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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

WILLIAM MIDDLEBROOKS,

No. 88  
(Papers sealed)

Appellant.

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PEOPLE,

Respondent,

-against-

FABRICE LOWE,

No. 89  
(Papers sealed)

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 06, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
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

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1 CHIEF JUDGE LIPPMAN: Let's start with  
2 number 88 and 89.

3 Counselor?

4 MR. ROTHSCHILD: Yes, Your Honor. Phil  
5 Rothschild from Hiscock Legal Aid.

6 CHIEF JUDGE LIPPMAN: You want any rebuttal  
7 time, counsel?

8 MR. ROTHSCHILD: I'd like to reserve two  
9 minutes, Your Honor.

10 CHIEF JUDGE LIPPMAN: How much, counsel?

11 MR. ROTHSCHILD: Two minutes.

12 CHIEF JUDGE LIPPMAN: Two, sure. Go ahead.

13 MR. ROTHSCHILD: In Rudolph, this court  
14 found that the trial court should exercise discretion  
15 in determining YO eligibility. We feel that it  
16 should extend to have the court make a particular  
17 finding of facts or factors under CPL - - -

18 CHIEF JUDGE LIPPMAN: Tell us - - - tell us  
19 what - - - what - - - what's the issue in your case?  
20 What happened?

21 MR. ROTHSCHILD: Well, in my case, there  
22 essent - - -

23 CHIEF JUDGE LIPPMAN: - - - in front of the  
24 judge? Go ahead.

25 MR. ROTHSCHILD: - - - there essentially

1 was an implicit finding of eligibility, and I think  
2 that the - - - the court never said he was not  
3 eligible and seemed to believe that he was eligible.  
4 And also the Appellate Division, the Fourth  
5 Department also seemed to believe that he was  
6 eligible.

7 JUDGE STEIN: But was he an eligible youth  
8 as defined in the statute?

9 MR. ROTHSCHILD: Yes, he was, Your Honor,  
10 because we - - - we would submit it's fairly clear  
11 that he was eligible insofar as under 710 - - - or,  
12 excuse me, under 720.10(3) defense counsel asked for  
13 YO, set forth mitigating factors. Contrary to  
14 respondent's claim, she set forth, look, this is a  
15 constructive possession. There is absolutely no  
16 proof outside of the statute - - - outside of the  
17 statutory presumption, and there's no - - - no  
18 witnesses, no one to say that he - - - they saw him  
19 with the gun, use the gun.

20 JUDGE STEIN: But - - - but under the  
21 statute, it says an eligible youth is someone who - -  
22 - of a certain age range "except", and one of the  
23 exceptions is an armed felony, right?

24 MR. ROTHSCHILD: Yes, Your Honor. However,  
25 Appellate Divisions also can make their own finding

1 of eligibility, and they have - - - have done so  
2 regularly, Amir W., Cruickshank -- which I believe  
3 went to this court under People v. Maria C., and that  
4 can be done. And in this case we essentially have an  
5 implicit finding, and what's the respondent's  
6 position is, well, that doesn't matter, because the  
7 judge didn't write out, hey, you - - -

8 JUDGE PIGOTT: Well, where do - - - where  
9 do you draw the line, because obviously there are - -  
10 - there's mandatory YOs and - - - and - - - and, as  
11 Judge Stein is - - - is - - - is saying, this one  
12 you're not. You - - - you are not YO eligible  
13 unless, and I know you and your - - - and your co-  
14 counsel are going to argue that we should extend  
15 Rudolph to say we ought to - - - we ought to pursue  
16 the "unless" part as part of - - - of a Rudolph  
17 jurisprudence.

18 MR. ROTHSCHILD: Well, I think this case is  
19 actually - - - the - - - my client is actually the  
20 poster child for why the rule should be extended,  
21 because essentially, you have the - - - both the  
22 trial court and the Appellate Division implicitly  
23 finding him eligible.

24 JUDGE PIGOTT: I didn't get that from Judge  
25 Walsh. I don't - - -

1 MR. ROTHSCHILD: Well, Judge Walsh found -  
2 - - basically said I - - - I'm going to deny it,  
3 because you took your case to trial. That's - - - he  
4 said that three times. He said that over and over  
5 and over again. But as far as the finding of - - -  
6 of eligibility, when defense counsel said look, you  
7 know, he was - - - there's minor involvement, there's  
8 no witnesses. All you have is the gun at the feet;  
9 no indication he held it or possessed it or used it.

10 JUDGE PIGOTT: That's - - - that's not  
11 true.

12 JUDGE RIVERA: Counsel, isn't the - - -  
13 isn't the - - - the - - - the statute, just reading  
14 the text of the statute, isn't the presumption, every  
15 youth is eligible unless, so you start out with the  
16 eligibility and then you're working against the  
17 presumption of eligibility?

18 MR. ROTHSCHILD: Yes, Your Honor.

19 JUDGE RIVERA: As an eligible youth?

20 MR. ROTHSCHILD: Yes, Your Honor. However,  
21 as I said, the court does have discretion in making  
22 that determination of eligibility, and that  
23 discretion - - -

24 JUDGE RIVERA: Yes. But I'm saying you  
25 start out with the presumption.

1 MR. ROTHSCHILD: Yes.

2 JUDGE RIVERA: And you're - - - you're  
3 looking to check these factors to see if they - - -  
4 they - - -

5 MR. ROTHSCHILD: Yeah.

6 JUDGE RIVERA: - - - are carved out by the  
7 legislature.

8 MR. ROTHSCHILD: Indeed, Your Honor. And -  
9 - -

10 JUDGE RIVERA: Doesn't that also then  
11 require that you're always making a finding of  
12 eligibility; it's a threshold question?

13 MR. ROTHSCHILD: It's a threshold - - -

14 JUDGE RIVERA: How do you know who's  
15 eligible if you don't look at these factors?

16 MR. ROTHSCHILD: Well, that's just it, and  
17 how do you know and how does an Appellate Court know  
18 unless, in fact, it's put forth on the record, and  
19 that's the problem with the - - -

20 CHIEF JUDGE LIPPMAN: What's the judge's  
21 responsibility in this area?

22 MR. ROTHSCHILD: I think that the judge  
23 should make particularized findings of fact and  
24 should set it forth for the appellant to - - -

25 CHIEF JUDGE LIPPMAN: Affirmat - - -

1 affirmatively, the - - -

2 MR. ROTHSCHILD: I - - - I believe so, Your  
3 Honor, because - - -

4 JUDGE PIGOTT: All right, suppose - - -  
5 suppose you're thirty years old and you commit an  
6 armed felony. Do you have to make a finding that  
7 they're not YO eligible?

