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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

CARLOS SANTIAGO, JR.,

No. 159
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
September 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 159, Santiago?

2 MR. DUBRIN: Good morning, Your Honors.

3 CHIEF JUDGE LIPPMAN: Good morning.

4 MR. DUBRIN: Good afternoon; I apologize.

5 CHIEF JUDGE LIPPMAN: It's okay.

6 MR. DUBRIN: All right. I would li - - -

7 Drew DuBrin, Monroe County Public Defender's Office.

8 I would like to reserve two minutes for rebuttal, if

9 I may.

10 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

11 MR. DUBRIN: New York has a strong public
12 policy reflecting various statutory provisions - - -

13 CHIEF JUDGE LIPPMAN: What's the difference
14 between the YO context and the infancy, in terms of
15 what we're trying to deal with here?

16 MR. DUBRIN: Well - - -

17 CHIEF JUDGE LIPPMAN: Is sixteen to
18 eighteen a different case?

19 MR. DUBRIN: It's significant here because
20 we know that someone who is fifteen years old - - -

21 CHIEF JUDGE LIPPMAN: In terms of policy.

22 MR. DUBRIN: Policy.

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MR. DUBRIN: - - - is that we know that a
25 child, who has committed an act for which he cannot

1 be criminally responsible for, could never be
2 convicted of or be found to have committed a felony
3 which is the equivalent of a New York felony. And
4 under the penal law - - -

5 JUDGE GRAFFEO: Because he's fifteen - - -

6 MR. DUBRIN: Because he's fifteen - - -

7 JUDGE GRAFFEO: - - - at the time?

8 MR. DUBRIN: - - - and I think the People
9 concede that the highest level of offense here, for
10 which Mr. - - - which would be the equivalent of
11 murder in the third degree, would be New York's
12 manslaughter in the second degree. And someone who
13 is fifteen years old cannot be held criminally
14 responsible for - - -

15 JUDGE SMITH: So is the answer to the
16 Chief's question that it's the difference between a
17 discretionary decision and a complete defense?

18 MR. DUBRIN: The answer is that with
19 respect to discretionary decision, it's speculative
20 whether or not a conviction may or may not have
21 resulted. We know that had this offense or this act
22 been committed in New York, no conviction would have
23 resulted. And we also know that there would have
24 been no felony whatsoever, because under the penal
25 law, the definition of a felony is it's an offense

1 for which a term of imprisonment in excess of one
2 year may be imposed. And a term of imprisonment may
3 not be imposed for an act committed by a child for
4 which he cannot be held criminally responsible. And
5 even under the Family Court Act, for example,
6 children are not considered to have committed
7 felonies, right? They are committed - - - they are
8 considered to have committed acts which, if committed
9 by an adult, would constitute felonies, but they're
10 not committed - - - they're not considered to have
11 committed felonies at all.

12 CHIEF JUDGE LIPPMAN: Do they have to be a
13 certain age? Age is effectively a part of the crime?

14 MR. DUBRIN: Yeah, as a matter of fact, I
15 take strong disagreement with the People in that
16 infancy does not really define the status of the
17 offender. It does, instead, really define the nature
18 of the act itself.

19 JUDGE SMITH: But it is a defense. I mean,
20 the People don't have to prove, in every case, that
21 the defendant was over fifteen.

22 MR. DUBRIN: It is a defense; that is
23 correct, and it has to be raised; that is correct.
24 But it's much more than a defense, because it is - -
25 - it is a complete absolute bar to conviction that

1 could be raised at any time in the proceedings,
2 whether it's at the preliminary hearing, at a motion
3 to dismiss the indictment. It could be raised in a
4 motion to set aside the verdict. It can be raised as
5 an ordinary defense. It can even be raised - - -

6 JUDGE SMITH: Well, what about
7 preservation?

8 MR. DUBRIN: Pardon me, Your Honor?

9 JUDGE SMITH: Well, at some point - - - if
10 you've got more to say on this go ahead, but I want
11 to hear about preservation, too.

12 MR. DUBRIN: Yeah. Yeah. Well, I was just
13 going to say that there's a significant in
14 differences bec - - - in that we do not have to
15 resort to speculation as to whether or not infancy
16 would have barred a conviction, you know. And in an
17 ordinary defense, usually, you need a trial to
18 determine whether a defense would be - - -

19 JUDGE SMITH: All right. So assume you're
20 right about that - - -

21 MR. DUBRIN: Yes.

22 JUDGE SMITH: - - - why did you not have to
23 make this argument to - - - I mean, why under Samms
24 and other cases did you not have to make this
25 argument to the sentencing court?

