

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

PEOPLE,

Appellant-Respondent,

-against-

No. 155

STANLEY R. KIMS, II,

Respondent-Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
September 11, 2014

Before:

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

Appearances:

HARMONY A. HEALY, ADA  
JEFFERSON COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Appellant-Respondent  
175 Arsenal Street  
Watertown, NY 13601

MARK C. DAVISON, ESQ.  
DAVISON LAW OFFICE, PLLC  
Attorneys for Respondent-Appellant  
P.O. Box 652  
61 N. Main Street  
Suite C  
Canandaigua, NY 13324

Sara Winkeljohn  
Official Court Transcriber

1  
2 CHIEF JUDGE LIPPMAN: Let's start with  
3 number 155.

4 Counselor, you want any rebuttal time?

5 MS. HEALY: Yes, Your Honor, one minute,  
6 please.

7 CHIEF JUDGE LIPPMAN: How much?

8 MS. HEALY: One minute.

9 CHIEF JUDGE LIPPMAN: One minute, go ahead.

10 MS. HEALY: Yes, Your Honor. My name is  
11 Harmony Healing - - - Healy. I am appearing for the  
12 People. And as the Fourth Department Presiding  
13 Justice Scudder determined in his dissenting memo,  
14 the court did properly determine that the jury could  
15 find that the defendant was in close proximity to the  
16 cocaine when he was apprehended and at the time that  
17 the cocaine found.

18 CHIEF JUDGE LIPPMAN: If - - -

19 JUDGE SMITH: What - - - what is the  
20 location that you say was in close proximity?

21 MS. HEALY: The location where the  
22 defendant was apprehended.

23 JUDGE SMITH: You mean in - - - in his car?

24 MS. HEALY: Yes, in his car. Well, I - - -  
25 yes. He was apprehended on the way to the car, as he

1 was getting into the vehicle, and then parole was  
2 approaching the vehicle. They had also observed him  
3 leaving the residence.

4 JUDGE SMITH: Question, when - - - when  
5 were the drugs found?

6 MS. HEALY: Approximately five - - - you  
7 know, between three and five minutes from when he was  
8 actually detained.

9 JUDGE GRAFFEO: What does close proximity  
10 mean? How are - - - how - - - what's your rule for  
11 determining when something is in close proximity?

12 MS. HEALY: Well, in this court in People  
13 v. Daniels, the pol - - - the court held that when  
14 the police were observing the defendant leave the  
15 depart - - - leave the apartment where a large amount  
16 of cocaine was found in plain view, that that was  
17 considered close proximity where he was detained.

18 JUDGE GRAFFEO: He was the only person that  
19 was in the apartment, though, correct?

20 MS. HEALY: He was the only person that was  
21 - - - that - - - in that apartment; however, I would  
22 say that in this case this apart - - - this apartment  
23 was under surveillance, constant surveillance.

24 Parole watched him exit the residence. He was - - -

25 CHIEF JUDGE LIPPMAN: Counselor, but where

1 do you draw the line? I think that's the pres - - -  
2 that's the difficulty with these presumption cases.  
3 That, you know, you have a pizza deliveryman who  
4 comes into the building, you know, is he going to be,  
5 you know, in close proximity? What's close prox - -  
6 - what's it really mean if you - - - if you digest  
7 our cases, what does it mean?

8 MS. HEALY: Well, Your Honor, I would argue  
9 here that this isn't a situation where a pizza man  
10 was entering into a building. This was a house or a  
11 - - - a two-story residence - - - a two-residence  
12 apartment building where this defendant had  
13 proprietary interest. He had a key on his key ring.  
14 He - - -

15 JUDGE SMITH: Yeah, but how - - - why - - -  
16 why does that make - - - make him in closer  
17 proximity? In proximity sounds to me like it's  
18 measuring distance, not - - - not - - - not his  
19 relationship with the house. Why was - - - why  
20 wasn't - - - if there had been a - - - suppose there  
21 was a car right next to his with a guy delivering  
22 pizza. Why isn't the pizza man in the same close  
23 proximity that he is?

