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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 35

BURGESS (WARREN),

Appellant.

265 East 161st Street
Bronx, New York
March 12, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is People v. Burgess.

3 MS. RHIM: Good morning. And may it please the
4 court. I'm Ji Hyun Rhim with the Legal Aid Society on
5 behalf of appellant, Mr. Warren Burgess.

6 The appellate term correctly - - -

7 CHIEF JUDGE WILSON: You wish to save any time
8 for rebuttal?

9 MS. RHIM: Oh, yes. Sorry. I would like to
10 request three minutes for rebuttal, please.

11 CHIEF JUDGE WILSON: Three? Yes. Thank you.

12 MS. RHIM: The appellate term correctly held that
13 as per Longshore operability was not alleged in this case.
14 And because the same defect rendered every charge facially
15 insufficient, the instrument was tainted in its entirety,
16 and the court must dismiss it.

17 JUDGE HALLIGAN: Can I ask you if the procedure
18 that - - - that was employed here is authorized by the CPL,
19 the dismissal of the felony counts?

20 MS. RHIM: If you're referring to the 180.50, it
21 was. It - - - it was sort of properly - - -

22 JUDGE HALLIGAN: So - - - so what's the statutory
23 authority for - - - for the court ordering the dismissal of
24 a felony complaint?

25 MS. RHIM: Well, the prosecution had sort of

1 reduced this to a misdemeanor information, and that - - -
2 and you know, they sort of didn't - - -

3 JUDGE SINGAS: Doesn't a judge have to do that?

4 MS. RHIM: The judge offered this reduction and
5 the - - - and the prosecution - - -

6 JUDGE SINGAS: But it wasn't superseded, and it
7 wasn't reduced - - -

8 MR. RHIM: No.

9 JUDGE SINGAS: - - - and there wasn't a notation
10 written, so was there a proper reduction?

11 MS. RHIM: If - - - if there wasn't a proper
12 reduction, at this point, the prosecution has waived that
13 argument. As this court has held, this is a 180.50 error,
14 isn't a jurisdictional error, it's a procedural one. And
15 so that would have had to have been preserved.

16 JUDGE SINGAS: Did you make that argument about
17 waiver below?

18 MS. RHIM: About - - - about the waiver of the
19 180.50, Your Honor?

20 JUDGE SINGAS: Yes.

21 MR. RHIM: I believe in our reply we did say that
22 this - - - this was not preserved, and - - - and that
23 prosecution did waive it.

24 JUDGE SINGAS: Isn't the real problem here that
25 the judge should not have taken a plea off of a felony

1 complaint?

2 MS. RHIM: I think the understanding was that,
3 you know, this was going to be reduced to a misdemeanor
4 information. And - - -

5 JUDGE SINGAS: Then it wasn't. And then the plea
6 was taken off of felony complaint, which shouldn't have
7 happened, right? You'd agree with that, but you're not
8 challenging that illegality, correct?

9 MS. RHIM: No. We're - - - today we're just
10 challenging whether operability is an essential element,
11 and whether, when that defect taints the entire instrument
12 and every charge in this accusatory instrument, what to do
13 with it.

14 JUDGE RIVERA: What - - - what, if any,
15 difference - - - does it matter at all that, as I
16 understand this record, the judge dismissed the felony
17 counts?

18 MS. RHIM: That's how I - - -

19 JUDGE RIVERA: Was is it a reduction or a
20 dismissal?

21 MS. RHIM: The accusatory instrument shows they
22 crossed out the reduction. It was a dismissal, Your Honor.
23 This - - -

24 JUDGE RIVERA: It's a dismissal. So why does
25 180.50 apply anyway? That's about reductions.

1 MS. RHIM: Well, I - - - I was just - - - I was
2 just - - -

3 JUDGE RIVERA: No, no. I'm asking. I'm asking.
4 Is it - - - does it apply or not, if it's a dismissal as
5 opposed to a reduction?

6 MS. RHIM: In this case, because as Your Honor
7 correctly pointed, that - - - you know, felony complaints
8 have to turn into something else. They're either - - - you
9 either proceed on a grand jury indictment, or it turns - -
10 - you turn it into a misdemeanor complaint. And that's
11 what happened here.

12 The DA - - - you know, the top charge here was a
13 felony, but the DA offered a plea deal in which Mr. Burgess
14 could plead to a misdemeanor. And - - - and that's what
15 happened here.

16 JUDGE GARCIA: Which you - - - you did plead to -
17 - - Counsel, here. Counsel? And then in the Appellate
18 Division, I - - - I'm having some trouble understanding
19 what's actually here.

20 In the appellate term - - - I'm sorry. You, I
21 think, represented a dismissal of the accusatory instrument
22 rather than vacatur or remand on the remaining charge. So
23 the only thing it seems to me, the appellate term decided
24 was they weren't going to dismiss the felony complaint, and
25 that was it. Because you didn't want them to decide the

1 other thing.

2 MS. RHIM: That's correct, Your Honor.

3 JUDGE GARCIA: And now it comes here, and what do
4 we have? We don't have an appellate term decision on that
5 because of the relief you requested. So what do we do with
6 that?

7 MS. RHIM: Well, at the time, it's true that we
8 did ask for an affirmance if the court wasn't willing - - -

9 JUDGE GARCIA: Right.

10 MR. RHIM: - - - to dismiss. And honestly - - -

11 JUDGE GARCIA: And you got what you asked for.

12 MS. RHIM: We did get what we - - -

13 JUDGE GARCIA: And now you're appealing?

14 MS. RHIM: That's - - - that's correct.

15 JUDGE GARCIA: I'm having some trouble with that.

16 MS. RHIM: Well, the - - - the reason - - -
17 obviously, our client's best interests are always, you
18 know, at the heart of how we make these decisions. And in
19 the appellate term, we - - - we saw that the law wasn't on
20 our side, frankly. And so we asked for an affirmance.