8 MR. ROTHSCHILD: Well, by statute they  
9 could never be - - -

10 JUDGE PIGOTT: Of course not. And - - -  
11 and that is the statute here, that says you're not  
12 eligible if you committed an armed felony. And now  
13 you want to say, but - - - you know, there's another  
14 section and you, the court - - - not me, not me the  
15 defense lawyer. I'm - - - you know, I'm - - - I'm  
16 just a - - - a - - - a lamppost here. I stand next  
17 to my defendant and I do nothing. The court does it,  
18 and if the court doesn't do my job, then we're going  
19 to reverse it. I mean, I'm - - - I'm wondering where  
20 the line gets drawn.

21 MR. ROTHSCHILD: Well, I think in my - - -

22 JUDGE PIGOTT: Rudolph was clear.

23 MR. ROTHSCHILD: I think in my case, the  
24 line is drawn basically at - - - at the relief that  
25 the People are requesting saying, hey, even though

1           there's this implicit finding, because the judge  
2           didn't check off this box, you know, this person - -  
3           - and there's - - - he's not eligible and don't  
4           bother with Appellate review.

5                    JUDGE PIGOTT:  Where's the implicit?  I - -  
6           - I - - - I'm missing the implicit part.

7                    MR. ROTHSCHILD:  Well, basically, as I  
8           said, the - - - the Appellate Division - - - first of  
9           all, the - - - the - - - the court didn't say you're  
10          not eligible.  The Appellate Division didn't say, as  
11          they said in Middlebrooks, you're not eligible.

12                   JUDGE PIGOTT:  And the court didn't - - -

13                   MR. ROTHSCHILD:  They just said it's not an  
14          abuse of discretion.

15                   JUDGE PIGOTT:  Doesn't the statute say  
16          you're not eligible?

17                   MR. ROTHSCHILD:  Well, the statute says  
18          you're not eligible, but you can be eligible.

19                   JUDGE PIGOTT:  Right.

20                   MR. ROTHSCHILD:  And as I said, Appellate  
21          Divisions can and often do find eligibility even  
22          though the trial court does not.  And - - -

23                   JUDGE PIGOTT:  Right.

24                   MR. ROTHSCHILD:  - - - we would say that  
25          ess - - - essentially that's what - - - what occurred

1 in this case.

2 JUDGE ABDUS-SALAAM: Counsel, you started  
3 to answer a question about what the judge has to  
4 consider and put on the record, and I'm - - - I'm  
5 curious as to what you think that litany should be,  
6 because we have a - - - a - - - in another case, the  
7 judge just saying I'm not going to do it. So what -  
8 - - what is the judge's - - - if the judge does  
9 consider YO, what are you saying the judge has to  
10 say?

11 MR. ROTHSCHILD: Well, the two aspects.  
12 First of all, the eligibility under 720.10(3),  
13 whether in fact the factors -- and the circumstances  
14 of the crime, but more importantly, what the  
15 Appellate Division decided in this case that this was  
16 not an abuse of discretion, we would submit that that  
17 was wrong - - - essentially wrong, because there  
18 clearly was an abuse of discretion as a matter of  
19 law. First of all, the denial of the adjournment in  
20 this case. The court does have discretion in  
21 determining its calendar, but that's not unlimited  
22 discretion. And - - -

23 CHIEF JUDGE LIPPMAN: Why did the judge do  
24 it - - - what they did in this case? What - - - what  
25 was the motivation?

1 MR. ROTHSCHILD: The denial of the  
2 adjournment?

3 CHIEF JUDGE LIPPMAN: Yeah, in general.

4 MR. ROTHSCHILD: I think it was pretty  
5 clear. It was - - - the judge said over and over  
6 again, you took your case to trial. I'm not going to  
7 give you an adjournment.

8 CHIEF JUDGE LIPPMAN: So your - - - your  
9 basic view is that the judge was just annoyed that  
10 they didn't take a plea, and therefore wasn't going  
11 to consider the YO. That - - - that there was a  
12 recognition that - - - that it could be considered?

13 MR. ROTHSCHILD: I think it was fairly  
14 clear. I mean, it's - - - it's - - - I don't know if  
15 it's view, but - - - but that's what the court said  
16 over and over again.

17 JUDGE FAHEY: Can I just ask, do - - - do  
18 you think Judge Walsh made a determination on his YO  
19 status? I mean the PSR said that - - - said that  
20 they recommended YO for him, right? On Lowe we're  
21 talking here.

22 MR. ROTHSCHILD: Yes.

23 JUDGE FAHEY: And the - - - the way I read  
24 the record, it's unclear to me whether Walsh - - -  
25 Judge Walsh, excuse me, actually made a determination

1 on his YO status. What's your position on that?

2 MR. ROTHSCHILD: I - - - I think that the  
3 judge essentially couldn't make a proper  
4 determination.

5 JUDGE FAHEY: So the answer is no, he  
6 didn't make a determination; and do you think it was  
7 requested?

8 MR. ROTHSCHILD: Oh, it - - - it was  
9 definitely requested by trial counsel over and over  
10 again, as well as the adjournment.

11 JUDGE STEIN: Well, the - - - as I read the  
12 record counsel came in and said that had called  
13 chambers and requested an adjournment and was told  
14 that the - - - the sentencing had been moved up.

15 MR. ROTHSCHILD: Yes.

16 JUDGE STEIN: But there wasn't a - - - a  
17 real clear further request on the record, I don't  
18 think, for an adjournment. The counsel talked about  
19 how they needed this information and how important it  
20 was, but didn't say - - - it - - - it - - - never  
21 really asked the judge, and it's not clear whether  
22 the judge was even aware of the - - - the first  
23 request.

24 MR. ROTHSCHILD: I think if you look at  
25 page 603 to 605 of the transcript, I think it - - -

1           it's pretty clear that defense counsel said, look,  
2           there's much information; that we really need to get  
3           this. I think it's pretty clear that she requested  
4           another adjournment and the court just said no.

5                     JUDGE STEIN: Is there anything in the  
6           record that indicates why she couldn't have presented  
7           that information without the - - - this report?

