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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF DELROY S.,

Appellant, (Papers sealed)

No. 81

Judicial Institute
84 North Broadway
White Plains, New York 10603
April 29, 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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 81, Matter of
2 Delroy S.

3 All right, counselor, go ahead. You're on.

4 MR. ROGERS: May it please the court - - -

5 CHIEF JUDGE LIPPMAN: Do you want rebuttal
6 time?

7 MR. ROGERS: Yes. I'd like one minute of
8 rebuttal.

9 CHIEF JUDGE LIPPMAN: One minute of
10 rebuttal. You have it. Go ahead.

11 MR. ROGERS: My name is Raymond Rogers. I
12 represent the appellant. The Appellate Division in
13 this case held that the eleven-year-old appellant was
14 subjected to custodial interrogation without Miranda
15 warnings but that the admission of the statement he
16 made was harmless error.

17 JUDGE READ: What about to his
18 justification defense?

19 MR. ROGERS: Well, we think that, in terms
20 of the harmless error as to whether the - - - the
21 evidence was overwhelming, we certainly think the
22 evidence was not overwhelmingly against us on the
23 justification where the prosecution has the burden of
24 proving that or disproving the justification beyond a
25 reasonable doubt.

1 And there were numerous facts here in the
2 record that show that this was a justified incident.
3 There were two fights between these two individuals,
4 and both of them were started by the complainant. In
5 both cases the complainant came to the appellant's
6 home to confront him. In the earlier incident it was
7 that he thought he'd taken a scooter from him. They
8 tussled over that scooter. The - - - and the
9 complainant was older, a couple of years older. He
10 was much bigger, much taller, much stronger, much
11 heavier here. He came - - -

12 JUDGE READ: So - - - so you think it was
13 harmful to the justification defense?

14 MR. ROGERS: To our justification defense
15 it definitely was. And I think the reason for that
16 is you look at the statement. The statement itself,
17 as - - - this is one of those where the police
18 officer gives you the "in sum and substance" here.
19 And he boiled it down to a couple of sentences. And
20 if you look only at that statement there's not a
21 justification defense. The justification - - - the
22 facts supporting the justification defense come from
23 the complainant and his brother's testimony here.
24 Our cross-examination of them show all the facts
25 here. But the statement itself is very prejudicial

1 and was twice referred to by the prosecutor in
2 summation here where the only issue in this case was
3 justification.

4 JUDGE STEIN: What's the evidence to
5 support the justification defense? And - - - and I'm
6 especially asking about the - - - the duty to retreat
7 here.

8 MR. ROGERS: Yes. Well, I think you have
9 to look at all the - - - the facts that lead up to
10 that here, that this was the second encounter. This
11 is not a case where my client went over to the
12 complainant's house to beat him up.

13 They had this first encounter. The
14 complainant goes back home.

15 JUDGE STEIN: Yeah. But the evidence in
16 your favor is that after they came back out they were
17 fighting and then he stepped away, didn't he? Didn't
18 he step away after he was being choked?

19 MR. ROGERS: This is the one point in the
20 encounter that the presentment agency, the
21 prosecution focuses on, is that there was a break.
22 The complainant had my client against the wall and
23 was choking him with both hands around his neck, and
24 there's really no dispute about that. And the
25 complainant brought ten other youths with him, all

1 right.

2 JUDGE STEIN: So is it the - - - is it the
3 other youths that - - - that you say may have led him
4 to bel - - - believe, reasonably believe, that he
5 couldn't have left?

6 MR. ROGERS: Absolutely. They have him
7 surrounded. That's the testimony of both the
8 complainant and the complainant's brother.

