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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 81

ROSEMARY HERNANDEZ,

Appellant.

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20 Eagle Street  
Albany, New York  
September 11, 2025

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: Next case on the calendar is  
2 People v. Hernandez.

3 MS. HAUPT: May it please the court. Allison  
4 Haupt, for Ms. Rosemary Hernandez. I'd like to request  
5 three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MS. HAUPT: Penal Law 60.12 says notwithstanding  
8 any other provision of law where a court imposes sentence  
9 upon a victim of domestic violence pursuant to the DVSJA,  
10 the court may impose a sentence in accordance with this  
11 section. That language plainly states that the sentencing  
12 scheme set forth in Penal Law 60.12, and no other, applies  
13 to domestic violence victims like Ms. Hernandez, whose  
14 years of unending abuse were a significant contributing  
15 factor to the offense for which she was convicted and  
16 sentenced under 60.12(3) - - -

17 JUDGE GARCIA: Counsel, but why no supervised  
18 release for this one particular category? I understand  
19 your statutory argument, but what logic could there be to  
20 this?

21 MS. HAUPT: Well, first, because there is the  
22 statutory argument, because Penal Law 60.12 preempts - - -

23 JUDGE GARCIA: I understand it. But what would -  
24 - - let's say it's ambiguous. What logic would there be to  
25 your interpretation?

1 MS. HAUPT: Well, I'd say rather than saying it's  
2 ambiguous, if the plain language isn't clear, we should see  
3 is it going to be absurd or lead to unreasonable results?  
4 And here, it wouldn't be unreasonable, and there's a number  
5 of reasons why.

6 JUDGE GARCIA: Why - - - why?

7 MS. HAUPT: So first, while the DVSJA clearly had  
8 broad scope in terms of helping many different victims of  
9 domestic violence, we - - - we have to see that the  
10 legislature was specifically focused on this group of  
11 offenders, women like Ms. Hernandez, who were sadly  
12 convicted of killing an intimate partner - - -

13 JUDGE GARCIA: But why were people in that  
14 category were the ones convicted of, at least in the code,  
15 the most serious level of offense not get supervised  
16 release, where somebody convicted of what the code  
17 considers a less serious offense would have mandatory  
18 supervised release?

19 MS. HAUPT: Well, first, because the legislature  
20 made clear that this group of offenders do not - - -

21 JUDGE GARCIA: But this group of offenders has  
22 been convicted of crimes that, under the code, are the most  
23 serious.

24 MS. HAUPT: But also ones for which the  
25 legislature recognized has a zero percent recidivism risk,

1 so those specifically not in need of PRS. This court has  
2 said that PRS is stringent, a tough penalty, and that it's  
3 meant to reduce further violent crime. This is a group of  
4 offenders that the legislature recognized doesn't have  
5 criminal history, doesn't have history of violence - - -

6 CHIEF JUDGE WILSON: I'm sorry. When you - - -  
7 when you say a group of offenders, what - - - how - - - how  
8 are you defining the group? Is it just A felons who are  
9 sentenced under the act or everybody sentenced under the  
10 act?

11 MS. HAUPT: 60.12(3), what's at issue here, is A  
12 felonies under 70 - - - Penal Law 70.

13 CHIEF JUDGE WILSON: I understand. But are you  
14 saying it is that subsection of the DVSJA offenders who are  
15 - - - who have the zero recidivism rate?

16 MS. HAUPT: Primarily, that subsection is going  
17 to involve people convicted of murder, and that's  
18 specifically what the legislature was focused on. Women  
19 convicted of killing an abusive, intimate partner who have  
20 no criminal history, who have years of domestic violence in  
21 their histories, who have a zero percent recidivism rate.  
22 So that's in the legislative history - - -

23 JUDGE GARCIA: Can't there be a class B violent  
24 felony that has some element of that to it as well?

25 MS. HAUPT: At this - - - yes, but first, this

1 primary focus of offenders is important - - -

2 JUDGE GARCIA: So - - - but that's a lesser  
3 offense, so why wouldn't they not get supervised release in  
4 addition to someone who's convicted of a more serious  
5 offense - - -

6 MS. HAUPT: Because the - - -

7 JUDGE GARCIA: - - - of the same nature, but - -  
8 -

9 MS. HAUPT: This - - - this actually fits within  
10 the scheme that the legislature created. What we see in  
11 this sentencing scheme under the DVSJA is balancing a need  
12 for PRS with imprisonment time. So offenders - - -

13 JUDGE GARCIA: But I - - - I understand that  
14 argument. The problem I have is when I look at the  
15 statute, I think somebody convicted of a B felony under  
16 this statute could get at least as much or more in terms of  
17 a sentence as someone convicted of a class A felony. So  
18 somebody there would get that term of years plus supervised  
19 release for the class A felony could get five years or  
20 whatever it is under the statute and not get supervised  
21 release.

