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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

No. 74

MOUHAMED THIAM,

Respondent.

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20 Eagle Street  
Albany, New York  
September 10, 2019

Before:

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The third appeal on this  
2 afternoon's calendar is appeal number 74, The People of the  
3 State of New York v. Mouhamed Thiam.

4 Good afternoon, counsel.

5 MS. KULKARNI: Good afternoon, Your Honors. May  
6 it please the court, my name is Katherine Kulkarni, and I  
7 am here on behalf of the appellant, the People of the State  
8 of New York. At this time I would respectfully request two  
9 minutes for rebuttal.

10 CHIEF JUDGE DIFIORE: Of course.

11 MS. KULKARNI: Thank you. Because the defendant  
12 was charged in a misdemeanor complaint with at least one  
13 facially sufficient misdemeanor count, the criminal court  
14 had jurisdiction over his prosecution and was therefore  
15 authorized to accept his guilty plea to seventh degree  
16 possession of a controlled substance, even if that charge  
17 was not sufficiently pled.

18 JUDGE STEIN: There are a lot of terms being  
19 thrown around here. There's "personal jurisdiction",  
20 there's "trial jurisdiction", there's "subject matter  
21 jurisdiction", and then on top of all that there are "mode  
22 of proceedings errors". How do you differentiate between  
23 those, and what do you think we're - - - we're looking at  
24 here?

25 MS. KULKARNI: Sure. So we're looking at



1 prosecution - - - or sorry, jurisdiction over the  
2 defendant's prosecution. And for our purposes, subject  
3 matter juris - - -

4 JUDGE FAHEY: Is that really correct? Aren't you  
5 really looking at jurisdiction over the person as opposed  
6 to jurisdiction over the crime here? Isn't there a  
7 distinction drawn between an accusatory instrument and a  
8 prosecutorial - - - or a prosecutable instrument? And here  
9 we're talking about the fundamental misdemeanor complaint  
10 which is an accusatory instrument which gives the court  
11 control over the person?

12 MS. KULKARNI: That's correct, Your Honor. And  
13 so, for our purposes, personal jurisdiction and subject  
14 matter jurisdiction are one and the same, and they are both  
15 established with the filing of a valid misdemeanor  
16 complaint.

17 JUDGE FAHEY: But that's not what the CPL sets  
18 out. The CPL does not set out a situation where personal  
19 jurisdiction and subject matter jurisdiction are the same.  
20 Let me give you an example. I was a city court judge when  
21 I first became a judge, and all the time we would - - -  
22 they would bring in people for felony hearings or people  
23 that had been arrested for felonies, and I would arraign  
24 them. I had jurisdiction over their person to arraign  
25 them. I had no jurisdiction to hear the case at all or to



1           decide the case at all. I had no jurisdiction over the  
2           crime, over the subject matter; I only had jurisdiction  
3           over the person to set bail on them, to set it down for a  
4           felony hearing, or refer it to the grand jury.

5                        So -- so the CPL seems to clearly contemplate a  
6           difference. And each court's jurisdiction, based on the --  
7           the size of the court and the jurisdiction of the court,  
8           will change. But so that fundamental distinction here, the  
9           way I understand it is we're talking about the basis for  
10          that distinction. And the way I understand defendant's  
11          argument is you may have jurisdiction over the person,  
12          maybe, but - - - they say you don't even have that, but you  
13          clearly don't have jurisdiction over the crime here.

14                       MS. KULKARNI: Nowhere in the CPL is the term  
15          "subject matter jurisdiction" mentioned. It just generally  
16          mentions - - -

17                       JUDGE FAHEY: That's true.

18                       MS. KULKARNI: So - - - so respectfully, there is  
19          no - - - the CPL doesn't stand for this distinction that my  
20          adversary is trying to make.

