

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 10

ALBERT EDWARD,

Appellant.

20 Eagle Street
Albany, New York
January 4, 2018

Before:

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

Appearances:

LAWRENCE T. HAUSMAN, ESQ.
THE LEGAL AID SOCIETY
Attorney for Appellant
199 Water Street
New York, NY 10038

SHERYL FELDMAN, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
One Hogan Place
New York, NY 10013

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on is
2 appeal number 10, the People of the State of New York v.
3 Albert Edward.

4 MR. HAUSMAN: Good afternoon, Your Honors.

5 CHIEF JUDGE DIFIORE: Good afternoon.

6 MR. HAUSMAN: Lawrence Hausman for the defendant-
7 appellant, Albert Edward. I'd like to reserve two minutes
8 for rebuttal.

9 CHIEF JUDGE DIFIORE: You may.

10 MR. HAUSMAN: And I - - - I would also like to
11 start with the merits and sort of in the middle of them and
12 then I'll - - - then I'll get to the district attorney's
13 alternative procedural argument. What I'd like to do is
14 really focus the court's attention on Jamie D. because my
15 concern is that the standard put forward by the People is -
16 - - is way too broad, and it goes to some of the examples
17 that Your Honors have posed. Because I think that if you
18 consider it sufficient for a box cutter which could
19 otherwise be a lawful tool to become a dangerous knife
20 based on the fact that the possessor merely considers - - -

21 JUDGE FEINMAN: Well, have they actually alleged
22 dangerous knife here? Because I'm looking at the
23 accusatory instrument at record A-6, and they say that:
24 "The defendant possessed a dangerous and deadly instrument
25 and weapon with intent to use it unlawfully against



1 another." So in the actual accusatory part there's - - -

2 MR. HAUSMAN: Fair point.

3 JUDGE FEINMAN: - - - actually no reference in
4 this complaint to dangerous knife.

5 MR. HAUSMAN: It's a fair point, Your Honor, that
6 in this case, they did - - - they did use the charging
7 language in - - - as dangerous instrument.

8 JUDGE FEINMAN: So - - - so they're going - - -
9 the way I read this accusatory instrument they're going
10 with the second - - -

11 MR. HAUSMAN: Right, as to - - -

12 JUDGE FEINMAN: - - - part of the statute.

13 MR. HAUSMAN: - - - which you don't even trigger
14 the presumption. But indulging the fact that the court may
15 nonetheless because the - - - because of the Penal Law
16 section that was charged may nonetheless - - -

17 JUDGE FEINMAN: How is the - - - how is that the
18 case? It's up to them to tell you what subdivision and
19 what part of the statute they're using.

20 MR. HAUSMAN: Right. Well - - - well, and I
21 certainly don't think - - -

22 JUDGE FEINMAN: They could have superseded this I
23 suppose.

24 MR. HAUSMAN: I certainly don't think there's any
25 evidence of - - - of unlawful intent here, so if - - - if



1 we treat this as a dangerous instrument - - -

2 JUDGE FEINMAN: So if it - - -

3 MR. HAUSMAN: - - - it's certainly - - -

4 JUDGE FEINMAN: - - - in fact - - - let's say
5 you're correct, assume for a moment. Because I'm - - - I'm
6 really going to bring you to the second part of your
7 argument. Let's say you're correct that in this particular
8 instrument they haven't made out the 265.01(2). But you
9 have all these other charges here that are - - - that you
10 concede, correct, that are - - -

11 MR. HAUSMAN: Well - - - well, I don't concede.
12 They haven't charged - - -

13 JUDGE FEINMAN: - - - facially sufficient?

14 MR. HAUSMAN: I think I dropped a footnote saying
15 that we haven't had the opportunity to contest them because
16 we don't think it's properly - - - it was properly before
17 the court.

18 JUDGE FEINMAN: You certainly could have stood up
19 at arraignment and moved to dismiss this entire instrument.

20 MR. HAUSMAN: For the facial sufficiency - - -

21 JUDGE FEINMAN: And you certainly could have
22 argued in your brief that the whole instrument is
23 defective.

24 MR. HAUSMAN: But we don't think the facial
25 sufficiency of other charges say the facial sufficiency of



1 the challenged charge, and that's because we think - - -

2 JUDGE FEINMAN: So - - - so let's say you're
3 right that it's insufficient. But where - - - where I'm
4 going is to the alternative argument that we should - - -
5 because if - - - the whole point of Alejandro and all of
6 this is the jurisdiction of the criminal court or whatever
7 the local court is, but here the criminal court, to have
8 that criminal defendant in front of it and subject to its
9 adjudication, right?

10 MR. HAUSMAN: Your Honor, I think there's a
11 further protection which is I think there is a protection
12 that the charge of which you're convicted be facially
13 sufficient and jurisdictionally sound. That's what People
14 v. Harper, this court's own case, says and that's a case
15 that - - - People v. Keizer that the People rely on
16 (indecipherable), and the reason that People v. Keizer was
17 not a jurisdictional defect, it was because it was treated
18 as a lesser included offense to which the defendant was
19 pleading guilty. Now under - - - and so the - - - the
20 issue was analyzed under Article - - - CPL 220.20 which
21 allows pleads to lessers that aren't even true lessers.
22 Now the disorderly - - -

23 JUDGE FEINMAN: So we have fictional, right?

24 MR. HAUSMAN: Right.

25 JUDGE FEINMAN: We allow fictional -- we allow



1 constantly in hundreds of pleas a day - - -

2 MR. HAUSMAN: Disorderly conduct.

3 JUDGE FEINMAN: - - - in the criminal court
4 people plead to 240.20 that's not even alleged and there's
5 no disorderly conduct. So we do all of that.

