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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 16

FREDDIE THOMPSON,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 13, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

A. ALEXANDER DONN, ESQ.  
APPELLATE ADVOCATES  
Attorneys for Appellant  
111 John Street  
New York, NY 10038

ANNE GRADY, ADA  
RICHMOND COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Respondent  
130 Stuyvesant Place  
7th Floor  
Staten Island, NY 10301

Sharona Shapiro  
Official Court Transcriber

1                   JUDGE PIGOTT: Case number 16, People v.  
2 Freddie Thompson.

3                   Good morning, Mr. Donn. Welcome.

4                   MR. DONN: May it please the court. Alex  
5 Donn of Appellate Advocates for Appellant Freddie  
6 Thompson.

7                   The plain meaning - - - I - - - I'd like to  
8 request four minutes for rebuttal.

9                   JUDGE PIGOTT: Four minutes for rebuttal?  
10 Okay.

11                  MR. DONN: Your Honors, the plain meaning  
12 of Penal Law 70.04 clearly provides that the initial  
13 lawful probationary sentence that is imp - - - that  
14 is imposed on a prior violent felony conviction is  
15 the sentence that determines whether the conviction  
16 falls within the ten-year lookback period provided in  
17 Penal Law 70.04(1)(b)(iv), the lookback provision.

18                  JUDGE ABDUS-SALAAM: Before we get to the  
19 merits of your claim, why is this case appealable to  
20 this court?

21                  MR. DONN: It - - - it's appealable to this  
22 court because the Appellate Division's order was  
23 adverse to Mr. Thompson. And the issue was also  
24 adverse to him in that the Appellate Division's order  
25 affirmed, as modified, the resentence. So the

1 Appellate Division - - -

2 JUDGE ABDUS-SALAAM: Wasn't that in the  
3 interest of - - - and didn't it modify the - - - the  
4 sentence in the interest of justice?

5 MR. DONN: The Appellate Division modified  
6 Mr. Thompson's sentence by reducing from twenty to  
7 fifteen years in the interest of justice. But as  
8 modified, it affirmed the resentencing. What - - -  
9 what occurred at the resentencing was he was  
10 adjudicated a predicate violent felony offender on  
11 the People's motion. So the Appellate - - - the  
12 Appellate Division decision affirmed the order that  
13 was adverse to - - - to Mr. Thompson, which is what  
14 we're here to discuss today.

15 JUDGE ABDUS-SALAAM: It has to be on an  
16 issue of law or such facts and law as would require -  
17 - - that led to the modification. Are you saying  
18 that the - - - this is an issue of law that led to  
19 the modification?

20 MR. DONN: No, Your Hon - - - no, Your  
21 Honor. I'm - - - the - - - the - - - at - - - at the  
22 resentencing, the court imposed a sentence of twenty  
23 years - - -

24 JUDGE ABDUS-SALAAM: Right.

25 MR. DONN: - - - after adjudicating Mr.

1 Thompson a predicate violent felony offender. The  
2 Appellate Division modified the numerical sentence by  
3 reducing to fifteen years, but as modified, i.e.,  
4 other than the year modification, it affirmed their  
5 resentencing; meaning, it affirmed the order which  
6 adjudicated him a predicate violent felony offender.

7 JUDGE FAHEY: Well, the question is does it  
8 create adversity. And is your point that by sticking  
9 with the second violent felony offender - - - it was  
10 a second violent felony offender, right? So that  
11 created the adversity necessary to - - -

12 MR. DONN: Yeah, appellant argued, in the  
13 Appellate Division, I was improperly sentenced as a  
14 predicate violent felony offender. And the Appellate  
15 Division decision affirmed the lower court's order on  
16 that issue. So the ruling was clearly adverse to  
17 him. And going forward, the lower court's ruling  
18 would be binding on him in the future, under - - -  
19 under C.P.L., I believe it's 415(8), where it says a  
20 ruling under this subsection binds you going forward.