21                       JUDGE FAHEY: So you would say that - - -

22                       MS. KULKARNI: And in fact, in Keizer - - -

23                       JUDGE FAHEY: Well, let me just get this clear.

24                       MS. KULKARNI: Sure.

25                       JUDGE FAHEY: You would say that, for



1 jurisdictional purposes, you have both jurisdiction over  
2 the person and over what that person is charged with, once  
3 you establish that you have jurisdiction?

4 MS. KULKARNI: That's correct, because subject  
5 matter jurisdiction, there's absolutely no support for a  
6 finding that it is specific to each offense charged in the  
7 complaint. In fact, this court's decision in Keizer,  
8 couldn't exist if that - - - if that were the rule, because  
9 this court held that the filing of a valid misdemeanor  
10 complaint gave the court jurisdiction over the defendant's  
11 prosecution.

12 JUDGE FAHEY: How about some other cases like  
13 Hightower, Dreyden?

14 MS. KULKARNI: Sure. Well, Hightower,  
15 unfortunately we didn't make the - - - the argument that  
16 we're making now in Hightower; we made a different  
17 argument. But again, because we didn't make the argument  
18 in Hightower that we're making now, extending Keizer to  
19 this case does not require the court to overrule Hightower.  
20 But back - - -

21 JUDGE STEIN: But what was the argument - - -

22 JUDGE FEINMAN: So how would you - - -

23 JUDGE STEIN: - - - in Hightower?

24 JUDGE FEINMAN: I'm sorry. Yeah, how would you  
25 get around Hightower?



1 JUDGE STEIN: Yeah, what was the argument that  
2 was made in Hightower? What was that about if it wasn't  
3 about this?

4 MS. KULKARNI: So the argument we made in  
5 Hightower was, regardless of whether there's one  
6 sufficiently-pled count in a misdemeanor complaint, the  
7 defendant forfeits his right to make a facial sufficiency  
8 challenge by pleading guilty.

9 Here we're saying where there is one  
10 sufficiently-pled count in a misdemeanor complaint, that  
11 gives the court jurisdiction to accept the defendant's  
12 guilty plea to any count in the complaint, regardless of  
13 whether it's sufficiently pled. And because this -- this  
14 isn't a jurisdictional issue and the court has  
15 jurisdiction, by pleading guilty, the defendant forfeits  
16 his right to challenge the facial sufficiency of the crime  
17 to which he pled guilty - - -

18 JUDGE STEIN: But didn't - - -

19 MS. KULKARNI: - - - like he does most claims.

20 JUDGE STEIN: But didn't Hightower ultimately  
21 rest on the - - - on the question of whether the - - - the  
22 complaint should be dismissed or remitted as to whether  
23 there was a - - - a penological purpose under Allen to - -  
24 - to - - - you know, to -- to do it over, or - - - or just  
25 - - - or not?

1 MS. KULKARNI: Well - - -

2 JUDGE STEIN: Isn't that what that whole  
3 dismissal thing was about in Hightower?

4 MS. KULKARNI: In Hightower the court just  
5 considered the sufficiency of the offense to which the  
6 defendant pled guilty, said it's insufficient, because this  
7 is the offense to which the defendant pled guilty, we don't  
8 need to look to these other offenses in the account,  
9 therefore dismissed - - - or sorry, in the complaint,  
10 therefore dismissed. So the court did not actually  
11 consider the argument that we're making now.

12 JUDGE GARCIA: Hightower, to me, also seemed to  
13 be a different challenge to the count itself. And granted,  
14 some of our cases are a little bit here, a little bit  
15 there, but in Hightower I thought the problem with the  
16 count that was pled to was that, even assuming the  
17 allegations as in the complaint, you couldn't show that the  
18 money that was taken from the swipes belonged to the  
19 transit authority. So even assuming all of that, it was  
20 legally insufficient, in a way, to prove the crime charged,  
21 even if you accepted what was being said.