6 MR. HAUSMAN: Right, and - - -

7 JUDGE FEINMAN: So why isn't it - - - if we
8 assume for the sake of argument that these other trespass
9 charges are - - - are valid and sufficiently pled why
10 wouldn't we allow here him to plead to 265.01 even if it's
11 insufficient to satisfy this entire accusatory instrument.

12 MR. HAUSMAN: Because in Keizer those 240.20
13 pleas were analyzed under CPL 220.20 and what this court
14 says, that's not a - - - when you plead to a lesser or non-
15 criminal offense, even if it doesn't literally comply with
16 CPL 220.20 that's a mere statutory violation. It's not a
17 jurisdictional violation. That's different than a facial
18 sufficiency challenge to a co-equal charged offense, and
19 that's why I point Your Honors to People v. Harper. And
20 this is what the Court of Appeals said in People v. Harper.
21 You need subject matter jurisdiction over the crime of
22 conviction. What happened in Harper was you had two valid
23 charges and then the court improperly, but with the consent
24 of the defense, added two charges improperly. And the
25 court said those convictions can't stand because there's no



1 subject matter jurisdiction over those convictions. So it
2 can't be that just because you have one valid accusatory
3 charge - - -

4 JUDGE FEINMAN: So - - - so in other words, let's
5 say you had this complaint and they said, you know, Judge,
6 I don't - - - I mean in fact the defense attorney said I
7 don't want him to plead to the weapons charge but for
8 whatever reason, you know, that - - - that's what happened.
9 And let's say there were immigration concerns because there
10 was particular charges here. Are you saying that they
11 couldn't plead guilty to another A misdemeanor, an added
12 charge, to resolve the - - - the charges with the consent
13 of the prosecution and the defense?

14 MR. HAUSMAN: Well, they could - - -

15 JUDGE FEINMAN: You know, to - - - to avoid, you
16 know, whether it's a crime of moral turpitude or whatever,
17 you know, maybe the concern of the defense attorney
18 allowing the particular charge - - -

19 MR. HAUSMAN: They - - - they certainly can plead
20 to a lesser under Keizer because once you're - - -

21 JUDGE FEINMAN: Yeah, I'm not asking that. What
22 about a co-equal misdemeanor?

23 MR. HAUSMAN: Well - - -

24 JUDGE FEINMAN: I mean this - - - this is not
25 like the felonies - - -



1 MR. HAUSMAN: Right.

2 JUDGE FEINMAN: - - - that you have a
3 constitutional prohibition. So this is - - -

4 MR. HAUSMAN: Right, it's - - - it's a little
5 different than when you're talking about the facial
6 sufficiency of the charged offense. If you're adding an
7 offense and you're doing it under CPL 220.20 which is
8 you're adding a lesser for plea purposes even if it's not a
9 lesser because CPL 220.20 does recognize that sometimes you
10 could have a co-equal offense for plea purposes. So if
11 you're adding it for plea purposes and there's no
12 misunderstanding that you need notice as to the charge for
13 which you're being convicted because you're piggy-backing
14 off of a facial sufficiency charge. That's different than
15 here where you're - - - where you're - - - if you're
16 pleading guilty to the charged offense, under Harper you
17 need subject matter jurisdiction over that charge. And you
18 get subject matter jurisdiction over that charge by - - -
19 in a plea case by - - - by having that charge be facially
20 sufficient. I think it's very important in - - - in - - -
21 you know, a lot of individuals - - -

22 JUDGE FEINMAN: So why doesn't the court have
23 subject matter jurisdiction here with the - - - these
24 trespass charges?

25 MR. HAUSMAN: It would have subject matter



1 jurisdiction over a trespass plea or over a lesser charge
2 that's - - - that's coming off of those trespass pleas.

3 But the - - -

4 JUDGE FEINMAN: So when they resolve in the
5 criminal court, you know, somebody comes in they're charged
6 with, you know, selling, you know, some - - - I mean
7 something that's a Class D felony and then they take the
8 felony complaint and convert it to a misdemeanor complaint
9 and add the charge of criminal facilitation for the
10 purposes of disposition, happens every day in part - - -

11 MR. HAUSMAN: That's okay - - -

12 JUDGE FEINMAN: - - - that's no good or it is
13 good?

14 MR. HAUSMAN: That's okay. Because again, like -
15 - - as in Keizer, there the jurisdictional validity is
16 coming from the greater charge and the lesser is really an
17 application of a statute. And so it may be a statutory
18 violation.