21 JUDGE FAHEY: Well, the opposite side of  
22 that, I suppose, would be that every time there's a  
23 reduction of a sentence, in the interest of justice,  
24 that the defendant would then lose his right to  
25 appeal any other issue in the case. If a reduction

1 in the interest of justice, from ten to five,  
2 whatever it is, takes place, then if the People's  
3 theory was correct, then there would be no adversity  
4 from that point on, and there'd be no appealable  
5 issues.

6 MR. DONN: Correct - - - correct. If I  
7 could - - -

8 JUDGE FAHEY: Okay. Okay.

9 MR. DONN: Unless there are other questions  
10 on - - - on the procedure, I'd - - - I'd like to move  
11 on to the merits. It's - - - it's extremely  
12 straightforward. The - - - the statute we're looking  
13 at, all we need to do to answer the question on the  
14 merits in this case is look at 70.04. The - - - the  
15 only question here, basic rule of construction, where  
16 statutory language is clear and unam - - -  
17 unambiguous, courts must give effect to its plain  
18 meaning. Here the question is whether the word  
19 "sentence", as used in the lookback period, includes  
20 a sentence to probation. And the statute here is  
21 clear and unambiguous.

22 In 70.04, it explicitly states that for the  
23 purposes of this statute, for the purposes of  
24 determining whether a prior felony conviction  
25 constitutes a predicate violent felony conviction for

1           this statute, a sentence of probation "shall be  
2           deemed to be a sentence." The issue really is that  
3           simple in this case and - - -

4                    JUDGE STEIN: Let me ask you this. When  
5           there was a violent in probation here, and he was  
6           resentenced to a term of imprisonment, was that  
7           sentence of the term of imprisonment imposed on the  
8           original assault - - -

9                    MR. DONN: Yes.

10                   JUDGE STEIN: - - - conviction, or was it  
11           imposed on the violation of probation?

12                   MR. DONN: It was - - - it was imposed on  
13           the assault, Your Honor. It was - - - it was - - -  
14           the probationary term was essentially revoked, and a  
15           sentence of incarceration was imposed.

16                   JUDGE RIVERA: Well, would there have been  
17           a legal basis for the incarceration but for the  
18           conviction? Where - - - where would you have a basis  
19           to impose incarceratory - - - an incarceratory period  
20           but for the conviction? Don't you have - - -

21                   MR. DONN: Correct.

22                   JUDGE RIVERA: - - - to track back to the  
23           conviction?

24                   MR. DONN: Correct, it all - - - it all  
25           comes back - - - it all comes back to the conviction.

1 And the conviction and the initial sentence was never  
2 vacated. So he - - - he pled guilty to a crime, and  
3 a lawful sentence of probation was initially imposed.

4 JUDGE FAHEY: I had thought, though, isn't  
5 the problem with your analysis is Article - - - I  
6 think Penal Law 61, charac - - - the legislature  
7 there, when it talked about authorized dispositions,  
8 generally, I thought the legislature characterized  
9 probation as a revocable sentence.

10 MR. DONN: It - - - it says that a - - - a  
11 revoke - - - a - - - a sentence is - - - I'm sorry,  
12 Your Honor - - - that it's revocable only to the  
13 extent that it - - - i.e., the punitive part of it  
14 can be altered or revoked, but for all other  
15 purposes, "it shall be deemed to be a final judgment  
16 of conviction". And what that basically means is  
17 that the punitive part of the sentence, the part that  
18 - - - that the defendant essentially takes away from  
19 the experience, that can be altered based on his  
20 conduct. But it explicitly states that, for all  
21 other purposes - - - and I would submit, obviously,  
22 for the purposes of - - - of determining when the  
23 conviction took place, it's a final judgment of  
24 conviction.