22 MS. HAUPT: So the length of time in prison for  
23 someone convicted under 60.12(3) is far greater than a B  
24 felony - - -

25 JUDGE GARCIA: Not always.

1 MS. HAUPT: Up to fifteen years in prison.

2 JUDGE GARCIA: Up to. But what's the minimum?

3 MS. HAUPT: The minimum is - - - is five years,  
4 but up to - - -

5 JUDGE GARCIA: Right. So he could get five.

6 MS. HAUPT: - - - 15 years, it's available.

7 JUDGE GARCIA: If you got five, you get no  
8 supervised release under that reading.

9 MS. HAUPT: Yes. But there's the availability  
10 for a lengthier period of - - - of prison time. If you  
11 look at the B - - - the B felonies actually explain the  
12 scheme that the legislature created. A B violent felony  
13 offense can get a maximum of up to five years in prison.  
14 That's then balanced with longer periods of PRS.

15 JUDGE GARCIA: But what if that B felon gets five  
16 years and your class A felon gets five years, so they both  
17 have the same term. But for the B felony, which is a  
18 lesser felony under our scheme, they can't get - - - they  
19 can get supervised release of up to a certain amount - - -  
20 I think it's two-and-a-half years - - - and the A felon  
21 cannot.

22 MS. HAUPT: That would just be a matter of  
23 discretion like anything else where the court has those  
24 ranges based on the character and nature - - -

25 JUDGE GARCIA: Well, I'm just saying available

1 range. One is nothing. One is two-and-a-half years.

2 MS. HAUPT: What the sch - - - what I believe the  
3 scheme shows - - - I believe the - - - the sentencing  
4 really looks at these sentences in the aggregate.

5 I believe, Judge Singas, you referenced that  
6 aggregate sentencing within your dissent in - - - in People  
7 v. Brenda WW. And so the entire aggregate of someone  
8 convicted of murder would be a sentence that needs to be  
9 served in prison. Whereas for someone convicted of a B  
10 felony offense, there's more of that balance where it'd be  
11 - - -

12 JUDGE SINGAS: Do you have any authority for any  
13 of that? That the - - - under the B, they decided, you  
14 know what, if their exposure to jail is so much greater,  
15 then we're not going to tag on a PRS sentence.

16 MS. HAUPT: It's just looking at the scheme  
17 itself. I think looking at the violent - - -

18 JUDGE SINGAS: So that's no?

19 MS. HAUPT: The authority - - - this is - - - the  
20 DVSJA is being interpreted now by the courts, but if we  
21 look - - -

22 JUDGE TROUTMAN: But it - - - it doesn't  
23 specifically say that they're exempted.

24 MS. HAUPT: Well, when the legislature intended  
25 for there to be a term of PRS, it said so. It specifically

1 cross-referenced - - -

2 JUDGE TROUTMAN: And does it say specifically  
3 here, they are not subject to PRS?

4 MS. HAUPT: It says that a sentence in accordance  
5 with 60.12 may be imposed.

6 JUDGE TROUTMAN: And - - - and there was a  
7 concern that they were being sentenced as other violent  
8 felonies without taking into consideration their history of  
9 domestic violence. Was that not the purpose of the law?

10 MS. HAUPT: The purpose of the law was to undo  
11 years of injustice that was - - -

12 JUDGE TROUTMAN: And that's taking into  
13 consideration harsh sentencing, correct?

14 MS. HAUPT: Yes. But - - -

15 JUDGE TROUTMAN: In prison, it's part of it,  
16 right?

17 MS. HAUPT: Of course, the prison sentence is - -  
18 -

19 JUDGE TROUTMAN: And without the act - - -  
20 without the act existing, it would have been imprisonment.  
21 And then upon release, it would, on top of that, be the PRS  
22 supervision, correct?

23 MS. HAUPT: If it was a violent felony offense.

24 JUDGE TROUTMAN: But now you're saying that there  
25 is an enumerated exception to the default rule that PRS

1 does apply?

2 MS. HAUPT: But I'd argue that the default rule  
3 cannot apply to someone convicted - - -

4 JUDGE TROUTMAN: I know.

5 MS. HAUPT: - - - under 60.12(3), and that it's  
6 only when the legislature, specifically - - -

7 JUDGE TROUTMAN: Because they did not  
8 specifically say?

9 MS. HAUPT: Yes. And I think Brenda WW supports  
10 this - - -

11 JUDGE SINGAS: Well, didn't they - - - didn't  
12 they specifically say, under Penal Law 70.45, when a court  
13 imposes a determinate sentence, it shall in each case state  
14 not only the term of imprisonment, but also an additional  
15 period of PRS as determined in this article. So they did  
16 say that. This is a determinate sentence, correct?