22 In this case, it seems it's more of a traditional  
23 hearsay challenge, but one of our hearsay categorized as by  
24 the police officer hearsay, right? So the question is:  
25 when you plead to that, with a legally sufficient charge -



1           - - and assume for the moment -- I know they're challenging  
2           it -- that the marijuana charge is legally sufficient.

3                   MS. KULKARNI:   Um-hum.

4                   JUDGE GARCIA:   But assume it is, would we apply  
5           that same rule on waiver, when you plead to a misdemeanor,  
6           if assuming what was alleged would make out a crime?  That  
7           seems to me the difference with Hightower.

8                   MS. KULKARNI:   Yeah, I think that's an important  
9           distinction.  And as Your Honor highlighted, here there's  
10          no reason to believe that we couldn't have amended the  
11          complaint to include more detailed allegations.  The  
12          officer wrote that, based upon his training and experience,  
13          he knew the pills were Oxycodone, so we have every reason  
14          to believe he could have explained how he knew, even though  
15          it wasn't in the complaint and they were --

16                   JUDGE GARCIA:   I mean, I guess the argument would  
17          be in Hightower you couldn't do that because the money just  
18          didn't belong to the Transit Authority.

19                   MS. KULKARNI:   Right, we don't have that  
20          situation here.  And by the way, the defendant pled guilty  
21          to this crime, so he admitted that he was guilty of  
22          possessing Oxycodone.  So this isn't a case where we're  
23          worried about the People overcharging the defendant with  
24          the crime because, point blank, he pled guilty and admitted  
25          his guilt to it.



1 JUDGE WILSON: Dreyden seems just like this case  
2 but for one thing, and maybe there's others I haven't  
3 anticipated, but the difference to me seems to be that the  
4 validly-pleaded allegation there related to a violation  
5 rather than to a misdemeanor. Does that make a purpose for  
6 jurisdiction, and if so, why?

7 MS. KULKARNI: It does, Your Honor, because under  
8 the - - - the CPL expressly authorizes a defendant to plead  
9 guilty to any count in the complaint in satisfaction of the  
10 entire complaint. It doesn't mention anything about the  
11 class of a misdemeanor. So under the jurisdictional rule  
12 we're advocating for, and under the plain words of the CPL,  
13 it has to be a misdemeanor count to give the court  
14 jurisdiction to accept a guilty plea to an insufficiently  
15 pled misdemeanor count.

16 JUDGE STEIN: Let's say we think and we agree  
17 that in fact there was a violation of CPL Article 220 here.  
18 Why is that violation - - - why does that violation not  
19 rise to the level of a nonwaivable violation?

20 MS. KULKARNI: Sure. Well, first of all, I would  
21 like to disagree with this being a violation of the CPL.  
22 It's actually expressly authorized by the CPL.

23 And finding that this is not a jurisdictional  
24 defect is in line with the legislative intent behind the  
25 pleading requirements as set forth in CPL, the way to cure



1 a pleading defect, and also the legislative principle that  
2 plea bargains are intended to be final. The legislature  
3 has made clear that where defendant - - - may I continue?  
4 I see my time is up.

5 CHIEF JUDGE DIFIORE: Yes, please.

6 MS. KULKARNI: The legislature has made clear  
7 that where a defendant has pled guilty, he forfeits most  
8 claims, and only the narrowest class of claims are an  
9 exception to that.

10 Under the CPL, because we have these specific  
11 provisions in place that require a defendant to move to  
12 dismiss the accusatory instrument before sentencing and  
13 that provide that an accusatory instrument should be  
14 amended - - - should not be dismissed if it can be amended,  
15 the legislature made clear that it intended pleading  
16 deficiencies to be litigated before a defendant pleads  
17 guilty. And by not litigating these pleading deficiencies  
18 early on, as the defendant chose not to do in this case,  
19 and instead accept a favorable plea deal that was a very  
20 good disposition for him, the legislature could not  
21 possibly have intended for, years later, the defendant  
22 having received that favorable disposition, to then move to  
23 dismiss - - - erase the entire thing just because - - - on  
24 the grounds that the court never had the authority to  
25 accept his plea in the first place.