21 JUDGE GARCIA: Because you wanted the benefit of
22 your bargain, right?

23 MS. RHIM: That's correct, Your Honor.

24 JUDGE GARCIA: Your misdemeanor, when you were
25 charged with two felonies, and then you appealed it to us.

1 MR. RHIM: That's correct, Your Honor.

2 JUDGE GARCIA: So what are we reviewing? Are we
3 only reviewing whether we should reinstate the felony
4 complaint?

5 MS. RHIM: No, Your Honor. We're - - - the
6 question before us is what do we do? What we're asking for
7 now is different from what we're - - - what we asked in the
8 appellate term. Because as I said - - -

9 JUDGE HALLIGAN: How can you - - -

10 JUDGE GARCIA: Yeah.

11 JUDGE HALLIGAN: - - - do that? I mean, it seems
12 to me that you now are taking a different view. Right?

13 MS. RHIM: The - - - the view is - - - the view
14 that we're taking now, is that as a matter of - - - as a
15 matter of law, this needs to be dismissed.

16 JUDGE GARCIA: So if we disagree with you, then
17 we reinstate the felony complaint?

18 MS. RHIM: If you disagree with us, and - - - if
19 you - - - if you disagree with us, we're not asking for an
20 affirmance today.

21 CHIEF JUDGE WILSON: Did - - - did the - - -

22 MR. RHIM: But if - - -

23 CHIEF JUDGE WILSON: - - - did the appellate term
24 act in its interest of justice jurisdiction rather than on
25 a basis of law in doing what you asked for?

1 MS. RHIM: I mean, what we're - - - our position
2 today is that they had no interest of - - - of justice
3 power when - - - they couldn't have exercised that when
4 every single count was jurisdictionally defective, as it
5 was here.

6 JUDGE GARCIA: I think the point is they
7 exercised their interests of justice power by not
8 dismissing what was a jurisdictionally defective count,
9 which we can't do.

10 MS. RHIM: Right. But we're not asking Your
11 Honors to exercise a - - - an interest of justice - - -

12 JUDGE GARCIA: We can't.

13 CHIEF JUDGE WILSON: No. We don't have one.
14 It's a different question. The question is whether we - -
15 - there's anything reviewable by us, here? Because of what
16 the appellate term did, it did not as a matter of law but
17 in exercise of its interest of jurisdiction and power. We
18 can't review that, and therefore, there's nothing for us to
19 review. That's the question. Is that right or wrong?

20 MS. RHIM: I believe that's wrong, Your Honor.

21 CHIEF JUDGE WILSON: Why?

22 MR. RHIM: Because what the appellate term said
23 in its decision is that operability is an essential element
24 that needs to be alleged. So that was - - - that was
25 agreed upon. That was conceded upon by respondent - - -

1 JUDGE GARCIA: Right. And then they did
2 something with that that they couldn't do. Which is
3 essentially, leave a jurisdictionally defective count in
4 place at your request. And we don't have that type of
5 power. So what they did was beyond our power to review.

6 MS. RHIM: But you can still rule on whether - -
7 - on - - - on sort of the substantive sort of merit of - -
8 - of that decision.

9 JUDGE GARCIA: I think if - - -

10 JUDGE RIVERA: Let me ask you this. Do - - - do
11 - - - do - - - just go with this for a moment. Can they
12 exercise interest of justice jurisdiction to do what
13 members of the bench are suggesting they interpret this
14 opinion to say they have done?

15 MS. RHIM: Could the appellate term - - -

16 JUDGE RIVERA: Yes. Because I see these requests
17 all the time. Right? I see these requests all the time,
18 and either the - - - the Appellate Division or appellate
19 term grants or doesn't grant what they say. Look, if
20 you're not giving - - - going to give me the relief I want,
21 I don't want to lose the plea.

22 MS. RHIM: I - - - at the time, we believed that
23 was so. Because, again, you know, we don't have - - - we
24 don't have the law on this, and that's why we're here today
25 - - -

1 JUDGE GARCIA: So if we - - -

2 JUDGE RIVERA: No, no, no. I'm not - - - I'm
3 sorry.

4 JUDGE GARCIA: I'm sorry. Go ahead.

5 JUDGE RIVERA: I just - - - I just need
6 clarification on this. Is it your position - - - I know
7 you asked for it, I - - - so you must have a yes answer to
8 me. And I - - - and then I'd like to know what's a source?
9 What's the source of a court being able to do this? What's
10 the - - - for them? They have the interest of justice
11 jurisdiction. What - - - what is the scope of that
12 interest of justice jurisdiction to maintain - - -

13 MR. RHIM: The - - -

14 JUDGE RIVERA: - - - in place, as you have
15 argued, a jurisdictionally defective count?

16 MS. RHIM: I mean, the citation we use is People
17 v. Burwell, Your Honor.

18 If I may move on?

19 JUDGE GARCIA: But what - - - if they don't have
20 the authority to do it, anywhere, then we could make clear
21 in this case that requests like that are unlawful. That
22 you can't ask the appellate term or the Appellate Division
23 to rule that way in the alternative, because they don't
24 have the inherent authority to do that. Is that what
25 you're asking us to do?

1 MS. RHIM: If Your Honors agree that this is a
2 completely jurisdictionally defective instrument, and there
3 is nothing left to remand, that - - - and - - - and you can
4 provide clarity for us on that, then yes, we will ask for
5 that.

6 JUDGE GARCIA: So then the next time you go to
7 the appellate term, it would just be all or nothing?

8 MS. RHIM: In a case like this where, from top to
9 bottom every charge is jurisdictionally defective? Then,
10 yes.

11 JUDGE GARCIA: But if they disagree with you,
12 then they just reinstate the felony complaint, and you
13 can't ask them not to do that?

14 MS. RHIM: Well, no. That's not how - - -

15 JUDGE RIVERA: Well, that's the nature of these
16 questions.

17 MS. RHIM: Right. I - - - I understand, Your
18 Honor. I understand the prosecution, the way - - - the
19 respondent, the way they presented their arguments about
20 what rights they have to withdraw the accusatory
21 instrument. If they want to re prosecute this, Your Honor -
22 - -

23 JUDGE RIVERA: Uh-huh.

24 MR. RHIM: - - - the only way they can do that is
25 to ask this court for permission. And that - - - the

1 statute for that is 40.30.