17 MS. HAUPT: They said that, but we have  
18 conflicting statutes, and a notwithstanding provision - - -

19 JUDGE RIVERA: What conflicts? What - - - no - -  
20 - no - - - what - - - what's the conflict? What's the  
21 conflict?

22 MS. HAUPT: Because Penal Law 60.12 says that the  
23 court can impose a sentence in accordance with this  
24 section. It does not say a sentence of imprisonment - - -

25 JUDGE RIVERA: Right. And - - - and as Judge

1 Singas says - - - I mean, it strikes me, we have to suspend  
2 so many rules of construction to read this framework the  
3 way you suggest. That - - - that's what it says the court  
4 should do for that sentence. And then it says when a court  
5 imposes a determinate sentence, and it goes on about PRS,  
6 so - - -

7 MS. HAUPT: But that's - - -

8 JUDGE RIVERA: - - - so I don't see how you get  
9 around this.

10 MS. HAUPT: - - - that's an interpretation of  
11 70.45. But 60.12 says notwithstanding any other provision  
12 of law. That's the broadest notwithstanding clause. This  
13 court has said that it's the - - -

14 JUDGE RIVERA: But it doesn't say notwithstanding  
15 any other provision of law. Sentence doesn't mean what it  
16 means in every other provision - - -

17 MS. HAUPT: As - - - as - - -

18 JUDGE RIVERA: - - - which is the way you're  
19 reading. You're reading it. Sentence means only the  
20 incarceratory period.

21 MS. HAUPT: Your Honor, I would argue that's  
22 respondent's view. Respondent is trying to narrow the  
23 reach of the notwithstanding clause, to argue that it only  
24 applies to a sentence of imprisonment - - -

25 CHIEF JUDGE WILSON: Are you - - - are you

1           arguing that - - - I think you're arguing that the  
2           notwithstanding clause in 60.12 notwithstands 70.45?

3                   MS. HAUPT:   When the legislature did not  
4           explicitly authorize a term of PRS pursuant to 60.12 by  
5           cross-referencing it in 70.45.

6                   CHIEF JUDGE WILSON:   So you're saying for the - -  
7           - for the provisions in 70.45, where there is a reference  
8           back to 60.12, the notwithstanding clause and 60.12 doesn't  
9           operate?

10                   MS. HAUPT:   There's no conflict there because in  
11           accordance with 60.12, there's a term of PRS.   The  
12           legislature purposefully and specifically mandated a period  
13           of PRS.   And I - - -

14                   CHIEF JUDGE WILSON:   I'm sorry.   In - - - in  
15           60.45 - - - 60.12 or in 70.45?

16                   MS. HAUPT:   So it was incorporated by cross-  
17           reference into 70.45.   But in - - - by including those  
18           offenses, those 60.12 offenses in 70.45 at the same time  
19           that it revised 60.12, what the legislature was saying was,  
20           you may impose a sentence in accordance with 60.12,  
21           notwithstanding any other provision of law.   When PRS is  
22           authorized, we'll say so by cross-referencing it  
23           essentially.

24                   CHIEF JUDGE WILSON:   So - - - so essentially - -  
25           - so when I'm looking at 70.45, right, subsections, you

1 know, let's start with, I think, (b) - - - no, it actually  
2 starts with (a) - - - subsections (a) all the way through  
3 have cross-references back to 60.12.

4 MS. HAUPT: Yes.

5 CHIEF JUDGE WILSON: Right. But what you're  
6 saying, I guess, is that in 70.45, in the - - - in sub (1),  
7 I think it is, that says it has to be at least five years.

8 MS. HAUPT: In 70.45(2), that's the default rule  
9 applicable in non-DVSJA circumstances.

10 CHIEF JUDGE WILSON: All right. And that doesn't  
11 have a - - - that doesn't have a reference back to 60.12?

12 MS. HAUPT: There's no reference back to 60.12  
13 subsection (3).

14 CHIEF JUDGE WILSON: And you're saying that  
15 omission is deliberate and consequential?

16 MS. HAUPT: Yes. Because - - - Your Honor, in  
17 your majority opinion in Brenda WW you said that the PRS  
18 term is specific to the DVSJA. I'll point to footnote 3.  
19 "The DVSJA imposes a specific requirement for a mandatory  
20 term of post-release supervision that applies pursuant to  
21 it alone." And so it's that specific cross-reference  
22 that's so essential that PRS is a component of this  
23 sentence in accordance with this section. And that, Your  
24 Honor said in Brenda WW that this interpretation has no  
25 impact on PRS in non-DVSJA circumstances.