1 Thank you very much.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 Counsel?

4 MR. PAGE: Good afternoon, Your Honors. Will  
5 Page on behalf of Mr. Thiam.

6 I think since Keizer is getting so much attention  
7 here, it's important that we focus on the context that  
8 Keizer was decided in. In Keizer there were two facially  
9 sufficient A misdemeanors that no one challenged. And if  
10 we look at the DA's brief from Keizer at page 9 - - -

11 JUDGE STEIN: But in essence, although the  
12 defendant did raise a challenge here, he withdrew that  
13 challenge, didn't he, by - - - by pleading to the count  
14 that he pled to?

15 MR. PAGE: Well, I think - - -

16 JUDGE STEIN: He - - -

17 MR. PAGE: Sorry, Your Honor.

18 JUDGE STEIN: He said, you know, instead of  
19 getting a decision on my - - - on my motion, or whatever it  
20 was, I -- I'd rather plea; it's to my benefit to do that.

21 MR. PAGE: I think in - - - I mean, the same  
22 thing can be said of basically every facially insufficient  
23 case that's been before this court where the defendant has  
24 pled guilty. In the seminal case of People v. Kasse, Mr.  
25 Kasse pled guilty, and this court still considered whether



1 or not the misdemeanor charges were sufficient.

2 And -- and if you look at how the DA expressed  
3 this law in Keizer, the DA - - - the Manhattan DA said: "A  
4 juxtaposition of Johnson, Ford, and Foster makes clear that  
5 a defendant may plead guilty to a crime that's not strictly  
6 within Article 220 of the CPL so long as the crime is not  
7 of an equal or higher grade than the crimes actually  
8 charged."

9 So at some point in time, we were all in  
10 agreement that these rules were here for a fundamental  
11 reason. Something has changed. Now Keizer is being  
12 interpreted as an expansion that can undo the longstanding  
13 jurisdictional rules this court put in place, one of the  
14 most fundamental protections that someone accused of a  
15 misdemeanor has. As the court knows, those accused of  
16 misdemeanors don't have a grand jury. So when - - -

17 JUDGE GARCIA: But let's go to that. I mean,  
18 what is the fundamental purpose here? And I know we have  
19 Hightower, we have Dreyden, but what is the fundamental  
20 purpose here because, as I understand it, a person can come  
21 in, plead to a felony on an indictment, waives any defect  
22 in the grand jury, right? Waives.

23 So if the analogy is the affidavit to the grand  
24 jury proceeding, and this is protection for the defendant,  
25 why wouldn't we allow somebody to waive that? If you're



1 allowed to waive your - - - you have a constitutional right  
2 to be indicted by a grand jury. We've spoken to it time  
3 and again. You can't waive indictment in many cases. Why  
4 would we let you waive indict - - - waive - - - plead  
5 guilty and you waive defects in a grand jury proceeding,  
6 which maybe you didn't put in proof of the murder, but you  
7 can't waive as to whether or not you have a personal reason  
8 to believe this is Oxycodone? That - - - that - - - what's  
9 the purpose of that?

10 MR. PAGE: Well, the one thing - - - the one  
11 fundamental protection that a misdemeanor accused has is  
12 that the conviction they've pled to is going to have some  
13 factual basis to support that charge or a higher level  
14 offense. And there's none here.

15 JUDGE GARCIA: That, to me, seems like either a  
16 due process or a double jeopardy issue is the only  
17 fundamental reason I could see there for doing that. So if  
18 you plead to this charge in this complaint, what - - - what  
19 is the fundamental defect there? You're not going to be  
20 reprosecuted for possessing oxycodone on this street corner  
21 at this time, so there's no double jeopardy issue. Is  
22 there an issue with you couldn't have prepared your  
23 defense?