24 MS. HEALY: Because the parole officers  
25 observed him leaving the residence, and he was under

1 constant surveillance by the parole officers. And -  
2 - -

3 JUDGE RIVERA: So - - -

4 MS. HEALY: - - - this - - - a residence -  
5 - -

6 JUDGE RIVERA: - - - so if the parole  
7 officers had not caught up with him before he got in  
8 the car and he drove down four blocks, is he still in  
9 close proximity? Nothing else has changed, right?  
10 You've observed him leave. He got in the car or the  
11 van, whatever it was. And he went four blocks. Is  
12 he still close - - - and - - - and you've observed  
13 him - - - the parole officers, they've observed him  
14 the entire time?

15 MS. HEALY: Well, I think the difference  
16 here is that it - - - it wasn't four blocks down the  
17 street. He simply exited the residence - - -

18 JUDGE RIVERA: No, I - - - I'm  
19 understanding you, but what if it was? I understand  
20 that.

21 MS. HEALY: I think that you have to look  
22 at the legislative intent here. And I think that the  
23 legislative intent behind the statute was to  
24 apprehend these people who - - - and hold accountable  
25 these people who are operating these drug factories.

1 JUDGE RIVERA: Wasn't one - - -

2 JUDGE ABDUS-SALAAM: What is the legis - -  
3 - legislative, what - - - what is the statute called?  
4 Isn't it the room presumption?

5 MS. HEALY: The room presumption.

6 JUDGE ABDUS-SALAAM: The room.

7 MS. HEALY: Or the drug factory  
8 presumption.

9 JUDGE ABDUS-SALAAM: Yeah.

10 MS. HEALY: Yes.

11 JUDGE ABDUS-SALAAM: Or the drug factory  
12 presumption. But usually the - - - the defendants  
13 are in the room or very close to the room.

14 MS. HEALY: Right, and I would argue that  
15 he wasn't very far from the room. He had just left  
16 the residence when he was apprehended, and they - - -

17 JUDGE READ: And does the lapse - - -

18 MS. HEALY: - - - saw him leaving the  
19 residence.

20 JUDGE READ: Does the lapse of time make a  
21 difference? I mean it would be a different case if  
22 he had left ten minutes before, fifteen minutes  
23 before?

24 MS. HEALY: I think it does in this case,  
25 because there was a second person in the residence

1           who was found sleeping on the couch. And because  
2           there was a second person in the residence who was  
3           found sleeping on the couch, that changes the  
4           difference in the time. But because this all  
5           happened so quickly - - -

6                    JUDGE PIGOTT: Why - - - why - - - why does  
7           that change anything?

8                    MS. HEALY: Because I think in this case  
9           there wasn't time to deposit the amount of things  
10          that would indicate that this is a drug factory on  
11          the counter.

12                   JUDGE PIGOTT: Let's assume - - - let's  
13          assume for a moment that Mr. Kims is seen in between  
14          the house and the car.

15                   MS. HEALY: Okay.

16                   JUDGE PIGOTT: All right, and they do  
17          nothing except pick him up the next day and arrest  
18          him and say, you know, you were found in close  
19          proximity to the room. It doesn't make any  
20          difference when they get him, does it?

21                   MS. HEALY: I believe it makes a difference  
22          when they get him because they've - - -

23                   JUDGE PIGOTT: Really? So - - - so if they  
24          arrested him the day after this, the room  
25          presumption's gone even though he was standing just

1 outside the room?

2 MS. HEALY: Well, there's a difference  
3 between arresting and apprehending.

4 JUDGE PIGOTT: I'm - - - I'm sorry, there's  
5 a what?

6 MS. HEALY: I think the difference here is  
7 that he was apprehended and he was detained leaving  
8 the residence. And then as soon as he was  
9 apprehended, within a couple of minutes, that's when  
10 the narcotics was found. So from the time he was  
11 apprehended - - -

12 JUDGE SMITH: Where - - - where in the  
13 statute does it say anything about having - - - about  
14 having recently left the area? I mean it's - - -  
15 it's a question of how near you are when the drugs  
16 are found.