1           If we were to read the 70.45(2) default provision  
2 to apply to 60.12 subsection (3), we would be creating a  
3 specific term of PRS pursuant to the DVSJA that doesn't  
4 exist. And if this court were to distinguish between PRS  
5 for someone under 60.12 subsection (3), and that regular  
6 default provision for somebody in a non-DVSJA circumstance,  
7 they would have to create some distinction that's reflected  
8 in Brenda WW where the words don't justify it. You'd have  
9 to read words into the statute to create a specific  
10 authorization, which is why for a sentence for 60.12(2),  
11 for 60.12(4) through (11), there is a - - - an  
12 incarceration component and a specific mandated term of  
13 PRS. But in the absence of that cross-reference of a  
14 specific requirement for PRS, then all the sentence that is  
15 authorized is that term of imprisonment of between five and  
16 fifteen years.

17           And if I can go back to why it's not absurd or  
18 unreasonable, where we do see these aggregate sentences,  
19 you could have a B violent felony offense with five years  
20 of imprisonment and two and a half to five years of PRS.  
21 Compare that to a nonviolent offense where you can get up  
22 to nine years in prison, almost double the amount of time  
23 for a B violent felony offense. And that's tipped the  
24 scales with far less PRS, just one to two years. So we see  
25 in the aggregate the sentences are balancing out. But

1 where the legislature believed that PRS was necessary,  
2 where it was - - - the original conception of PRS for  
3 violent crime, we tip the scales in PRS, and we balance  
4 that out with less time. That's the only thing that could  
5 make sense. Why would a nonviolent B felony offense have  
6 double the incarceration time as a B violent offense?

7 And here where you have a group of offenders who  
8 have a zero percent recidivism risk that the legislatures  
9 were so focused on who wouldn't need PRS. And in fact,  
10 because PRS is known to be so burdensome, particularly to  
11 domestic violence victims, again, Judge Singas - - - Singas  
12 recognizing the harm, how it can mimic the abusive  
13 relationship - - - where it's not needed, it makes sense  
14 that the legislature is tipping the scales in more  
15 incarceration. And for this group of offenders, where,  
16 while we're recognizing that women are also victims,  
17 they're also offenders, where the entirety of their  
18 sentence should be in prison to reflect the retribution  
19 that's necessary, it makes sense, as compared to the rest  
20 of the scheme, that the entirety of the sentence be in  
21 prison.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. WITTHUHN: Good afternoon, Your Honors. My  
24 name is Brian Witthuhn. I represent the respondent, the  
25 People of the State of New York.

1 PRS and determinate sentences go hand in hand.  
2 They are fully compatible. You cannot have one without the  
3 other. 70.45 - - -

4 JUDGE RIVERA: What - - - what - - - can you  
5 address this cross-reference argument she was just making?

6 MR. WITTHUHN: Yeah. It's - - - it inverts, as  
7 Your Honor suggested, the usual way that we read statutes.  
8 The cross-references occur in the exceptions to the five-  
9 year default. You only have an exception if the default  
10 applies in the first instance, so it wouldn't make sense to  
11 have to - - - to create an exception. It wouldn't make  
12 sense to not apply the default because there is no  
13 exception. In fact, the opposite is true. The default  
14 applies in the absence of an exception. We strictly  
15 construe the exceptions to a rule, not the rule itself.

16 And 70.45 makes the rule as plain as can be. I  
17 don't know how much more plain the legislature could have  
18 made it. In every single case where the court imposes a  
19 determinate prison term, the court must impose a period of  
20 post-release supervision, and that period must be five  
21 years unless an exception applies. And here after - - -

22 CHIEF JUDGE WILSON: Okay. Why - - - why in  
23 60.12 subsection (2), for - - - you know, there's - - - for  
24 class B through E felonies, there's a specific listing of  
25 the term, right? I'm - - - I'm - - - I'm sorry. I'm

1 meaning to ask something different. Never mind. What I  
2 wanted to ask you is why is there not a cross-reference in  
3 the general section, 70.45(2)? Why is it not a cross-  
4 reference back to 60.12?