24 MR. PAGE: Well, I mean, technically, I'm not  
25 sure what you could be prosecuted for, Your Honor, given



1 that there's no description of the pills here, there's no  
2 description of whether they were in any kind of baggies.  
3 We really - - -

4 JUDGE FAHEY: What happens in these cases, drug  
5 cases, he's got eight pills on him. The policeman says:  
6 it looks like Oxycodone because it's looked like Oxycodone  
7 before. But you don't have a prosecutable - - -  
8 prosecutable instrument until you go back and get a drug  
9 test and it comes back and confirms it to that. And it  
10 does happen that people, when they're selling drugs, sell  
11 what's known as "bunk", you know, which is - - - and  
12 usually that's the core of - - - in my personal experience,  
13 that's been the core of these arguments. So they're  
14 selling something and it isn't drugs, and they're charging  
15 people for it; they're selling aspirin tablets. So they  
16 say you can never prosecute me for a drug violation, I was  
17 selling aspirin tablets.

18 MR. PAGE: Exactly, Your Honor.

19 JUDGE FAHEY: And I sell them to people that are  
20 buying my marijuana that I was also charged with. So - - -  
21 and from a cynic's point of view of the world, that's - - -  
22 that's the strategic reason of why he would do that. And  
23 that's also probably why he pleaded that charge. But  
24 without - - - without a drug test, you do not have a  
25 prosecutable instrument ever.



1 MR. PAGE: And referring to one of your questions  
2 that you asked earlier, the CPL does actually recognize  
3 this distinction as well between personal jurisdiction and  
4 subject matter jurisdiction in that the CPL 1.20 (24) and  
5 (25) discuss preliminary jurisdiction, something that the  
6 DA doesn't mention - - -

7 JUDGE FEINMAN: So I want to ask you some  
8 practical questions. You're in arraignments and you have  
9 this A misdemeanor, and you have a B misdemeanor, let's  
10 say, that's made out. Let's say the B misdemeanor that's  
11 made out is some sort of a - - - a groping or a - - - you  
12 know, some sort of sexual offense on the subway. And  
13 that's clearly sufficient. It's adequately pled out. And  
14 when they arrest him, they recover six Oxycodone pills, all  
15 right, but it doesn't make out all the allegations that you  
16 need under 100.40 and it's insufficient. And the guy says  
17 at arraignment, Judge, I want to take that plea because I  
18 don't want to have to register as a sex offender, or  
19 whatever or go through, a SORA evaluation. So what's the  
20 judge supposed to do, put it over to have them cure and  
21 bring him back? You know, the judge is willing to give him  
22 time served.

23 And you know, I'm a little concerned about the  
24 reality of - - - of what's going to go on in - - - in a  
25 criminal court.



1 MR. PAGE: We're really talking about throwing  
2 out all of the longstanding protections in favor of  
3 probably a really sub -- small sub class then. I mean, if  
4 Mr. - - -

5 JUDGE FEINMAN: But if that defendant is making a  
6 knowing choice by pleading guilty, getting back to, I  
7 think, some of the points that Judge Garcia was making,  
8 what - - - what are we achieving in that hypothetical?

9 JUDGE STEIN: And is that a small subset, in this  
10 day and age, in immigration consequences and SORA and other  
11 collateral consequences that have become quite significant?

12 MR. PAGE: Absolutely, and I think it's an  
13 interesting question in the co-equal context, Your Honors,  
14 where perhaps one has those consequences and one doesn't.  
15 But that's not our case here. We have a case that doesn't  
16 have those considerations where, because of a top count  
17 that was facially insufficient, Mr. Thiam was in a position  
18 to plead up where there was no subject matter jurisdiction  
19 established.

20 Now, immigration consequences aside - - -

21 JUDGE STEIN: Well, how - - -

22 MR. PAGE: - - - I think it would be hard - - -

23 JUDGE STEIN: If you can plead down, if you can  
24 plead to a nonexistent fictitious crime, right - - -

25 MR. PAGE: Yes.



1 JUDGE STEIN: - - - how could that be subject  
2 matter jurisdiction? That isn't even in the accusatory  
3 instrument. How - - - how can that be subject matter  
4 jurisdiction?

