ORIGINAL

In the

Supreme Court of the United States

COUNTY COURT ULSTER COUNTY, NEW YORK: WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK, PETITIONERS, V. SAMUEL ALLEN, RAYMOND HARDRICK, AND MELVIN LEMMONS, RESPONDENTS.	No. 77-1554

Washington, D. C.
February 22, 1979

Pages 1 thru 49

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

COUNTY COURT ULSTER COUNTY, NEW YORK; WOODBOURNE CORRECTIONAL FACILITY, WOODBOURNE, NEW YORK, Petitioners,	:	
v.	:	No. 77-1554
SAMUEL ALLEN, RAYMOND HARDRICK, and MELVIN LEMMONS, Respondents.	:	

Washington, D.C.
Thursday, February 22, 1979

The above-entitled matter came on for argument at 2:10 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MRS. EILEEN SHAPIRO, Assistant Attorney General, Two World Trade Center, New York, New York 10047; for the Petitioners.

MICHAEL YOUNG, Esq., 401 Broadway, Suite 306, New York, New York 10013; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in County Court of Ulster against Allen.

Mrs. Shapiro.

ORAL ARGUMENT OF MRS. EILEEN F. SHAPIRO

ON BEHALF OF THE PETITIONERS

MRS. SHAPIRO: This habeas corpus proceeding is on two issues. The first issue is waiver, and the second is the constitutionality of the New York State evidentiary presumption which provides, with certain exceptions, that the presence in an automobile of any of the weapons enumerated in the statute is presumptive evidence of its possession by all persons occupying the automobile at the time that the weapon is found.

The threshold question here is whether respondents have preserved the question of the statute's constitutionality for habeas corpus review, considering that respondents failed to object at trial to a jury instruction which only partially explained the statute and again failed to object either at trial or on their state appeals to the constitutionality of the statute itself.

A consideration of both the facts of this case and the applicable law compels the finding that respondents have indeed failed to preserve any substantive constitutional claim for collateral review.

The facts in this case are not is dispute. The respondents and a 16-year-old girl, who was later adjudicated as a youthful offender and was thereinafter referred to as Jane Doe, were riding in a car on the New York State Thruway in upstate Ulster County when they were stopped for speeding through a work zone. The driver, Respondent Lemmons, produced a license and a registration. A radio check was made, and it was determined that he was wanted on a Michigan fugitive warrant. He was arrested. When one of the policemen, Trooper Askew, returned to the vehicle, he looked in through the right front passenger window and detected protruding from a lady's handbag, Jane Doe's handbag, on the floor of the front seat of the car a .45 automatic pistol.

Q It is clear that it was Jane Doe's handbag?

MRS. SHAPIRO: Yes, Your Honor, it is clear. There is no dispute.

He reached in, removed that gun--which turned out to be fully loaded, I believe with modified hollow point bullets--and found underneath that gun a second gun, a .38 Smith and Wesson revolver also fully loaded.

The officer placed all three of the remaining occupants of the car under arrest and then attempted to enter the trunk of the car. The trunk key was not recovered on any of the respondents. It was not in the car. And so when the car was returned to the barracks, the trunk was pried open; and the

police found therein a pound and a half of heroin and a .45 caliber spitfire machine gun also loaded with 27 rounds of ammunition.

All four of the passengers were indicted on three counts of felonious weapons possession and one count of narcotics possession, a charge which in New York at that time bore a potential life sentence. As the record clearly shows, all the parties--the respondents and Jane Doe--mounted a cooperative defense, although they were individually represented by counsel.

In particular, respondents directed their aspect of the defense toward rebutting the articles in the trunk of the car, the heroin count and the machine gun count. And Doe's counsel, Mr. Goldberger--who parenthetically is representing respondents in this proceeding--directed his attention toward the handgun in the car.

Q I thought that Jane Doe was tried in a juvenile proceeding.

MRS. SHAPIRO: No, she was tried jointly.

Q As a co-defendant in this--

MRS. SHAPIRO: As a co-defendant, and it was not until sentencing that the trial judge set aside her conviction, adjudicated her a youthful offender.

Q So, there were four co-defendants.

MRS. SHAPIRO: Absolutely, yes.

At the close of the people's case, the respondents and Jane Doe made a routine pro forma motion to dismiss, which in New York is rarely granted as jeopardy may often attach should the motion be erroneously granted and then on appeal it cannot be reversed.

The respondents' motion in particular was directed toward the fact that as the handguns were in Jane Doe's handbag, they were on her person under the meaning of the statutory presumption at issue, and thus they could not be held responsible.

The trial court, agreeing with the district attorney, found that the location of the guns, since they were not actually in Jane Doe's pocket or whatever, was a question of fact to the jury; and thus he denied their motion. In fact, respondents Hardrick and Allen even appeared to concede in that motion, which is reproduced on page 17 of the appendix, that in fact the judge may have been right that it is a question of fact.

At the close of the entire case, all counsel joined in moving to dismiss the machine gun and heroin charges against Jane Doe. In other words, Jane Doe's lawyer made the motion, and counsel for the three respondents piped up and said, "Yes, Your Honor, we think you ought to grant Jane Doe's motion."

At summation, Doe's lawyer placed great emphasis on

the large caliber of the handguns, the weight of the guns, which amounted to approximately six pounds, the size of the guns, and in particular the position of the guns in the handbag--they were positioned crosswise so as to keep the handbag open--to support his position that the respondents tossed the gun in the bag either at the time the car was flagged down by the police or in the interval when the driver was being arrested.

Respondents Allen and Hardrick, on the other hand, placed great emphasis on the absent trunk key and the fact that the car had been borrowed that very morning from Respondent Lemmons' brother in Rochester, New York, approximately 250 miles away from the site of the arrest. And then in unmistakable language in their summation these respondents, Allen and Hardrick, virtually conceded their guilt on the handgun charges.

Q They conceded what?

MRS. SHAPIRO: Their guilt on the handgun charges.

Q In the arguments, you are telling us?

MRS. SHAPIRO: Pardon me?

Q In their final arguments?