9 JUDGE ABDUS-SALAAM: But, counsel, were
10 they blocking the entrance back into his building?

11 MR. ROGERS: Yes, they were. The
12 complainant had my client backed against the wall.
13 Then the other ten youths have him surrounded. There
14 is nowhere for him to go at this point, and he is
15 choking him. Now, the complainant testified that
16 he's able to break through - - - break loose, that -
17 - - that my client was able to break loose by biting
18 his hand, at which point the complainant was mad and
19 punched my client. It's at this point that there's a
20 - - -

21 CHIEF JUDGE LIPPMAN: What's - - - what's -
22 - - what's the reasonable - - - is your argument what
23 a reasonable eleven-year-old would - - - would think
24 in this circumstance? That's - - - that's what your
25 - - -

1 MR. ROGERS: Yes. I'm - - - I'm saying
2 that he could reasonably - - -

3 CHIEF JUDGE LIPPMAN: About his ability to
4 - - - to retreat or not retreat or - - -

5 MR. ROGERS: Right. But he could
6 reasonably think he could not and the statute
7 requires that you be able to retreat with complete
8 personal safety, is what the statute requires. I
9 think he could say when you look at all of these
10 facts here, that he could not have retreated - - -
11 that he could reasonably feel he could not retreat
12 with complete personal safety.

13 But also, remember, the question before
14 this court is not the sufficiency of the evidence.
15 You know, that's one standard. This is a much higher
16 standard where the prosecution must prove beyond a
17 reasonable doubt that the evidence was not
18 overwhelming, because we're talking harmless error
19 here and whether or not that - - - so it's a much
20 higher standard.

21 And we think the case is very much - - -
22 this court decided a case, Matter of Y.K., a
23 justification defense in 1997, that also involved a -
24 - - a gang of youths who surrounded an individual and
25 were beating her up. And one of the - - - and the

1 complainant was on top of her at the time, and then
2 the juvenile in that case used a knife to defend
3 herself. This court held in Y.K. that that was
4 justified, because they had not proved beyond a
5 reasonable doubt. It was not a harmless error case.
6 Yet, this is a very similar case and we're talking
7 about whether the evidence was - - - was overwhe - -
8 - was overwhelming. It clearly was not. This court
9 said in Y.K. it was not even sufficient to make a
10 finding. So here we don't think there's any way it
11 could found to be overwhelming.

12 JUDGE ABDUS-SALAAM: Counsel, on the
13 overwhelmingness or lack of it of the evidence, I'm -
14 - - I found the statement a bit confusing about when
15 Delroy stepped away and when he got the knife. Can
16 you - - - can you clarify that at all?

17 MR. ROGERS: I think that's part of the
18 problem is that the statement, as summarized by the
19 police officer, he conflates the two incidents. The
20 statement as it comes in is that I was having a fight
21 with the complainant. I then went inside my
22 apartment. This would indicate right then that he
23 did retreat; not only that he could retreat but he
24 did, in fact, retreat. Says I went inside my
25 apartment. I looked for my brother; presumably

1 couldn't find his brother. The statement goes on to
2 say I got a knife and I came back out and I stabbed
3 the complainant.

4 All right, that's the statement here. And
5 I think what that is is a combination of the two
6 incidents. They have the first fight outside his
7 apartment over the scooter. Then the complainant
8 leaves, goes back home with the scooter. Our client
9 goes back inside his apartment at that point.
10 Perhaps he did then look for his brother and wasn't
11 able to. But the second fight happens about ten or
12 fifteen minutes later after the complainant goes
13 home, gets the ten or fifteen other youths, and comes
14 back over. Now the complainant - - - or - - - or,
15 I'm sorry, Delroy, my client, he had the knife during
16 the second fight. He had the knife the whole time.

17 But yet the - - - what's prejudicial about
18 the statement is it indicates that there was one
19 fight and that he was able to retreat and go back
20 inside his apartment, that the fight was over, he
21 gets this knife, he comes back out, and without
22 justification stabs him, and that's not what
23 happened. Both the complainant and the complainant's
24 brother testified that - - - that there was no break
25 in the fight like that in which our client was able

1 to retreat and go inside.

2 That's why we think that even if the
3 evidence was overwhelming, the statement - - - and -
4 - - and it's a two-part test on harmless error, one
5 overwhelming in that the statement had no effect.
6 Even if you think the evidence is overwhelming, and
7 we certainly don't think it was here, the - - - the
8 statement itself was extremely prejudicial and it
9 was, as I said before, twice referred to by the
10 prosecutor in summation here. And the - - - the
11 trial judge made no particular findings in this case
12 indicating that - - - that - - - that oh, I didn't
13 consider that statement.

