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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 34

TERI W.,

Appellant.

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20 Eagle Street  
Albany, New York  
February 14, 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:

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1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is appeal number 34, The People of the State of  
3 New York v. Teri W.

4 MR. HAUSMAN: Good afternoon, Your Honors.

5 CHIEF JUDGE DIFIORE: Good afternoon, counsel.

6 MR. HAUSMAN: Lawrence Hausman for the defendant-  
7 appellant Teri W. And I would like to reserve two minutes.

8 CHIEF JUDGE DIFIORE: Of course.

9 MR. HAUSMAN: Thank you.

10 So the - - - the question on this appeal is the  
11 period of probation for a youthful offender whose  
12 substituted conviction was for a sex offense. And it's - -  
13 - as Your Honors are aware, it's Penal Law 60.02 that  
14 governs youthful offender sentences - - -

15 JUDGE FEINMAN: So we have Torrez, we have Gray,  
16 and we have Brandon T. So that's the Second, Third, and -  
17 - -

18 MR. HAUSMAN: Fourth - - - I mean, excuse me,  
19 First, Second, and Third.

20 JUDGE FEINMAN: - - - First, Second, and Third  
21 Department. They all agree. So what are we doing here?

22 MR. HAUSMAN: Well, Your Honor, respectfully,  
23 they got it wrong. And - - -

24 JUDGE FEINMAN: But the Fourth Department, if  
25 they ever got there, they might have gotten it right?



1 MR. HAUSMAN: Well, they - - - I - - - I expect  
2 they would have.

3 JUDGE STEIN: If - - - if - - - so is there  
4 anything in the language of the statute itself that says  
5 that we should do the analysis that you say we should do?

6 MR. HAUSMAN: I - - - I think there is, Your  
7 Honor. And I think Your Honor's decision, I think, in  
8 Jorge D., although ultimately it disagrees on this - - -  
9 this piece of it in dicta, I think Your Honor's analysis in  
10 Jorge D. gets us a long way there. And - - -

11 JUDGE STEIN: Right, but in Jorge D. there was -  
12 - - there was actually a statute that - - - that indicated  
13 that a prison term could only be a - - - a determinative -  
14 - - a determinative term, right, and so that's really - - -

15 MR. HAUSMAN: But --

16 JUDGE STEIN: - - - what we rested that decision  
17 on.

18 MR. HAUSMAN: But I think if you step back a  
19 little bit and you look at 60.02 together with 720.20, what  
20 Jorge D., I think, recognizes is that you have this term in  
21 60.02, "Class E felony offense", and the question is do you  
22 mean like a regular Class E felony as opposed to a violent  
23 E felony or drug E felony or sex E felony, or do you mean  
24 any - - - any E felony?

25 And I think what 72.20 (sic) does, it says that



1 that language "Class E felony", 720.20 means it - - - it  
2 means that it's that regular E felony, the indeterminate E  
3 felony, right?

4 JUDGE STEIN: Well, I know. But as I say, there  
5 was another statute that seemed to contradict that. And -  
6 - - and so is there anything here that contradicts that  
7 other than - - - well, I don't know.

8 MR. HAUSMAN: Well - - -

9 JUDGE STEIN: Is there anything in the statutory  
10 literature - - -

11 MR. HAUSMAN: - - - so but I don't think that - -  
12 - I don't think that 720.20 contradicted anything. I think  
13 it informed the definition of Class E felony. And I think  
14 Your Honor made the point in Jorge D. that when this all  
15 started, when 60.02 was enacted, there was only one scheme.  
16 There was a - - - there was a - - - what I'll call a  
17 regular felon - - - regular E felony, so not - - - there  
18 were no violence determinants, no drug determinants, no sex  
19 offense.

20 So clearly, at - - - at its origin, when the  
21 legislature said E felony in 60.02, they meant a  
22 determinant - - - they meant indeterminate terms with  
23 maximum of five years' - - -

24 JUDGE STEIN: But does that - - -

25 MR. HAUSMAN: - - - probation.



1 JUDGE STEIN: - - - mean that in every case - - -  
2 we have to go - - - in order to - - - to interpret the  
3 statute, we have to go back to the very beginning of time  
4 when that statute was originally enacted, or can't we  
5 assume that the legislature knows about Torrez and Gray and  
6 Brandon T. and how this is being - - - being implemented.  
7 And if - - - if the courts were getting it wrong, they  
8 could do something about it.

9 MR. HAUSMAN: Well - - - well, an important point  
10 on that is that the legislature rarely intervenes over  
11 intermediate appellate authority. So - - - so the cases  
12 like State Farms and Palladino are cases where this court  
13 is considering rethinking an earlier precedent of its own.