8                     MR. ROTHSCHILD: Well, what she indicated  
9           on the record was, look, the Center for Community  
10          Alternatives - - - which, by the way, in - - - in the  
11          Amir case was used by the Fourth Department to  
12          overrule the trial court's earlier denial - - -  
13          basically said, they can get information that I  
14          can't. These are people - - - this - - - this is  
15          their job. This is what they do, and I - - - I don't  
16          believe the court ever said, look, we don't have  
17          enough time. This thing is - - - you know this - - -  
18          it's too much - - - you know, there's too much delay.  
19          It was never claimed by the trial court, and we would  
20          submit that it was an absolute abuse of discretion  
21          which led to a - - -

22                     CHIEF JUDGE LIPPMAN: Okay, counsel.

23                     MR. ROTHSCHILD: - - - a failure to  
24          exercise discretion.

25                     CHIEF JUDGE LIPPMAN: Let's - - - let's - -

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MR. ROTHSCHILD: Thank you.

CHIEF JUDGE LIPPMAN: - - - hear from your adversary and then you'll have your rebuttal.

MR. MAXWELL: James Maxwell for the People, may it please the court.

CHIEF JUDGE LIPPMAN: Counsel, what - - - what - - - your adversary seems to indicate that the judge appeared to be motivated by being annoyed that the defendant did not take the plea. Do you think that precluded - - - in essence precluded YO consideration by the judge, that that's what happened here?

MR. MAXWELL: Well - - -

CHIEF JUDGE LIPPMAN: Right?

MR. MAXWELL: - - - I think have to step back from that - - -

CHIEF JUDGE LIPPMAN: Go ahead.

MR. MAXWELL: - - - just one step. What precluded YO consideration is that adjudicating him a youthful offender in this case would have been illegal.

CHIEF JUDGE LIPPMAN: Yeah, yeah, yeah. But - - - but he's intimating there's more than that.

MR. MAXWELL: Well, having said that it

1 would have been illegal, I don't think Judge Walsh  
2 analyzed it that way. I think he analyzed it as  
3 here's a young man who was given a reasonable offer  
4 before trial. He had the poor judgment to go to  
5 trial, lie to the jury, and get convicted, and the  
6 judge now has heard all the evidence at trial and  
7 he's going to go ahead and sentence him.

8 CHIEF JUDGE LIPPMAN: Why - - - why is it  
9 illegal?

10 MR. MAXWELL: It's illegal because the  
11 judge never made findings that either of the  
12 exceptions under the statute fit to make him an  
13 eligible youth. So I'd have three suggestions for  
14 the court as you try and - - -

15 CHIEF JUDGE LIPPMAN: Please do.

16 MR. MAXWELL: - - - give guidance to the -  
17 - - the - - - the trial bench. One is that an  
18 adjudication of an armed felon as a youthful offender  
19 is illegal until and unless the judge makes a finding  
20 that it fits one of those categories.

21 JUDGE PIGOTT: Well, how about unless  
22 somebody asks? I mean, I'm - - - I was picking on  
23 Mr. Rothschild about the fact - - -

24 MR. MAXWELL: Yes.

25 JUDGE PIGOTT: - - - that everybody seems

1 to say it's all on the judge.

2 MR. MAXWELL: Yes. And - - - and what - -  
3 - well - - -

4 JUDGE PIGOTT: There needs to be a motion  
5 or, you know, something.

6 MR. MAXWELL: Well, that's number two.

7 JUDGE PIGOTT: Oh.

8 JUDGE RIVERA: Well, no, let me stay on  
9 number one.

10 MR. MAXWELL: Okay.

11 JUDGE RIVERA: I'm - - - I'm just reading  
12 the statute as the plain text, 720.10(1) defines a  
13 youth - - - Section 720.10(2) - - - "Eligible youth  
14 means a youth who is eligible to be found a youthful  
15 offender. Every youth is so eligible unless" - - -  
16 so you've got to work through this to figure out if  
17 they're an eligible youth.

18 MR. MAXWELL: Yes.

19 JUDGE RIVERA: It looks to me like the  
20 presumption works exactly the opposite of what you've  
21 suggested. What - - - what - - - how am I misreading  
22 the text?

23 MR. MAXWELL: I think it's fair to read  
24 that text as that the person is not eligible unless  
25 one of those two things exist.

1 JUDGE RIVERA: But, "Every youth is so  
2 eligible unless". Not - - -

3 MR. MAXWELL: Unless.

4 JUDGE RIVERA: - - - not they're not  
5 eligible unless.

6 MR. MAXWELL: I think just using unless  
7 shows that you have to make that finding. I - - -

8 CHIEF JUDGE LIPPMAN: Counsel, why isn't  
9 this a - - - a logical place to go based on our  
10 precedent in Rudolph?

11 MR. MAXWELL: Oh, I think I - - -

12 CHIEF JUDGE LIPPMAN: You know, the whole  
13 purpose is if - - - if these kids are - - - are  
14 eligible in some sense, the judge ought to just take  
15 a look. What's wrong with - - - in this particular  
16 case where they obviously wanted him to take a look,  
17 what - - - what's wrong with that? Why isn't it  
18 consistent from a policy perspective in what we were  
19 trying to say in - - - in the Rudolph case?

20 MR. MAXWELL: I think consistent with  
21 policy and consistent with Rudolph, because Rudolph  
22 was one of those cases where you read the statute and  
23 you apply it. Like again, here, you read the statute  
24 and you apply it - - - God bless you - - - and you  
25 come to the conclusion that the legislature

1 structured this in such a way that an armed felon  
2 does not get youthful offender unless.

3 JUDGE PIGOTT: Let's - - - yeah, if you go  
4 to that unless - - - Mr. Rothschild touched on this  
5 too - - - I don't understand why the judge couldn't  
6 wait for the CCA report, and I don't understand why  
7 the court gets to move it forward two - - - two weeks  
8 when - - - when everybody else - - - I assume that he  
9 was incarcerated during this time. It wasn't like he  
10 was - - -

11 MR. MAXWELL: Um-hum.

12 JUDGE PIGOTT: So why wouldn't we wait and  
13 see what the CCA report said and maybe those are the  
14 - - - the facts that would lead to possibly an  
15 exception under the - - -

16 MR. MAXWELL: Because what the defense  
17 attorney was arguing is I need the CCA report for  
18 history and background, and history and background  
19 doesn't get you to mitigating circumstances that - -  
20 - directly on the case - - -

21 JUDGE PIGOTT: Well, well - - - because the  
22 judge said, well, I'll put it in the file, and she  
23 says no, no, no.

24 MR. MAXWELL: Um-hum.

25 JUDGE PIGOTT: I - - - I don't want it in

1 the file. I want it as part of the sentencing  
2 record.