5 MR. PAGE: I think that's exactly what Keizer was  
6 sort of trying to deal with, right? When Keizer was  
7 delineating between the felony context and the misdemeanor  
8 context, and recognizing that some of the Constitutional  
9 protections don't apply in felonies and sort of slightly  
10 loosening it in misdemeanors, what we're recognizing was  
11 that you can't plead down to something that's not even  
12 related to charges, in an indictment context, but with a  
13 misdemeanor you can.

14 JUDGE STEIN: Well, but - - -

15 MR. PAGE: You can plead down to a lesser  
16 offense.

17 JUDGE STEIN: - - - doesn't some of it have to do  
18 with the constitutional requirements of prosecution by  
19 indictment and going before a grand jury in felonies that  
20 don't apply in misdemeanor cases? And if that's true, then  
21 aren't there statutory violations that aren't - - - call it  
22 whatever you want to call it, jurisdictional or - - - or  
23 mode of proceedings errors or whatever, that can be waived?

24 MR. PAGE: And that's what Keizer was - - -

25 JUDGE STEIN: Do you agree that there are - - -



1 MR. PAGE: Absolutely.

2 JUDGE STEIN: - - - that those exist? Well, why  
3 isn't this one of them?

4 MR. PAGE: Well, Keizer was recognizing that in  
5 the context of the quintessential lessor, the noncriminal  
6 violation to disorderly conduct. It cannot be the case  
7 that you've been hauled in on a low-level marijuana charge  
8 and now, if you take Keizer to its natural extension, based  
9 on the district attorney's reading, you could also be  
10 charged with an uncharged A misdemeanor that could subject  
11 you to SORA consequences or immigration consequences. And  
12 I guess you could be offered a plea to that. That's a  
13 fundamental unfairness that's going to happen to the  
14 defendant, and apparently that would be a fair reading of  
15 Keizer now.

16 JUDGE FEINMAN: So what about a situation where  
17 you have ungraded misdemeanors?

18 MR. PAGE: An ungraded misdemeanor?

19 JUDGE FEINMAN: And they're - - - yeah, you know,  
20 things like the environmental conservation. But you know,  
21 there's a lot of ungraded misdemeanors out there, you know.  
22 I'm trying to - - -

23 MR. PAGE: I'm assuming those would also - - -

24 JUDGE FEINMAN: I'm trying to remember back to my  
25 days in the SAP Part, you know, you pull a fish out of the



1 river that's the wrong size and you didn't throw it back.  
2 What about ungraded misdemeanors?

3 MR. PAGE: I suppose to the degree that they're  
4 not considered B's or lower misdemeanors, I mean - - -

5 JUDGE FAHEY: No, it's prosecutable through a  
6 simplified information.

7 MR. PAGE: That's also correct, Your Honor, but -  
8 - - and also we could look at - - -

9 JUDGE FAHEY: But there's four types of  
10 informations that are prosecutable, you know, a grand jury  
11 indictment, an information, a simplified information, and a  
12 prosecutor's information. That's what we're talking about.  
13 That's what the judge is talking about.

14 So to have a prosecutable instrument, though, is  
15 different than having an accusatory instrument. The  
16 accusatory instrument there would be the ticket that would  
17 be handed out to someone. And this is a more difficult  
18 problem than - - -

19 MR. PAGE: Absolutely.

20 JUDGE FAHEY: - - - you would have expected in  
21 this case.

22 MR. PAGE: And that's why I'm - - -

23 JUDGE RIVERA: But counsel, if we agree with you,  
24 what does the criminal justice system, with respect to  
25 these misdemeanors, look like the next day?