5 MR. WITTHUHN: For - - -

6 CHIEF JUDGE WILSON: Is the cross-reference - - -

7 MR. WITTHUHN: - - - so why isn't there a cross-  
8 reference to 60.12 sub (3)?

9 CHIEF JUDGE WILSON: Yes.

10 MR. WITTHUHN: Because the default applies. The  
11 default applies in the absence of a - - - of an exception.  
12 There wouldn't be a need to establish these exceptions for  
13 the other - - - you know, 60.12(2), 60.12(4) through (11),  
14 if the default didn't apply in the first instance. And the  
15 legislature specifically chose - - - sensibly chose to not  
16 make an exception for the most serious class of offenses -  
17 - -

18 CHIEF JUDGE WILSON: I - - - I guess the question  
19 is why isn't the notwithstanding a reason that you need a  
20 cross-reference back? How do you deal with the  
21 notwithstanding?

22 MR. WITTHUHN: Notwithstanding - - - a  
23 notwithstanding clause makes peace, not war. And what I  
24 mean by that is it resolves a statutory conflict. It  
25 doesn't create a statutory conflict.

1 JUDGE HALLIGAN: Between what and what, exactly?  
2 What's the conflict it resolves?

3 MR. WITTHUHN: There is none. That - - - that's  
4 the - - -

5 JUDGE HALLIGAN: You said that I think that it  
6 resolves a conflict?

7 MR. WITTHUHN: Right.

8 JUDGE HALLIGAN: And what is the conflict that it  
9 resolves? What are the conflicting provisions?

10 MR. WITTHUHN: Oh, oh, in our case, there's no  
11 conflict for this issue. But the conflict that - - -

12 JUDGE HALLIGAN: In - - - in the statutory  
13 framework.

14 MR. WITTHUHN: Right. It would - - - it would be  
15 referring to the periods and other - - - periods of  
16 incarceration and other sentences that are otherwise  
17 authorized for the crimes that were reduced in the DVSJA,  
18 such as, you know, Penal Law 70.00. You know, we go from -  
19 - - for second degree murder, you go from, you know, it  
20 could be twenty-five to life, and we go indeterminate; we  
21 go to determinate of five to fifteen. So those are the  
22 provisions that actually conflict. That's what the  
23 notwithstanding clause operates upon. Notwithstanding  
24 clause doesn't operate upon post-release supervision, which  
25 has been a mandatory required part of any determinate

1 sentence since 70.45 was passed in 1998.

2 JUDGE RIVERA: Why - - - why wouldn't it just say  
3 if the criteria for the - - - under the DVSJA applies, the  
4 sentence shall be? Why get into this whole  
5 notwithstanding?

6 MR. WITTHUHN: For - - - I believe it speaks to  
7 the point that Judge Halligan was making - - - that there -  
8 - - there is a conflict that operates within the DVSJA, and  
9 it's simply, you know, refers to 70.00, 70.02, 70.71, all  
10 the sentencing provisions that establish, you know, what  
11 else term the original kind of sentence is for these crimes  
12 - - -

13 JUDGE RIVERA: Right.

14 MR. WITTHUHN: - - - that are in conflict with  
15 the alternative dispositions authorized by the DVSJA for  
16 qualifying individuals.

17 JUDGE RIVERA: You're saying if - - - if they had  
18 just written the sentences are, right, that that would have  
19 created perhaps some ambiguity or tension, because in other  
20 provisions - - - the other provisions that are listed - - -  
21 it also says the sentence is?

22 MR. WITTHUHN: Precisely. And so the  
23 notwithstanding clause tells us which one - - - which one  
24 prevails - - -

25 JUDGE RIVERA: It says when that doesn't apply,

1           only this applies. Okay.

2                       MR. WITTHUHN: Exactly, Your Honor.

3                       Just - - - I don't believe remedy's an issue  
4 here. I believe the statutory language is as plain as it  
5 can be. But I just want to clarify, because it didn't  
6 really have an answer for you at the time of the briefing.  
7 If the court does find the sentence illegal, we would  
8 request that it simply strike the PRS component. Defendant  
9 would have no cause to complain. She would get more than  
10 she bargained for. As to the appeal waiver - - -

11                      CHIEF JUDGE WILSON: Before you get to that, can  
12 I ask you about counsel's - - - I don't want to call it  
13 idea - - - response - - - that the - - - this was a  
14 deliberate choice.

15                      MR. WITTHUHN: Yeah. I - - - I - - -

16                      CHIEF JUDGE WILSON: Because - - - because  
17 there's a zero percent recidivism rate. These people, you  
18 know, killed a intimate partner likely, and the chance that  
19 they're - - - that's going to happen again is low compared  
20 to B, C, D, E.