3 MR. MAXWELL: Right.

4 JUDGE PIGOTT: And that at least implied to  
5 me that - - - that it was going to be an important  
6 factor in determining what the sentence would be,  
7 which could lead to Mr. Rothschild's implicit or - -  
8 -

9 MR. MAXWELL: Well, it may have to do with  
10 the ultimate sentence that then the Appellate  
11 Division cut in half, but in terms of whether the  
12 person is an eligible youth, the defense attorney's  
13 arguments weren't geared towards what would make that  
14 person an eligible youth. They were geared towards  
15 history and background.

16 JUDGE FAHEY: Yeah, but a CCA report would  
17 obviously speak to whether or not the guy would be  
18 eligible. Now, there's - - - there's two factors,  
19 you know. That - - - that - - - that's - - -

20 MR. MAXWELL: Yeah.

21 JUDGE FAHEY: That's kind of  
22 straightforward. The - - - it's - - - Mr. Maxwell,  
23 only speaking as Judge Fahey, it seems to me that  
24 this moves towards an abuse of discretion. The  
25 question is whether or not it's harmless. I - - - I

1 think that's really on - - - on this particular  
2 issue.

3 MR. MAXWELL: Well, and in that equation -  
4 - - I don't dispute what you're saying.

5 JUDGE FAHEY: Yeah.

6 MR. MAXWELL: But in that equation is the  
7 fact that the Appellate Division has already cut the  
8 sentence in half.

9 JUDGE FAHEY: Right, right.

10 CHIEF JUDGE LIPPMAN: So he got that  
11 relief.

12 JUDGE FAHEY: But - - - but it's not a moot  
13 issue, because it - - - he'd be, what is it, one-  
14 third - - - one-third to four on an E felony.

15 MR. MAXWELL: Well, it would - - -

16 JUDGE FAHEY: So it's - - - it's - - - it's  
17 far from moot in this case.

18 MR. MAXWELL: Right.

19 JUDGE FAHEY: So - - - yeah.

20 MR. MAXWELL: But in the big picture, I  
21 suggest that you should rule that the defense should  
22 make the showing before the judge even has to make  
23 the finding.

24 JUDGE FAHEY: What I'm - - - what I'm  
25 wondering here is maybe this isn't keyed up for a

1 big-picture decision, so maybe it's a small-picture  
2 decision.

3 MR. MAXWELL: Lowe itself - - -

4 JUDGE FAHEY: Yeah, yeah.

5 MR. MAXWELL: - - - is probably small-  
6 picture, yes.

7 JUDGE RIVERA: Wait, coun - - - I'm sorry.

8 CHIEF JUDGE LIPPMAN: Go ahead, Judge  
9 Rivera.

10 JUDGE RIVERA: Counsel, I - - - I just want  
11 to clarify, because I'm really not understanding your  
12 argument. What - - - what, then, is the way,  
13 depending on this argument about the way you're  
14 reading 720.10(1) and (2), what - - - how are you  
15 then reading 3? What's - - - what's the - - - how -  
16 - - how do you harmonize 1, 2, and 3?

17 MR. MAXWELL: 3 is a way take what - - -  
18 what a person would be presumpt - - - presumed to be  
19 ineligible and in certain circumstances - - - not all  
20 circumstances, but in certain circumstances, allow a  
21 judge to make a finding that they are eligible.

22 JUDGE RIVERA: Um-hum. But - - -

23 MR. MAXWELL: And - - - and so I - - - I  
24 think that - - - that should be the - - - the  
25 statutory interpretation, and the approach the court



1           that.

2                       MR. MAXWELL:   And it's kind of a charade to  
3           go ahead and say, well, you have to go through this  
4           process, when the defense hasn't even made that  
5           showing.

6                       JUDGE RIVERA:   Well, what makes - - - no,  
7           counsel, let's - - - let's get to number 3 and we'll  
8           get back to this point you're making that it's a  
9           charade.   Number 3 says, "Notwithstanding the  
10          provisions of subdivision 2, a youth who fits under  
11          these exceptions" - - - if - - - "can still be  
12          eligible if the court determines".   It doesn't say  
13          there, if upon motion by the defendant, if the  
14          defendant so requests it; it says, "if the court  
15          determines".   Why can't we read that as the court has  
16          to make that determination as part of the  
17          definitional sections here of what is an elig - - -  
18          who is an eligible youth?

19                      MR. MAXWELL:   Well, I'm just suggesting,  
20          Your Honor, that they - - - the - - - the  
21          legislature went out of its way to put that in a  
22          separate paragraph to say that the court can change  
23          what is otherwise ineligible to eligible, but only  
24          under certain circumstances.

25                      JUDGE READ:   But who - - -

1                   JUDGE RIVERA: Right. But that's about the  
2 discretion of the court. It's not about whether or  
3 not the court has to actually exercise the - - - the  
4 choice of figuring out whether or not a particular  
5 youth - - -

6                   MR. MAXWELL: Um-hum.

7                   JUDGE RIVERA: - - - who is otherwise  
8 eligible, except they fit these two exceptions, then  
9 can be excepted from the exception under number 3.

10                  MR. MAXWELL: Well, all I'm suggesting is  
11 the discretion comes in - - -

12                  JUDGE RIVERA: Um-hum.

13                  MR. MAXWELL: - - - only after you've taken  
14 that step. The discretionary step is whether the  
15 defendant's going to get - - -

16                  JUDGE RIVERA: Oh, I'm not in disagreement  
17 with you that 3 is solely within the court's  
18 discretion. The - - - the question is whether or not  
19 making the determination is discretionary. It seems  
20 to me you're arguing that both steps are  
21 discretionary, and I can't - - - I - - - I'm - - -  
22 I'm not clear as to your argument why the language of  
23 720.10, given 1, 2, 3 and the purpose, as we've  
24 described it, of - - - of the statute, and Rudolph  
25 suggests that the legislature is interested in trying

1 to give this kind of status to youth.

2 MR. MAXWELL: Well, again, I - - - I - - -  
3 maybe I'm not going to be on the same page with you,  
4 but it seems to me that the first step is more  
5 legalistic.

6 JUDGE RIVERA: Um-hum.

7 MR. MAXWELL: The second - - - and then  
8 that only after you get over that hurdle do you reach  
9 the discretionary part.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MR. MAXWELL: All right.

12 CHIEF JUDGE LIPPMAN: One more question,  
13 Judge Abdus-Salaam.

14 JUDGE ABDUS-SALAAM: Yeah. I - - - I was  
15 just going to - - - when - - - you say that it's the  
16 defense responsibility to bring this to the attention  
17 of the court. So when is that supposed to happen?  
18 Is - - - is this before the sentencing or at the time  
19 that you ask for YO or - - - I'm just unclear when  
20 you think this is - - - the defense is going to be  
21 ready to make that showing?