25 And I think it's important to take a quick

1 step back and look. This is - - - we are not - - -  
2 we are here to find out what the - - - what the date  
3 of the conviction was. This is - - - we're starting  
4 out - - - if you look at the statute, it's the  
5 definition of a second violent felony offender, and a  
6 second violent felony offender is someone who's  
7 convict - - - who's been convicted of - - - who has a  
8 certain conviction. And in order to define that  
9 conviction and figure out when it occurred, we need  
10 to - - - to figure out a date. And clearly, the  
11 statute contemplates that there will only be one date  
12 on which sentence was imposed.

13 JUDGE STEIN: So in other words, unless we  
14 are vacating the conviction, then - - - then the fact  
15 that we're vacating the probationary sentence doesn't  
16 do away with that. Is - - -

17 MR. DONN: Because - - -

18 JUDGE STEIN: Is that your argument?

19 MR. DONN: Correct, because we're modifying  
20 the sentence itself, the - - - the probation versus  
21 incarceration, doesn't take away from the fact that a  
22 lawful sentence was imposed when the probationary  
23 sentence was imposed.

24 And I also just want to say that everything  
25 we need to do is - - - is in the statute here; it

1 explicitly states that a sentence of probation "shall  
2 be deemed to be a sentence."

3 JUDGE PIGOTT: Does it make any difference  
4 what the violation is, in your view?

5 MR. DONN: No.

6 JUDGE PIGOTT: So if he was guilty of  
7 another assault, you - - - you'd say, well, that - -  
8 - that doesn't - - - that doesn't make any  
9 difference. The fact that he, you know, beat  
10 somebody - - - I mean, the whole point of violent  
11 felonies is that they're violent. I could understand  
12 if he's late for, you know, his probation or, you  
13 know, that, but if the - - - if the crime that - - -  
14 that leads to the - - - to the incarceration is a  
15 serious crime in itself, is it your view that that -  
16 - - that they would need to get a conviction on that  
17 in order to then count from there?

18 MR. DONN: I would say it's completely  
19 beside the point regarding the question of the date  
20 on which the first conviction occurred. He may  
21 suffer consequences as a result of that new action,  
22 but in order to determine what was the date on which  
23 his prior conviction took place - - -

24 JUDGE RIVERA: Well, the legislature could  
25 have written the statute in the way Judge Pigott

1 suggests, right? If the legislature felt it - - - it  
2 depends what - - - what you do, right? If it's  
3 another assault - - -

4 MR. DONN: There are a lot of - - -

5 JUDGE RIVERA: - - - then the date starts  
6 from that - - - then the lookback will include that -  
7 - -

8 MR. DONN: Correct.

9 JUDGE RIVERA: - - - particular period.

10 MR. DONN: The legi - - - the legislature  
11 would have done a lot of things. It could have - - -  
12 have said what the People - - -

13 JUDGE RIVERA: So true.

14 MR. DONN: The - - - the legislature could  
15 have - - - have said what the People want the statute  
16 to read, which is that the answer to the question of  
17 what date sentence was imposed on a prior conviction  
18 depends on whether or not we're looking at the  
19 lookback provision or whether or not we're looking at  
20 the sequentiality provision.

21 JUDGE RIVERA: So the violation of the  
22 parole, you're saying, is not the conviction that  
23 this statute is concerned with.

24 MR. DONN: Correct.

25 JUDGE RIVERA: That's your point.

1 MR. DONN: That is my - - - this - - - this  
2 statute is - - - is concerned with identifying the  
3 date - - -

4 JUDGE RIVERA: That's the bad act; that's  
5 the violent act that the legislature was concerned  
6 with, not - - - not the violation, should you have  
7 gotten some - - -

8 MR. DONN: Correct.

9 JUDGE RIVERA: - - - version of - - -

10 MR. DONN: Correct.

11 JUDGE RIVERA: - - - leniency, shall we  
12 say, through probation?

13 MR. DONN: Yes, Your Honor, correct. And -  
14 - -

15 JUDGE PIGOTT: Thank you, Mr. Donn. I  
16 think we have your argument, and you have your four  
17 minutes of rebuttal time. Let's hear from Ms. Grady.