1 MR. DUBRIN: Well, I think it falls
2 squarely within the illegal sentence exception of the
3 preservation requirement, because the record
4 unequivocally demonstrates that there is an act, so
5 this does not violate - - -

6 JUDGE SMITH: But Samms and People - - -
7 the case it talks about, People v. Smith, seem to say
8 that when you're doing this out-of-state felony
9 exercise - - - I forget what it's called, complete
10 equivalency, or whatever it is - - - that that
11 requires preservation.

12 MR. DUBRIN: It - - - often, when you - - -
13 when you are making a challenge to a second felony
14 offender adjudication, the issue has to be raised.
15 And I agree with you, Your Honor, normally it has to
16 do - - - you have to raise the issue where the issue
17 turns on the equivalency of foreign offense.

18 JUDGE GRAFFEO: Is it because you're not
19 really comparing elements between the two states,
20 you're just - - -

21 MR. DUBRIN: No - - - no - - - well - - -

22 JUDGE GRAFFEO: - - - just looking at an
23 age qualification - - -

24 MR. DUBRIN: No, it's - - -

25 JUDGE GRAFFEO: - - - is that - - - is that

1 what takes you out of Samms?

2 MR. DUBRIN: Well, Samms requires
3 preservation because of the need to look at the
4 underlying accusatory. And I think the People agree
5 with me that not only is it not necessary to look at
6 the accusatory of the foreign jurisdiction, it would
7 be wrong to do so, because of the nature of the
8 foreign offense.

9 Murder in third degree can be committed in
10 various ways, no doubt about it, but it's only
11 because of its broadly defined nature. It does not
12 expressly set forth different ways in which the crime
13 could be committed. Like in Smith, for example, Your
14 Honor, the foreign offense federal charge defined
15 kidnapping in various ways, expressly set forth
16 different ways. You know, someone could inveigle
17 another, decoy another, but - - - and abduct another,
18 but in New York, only what was required - - - or what
19 was required was abducting. So given the fact that
20 the foreign offense expressly set forth different
21 ways in which the crime could be committed, it was
22 entirely proper to look to the foreign accusatory.
23 But here you don't have that; you have, essentially,
24 a - - -

25 JUDGE GRAFFEO: So what did the lawyer say

1 here - - -

2 MR. DUBRIN: The lawyer said - - -

3 JUDGE GRAFFEO: - - - that we can hang our
4 hat on - - -

5 MR. DUBRIN: Yeah.

6 JUDGE GRAFFEO: - - - in terms of saying
7 that at least they alerted the trial judge to this
8 problem?

9 MR. DUBRIN: Well, the lawyer said that
10 because the chil - - - because Mr. Santiago was just
11 a child, he was fifteen years old when he committed
12 the crime - - - and the People conceded that he was
13 just fifteen, or did not disagree with that fact - -
14 - that he would have been entitled to youthful
15 offender treatment.

16 JUDGE SMITH: So when he was - - -

17 MR. DUBRIN: I would concede that's not an
18 accurate argument, and even he - - -

19 JUDGE SMITH: But you say - - -

20 MR. DUBRIN: - - - were eligible - - -

21 JUDGE SMITH: But you say that even though
22 - - - even though he - - - even though he said the
23 wrong thing, that should have been enough for the
24 judge to say, wait a minute, fifteen, that's - - -

25 MR. DUBRIN: Well, it was certain - - -

1 JUDGE SMITH: - - - a YO.

2 MR. DUBRIN: - - - it was enough to alert
3 me to raise the issue at the Appellate Division for
4 the first time on appeal. And it's certainly enough
5 - - - I believe, enough record support to argue - - -

6 JUDGE SMITH: I mean, I guess - - - I
7 guess, my instinct is that it's not - - - it's not a
8 particularly subtle point that fifteen year olds
9 aren't criminally responsible in New York; you would
10 normally expect a judge to know that.

11 MR. DUBRIN: I think that it would - - -
12 given the fact that the People were not seeking to
13 adjudicate him a second violent felony offender, I
14 think the People were - - - the court was alerted
15 that we're not talking a highest level offense, that
16 I think given the fact that counsel raised the age of
17 fifteen, that would alert him. But again, Your
18 Honors, I think this does fall squarely within the
19 preservation exception.