19 JUDGE FEINMAN: So criminal facilitation it isn't
20 a lesser of any of those things. I think that's my point.

21 MR. HAUSMAN: Well, right. But nor was
22 disorderly conduct but what Keizer said is really that's
23 just a violation of the 220.20 statute. It's merely a
24 statutory violation but because it's still getting its
25 jurisdictional strength from the greater charge that's



1 okay. Because 220.20 which is rather sort of - - - which
2 is rather flexible and it's even been enhanced by the
3 common law of this court beyond the literal terms of the
4 statute if you're pleading to a lesser you look to the - -
5 - to the greater charge for the subject matter
6 jurisdiction. But where you're talking about two co-equal
7 charges that are both charged in the accusatory instrument,
8 under Harper they each have to have their own independent
9 jurisdictional - - -

10 JUDGE GARCIA: Harper was a trial, right? This
11 is a plea.

12 MR. HAUSMAN: Harper was a trial but what Harper
13 shares with this case is the notion that - - - and in
14 Harper, the defendant consented to the submission of the
15 charge. But - - - but what Harper stands for is that the
16 crime of conviction still has to be supported
17 jurisdictionally. And so - - - what - - - an interesting
18 point - - -

19 JUDGE FAHEY: They do make the point - - - the
20 court makes a point in Harper in the present case there was
21 a trial rather than the entry of a plea suggesting this is
22 a rule for trial.

23 MR. HAUSMAN: Well, I - - - I think what - - -
24 what it does is it establishes that - - - you know, that
25 co-equal - - - that there's a difference between co-equal



1 charges and lessers because in - - - in Ford, which is also
2 a trial case, it - - - it was okay for the parties to agree
3 to a lesser even though it wasn't a true lesser, right. As
4 long as the parties agreed to it, it was okay, but in
5 Harper they were co-equal and that was the problem. They
6 were co-equal. They were - - - they were - - - and one was
7 jurisdictionally valid and one wasn't. That was a problem.
8 And - - - and I think the same is true here where you're
9 talking about the charge to which you're pleading to has to
10 be supported by subject matter jurisdiction. And just one
11 important - - -

12 JUDGE RIVERA: No, I think that - - - just to
13 quickly follow up because your light is red, is if I'm
14 understanding Judge Garcia's question his question is okay,
15 well, maybe that's the rule for a trial. Why should that
16 rule apply with equal force to a plea?

17 MR. HAUSMAN: I think the reason it should apply
18 with equal force to a plea is because it's important to
19 have subject matter jurisdiction over - - - over a charge.
20 And - - - and one - one sort of side point that I'd like to
21 make, this court has repeatedly - - -

22 JUDGE RIVERA: Even if you can plea to something
23 that's - - - doesn't even exist?

24 MR. HAUSMAN: Well, there - - - there it's
25 understood by everyone that you're deriving jurisdiction



1 from the charged offense. When that's not the case,
2 there's an important systemic protection which is that one
3 of the few protections in a plea case, right, is the facial
4 sufficiency of the charge to which you're being - - -
5 you're pleading guilty and you're going to have that
6 conviction for the rest of your life. And so there aren't
7 a lot of protections and one that does - - - that should
8 exist and - - - and is good for both the defendant and the
9 criminal justice system is to know that the crime that
10 you're - that's going to be attached to you is at least
11 supported by facts that established that that crime
12 occurred. I think that's an incredibly important safety
13 valve in the system. It's one of the only protections that
14 applies to the misdemeanor plea and that's why I think just
15 like the jurisdictional issue that was held to be the - - -
16 the applicable of Harper should apply to the plea context,
17 as well.

18 CHIEF JUDGE DIFIORE: Thank you, Mr. Hausman.

19 MR. HAUSMAN: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel.

21 MS. FELDMAN: May it please the court, my name is
22 Sheryl Feldman. I'm here on behalf of the People.

23 JUDGE STEIN: Counsel, on - - - on this
24 particular issue, I - - - I looked at our decisions in
25 Hightower and Dumay, and they appear to implicitly reject



1 your argument and - - - because the - - - actually, maybe
2 it was - - - I think they implicitly rejected the argument
3 that - - - that the challenge that - - - because they
4 reviewed the sufficiency of the challenged misdemeanor
5 charge, I'm sorry, even though there were unchallenged
6 misdemeanor charges in the accusatory instrument. So why
7 doesn't that indicate no, no, no, we have to look at the
8 equal charge that was being pled to rather than say, okay,
9 well, these other charges are fine so - - - so we have
10 jurisdiction?

11 MS. FELDMAN: The very simple answer to your
12 question, Your Honor, is we never made that argument, the
13 argument that I'm making now. I have no idea why. Had
14 they made that argument the court would have considered it.
15 It wasn't made. The argument that was made was that
16 automatically, regardless of whether there's one count,
17 multi-counts, a defendant automatically forfeits this claim
18 when he pleads guilty. And that's not the rule that we're
19 asking for here.

20 JUDGE STEIN: So then does the - - - the court
21 have to look every - - - every time a plea to an equal
22 charge is made, look to - - - to make sure that there's
23 this sufficiency of some other charge?

24 MS. FELDMAN: What you have to make sure of is
25 that the court had jurisdiction over the prosecution of



1 this case and over the defendant. And by not challenging
2 the - - - the trespass charges, the defendant, in fact,
3 conceded that the - - - that the court had jurisdiction
4 over the prosecution of this case and therefore, the
5 statute allows - - - it's not a jurisdictional defect. The
6 - - - the statute allows a defendant to plead guilty to one
7 charge to cover the others. And as Judge Feinman - - -

8 JUDGE STEIN: Where does the statute say you can
9 plead guilty to an equal charge, though?

10 MS. FELDMAN: Oh, yeah. It's - - - okay. This -
11 - - the pleading statute which is - - - unfortunately, I
12 don't have - - - I had it right in front of me. There's a
13 - - - there's a statute that says that it lists the
14 permissible pleas that - - - that a person can take, and in
15 that statute, it says that you may plead guilty to one
16 count to cover the other counts which is exactly what this
17 defendant did. What it says in that same statute is that
18 you can't plead guilty to a lesser crime unless it's in a -
19 - - a real lesser included offense and that's what happened
20 in Keizer.