2 That's an exception to New York's statutory
3 double jeopardy clause in 40.20. 40.20 establishes the
4 baseline that a second prosecution isn't generally allowed.
5 And that bars reprosecution unless the court authorizes
6 obtaining a new accusatory instrument. So while 40.30
7 exists as an exception to 40.20, it isn't automatic as - -
8 - as respondent is making it out to be.

9 And it's very clear from legislature that
10 legislature - - - that the legislature intended this to be
11 a higher bar for the prosecution to meet in asking for
12 permission and convincing the court to authorize this.
13 That - - - that's the source, Your Honor.

14 And it's a power this court has never exercised
15 before in a facial sufficiency case where all the charges
16 were defective, and this case shouldn't be - - -

17 JUDGE GARCIA: To go to the merits, what's the
18 standard for a felony complaint?

19 MS. RHIM: The - - - the standard for a felony
20 complaint is the same as a misdemeanor complaint. It's
21 establishing facts of a - - - establishing facts of an
22 evidentiary nature, establishing reasonable cause. And
23 that's under CPL 115 and 140. They're governed by the same
24 statute, Your Honor.

25 JUDGE SINGAS: Didn't we say in Alejandro that

1 140 only applies to misdemeanors?

2 MS. RHIM: It arises out of the same - - -

3 JUDGE SINGAS: But do we say it only applies to
4 misdemeanors because there are other mechanisms that
5 protect felonies?

6 MS. RHIM: I - - - I don't believe that's the
7 case for - - - in order to commence - - - in order to
8 commence a prosecution. I don't - - - I don't think so,
9 Your Honor.

10 JUDGE GARCIA: Is there any case where we have
11 set out the standard for felony complaint?

12 MS. RHIM: The standard for - - - I think that's
13 Alejandro, Your Honor, the standard for felony complaints.

14 JUDGE RIVERA: Okay. Your red light is on.
15 Do you want to just quickly, just a moment,
16 address the operability argument?

17 MS. RHIM: You can't infer operability from a
18 defaced serial number. The prosecution is alleging that
19 because this is a modern weapon, you would only deface it
20 if it works. And there's no logical nexus between whether
21 the allegation that a working gun - - - you know, working
22 gun serial number was defaced at some point, and whether
23 the gun is currently operable. And the People haven't
24 really laid out a theory as to why there might be.

25 And I would also point this court to Grillo,

1 which is a case that was cited to in Longshore. In that
2 case, the defendant possessed a pistol which had a defaced
3 serial number, but also a broken firing pin. And so there,
4 the court held that it wasn't a pistol under the meaning of
5 the statute. And that the gun - - - it's a - - - the gun -
6 - - the gun was made, more or less, dangerous by the firing
7 pin rather than a - - - the defaced - - - the defaced
8 serial number.

9 CHIEF JUDGE WILSON: What do you think the People
10 would need to do as - - - practically, to have a basis to
11 allege that it was operable?

12 MS. RHIM: The basis to allege that it was
13 operable - - - you know, we - - - I - - - I would say that
14 what this court found in Kalin is enough to rely on their
15 training and experience. We have no doubt that an officer
16 who is trained with guns could allege that based on their
17 training and experience; based on their inspection of the
18 gun; based on the fact that it's sort of in working order;
19 and there's no obvious defects - - -

20 JUDGE GARCIA: How do they know it's in working
21 order? They have to fire it?

22 MS. RHIM: No. I - - - I mean, yes, for a
23 ballistics test. Yes.

24 JUDGE GARCIA: Because, I - - - you know, under
25 New York Rules, right, once this felony complaint is filed,

1 the right to counsel attaches. Right? So would that be an
2 incentive to just question the defendant first and say, you
3 know, did you fire this gun? Do - - -

4 MS. RHIM: I mean no - - -

5 JUDGE GARCIA: There's no right to counsel that's
6 attached here, right? So why am I going to file a fire - -
7 - a felony complaint? We haven't gone down to the range
8 yet. And he'll test this. I'll get a ballistics expert.
9 So why would we want to do that?

10 MS. RHIM: Because an officer doesn't have to
11 know exactly what - - - what crime they're charging the
12 person with. All you need is - - - you know, a reasonable
13 person thinking that a crime has been committed, the
14 officer can arrest them. They don't need to know at that
15 point if the - - - if - - - if you know someone is - - -

16 JUDGE GARCIA: So let's say in this case, you had
17 a gun and matching bullets. I know there were not here. I
18 think there were 9-millimeter bullets. Would that be
19 enough?

20 MS. RHIM: Were - - - were the bullets in the - -
21 - in the gun or - - -

22 JUDGE GARCIA: No. Just in the same container.

23 MS. RHIM: I - - - I think at that point, Your
24 Honor, there's actually not enough for operability at that
25 point. But what the officer does have, and what the

1 prosecution does have prior to the ballistics, is what they
2 have is enough for an attempted possession. That's - - -
3 that's Saunders, which is also cited to by Longshore.

4 So this wouldn't prevent an officer from
5 arresting anyone or making a charge. It's only at the
6 charging stage when they have to determine, oh, is this gun
7 operable or not, that they would need a little bit more.

8 JUDGE GARCIA: Also, Alejandro is a misdemeanor
9 case.

10 MS. RHIM: I will look that up and come back to
11 you on rebuttal with that.

12 CHIEF JUDGE WILSON: Thank you.

13 MS. RHIM: Thank you.

14 MR. BRAUN: Thank you. May it please the court,
15 Justin J. Braun, on behalf of Darcel D. Clark. Thank you
16 for coming to the Bronx today.

17 I want to start by getting to the - - - the - - -
18 the question that was addressed first to my adversary, and
19 that is the appellate term. Even if there was a - - - a
20 problem with this plea that was engineered for the
21 defendant's benefit for a speedy disposition, if there was
22 a jurisdictional issue, the remedy would be remand.
23 Normally.