17 MS. HEALY: Because I think that we have -  
18 - - we have evidence in this case that places him  
19 where the drugs were found. The testimony - - -

20 JUDGE PIGOTT: I'm sorry. We have evidence  
21 what?

22 MS. HEALY: In this case that places him  
23 where the drugs were found very close to when he was  
24 arrested and detained. And he was detained steps  
25 outside of his residence. He wasn't detained four



1 blocks down the street. He was arrest - - - he was  
2 detained steps outside.

3 JUDGE SMITH: Well, but isn't - - - but  
4 aren't you rewriting the statute to - - - to - - - to  
5 apply to somebody who has recently been in a - - - a  
6 - - - a - - - a room where the drugs were found?

7 MS. HEALY: Well, this court held in People  
8 v. Daniels that as he was leaving the apartment, and  
9 that was under constant surveillance by the police,  
10 and that that's where that applied. He wasn't in the  
11 room, and courts have held that you don't have to be  
12 in the immediate room where the drugs are found. And  
13 I would argue that this is the same type of scenario.

14 CHIEF JUDGE LIPPMAN: But you would argue  
15 that on the street in front of a building is  
16 sufficient - - -

17 MS. HEALY: I - - - I would - - -

18 CHIEF JUDGE LIPPMAN: - - - in a - - - in a  
19 car or whatever?

20 MS. HEALY: I would argue that as in  
21 Daniels, when officers are watching him leave and  
22 within a couple of minutes find drugs - - -

23 CHIEF JUDGE LIPPMAN: Doesn't matter  
24 whether he's outside the door or down on the street?

25 MS. HEALY: Well, in looking at the

1 legislative intent, the legislators were trying to  
2 keep people who were fleeing the scene or who were  
3 attempting to say that's not my drugs. And so anyone  
4 who - - -

5 CHIEF JUDGE LIPPMAN: What about in the  
6 pizza - - -

7 MS. HEALY: - - - was going into the closet  
8 or - - -

9 CHIEF JUDGE LIPPMAN: What about in the  
10 pizza man hypothetical? Are you talking about pizza  
11 man goes up, delivers the pizza, leaves the  
12 apartment, goes down to the same place where this  
13 defendant was arrested. Could the pizza man in that  
14 case - - - he's close enough, and you're adding a  
15 little issue that - - - that it's when he comes out  
16 and he's under surveillance. Say he's under  
17 surveillance the whole time. Pizza man could be  
18 caught in the net of drug factory presumption?

19 MS. HEALY: The pizza man doesn't have any  
20 proprietary interest in the residence. That's the  
21 difference here that's making a difference here.

22 JUDGE PIGOTT: Well, that's not - - -  
23 that's not a requirement of the statute is it, to  
24 have - - -

25 MS. HEALY: It's not a requirement of the

1 statute, but I think it's something that the courts  
2 should look at in determining whether or not it  
3 applies in this situation.

4 JUDGE PIGOTT: So - - - so you're saying if  
5 he did not have a proprietary interest - - - you  
6 know, it's the lease that gets him? It's not - - -  
7 that - - - that gets the presumption?

8 MS. HEALY: I - - -

9 JUDGE PIGOTT: It's nothing else?

10 MS. HEALY: I think it's all of the factors  
11 in totality.

12 JUDGE GRAFFEO: Well - - -

13 MS. HEALY: I think - - -

14 JUDGE GRAFFEO: - - - twice you've  
15 mentioned legislative intent. What is there in the  
16 legislative history that supports your position?  
17 Because looking at the State Commission on (sic)  
18 Investigation report that drafted this presumption,  
19 in their letter in the bill jacket, they don't refer  
20 to what you're talking about. They - - - they  
21 strictly mention the ability for the police to  
22 execute the warrant on the premises - - -

23 MS. HEALY: Well - - -

24 JUDGE GRAFFEO: - - - where the alleged  
25 drug factory is.

1 MS. HEALY: First of all - - -

2 JUDGE GRAFFEO: And for persons that are  
3 hidden in - - - I think they say closets, bathrooms,  
4 and other convenient recesses.