21                      MR. WITTHUHN: I - - - I think there are a few  
22 things to unpack there. First of all, I'm not sure where  
23 the zero percent recidivism rate comes from, if that's been  
24 established in the record or - - - or outside of the  
25 record. But the, you know, more interesting response to

1 that, in my opinion, is that the DVSJA - - - and as my  
2 office admits, and I believe every prosecutor's office  
3 across the State, as far as I know - - - it doesn't just  
4 apply when a qualifying individual commits a crime against  
5 the person who perpetrated the abuse against them. So you  
6 know, you can think of horrible situations where, you know,  
7 an abused person takes it out on their children, for  
8 instance.

9 CHIEF JUDGE WILSON: Yeah.

10 MR. WITTHUHN: Or it could just be a random  
11 stranger, or you know, some sort of other crime where the  
12 actual abuser isn't - - - doesn't become the crime victim.

13 CHIEF JUDGE WILSON: Uh-huh.

14 MR. WITTHUHN: So you know, for this kind of  
15 argument that, well, for second degree murderers, you know,  
16 the problem is taken care of. This person's not a risk of  
17 - - - of, you know, committing any crimes in the future. I  
18 don't think common sense or - - - bears that out. And  
19 unfortunately, you know, you don't really know what the  
20 triggering event will be, whether it'll be abuse or whether  
21 somebody totally unrelated to the abuse ends up as a crime  
22 victim. And this is precisely the type of people that PRS  
23 is, you know, designed to - - - to facilitate their reentry  
24 into society.

25 I think everybody here understands that, you

1 know, women in particular who are part of an abusive  
2 relationship tend to be serially abused, as this particular  
3 defendant was as well. So you know, you want to be sure  
4 when that person's reintegrating into society that they're  
5 not going to end up in precisely the same sort of situation  
6 that might have caused them to enter the criminal justice  
7 system in the first place.

8 JUDGE RIVERA: There are other conditions imposed  
9 other than monitoring on the PRS that I think you're  
10 arguing may - - - may be helpful to the person to  
11 reintegrate - - -

12 MR. WITTHUHN: Yes.

13 JUDGE RIVERA: - - - or at least to give comfort  
14 to society that they will be able to reintegrate.

15 MR. WITTHUHN: Yeah. And that's the - - - that's  
16 the design behind PRS, and that's why it's part of not only  
17 New York's sentencing scheme, but also the Model Penal  
18 Code.

19 JUDGE RIVERA: Can you address the waiver issue?

20 MR. WITTHUHN: Yes. So - - -

21 JUDGE RIVERA: Are the waivers valid in your  
22 view?

23 MR. WITTHUHN: The waiver is valid. The court  
24 here conducted a thorough colloquy. Defendant had ample  
25 consultation with counsel - - - extensive consultation with

1 counsel. This was a three-year plea negotiation,  
2 essentially. And furthermore, it's a question of law and  
3 fact. Really, any time you have - - -

4 JUDGE RIVERA: But she argues that the oral  
5 colloquy suggests that the judge - - - let's just take one  
6 point - - - had communicated that the waiver means you will  
7 not have counsel appointed to you, even though later on, of  
8 course, there's some other language about claims that might  
9 survive the waiver, and that creates tension. You're not  
10 sure - - - she would not have known - - - the defendant  
11 would not have known or might have been confused as to  
12 whether or not that waiving the opportunity for appointment  
13 of counsel would apply, even to the claims that she could  
14 have brought.

15 MR. WITTHUHN: Yeah, I don't - - - I don't think  
16 the record bears that out. I think, you know, the - - -  
17 the colloquy largely tracked the model colloquy. And even  
18 if there were some ambiguity in that aspect, the extensive  
19 consultation with counsel, competent counsel, and the  
20 written waiver would have supplemented - - -

21 JUDGE RIVERA: We've said the written waiver  
22 can't cure a defect.

23 MR. WITTHUHN: It would have supplemented the  
24 oral colloquy to the extent that, you know, it was found  
25 deficient in some way.

1 CHIEF JUDGE WILSON: Do - - - do we need to get  
2 to the waiver issue?

3 MR. WITTHUHN: And we don't even need to get to  
4 the waiver issue, Your Honor. The Appellate Division  
5 already ruled on the merits that the sentence here was  
6 fair, exercising its interests of justice jurisdiction.  
7 There would be no reason to remand even with an invalid  
8 waiver - - -

9 JUDGE RIVERA: Well, if it's decided that there's  
10 a waiver bar, that's not a binding decision.

11 MR. WITTHUHN: It is. This court - - -

12 JUDGE RIVERA: What is that?

13 MR. WITTHUHN: - - - it's an alternative holding.  
14 You know, just because - - -

15 JUDGE RIVERA: Well, it can't be an alternative  
16 holding. Alternative holding means I've got two bases on  
17 which to decide, but one doesn't necessarily foreclose the  
18 other. The waiver forecloses consideration of the other.  
19 That's the whole point of the waiver.