21 That was the challenge in Keizer. They said this
22 isn't an official lesser included offense, and there's
23 absolutely no facts in this complaint that support the
24 charge of disorderly conduct. So the - - - the court did
25 not have jurisdiction to take that plea. It's a



1 jurisdictional defect. And Keizer said, no, wrong.
 2 Jurisdiction was obtained in the charges that you're not
 3 challenging so that you forfeit that claim that the charge
 4 that you pled guilty to was not sufficiently pled in the
 5 complaint. This is identical. It's really identical to
 6 Keizer. Keizer doesn't say only in - - - when - - - if
 7 you're pleading to a lesser crime because as Judge Feinman
 8 also pointed out there are many reasons why a defendant
 9 would prefer to plead to one crime rather than another.

10 JUDGE RIVERA: Can I just ask are you making a
 11 distinction between personal and subject matter
 12 jurisdiction or - - -

13 MS. FELDMAN: No.

14 JUDGE RIVERA: - - - that doesn't matter here or
 15 - - -

16 MS. FELDMAN: I'm - - -

17 JUDGE RIVERA: While personally you can waive
 18 subject matter, you generally can't. So I'm just trying to
 19 understand - - -

20 MS. FELDMAN: I - - - they had - - -

21 JUDGE RIVERA: - - - what your argument is.

22 MS. FELDMAN: No, my argument is that they had
 23 jurisdiction over the prosecution of the defendant being in
 24 a building, trespassing in a dwelling, with a gravity knife
 25 in his pocket that he admittedly intended to use a weapon.



1 JUDGE FEINMAN: This one was a box cutter,
2 actually.

3 MS. FELDMAN: I'm sorry?

4 JUDGE FEINMAN: This one I think is a box cutter.

5 MS. FELDMAN: Is that what I said? No, I didn't
6 say that?

7 JUDGE FEINMAN: You said gravity knife.

8 JUDGE RIVERA: You said gravity knife.

9 MS. FELDMAN: Oh, I'm sorry. All that gravity
10 knife talk.

11 JUDGE FEINMAN: Yeah, but I - - - I didn't mean
12 for that to be - - -

13 JUDGE STEIN: That's a whole other animal.

14 MS. FELDMAN: Yeah, I'm sorry. No, that he
15 admittedly - - - he admitted I'm not going to use this to
16 cut boxes. I'm carrying it on the train for protection.
17 He was using - - - he was carrying it for - - - to use as a
18 weapon. So it's all one transaction, and to cover the
19 prosecution of that entire transaction - - -

20 JUDGE STEIN: Does that make a difference? What
21 if it wasn't the - - - the same transaction? What if the
22 trespass took place on a completely other - - - other day?

23 MS. FELDMAN: Well, then they wouldn't be
24 joinable. It wouldn't be in the same complaint. I mean -
25 - -



1 JUDGE RIVERA: But - - - but your argument - - -

2 MS. FELDMAN: - - - it was properly joined in
3 this complaint because it was all part of one transaction.
4 Francis says what you need is time and place and victim, if
5 - - - if that applies, which it doesn't here.

6 JUDGE RIVERA: But - - - but your argument is
7 regarding jurisdiction over this person's violation based
8 on the charge, right? It's that charge, that count, that
9 you're talking about?

10 MS. FELDMAN: Yeah. Yeah. And in fact, I mean
11 it would be almost insane to think that - - -

12 JUDGE RIVERA: So - - - so your position is
13 that's waivable?

14 MS. FELDMAN: That - - - yes.

15 JUDGE RIVERA: Jurisdiction is waivable?

16 MS. FELDMAN: It's forfeited by his guilty plea
17 is my position just like in Keizer. Just like in Keizer.
18 It's forfeited. He can't raise the sufficiency of that
19 particular count because he forfeited when he chose to
20 plead guilty. If he didn't choose to plead guilty, then -
21 - - and he actually raised this below - - - I'm saying you
22 can't raise this for the first time on appeal. He actually
23 raised it below and - - - and didn't jump on getting - - -

24 JUDGE FEINMAN: So - - - so what would have
25 happened. Let's say he didn't jump on the ten days and he



1 said - - - so - - - but he moved to dismiss the 265.01 and
2 the - - - couple things could have happened, right?

3 MS. FELDMAN: Right.

4 JUDGE FEINMAN: The judge could say, yep, I'm
5 striking that and now we only have three charges left.

6 MS. FELDMAN: But the judge didn't do that.

7 JUDGE FEINMAN: Or the judge could have said make
8 that motion in writing and I'll think about it. Or you're
9 right, but I'm going to give the People time to supersede.
10 All of those things could have happened at the arraignment
11 or at a subsequent appearance in the all-purpose part.

12 MS. FELDMAN: Exactly. Or we could file a
13 supporting deposition with extra facts.

14 JUDGE FEINMAN: So my question - - - or you could
15 have cured it with a supporting deposition. But I just
16 want to be clear about one thing going back to you're not
17 claiming here that this was a dangerous knife. You're
18 saying it was a dangerous instrument?