20 JUDGE SMITH: You do - - - I'm sorry, let
21 me go back to the merits for a minute. You agree
22 that if your guy had not, in fact, been fifteen, the
23 fact that a fifteen-year-old, theoretically, could be
24 convicted of this crime in Pennsylvania would not
25 take you out of the - - -

1 MR. DUBRIN: I think fifteen years old
2 would be a predicate, because I - - - you know,
3 infancy really should not be treated any differently
4 than an element of the offense that - - -

5 JUDGE SMITH: Well, oh, so you're say - - -
6 I mean, so you're saying that if Pennsylvania
7 punishes fifteen-year-olds, then under the - - - Olah
8 and our other strict equivalency cases, then the
9 Pennsylvania murder statute can't be used?

10 MR. DUBRIN: No. No, I'm sorry; I
11 misstated - - -

12 JUDGE SMITH: Okay.

13 MR. DUBRIN: - - - very clearly. The fact
14 that he was fifteen makes it legally impossible for
15 him to have been convicted of a crime for which he
16 was criminally responsible, and it makes it legally
17 impossible that the act that he committed is an
18 offense which, by definition, constitutes a felony.

19 JUDGE GRAFFEO: And that's what makes it an
20 illegal sentence?

21 MR. DUBRIN: That's what makes it an
22 illegal sentence.

23 JUDGE GRAFFEO: That's what puts you under
24 the exception.

25 MR. DUBRIN: That's right. The intent of

1 the legislature is quite clear, that the intent of
2 the legislature for 70.06 was to prohibit the use of
3 acts for which children could not have been
4 criminally responsible in the state. It's reflected
5 both in the plain language of the statute, it's
6 reflected in New York's strong public policy interest
7 of - - -

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. DUBRIN: It's - - - thank you, Your
10 Honor.

11 CHIEF JUDGE LIPPMAN: Thanks, counselor.

12 MR. KAEUPER: Good afternoon, Your Honors.

13 CHIEF JUDGE LIPPMAN: Counselor, how do you
14 get around the infancy issue?

15 MR. KAEUPER: Well, I think - - - I guess,
16 first of all, I want to - - - I want to clarify
17 something that I think is important to how - - -

18 CHIEF JUDGE LIPPMAN: Please do.

19 MR. KAEUPER: - - - this is being
20 discussed, which is defense counsel says that I
21 concede that the highest thing he could have been
22 charged with under New York is manslaughter second.
23 I certainly don't concede that. It's the - - -
24 that's the lowest equivalency. That's the, sort of -
25 - -

1 CHIEF JUDGE LIPPMAN: So - - -

2 MR. KAEUPER: - - - lowest common
3 denominator.

4 CHIEF JUDGE LIPPMAN: So - - -

5 MR. KAEUPER: But I think that's critical
6 here, because this is exactly like YO. This is - - -
7 this is contingent.

8 CHIEF JUDGE LIPPMAN: But - - -

9 MR. KAEUPER: This is speculative.

10 CHIEF JUDGE LIPPMAN: But YO is sixteen and
11 up; this is a fifteen year old. How is it exactly
12 like a YO? It's not a discretionary issue. It can't
13 be a crime in New York; it's not public policy,
14 right?

15 MR. KAEUPER: No, no, because if we're - -
16 - if we're going to start talking about what if he
17 had done this in New York, if he had done this in New
18 York, he probably would have been charged as a
19 depraved indifference murderer, or he could have been
20 charged with manslaughter 1. Those are offenses that
21 the - - -

22 JUDGE SMITH: You're examining the
23 underlying acts to reach that conclusion, right?

24 MR. KAEUPER: Well, yes, but I guess what
25 I'm saying is you can't do the Gonzalez test, come

1 out with the lowest common denominator and then say,
2 well, if he had done that in New York, he wouldn't
3 have been able to have been charged because - - -

4 JUDGE PIGOTT: Well, Mr. Kaeuper, just so I
5 understand, let's - - - you get statute-to-statute
6 comparisons and you say they match and so that's
7 gone. Mr. DuBrin, as I understand it, wants to add
8 an element; I think that's what you say in your
9 brief. He wants to add something to this otherwise
10 very clear rule.