20 MR. WITTHUHN: Yeah. But the court often reaches  
21 that - - - the court being the Appellate Division - - -

22 JUDGE RIVERA: Yes.

23 MR. WITTHUHN: - - - often reaches, you know, the  
24 merits of claims in the alternative. And you know, that's  
25 something that I believe this court would want to

1 encourage, not discourage.

2 JUDGE RIVERA: Why is that? Why would we  
3 encourage acting on matters that you - - - if - - - if we  
4 viewed it this way? I'm not saying anyone does - - -  
5 matters over which there - - - it's unnecessary to opine or  
6 that are barred. Are you saying it all funds - - - falls  
7 under interest of justice jurisdiction?

8 MR. WITTHUHN: No. I think you have lots of  
9 various issues that aren't even related to interest of  
10 justice jurisdiction - - -

11 JUDGE RIVERA: Uh-huh.

12 MR. WITTHUHN: - - - that are foreclosed by an  
13 appeal waiver or - - - or a guilty plea itself.

14 JUDGE RIVERA: Uh-huh.

15 MR. WITTHUHN: And you don't want to handle those  
16 in a piecemeal fashion, you know, for the Appellate  
17 Division to say, you know, your suppression issue is  
18 foreclosed by your appeal waiver, then not rule on it, have  
19 this court consider the appeal waiver, send it back down -  
20 - -

21 JUDGE RIVERA: Oh, no, I - - - I - - - obviously,  
22 I understand the benefit, but that has nothing to do  
23 whether they have authority to reach the issue.

24 MR. WITTHUHN: Yeah. I - - -

25 JUDGE RIVERA: But - - - and even if they did, if

1 it's purely advisory and nonbinding, sure, maybe other  
2 panels on the AD would defer to that decision, but that - -  
3 - it's about the structure of the appellate process, right?

4 MR. WITTHUHN: No, I - - - I don't think it  
5 renders it an advisory opinion to reach two different  
6 holdings, one procedural, one merits in the alternative.  
7 And the - - -

8 JUDGE RIVERA: Well, except the procedural bars  
9 consider - - - that's the whole point of the waiver. Isn't  
10 that the whole point of the waiver?

11 MR. WITTHUHN: I - - -

12 JUDGE RIVERA: And why are you asking for waivers  
13 if they're going to reach it anyway?

14 MR. WITTHUHN: Because it gives the Appellate  
15 Division - - - it - - - waivers, we argue, should be  
16 enforced, but you know, we're not the ones bringing these  
17 claims despite waivers.

18 JUDGE RIVERA: I see.

19 MR. WITTHUHN: So you know, if - - - if you're  
20 going to bring these claims and - - - and raise them,  
21 there's nothing that prevents the Appellate Division from  
22 issuing two different alternative holdings.

23 And if there are no further questions, then I'd  
24 like to rest.

25 CHIEF JUDGE WILSON: Thank you.

1 MS. HAUPT: Respondent keeps harping that 70.45  
 2 is so clear in this default provision, but that's always  
 3 going to happen when there are statutes in conflict. I'll  
 4 cite to Matter of New York State v. John S. The CPL was  
 5 very clear that when a proceeding is terminated in a  
 6 defendant's favor, all the records are sealed, and they are  
 7 not to be turned over to any person, court, or agency. And  
 8 yet, another statute with a broad notwithstanding clause  
 9 just like 60.12 preempted that. So that 70.45 requires it  
 10 is not the dispositive issue. It's 60.12 has the broadest  
 11 notwithstanding clause for a sentence.

12 Respondent wants to narrow that by saying  
 13 sentence of imprisonment, but this court has said that when  
 14 the legislature intends for there to be language in its  
 15 statutes, it says it. The legislature could have said,  
 16 notwithstanding any other provision of law, a court may  
 17 impose a sentence of imprisonment in accordance with this  
 18 section. It didn't do that.

19 And in fact, under the DVSJA, the legislature  
 20 revised the former Penal Law 60.12, which did have  
 21 reference to sentence of imprisonment, and it excised that  
 22 out - - -

23 JUDGE RIVERA: Can - - - can - - - can you  
 24 address the waiver?

25 MS. HAUPT: Yes.

1 JUDGE RIVERA: You didn't get to that.

2 MS. HAUPT: This was not a valid waiver. The  
3 court made many errors, most significantly conflating which  
4 types of sentence claims are barred and survive the waiver.  
5 So the court told Ms. Hernandez that she was giving up the  
6 right to raise a factual or legal error in her sentence.  
7 We know that that is not true. And illegal sentence can  
8 always survive the waiver.