18 Ms. Grady, good morning.

19 MS. GRADY: Good morning, Your Honor. Anne  
20 Grady for the - - -

21 JUDGE RIVERA: Why isn't he correct that  
22 what the legislature is concerned about is that  
23 conviction? That's the language in the statute,  
24 regardless of what may be the basis for the violation  
25 of the parole that ends up in - - - ends up in a

1           resentence with incarce - - - with an incarceratory  
2           period, that what the legislature's concerned with is  
3           that conviction?

4                   MS. GRADY: Well, I agree with him in part.  
5           If you look at the - - - the statute, the section  
6           we're talking about is concerned with finding out  
7           whether the prior conviction - - -

8                   JUDGE RIVERA: Um-hum.

9                   MS. GRADY: - - - is a predicate  
10          conviction.

11                  JUDGE RIVERA: Um-hum.

12                  MS. GRADY: The tests then include the  
13          sequentiality provision, which does say "upon such  
14          conviction". Those words, though, were omitted from  
15          the lookback provision, and that is why my opponent's  
16          argument must fail.

17                  JUDGE ABDUS-SALAAM: Doesn't that suggest,  
18          counsel, that the legislature did not mean to include  
19          such conviction because the lookback period is  
20          focused on sentence, and there can really only be one  
21          sentence, because now we're talking about a  
22          resentence, not the sentence, and that's what the  
23          legislature says in subdivision (iv), "the sentence".  
24          So isn't your adversary correct that you don't need  
25          to have "upon such conviction", because the only

1 thing that's important in (iv) is "the sentence"?

2 MS. GRADY: Well, it doesn't actually "the  
3 sentence", to - - - to quibble, if you will. The - -  
4 - it says "sentence". And I think that the answer is  
5 that of course there may be more than one sentence  
6 for every judgment of conviction, and the legislature  
7 knew that, as demonstrated by subdivision (iii),  
8 which say - - - which addresses the question of  
9 suspended sentences, tentative sentences, that they  
10 "shall be deemed a sentence" for purposes of the  
11 statute.

12 JUDGE RIVERA: But if - - -

13 JUDGE PIGOTT: Does it make sense, if you  
14 have a ten-year lookback, and so the sentence is on -  
15 - - on this first day, and then six years later,  
16 because he's late for his probation appointment or  
17 something, he gets violated, that the purpose of the  
18 statute, which is to give somebody, you know, if they  
19 - - - if they've reformed and over ten years haven't  
20 - - - haven't - - - haven't done anything bad,  
21 they're - - - they're not termed violent anymore, but  
22 we say, well, now he's violent because he missed his  
23 probationary appointment here six years after the  
24 sentence, and so that's when you start counting.

25 MS. GRADY: I think the answer is, what is

1 the purpose of the lookback? You're right; it's to  
2 afford a measure of leniency. We're going to treat  
3 people who are in fact repeat offenders as if they  
4 were not.

5 I think Judge Sulli - - - Justice Sullivan  
6 got it right in his dissent in Bell, which was  
7 adopted by this court, that it's for the defendant to  
8 show his eligibility for release from the statute.  
9 If - - - if yes - - - I know it's - - - if he has  
10 been resentenced and brought before a court, with a  
11 jurisdiction over him and the conviction, and the  
12 authority of the court has been impressed upon him  
13 anew, and he goes out and commits a violent felony  
14 offense the next day, yes, he should be treated as a  
15 second violent offend - - -

16 JUDGE RIVERA: Why don't you just prosecute  
17 him for that offense, and then you - - - and then  
18 you've got your clock ticking?