5 MS. HEALY: Right, and that's what I would  
6 argue the difference between - - - I - - - one - - -  
7 one of the judges asked me previously. When you're  
8 exiting and you - - - you close the door and you're  
9 outside standing, say, on the porch, how does that  
10 differentiate between when you're exiting and going  
11 into the bathroom as they talked about in the  
12 legislative intent? Or as you're exiting and hiding  
13 in a closet, how does one door make a difference  
14 between - - - between whether or not they're hiding  
15 and fleeing the police - - -

16 CHIEF JUDGE LIPPMAN: So what's the rule?  
17 What - - - what - - - how do we know when you're in  
18 close proximity so you have the presumption? What is  
19 it in the broadest - - - put aside your case exactly.  
20 What's the rule for other cases?

21 MS. HEALY: I think you have to determine  
22 it in a case-by-case fa - - - in a case-by-case  
23 fashion, which is how it has been determined thus  
24 far. And I think in People v. Daniels it  
25 demonstrates the rule that - - - that if they are - -

1 - if the police are watching the residence and they  
2 watch the defendant leave, that - - - and they  
3 apprehend him immediately, that that is considered  
4 close proximity.

5 CHIEF JUDGE LIPPMAN: Immediately means he  
6 could be around the corner?

7 MS. HEALY: I think you'd have to consider  
8 the time and the distance that it took to apprehend  
9 him.

10 JUDGE PIGOTT: Really? I mean if somebody  
11 - - - if - - - if a police says I saw him in the room  
12 - - - pardon me - - - or I saw him, in your example,  
13 in the bathroom, and they arrest him the next day,  
14 it's too late; the room presumption's gone?

15 MS. HEALY: I think it depends on where he  
16 was - - - no, I think it would still apply in that  
17 case if they saw him where the drugs were in plain  
18 view, then it would still apply there.

19 JUDGE SMITH: Who - - - who actually saw  
20 this defendant be near enough the drugs to see or  
21 touch them?

22 MS. HEALY: Robert Sawyer, there was  
23 testimony from him.

24 JUDGE SMITH: And - - - and only Mr.  
25 Sawyer, who's an accomplice?

1 MS. HEALY: He was an accomplice, yes.

2 JUDGE SMITH: And isn't that - - - is - - -  
3 isn't that a much difference case from the typical  
4 room presump - - - the - - - when you - - - the - - -  
5 the room presumption seems to be designed for a case  
6 where the police burst in and find people standing  
7 there. And then you have the police who can see with  
8 their eyes these people are really near the drugs.  
9 He - - - he - - - if you - - - when you - - - when  
10 you start to stretch the meaning of close proximity  
11 to get to the car outside, you find yourself relying  
12 on the word of a - - - of a drug addict accomplice  
13 that he was ever anywhere near the drugs.

14 MS. HEALY: I don't think you're only  
15 relying on - - - upon their word. I think you're  
16 relying upon all the information that the police had  
17 at this time. The police - - -

18 JUDGE SMITH: Oh, I'm sorry. What did you  
19 say?

20 MS. HEALY: All of the information that the  
21 police had at this time.

22 JUDGE SMITH: Well, they - - - they - - -  
23 look, there's no doubt there's a lot of evidence that  
24 this guy was involved in drug dealing. Are they - -  
25 - and - - - and are we allowed to consider all of it

1 to - - - to figure out whether he was in close  
2 proximity?

3 MS. HEALY: I think you can consider the  
4 knowledge that they knew at the time as to whether or  
5 not he was in close - - -

6 JUDGE SMITH: I mean if the police - - - if  
7 the police know he's guilty he's in close proximity?  
8 Is that what you're saying?

9 MS. HEALY: No, Your Honor. That's not  
10 what I'm saying at all.

11 JUDGE SMITH: All right.

12 CHIEF JUDGE LIPPMAN: Aren't all these  
13 surrounding circumstances that you're raising, aren't  
14 they kind of swallowing the rule, and in your words,  
15 the original legislative intent?

16 MS. HEALY: I think the legislative intent  
17 is to keep people from - - - who are operating drug  
18 factories from being able to hide from police when  
19 they come upon the scene.

20 CHIEF JUDGE LIPPMAN: Yeah, but isn't the  
21 more typical situation the one that Judge Smith just  
22 mentioned to you? That's what we would generally  
23 think is a drug factory presumption. These other  
24 things, it gets to the point where it has no nexus to  
25 the original rule, because it's so - - - you're so

1 widening the net, you know.