MRS. SHAPIRO: In their summation. And I have the quote from the summation.

Q What page are you referring to in the appendix?

MRS. SHAPIRO: Page 21 to 22, which also appears on

page 654 of the transcript. This is what Mr. Torraca, counsel for Allen and Hardrick, said to the jury: "If you were living under their times and conditions and you traveled from a big city, Detroit, to a bigger city, New York City, it is not unusual for people to carry guns, small arms to protect themselves, is it? There are places in New York City policemen fear to go. But you have got to understand you are sitting here as jurors. These are people, live flesh and blood, the same as you, different motives, different objectives." And he went on to say: "The small arms were in the pocketbook, it is true. The question is, Who did they belong to? If you think that Hardrick and Allen exercised dominion and control over the weapons in the purse, then follow the law as the judge gives it to you on the presumption of what was in the purse as to all four or three or two or one." And I think that this cannot be mistaken as anything other than a concession on those charges.

After summations, the judge charged the jury--

Q I may be dense today, but I do not understand why that is a concession.

MRS. SHAPIRO: Pardon me?

Q You will have to explain it a little more to me. Why is that a concession? There is a concession that they were in the car.

MRS. SHAPIRO: No, it is a concession that they--

Allen and Hardrick--brought the guns from Detroit, where they were coming from, to take to New York City.

Q I may have missed part of what you read. You say it is on page 17 of the appendix?

MRS. SHAPIRO: I am sorry, 21 and 22 of the appendix.

Q Oh, I am sorry, I misunderstood you.

Q The guns were concededly found in the car.

MRS. SHAPIRO: Yes, Your Honor.

Q And the car was on a trip from Detroit to New York City. He conceded no more than that, did he, than the acknowledged facts?

MRS. SHAPIRO: I believe he conceded more than that. He said, "Look at these two fellows. They are going to New York City, where they are afraid of crime, and they are bringing these guns with them. What is wrong with that?" He did not say, "Why are you charging me or Allen and Hardrick with the pistol charges when Jane Doe had the guns in her bag and they are really Jane Doe's guns?"

Q If you look on 22, he made that point. But you know this better than I do.

Q He surely on 22a, just the fourth, fifth, and sixth lines--it sounds as though he is waiving any question about the validity of the statutes, where he says: "If you think that Hardrick and Allen had exercised dominion and control over the weapons in the purse, then follow the law as

the Judge gives it to you on the presumption of what was in the purse as to all four or three or two or one."

MRS. SHAPIRO: It would seem to me at the very least--

Q Do you link that with his failure to make objection?

MRS. SHAPIRO: I certainly do. I certainly feel that at the very least that quotation indicates that--

Q That would perhaps explain why he did not object to the instruction.

MRS. SHAPIRO: I have some theories in that regard as to why I think he may not have objected or why none of the respondents did object to the presumption.

Q Of course in theory, Mrs. Shapiro, I do not know what the procedural practice is in New York; but if a trial judge tells you after you have objected that I am going to charge on the presumption, you do not go to the jury and tell them that this presumption is all bad and the judge may tell you it is all right, but do not believe him. You follow the law as the judge gives it to the jury. In your argument to the jury you are bound pretty much by the judge's version of the law.

MRS. SHAPIRO: Absolutely, but at this point the jury had not yet been charged.

Q He was anticipating the charge.

MRS. SHAPIRO: He was anticipating the charge, and you

would think anticipating the charge he would also be anticipating the full charge since he was quite aware that beyond-the-person presumption was included in the statute, and his earlier motion indicated to some degree that he felt that his defendants were entitled to that charge.

Q Of course Mr. Justice Rehnquist is entirely correct that thr lawyer in his summation cannot argue with what the judge is later going to say in the charge, cannot properly do so without being guilty of some misconduct.

MRS. SHAPIRO: I would not think so.

Q It would appear here that he was reading the statute just as the prosecution was reading it when you couple that with the fact that he made no objection to the charge.

MRS. SHAPIRO: Yes, I would think so. And he certainly made constitutional objection even in the earlier motion to dismiss.

Q The Court of Appeals opinion in the habeas case, the Second Circuit opinion, does cite passages from briefs. But as I read Judge Jasen's opinion for the majority of the New York Court of Appeals, that does not pass on any constitutional question, does it?

MRS. SHAPIRO: What Judge Jasen appeared to do, it seemed apparent, is that he did not view a constitutional question as having properly been raised. And I think that if you read the full text of respondents' brief to all three

courts, they are essentially the same brief, and it is repeated throughout the joint appendix, I think you will see that--Your Honor will see that the claim they were making essentially is that not that the statute was unconstitutional, but that the failure to grant them the benefit of the exception was the unconstitutional aspect, and clearly they had waived that by their earlier failure to object to the charge.

Q Why was there never an exhaustion of state remedies here?

MRS. SHAPIRO: Pardon me?

Q Do you contend that there was no exhaustion of state remedies here?

MRS. SHAPIRO: We contended that early in the habeas proceedings. The state did contend it.

Q Have you abandoned that claim now?

MRS. SHAPIRO: It appears that the waiver, which we argue would bar collateral review in this Court, would bar collateral review in the state court in the state habeas corpus proceeding as well, the only state remedy open to it.

Q If this question was never presented in the state courts, has the federal habeas statute been satisfied?

MRS. SHAPIRO: I think there is a question at this stage in the proceeding to require the respondents to go back through a state habeas proceeding, considering--

Q Is that one of the questions you have raised

here?

MRS. SHAPIRO: No, I have not, Your Honor. I have not raised exhaustion in my petition for certiorari and none of the questions.

Q Is the state in position to waive that, this federal statutory requirement? May a state waive that?

MRS. SHAPIRO: The Second Circuit does not seem to think so.

Q I beg your pardon?

MRS. SHAPIRO: We are not waiving it. I view it as in this case a futile exercise.

Q What is a futile exercise?

MRS. SHAPIRO: To ask these respondents to return and go through a state habeas proceeding. If their state direct appeal is completed, the only method, the only state procedure they could pursue would be a state habeas.