1 MR. PAGE: Well, I don't think there's any real  
2 change. You're announcing a bright line rule that's easy  
3 for the court, the defendant, and the district attorney's  
4 office to follow which is - - -

5 JUDGE RIVERA: Why make a motion to dismiss?

6 MR. PAGE: Sorry?

7 JUDGE RIVERA: Why make a motion to dismiss?

8 MR. PAGE: Well - - -

9 JUDGE RIVERA: I'd take the plea, and according  
10 to the amici that way you walk out, you don't have to  
11 suffer the - - - the delay and the uncertainty of  
12 potentially losing your job, being apart from your family,  
13 et cetera, and so forth.

14 MR. PAGE: There will be defendants who will have  
15 the ability to make motions to dismiss and we should be  
16 encouraging a system with those robust protections. But  
17 there are enormous pressures placed on offenders.

18 JUDGE RIVERA: Was there a change in the law also  
19 that might impact the way this looks the next day?

20 MR. PAGE: I don't think - - - if Your Honor's  
21 referring to the legislature reducing some of the  
22 pressures, I don't think - - - the pressures that many of  
23 our clients face deal with returning to court for many  
24 appearances. Those pressures are not going to be  
25 alleviated. I mean, being low income, having to tell your



1 supervisor you're looking for time off, you have to return  
2 to court every two weeks, every month. Do you run the risk  
3 of losing your job, losing your housing? How do you  
4 arrange childcare for each of your court appearances?  
5 Those pressures are still in place, and those are enormous  
6 pressures that - - -

7 JUDGE STEIN: So won't those - - - but how else  
8 could you resolve the case then, if you're - - - if you're  
9 charged - - - let's say - - - you know, let's say that it's  
10 - - - it's really unclear whether there is a sufficiently-  
11 pled crime, misdemeanor, whatever.

12 MR. PAGE: But not this case.

13 JUDGE STEIN: Not - - - well, let's - - - whether  
14 it's this case or not, it's - - - it's very close, it's  
15 very unclear. So then doesn't any defendant have to make  
16 that choice: am I going to plead and be done with this  
17 case, or am I going to make motions and so on and so forth?  
18 So - - -

19 MR. PAGE: And it will be within the purview of  
20 some defendants to do that, but this court's recognized  
21 that there are nonwaivable jurisdictional prerequisites  
22 because of the fast-moving environment of the misdemeanor  
23 court, because of the fact that there's no - - - like you  
24 look at Article 220 and subsection (10) there. It's  
25 talking about pleading to any count of an indictment in



1 order to satisfy the instrument.

2 So again, we're assuming that a grand jury has  
3 already passed on the sufficiency of those allegations.  
4 That's not happening here. It's moving very quickly, an  
5 instrument's filed. We want to incentivize the system to  
6 ensure that there are facts collected by the officer, that  
7 those facts make it into the complaint, and that the  
8 prosecution uses their duty to ensure that charges that are  
9 supported, especially the top count, which is driving the  
10 misdemeanor prosecution, is present, that it's a facially-  
11 sufficient charge.

12 JUDGE STEIN: So if - - - I'm sorry, go ahead.

13 CHIEF JUDGE DIFIORE: No. Go ahead. I was just  
14 going to say thank you.

15 JUDGE STEIN: Oh, sorry.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. PAGE: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MS. KULKARNI: Thank you. As Your Honor  
20 mentioned - - -

21 JUDGE RIVERA: So doesn't his rule, or the rule  
22 he's advocating for, incentivize the proper pleading of  
23 these instruments?

24 MS. KULKARNI: I - - -

25 JUDGE RIVERA: Isn't that what the legislature is



1 also intending?

2 MS. KULKARNI: We're not seeking to do away with  
3 the pleading requirements. The People should still seek to  
4 comply with those in each and every complaint.

5 JUDGE RIVERA: Where's the downside to making a  
6 mistake or not doing it?

7 MS. KULKARNI: Well - - -

8 JUDGE RIVERA: Or being - - - being - - - shall  
9 we just say, not - - - not as careful as one might wish for  
10 the ADA to be?

