendant ha[d] already served his sentence" (Hightower, 18 NY3d at 253).[10] Thus, the issue presented in this case—whether a defendant may be held to a "plead-up" to a class A misdemeanor that lacks a factual basis in satisfaction of a properly charged class B misdemeanor—was not presented to, or addressed by, the Court in Hightower. In other words, the Court did not "reject[] that justification to sustain conviction" (DiFiore, Ch. J. concurring op at 11 n 5) because the Court simply did not consider the issue. In our view, Hightower should not be

[10] As the Chief Judge notes (see DiFore, Ch. J. concurring op at 11 n 5), we have never provided a "supporting rationale for the unusual result" of such a dismissal as a matter of discretion, beyond stating that "the defendant ha[d] served [the] sentence" in cases "involv[ing] relatively minor crimes and offenses" (People v Allen, 39 NY2d 916, 917-918 [1976]). We agree with the Chief Judge that, contrary to our decision in Hightower, the proper corrective remedy in cases such as this one would have been that afforded by CPL 470.55—remittal to the trial court for further proceedings on the accusatory instrument—to avoid gamesmanship (see DiFiore, Ch. J., concurring op at 15).

extended beyond the issues actually addressed in the case; the decision was not an advisory opinion forbidding the practice of pleading up to class A misdemeanors in all cases.[11]

IV.

In short, inasmuch as defendant pleaded to a misdemeanor, rather than a felony, there is "no constitutional impediment" or "statutory noncompliance rising to the level of a jurisdictional defect" that would prevent the taking of the plea (Keizer, 100 NY2d at 119; see People v Freeman 149 AD3d 555, 555-556 [1st Dept 2017], lv denied 29 NY3d 1079 [2017] ["The constitutional restriction preventing the State from indicting a defendant on one felony and then accepting a plea to a different felony with no common factual or legal basis is inapplicable here, as defendant was charged with, and pleaded guilty to, misdemeanors"]). A contrary conclusion—that due process prohibits a defendant from forfeiting a challenge to a guilty plea to a higher grade misdemeanor than that charged in the accusatory instrument—ignores the reality that there are many circumstances in which a defendant might prefer to plead to a class A misdemeanor, in satisfaction of a class B misdemeanor. For example, in Freeman, "[d]efendant concede[d] he wanted to avoid the

[11] The defendant in Hightower did not raise before the trial court the same facial sufficiency claim raised on appeal and then knowingly offer to waive that claim in exchange for a reduced sentence. Thus, Hightower can be further distinguished on the ground that, here, defendant objected that the count to which he sought to plead was facially insufficient and then immediately followed that objection with a request that he be permitted to plead to that crime anyway, in exchange for a sentence of time served, rather than the five days' incarceration requested by the People. As the People argue, defendant used the readily-curable facial insufficiency of the controlled substance charge as a bargaining chip at arraignment, and now belatedly seeks to raise a jurisdictional challenge to the count to which he pleaded to obtain a dismissal.

significant stigma of a conviction on the initial class A misdemeanor charge, an animal cruelty charge, and therefore pleaded guilty to second-degree trespass, also a class A misdemeanor, even though there was no common factual or legal predicate for that charge" (149 AD3d at 556 [internal quotation marks and citation omitted]).

Although, historically, pleas to crimes that were not sufficiently pleaded in an accusatory instrument—including hypothetical crimes or crimes for which there is no factual basis—were to lesser crimes (see Francis, 38 NY2d at 155-156; Foster, 19 NY2d at 153-154), this Court should not turn a blind eye to the fact that we now live in an age of increasing civil collateral consequences flowing from criminal convictions—such as deportation—that may make pleas to higher grade misdemeanors desirable for defendants. Indeed, the Supreme Court of the United States recently "has reiterated that deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence'" (Sessions v Dimaya, 584 U.S. ——, ——, 138 S Ct 1204, 1213 [2018], quoting Jae Lee v United States, 582 U.S. ——, ——, 137 S Ct 1958, 1968 [2017] [emphasis added]). Similarly, this Court recently recognized the severity of deportation as a collateral consequence, explaining that deportation is a "severe penalty . . . because the loss of liberty associated therewith is analogous to that inherent in incarceration and because deportation—which may result in indefinite expulsion from the country and isolation from one's family—is frequently more injurious to noncitizen defendants" than a short term of imprisonment (People v Suazo, 32 NY3d 491, 500 [2018]). Despite our recent recognition of the potential severity of collateral consequences such as

deportation, a majority of this Court now wishes to overlook the magnitude of all collateral consequences in order to justify its expansion of the holding in Hightower.

That short-sightedness will not change the modern reality that a plea to a higher grade misdemeanor may be advantageous when the defendant perceives that the collateral consequences of a conviction of a lesser grade, class B misdemeanor would be more severe than the consequences flowing from a class A misdemeanor conviction (see Thea Johnson, *Fictional Pleas*, 94 Ind LJ 855, 858-859, 869 [2019]; see also Freeman, 149 AD3d at 555-556). Yet, the result reached today by a majority of this Court would foreclose that opportunity to defendants when the class A misdemeanor is included in the accusatory instrument but not adequately pleaded, even where a defendant knowingly, intelligently and voluntarily seeks to enter such a plea. In our view, such a result is not a vindication of due process, but works an entirely avoidable injustice. Where a defendant voluntarily seeks to enter into a plea to a class A misdemeanor, for which there is no factual basis, in satisfaction of a properly charged class B misdemeanor, "the bargain [should] become[] final" so long as "the court which accepts [such a] plea has no reason to believe that the plea is unfair or inappropriate" (Francis, 38 NY2d at 156).

Here, Appellate Term erred in vacating the plea solely on the ground that the controlled substance charge was insufficiently pleaded without considering the People's argument that defendant voluntarily pleaded to that crime in satisfaction of the jurisdictionally adequate fifth-degree marihuana charge. Accordingly, we would reverse the order and reinstate the judgment of Criminal Court.

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Order affirmed, in a memorandum. Chief Judge DiFiore and Judges Rivera, Fahey and Wilson concur, Chief Judge DiFiore in a concurring opinion in which Judge Wilson concurs and Judge Fahey in a concurring opinion in which Judge Rivera concurs. Judge Stein dissents in an opinion in which Judges Garcia and Feinman concur.

Decided October 29, 2019