14 So the cases where the legislature has - - - has  
15 been - - - has been deemed to have with - - - you know,  
16 withheld acting in light of intermediate appellate  
17 authority is when there was a special call for the  
18 legislature to - - - to overrule some lower intermediate  
19 appellate courts, and they've refrained from doing so.

20 JUDGE WILSON: So let me ask you this. If - - -  
21 if the legislature, instead of doing what it did, had  
22 increased the penalty for E felonies, you would agree at  
23 least in that circumstance, that increased penalty would  
24 apply - - - or increased probation, let's say, for - - - it  
25 didn't classify them. It didn't have a special carve-out



1 for sex offenders, it just said - - -

2 MR. HAUSMAN: Yes. Then - - -

3 JUDGE WILSON: You would agree with that?

4 MR. HAUSMAN: - - - absolutely I would agree.

5 JUDGE WILSON: Okay.

6 MR. HAUSMAN: And so I - - - so I think there's a  
7 two-step analysis here, which is first what did you mean -  
8 - - what did the legislature mean by Class E felony. And  
9 like I - - - like I think Jorge D. does a nice example,  
10 there's three reasons why a Class E felony meant a non-  
11 drug, non-sex, nonviolent felony, and that's: 1) because  
12 that's how it was at the beginning; and 2) when the  
13 legislature started to add all these other kinds of  
14 schemes, they didn't do what you would expect them to have  
15 done and what they did in other similar language in the  
16 statute. They didn't say an E felony of the type that's  
17 being substituted.

18 And in fact, you know, when - - - when this very  
19 statute has made some other exceptions, they've said things  
20 like, for - - - for example, conditional discharges and  
21 unconditional discharges can apply to certain drug  
22 sentences. And they say "except when the substituted  
23 conviction is" X, Y, and Z.

24 And so you would expect that when the legislature  
25 - - -



1 JUDGE STEIN: But it also didn't say to an  
2 undesignated or unclassified or whatever E felony. And so  
3 when - - - when it refers you to the - - - the term that's  
4 permitted for an E felony, don't you have to then go to  
5 that statute and say okay, what's permitted for an E  
6 felony, and - - - and what are we dealing with here?

7 MR. HAUSMAN: Well, one important point is that  
8 the legislature doesn't really use the - - - the term  
9 "undesignated" or "unclassified". And so - - - so when  
10 they say - - -

11 JUDGE STEIN: Right. Well, they could - - - they  
12 could - - - they - - - they could use language of that  
13 sort.

14 MR. HAUSMAN: They could. But throughout, even  
15 in the penal law, like Penal Law 70, when they're talking  
16 about non-drug, nonviolent, non-sex felonies, they say an E  
17 felony. And so - - - and so I think you're right, in  
18 certain circumstances, maybe an E felony could mean all  
19 types of felonies.

20 But that's why you have to look at the context,  
21 which is - - -

22 JUDGE STEIN: Well, talking about context, let me  
23 - - -

24 MR. HAUSMAN: Yeah.

25 JUDGE STEIN: - - - ask you one other question.



1 If we agree with your interpretation - - -

2 MR. HAUSMAN: Yeah.

3 JUDGE STEIN: - - - then don't we have this kind  
4 of strange result that - - - that a class - - - somebody  
5 who is a youthful offender having been convicted of a Class  
6 A misdemeanor sex offense, gets a longer term of probation  
7 available than a Class - - - than a felony sex offense?

8 MR. HAUSMAN: Assuming you agree with the  
9 People's interpretation of that misdemeanor statute. And -  
10 - - and I think that you could easily also just say that in  
11 2000, when the legislature expanded these probationary  
12 terms, they weren't thinking about - - - they weren't  
13 thinking about the youthful offender sentence.

14 And I think the best evidence of that is that  
15 although 60.02 had clearly only referred to regular E  
16 felonies, they - - - the - - - the language didn't at all -  
17 - - they didn't introduce any language that tracked that E  
18 felony which we - - - as we know, was already completely  
19 separated from the level of the substitute conviction.  
20 Right? Even if you have a B conviction, you're getting an  
21 E. But there's - - - they didn't do anything to connect it  
22 back to the type of underlying crime.

23 CHIEF JUDGE DIFIORE: So Mr. Hausman, come along  
24 to C.P.L. 65.

25 MR. HAUSMAN: Yes, Your Honor.





1 CHIEF JUDGE DIFIORE: The probation statute that  
2 requires the court to consider the nature and circumstances  
3 of the crime - - - the sentencing court. So doesn't that  
4 lead us right directly back to the underlying offense here  
5 and the nature of that offense?