Q How do you know what the Court of Appeals would decide on this question if it was never presented to them?

MRS. SHAPIRO: On the facial constitutionality of the statute?

Q On the direct appeal. If you say the Court of Appeals of the State of New York did not pass on this question, if it was never presented to them, how do you know how they would decide it?

MRS. SHAPIRO: I do not know how they would decide it,

Your Honor.

Q Then what do you mean it is a futile exercise to go back to the state court?

MRS. SHAPIRO: It is our point that in effect they have waived their right in the state court to even raise the constitutionality of the presumption.

Q Are you saying that not having raised it on direct review, your state courts would not entertain it on state habeas; is that what you are telling us?

MRS. SHAPIRO: Yes, Your Honor.

Q Then why should we entertain it here? That is the next question.

MRS. SHAPIRO: That is the point. It goes around in a circle.

Q But in answer to my Brothers White and Brennan, you do not raise the exhaustion point here because of the well settled rule that exhaustion is satisfied if there can be a showing that further pursuit of the question in the state courts would be futile; is that it?

MRS. SHAPIRO: That is true. That is our position.

Q But that still does not answer the question of the direct appeal and your claim that it was not even presented in the direct appeal and that, therefore, the New York Court of Appeals was not asked to rule on the constitutional question.

MRS. SHAPIRO: What I think the New York courts did

is that they found that the respondents, by failing to object to the charge, which in that case incorrectly embodied statutory presumption, has thereafter waived any claims flowing from that failure.

Q Maybe you are quite right that a person who is convicted in a state trial court can completely abandon his appeal in the state system and come directly into federal habeas?

MRS. SHAPIRO: No. No, Your Honor, I have never said that at all. But you cannot appeal through the state system a claim that you have not preserved at trial.

Q All right. So, let us assume that a person is convicted in a New York trial court. He just does not appeal. And then he goes to state habeas. He will be thrown out.

MRS. SHAPIRO: Yes, Your Honor, he will.

Q Can he then come to federal habeas?

MRS. SHAPIRO: No, Your Honor.

Q Why is that not this case?

MRS. SHAPIRO: He has waived his state right to direct appeal.

Q What about this particular question then about the facial constitutionality of this presumption? Let us assume it was never presented to the Court of Appeals of New York, although it could have been, and it was not. And it was not decided by them. And it may not be available in state

habeas, but is it available in federal habeas?

MRS. SHAPIRO: No, Your Honor.

Q Is not that this case?

MRS. SHAPIRO: No. What I believe the New York Court of Appeals did in the course of the opinion, subject to some interpretation, is that it held that having waived the objection to the jury charge, which was the embodiment of the statutory presumption, the respondents waived all claims flowing from that waiver, including the facial claim, the as-applied claim, and the state law claim.

I have just discussed the New York Court of Appeals opinion. I would like to say that at no stage in the federal or state proceedings did the respondents give a reason for their failure to object. In fact, it is not until their brief to this Court that they suggest for the first time that the reason might be inadvertence. However, I would like to say that far from being inadvertence, the record belies inadvertence. The record shows that the respondents knew the presumption would be charged, expected it to be charged, that they had a specific strategy, and the specific strategy they had was to deflect pressure away from Jane Doe on the handgun charges so that Jane Doe, a 16 year old with no prior record and everything to gain and virtually nothing to lose, would not testify against them. And that is indeed what happened. The respondents skewed their entire defense away from putting pressure on Jane Doe, away from

pointing an accusatory finger at Jane Doe. And in fact the part of Allen and Hardrick's charge that I quoted to the Court indicates that they were virtually conceding those counts rather than have Jane Doe testify on the serious life sentence charge. And I say this also because it seems unlikely that counsel, who had so successfully these respondents on the drug charge--this was actually by any standard a very successful defense--would have been unlikely, particularly since they knew about everything that was going to happen at the jury charge period, would be unlikely to overlook such an important feature. And there is also possibly another explanation for this waiver which may come to mind, and that is that these respondents were, in a sense, willing to accept a compromise verdict to allow the jury to convict them on the lesser charges in the hopes of getting an acquittal on the life sentence charge.

Of course, respondents have a burden for coming forward with a good cause. Mere inadvertence does not satisfy the Wainwright v. Sykes standard. But if either of the theories that I have proposed to the Court is supported by the record--and I believe they are--these respondents have failed to even meet the Fay v. Noia standard.

If, notwithstanding the respondents' waiver, the Court nevertheless considers the constitutionality of the presumption, the state submits that the statute is constitutional.

The statute is a carefully drafted statute which embodies legislation recognition that illegal handguns and automobiles are closely linked with the commission of violent crimes. The presumption provides that the presence in a private automobile of an illegal weapon is presumptive evidence of its possession by all the occupants of the car unless one of the exceptions applies. There are three exceptions. There is the on-the-person exception, which this case involved. There is an exception where possession would not be imputed to a taxicab driver if a gun is found in the car. And the third exception is if one of the occupants of the car not present under duress has a valid license.

There are also approximately 15 exemptions which are contained in another statute, 265.20 of the penal law. And these exemptions cover persons who voluntarily surrender handguns, for example, or manufacturers, shippers, or other legitimate firearms holders or owners.

The elements of the crime of felonious weapons possession, which respondents state quite accurately in their petition for habeas corpus in paragraphs 5 and 6, is a knowing and voluntary possession. The requisite mental state must be proved by evidence independent of the presumption. Moreover, New York has a very liberal definition of constructive possession. Weapons must be within the immediate control and reach of the accused and where it is available for his

unlawful use if he so desires. So, thus once the requisite mental state of knowing and voluntary possession is established through other evidence, the presumption simply permits a jury to infer that an individual in close proximity to a weapon has that weapon within his immediate reach and control. Thus it merely accords the evidence its natural probative force and effect. In such a case the relationship between the proved fact and the presumed fact is so close that it must satisfy any test this Court deems appropriate. And I refer to the beyond-a-reasonable-doubt test, which is really not that different from the Leary "more likely than not" test.