14 And, also, this is a case in which the - -
15 - the prosecution intentionally chose to use this
16 statement. Many times in cases in family court, you
17 receive the voluntary disclosure form that says your
18 client made a statement. You file your motion to
19 suppress. The prosecutor comes back and says, you
20 know, we'll withdraw our intent to use that statement
21 because we have - - - we have a - - - in this case we
22 have an - - - a complainant and an eyewitness. We're
23 not going to use it. They didn't do that here. They
24 - - - they wanted to use this statement precisely
25 because it helped to rebut the justification.

1 And let me also say that - - - that the - -
2 - the presentment agency has also argued in the
3 alternative here. They have the raised the issue
4 that - - - that the Appellate Division incorrectly
5 ruled on the merits of the - - - the Miranda issue.
6 And now that's a - - - a different matter here. We
7 think that that - - - the court reviews that under a
8 different standard whether there was custodial
9 interrogation. That's a mixed question of law and
10 fact the court has held. So there simply needs to be
11 some evidence in the record supporting the - - - the
12 Appellate Division's determination that there was
13 custody and there was interrogation. Here we're
14 talking about an eleven-year-old. The U.S. Supreme
15 Court has ruled that ,in J.D.B. v. North Carolina,
16 that age is a crucial component of whether someone's
17 in custody.

18 JUDGE ABDUS-SALAAM: Counsel, we have a
19 civil proceeding here as opposed to a criminal
20 proceeding in family court, correct? Is - - - so
21 you're saying the standard still is the one that
22 you're conveying, or is there a different standard
23 that we have to use?

24 MR. ROGERS: No. I think it's - - - it's
25 definitely quasi-criminal. I - - - I think all the -

1 - - the U.S. Supreme Court decisions on criminal
2 procedure apply to delinquency prosecutions in family
3 court.

4 JUDGE READ: Have we ever said that, by the
5 way?

6 MR. ROGERS: Oh, well, the - - -

7 JUDGE READ: That it's - - - that it's - -
8 -

9 MR. ROGERS: - - - the court has routinely
10 done so.

11 JUDGE READ: So but - - - but have we ever
12 explicitly said that? The standard is - - -

13 MR. ROGERS: You're putting me on the - - -
14 on the spot here.

15 JUDGE READ: Well, you - - -

16 MR. ROGERS: The court had routinely
17 applied them in - - - in all family court cases - - -

18 JUDGE READ: All right.

19 MR. ROGERS: - - - delinquency cases as
20 well.

21 CHIEF JUDGE LIPPMAN: So you want us to say
22 that here, if we haven't.

23 MR. ROGERS: If you have to, that's right.

24 CHIEF JUDGE LIPPMAN: Okay, very good.

25 MR. ROGERS: Thank you.

1 CHIEF JUDGE LIPPMAN: Thank you.

2 Coun - - - counselor.

3 MR. PASTOR: Good afternoon, Your Honors.

4 My name is Michael Pastor. I'm counsel to the
5 presentment agency.

6 CHIEF JUDGE LIPPMAN: Counsel, is this
7 harmless? Assuming we're using a - - - a standard.
8 Is this - - - is this harmless beyond a reasonable
9 doubt?

10 MR. PASTOR: Yes, Your Honor.

11 CHIEF JUDGE LIPPMAN: Why?

12 MR. PASTOR: For the following reasons.

13 CHIEF JUDGE LIPPMAN: Why?

14 MR. PASTOR: These - - - these are the key
15 facts as it relates to the harmlessness. The
16 overwhelming evidence established the ability of
17 respondent to retreat. There was an initial
18 altercation when respondent actually punched the
19 complainant in the face and called him, if you'll
20 permit me using this word, a bitch. And then the - -
21 -

22 CHIEF JUDGE LIPPMAN: We've heard worse
23 words in this courtroom.

24 MR. PASTOR: I'm sure you have.

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 JUDGE RIVERA: Not from the bench, though,
2 huh?