6 MR. HAUSMAN: The reason I think it doesn't, is  
7 because if you start - - -

8 CHIEF JUDGE DIFIORE: Does not?

9 MR. HAUSMAN: - - - at the very section of Penal  
10 Law 65 where it talks about criteria, it talks about  
11 convictions. And so then later, when, in Section 3 they  
12 talk about a felony sexual assault, I think clearly they're  
13 talking about a felony sexual assault conviction, whereas -  
14 - -

15 CHIEF JUDGE DIFIORE: Was there no regard for - -  
16 - I get the conviction piece - - -

17 MR. HAUSMAN: Right.

18 CHIEF JUDGE DIFIORE: - - - for the underlying  
19 offense and the facts and circumstances surrounding that?

20 MR. HAUSMAN: Well, Your Honor, I think you're -  
21 - -

22 CHIEF JUDGE DIFIORE: And the purpose of the  
23 probation?

24 MR. HAUSMAN: - - - you're absolutely right that  
25 you would look to the underlying circumstances in fixing



1 the appropriate term of probation within the legal - - -  
2 once you decide what that term is and in deciding whether  
3 to impose probation or not. But in answering the legal  
4 question of whether it's a five-year term of probation or a  
5 ten-year term of probation, you have to go back to that  
6 question of when the legislature said a Class E felony, did  
7 they mean a Class E nonviolent, non-drug, non-sex felony,  
8 or did they mean one that just - - - or did they mean,  
9 well, it depends. But we're not telling you when which - -  
10 - when each section applies.

11 I mean, an important point is that when the  
12 legislature - - - can I just finish my - - - I see my time  
13 is up.

14 CHIEF JUDGE DIFIORE: Yes, you may.

15 MR. HAUSMAN: When the legislature - - - when the  
16 legislature started adding probationary - - - enlarging the  
17 probationary terms in 2000, they didn't change the language  
18 in 60.02, but so for the People's position to be right,  
19 that same language in 60.02 - - - in 60.02, a Class E  
20 felony, would have to, under Jorge D., mean a regular class  
21 E felony, not a drug E felony or sex E felony, but for - -  
22 - but for probationary sentences, that very same language  
23 which they didn't even change, would all of a sudden have  
24 to also mean - - - would all of a sudden have to mean the  
25 opposite and would have to mean a sentence based on the



1 underlying conviction.

2 And I think 65 doesn't - - - Penal Law 65 doesn't  
3 support that, because it's limited to - - - when it talks  
4 about felony sexual assault, there has to be a reference  
5 back to the criteria section which deals with convictions.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. HAUSMAN: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel?

9 MR. POLLACK: Chief Judge, and may it please the  
10 court, Lee Pollack for the People.

11 The legislative scheme at issue in this case is  
12 entirely internally consistent, because 65.00, particularly  
13 subsection (3)(d) second - - - last paragraph, explicitly  
14 keys the enhanced probationary sentence for a sexual  
15 assault - - - for a sexual assailant, to the offense,  
16 whereas all of the legislation and all the provisions that  
17 we're discussing regarding incarceration, are keyed to  
18 someone convicted.

19 And while 60 - - - 60.02 does - - - does state  
20 that a youthful offender conviction substitutes for the  
21 felon - - - for the conviction - - - the adjudication  
22 substitutes for the felony of conviction, it still clearly  
23 and explicitly contemplates that a youthful offender has  
24 committed a cognizable offense.

25 And so the only way to read these two statutes



1 together is that when - - - as in this case - - - the  
2 youthful offender sub - - - has committed the offense that  
3 is a sexual assault, the separate and wholly independent  
4 definition of that term that appears only in 65.00 - - -  
5 and it says in this section this term means an offense,  
6 that the only permitted sentence, at that point, is the  
7 ten-year sentence of probation for people who have  
8 committed that offense.

9 JUDGE WILSON: Do you know of anything in the  
10 legislative history that would suggest that when the  
11 legislature increased the probationary period for sex  
12 offenders, it was thinking about the interplay with the  
13 youthful offender statute?

14 MR. POLLACK: There's nothing in the explicit  
15 legislative history, but we do have this decade of silence  
16 in response to consistent Appellate Division precedent  
17 interpreting these statutes in this way, despite the fact  
18 that there have been multiple amendments to each and every  
19 one of these provisions, in the last ten years, but nothing  
20 that changed the outcome in Gray, in - - - in Torrez, in  
21 Brandon T.