Finally, the statute focuses on narrowly defined conduct, presence in a private automobile. As the cases show, the presumption is applied in a principled way by the New York courts on a case-by-case basis, taking every variable into consideration.

Q I take it New York is not one of those states that purports to say that a presumption disappears and you just disregard it when any contrary evidence suddenly shows up.

MRS. SHAPIRO: Not when any contrary evidence. If there was contrary evidence, for example, that was compelling, the New York judge certainly need not either send the case to the jury or charge the jury on the presumption.

Q So, apparently he thought there was not enough evidence. But he did instruct on the presumption.

MRS. SHAPIRO: He did instruct on the presumption. He omitted the instruction on the exception.

Q Do you think he told the jury they could ignore the presumption if they wanted to?

MRS. SHAPIRO: In the charge the judge does state specifically--and I do not have the exact page here--that you may find for the respondent even though he submits no evidence in rebuttal. And then of course he went through a very careful, reasonable doubt charge and said the burden--

Q Did he purposely give the instruction that is given on the possession of recently stolen property, that you may infer--is that not what he actually gave them? What page is it?

MRS. SHAPIRO: 23a, Your Honor.

Q I knew I had seen it somewhere. But it is essentially the possession-of-recently-stolen-property instruction.

MRS. SHAPIRO: It says the burden rests upon the shoulders of the People. It never shifts. The defendant is never called to establish his innocence.

Q The defendants do not have to prove anything.

MRS. SHAPIRO: The charge is very careful to state the defendants do not have to come forward with any rebuttal evidence, that the jury could disregard the presumption and nevertheless acquit the respondents.

Q Then none of that has to do specifically or explicitly with the presumption at issue, the statutory presumption at issue in this case.

MRS. SHAPIRO: I think--

Q Where is the instruction about that?

Q But then he went on to instruct on the presumption.

MRS. SHAPIRO: Yes.

Q Where, 24, 25?

MRS. SHAPIRO: On page 25. It begins on the bottom of page 24, the top of page 25. And he defines possession in terms of the drugs and the guns.

Q Do you think this part of the instruction is correct: "The presumption or presumptions is effective only so long as there is no substantial evidence contradicting the conclusion flowing from the presumption, and the presumption is said to disappear when such contradictory evidence is adduced"? Is that the New York law?

MRS. SHAPIRO: The New York law is if substantial evidence is introduced to rebut the presumption, then the presumption need not go to the jury.

Q So, this must have been his opinion that there had not been any substantial evidence on the contrary side, or there would not have been any presumption instruction at all.

MRS. SHAPIRO: Probably so. And there was no effort

made on the part of the respondents, for example, to rebut the presumption.

Q Going to the third line of that paragraph of the instruction, "You may infer and draw a conclusion that such prohibited weapon was possessed by each," that is essentially what is given and has been approved universally in terms of possession of recently--

MRS. SHAPIRO: Stolen property.

Q --stolen property.

MRS. SHAPIRO: As in Barnes.

Q Even where courts have said a presumption to that effect would violate due process.

MRS. SHAPIRO: But an inference would.

Q But a permissible inference is acceptable.

MRS. SHAPIRO: As I pointed out at the end of my main brief, the practice in the New York courts, in any event, is to employ the statute permissively. And so it is more like an inference than like a statutory presumption, for example, in some of the federal cases that this Court has examined.

Q But the original Sullivan law was just out and out presumption.

MRS. SHAPIRO: Pardon me?

Q The original Sullivan law was just out and out presumption.

MRS. SHAPIRO: The Sullivan law, Your Honor, referred

to an entire range of firearms protection--

Q The original one was just presumption.

MRS. SHAPIRO: Oh, you mean the 1936 statute prior to the--

Q Yes.

MRS. SHAPIRO: --adding on of the exceptions.

Q And then all of these have been added on later.

MRS. SHAPIRO: Yes, Your Honor. Yes.

Q But the original one--if you were caught with one and you did not have a license, forget it.

MRS.SHAPIRO: Yes, Your Honor.

Q And it was not a constitutional statute, except this Court said it was.

MR. CHIEF JUSTICE BURGER: Mr. Young.

ORAL ARGUMENT OF MICHAEL YOUNG, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CHIEF JUSTICE BURGER: Before you go on, let me try to clear up one question. If no appeal had been taken at all, direct appeal, would the state courts in New York entertain habeas corpus to attack the basis of the conviction?

MR. YOUNG: In response to that, I would clear somethin up, Your Honor. The petitioners insisted that the respondents never raised their constitutional claim in the state courts. That is simply incorrect.

MR. CHIEF JUSTICE BURGER: Let us get an answer to my

question first. If there was no direct appeal--

MR. YOUNG: Yes.

MR. CHIEF JUSTICE BURGER: --may the conviction be attacked on--

MR. YOUNG: Not on grounds which were available to the petitioner at the time he could have taken his direct appeal.

MR. CHIEF JUSTICE BURGER: Then, if that is so, would it not follow that a direct appeal which omitted raising certain points would not be permitted on habeas corpus--

MR. YOUNG: Yes, Your Honor, that is correct.

MR. CHIEF JUSTICE BURGER: --would not be heard on habeas corpus?

MR. YOUNG: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: We come down now to what you were about to say.

MR. YOUNG: Which is that this direct appeal fully raised the issue that we are talking about right here. I would like to take Your Honors through the documents which are relevant to that fact because frankly, from what Mrs. Shapiro was describing, I am not sure we are talking about the same case. The petitioners' first challenge--

Q That case is frequently true.

MR. YOUNG: I hope I can clear this up. The petitioners--or the respondents--it is difficult for me to change.

I am usually a petitioners representative. So, I may make a slip of the tongue. The respondents, the defendants in this case, first challenged the presumption in this case at the earliest possible moment in the state proceedings. That challenge was a general challenge. It came at the end of the government's case.

Q Where do we find it?

MR. YOUNG: That is set forth on pages 12a through 17a of the appendix, the joint appendix in this case.

That challenge, we concede, did not throw out the constitutional issues.

Q Twelve to 17, that is five pages. Will you pinpoint the first place where it is there.