24 It's not - - - it's not a double jeopardy issue.
25 It's governed by CPL 470.54 that, when there's a reversal

1 of a judgment on an accusatory instrument or part thereof,
2 it is restored to its pre-pleading status.

3 Now, in this case, what the defendant asked for
4 in the appellate term was that if you're not going to
5 dismiss all the counts, then we want to keep our plea.
6 Please keep the - - - the plea intact and affirm.

7 JUDGE TROUTMAN: Can you do that if it's a
8 jurisdictional defect?

9 MR. BRAUN: You can. Because here, what the - -
10 - what the appellate term was tasked was deciding as - - -
11 in their interests of justice power, was whether with the
12 jurisdictional defect, a dismissal would be in the interest
13 of justice or if it should be sent back for remand to be -
14 - - to be pursued on the - - - on the original accusatory
15 instrument.

16 JUDGE RIVERA: Well, of course, we always say we
17 have to determine. It doesn't matter what they call it,
18 right?

19 MR. BRAUN: That's right.

20 JUDGE RIVERA: But - - - but obviously, they
21 didn't think that's what they were doing. Because they've
22 got a paragraph - - - they've got a - - - the top that says
23 they're going to modify as a matter of discretion, the
24 interest of justice to the extent of vacating the mandatory
25 surcharge and fees otherwise affirmed. And then the last

1 paragraph is says, expressly based on our own interest of
2 justice powers, we vacate the surcharge and fees. So they
3 - - - they thought that was the exercise of their powers.

4 Of course, we could decide on our own that what
5 they did here with respect to the affirmance, otherwise,
6 was also in the exercise of their interests of justice
7 powers.

8 But what's the - - - what's the source of that
9 power? For - - - for purposes of the affirmance otherwise?

10 MR. BRAUN: Well, if - - - if you're saying - - -
11 if this court agrees that there was a jurisdictional defect
12 - - -

13 JUDGE RIVERA: Yes.

14 MR. BRAUN: - - - and we don't. We have our
15 arguments why we don't think there was a jurisdictional
16 defect. But if the court agrees that there was a
17 jurisdictional - - -

18 JUDGE RIVERA: What - - - what he pleaded to, you
19 mean?

20 MR. BRAUN: Correct.

21 JUDGE RIVERA: Okay.

22 MR. BRAUN: Then again, by CPL 470.55, normally,
23 the - - - the action that would be taken by the court would
24 be to remand it for further disposition. And there are
25 many reasons why that would be appropriate in this case.

1 However, because they have these interests of
2 justice power that allows them - - - that is, by the way,
3 reviewed for abuse of discretion by this court because they
4 have this interest of justice of power to see if - - - if
5 pursuant to Burwell and that line of cases, whether or not
6 this is a relatively minor crime that would justify having
7 a - - -

8 JUDGE GARCIA: So in your view - - -

9 MR. BRAUN: - - - an outright dismissal.

10 JUDGE GARCIA: - - - do you think the appellate
11 term, in this case, has interests of justice power to
12 accept a jurisdictionally defective charge?

13 MR. BRAUN: Well, they're not accept - - -
14 they're not accepting it. They're sending it back. In
15 other words, they're saying that this - - - this was - - -
16 this was the - - - the - - - the - - - the plea was
17 defective, so we're sending it back to the plea - - - plea
18 - - - the pre-plea status. We're remanding it because
19 there was a jurisdictional defect.

20 JUDGE GARCIA: They didn't do that?

21 MR. BRAUN: What's that?

22 JUDGE GARCIA: They didn't do that.

23 MR. BRAUN: They did not do that.

24 JUDGE GARCIA: So your view is they had interests
25 of justice authority to do what they did, which was we're

1 going to accept the plea to a jurisdictionally defective
2 instrument?

3 MR. BRAUN: Which is exactly what the defendant
4 asked.

5 JUDGE GARCIA: I understand they asked for it.
6 But do you believe they had the authority to do that, and
7 what is it?

8 MR. BRAUN: Well, what they had - - - if I can
9 reframe it a little bit? I think what they had the
10 authority to do was to determine whether, in their
11 interests of justice power, dismissal was appropriate in
12 this case in lieu of remand.

13 JUDGE HALLIGAN: But that's not what they did.

14 JUDGE GARCIA: Right.

15 MR. BRAUN: Well, but - - -

16 JUDGE HALLIGAN: So - - - so I - - - I think my
17 question is probably exactly the same as Judge Garcia's.

18 What I understand them to have done here is not
19 to have dismissed, but to have affirmed, other than with
20 respect to the surcharge and fees, right?

21 So what is the authority - - - if we were to
22 conclude the plea is jurisdictionally defective, what is
23 the authority for their power for - - - for their authority
24 to exercise interests of justice power to affirm a
25 jurisdictionally defective plea?

1 MR. BRAUN: If that's the - - - the tack that
2 this court wants to take in analyzing it and doesn't, as
3 Judge Rivera said, read into it and say this is what the
4 court actually did, then, at that point, the appropriate
5 response would be to remand for further proceedings.

6 JUDGE HALLIGAN: Because - - - because, in your
7 view, if we read this as exercising interests of justice as
8 to the affirmance of the jurisdictionally defective plea,
9 you see no authority for doing that. Is that what you're
10 saying?

11 MR. BRAUN: If you read it that way, yes. But if
12 you read it the way I'm suggesting, which is that what they
13 actually did was use their interests of justice power in
14 order to determine that dismissal was not appropriate here,
15 then there is authority to do that.

16 JUDGE HALLIGAN: I - - - I'm not sure - - - I'm
17 not sure I understand that - - - and - - - and I mean this
18 genuinely. Other than as a semantic point, what does it
19 mean to - - - to do what you're saying as opposed to
20 affirming?

21 MR. BRAUN: So again, if I - - - if - - - and
22 maybe I'm getting caught up in this. But if - - - if - - -
23 if, under the normal circumstances, what would - - - what
24 would be the appropriate remedy here? Because that's what
25 we're talking about: remedy. Under no circumstances is

1 the appropriate remedy outright dismissal with prejudice.