3 MR. PASTOR: Then Shakiel left and - - -

4 CHIEF JUDGE LIPPMAN: Not from - - - you're
5 right.

6 MR. PASTOR: And these are the - - - the -
7 - -

8 CHIEF JUDGE LIPPMAN: Go ahead. We're
9 kidding you. Go ahead.

10 MR. PASTOR: These are the - - - the key
11 facts. So Shakiel leaves and he comes back with his
12 brother, and when he arrives the respondent comes
13 out. And it's a critical point. He comes out with
14 his brother and his sister that are there with him,
15 and his brother is in late-teens maybe even his
16 twenties. And they - - - they engage in a fight and
17 there's fistfighting going on. And - - - but at a
18 moment in time it's - - - it's undisputed - - - they
19 break. They're - - - they're six to twelve feet
20 apart at the time that his brother is with him, and
21 it's critical to stress that he's right next to his
22 own apartment, right there. And at that moment he -
23 - -

24 CHIEF JUDGE LIPPMAN: Yeah, yeah. But it's
25 also critical that you - - - isn't it critical that

1 there's an eleven-year-old here?

2 MR. PASTOR: Not - - - from this - - - I
3 don't think there's any reason to conclude this
4 eleven-year-old could not have attempt - - - at least
5 attempted to retreat.

6 JUDGE RIVERA: But he's surrounded and he's
7 just been choked.

8 MR. PASTOR: He had just been choked, Your
9 Honor, but the - - - the breakdown occurred - - -

10 JUDGE RIVERA: He has to bite him to get
11 loose.

12 MR. PASTOR: He did. That's right, Your
13 Honor.

14 JUDGE RIVERA: And he falls to the ground,
15 and he's surrounded.

16 MR. PASTOR: I don't actually think that
17 there is evidence that he ever was on the ground.
18 And, in fact, the - - -

19 JUDGE ABDUS-SALAAM: Well, wasn't there
20 some testimony about it wasn't clear whether Shakiel
21 was on the ground and that Delroy was on top of him
22 when he stabbed him as opposed to the bear hug? I
23 thought there was some conflicting testimony about
24 that.

25 MR. PASTOR: I - - - I believe at - - - at

1 cite - - - page 232 of the record, Your Honor, I - -
2 - I believe the question was actually put to Shakiel.
3 You know, were you on top of him, and he said no. I
4 was not on top of him. But I'd like to touch on
5 quickly the notion of the - - - the surrounding - - -

6 CHIEF JUDGE LIPPMAN: Yeah, yeah. But you
7 acknowledge, or do you, that there's a difference
8 between a reasonable eleven-year-old and a reasonable
9 sixteen-year-old or seventeen-year-old? I mean this
10 is an eleven-year-old kid. Common sense would tell
11 you that you have to view it in that context. Again,
12 without saying what's right and wrong, I mean, this
13 is a - - - a child.

14 MR. PASTOR: I think it's something to take
15 into consideration but I - - - I still think that - -
16 -

17 CHIEF JUDGE LIPPMAN: Well, to me it's a
18 pivotal consideration that you know he's eleven years
19 old. Again, what's reasonable in that circumstance
20 as opposed to an older young adult, you know, teens,
21 sixteen, seventeen, or a fifteen-year-old (sic) man.
22 I mean all of these things that obviously the context
23 is eleven - - - eleven-year child, a - - - an eleven-
24 year-old child. And, again, you can make your
25 arguments about it but to me that's so central to

1 setting the stage here as to how we view this thing.

2 MR. PASTOR: It's - - -

3 CHIEF JUDGE LIPPMAN: You don't - - - you
4 don't argue with that?

5 MR. PASTOR: I don't. It's informative,
6 Your Honor. But I think that - - - that it gets back
7 to the question of whether or not he was justified in
8 escalating this in the way that he did. Even eleven-
9 year-olds have to be justified in doing that. I mean
10 even - - -

11 CHIEF JUDGE LIPPMAN: Yeah. But - - - but
12 I guess what we're focusing particularly on is - - -
13 is the - - - the option to retreat.