11 MR. KAEUPER: Right.

12 JUDGE PIGOTT: If there were two people in
13 front of the court and one had committed this
14 identical crime in New York and one had done it in
15 Pennsylvania, would the outcomes be the same?

16 MR. KAEUPER: We have no idea.

17 JUDGE PIGOTT: Well, we do, because in New
18 York, you can't be criminally responsible.

19 MR. KAEUPER: If you're charged with
20 manslaughter second at age fifteen. But if you do
21 the act that the defendant did, you might have been
22 charged with manslaughter 1 or depraved indifference
23 murder.

24 JUDGE SMITH: Take that feature out of the
25 case for a moment.

1 MR. KAEUPER: Okay.

2 JUDGE SMITH: Suppose you had a defendant
3 who was fifteen and is not a homicide, so there's no
4 way he could have been criminally responsible in New
5 York, do you still say that if he was criminally
6 responsible in Pennsylvania he's a second - - - he's
7 a predicate?

8 MR. KAEUPER: Yes, because the Meckwood
9 case tells us you assign the status that the foreign
10 jurisdiction assigned. And so, I mean, the - - -

11 JUDGE SMITH: Isn't there something
12 disturbing about treating a fifteen year old as - - -
13 a guy who was fifteen when he committed this crime as
14 a predicate felon?

15 MR. KAEUPER: Not if he shoots into a
16 crowd. I mean, again - - - and until - - -

17 JUDGE SMITH: No, but you admit that
18 predicate felon status doesn't depend on that?

19 MR. KAEUPER: Correct. Correct. But I
20 guess - - -

21 JUDGE SMITH: He took a plea, right? So
22 there's no way to know whether he in fact - - - and
23 he wasn't the shooter, as I remember.

24 MR. KAEUPER: I could be wro - - - I
25 thought he was; I could be wrong about that. But in

1 any event, I mean, you could draw a distinction, I
2 suppose, between cases where it would be absolute,
3 versus a situation like this where it's contingent.
4 But I think that's still - - - that's still not an
5 appropriate distinction to draw, because it's going
6 to bring in all kinds of other things. What about a
7 statute of limitations situation? You could have
8 something absolute - - - more absolute than that. If
9 he was charged in Pennsylvania with murder third,
10 presumably Pennsylvania has no statute of limitations
11 on murder, but under the Gonzalez test this is
12 equivalent to - - - the most this equivalent to is a
13 manslaughter second. If there was, you know, twelve
14 years between - - -

15 JUDGE SMITH: Isn't this - - - I mean, I -
16 - - it's a good argument, but isn't there a
17 qualitative difference between infancy and the
18 statute of limitations? I mean, isn't this - - -
19 isn't infancy one of those sort of primary things
20 that go to the very nature of the act?

21 MR. KAEUPER: I guess if it is, it's up to
22 the legislature to make that an exception under the
23 statute, and they chose not to do that. But
24 ultimately, we're putting into effect a statutory
25 enactment which doesn't include any sort of

1 consideration of defenses and so forth, as long as
2 there's a conviction. So if he had been adjudicated
3 a YO in the foreign jurisdiction and that was, you
4 know, equivalent to a New York adjudication, then he
5 wouldn't have been convicted. That fits within the
6 statute. But there's no room for consideration of
7 other defenses that the defendant might bring up, and
8 therefore there's no way to confine it to that,
9 because where - - -

10 JUDGE SMITH: You're basically saying, if I
11 understand you, that the Olah rule works both ways,
12 that if you can't look at the underlying facts, he
13 can't either?

14 MR. KAEUPER: Yeah, I think that's - - - I
15 think that's true, but also - - -

16 JUDGE SMITH: But it also - - - but it
17 doesn't - - - but it doesn't work to the - - - I
18 mean, as I guess Mr. DuBrin concedes, it doesn't - -
19 - it doesn't work both ways to the extent that every
20 defense that would be available in New York but not
21 in Pennsylvania eliminates equivalency and wipes out
22 the foreign statute.

23 MR. KAEUPER: I'm sorry - - -

24 JUDGE SMITH: In other words - - - in other
25 words, he disavowed the argument that you can throw

1 out the whole Pennsylvania statute because they
2 convict fifteen-year-olds. And you would agree with
3 him about that, I take it?