22 MR. MAXWELL: Well, I think that showing -  
23 - - let's use this case as an example. The defense  
24 attorney at the sentencing says, I'm asking for  
25 youthful offender, but she doesn't go any further to

1 say, and this is why the person's eligible, this is  
2 why, even though it's an armed felony, they should  
3 get it; and I'm suggesting that there should be a  
4 burden on the defense to - - - to persuade the judge  
5 in that circumstances to - - - to - - -

6 JUDGE ABDUS-SALAAM: So it should be a part  
7 of the request for YO, and so you're making the  
8 request for YO and you know that your - - - your  
9 client has a felony conviction, so you're saying  
10 automatically, the defense counsel has to rely on 3  
11 and say this is the reason that my client would  
12 benefit from the exception?

13 MR. MAXWELL: Yes. And - - - and it would  
14 fit the exception, I guess would be the way I'd put  
15 it.

16 JUDGE ABDUS-SALAAM: Or - - - or would fit  
17 the - - -

18 MR. MAXWELL: Yes.

19 JUDGE ABDUS-SALAAM: - - - exception.

20 MR. MAXWELL: Yes. And then from there  
21 argue that within the court's discretion that you  
22 should be a youthful offender.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MR. MAXWELL: Thank you.

25 CHIEF JUDGE LIPPMAN: Thanks, counselor.

1                   Rebuttal, counsel.

2                   MR. ROTHSCHILD: Yes, Your Honor. I - - -  
3 I believe the respondent's position would put even  
4 more barriers towards the exercise of the court's  
5 discretion and appellate review of that discretion  
6 saying, well, you have to make a motion in order for  
7 the mitigating circumstances to be considered. I  
8 don't believe that it's the statute.

9                   JUDGE PIGOTT: I'm not - - - I wasn't sugg  
10 - - - suggesting a motion. What I was thinking is  
11 that when you're deal - - - when you're negotiating  
12 all these pleas and, you know, the - - - and not  
13 everything goes to trial and not everything, you  
14 know, is confronted in black and white, and the def -  
15 - - the defense lawyer comes in and says, judge,  
16 we've reached an agreement, the DA agrees, it's  
17 three-and-a-half to seven, and he's a good kid, and -  
18 - - and you should give him the minimum. Does the  
19 court then say, well, wait a minute before you guys  
20 all hug and say this is a great deal, I'm going to  
21 make a YO determination. Is that - - - is that the  
22 obligation of the judge to interfere with the plea  
23 bargaining process under those situations?

24                   MR. ROTHSCHILD: I don't know if it  
25 necessarily interferes with the plea bargain process.

1 Under this court's ruling in Rudolph, this is  
2 something that this - - - this court said. It can't  
3 be bargained away. You can't - - -

4 JUDGE PIGOTT: Well, it's an armed felony,  
5 is what I'm saying. I mean, he's not eligible. But  
6 you - - - you want to suggest that even though he's  
7 not eligible and we have now agreed to a reduced  
8 sentence and a reduced plea, the judge is supposed to  
9 say, all right, I know he's not eligible, I know you  
10 guys have gotten the agreement that everybody's  
11 satisfied with, but now I've got to do something  
12 extra, and I've got to make a determination as to  
13 whether he's YO eligible or not, and I think he's YO  
14 eligible. The DA then says there's no - - - then  
15 there's no deal. We're going to trial.

16 MR. ROTHSCHILD: Well, then - - - then  
17 that's - - - that is what it is. But as far as the -  
18 - - the court's responsibility, I - - - I believe  
19 that the - - - the idea is that this decision should  
20 be made by a judge. It should be made by a trial  
21 court, and it should be able to be reviewed. And as  
22 far as barriers suggested by - - - by opposing  
23 counsel, I would submit that they are contrary to  
24 public policy and contrary to Rudolph. Sec - - -

25 JUDGE PIGOTT: I would think - - - I would

1 think - - - I - - - I - - - I think Mr. Maxwell's  
2 asking for too much in saying you've got to  
3 specifically say why. I think if you say YO, the - -  
4 - you know, the - - - the bells go off and you take a  
5 look and say why do you think, you know, he - - -  
6 he's entitled to the override.

7 MR. ROTHSCHILD: Additionally in this case,  
8 basically she did set forth mitigating circumstances.

9 Re - - - Judge Fahey, regarding your  
10 question regarding mootness or harmlessness, this was  
11 not harmless, because, first of all, the purpose of  
12 390.40 is to allow the defendant to have input. It  
13 makes it less constitutionally suspect. Secondly,  
14 regarding the - - - the mootness, against, five years  
15 versus four years, additionally, it takes the purpose  
16 of the YOs to make sure that the defendant doesn't  
17 have the onus of a criminal record. So this is - - -  
18 this goes just beyond.

19 JUDGE PIGOTT: You want this remitted to  
20 Judge Walsh for - - - for resentencing?

21 MR. ROTHSCHILD: Well, Judge Walsh, I  
22 believe, is retired.

23 JUDGE PIGOTT: I see. That's why you're so  
24 strident in your argument.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. ROTHSCHILD: Thank you, Your Honor.

2 CHIEF JUDGE LIPPMAN: Thanks, counselor.

3 Okay, counsel.

4 MS. DAVIES: Good afternoon, Barbara Davies  
5 for Mr. Middlebrooks.

6 CHIEF JUDGE LIPPMAN: You want rebuttal  
7 time, counsel?

8 MS. DAVIES: One minute, please.

9 CHIEF JUDGE LIPPMAN: One minute, go ahead.

10 MS. DAVIES: One minute. After Rudolph, my  
11 case presents the question of the court's role. I  
12 believe Your Honor mentioned that - - - what should  
13 the court do in this - - -

14 CHIEF JUDGE LIPPMAN: Yes.

15 MS. DAVIES: - - - in this situation.

16 CHIEF JUDGE LIPPMAN: Tell us. What should  
17 the court do?

18 MS. DAVIES: Well, in - - - in our case,  
19 the court did nothing. Defense counsel did nothing,  
20 the court did nothing; everybody knew that Mr.  
21 Middlebrooks was eighteen years old.

22 JUDGE STEIN: Should there be a  
23 distinction? In the one case, the request was made  
24 and certainly the - - - the court was alerted to the  
25 fact that - - - that perhaps the defense thought

1           there was some basis for finding - - - do - - - doing  
2           YO, whereas in your case, nothing.