14 MR. PASTOR: Sure, Your Honor. But I - - -
15 I think even - - - even eleven-year-olds, if they
16 believe that they are at risk of being - - - being
17 killed - - - and - - - and we've argued in our brief
18 I think that there's some doubt to believe that here
19 - - - even they have an opportunity to retreat. And
20 so I just want to touch on the surrounding - - -

21 JUDGE STEIN: But - - - but isn't the
22 question - - - I mean we're - - - we're debating this
23 whether - - - whether he did or didn't have the
24 opportunity to retreat. And isn't that, in fact, the
25 issue that how - - - how could the admission of the

1 statement be harmless if - - - you know, how can we
2 say it had no effect on the determination?

3 MR. PASTOR: Well, the - - - the way you -
4 - - you say that, I think, in a harmless error case,
5 Your Honor, is to step back and - - - and look at the
6 fact that the family court was there taking in all
7 this trial evidence and going through and hearing all
8 these witnesses. I would also point out that his
9 sister did testify and did not mention anything about
10 the - - - the surrounding.

11 And - - - and so I - - - I would love to
12 address real quickly the surrounding point, because I
13 think it's a critical point. In - - - in their
14 briefs they claim very frequently about a gang, a
15 mob. They even claim that - - - that there was a
16 group out for Delroy's blood. And I think the cites
17 that they have in there for that are not consistent
18 with that at all. There was a group; it was
19 undisputed. They were friends with both of the
20 children, both of the kids that were fighting. They
21 - - - they were cheering them on both. And I think
22 what the Appellate Division must - - -

23 CHIEF JUDGE LIPPMAN: Doesn't that matter,
24 they were cheering them on both and again what a
25 reasonable eleven-year-old kid would do in that - - -

1 again, to make it beyond a reasonable doubt.

2 MR. PASTOR: Yes.

3 CHIEF JUDGE LIPPMAN: Harmless in a
4 situation where - - - where, you know, for anybody
5 that's pretty heavy, an atmosphere that - - - to
6 figure out what to do and, again, as it relates to
7 this ability to retreat. Or - - - or what one would
8 think about retreating.

9 MR. PASTOR: It might. But if - - - if you
10 look at Y.K., which is the cite - - -

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MR. PASTOR: - - - the - - - the case that
13 they cite. And what you have there is undisputed
14 evidence of ten to fifteen people essentially jumping
15 another kid and getting him to the floor, kicking,
16 stomping. And - - - and I would say that it's highly
17 relevant here that the respondent's brother was
18 there. I think it's highly relevant that he was
19 right next to his apartment. These - - - these are
20 the kind of things where - - -

21 CHIEF JUDGE LIPPMAN: Yeah. There are lots
22 of things that are relevant. But the question is can
23 we view it beyond a reasonable doubt all in the way
24 that you're suggesting, or all those relevant things
25 you look at it together and do you say, gee, you

1 know, maybe it's harmless, maybe it's not. But it's
2 not harmless beyond a reasonable doubt.

3 MR. PASTOR: I - - - I think on the issue
4 of whether or not he had the ability to retreat, it
5 is overwhelmingly established. I think on the
6 question of, you know, whether or not it could have
7 affected the outcome, I mean, it's always a - - - a
8 bit of a difficult test with that, right. Because we
9 don't - - - we don't have reason to know and to - - -
10 we're not mind readers. But I think what - - - what
11 the harmless error case law says is that errors do
12 occur. Even when they occur, you - - - you step back
13 and you say do you think that the - - - the trial was
14 fair. Do you think that the result would be the
15 same? And I think looking at all the evidence here I
16 think the result would be.

17 JUDGE ABDUS-SALAAM: Well, counsel, you - -
18 - even given the - - - the test you just laid out in
19 this case with the statement that was made by - - -
20 allegedly made by Delroy to the police, are you
21 saying that it was not prejudicial, it did not
22 undermine his justification defense?

23 MR. PASTOR: I - - - I think it - - - it
24 did - - - it would not - - - there was no reasonable
25 probability that it would have changed the result.