19 MS. FELDMAN: No, well, a dangerous knife is a
20 dangerous instrument under the statute - - -

21 JUDGE FEINMAN: Just, you know, because the
22 accusatory part, the first paragraph of this particular
23 complaint.

24 MS. FELDMAN: Correct.

25 JUDGE FEINMAN: I know what the statute says.



1 MS. FELDMAN: Right.

2 JUDGE FEINMAN: But the question is how you wrote
3 it in this particular - - - you know, whether there's a
4 drafting error that made a <indecipherable> - - - you may
5 be stuck with that.

6 MS. FELDMAN: Well, I don't - - - I don't think
7 that we're stuck with it because if you look at the actual
8 statute, you know, 265, it says "or other dangerous
9 instrument." So - - - so the fact is that a dangerous
10 knife is a dangerous instrument.

11 JUDGE RIVERA: Okay. But - - - but isn't - - -
12 maybe I misunderstood.

13 MS. FELDMAN: Sure.

14 JUDGE RIVERA: I - - - isn't the People's
15 position that if it's a dangerous knife the presumption is
16 it's with intent to use but if it - - - if you're charging
17 as a dangerous instrument you have to have some other
18 assertion in the - - - in the - - - in the charge to give
19 you a factual basis for intent?

20 MS. FELDMAN: Our position is that a dangerous
21 knife is a dangerous instrument and if in fact - - -

22 JUDGE RIVERA: Well, everything that's listed
23 there - - -

24 MS. FELDMAN: - - - you have the - - -

25 JUDGE RIVERA: - - - would be a dangerous



1 instrument.

2 MS. FELDMAN: I'm sorry?

3 JUDGE RIVERA: Everything that's listed there. A
4 dagger's a dangerous - - - I mean isn't that the point?

5 MS. FELDMAN: Correct.

6 JUDGE RIVERA: Okay.

7 MS. FELDMAN: Yes.

8 JUDGE RIVERA: But that's not what - - - I - - -
9 I thought the People's argument was, as I think Judge Fahey
10 unless I misunderstood him was clarifying in the prior
11 case, that if you establish it's a dangerous knife - - -

12 MS. FELDMAN: Right.

13 JUDGE RIVERA: - - - the presumption is it's for
14 the intent to use unlawfully.

15 MS. FELDMAN: Absolutely.

16 JUDGE RIVERA: But if you charge it as a
17 dangerous instrument you have to have some other factual
18 assertion to establish or - - - or to get reasonable cause
19 for the intent to use the same unlawfully.

20 MS. FELDMAN: I would use - - -

21 JUDGE RIVERA: Am I misunderstanding you?

22 MS. FELDMAN: - - - or other dangerous
23 instrument.

24 JUDGE RIVERA: Yes.

25 MS. FELDMAN: Our position is - - -



1 JUDGE RIVERA: Yes.

2 MS. FELDMAN: - - - this is a dangerous knife.
3 This is a dangerous - - - he admits it's a utility knife.
4 And the defendant says - - - that's what a box cutter is,
5 in effect, a utility knife. There's no question that he
6 had notice of what we were talking about here. We're
7 talking about a utility knife that - - -

8 JUDGE FEINMAN: All right. So - - - so if your
9 claim is it's a dangerous knife - - -

10 MS. FELDMAN: Yes.

11 JUDGE FEINMAN: - - - what do I do with the fact
12 that the words "dangerous knife" don't - - - don't appear
13 in this complaint?

14 MS. FELDMAN: I don't think that matters. I
15 honestly don't think that matters. He has notice - - -

16 JUDGE WILSON: The - - - the presumption in
17 265.15(4) when it discusses an instrument requires the
18 instrument be: "Designed, made, or adapted for use
19 primarily as a weapon" which is not - - - that doesn't
20 attach to a dangerous knife.

21 MS. FELDMAN: Absolutely not. But I'm saying
22 that the fact that we left the word "dangerous knife" out
23 of the accusatory instrument doesn't mean that we didn't
24 plead that the defendant had a dangerous knife. We said
25 that he had a box cutter. A box cutter is a utility knife.



1 JUDGE FEINMAN: Yeah, but doesn't - - - you know,
2 I don't remember the exact section, is it 100.40 that tells
3 you what you have to have in the complaint and you have to
4 have two parts. You have to have - - -

5 MS. FELDMAN: Right.

6 JUDGE FEINMAN: - - - the accusatory part, you
7 know, that lays out - - -

8 MS. FELDMAN: Right.

9 JUDGE FEINMAN: - - - the particular statute and
10 you have to have the factual portion. And so I guess what
11 I'm focusing you on now is if there's a defect in the first
12 part, the accusatory part, what's the consequence of that?

13 MS. FELDMAN: Which could have been cured. That
14 - - -

15 JUDGE FEINMAN: I don't have any problem saying
16 that it's curable, but you didn't cure it and - - -

17 MS. FELDMAN: Well, we didn't cure it because he
18 pled guilty at arraignment.

19 JUDGE FEINMAN: Okay.

20 MS. FELDMAN: We - - - we were deprived of the
21 opportunity.

22 JUDGE FEINMAN: So - - - so the question is is
23 that - - - that something that Alejandro and all the cases
24 that come after that is - - - makes it defective and a loss
25 of jurisdiction?