3                     MS. DAVIES:   Nothing.

4                     JUDGE STEIN:   Nothing.   And - - - and by  
5           the statute, your client's not eligible.

6                     MS. DAVIES:   He's not eligible, but we  
7           would ask the court to read the statute as a whole  
8           and bearing in mind the policy considerations that  
9           the court thought were so important in Rudolph, a  
10          fresh start.   And what we're asking of the - - -

11                    JUDGE STEIN:   But the statute says that the  
12          court has to do enumerated things when - - - when the  
13          court is dealing with an eligible youth, and it  
14          defines an eligible youth.   Someone who commits an  
15          armed felony is not, under that statute - - - at  
16          least how I interpret it - - - an eligible youth, so  
17          why should there be any requirement on the part of  
18          the court to initiate a discussion when the  
19          defendant, him or herself, doesn't raise the issue?

20                    MS. DAVIES:   Well, we believe that there  
21          will be a gap in the statute unless there is this - -  
22          - this review, and we are cognizant of what Judge  
23          Rivera said in her reading of the statute, and we  
24          would ask that the sentencing court merely alert  
25          defense counsel.   We're not asking that defen - - -

1           that the sentencing court run the hearing or do  
2           anything other than just alert defense counsel, who  
3           has said nothing about his client's status.

4                    JUDGE PIGOTT: Well, what does the court  
5           know? I mean that - - - that - - - that you think  
6           that they're on the notice and the - - - and the  
7           defense isn't? You know, you - - - you got a guy who  
8           killed three people. All right, and - - - and now  
9           there's a - - - there's a plea coming in front of the  
10          court. Does the court say by the way, you know your  
11          client might be YO eligible, do you want to bring  
12          that up?

13                   MS. DAVIES: Yes. We would want the court  
14          to do that. That's exactly what happened in this  
15          case. It - - -

16                   JUDGE PIGOTT: Where's defense counsel?

17                   MS. DAVIES: Well, defense - - -  
18          unfortunately, defense counsel - - - you could make  
19          the argument defense counsel was ineffective in - - -  
20          in cases like this where - - - where you have an - - -  
21          - an armed felon who might be eligible for youthful  
22          offender and defense coun - - - and defense counsel  
23          says nothing, and perhaps he's ineffective. But  
24          should the client suffer because his counsel is not  
25          proactive enough? And that's why we would urge that

1 the court simply engage in this limited logical  
2 extension - - -

3 JUDGE PIGOTT: How many people do you think  
4 that would be - - - would be back in front of us on a  
5 440 if we found your way? I'm just curious. I have  
6 no idea how many.

7 MS. DAVIES: On ineffective assistance of  
8 counsel?

9 JUDGE PIGOTT: No. How many armed felons  
10 are out there that - - - that - - - that committed  
11 their armed felonies when they were - - - were  
12 between seventeen and nineteen?

13 MS. DAVIES: Well - - - well, we're - - -  
14 we would agree and suggest that the court take the  
15 same position that it did in Rudolph that it be  
16 retroactive to cases that are on appeal but - - - but  
17 not anything other than that.

18 CHIEF JUDGE LIPPMAN: Okay, counsel.  
19 Thanks.

20 Counselor.

21 MR. HERATY: Good afternoon. May it please  
22 the court, David Heraty for the People. For an  
23 ineligible youth like Mr. Middlebrooks, the youthful  
24 offender statute does not require a court to address  
25 the possible existence of mitigating circumstances.

1 In Rudolph, this court read the language of the  
2 statute to require a YO determination - - -

3 JUDGE PIGOTT: But suppose there are  
4 mitigating circumstances.

5 MR. HERATY: Well, Your Honor, the  
6 defendant is free to raise those with the judge. The  
7 judge could find them on his or her own based on the  
8 - - - the record, the trial or the - - -

9 CHIEF JUDGE LIPPMAN: Judge has no  
10 responsibility?

11 MR. HERATY: Not when it comes to an  
12 ineligible youth, Your Honor. The judge can proceed  
13 to sentence the defendant as an adult without  
14 addressing the issue.

15 CHIEF JUDGE LIPPMAN: Doesn't it makes  
16 sense pursuant to Rudolph that the judge might raise  
17 this issue?

18 MR. HERATY: Respectfully, Your Honor, I -  
19 - - I - - - I don't believe so.

20 CHIEF JUDGE LIPPMAN: Why not?

21 MR. HERATY: Because Rud - - -

22 CHIEF JUDGE LIPPMAN: Why isn't it better -  
23 - - why isn't it better - - - even if you assume that  
24 Rudolph doesn't mandate it but - - - but let's assume  
25 your adversary wants us to extend it a little. Why

1           isn't that a better rule when the whole purpose is if  
2           - - - if these kids could get the YO, it - - - it  
3           would serve them well. It's better for the kid.  
4           It's better for society. Why - - - why isn't it a  
5           better rule to do - - - to - - - to say the judge  
6           should - - - should raise it?

7                       MR. HERATY: Respectfully, Your Honor, I  
8           think that Rudolph was an iss - - - a case strictly  
9           of statutory construction where this court - - -

10                      CHIEF JUDGE LIPPMAN: You don't think there  
11           was a policy reason behind it?

12                      MR. HERATY: No, Your Honor. I think the -  
13           - - I think the plain - - - the language of Rudolph  
14           was that it would - - - that the - - - this court  
15           found that the legislature's policy, that the - - -  
16           the - - - the use of the word "must" reflected the  
17           legislature's policy choice that a YO - - -

18                      CHIEF JUDGE LIPPMAN: You think that - - -  
19           that the statute as - - - as it exists shows a  
20           different legislative policy relating to this kind of  
21           situation?

22                      MR. HERATY: I do, Your Honor. The - - -  
23           the reason why we have this - - - this different rule  
24           is because the state legislature amended the statute  
25           in 1978 to exclude armed felons like Mr. Middlebrooks

1 and Ms. Lowe (sic) from - - -

2 CHIEF JUDGE LIPPMAN: Except in certain  
3 circumstances, right?

4 MR. HERATY: Well, Your Honor, the - - -  
5 the legislature gave the court the option to override  
6 the presumption of ineligibility.

7 JUDGE RIVERA: Well, what - - - why - - -  
8 why do you read it that way? I mean, the language is  
9 pretty straightforward. Eligible youth means a youth  
10 who's eligible to be found a YO. "Every youth is so  
11 eligible unless" - - - you've got the unless - - -  
12 and then you've got, "notwithstanding those  
13 provisions". "That youth who fits under these  
14 exceptions" is eli - - - "is an eligible youth if the  
15 court determines." How is that not an exception to  
16 the exception? Why is that not a carve out  
17 reflecting - - - you can call it policy, whatever you  
18 want, under Rudolph, but reflecting a legislative  
19 policy choice that there are a category, even of  
20 those who fit under 2, who would otherwise be  
21 ineligible, who are eligible if the court exercises  
22 its discretion in that way.