MR. YOUNG: Sure. Let us see, I believe on page 14a we get into it most exactly.

Q You concede that in that five pages you did not specifically challenge it on federal constitutional issues.

MR. YOUNG: Yes, Your Honor, we concede that. All that we are pointing out about that is that the presumption was challenged in general terms at that point because the constitutional challenge comes forth very clearly later on in the trial proceedings. I just wanted to point out that that is the first instance when the respondent said, "Hey, we do not think that this presumption is applicable in this case."

Q Applicable.

MR. YOUNG: Applicable. And most importantly--

Q What is the federal constitutional claim?

MR. YOUNG: The federal constitutional claim is set forth for the first time in the appendix at page 36a, Your Honor. This was--

Q That is your motion for a new trial.

MR. YOUNG: That is a motion to set aside a verdict which is specifically authorized under Section 330.30 of the New York Civil Procedure Law. And it is appropriate at that time, Your Honor, because this is not a charge case. This is not a case in which we are simply arguing that if a judge had charged the jury differently, that everything would have been all right. This is a case of failure of proof. It is a case where the state admitted that it has no proof the defendants possessed the guns.

Q At any rate, after the trial is over was the first time that you raised the point--

MR. YOUNG: The constitutional issue, yes, Your Honor. But before--

Q Are you saying that the trial court was obligated to decide your submission here in terms of--

MR. YOUNG: Yes, Your Honor. The trial court was obligated at this point just as it would have been at any point during the trial when this issue could have been raised. The trial court was obligated to dismiss the charges, not simply to

instruct the jury differently or to tell--

Q Where is your submission then on--

MR. YOUNG: That is on page 36a, in which the respondents specifically stated, "Secondly, if the presumption is"--

Q What page?

MR. YOUNG: Page 36a of the joint appendix. That is the tan document.

Q Mr. Young, is it perfectly clear you are raising a federal constitutional challenge and not a statement because although you do cite Leary v. United States, you suggest the New York test may be different, and then you cite only New York cases?

MR. YOUNG: They do not suggest that the New York case would be different. They say it is the same.

Q "The New York test has been held"--

MR. YOUNG: It may be more demanding, in fact.

Q "--has been held to conform to that set out in Leary." Then you go ahead and just cite all the New York cases.

MR. YOUNG: But we also cite New Jersey cases, Your Honor. We are pointing out that nationally--

Q What provision of the United States Constitution did you rely on here?

MR. YOUNG: The Leary due process test, Your Honor.

Q You do not say so here.

MR. YOUNG: No, Your Honor, but we do say uconstitutional as applied, and then immediately cite the Leary. And there cannot be any question--there could not have been any question in a state's mind that we were referring to the federal constitutional test that is set forth in Leary.

In fact, on appealing this case, every time this argument was raised, the state did not respond by saying, "Oh, no, the state constitution allows this." They responded by saying, "No, Leary allows this." So, they recognized the claim as being federally based just as we do.

Q Why did not Judge Jasen's opinion for the majority in the New York Court of Appeals make any reference, at least so far as I can tell, to a federal constitutional challenge having been made to the presumption of Leary base.

MR. YOUNG: Your Honor, I would point out that the dissenters in the New York Court of Appeals did make reference--

Q Yes, but they do not speak for the court.

MR. YOUNG: Well--

Q Leary is not in the Constitution.

MR. YOUNG: No, but Leary only applies the Federal Constitution, Your Honor, and I think it is fairly common practice that if you are trying to raise a constitutional claim, you say it is unconstitutional and then cite to the controlling--

Q I submit that the usual practice is to cite the

Constitution.

MR. YOUNG: Well--

Q The section of the Constitution.

MR. YOUNG: Then defense counsel was less than explicit. But if the purpose of that rule is to make clear to everyone involved what is being relied on--and that is what I think Bryan v. Zimmerman and those cases say, that the intent of specifying what you are relying on is so that nobody has any question whether it is a federal constitution versus a state constitution. There could not have been any question in this case because Leary does not apply a state test.

Q For example, we have got a little book up here on our desk, and it does not say a word about Leary. It says, The United States Constitution."

MR. YOUNG: No; but, Your Honor--

Q That is for us to refer to.

MR. YOUNG: But, Your Honor, the point is that Leary does refer to the--suppose the respondents had simply said that it is unconstitutional under Leary. Would that not clearly say what we are referring to is--

Q The New York Court of Appeals to me does not even talk about a federal constitutional doctrine relating to presumption in the majority opinion.

MR. YOUNG: The Second Circuit, looking at that

opinion, said that it is clear that the New York Court of Appeals had considered the constitutional issue.

Q You can look at the opinion, we can look at it. You tell me where it did.

MR. YOUNG: Where it did was in the first paragraph where it discusses how important this presumption is, how necessary it is to the activities of criminal justice.

Q The first paragraph of Judge Jasen's opinion?

MR. YOUNG: No. Judge Jasen's opinion, I may be mistaken--

Q I thought you said the Second Circuit said that Judge Jasen's opinion--

MR. YOUNG: No, the Second Circuit said the New York Court of Appeals had implicitly decided the constitutional--

Q Where do you think Judge Jasen's opinion implicitly decided the constitutional question?

MR. YOUNG: That decision is set forth in the appendix to the petition. I am trying to find the beginning of it right now.

Q It starts at page 40a.

MR. YOUNG: The Court of Appeals suggested that what happened here was the New York Court of Appeals had decided in a score of cases over the last several decades that this presumption was constitutional. And, therefore, it did not expressly address that issue in this case. What it did was

simply note in passing, as Judge Jasen does, that this presumption--and he says--let us see, starting at 43a he begins to discuss the presumption. And he points out the presumption was enacted because of difficulties in proving weapons possession without it and because of, therefore, the urgent need for legislation to make the presence of a forbidden weapon presumptive evidence of its possession and that such amendment would require the occupants of the automobile to explain the presence of the firearm, and that therefore this presumption was enacted, providing that all persons in an automobile at the time are presumed to possess.

The point is what the court was saying is that this is a valid presumption.