22 And so - - - and the other piece of - - - the  
23 other critical piece of information, I think, is that the  
24 statutes here, on their plain language, fit together  
25 correctly. They lead to exactly the result we're talking



1 about, exactly the result that the Appellate Divisions have  
2 repeatedly come to that for a sentence of incarceration  
3 which are keyed to conviction, a youthful offender doesn't  
4 have one.

5 Which - - - for sentences of probation which are  
6 keyed to the offense, the youthful offender absolutely has  
7 one. And it even makes - - - and it makes sense that that  
8 would be where the legislature would come out, because the  
9 whole point of the legislative - - - the youthful offender  
10 scheme, repeatedly throughout all of the evidence, is to  
11 avoid the stigma of incarceration. Youthful offender - - -  
12 sexual offenders don't end up registering under SORA. It's  
13 all about avoiding stigma.

14 But that's different. And in fact, 65 explains  
15 that the purpose of probation is different. It's not  
16 stigmatizing. Probationers are not registered in a public  
17 - - - you know, you can't look them up online. The purpose  
18 of probation is where the defendant is in need of guidance,  
19 training, or other assistance, which in this case could be  
20 effectively administered through probation, the point of  
21 probation is to help people get back on the straight and  
22 narrow and stay on the straight and narrow.

23 JUDGE RIVERA: Well, being on probation can be  
24 stigmatizing. The question here is the - - - how much time  
25 you spend on probation.



1 MR. POLLACK: But I think that there's a critical  
2 issue where probation isn't - - - it's not punitive. It -  
3 - - it is about - - - it's rehabilitative. And these  
4 individuals, the legislature quite reasonably determined,  
5 sexual offenders, people who've committed these sexual-  
6 assault offenses, benefit from additional - - - additional  
7 probation.

8 JUDGE RIVERA: Then wouldn't one expect to find  
9 language in the statute - - -

10 MR. POLLACK: I don't think - - -

11 JUDGE RIVERA: - - - so that we wouldn't be here  
12 today?

13 MR. POLLACK: I - - - I don't think so. I don't  
14 think the legislature needed to amend the statute - - - 60  
15 - - - needed amend 60.02, when on its terms, when read in  
16 conjunction with 65.00 it gave the right answer, and when  
17 read in conjunction with 70.80 on the felony - - - on the  
18 incarceratory side, when read with 70.70 and 70.71 on the  
19 drug side, it also gave the right answer.

20 There's no reason for the legislature to engage  
21 in additional amendment - - - to expect them to engage in  
22 additional amendment when, on a close reading of the plain  
23 language of the statute, you get the answer they clearly  
24 wanted and the one they have ratified by their silence.

25 I - - - I do want to briefly - - - if I have a



1 moment - - - speak to one issue that my opponent raised in  
2 his reply brief, and I haven't had a chance to speak to  
3 before, which is this notion that you end up with a strange  
4 result under 65(3)(a)(ii), which is the provision about A-1  
5 drug and B second felony offenders - - - offenses.

6 JUDGE FAHEY: You're talking about - - - the  
7 argument that's made against them is that an A misdemeanor  
8 would be six years' probation where - - - where an  
9 unclassified E would be five, and then the response would  
10 be, but look at the felonies? Is that what you're talking  
11 about?

12 MR. POLLACK: No. So at the - - - on the last  
13 page of my opponent's reply brief - - -

14 JUDGE FAHEY: Um-hum.

15 MR. POLLACK: - - - he makes an argument that the  
16 result - - - the - - - the reading - - - the plain language  
17 reading can't be correct, because there is this additional  
18 provision regarding felony - - - felony probationary  
19 sentences for B second felony sex offenders and A-II drug  
20 offenders.

21 JUDGE FAHEY: Right.

22 MR. POLLACK: Which lead to twenty-five years or  
23 lifetime probation. And - - -

24 JUDGE FAHEY: Oh, okay. All right.

25 MR. POLLACK: - - - the response, which we



1 haven't had a chance to give yet, because it was in our  
2 opponent's reply brief, is that actually a youthful  
3 offender can't fall under either of those provisions. A  
4 youthful offender can't be a second - - - adjudicated  
5 second felony offender by definition. They don't have a  
6 conviction. And 70.71, which is the statute that's  
7 explicitly referenced in - - - and this is 65 - - -  
8 65.00(3)(a)(ii) - - - explicitly references an A felony  
9 drug offender as defined in subdivision 70.71. That  
10 provision also requires a person to stand convicted of a  
11 felony, which we absolutely agree with defendant, youthful  
12 offenders don't stand convicted of a felony.