23 MR. HERATY: Your Honor - - -

24 JUDGE RIVERA: Why is that - - - I - - - I  
25 guess I am finding it very difficult to understand in

1 both these cases why 720.10 is not about how a judge  
2 figures out if someone is an eligible youth, and that  
3 includes figuring out if the youth fits the exception  
4 to the exception. I - - - I - - - maybe you can help  
5 me understand.

6 MR. HERATY: Yes - - - yes, Your Honor. I  
7 - - - 720.10(2) is the - - - the category in which, I  
8 believe, the defendant - - - a judge determines  
9 whether a judge (sic) is eligible or presumptively  
10 ineligible. That's where eligible youth is defined  
11 and as Mr. Middlebrooks - - -

12 JUDGE RIVERA: But - - - but 3 is pretty  
13 clear. 3 is very clear, "Notwithstanding 2", right?

14 MR. HERATY: Yes.

15 JUDGE RIVERA: "A youth is an eligible  
16 youth".

17 MR. HERATY: I think another way of reading  
18 720.10(3) is if - - - the defendant is - - - is an  
19 eligible youth if but not - - - but only if, you  
20 know; unless and until a court determines that  
21 mitigating - - -

22 JUDGE RIVERA: Absolutely fair, but it  
23 still means you're an eligible youth.

24 MR. HERATY: Under those circumstances,  
25 Your Honor, but I believe that the best reading of

1           720.10 is that a defendant is ineligible, he is  
2           presumptively ineligible, and there is no mandate  
3           that the court rule on the possible existence of  
4           mitigating circumstances.

5                    JUDGE ABDUS-SALAAM:   How's that?

6                    JUDGE PIGOTT:   I'm wondering what - - - I'm  
7           sorry.

8                    JUDGE ABDUS-SALAAM:   I'm sorry.   Then why -  
9           - - I - - - I - - - I'm - - - I'm kind of with Judge  
10          Rivera on this one.   Why is it in the statute if the  
11          court doesn't have to rule on it?

12                   MR. HERATY:   Because, Your Honor, I think  
13          it's a case where if a defendant is ineligible but a  
14          judge wishes to make the defendant eligible because  
15          of these extraordinary circumstances, the statute  
16          allows for that - - - for that - - - for that  
17          override.

18                   JUDGE FAHEY:   But - - - but another way to  
19          read it would be to say that while it says must in  
20          these circumstances, the fact that it doesn't say  
21          must - - - must, doesn't mean that this court  
22          couldn't read into it a requirement that - - - that  
23          you do so.   See, the thing is is some - - - sometimes  
24          I think we're precluded from doing something here,  
25          but here, I - - - I don't think we're necessarily

1 precluded, and I think for your argument to be  
2 successful, you got to argue that we're from - - -  
3 precluded almost from - - - from - - - from - - -  
4 from saying to the judge you got to consider this,  
5 and I don't read the statute that way. That - - -  
6 that seems to me a logical reading of it. We could  
7 read the must into there because there's - - -  
8 because there's nothing there.

9 MR. HERATY: I respectfully - - -

10 JUDGE FAHEY: You see my point?

11 MR. HERATY: Yeah, I do, Judge Fahey. What  
12 - - - what I would - - - what I would argue is that  
13 where the present - - - where there's mandatory  
14 language throughout the statute, the absence of  
15 mandatory language means that there's an absence of a  
16 requirement.

17 JUDGE FAHEY: Taking it one step further,  
18 Mr. Heraty. As - - - as a - - - as a rule in court -  
19 - - I ask this question of a lot of people when they  
20 come up here, but as a rule, wouldn't it make more  
21 sense to just every time somebody comes up, if  
22 they're in a certain age category, you got to make a  
23 determination of whether or not they're YO, and - - -  
24 and the court's got to make that determination all  
25 the time in every instance.

1                   Now, the factors may differ. If you're an  
2 armed felon, then the factors are there's no  
3 mitigating circumstances and there wasn't minimal  
4 involvement; those are the only factors I can  
5 consider by statute. So the factors may differ from  
6 case to case, but you're going to need a PSR and  
7 you're going to need to look at the - - - their  
8 history to see - - - to see what it is, see if  
9 there's any mitigating circumstances. But - - - so -  
10 - - so that may differ from a straight YO where  
11 there's not an armed felon or a sex offense crime.  
12 But it doesn't prevent the court from saying, there  
13 needs to be a determination here as to that one way  
14 or the other. You see what I'm saying?

15                   MR. HERATY: I do, Your Honor.

16                   JUDGE FAHEY: Okay.

17                   MR. HERATY: But I think - - - I - - - I  
18 think it's not necessarily a - - - a bad practice to  
19 when a - - - when a youth is before the court to make  
20 - - - you know, go through all the steps, see if  
21 there are mitigating circumstances, relatively minor  
22 participation.

23                   JUDGE FAHEY: So - - - so shouldn't we - -  
24 - shouldn't we, as a policy, say, listen, on all  
25 these cases you - - - you may have different factors,

1 but you got as a policy - - -

2 MR. HERATY: I - - - I respectfully - - -

3 JUDGE FAHEY: - - - you - - - you make the  
4 determination, judge, you know.

5 MR. HERATY: I - - - I respectfully  
6 disagree that it is required, Your Honor. I - - - I  
7 think that if the - - - if the legislature - - - the  
8 - - - the - - -

9 CHIEF JUDGE LIPPMAN: Not - - - it's not -  
10 - - not required.

11 MR. HERATY: Right, understood.

12 JUDGE FAHEY: I - - - I assume it's not  
13 required. Are we - - - do you think we're precluded  
14 from saying that it - - - it can be required?

15 MR. HERATY: Well, I - - - I would - - - I  
16 would say that - - -

17 JUDGE FAHEY: Judge Harety, Your Honor.

18 MR. HERATY: Yes, Your Honor. That's - - -  
19 yeah. I - - - respectfully, I think the best reading  
20 of the statute is to rule that it's not required.

21 JUDGE FAHEY: I see.

22 CHIEF JUDGE LIPPMAN: But isn't it more  
23 consistent, again, with the policy behind Rudolph - -  
24 -

25 MR. HERATY: No, Your Honor.

1 CHIEF JUDGE LIPPMAN: - - - which is that  
2 the court should consider it; this is a kid and the  
3 court should consider it?