1 And I - - - I think that - - - that I would like to
2 contest the point that it was a point of emphasis in
3 our summation. I think that our summation went
4 through all the things I'm describing here.

5 And I think if - - - if you compare it with
6 the - - - the Goldstein case, Your Honor, in
7 Goldstein, which they cite, you know, you have a
8 summation where it's sort of relentless on the point
9 of the evidence that was eventually found to be in
10 error. I think in Goldstein actually it was even
11 maybe the last thing in the summation. So it's one
12 of those instances where it's really front and
13 center. And I think those are the instances where
14 you might say there might have been a reasonable
15 probability of a different result.

16 I'd like to just turn quickly, if I may - -
17 -

18 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

19 MR. PASTOR: - - - Your Honors, to - - - to
20 the Miranda issue. I think - - - and we briefed this
21 point. I think it - - - it was clear that the - - -
22 the respondent was neither in custody and - - - and
23 he was not subject to interrogation.

24 And I think I'd like - - - the point I'd
25 like to stress most on this to the panel is - - - is

1 the short duration of what occurred here. The
2 officers were invited in by his sister. They came
3 in. It was she who instructed - - - who asked him, I
4 guess, to come out, and he did. And - - - and at
5 that moment they said what happened.

6 It was right after they had arrived at - -
7 - at the scene. They were trying to figure out
8 what's going on. And - - - and it's one of those
9 instances where if you look at the cases that they've
10 cited, there really aren't the typical trappings of
11 either custody or an interrogation. In custody,
12 obviously, what you would normally look for is the
13 precinct or a car or someone - - - someone blocking
14 the way. That didn't happen here in any way. He - -
15 - he's in his home. And it's - - - it's contrast to
16 Ricardo S. which is - - -

17 JUDGE RIVERA: He - - - he's a kid who just
18 came from this fight - - -

19 MR. PASTOR: Yes, Your Honor.

20 JUDGE RIVERA: - - - where he's being
21 choked, where he has stabbed his assailant, and he
22 runs back home, closes the door, and cops come in.
23 What - - - what is this child thinking is going on?

24 MR. PASTOR: As I under - - -

25 JUDGE RIVERA: He thinks he can walk away?

1 MR. PASTOR: As I understand the test, Your
2 Honor, I hope I'm not getting this wrong. It - - -
3 it - - - it's the reasonableness of a person who
4 thinks that he's innocent of the crime. So someone
5 who is innocent, would they feel like they could
6 leave. So it - - - it isn't the case, I believe, I
7 hope I'm getting this right, that you're looking at
8 this subjective what is this particular - - - he - -
9 - he thinking given the fact that he actually had
10 been at the crime. So in that instance, I think that
11 a - - -

12 JUDGE RIVERA: No, no. I thought the test
13 was a - - - a reasonable person of that age in that
14 situation.

15 MR. PASTOR: In that situation but in - - -
16 but innocent of the crime. I - - - I believe that's
17 the standard. That - - - and so it would be a person
18 do they think they can leave if they haven't done
19 anything. And I think that if you look at the case
20 law on custody, you know, they really don't cite any
21 case that - - -

22 JUDGE RIVERA: I guess we figure out
23 innocence by accepting the - - - the actual statement
24 that he's claiming should not be included? A little
25 bit circular, your argument. I'm sorry, finish it

1 up, please.

2 MR. PASTOR: So - - - so I - - - I would
3 like to just touch quickly on interrogation. I see
4 my light is on.

5 CHIEF JUDGE LIPPMAN: Okay, finish off,
6 counsel. Yeah, your light's been on.

7 MR. PASTOR: On the interrogation point, as
8 well, custodial interrogation normally it's - - -
9 it's about, you know, a - - - a series of in - - - of
10 questions that a police officer asks trying to find
11 out - - - trying to elicit an inculpatory statement.
12 Here it's one question.