Q But there is no reference in that opinion to any provision of the Constitution.

MR. YOUNG: But we argued unconstitutionality to that court in our part of that brief. The Court cannot avoid an issue by simply not referring to it.

Q No, but then you must be able to convince us that your motion raising a constitutional question and a motion to set aside the verdict in the trial court was timely, that it should not have been made before that time.

MR. YOUNG: Let us look directly to that issue, then. We submit that that motion was entirely timely to raise this issue for several points--

Q Did the New York Court of Appeals agree with you on that?

MR. YOUNG: The New York Court of Appeals never said that the constitutional claim had been waived. They only said that a state law claim concerning whether or not the on-the-person exception to this presumption was controlling as a matter of state law had been waived by the failure to object to the judge's charge. They never said the constitutional claim had been waived. And there are several reasons why they did not say that.

Q Mr. Young, I imagine one reason may be you did not make a separate point of the constitutional issue in any event. You just argued it in passing during the part of your argument on the insufficiency of the evidence, did you not?

MR. YOUNG: Your Honor, it is hard to say that it was argued in passing.

Q But if somebody just read the summary of the argument in the boldface, he would never find a mention of the Constitution would he?

MR. YOUNG: No. Well, you do actually in the part addressing the state. The state argued that it was a constitutional presumption.

Q I see. But it is under the point the evidence was insufficient to support the conviction.

MR. YOUNG: Yes. If you will look at the brief to the

Court of Appeals, that is set forth in the joint appendix at page--

Q Forty.

MR. YOUNG: Forty--well, 50a is when the constitutional part of that brief is submitted. And there again--

Q Oh, I am sorry.

MR. YOUNG: --the respondents plainly stated, secondly, if the presumption is applicable here, then it is unconstitutional as applied. In essence, they used exactly the same argument that they had used to in their motion to set aside a verdict, namely that--

Q You will surely admit that you did not argue that the statute was facially unconstitutionally.

MR. YOUNG: We will argue that that was preserved, Your Honor, for two reasons. One is this presumption has had a history over the three decades it was enacted of being held facially constitutional by New York's highest court. Now, 2254 only requires you to exhaust effective state remedies before raising an issue on federal habeas corpus. And this Court and every circuit court has interpreted that phrase to mean that where an issue has been squarely decided by the state's highest court in previous cases, that a petitioner is not required to argue it again in the state's courts before raising it in habeas corpus petition.

Q Coming back to several questions put to you,

where did the Court of Appeals deal with the problem?

MR. YOUNG: Let us take that in two stages. First of all, it is clear that the respondents raised a constitutional challenge in the Court of Appeals. That is set forth on 50a; that part of our brief is set forth on 50a. We submit, as the Second Circuit found, that the New York Court of Appeals did not expressly address the constitutional issue because it had decided it in so many previous cases. Therefore, it only noted in passing how important this presumption was and then went on to address the respondents' state law argument because that is what the dissenters in the New York Appellate Division had agreed with the respondents on.

So, in other words, the New York Court of Appeals in essence said we have decided 15 times already that this statute is constitutional. We are not going to do a lengthy analysis of that now. All we are going to do is note this presumption has a pressing need, that it was enacted because of certain problems dealing with criminal justice. And now we are going to go on and address the problem that troubled the Appellate Division dissenters. That is how that opinion is written.

So, like I said, even if they had not made any reference to the need for the presumption, we raised the issue, and they cannot duck it.

Q But they did duck it. They did not respond to

your precise argument, which was that it was unconstitutional as applied to these facts.

MR. YOUNG: That is right.

Q And they do not mention that argument. And the fact they held it constitutional as applied to a lot of other facts has nothing to do with the validity of your argument as applied to these facts.

MR. YOUNG: That is true, Your Honor, but--

Q Would you point out in the opinion just what you are talking about.

MR. YOUNG: Yes. The New York Court of Appeals' opinion is set forth in the petition for writ of certiorari.

Q I do not know the page.

MR. YOUNG: At pages--I have to find it again.

Q This document that used to be entitled "Brief for Petitioners."

MR. YOUNG: Yes. It still is on mine. But the one with the most fingerprints on it since it has been used the longest. All right, that is set forth--the part about the presumption starts on page 43a and continues through the end of the opinion, which runs--

Q I want the part that says that this case has been decided by so many Supreme Court cases.

MR. YOUNG: No, I am saying that is why they did not expressly address it here, is because--

Q You gave me the impression that was in the opinion.

MR. YOUNG: Oh, I am sorry, Your Honor, I did not mean to do that. What I am saying is--

Q Well, you did.

MR. YOUNG: --that the Court of Appeals had decided this in so many previous issues that all they did in this opinion--

Q You psychoanalyzed them?

MR. YOUNG: It was enough for the Second Circuit. The Second Circuit psychoanalyzed it the same way, Your Honor.

Q Then psychoanalyze me because I used to be on the Second Circuit, while you are at it.

MR. YOUNG: They thought that it was clear that the New York Court of Appeals had only found--

Q Where? Where does it say that?

MR. YOUNG: It does not expressly address the constitutional issue.

Q If I am writing an opinion sustaining your position, what do I cite for what you just said? You?

MR. YOUNG: No, I would cite to the fact that respondents raised the constitutional issue and that since the Court of Appeals did not expressly address it but did say that they felt that this presumption was valid--

Q Where did they say that?

MR. YOUNG: On pages--

Q I have got to get a quote someplace from you.

MR. YOUNG: --43 to 45.

Q Counsel, take a look at the top of page 51a and see if that helps you. Is that the dissenting opinion?

MR. YOUNG: Yes, I believe that is, Your Honor. Yes, that is Judge Walker's dissenting opinion in which he says the constitutional challenges have been rejected in the past by the New York Court of Appeals. Judge Walker felt that this presumption was unconstitutional.

Q So, that suggests that the issue was before the court perhaps.

MR. YOUNG: Well, it definitely was--

Q It really suggests that the dissenters thought something about it. It does not suggest that the court thought it was there.

MR. YOUNG: It does suggest that the issue was before the Court.