2 So normally here the appellate term would have
3 been tacked with determining whether or not they should
4 remand the case back for further proceedings.

5 JUDGE HALLIGAN: Right.

6 MR. BRAUN: In other words, so that we could take
7 this case to a grand jury, we could present our operability
8 report, go forward, all of that. Or whether or not
9 dismissal in this case is appropriate.

10 JUDGE HALLIGAN: Under Burwell?

11 MR. BRAUN: Under Burwell.

12 JUDGE HALLIGAN: But not - - - not because the
13 plea was not jurisdictionally defective? I know you argue
14 it was okay. But - - - but if the view was it was
15 jurisdictionally defective, the dismissal would have to be
16 under Burwell, it seems to me. Yes?

17 MR. BRAUN: Correct. That - - - that is our view
18 of things. And - - - and - - -

19 JUDGE HALLIGAN: And so this is some gloss on
20 Burwell that says, well, we could dismiss under Burwell,
21 but otherwise we'll affirm.

22 MR. BRAUN: Yes. And I think it was done, again,
23 at the defendant's behest because that's what they asked
24 for. Which, by the way, is the same thing that was done
25 below.

1 JUDGE TROUTMAN: Are we bound by the - - - what
2 the defendant asked for?

3 MR. BRAUN: You're not bound by what the
4 defendant asks. So if you - - - again, if you determine
5 that that is not the gloss you want to put on what the
6 Appellate Division did - - - the appellate term, excuse me,
7 did, then, I think - - - then, I think, the - - - the
8 appropriate response would have been to remand for further
9 proceedings.

10 CHIEF JUDGE WILSON: There's a - - - there's a
11 case of ours, though, that I think the parties didn't cite
12 that may run afoul of - - - of part of the position you're
13 taking. It's called Campbell v. Pesce. You're familiar
14 with it at all?

15 MR. BRAUN: I'm not familiar with that.

16 CHIEF JUDGE WILSON: Okay. Let me describe - - -
17 it's not too long. Let me read you a couple of things from
18 it. It involves a case in which - - - I'll - - - I'll
19 quote here. "The People moved to vacate appellant's
20 conviction on the ground that the charges had been reduced
21 in violation of CPL 180.50", which prohibits the reduction
22 of an armed felony to a misdemeanor charge.

23 We - - - the court then says, "acceptance of the
24 plea was illegal, but our holding is that after sentence
25 has commenced, a court which has accepted a plea in

1 violation of the Criminal Procedure Law, may not vacate the
2 illegal plea and reinstate the original charges - - -
3 charges". And at the very end, we say, "there being no
4 basis for the court's vacatur of the plea, the original
5 plea and sentence must be reinstated and further - - -
6 further criminal proceedings on the first felony charges
7 are barred by double jeopardy protection".

8 So that seems to be a problem.

9 MR. BRAUN: Well, but that would - - - I don't
10 see why there would be a double jeopardy issue in this
11 case, because this hadn't gotten to a grand jury stage.
12 This is - - - it's - - - and therefore, it's under CPL
13 470.55. That would be - - - the remedy would be a remand.

14 There's no double jeopardy issue because we were
15 at commencement of the case, not at prosecution.

16 JUDGE GARCIA: Counsel, as I remember that case,
17 it was the People who tried to undo that plea which
18 implicates double jeopardy. But where a defendant tries to
19 undo a plea, I'm not so sure how double jeopardy would be
20 implicated.

21 MR. BRAUN: Your - - - Your Honor is more
22 familiar with the case than me, so I - - - I will go with
23 that.

24 But I'll also say that in hearing your recitation
25 of that case, it seems like that was implicating a 180.50,



1 which is a reduction in this case there. As Your Honor has
2 pointed out, the - - - the 180.50 wasn't explicitly
3 invoked.

4 JUDGE RIVERA: Did - - -

5 CHIEF JUDGE WILSON: Right. And we also have
6 other cases - - -

7 I'm sorry.

8 JUDGE RIVERA: No, no.

9 CHIEF JUDGE WILSON: - - - that - - - that say
10 that if it's not a reduction, but it's simply a - - - a
11 dismissal of the felony charges, 180.50 doesn't apply at
12 all.

13 MR. BRAUN: I - - - perhaps you're talking about
14 Johnson and that line of cases.

15 JUDGE RIVERA: Yeah.

16 MR. BRAUN: Yes. No, I understand that. And
17 that's why - - - that's why in this particular case, in
18 order to effectuate a plea that we thought that the
19 defendant - - - we - - - we knew that the defendant wanted,
20 and give him a speedy resolution of the case, that under
21 Johnson and that authority, there was some authority for us
22 to be able to do this, to be able to do the dismissal.

23 Again, this court can say that there wasn't
24 authority for that and that the - - - the - - - the proper
25 procedures were not followed in this particular case, but



1 Johnson would seem to indicate that, yeah. But I think
2 that gets to the larger point here, which is also that this
3 whole plea, it was the understanding of all of the parties,
4 at all times that it is - - -

5 JUDGE RIVERA: And if we - - - if we conclude, on
6 the basis of Johnson, maybe some of the cases, that 180.50
7 doesn't apply; the dismissal was appropriate given the
8 circumstances in this case; then are we just left with the
9 count that he pleaded to? And whether or not that's
10 jurisdictionally defective?

11 MR. BRAUN: Well, I - - - I understand Your
12 Honor's point.

13 JUDGE RIVERA: Yes.

14 MR. BRAUN: And in this particular case, I - - -
15 I think that - - - you know, our - - - our argument is that
16 in this case, everybody knew we were dismissing solely for
17 the purposes of - - -

18 JUDGE RIVERA: No, no, no. I understand that. I
19 - - - I'm just saying, if - - - if - - - if we conclude - -
20 - if the court concludes that there was an appropriate
21 dismissal of the felony counts.

22 MR. BRAUN: Uh-huh.

23 JUDGE RIVERA: And that the issue is whether or
24 not what he pleaded to is jurisdictionally defective, do we
25 then not have to deal with this question of whether or not

1 there - - - the appellate term is exercising interests of
2 justice and all the rest of this, perhaps? These knotty
3 issues related to that?