9 On the other hand, a factual or legal error is  
10 not an excessive sentence claim. That goes to the court's  
11 interest - - -

12 JUDGE RIVERA: The court later does say that  
13 there are claims that survive.

14 MS. HAUPT: They say that - - -

15 JUDGE RIVERA: And the written waiver says the  
16 same.

17 MS. HAUPT: The court says that there are  
18 constitutional claims that survive but never explain - - -  
19 the - - - the court said this waiver only applies to  
20 factual and legal errors. That does not inform a first  
21 felony offender, a vulnerable offender at that - - - we've  
22 identified under the DVSJA - - - that she's giving up a  
23 right to have the excessiveness of her sentence viewed in  
24 the interest of justice.

25 And respondent keeps on arguing that the model



1 colloquy was observed, but it wasn't. The model colloquy  
2 specifically says that you're giving up the right to  
3 challenge the excessiveness of the sentence and have it  
4 modified. The court never said that.

5 JUDGE RIVERA: Let - - - let's say you're right.  
6 What about what he's calling the alternative holding?

7 MS. HAUPT: I would agree with you, Your Honor,  
8 that this was a procedural bar. The court decided that the  
9 waiver barred consideration of the sentencing claim. And  
10 waivers are meant to stop this sort of review. But most  
11 importantly, in this case, we see that the - - - the issue  
12 of the waiver is so intertwined with the question of  
13 excessiveness. Appeal waivers are meant to be final.  
14 Lopez speaks of the reasonableness of the disposition when  
15 you enter into a plea and agree to not have a higher court  
16 review it.

17 So at the point at which a court has decided that  
18 Ms. Hernandez has entered into a valid waiver, it's already  
19 acknowledging that there couldn't be an interest of justice  
20 reason to adjust the sentence. So here, when the waiver  
21 barred consideration where anything after is dicta, and  
22 when those considerations are so intertwined, the remedy -  
23 - - because the waiver here is invalid - - - is to send it  
24 back to the Appellate Division to consider the sentence.  
25 And - - -

1 CHIEF JUDGE WILSON: So could the Appellate  
2 Division have decided the excessive sentence claim and not  
3 said anything about the waiver?

4 MS. HAUPT: I mean, first, it didn't here, very  
5 clearly - - -

6 CHIEF JUDGE WILSON: Well, I'm asking if that - -  
7 - if - - - yeah, I'm asking if they could have done that.

8 MS. HAUPT: I don't think the - - - the court  
9 would want to be encouraging that because the reason - - -

10 CHIEF JUDGE WILSON: That's not my question.

11 MS. HAUPT: I don't - - - I don't think so. I  
12 think waivers are being implemented for a reason, and the  
13 court would have to make that threshold decision. But  
14 certainly, here, we know they made that threshold decision,  
15 and therefore, the only remedy is to send it back to the  
16 Appellate Division to consider it anew.

17 If I could - - -

18 CHIEF JUDGE WILSON: So you - - - can you - - -  
19 for - - - just to make - - - put a point on it - - - so the  
20 Appellate Division couldn't say the waiver question here is  
21 a very difficult one, but the only thing behind it is a  
22 request for reduction of the sentence, and that's very  
23 clear, we're reducing the sentence, or we're not reducing  
24 the sentence, period.

25 MS. HAUPT: I think it's still problematic

1           because when you're looking at the totality of the - - - of  
2           the circumstances, that waiver analysis is going to infect  
3           the determination of the sentence, and so I - - - I do  
4           believe that that's still a problem. But even so, sure, in  
5           that circumstance, maybe that could be allowed. But here,  
6           that didn't happen. Here, they clearly determined that the  
7           waiver was valid and therefore went on to continue  
8           extraneously the sentence question.

9                         If I can just respond to the remedy issue on the  
10           first point. This court, in *Lingle* and *Minaya*, only when  
11           there is a ministerial error inadvertence in the way that  
12           the sentence is being described, can you avoid a plenary  
13           resentencing, and that's not what happened here. This is  
14           not a clerical error. Everybody intended to impose an  
15           illegally high sentence if the court were to determine that  
16           five years is not authorized because it's preempted under  
17           60.12, and so there's no mechanism to just strike the PRS.  
18           The sentence should be vacated and sent back for  
19           resentencing. And we see that in myriad cases, and we see  
20           that in *People v. Calderon* and *Matter of Kisloff* that the  
21           illegal sentence needs to be remedied by - - - by having a  
22           resentencing with a lawful sentence.

23                         CHIEF JUDGE WILSON: Thank you.

24                         MS. HAUPT: Thank you.

25                         (Court is adjourned)



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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Hernandez (Rosemary), No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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