4 MR. KAEUPER: I guess I'm - - - I guess I'm
5 confused - - -

6 JUDGE SMITH: Okay.

7 MR. KAEUPER: - - - by the question.

8 JUDGE SMITH: The argument is theoretically
9 possible that because Pennsylvania convicts fifteen-
10 year-olds and New York doesn't, the Pennsylvania
11 statute and the New York statute are not strictly
12 equivalent under Olah, and no one who violates the
13 Pennsylvania statute can be a predicate. He said
14 he's not going to make that argument. You agree that
15 he's wise not to make that argument?

16 MR. KAEUPER: Yeah, yes - - - no,
17 certainly.

18 JUDGE SMITH: Okay. But see - - - but then
19 aren't you really getting the best of both worlds?
20 You're saying you won't give him the benefit of the
21 Olah rule and you won't let him look at the
22 underlying facts, either.

23 MR. KAEUPER: Well, I mean, I - - - I
24 guess. I mean, if - - - if what he has - - - if the
25 act that he commits in the foreign jurisdiction is an

1 act which this state says is felonious, and he
2 commits it in a state which says that whatever age he
3 commits it at he is criminally responsible, then yes,
4 I think that counts as a - - - as a predicate,
5 because he's committed an act which this state says
6 is felonious. And he's - - - and again, the Meckwood
7 rule, which - - - you know, it says it's well settled
8 that you attach the same force and effect of the
9 conviction that the foreign state does. And again -
10 - -

11 JUDGE SMITH: Do you happen to know what
12 the Constitutional limit, if any, is for the lower
13 end of criminal responsibility? I mean, I certainly
14 can't - - - you can't treat ten-year-olds as
15 criminals?

16 MR. KAEUPER: I - - - I'm sure - - -

17 JUDGE SMITH: Because it crossed my mind -
18 - -

19 MR. KAEUPER: - - - there must be some
20 limit, but I - - -

21 JUDGE SMITH: Whatever the minimum is, I
22 mean, suppose it's fourteen, you - - - obviously you
23 would make the same argument as fourteen, thirteen,
24 twelve, as long as it's allowed?

25 MR. KAEUPER: Yes, yeah. And again,

1 because of the way that the statute is written. I
2 mean, the legislature can change this, if they want
3 to change this. But they wrote a statute which
4 doesn't involve any of these other considerations.
5 There's a conviction in the foreign state and the
6 offenses are equivalent.

7 JUDGE SMITH: Isn't the point of the
8 statute to get people who have committed for the
9 second time things we think are felonies?

10 MR. KAEUPER: Well, sure, that's the
11 general point - - -

12 JUDGE SMITH: And we - - -

13 MR. KAEUPER: - - - but they - - -

14 JUDGE SMITH: - - - and we don't think a
15 fifteen-year-old - - - putting aside your point that
16 this is really depraved indifference murder, we don't
17 think a fifteen-year-old, if it's manslaughter, is a
18 felon.

19 MR. KAEUPER: Yes, in our state, but we
20 also - - - I mean, and again, we're back to the fact
21 that he might have been charged with something
22 different if he had done this in the state. But I
23 think also, I mean, generally speaking, the Gonzalez
24 rule is pretty tough on prosecutors. It's much more
25 likely to invalidate a prior conviction, which is

1 something we would all agree, yes - - -

2 JUDGE SMITH: Okay.

3 MR. KAEUPER: - - - that's something we
4 should - - -

5 JUDGE SMITH: But are you now arguing that
6 since you suffered so much injustice, let the defense
7 suffer some once in a while?

8 MR. KAEUPER: No. I'm saying that the
9 statute gives us a framework and that's what we're
10 stuck with. And it doesn't produce perfect results,
11 maybe. You know, there may be circumstances where
12 you say, well, you know, gee, I think that prior
13 conviction should have counted or shouldn't have
14 counted. But we're stuck with the statutory
15 framework that we're given. And if the legislature
16 wants to say, no, you know, infancy is a different
17 thing, they can certainly - - - they can certainly
18 insert that into the statute. But as the statute is
19 now, to interpret it to include infancy, there's no
20 way to have it not include lots of other things,
21 because there's nothing in the statute that limits
22 that. So you would bring in all of the statute of
23 limita - - - speedy trial. There may be very
24 clear-cut cases where if this had been brought in New
25 York State, it would be dead on arrival. Speedy

1 trial; it's done. You cannot possibly be convicted,
2 whether - - - you know, whatever the level of
3 offense. And you know, that - - - that is not an
4 argument that gets brought in.