19 MS. GRADY: And then I've got my clock  
20 ticking?

21 JUDGE RIVERA: Are you not able to do that?

22 MS. GRADY: Well, we would. I - - - yeah,  
23 we would. That - - - that would be - - -

24 JUDGE RIVERA: Indeed - - -

25 MS. GRADY: That new conviction would be

1 the - - - but - - -

2 JUDGE RIVERA: Indeed; that's my point.

3 MS. GRADY: But that new conviction should  
4 be treated as a second violent felony offense that,  
5 based on the prior offense, the one that he was just  
6 resentenced for - - -

7 JUDGE PIGOTT: That - - -

8 MS. GRADY: - - - that that prior - - -

9 JUDGE PIGOTT: But wouldn't that - - -  
10 wouldn't that be true because it's within ten years  
11 of that sentence?

12 MS. GRADY: There's that too. There's - -  
13 - you mean the resentence? Yes.

14 JUDGE PIGOTT: Right, and - - -

15 JUDGE STEIN: So it doesn't - - -

16 JUDGE PIGOTT: No, no.

17 JUDGE RIVERA: No.

18 JUDGE PIGOTT: The first sentence. He's -  
19 - - you know, he's got - - - he's got to do - - -  
20 he's got to behave for ten years after that first  
21 sentence. If in year six, you know, the one I was  
22 using, he commits a violent felony, you're going to  
23 prosecute him on that, and he's going to be double  
24 violent because it's within ten years of - - - of the  
25 one that we've been kicking around here.

1 MS. GRADY: There's that, and also the  
2 sequentiality provision is satisfied as well, even  
3 though it's during the probationary period.

4 JUDGE PIGOTT: Right, but the point I - - -  
5 I was trying to get at was if - - - if it's not a  
6 violent violation, if it's simply, you know, failure  
7 to appear, or you know - - - or fail - - - failing a  
8 drug test, or some administrative or ministerial  
9 thing, that doesn't restart the clock on the ten  
10 years. I think that's their argument, if I'm  
11 understanding it, and you want to say it does start  
12 the clock on the ten years again.

13 MS. GRADY: It does start the clock for a  
14 future violent felony offense, looking back to that  
15 resentencing; it's that second resentencing, because  
16 remember, it's - - - it's not true; I was dumb - - -  
17 I was stunned, a little bit, this idea that  
18 irrevocable sentence, that when it's revoked and  
19 there is a new sentence imposed, it's not the  
20 punitive part of the sentence, it's not modifying a  
21 sentence by replacing probation with an  
22 incarceration.

23 The previous probationary sentence was  
24 tentative from the beginning. This defendant was  
25 told that at his first - - - in 1994, he was told,

1 this is tentative; behave or else. So it's always a  
2 tentative sentence from the beginning, and it is not  
3 just modified; it's revoked and replaced.

4 JUDGE STEIN: Well, doesn't - - -

5 MS. GRADY: And so now - - -

6 JUDGE STEIN: Doesn't Section 60.01,  
7 subdivision (4), refer to the part of the sentence  
8 that provide - - - "if the part of the sentence that  
9 provides for probation is revoked", doesn't - - -  
10 doesn't that indicate that it - - - that that is a  
11 part of the sentence, it's not the whole sentence?

12 MS. GRADY: That might - - - yes, that  
13 might suggest that it is. I think that the point is  
14 he's still already paid his crime victim's assistance  
15 fee or the restitution or what other aspect of it,  
16 but the - - - the probation was rev - - -

17 JUDGE STEIN: Part of a sentence, I don't  
18 think.

19 MS. GRADY: I beg - - -

20 JUDGE STEIN: I don't think those fees and  
21 restitution are considered part of a sentence.

22 MS. GRADY: Well, then I'm not sure what  
23 that par - - - that even means then, if - - - if  
24 probation is the sentence and it's revoked, it's  
25 gone. And now the sentence adhering to the judgment



1 - - -

2 MS. GRADY: - - - sentence.

3 JUDGE RIVERA: My point is - - - you say  
4 so. My point is that that doesn't make sense for  
5 legislative construction purposes.