4 MR. BRAUN: So let me see if I under - - - I'm
5 sorry, Your Honor.

6 JUDGE RIVERA: No. That's okay.

7 MR. BRAUN: So if you - - - if what you're saying
8 is that you determine that there is a - - - there is a - -
9 - that - - - that the procedure here followed was okay - -
10 -

11 JUDGE RIVERA: Yes.

12 MR. BRAUN: - - - and that after the procedure,
13 the only thing that survives is what's on the misdemeanor
14 complaint?

15 JUDGE RIVERA: That he pleaded to. Yes.

16 MR. BRAUN: Well, then that gets into the whole
17 arguments of operability and whether or not we - - -

18 JUDGE RIVERA: Yes. Yes, yes. Okay. So maybe
19 you can address the operability issue?

20 MR. BRAUN: I - - - I can. Sure. Absolutely.

21 So from our point of view, with operability,
22 there is - - - there's two parts to it, right? Because we
23 understand that there wasn't a waiver of prosecution by
24 information here. But in order for it to be sufficient, it
25 would have had to meet the reasonable cause standard and

1 the prima facie standard.

2 Now, by appellant's argument, they're saying we
3 don't even meet the reasonable cause standard, and that
4 can't be right. Because police officers, as was implied
5 earlier, can't swear under penalty of perjury that a gun is
6 operable without them actually having to fire it. That
7 would be - - - that would be putting a - - - a burden on it
8 that would - - - that would - - - and by the way, that's
9 also counter to the case law of this court in Leung and
10 other cases. So I think - - -

11 JUDGE RIVERA: So I think she was arguing based
12 on training and experience, your position is that even if
13 they look at - - - look at the weapon, handle it in some
14 way, that's just not possible.

15 MR. BRAUN: I don't know what kind of training
16 and experience could get an officer to swear under penalty
17 of perjury - - -

18 JUDGE RIVERA: And that's the - - - the - - - the
19 way that prosecutors always establish operability after
20 some kind of ballistics?

21 MR. BRAUN: I think you could establish
22 operability either through a ballistics test or maybe if
23 the defendant says, you know, again, this is just for
24 pleading purposes - - -

25 JUDGE RIVERA: Putting aside, if the defendant

1 somehow - - -

2 MR. BRAUN: Says something.

3 JUDGE RIVERA: - - - makes a statement that - - -
4 you know, you would use to get the inference of
5 operability.

6 MR. BRAUN: Yeah. Or if they - - - or if they
7 actually saw the gun being fired.

8 JUDGE RIVERA: They used it, yes. Sure.

9 MR. BRAUN: Yeah, exactly.

10 JUDGE HALLIGAN: What about - - - what about the
11 concession below that it was jurisdictionally defective,
12 which the appellate term notes?

13 MR. BRAUN: Yes, it's true. So below we - - -
14 we - - -

15 JUDGE HALLIGAN: Why - - - why shouldn't we hold
16 you to that? Did you - - - did you say - - - did you
17 carve-out, you know, okay, we're bound by this case, but we
18 disagree with it, in a footnote or a sentence?

19 MR. BRAUN: We didn't. But the concession - - -
20 but we were dealing with the appellate - - - the appellate
21 term and their line of case law.

22 JUDGE HALLIGAN: I know. But - - - but
23 generally, I think one can note, in a respectful way, that
24 while you recognize you're bound by a decision of that
25 court, that there is a higher court and you - - - you would

1 disagree with it, should there be a further appeal.

2 MR. BRAUN: I don't disagree with Your Honor.
3 And - - - and perhaps a footnote would have been wise
4 there.

5 JUDGE HALLIGAN: So - - - so given that - - -
6 that there isn't some effort to - - - to preserve your
7 objection to - - - or your view that that decision was
8 incorrect, why should we entertain that now?

9 MR. BRAUN: Because you have the - - - you have
10 the powers to entertain it as a court of law. The - - -
11 you have the powers to enter - - - and by the way, there's
12 no LaFontaine problem whatsoever in this case, because you
13 can revisit any defect in the trial court's original order.

14 So you have the power to entertain that. And
15 while it might have been more advisable to put it in a
16 footnote at the appellate term, that is an issue that you
17 can decide now and is ripe for this appeal as well.

18 But if I could get back to - - - if I could get
19 back to why there can't be any dismissal here with
20 prejudice. Not only is this not a relatively minor crime
21 under Burwell, but - - - you know, and Gary Allen from this
22 court also says it's a serious crime. There are many
23 penological purposes that would be served by not dismissing
24 this case.

25 This was a defaced gun. It was identified as a

1 40 point high - - - 40 Hi-Point gun. It was being
2 transported here in the Bronx.

3 And by the way, if the defendant wanted to
4 dismiss the entire complaint, which is what he's - - - he's
5 asking for now, for the first time in appeal, he would - -
6 - under CPL 170.35(1)(a), the People would have had the
7 chance to amend it in order to add an attempt charge, which
8 is something that we could do even with an inoperable gun.

9 So he's asking this court to do it but not give
10 us the chance under 170.35 to later amend it in order to
11 add the attempt. If - - - so for all of those reasons, a
12 dismissal with - - - with prejudice is clearly not
13 appropriate.

14 But to get back to the - - - to the operability
15 point, I think we can agree that the reasonable cause
16 standard here is met. I think it also meets the prima
17 facie standard here as well because Kalin asks us to allege
18 some facts that show operability. And I think in this
19 case, we have alleged facts that can - - - that can at
20 least go to for the purposes of commencement, show
21 operability, including the fact that it was a - - - a
22 named, labeled, brand-name gun Hi-Point 40 caliber gun.
23 That it was defaced.

24 All of these things suggest that this was a gun
25 that was manufactured to be operable. And short of putting

1 in a ballistics test, there was no other way to - - -

2 JUDGE TROUTMAN: But even if the gun is
3 manufactured to be operable, it doesn't necessarily follow
4 that, in this instance, this particular gun was, in fact,
5 operable without some evidence of same.