5 Now if I can also just quickly say a word
6 about - - -

7 CHIEF JUDGE LIPPMAN: Quickly, counselor.
8 Go ahead.

9 MR. KAEUPER: - - - about preservation, I
10 think this is clearly not preserved. The argument
11 that was made, in addition to the strange nexus
12 argument - - -

13 CHIEF JUDGE LIPPMAN: That the judge was
14 alerted as to the age issue?

15 MR. KAEUPER: No. The argument was a
16 Meckwood issue. It was the issue that was decided by
17 - - -

18 JUDGE SMITH: The judge did know - - -

19 MR. KAEUPER: - - - this court in Meckwood.

20 JUDGE SMITH: The judge did know he was
21 fifteen.

22 MR. KAEUPER: I believe - - - I believe she
23 does say that, yes.

24 JUDGE SMITH: The prosecutor said it at one
25 point.

1 MR. KAEUPER: I - - -

2 JUDGE SMITH: I mean, the - - - is it
3 really too much to expect a judge to realize that we
4 don't punish fifteen-year-olds as felons?

5 MR. KAEUPER: Well, but we do under some
6 circumstances. And - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but the judge
8 knows the age of criminal responsibility in New York.

9 MR. KAEUPER: Right, but he's charged - - -

10 CHIEF JUDGE LIPPMAN: I mean, this is not -
11 - -

12 MR. KAEUPER: But this is a mur - - -

13 CHIEF JUDGE LIPPMAN: - - - not nuclear
14 science for any judge sitting - - -

15 MR. KAEUPER: But this is - - -

16 CHIEF JUDGE LIPPMAN: - - - on the bench.

17 MR. KAEUPER: But this is a murder
18 conviction. I mean, on its face - - - if you're just
19 looking at it on its face, you say murder, yeah, you
20 can be convicted of murder in New York if you're
21 fifteen. I mean - - -

22 JUDGE PIGOTT: But didn't he specifically
23 ask whether you raised the unconstitutional issue or
24 not? I thought he specifically asked whether there
25 was a constitutional issue being raised.

1 MR. KAEUPER: I think that's about whether
2 you have a constitutional challenge to the underlying
3 conviction, yeah. I mean, that would be, you know -
4 - -

5 JUDGE SMITH: But he didn't. I mean, it's
6 not unconstitutional to convict a fifteen-year-old.

7 MR. KAEUPER: Right. Right, right, right,
8 right, no. I mean, I think that's a different
9 question there.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. KAEUPER: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks.

13 Counselor, rebuttal?

14 MR. DUBRIN: Yes. Judge Smith, just to
15 touch on the underlying facts question, I know this
16 Court is reluctant to look to the underlying facts;
17 the general rule is that we only compare elements
18 between the New York - - - the foreign offense and
19 closest New York analog. But there are instances
20 where it's entirely appropriate to - - - appropriate
21 to look at an underlying fact to see exactly how the
22 crime was committed, to determine whether if it were
23 committed in New York, it would constitute a New York
24 felony. Where - - - under certain circumstances,
25 it's appropriate to look at the underlying

1 accusatory, as this court held in People v. Muniz and
2 Gold v. Jackson, to determine exactly how the crime
3 was committed. In this case we have an act committed
4 by a child which, by its very nature, is not criminal
5 in New York. There are also instances in which we
6 look at the - - -

7 JUDGE SMITH: How do you distinguish his
8 point about the statute of limitations and speedy
9 trial? I mean, suppose your guy had been prosecuted
10 within the Pennsylvania statute, but later than the
11 New York statute would allow, would he still be a
12 predicate?

13 MR. DUBRIN: I'm not sure I follow the
14 argument, Your Honor.

15 JUDGE SMITH: Some hypothetical crime,
16 there's a three-year statute in Pennsylvania, there's
17 a four-year statute in New York; the guy is
18 prosecuted in Pennsylvania three-and-a-half years
19 after the crime, is convicted of a felony. Is he a
20 New York predicate?

21 MR. DUBRIN: I think things are different
22 when we're talking about infancy, Your Honor.

23 JUDGE SMITH: The answer has to be yes to
24 that one, right?

25 MR. DUBRIN: Well, I do think things are

1 different when we're talking about infancy, and you
2 know - - - thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Okay. Thank you.

4 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Carlos Santiago, Jr., No. 159 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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