11 MS. KULKARNI: Well, that's why we had these CPL  
12 provisions in place that allow for a defendant to move to  
13 dismiss. And a defendant can do that.

14 JUDGE RIVERA: Again, that burden all falls  
15 there. Where - - - where do you incentivize the ADA to do  
16 it right in the first place?

17 MS. KULKARNI: Well - - -

18 JUDGE RIVERA: What appears to me in the  
19 legislation to be a safety net, that should be used in the  
20 rarest of cases, then becomes the actual practice.

21 MS. KULKARNI: Well, our entire criminal justice  
22 system is premised on the notion that if a defendant has a  
23 claim to raise the burden is on him to raise it. For  
24 example - - -

25 JUDGE RIVERA: Yeah, but it's also premised on



1 the presumption that the prosecutor is held to a higher  
2 standard, is indeed properly doing their job.

3 MS. KULKARNI: Right, well, again, the pleading  
4 requirement still exists. We're not saying that they  
5 shouldn't exist.

6 JUDGE GARCIA: What would you do here - - -

7 MS. KULKARNI: And a prosecutor is still bound by  
8 ethical rules to not include completely frivolous charges  
9 in a - - -

10 JUDGE GARCIA: What would your office do here  
11 tomorrow, if we did rule the other way and this fact  
12 scenario came up again, defendant makes these objections,  
13 lawyer makes the objections, you know, points out the  
14 problems in the misdemeanor complaint and then says - - -  
15 would you offer a deal of time served to one hour or two  
16 hours, or would you say we aren't going to take that plea  
17 at this point, right? Why would you ever take that plea in  
18 the future if that's the rule?

19 MS. KULKARNI: I'm sorry, if the court rules in  
20 the - - -

21 JUDGE GARCIA: If this fact scenario came up  
22 again.

23 MS. KULKARNI: Right.

24 JUDGE GARCIA: And we rule for the defendant  
25 here, why would your office ever take this plea?



1 MS. KULKARNI: Well, our office will still take a  
2 plea if - - - if it's - - -

3 JUDGE GARCIA: Under these circumstances? So it  
4 could get reversed on appeal?

5 MS. KULKARNI: Well, that's a good point, Your  
6 Honor. I mean, I think if - - - if this - - - if the court  
7 ruled in my adversary's favor, the prosecutor would  
8 actually be incentivized to ask for a plea to every charge  
9 in the complaint.

10 JUDGE RIVERA: Isn't what one hopes you tell all  
11 the ADAs is to ensure that there's not a deficiency in the  
12 instrument so no, get the drug test or get the proper  
13 information so that you satisfy the requirements.

14 But I have a different question. Could you  
15 respond to Mr. Page's comment that the CPL does indeed  
16 recognize this distinction between personal subject matter  
17 jurisdiction to be found, at least as he had the  
18 opportunity to assert, at 1.20 (24) and (25)?

19 MS. KULKARNI: Sure. Again, even in those  
20 provisions, there's no mention of a distinction between  
21 subject matter jurisdiction and personal jurisdiction.

22 JUDGE RIVERA: Well, what do you read those  
23 provisions to apply to? What - - - what do you - - - what  
24 do they mean? What do they stand for?

25 MS. KULKARNI: They apply to the jurisdiction of



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the trial court, the criminal court over the defendant's prosecution, and that is established with the filing of a complaint with at least one valid misdemeanor charge.

JUDGE RIVERA: Okay.

MS. KULKARNI: And I would just like to briefly mention this subject matter jurisdiction point that my adversary's making, he's - - - he's obtained this from a line in Harper, this court's decision in Harper, but Harper involved the midtrial amendment of an accusatory instrument to add two counts. It was, in the trial context, a very different context. It really has no application here. Thank you very much.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of The State of New York v. Mouhamed Thiam, No. 74, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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