6 MS. GRADY: I think what you're getting at  
7 is what my opponent is arguing which is that for  
8 every prior conviction, there may be only one  
9 sentence.

10 JUDGE PIGOTT: Well, let's assume - - -

11 JUDGE RIVERA: No, I'm sorry.

12 JUDGE PIGOTT: Let's - - -

13 MS. GRADY: Then I - - -

14 JUDGE RIVERA: If I may just follow up.  
15 No, my point is that if the legislature has a - - - a  
16 multiple paragraph provision, and in these multiple  
17 paragraphs defines really one of the core terms, your  
18 argument is, okay, but that only provides to one of  
19 these provisions, not the others, even though the  
20 legislature never indicates that the definition is  
21 limited in the way you suggest.

22 And I say how does that fit within  
23 legislative construction doctrine that - - - that we  
24 are supposed to intuit that although the definition  
25 is in this multiple paragraph provision, it only

1 applies to the - - - to the paragraphs you say, not -  
2 - - not throughout.

3 MS. GRADY: Because of subdivision (iii).  
4 Because of subdivision (iii), which demonstrates the  
5 legislature's comprehension.

6 JUDGE RIVERA: Because it doesn't say "upon  
7 such prior conviction"?

8 MS. GRADY: No, sub (iv) doesn't say "upon  
9 such prior conviction".

10 JUDGE RIVERA: I'm sorry. Which is the one  
11 - - -

12 MS. GRADY: I understand what Your Honor's  
13 question is. Why should we treat - - -

14 JUDGE RIVERA: Well, (iii) is the  
15 definitional provision I'm talking about.

16 MS. GRADY: I don't think that that's true  
17 that it's a definitional provision.

18 JUDGE RIVERA: You don't think so?

19 MS. GRADY: Subdivision (ii) - - -

20 JUDGE RIVERA: Then what does it mean to  
21 "shall be" - - - "shall be deemed to be a sentence".

22 MS. GRADY: Yes.

23 JUDGE RIVERA: Isn't that explaining what  
24 sentence means?

25 MS. GRADY: Yes, the - - - I take it for -

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- -

JUDGE RIVERA: Okay. So that's  
definitional, right?

MS. GRADY: I thought that what - - - the  
definitional paragraph Your Honor was speaking of was  
sub (ii), "sentence upon such prior conviction",  
"upon such prior conviction" being omitted from sub  
(iv) is my point.

JUDGE RIVERA: Okay. But - - -

MS. GRADY: And Your Honor - - -

JUDGE RIVERA: But once the legislature has  
written "sentence upon such prior conviction", it is  
now making clear they're talking about the prior  
conviction in that sentence, not about the current  
conviction. And now the rest of these multiple  
provisions in the larger paragraph are about that  
sentence. So paragraph (ii) is clarifying the  
sentence we're talking about.

MS. GRADY: I disagree. I think  
subparagraph (ii) - - -

JUDGE RIVERA: Well, I know you do.

MS. GRADY: - - - is the sequentiality  
provision. It is designed so that if someone goes  
ahead and commits five armed robberies and then is  
only sentenced on them on one day, he's treated as a

1 first-time felony offender. That's the purpose of  
2 sub (ii). And so that's why upon that conviction, on  
3 that date, when judgment of conviction is entered,  
4 he's only a first-time felony offender. Going  
5 forward, that's the date that would establish  
6 sequentiality of any subsequent convictions.

7 JUDGE PIGOTT: Let - - -

8 MS. GRADY: That's all sub (ii) is.

9 JUDGE PIGOTT: Let me ask you a question  
10 about the revocation of the sentence. If in the '95  
11 violation, which was a possession, but let's assume  
12 it was violent, all right, his '95 - - - the  
13 violation of probation.