Q It was before the court in People v. Terra--

MR. YOUNG: But since Judge Walker found it unconstitutional here in this case, Your Honor, referring back to Terra, he was clearly saying it is an issue here too. But getting back to the point that I was initially making with, Your Honor, Justice Rehnquist, even though the New York Court of Appeals did not spell out book and verse what their

position was on the constitutional issue, that does not mean that we are precluded from federal habeas corpous proceedings. All we have to do is exhaust our remedies in the state court. We only have to raise the issue. If the Court of Appeals refuses to confront it, that is not our fault; and that does not preclude us, under 2254, from raising that issue thereafter in the federal courts.

Q What if it is an established rule of New York practice that you must make a motion based on a constitutional claim at the time the judge charges the jury? You make it at the time you made it in this case, the same procedural history up to the New York Court of Appeals. You argue the question with the New York Court of Appeals. The majority opinion simply does not mention the question. Do you think you can go into federal habeas on that?

MR. YOUNG: Your Honor, again you phrase that in terms of this being a charge case. Even if the judge in this case had made no mention whatsoever of this presumption, even if he had never told the jury that they could convict on the basis of this presumption, respondents would still be entitled to the relief which they have been granted. That is so because the state in this case rested their case without any actual proof of the crime charged. Instead, they relied solely on this presumption.

I would like to refer Your Honor to the colloquy that

occurred at the end of the state's case on exactly that. The defense counsel had argued that the presumption was not valid in this case. Admittedly they did not raise a constitutional claim at that point. What is important is that they argued that it was not valid. And in response, the court turned to the prosecutor and said, referring to defense counsel's argument, "He is saying that the only proof you have again is your presumption, right?"

The Prosecutor: Correct.

The Court: The defendant was in the car, and the statute presumes. You have no other proof?

The Prosecutor: Correct.

So, this is a case in which there is simply no proof. And defendants' right, their constitutional right, attached at that point.

Q Is the prosecutor saying "correct" with respect to the court's paraphrase of the defense contention or correct to the court's statement that that is the prosecution's position?

MR. YOUNG: I think the last comment by the court makes that clear. He says, "You have no other proof?" asking a question. There is a question mark after that.

Q What page are you on?

MR. YOUNG: Oh, I am sorry, page 15a.

Q Thank you.

MR. YOUNG: Bottom of 14a, the last three lines of 14a and the first three lines of 15a.

Q That does not mean that anybody says there was not proof. It just means that there is no more proof than the fact that the gun and the defendants were both in the same car.

MR. YOUNG: That is right. And that is why--

Q That does not mean there is no proof.

MR. YOUNG: It does if the presumption--

Q All you are arguing is that you should not be able to infer possession from the presence of the gun and the defendant in the car at the same time.

MR. YOUNG: That is right, Your Honor. And if you cannot constitutionally do that, then the prosecution's case necessarily falls at that point.

Q Suppose the judge had said, "All the evidence you have is that the gun was in the defendant's hand in the car. Is that all you have got?"

He says, "Correct."

Would that be all right?

MR. YOUNG: Then they would not be relying on the presumption, Your Honor.

Q That is right.

MR. YOUNG: But here they admitted that they were relying solely on the presumption.

Q I do not think you can win constitutional

questions on one sentence and one word by a judge or anybody else. Only one word I know is "acquittal."

MR. YOUNG: Well--

Q You want to argue every word in there.

MR. YOUNG: I am sorry. I do not quite understand.

Q No, no. I do not understand what you are talking about.

MR. YOUNG: What I am saying is that the defendants' due process rights were violated at the point that the state rested its case, without presenting any actual proof of possession but instead relying solely on this presumption. So, if this presumption is unconstitutional, defendants' rights were violated at that point no matter what the judge thereafter charged the jury, even if the judge had charged the jury that they could not convict on the basis of the presumption.

Q Mr. Young, the colloquy you referred to of course was in connection with the motion to dismiss the indictment.

MR. YOUNG: That is right, Your Honor.

Q Is it correct that Defendant Doe testified?

MR. YOUNG: Oh, you caught me totally off guard. It has been so long since I read the transcript, I am not sure. I do not think any of the defendants testified.

Q The dissenting opinion--this is what puzzles me,

as Mr. Justice Powell pointed out early--refers to the fact that Defendant Doe, who was the only woman in the vehicle, expressly admitted that it was her possession.

MR. YOUNG: I think a police officer testified that she had made that admission, Your Honor.

Q So, there was other evidence then. There was evidence about what was said at the time.

MR. YOUNG: Only as to Doe's possession, and Doe is not a respondent here.

Q I understand, but there was some oral testimony about what happened at the time that the vehicle was stopped and so forth?

MR. YOUNG: Essentially--

Q So, there was something more in the record other than the fact that the guns were in the car?

MR. YOUNG: No, that was essentially it as to these--as to the three respondents.

Q You just told me a moment ago that the police officer testified that she made some remarks concerning the location of the guns.

MR. YOUNG: Oh, you mean as to that evidence. But that does not apply to the respondents. It only applies to Jane Doe.

Q Would you mind reading again what the judge asked?

MR. YOUNG: Yes. "The Court"--referring to the argument defense counsel had just made--"He is saying that the only proof you have again is your presumption, right?" question mark.

Miss Donovan, the prosecutor: "Correct."

Q Then that is wrong, is it not? There was other evidence.

MR. YOUNG: Yes, that is all the evidence that they had.

Q But they had a lot more evidence than that.

Q That is all the evidence they relied on to defeat a motion to dismiss the indictment.

MR. YOUNG: His next comment is:

The Court: The defendant was in the car, and the statute presumes. You have no other proof?

The Prosecutor: Yes, that is correct.

Q We can look at the whole record and see what that means because it is ambiguous, and it cannot mean literally what it says because on this record it is clear that these two--one an automatic and one a pistol, a .45 and a .38--were in plain sight, sticking out of the handbag.

MR. YOUNG: In plain sight to the police officer, Your Honor.

Q Then you mean they were not in plain sight to the driver.