1 MS. FELDMAN: No, no. They - - - there was
2 jurisdiction in this case.

3 JUDGE FEINMAN: Because of your Keizer argument.

4 MS. FELDMAN: Absolutely.

5 JUDGE FEINMAN: Okay. So what is the remedy if I
6 don't - - - you know, we don't agree with you that, you
7 know, we can overlook this omission in the accusatory part?
8 It's just, yeah, defendant, you're right, but it's a
9 Pyrrhic victory because we have jurisdiction and Keizer
10 applies.

11 MS. FELDMAN: Absolutely. My position is that
12 under forfeiture rules under Keizer it didn't matter. In
13 Keizer there was no facts - - - disorderly conduct was not
14 charged at all. There was zero facts supporting the charge
15 of disorderly conduct. So - - -

16 JUDGE FEINMAN: And from a systemic point of view
17 - - -

18 MS. FELDMAN: Well, exactly.

19 JUDGE FEINMAN: - - - this is what happens every
20 day.

21 MS. FELDMAN: It happens every day. And the fact
22 of the matter is - - -

23 JUDGE FEINMAN: Of course that doesn't always
24 make it right.

25 MS. FELDMAN: - - - the defendant could go to



1 trial.

2 JUDGE STEIN: Yeah, my concern is that if the
3 statute doesn't permit it are we encouraging - - -

4 MS. FELDMAN: Yeah, the - - -

5 JUDGE STEIN: - - - courts to accept pleas that
6 are not - - - not permissible under the - - -

7 MS. FELDMAN: What - - - no, the statute permits
8 it. The statute permits you to plead guilty to any charge
9 that's in the complaint - - -

10 JUDGE FAHEY: Can I - - - can I - - -

11 MS. FELDMAN: - - - to cover the others.

12 JUDGE FAHEY: I know you're out of time, but just
13 one step back just to clarify.

14 MS. FELDMAN: Sure.

15 JUDGE FAHEY: - - - in my own mind. The
16 defendant's argument is - - - is you're saying - - - your
17 jurisdictional argument is is that the court didn't have
18 jurisdiction or that they - - - or their - - - or are they
19 saying that the court didn't have jurisdiction or are - - -
20 are you saying that once they waived or once they pled the
21 jurisdiction was gone?

22 MS. FELDMAN: What jurisdiction? I'm - - - I'm
23 sorry, Your Honor.

24 JUDGE FAHEY: Yeah.

25 MS. FELDMAN: I'm not understanding your



1 question.

2 JUDGE FAHEY: All right. All right. My question
3 is the jurisdictional argument.

4 MS. FELDMAN: Yes.

5 JUDGE FAHEY: Did we lose jurisdiction over this
6 case ever?

7 MS. FELDMAN: Never.

8 JUDGE FAHEY: All right. So we have jurisdiction
9 - - -

10 MS. FELDMAN: And that's what - - -

11 JUDGE FAHEY: All right. So it's non-waivable.
12 That's the way it's always been and it - - - it always is
13 all the way through, right?

14 MS. FELDMAN: What - - - what Keizer says is that
15 once jurisdiction over the prosecution of the defendant is
16 established it's not subsequently abrogated by a supposed
17 pleading defect in the charge that he pled guilty to. It
18 said you don't have to look at the accusatory - - -

19 JUDGE FAHEY: Let me - - - let me just - - -

20 MS. FELDMAN: - - - instrument - - -

21 JUDGE FAHEY: Whoa, whoa. Slow down.

22 MS. FELDMAN: Yeah.

23 JUDGE FAHEY: So - - - but if the instrument upon
24 which you're being charged is jurisdictionally defective
25 then there's no jurisdiction.



1 MS. FELDMAN: But it's not jurisdictionally
2 defective.

3 JUDGE FAHEY: It - - - I understand your argument
4 but it doesn't erase the fact that we have to address the
5 jurisdictional argument, right?

6 MS. FELDMAN: Absolutely you do.

7 JUDGE FAHEY: Okay.

8 MS. FELDMAN: And in fact, just to address
9 counsel's question about how you're not allowed to - - -

10 JUDGE FAHEY: Right.

11 MS. FELDMAN: - - - you have to. In fact, in
12 Casey, if you look at Casey the same thing that happened
13 here. In Casey, this court - - - the Appellate Term said -
14 - - well, you know, it was a challenge to an accusatory
15 instrument on a supposed hearsay defect. And - - - and the
16 Appellate Term said, well, no, he waived prosecution by
17 information. And this court said no, we disagree with
18 that. We're going to decide it on different grounds and
19 the grounds are that hearsay is not a jurisdictional defect
20 and so the defendant has to raise it below.

21 JUDGE FAHEY: Well, that's different. The
22 sufficiency of the instrument initially was - - - that's a
23 - - - that's an entirely different matter.

24 MS. FELDMAN: Yeah.

25 JUDGE FAHEY: Yeah.



1 MS. FELDMAN: This court always has to have
2 jurisdiction to consider a claim. Our claim is that this
3 court doesn't because he - - - he forfeited this claim by
4 his plea. So you have to reach that first before you - - -

5 JUDGE FAHEY: I can't say that I - - -

6 MS. FELDMAN: - - - can even consider it.

7 JUDGE FAHEY: I - - - either we have jurisdiction
8 or we don't, and it doesn't seem to me like we - - - and
9 even though he pleads, it's as a defect in the instrument.
10 It's non-waivable jurisdictionally. You're saying it's
11 waivable.