6 MR. BRAUN: I - - - I do understand Your Honor's
7 point. But again, this - - - this plea was constructed in
8 order to advance justice here. And maybe we would have
9 been safer taking - - - you know, not accepting a plea
10 until we put in a ballistics test every single time, but
11 that could also stymie the taking of pleas. Which would -
12 - -

13 JUDGE TROUTMAN: But you're also saying,
14 irrespective, even if it is jurisdictionally defective, you
15 get a chance to have it remitted?

16 MR. BRAUN: Absolutely. At the very least, that
17 - - - that's what has to happen in this court.

18 Unless Your Honors have any further questions, we
19 rest on our brief. Thank you very much.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. RHIM: Your Honor, I'd like to - - - I think
22 there's been some confusion as to a remand and dismissal
23 here. What we're asking for today is based on this court's
24 decision in Jones.

25 Defendant in Jones was charged with resisting

1 arrest and disorderly conduct. This court found that - - -
2 that the defendant - - - that - - - you know, the - - - the
3 disorderly conduct charge was facially insufficient. And
4 because the resisting arrest charge was tied directly to
5 the disorderly conduct, there was nothing left to send
6 back. That's the argument we're making here today.

7 Respondent says there - - -

8 JUDGE TROUTMAN: And if we disagree with you, are
9 you suggesting that we don't - - - we shouldn't remit it?

10 MS. RHIM: We're saying that there's nothing left
11 to remit, Your Honor. The proper - - -

12 JUDGE TROUTMAN: But if we believe that there is
13 something to remit, why shouldn't we?

14 MS. RHIM: Because that's - - - remittal is not
15 the proper remedy. As I mentioned, 40.20 - - - 40 - - -
16 40.30 is the correct remedy, Your Honor. And that's not
17 remand, that - - - that's reprosecution that comes after
18 dismissal. It's not automatic. The prosecution - - - the
19 prosecution can't amend their complaint automatically.
20 They have to ask this court for permission. And they have
21 not done so under 40.30 thus far. They haven't done so
22 when they got up to the podium. They're asking for
23 remittal when there's nothing left to remand.

24 CHIEF JUDGE WILSON: Can we - - - can we reach
25 the question of whether operability is required?

1 MS. RHIM: I'm sorry? Can - - - can - - -

2 CHIEF JUDGE WILSON: Can we reach the question of
3 whether operability is required?

4 MS. RHIM: We would - - - we would ask that you
5 do reach that question. This - - -

6 CHIEF JUDGE WILSON: And so what if we conclude
7 that operability is not required?

8 MS. RHIM: Then - - - then, I guess we have - - -
9 then, I guess it's an affirmance.

10 But we would ask that based on Longshore and
11 Cavines and fifty years of case law, that this court
12 continue to uphold that operability is an essential element
13 that needs to be - - - that needs to be pleaded in the
14 complaint. And it's easy to do.

15 JUDGE RIVERA: So operability, if - - -

16 MR. RHIM: You did it in Kalin.

17 JUDGE RIVERA: - - - if - - - if the court
18 decides operability is not required, what - - - how is that
19 an affirmance? Because, then, isn't he pleading to this
20 crime that required operability?

21 MS. RHIM: Right. Right. So if you don't need
22 to plead operability, then we don't have a case. Because
23 then - - - then, I guess, this information would be
24 facially sufficient without operability.

25 But operability must be alleged as per case law.

1 It's from - - - you know, Longshore, Cavines. It's from
2 the court's interpretation of the statute.

3 I - - - I believe respondent says in their brief,
4 you know, the word operability doesn't come out in the
5 statute. But that - - - that's the court exercising their
6 power to interpret statute. And we haven't been able to
7 find case law saying that operability is not an essential
8 element.

9 JUDGE RIVERA: If I - - - if I can go back - - -
10 because your red light is on - - - to some of the questions
11 before, regarding this exercise of interest of justice
12 jurisdiction, the defendant's request that if I - - - if I
13 can't get my primary remedy, then I want to keep my plea.

14 Why isn't that gaming the system?

15 MS. RHIM: Because a jurisdictional defect is a
16 jurisdictional defect, Your Honor. You can - - - you can
17 raise that after, you know, taking even the most favorable
18 guilty pleas.

19 JUDGE RIVERA: Yes. But his argument was, you
20 know, you negotiated - - - I'll just say it now - - - the
21 dismissal of the felonies to get that particular plea. And
22 they might not have made that choice.

23 MS. RHIM: Right. I understand that this may or
24 may not have been a - - - a good plea deal. But we really
25 can't know, because - - -

1 JUDGE RIVERA: You mean that kind of request when
2 you say this thing may or may not happen a great deal? The
3 defendant's making this kind of request?

4 MS. RHIM: Oh, no, no. What - - - sorry. What I
5 - - - what I'm - - - what I'm referring to is that without
6 operability having even been alleged in the accusatory
7 instrument, we can't know if this is an actual windfall and
8 if this is as good of a plea deal as Mr. Burgess could have
9 gotten. That's - - - that's - - -

10 JUDGE GARCIA: But I - - - I think the point is
11 more gaming the system is on what you requested. Because
12 at the Appellate Division you requested alternate forms of
13 relief. Either you vacate my plea and you dismiss the
14 complaint or you affirm my conviction, even though it's
15 jurisdictionally defective. And you got one of those
16 things. I don't know how you appeal that because you were
17 given what you asked for.

18 MS. RHIM: We're - - - we're simply asking this
19 court today - - - and if Your Honors believe that this is
20 the case you want to open the door - - -

21 JUDGE GARCIA: So let's say - - - just to go back
22 to gaming. Let's say, at that point you know they have a
23 witness, and you're going to go back, you're going to face
24 a felony charge. Now the witness dies and you come here
25 and you say, no, I don't really want that, I - - - I'll

1 take the felony complaint.