4 MR. HERATY: I would - - - I would say,  
5 Your Honor, that there is not necessarily any policy  
6 behind Rudolph. It's - - - it's statutory  
7 construction and I - - -

8 CHIEF JUDGE LIPPMAN: Yeah, yeah, yeah.  
9 But - - - but - - - but, again, it's the policy  
10 behind the whole statute.

11 MR. HERATY: Yes, Your Honor.

12 CHIEF JUDGE LIPPMAN: And - - - and the  
13 point is - - - I think as Judge Fahey was trying to  
14 make, it doesn't say we can't. It's - - - it - - -  
15 you know, you can't consider it. Why isn't it more  
16 consistent than logical and the best interest of the  
17 young person and of the system for the judge to  
18 consider it?

19 MR. HERATY: It - - - I - - - I - - -

20 CHIEF JUDGE LIPPMAN: What's the great harm  
21 if the judge considers it?

22 MR. HERATY: I - - - I'm not sure there's  
23 any harm, Your Honor, I just think it's - - - I - - -  
24 I think that the analysis of the case is to read the  
25 statute and - - -

1 CHIEF JUDGE LIPPMAN: If there's no harm  
2 and the statute doesn't preclude it and it's better  
3 for the young person, why isn't that the way we  
4 should rule?

5 JUDGE PIGOTT: Well, let me suggest that  
6 there are some victims and let's take a triple  
7 homicide and let's say, you know, you got a - - - you  
8 got an eighteen-year-old and somehow we're reading  
9 the statute to say it's not that you can find these;  
10 you must. The fact that he murdered his family, you  
11 still got to say I'm going to take a look at this and  
12 see if there are mitigating circumstances, and maybe  
13 we can give you YO so that nobody will know you're a  
14 murderer. It'll - - - it'll be - - - it'll be  
15 covered up in your - - - in your YO status.

16 And it - - - and it just seems to me that  
17 somebody's got to make that move before the courts  
18 do. I mean, we're not - - - we're not adjuncts to  
19 the defense. I mean we're supposed to be the  
20 detached, disinterested magistrate. I don't know why  
21 they - - - I mean, and depending on how we decide  
22 this, why the DA wouldn't be in - - - in these cases  
23 and saying by the way, judge, we - - - there are no  
24 mitigating circumstances and we'd ask you to deny the  
25 YO and then the defense can do whatever it wants.

1 But it shouldn't always necessarily be on the  
2 defense, I would think.

3 MR. HERATY: I - - - I think, Your Honor,  
4 that - - - and I - - - I - - - I agree. I think this  
5 - - - this reflects - - - if I could just finish up,  
6 Your Honor.

7 CHIEF JUDGE LIPPMAN: Yes, finish, sure.

8 MR. HERATY: Thank - - - thank you, Your  
9 Honor.

10 CHIEF JUDGE LIPPMAN: Finish your thought.

11 MR. HERATY: That the - - - the - - - this  
12 does reflect the legislature's policy to exclu - - -  
13 exclude armed felons like Mr. Middlebrooks from  
14 youthful offender eligibility, and - - - and I don't  
15 - - - based on the statute, it's not necessarily on  
16 anyone, whether it be the judge, the DA, the defense  
17 counsel. It's just a case of that the judge has the  
18 option to override but not the obligation.

19 CHIEF JUDGE LIPPMAN: Okay.

20 JUDGE RIVERA: May I? May I?

21 CHIEF JUDGE LIPPMAN: Thanks. Judge  
22 Rivera.

23 MR. HERATY: Yes, Your Honor.

24 JUDGE RIVERA: I just want to clarify.  
25 Counsel, the section is a definitional section.

1 MR. HERATY: Yes.

2 JUDGE RIVERA: So I'm a little bit confused  
3 about this argument that you need mandatory language.  
4 Provision 1 defines youth. Provision 2 talks about a  
5 presumption and defines eligible youth. Provision 3  
6 or sub - - - paragraph 3 - - - or paragraph 3 says  
7 notwithstanding 2, an eligible youth is this  
8 category. It's a definitional section. There's no  
9 mandatory language that's necessary. It's telling  
10 you what steps to go through - - - to go through each  
11 of the paragraphs. I - - - I'm - - - I'm not certain  
12 why you're arguing that it's either must or must not.  
13 It's very clear. Each one is a definitional  
14 paragraph.

15 MR. HERATY: It is, Judge Rivera, and I - -  
16 - I think that my point is not just that it doesn't  
17 say must here in 720.10, but anywhere in the youthful  
18 offender statute, and if the - - -

19 JUDGE STEIN: 720.20 talks about what the  
20 court must do.

21 MR. HERATY: Correct.

22 JUDGE STEIN: Right?

23 MR. HERATY: Correct. Yes, that's right.

24 JUDGE STEIN: Based on those definitions.

25 MR. HERATY: Yes, Your Honor. The - - -

1 the mandatory language can come in anywhere and  
2 usually it is in 720.20.

3 JUDGE RIVERA: I'm sorry. Then I  
4 misunderstood. I thought there was an argument being  
5 made that paragraph 3 requited - - - required the  
6 word must.

7 MR. HERATY: Not necessarily sub-paragraph  
8 3, Your Honor, but anywhere in the statute, some - -  
9 - somewhere in the statute. If - - - if there is an  
10 obligation on a court, it - - - that must be relect -  
11 - - reflected in mandatory language somewhere in the  
12 statute, especially where we have mandatory language.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 MR. HERATY: Thank you, Your Honors.

15 CHIEF JUDGE LIPPMAN: Let's hear from your  
16 adversary. You have one minute. Go for it.

17 MS. DAVIES: Just to follow up on what the  
18 Chief Judge and Judge Fahey were saying about policy  
19 considerations. If the court and defense counsel are  
20 both silent about mitigating circumstances and the  
21 court makes no determination pursuant to subdivision  
22 3, we'll have a situation where perhaps a deserving  
23 young armed felony offender will be then denied the  
24 fresh start that this court has deemed so important  
25 in Rudolph. And in our case, we would ask that the

1 Appellate Division order be reversed; that the  
2 finding of the Appellate Division that there are no  
3 mitigating circumstances be vacated; the case  
4 remitted to the sentencing court for a consideration  
5 of mitigating circumstances by the court based upon  
6 evidence adduced by defense counsel.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MS. DAVIES: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks. Thank you  
10 all. Appreciate it.

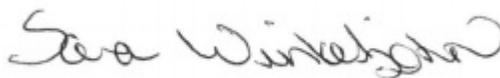
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. William Middlebrooks, No. 88 and People v. Fabrice Lowe, No. 89 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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