12 MS. FELDMAN: I - - - I'm saying there's no
13 jurisdictional defect in this complaint. If you look at
14 Keizer, that's what Keizer says. It's not a jurisdictional
15 - - -

16 JUDGE FAHEY: I get that.

17 MS. FELDMAN: - - - defect.

18 JUDGE FAHEY: No, I get that. I get that. I'm
19 all right with that. I understand what you're saying.

20 JUDGE FAHEY: Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MS. FELDMAN: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MR. HAUSMAN: If I could make a few points on the
25 Keizer Harper procedural question. One is that I'd like to



1 read this language from Keizer which says: "In the
2 circumstances alleged here, there was no statutory - - -
3 there was - - - there was no statutory non-compliance
4 rising to the level of a jurisdictional defect, see Harper,
5 thwarting defendant's plea to a lesser crime not included
6 in the accusatory instrument." And it's earlier just
7 mentioned that it's a non-criminal offense. So I think the
8 notion that, you know, once you have a valid charge in an
9 accusatory instrument like all bets are off is not true.

10 This was a narrow decision that you have a valid
11 charge. You're pleading to a lesser so that's different
12 than pleading to a co-equal charged offense. You're
13 pleading to a non-criminal offense. And under those
14 circumstances, the sort of technical violation of the
15 plead-down statute, 220.20 wasn't a defect that rises to
16 the level of a jurisdictional violation. And I think that
17 sort of more narrow reading of Keizer is consistent with
18 this court's history of treating these cases with multi-
19 count accusatory instruments like Judge Stein was
20 mentioning, Hightower, Dumay, Dreyden, Kalin, you know,
21 where there are a lot of - - - there are several counts but
22 there's a count to which the defendant pleads guilty and
23 that's the one that's challenged on appeal. And
24 historically that's the count that this court has
25 addressed. Now - - -



1 JUDGE RIVERA: I take it you disagree with her
2 position that the jurisdiction's waivable?

3 MR. HAUSMAN: That's correct. I - - - I think
4 that either it's a jurisdictional issue - - -

5 JUDGE RIVERA: Or forfeited, excuse me.

6 MR. HAUSMAN: Right.

7 JUDGE RIVERA: Using her terminology forfeited.

8 MR. HAUSMAN: Either it's a jurisdictional issue
9 or it's not. In Keizer it wasn't because it was really
10 viewed as a de minimis violation of this lesser plea
11 statute and they took into account the fact that it was a
12 lesser plea, it was a non-criminal disposition. This is
13 different. This is like Hightower, this is like Dumay, and
14 - - - and I - - -

15 JUDGE STEIN: So let's assume that you're right
16 and so now we have to make the decision as to whether the
17 same analysis should apply because it's never been - - - we
18 have never directly addressed it maybe.

19 MR. HAUSMAN: Right.

20 JUDGE STEIN: To this situation where we have co-
21 equal charges.

22 MR. HAUSMAN: Right.

23 JUDGE STEIN: What are - - - what are the reasons
24 why we shouldn't apply the same analysis as we did in
25 Keizer?

1 MR. HAUSMAN: I - - - I think the reasons are
2 because of the systemic reasons I pointed to because when a
3 defendant is - - - thinks he's pleading to a charge that's
4 jurisdictionally valid, the sort of - - - the integrity of
5 the system and the fairness of the defendant require that
6 that charge be supported by fact so that that conviction
7 which the defendant is going to live with - - -

8 JUDGE FEINMAN: Let - - - let's say, you know,
9 the defendant's charged with burglar's tools and, you know,
10 also auto stripping and, you know, some other charge and it
11 turns out that third charge, possession of a controlled
12 substance, all right. And he says to the judge I don't
13 want to plead to the burglar's tools and I don't want to
14 plead to the auto stripping because after all if I get
15 another auto stripping it can be a felony the next time
16 around. But it turns out, you know, that the 220.03 that
17 he pleads guilty to was insufficient. Why isn't, you know,
18 from a systemic point of view - - - a negotiated plea, the
19 defendant's getting some benefit there. Why isn't that
20 okay?

21 MR. HAUSMAN: Well, because I think the larger
22 systemic concerns that I pointed to outweigh the fact that
23 in specific cases you might say, oh, well, you know, maybe
24 - - - maybe the - - - you know, maybe everyone was fine in
25 that situation. I think there's a systemic importance to



1 knowing that, you know, hundreds of thousands of people are
2 prosecuted, right, every year in New York City. They go -
3 - - many of them at arraignment are making the choice
4 between pleading guilty to the charged offense or spending
5 several months in jail.

6 And I think there's an important safety valve
7 integrity piece of the facial sufficiency requirement that
8 says that - - - like that ensures that overall the crime to
9 which we're pleading guilty, you know, is - - - is
10 jurisdictionally valid. It's supported by facially
11 sufficient facts. I think it's consistent with Hightower
12 and Dumay and this court's - - - the way this court has
13 treated multi-count accusatory instruments is to say that
14 the count to which you plead guilty, you know, with the
15 exception of lessers which are - - - really are
16 piggybacking jurisdictionally off the charged offense that
17 that is important to the integrity of the system that you
18 apply the - - - the Harper analysis which is that if it's a
19 charged - - - you know, for a charged offense that you're
20 going to be convicted of that there - - - that that offense
21 be jurisdictionally valid.