13 And so again, the statutes fit together,  
14 absolutely seamlessly, no additional - - - no - - - no  
15 additional amendment was required.

16 If the panel has no further questions, we ask  
17 that you affirm.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 Counsel, Mr. Hausman?

20 MR. HAUSMAN: Yes, Your Honor. Thank you.

21 Just going back to Penal Law 65, which I think -  
22 - - I think where - - - is where a lot of the discussion is  
23 focusing, I think if you go back to 2000 when the  
24 legislature was looking at Penal Law 65 and saying we're  
25 going to increase the adult probationary terms of ten years





1 or five years, I think it's pretty remarkable to think that  
2 this legislature, already knowing that - - - that that  
3 language "E felony" from 720.20 was referring to regular E  
4 felony sentences, that they would - - - that they would - -  
5 - if they thought, oh, let's raise it for youthful  
6 offenders, we'll nonetheless leave the youthful offender  
7 statute alone, and we also won't mention the word "youthful  
8 offender" in Penal Law 65.

9 That's a pretty remarkable thing for them to do,  
10 to change the youthful offender sentences by both leaving  
11 the youthful offender statute unchanged and by being silent  
12 about the term "youthful offender" in Penal Law 65.

13 And then if you also think about the fact - - -  
14 if you also think about the fact that that term, "felony  
15 sexual assault" in Penal Law 65, as I said, is really  
16 defined by crit - - - by section 1 criteria which talks  
17 about convictions, and it's - - - it's often the case in  
18 other similar statutes - - - for example, in 70.80, the  
19 first section talks about felony sexual convictions, right.  
20 And then later on, when it says the length of sentence for  
21 those convictions, it starts referring to them as felony  
22 sexual offenses, and it drops out the word "conviction".

23 So clearly once you know you're talking about  
24 conviction, which you do in Penal Law 65 once you're  
25 talking about the criteria, you know, the fact that you



1 don't continue to repeat the word "conviction" is of no  
2 moment. Nonetheless - - - because that felony sexual  
3 assault refers back to that term "conviction".

4 So what you have here is you have a - - - what I  
5 think is an implausible supposition, that the legislature  
6 in 2000 is changing the probationary term of adult felony  
7 convictions, and let's suppose some legislature says, oh,  
8 well - - - legislator says, all right, let's change the  
9 youthful offender sentences too.

10 But then they don't go to the - - - either 60.02  
11 which they know has - - - by their other statute, 720.20,  
12 really limits E - - - E felonies to non-sex, non-drug,  
13 nonviolent felonies - - - right - - - so they know that;  
14 and - - - and they know really that felony sexual assault  
15 is defined by the term "conviction", and yet they don't say  
16 anything about youthful offenders in Penal Law 65, and they  
17 don't make any change to - - - to 60.02. I - - - I think  
18 that's a remarkable inference to draw from the  
19 circumstances.

20 And I think - - - and again, just to emphasize  
21 one other point that I made earlier, which is I think that  
22 the - - - the sort of the legislature's failure to act in  
23 response to intermediate appellate authority, is - - - is  
24 really of no moment, because the - - - the authority that's  
25 relied on by - - - by my adversary on that point is - - -



1 is either the Court of Appeals saying yeah, we're not going  
2 to overdo our own prior precedent, because the legislature  
3 is aware of it, or cases where there was a - - - where  
4 there was some intermediate appellate authority, and then  
5 there was a specific call to action for the legislature to  
6 act in response to those cases, and the legislature chose  
7 not to.

8 Because otherwise, I think it's fairly typical  
9 for - - - you know, I mean, when - - - when the  
10 legislature, to the extent it's conscious of intermediate  
11 appellate authority, will - - - will often wait until it  
12 percolates to this court before it - - - before it takes  
13 any - - -

14 JUDGE WILSON: So your answer to - - -

15 MR. HAUSMAN: - - - corrective action.

16 JUDGE WILSON: - - - Judge Feinman's question  
17 about why we're here is so that we can issue a ruling that  
18 the legislature can then reverse.

19 MR. HAUSMAN: Right. And - - - and I - - - and I  
20 hope that you'll - - - well, and hopefully they won't  
21 reverse it, because hopefully you'll agree that - - - that  
22 if they had meant to do what the People suggest they meant  
23 to do, they would have done something to - - - to either  
24 Penal Law 60.02 or to Penal Law 65 to indicate - - - to  
25 give some hint that that's what they meant to do when they



1 enhanced the probationary terms for adult felony  
2 convictions.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. HAUSMAN: Thank you, Your Honor.

5 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Teri W., No. 34 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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