13 JUDGE STEIN: Well, he was told that this
14 was the kid that did it, and he went in - - - and he
15 went into his apartment. How - - - how could - - -
16 even though he just said, so what happened here, in
17 other circumstances maybe that wouldn't be
18 interrogation. But here he - - - he knew who - - -
19 exactly who he was looking for and everybody told him
20 what he had done. So that sounds like interrogation
21 to me.

22 MR. PASTOR: I - - - I think that the - - -

23 JUDGE RIVERA: And he's talking to a child.

24 JUDGE STEIN: That's right.

25 MR. PASTOR: The - - - the key - - - the

1 key fact there, Your Honor, is that he also told that
2 the person who had done the stabbing had been being
3 bullied. So I think there was questions as to the -
4 - - the fight. There might have been injuries on
5 both side. There might have been a reason why he
6 stabbed him. So the officer went up, invited up, and
7 said what happened.

8 I would just like to contrast this case
9 quickly with Dunbar which is, you know, custodial in
10 the - - - you know, the - - - what happened there was
11 in central booking and - - - and as they were getting
12 ready to interrogate him after Miranda.

13 JUDGE ABDUS-SALAAM: Well, if he - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel. I'm
15 sorry, Judge - - - Judge - - - Judge Abdus-Salaam.

16 JUDGE ABDUS-SALAAM: I - - - I just wanted
17 to say Dunbar didn't involve an eleven-year-old
18 child, though.

19 MR. PASTOR: That's true, Your Honor. But
20 we - - - we believe that - - - that here, I mean, it
21 - - - it shouldn't be the rule that the eleven-year-
22 old - - - that the age ends the question.

23 CHIEF JUDGE LIPPMAN: No. But the - - -
24 but the law is that - - - that - - -

25 MR. PASTOR: It's related.

1 CHIEF JUDGE LIPPMAN: - - - juveniles have
2 rights.

3 MR. PASTOR: Absolutely.

4 CHIEF JUDGE LIPPMAN: And we've, you know,
5 established that many years ago. So that's the
6 context of it.

7 MR. PASTOR: Yes.

8 CHIEF JUDGE LIPPMAN: Yep. Thanks.

9 Counsel, rebuttal.

10 MR. ROGERS: Yes, may it please the court.
11 On the - - - the Miranda issue, the - - - the custody
12 and the interrogation here, the short duration I
13 don't think matters at all. If you're in custody, it
14 doesn't matter for how long you're in custody. Here
15 at all when - - - if you're in custody they must read
16 Miranda before you're questioned. Also here that - -
17 - that Delroy's mother was in the apartment at the
18 time, but the police did not get her and - - - and -
19 - - and have her present during the questioning. In
20 the course of - - -

21 JUDGE ABDUS-SALAAM: Does it matter that
22 his sister is an adult in her twenties?

23 MR. PASTOR: I don't think so when the
24 mother is right there and they make no attempt to do
25 so. And the statute under New York Law allows you to

1 have a parent present, you know, not a sibling. And
2 they made no effort, and his mother was right there.
3 She was in the back room of the apartment and yet the
4 police start the interrogation of a little kid. And
5 also, there was no doubt he was eleven. The police
6 officer, in fact, testified he was kind of shocked at
7 how small he was, described him as a little boy, this
8 little kid.

9 JUDGE PIGOTT: If - - - if his questions
10 were asked as part of an investigation, is there any
11 problem with that?

12 MR. ROGERS: I - - - well, in - - - in
13 general Miranda must - - - need not be given for
14 brief on-the-scene questioning. Here, for example,
15 when the police first showed up and - - - and found
16 the complainant bleeding and asked people what
17 happened, Miranda not required. But once Delroy was
18 identified as a suspect and they went to a different
19 location to question him, that's a different matter.
20 We're beyond the brief, on-the-scene questioning.
21 Miranda's now required.

22 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
23 you.

24 MR. ROGERS: Thank you.

25 CHIEF JUDGE LIPPMAN: Thank you both.

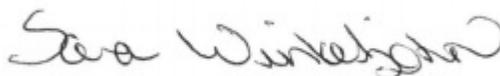
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Appreciate it.
(Court is adjourned)

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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 In the Matter of Delroy S., No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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