22 JUDGE RIVERA: Your light is off so I just have a
23 quick question. Are - - - are you in agreement with this
24 interpretation that 265.01(2), if - - - if they've charged
25 that it's a dangerous knife that there's a presumption of



1 the intent that applies?

2 MS. FELDMAN: So if they had charged it as a
3 dangerous knife and if this box cutter qualified as a
4 dangerous knife, the presumption would at least
5 theoretically apply from the outset. We argue and I think
6 the presumption is irrational in this case because you're
7 joining possession of a lawful object with unlawful intent
8 and we think it's irrational to apply that presumption.

9 We also - - - I know I'm going over my time but
10 if I could just for a moment discuss Jamie D.? Because I
11 think it's important just to discuss the - - - the
12 definition of dangerous knife and the origin of it in Jamie
13 D. Because Jamie D. was writing, in some sense, on a clean
14 slate because dangerous knife is undefined.

15 And so Jamie D. said some knives are
16 presumptively so dangerous that - - - that they're like
17 daggers and stilettos. I don't think a box cutter is like
18 that. I don't think anyone really argues that. But then
19 there's also then - then citing to the definition of
20 dangerous instrument the court in Jamie D. said but there
21 also could be use based situations where possession of
22 something that's otherwise a tool becomes a dangerous
23 knife.

24 And I think it's important to look at that
25 "dangerous instrument" definition that Jamie D. is relying



1 on to establish this use-based definition. Because if you
2 look at the statutory-based definition of a dangerous
3 instrument it's - - - it's an item that used or intended to
4 be used or threatened to be used, you know, in - - - in
5 this way as a weapon. And there - - - and in the case law
6 regarding dangerous imminence there's also an imminence
7 requirement. And so - - - and so in Jamie D. you had
8 someone who had just committed a crime. He's being chased
9 by the police. He grabs his belt, there's a knife there,
10 he refuses to bring his hand out. So under those
11 circumstances he's threatening its immediate use.

12 Now in this case where you're talking about, you
13 know, I carry for protection, you're not - - - you're
14 talking about a different situation. You're talking about
15 a future use, but you're also talking about conditional
16 use. You're saying that I may use it, you know, if the
17 situation arises where I can lawfully use it. And also
18 most importantly, you're talking about a lawful use because
19 when you're talking about a future prospective use of
20 something to protect yourself, you know, it's - - - it's
21 possible to act - - - you know, to sort of try to act in a
22 justifiably way - - - justifiable way and not succeed.

23 But the goal of protecting oneself in the future
24 is a lawful goal, and so I think it's important to go back
25 to the root definition of a dangerous knife in Jamie D. and



1 not read it so broadly to say that, oh, I consider it a
2 weapon and therefore it's a dangerous knife.

3 And just to end with one important point, to go
4 back to one of these examples which is that, you know, if
5 my niece is in her apartment in Brooklyn and she hears that
6 there's been a series of burglaries in their neighborhood
7 and so she takes her pen knife or her X-ACTO knife and puts
8 it on her nightstand, I don't think I have to tell her that
9 she can't do that because she might get arrested. She'll
10 have a great defense at trial. But you know - - -

11 JUDGE GARCIA: What if she's trespassing in the
12 lobby of the - - - should you tell her then you probably
13 shouldn't carry a knife if you're trespassing because you
14 might get arrested?

15 MR. HAUSMAN: I think that the trespassory aspect
16 of this case - - - that the problem with relying on that is
17 it's just simply not connected I think factually to
18 possession of the knife. And in that regard, it's very
19 much like the matter of Ricci S., which is a case that
20 Judge Fahey referred to earlier from this court. In that
21 case, Ricci S. had a hunting knife, and he was arrested,
22 you know, coming into a drug den. And - - - and yet the
23 court said not a dangerous knife because there was no
24 connection. It had it on him but there was no apparent
25 evidence that he was possessing that knife in a manner that

1 was connected with - - - with his maybe going there to
2 purchase drugs or whatever he was doing.

3 he court said no, that's not enough. If that's
4 not enough, you know, then I - - - I think it can't be the
5 case that your sort of awareness or you're - - - you're
6 even like temporarily using something or using something
7 for protective purposes that's lawful like the niece in the
8 apartment who puts the X-ACTO knife at the nightstand, like
9 the fact that she now considers it a weapon, that's far too
10 broad a standard. And it's way too subjective and
11 problematic if on the basis of triggering a presumption
12 unlawful intent.

13 And so I really urge the court to go back to
14 Jamie D. when you - - - when you're wrestling with how to
15 define dangerous knife and - - - and use the definition
16 that like dangerous instrument, which it's derived from, is
17 one that involves the use, attempted use, or threatened use
18 in an imminent way. Because don't forget if there's actual
19 evidence of intent to use unlawfully, you know, then you're
20 going to be able to make out the - - - the allegations
21 easily. But you really shouldn't use this - - - this
22 triggering the presumption for dangerous knives lightly.

23 CHIEF JUDGE DIFIORE: Thank you, sir.

24 MR. HAUSMAN: Thank you, Your Honors.

25 MS. FELDMAN: I know this is unconventional, but



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

if I could point Judge Stein to the - - - the statute that she had asked for.

CHIEF JUDGE DIFIORE: She's aware of it. Thank you.

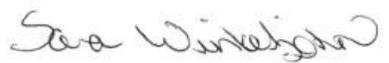
(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. Albert Edward, No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: January 11, 2018