14 MS. GRADY: Yes.

15 JUDGE PIGOTT: Right? You said you'd - - -

16 MS. GRADY: Yes, yes, yes. The narcotics,  
17 assuming it was a violent.

18 JUDGE PIGOTT: If - - - if that - - - if  
19 that revokes the sentence that was issued in '94,  
20 would he be wise to make the argument that because  
21 you revoked that one, that you can't count that as a  
22 violent felony for purposes of sentencing me on the  
23 '95 one?

24 MS. GRADY: Meaning - - - would he argue  
25 that that disrupted sequentiality, essentially? That

1 the previous sentence doesn't count for sub (ii)?

2 JUDGE PIGOTT: All right, yeah.

3 MS. GRADY: The answer to that is sub  
4 (iii), the judge - - - the legislature anticipated  
5 that, where you have people who - - - of course,  
6 sometimes violent offenders, who get probation,  
7 nevertheless go out and recommit. The legislature  
8 said, no, that first probationary sentence, although  
9 tentative and revocable, and although we're about to  
10 revoke it, that counts for sequentiality purposes.  
11 So therefore he is a second felony offender on the  
12 new violent - - - the new violent committed during  
13 the probationary period.

14 JUDGE PIGOTT: Okay.

15 MS. GRADY: That's the whole purpose,  
16 though, of sub - - - of sub (iii) saying that the  
17 previous tentative sentence shall be deemed a  
18 sentence. It's for the sequentiality of the  
19 convictions of - - - of a - - - of a reoffense during  
20 the probationary period while this tentative sentence  
21 is in place. That's the only purpose of sub (iii),  
22 is my argument.

23 JUDGE STEIN: Although this issue wasn't  
24 before us in Boyer, would be - - - if - - - if we  
25 agreed with you in this case, would we be saying

1 something inconsistent with what we said in Boyer?

2 MS. GRADY: Only with the dictum of Boyer,  
3 what I'm calling the dictum of Boyer. I think that  
4 the - - - the problem that I had with Boyer - - -  
5 although I love Boyer; I just quoted Your Honor - - -  
6 Your - - - this court in the Second Circuit where - -  
7 -

8 JUDGE STEIN: of course you do; it's  
9 favorable - - -

10 MS. GRADY: - - - it was a double jeopardy  
11 claim. But I thought Rivera - - - I thought Judge  
12 Rivera's dissent made some good points. I think that  
13 the - - -

14 JUDGE RIVERA: Thank you.

15 MS. GRADY: Well, I really did. The - - -  
16 the - - - if I could quote Your Honor: "what now?"  
17 But the - - - the - - - the paragraph there that  
18 Boyer has - - - provides difficulties speaks to  
19 striking a balance between what the defendant would  
20 want and what the People would want. And my argument  
21 is that the legislature already struck that balance.

22 JUDGE STEIN: Well, it also, I think,  
23 speaks to consistency rather than just a balance, but  
24 - - -

25 MS. GRADY: Consistency, and yes, if the

1 court agrees that there may be only one sentence for  
2 a prior judgment of conviction, for 70.04 purposes,  
3 then yes, I agree, it should be the first one imposed  
4 upon the judgment of conviction. But what I'm  
5 suggesting is that the purpose of the statute overall  
6 is to repeat - - - is to treat repeat offenders as  
7 the repeat offenders that they are, and that using  
8 the most recent sentence as the operative sentence  
9 for the lookback gives effect to the statute and is  
10 consistent with every New York court that has  
11 considered the question.

12 JUDGE PIGOTT: Thank you. Thank you, Ms.  
13 Grady.

14 MS. GRADY: Thank you.

15 JUDGE PIGOTT: I think we have your  
16 argument.

17 Mr. Donn, you have some rebuttal?

18 MR. DONN: A few quick points, Your Honor.  
19 First, on the - - - on the statutory interpretation  
20 and responding to my adversary's focus on the words  
21 "upon such prior conviction" in subsection (ii), I  
22 just - - - looking at the statute as a whole, it's  
23 clear, as Judge Rivera pointed out, subsection (i)  
24 talks about the conviction; we're defining what types  
25 of crimes apply.