MR. YOUNG: No, because they were in between the right front seat and the right front car door, next to which Jane Doe was sitting. So, between the seat and Jane Doe they were totally out of sight of everybody else in the car. There is no testimony to the effect that anybody else in that car could have seen those guns. And logically they could not have seen them because they were all the way over there.

Q You concede the officer could see it, but you say that a jury could not reasonably infer that anyone in that car could see it?

MR. YOUNG: Number one, I do not think that is a reasonable inference. But, number two, sight is not all that is required here. It is possession, Your Honor.

Q I am just sticking with one segment of it.

MR. YOUNG: Yes.

Q There is other evidence besides what this colloquy with the judge indicated. The evidence is that they were in plain sight, in the handbag, in the car.

MR. YOUNG: One gun was totally out of sight because the police officer did not even see it until he had removed the first gun. The first gun was in sight only in that the handle was sticking out of the top of the purse that was located in that location. I think it would be a pretty strange inference--

Q The only point I am making is that is evidence

from which a reasonable juror could reasonably conclude that other passengers in the car saw the same thing the officer did.

MR. YOUNG: As to the bottom gun?

Q As to the gun which was in plain sight.

MR. YOUNG: But they were convicted of both guns. So, even if sight alone was enough to convict here, it would not justify the conviction on the second gun.

Q Is the crime greater for the possession of two guns than one?

MR. YOUNG: The presumption was used to convict for both. So, obviously the issue would be raised as to the second gun even if Your Honor were correct in saying that the first gun was visible and that, moreoever, its visibility permitted a conviction simply because it was visible. We strongly disagree with that. We do not think that even if the gun was visible to the other passengers that that is enough. It simply strains the imagination to say that simply because a gun was visible, that all the people in the car automatically possess it because it was visible.

Q The presumption does not mean that everybody automatically possesses it. The presumption, as I understand it, means that the jury may look at that presumption with the rest of the evidence and may draw the inference that everyone possessed it. Is that not correct?

MR. YOUNG: Yes. Let us look at exactly what the presumption does mean.

Q They do not have to accept the presumption.

MR. YOUNG: No, they do not. But let us look at what the presumption means because it does not mean what Mrs. Shapiro described to you. The New York Court of Appeals has uniformly held that this presumption authorizes a jury, if they so wish, in most instances to infer possession of a gun to anyone who is present in the car where that gun is found.

Q If they come back with a guilty verdict, they will have violated their instructions unless they have found that beyond a reasonable doubt every member in the car possessed the gun.

MR. YOUNG: That is not--

Q They have been told to find the defendant guilty unless they find the state has proved the case beyond a reasonable doubt. And maybe the presumption and the so-called inference is part of the proof, but they nevertheless have to be convinced.

MR. YOUNG: Then, Your Honor, let us look at page 25 of the joint appendix, which contains the part of the judge's charge addressing the presumption. And there his lead-off statement is: "Our Penal Law also provides that the presence in an automobile of any handgun or firearm which is loaded is presumptive evidence of their unlawful possession.

Q So?

MR. YOUNG: So, that alone could--

Q It is presumptive evidence, that is true. But, nevertheless, it has to be evidence that will convince the jury beyond a reasonable doubt. That is the instruction.

MR. YOUNG: According to the New York Court of Appeals--and I think this Court is bound by the New York Court of Appeals interpretation of this statute--the New York Court of Appeals states, in their opinion, in this very case, that the presumption creates a prima facie case against the defendants. Now, it is my understanding--

Q I know. That just means it is enough to get to the jury.

MR. YOUNG: That is right, and not to convict on.

Q Yes, but the jury, nevertheless, has to be convinced beyond a reasonable doubt. That is the way it was instructed. And if they find the defendant guilty, without finding him guilty beyond a reasonable doubt, they have violated their instructions.

MR. YOUNG: Yes, but based on--

Q But whatever the evidence is, it has to convince them beyond a reasonable doubt.

MR. YOUNG: And the judge was telling him that they could reach that conclusion based solely on this possession.

Q I know, but they did not have to. They did not

have to.

MR. YOUNG: No, they did not have but--

Q But they had to find him guilty beyond a reasonable doubt. You cannot construe the constructions any other way, can you?

MR. YOUNG: Yes, I can construe--

Q If you can, then why do you not come up here and claim that some other section of the Constitution has been violated, that they violated the beyond-reasonable-doubt standard?

MR. YOUNG: To a certain extent this does because it permits--

Q That is not the question you have presented to us.

MR. YOUNG: I know, because we do not feel that that is the central issue here. What we feel is the central issue is that the due process rights were violated because the juries were instructed that they could draw an irrational inference. As this Court has said in every presumption case that it has dealt with, that is enough to violate the defendant's rights. You do not have to also violate the rights by misinstructing them as to the reasonable doubt standard. In every one of the presumption cases where this Court has reversed a co-viction because the presumption was irrational, the juries were charged that they had to find guilt beyond a reasonable doubt in those cases. So, it is not enough that they were instructed on

reasonable doubt in this case. What is important is that the prosecutor rested his case solely on the basis--

Q So, are you really objecting on a Sixth Amendment basis that they really interfered with your right to a jury trial?

MR. YOUNG: There are implications of that, Your Honor. It is more a due process violation under Leary, that what the judge has said is the jury does not have to be rational.

Q Do you want us to affirm the judgment in this case?

MR. YOUNG: Yes, I do, Your Honor.

Q Well, what are you arguing about?

MR. YOUNG: Well, I--

Q You have not cross-petitioned.

MR. YOUNG: Pardon me?

Q You have not cross-petitioned. You are talking about all these things that were not before the court and are not here; am I right?

MR. YOUNG: No. All the issues that we are talking about now were before the court.

Q And decided by the court?

MR. YOUNG: Pardon?

Q Go right ahead. Go right ahead. I give up.

MR. YOUNG: I am sorry. I misunderstood Your Honor's

question.

MR. CHIEF JUSTICE BURGER: I think your time is up, counsel.

MR. YOUNG: All right. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[The case was submitted at 3:10 o'clock p.m.]

- - -