2 MS. RHIM: Look, Your Honor, I - - - I understand
3 your point, but what - - - what we're arguing is that the
4 prosecution can - - - they - - - they can fix this if they
5 want. But remittal is not the remedy. They have to ask
6 permission from this court through 40.30. And this court
7 has to make an individualized determination as to whether
8 they want this - - - this case to go back or not.

9 And I'd also like to clarify one thing. It
10 wouldn't be going back to the pre-pleading posture because
11 a - - - because, under 30.30 subsection 7, to be in the
12 pre-pleading posture you need a valid accusatory
13 instrument.

14 So if Your - - - if Your Honors grant this 40.30
15 relief for the prosecution - - - and - - - and that can
16 only happen if they ask and they haven't. If Your Honors
17 grant that relief, then you would have to go back to the
18 commencement. You would go - - - you'd be going before the
19 pre-pleading posture.

20 JUDGE SINGAS: I mean, I guess our point - - -

21 MR. RHIM: I'd - - - I'd like to - - -

22 JUDGE SINGAS: - - - is that you knew all of that
23 when you entered into a plea. And it doesn't seem like
24 you're playing the long game. Because, ultimately, even if
25 you prevail on this, I think that this creative plea

1 negotiations with your adversaries isn't going to happen,
2 frankly, anymore.

3 MS. RHIM: I don't think so, Your Honor. Because
4 what we're asking for today - - - what we're asking for
5 today is for Your Honors to uphold case law that's already
6 there. We're asking that essential elements be pleaded in
7 accusatory instrument. That's all we're asking.

8 And you know, in Longshore, this court found that
9 - - -

10 JUDGE TROUTMAN: But then, why didn't you just
11 let the appellate term do what it needed to do and send
12 back instead of saying - - -

13 MR. RHIM: Because - - -

14 JUDGE TROUTMAN: - - - you can affirm?

15 MS. RHIM: Because remittal is not the proper
16 remedy, Your Honor.

17 JUDGE GARCIA: Then you could have appealed that.

18 MS. RHIM: We could have - - -

19 JUDGE GARCIA: Right.

20 MR. RHIM: - - - and - - - and - - - we could
21 have at the time, and - - - and - - -

22 JUDGE GARCIA: If they said, no, we're remitting
23 it, you could have appealed that. But you said, no, don't.
24 If they said, you're right, jurisdictionally defective, but
25 we're going to remit on the felony complaint, you could

1 have appealed that as proper under this court's precedent.
2 So what - - - the only thing you gain by saying don't remit
3 it, is you keep your plea.

4 MS. RHIM: Your Honors, what we are seeking now -
5 - - the remedy that we're seeking now, we didn't know was
6 available to us. That's - - - that's just - - - it's as
7 simple as that.

8 This 40.30 - - - the reason why we - - - we never
9 talked about 40.30, the reason why we've never asked for
10 dismissal on the entire accusatory instrument based on the
11 same defect sort of rendering every single charge
12 defective, is because that law is very unclear. That's why
13 I'm here. I just - - - we just want clarity on that.

14 JUDGE GARCIA: But a lot of times the law is
15 unclear, but you still don't get to kind of say, well, if
16 you clarify it against me, then just leave me alone with
17 the jurisdictionally defective plea. I mean, then you
18 appeal it. Maybe we'll clarify it for you.

19 MS. RHIM: Well, we will accept Your Honor's
20 decisions on that. But I - - - I will - - - I also just
21 want to quickly go back to the operability portion of this.

22 In Kalin - - - you know, or prior to Kalin, there
23 was this sort of fear of making the DA's jobs harder
24 because you had to have a drug test for every case. And
25 with Kalin, this court found that you just need to say

1 training and experience, packaging, and - - - you know, and
2 just to note, like, there - - - there were three dissenting
3 judges in that who found that that wasn't - - - that - - -
4 that was sort of, you know, unclear.

5 An operable gun is much more obvious than a white
6 bag - - - a bag - - - a little bag of white powder. And so
7 what we're asking for isn't a big lift. We're asking that
8 the officer be just - - - you know, upon their inspection
9 of the gun or after a ballistic - - -

10 JUDGE SINGAS: You think that you can determine
11 operability of a weapon by just looking at it?

12 MS. RHIM: I certainly can't, but a trained
13 police officer can. And I - - - and I trust that they can.

14 JUDGE SINGAS: Without firing that weapon?

15 MS. RHIM: Without firing that weapon. Again,
16 there's other charges that you could - - - you don't need
17 to know the exact charge at the time you're arresting
18 someone. If an officer sees sort of other - - - other
19 circumstances that sort of suggest criminality, I think
20 there was one - - -

21 JUDGE SINGAS: Like bullets?

22 MR. RHIM: Sorry?

23 JUDGE SINGAS: Like bullets in this case?

24 MS. RHIM: I mean, these were unmatched bullets
25 in a - - - in a trunk. So maybe, in this case, it's a

1 little bit less clear, and maybe the correct charge would
2 have been attempt. But we don't know that because we don't
3 have a ballistics test.

4 I guess my point is that on the street, you see
5 someone with a gun. An officer - - - an officer isn't sure
6 - - - it's in - - - you know, their pocket or - - - you
7 know, waistband. And an officer can't tell whether that
8 gun is working or not. They can still arrest the person.
9 They can still arrest the person, and then at the charging
10 station, they can either get a ballistics report, or they
11 can get the testimony of - - - of the officers - - -
12 supporting that position from the officer, sort of alleging
13 whether this, you know, rises to the level of reasonable
14 cause.

15 And that's not - - - that's not a heavy lift.
16 And this - - - that's exactly what this court did in Kalin.
17 And that's what we're asking for. And as for - - -

18 CHIEF JUDGE WILSON: Counsel - - -

19 MR. RHIM: - - - as for the remedy, I would like
20 to repeat again that the remedy here isn't remittal. It's
21 - - - it's - - - on the prosecution's burden. It's the
22 prosecution's burden now to ask for permission under 40.30
23 for this court to either authorize it or don't.

24 CHIEF JUDGE WILSON: Counsel, we - - - we have
25 that point, and your time is up. Thank you.

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Burgess (Warren), No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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