1           Subsection (ii) then brings it down and  
2           says, and we also care about when this happened,  
3           "sentence upon such prior conviction". And  
4           subsections (iii) and (iv) both continue to refer to  
5           that same date, when sentence was imposed on the  
6           prior conviction.

7           And there is no reasonable way of looking  
8           at the statute and taking away the notion that the  
9           legislature somehow intended, by not including upon -  
10          - - by not essentially reiterating those words in - -  
11          - in (iii) and (iv), the notion that they somehow  
12          meant something else that they otherwise didn't say  
13          at all. It's - - - it's clear from this statute that  
14          the legislature was - - -

15                 JUDGE ABDUS-SALAAM: Assuming, counsel,  
16                 that there is some ambiguity in the statute because  
17                 "upon such conviction" was not repeated in - - - in  
18                 (iii) and (iv), are we - - - are we to take that  
19                 ambiguity to mean that the - - - the legislature  
20                 expressly now wants us to treat a resentence as the  
21                 date that we do the lookback period?

22                 MR. DONN: I wouldn't - - - I wouldn't even  
23                 know how to answer the question, because I - - - I  
24                 don't see any ambiguity. But - - -

25                 JUDGE ABDUS-SALAAM: So there's no express

1 - - -

2 MR. DONN: The - - -

3 JUDGE ABDUS-SALAAM: - - - language that  
4 says - - -

5 MR. DONN: The - - -

6 JUDGE ABDUS-SALAAM: - - - resentence.

7 MR. DONN: There is no - - - there is no  
8 ambiguity, and even if there somehow were any  
9 ambiguity, there is certainly no express contrary  
10 intent expressed in the statute. And other than  
11 that, I'll just leave it at that with the statute. I  
12 think it's - - - it's - - - it's pretty clear.

13 I - - - I would note on - - - on Boyer, I'd  
14 just like to say a few words about Boyer. One, much  
15 more complicated case than this one. I mean, here  
16 all we need to do is look at the statute. Boyer  
17 involved elements that, arguably, weren't apparent on  
18 the face of 70.04. Here, it's all right there.  
19 However, and despite the dissent in Boyer, I'd note -  
20 - - note that both the majority and the dissent in  
21 Boyer agreed on the following.

22 One, if the initial sentence is lawful, it  
23 controls. There was some disagreement between the  
24 majority and the dissent in Boyer as to whether or  
25 not a Sparber resentencing vacates the prior sentence

1 or merely modifies. We don't need to get into that  
2 here. It was a lawful probationary sentence; it  
3 controls.

4 And number two, both the majority and the  
5 dissent in Boyer appeared to agree that there's only  
6 one sentence, one date on which sentence was imposed  
7 on these prior convictions, and that - - - that's why  
8 both the majority and the dissent were looking at - -  
9 - at a rule that was - - - that was supported by  
10 policy considerations that would support the  
11 identification of one date.

12 And I'd just like to read briefly from  
13 Boyer, "A rule premised on the original date of  
14 sentence for a prior conviction promotes clarity and  
15 fairness. Under this bright line rule, the defendant  
16 and the People alike can easily discern the date of  
17 sentence for a prior conviction. The People will not  
18 be able to rely on the later date of resentence to  
19 bring an otherwise ineligible decades-old conviction  
20 within the ten-year lookback period for predicate  
21 felony offender adjudication under 70.04(1)(b)(iv)."

22 If there are no further questions - - -

23 JUDGE PIGOTT: Thank you, Mr. Donn.

24 JUDGE ABDUS-SALAAM: It may be dicta, but  
25 it's persuasive, right?

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MR. DONN: Yes, Your Honor.

JUDGE PIGOTT: Thank you, Mr. Donn.

(Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Freddie Thompson, No. 16, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

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