2 So that's why I asked you where do you draw  
3 the line? And you're saying well, you can't. It's  
4 case-by-case. We got to look at all these things.  
5 It makes it hard to have a rule that's so flexible  
6 that then the - - - the - - - the rule is no longer  
7 there but it's - - - we're making a new rule.

8 MS. HEALY: Well, I don't think it's so  
9 flexible. I think that he was apprehended feet away  
10 from - - - feet away from where the drugs were found.  
11 I think he was observed leaving the area. And - - -

12 JUDGE PIGOTT: Well, it struck me that you  
13 didn't need it. It seemed to me you had everything  
14 you could possibly want in terms of a - - - of a - -  
15 - of a drug conviction. And adding it may have added  
16 an arrow to the quiver of the defendant who's saying  
17 this is not what the room presumption is. Because  
18 you - - - I mean you did have - - - everything you've  
19 described was there.

20 MS. HEALY: Well, I'm not conceding that it  
21 was error. I do believe that there was close  
22 proximity. But in this case, I also believe that if  
23 - - - if you do consider that it was error, that  
24 there was harmless error based on the overwhelming  
25 evidence.



1                   JUDGE PIGOTT: Harmless error makes it  
2 tough, too. We can look at it, but if when you're  
3 labeling it on, it's hard to separate, you know, what  
4 - - - what did the jury do? Because the presumption,  
5 as you know, is, you know, the judge said they're his  
6 drugs because I'm telling you they're his drugs. You  
7 don't have to believe me, but that's what the  
8 presumption is.

9                   MS. HEALY: I believe in this case you can  
10 determine which way the - - - the jury relied upon,  
11 which theory, because they found him guilty of  
12 criminal possession of marijuana.

13                   CHIEF JUDGE LIPPMAN: So what about  
14 constructive possession based on all of that?

15                   MS. HEALY: Right, and I believe he did  
16 constructively possess it. And I believe it was  
17 overwhelming evidence that he did.

18                   CHIEF JUDGE LIPPMAN: But in - - - but in  
19 answer to Judge Pigott, though, why do you need the -  
20 - - the - - - this presumption in the drug factory?  
21 Do you have enough with constructive possession?

22                   MS. HEALY: Whether you have enough with  
23 con - - - I - - - I believe we do have enough with  
24 constructive possession.

25                   JUDGE SMITH: You - - - you're now arguing

1 - - -

2 MS. HEALY: But I'm saying if it was - - -

3 JUDGE SMITH: - - - harmless error?

4 MS. HEALY: - - - if it was improperly  
5 instructed, then it was harmless error.

6 CHIEF JUDGE LIPPMAN: So then it doesn't  
7 matter because you have him anyway?

8 MS. HEALY: No, I'm not saying that.

9 CHIEF JUDGE LIPPMAN: No, I - - - I - - -  
10 that's what you're arguing, right?

11 MS. HEALY: I - - - I'm arguing that it was  
12 harmless error.

13 CHIEF JUDGE LIPPMAN: Yes.

14 MS. HEALY: If - - - if you're saying that  
15 it was close proximity.

16 CHIEF JUDGE LIPPMAN: But it doesn't matter  
17 that the judge made a - - - a legal error?

18 JUDGE ABDUS-SALAAM: I - - -

19 MS. HEALY: I don't believe it was a legal  
20 error, because I think that he allowed the jury to  
21 determine whether or not it applied based upon his  
22 wording. He said if you find that the defendant was  
23 in close proximity and if you find that the drugs  
24 were in open view, then you may presume that the drug  
25 factor presumption applies.

1 CHIEF JUDGE LIPPMAN: Yeah, but assume - -  
2 -

3 MS. HEALY: So the way that he worded it -  
4 - -

5 CHIEF JUDGE LIPPMAN: - - - that was a  
6 mistake; you think you have a case here?

7 MS. HEALY: I believe you do, because you  
8 can determine - - - as in People v. Giordano this was  
9 a factual situation. The jury had to apply the facts  
10 to the law. And similar to Becoats - - -

11 JUDGE ABDUS-SALAAM: Isn't the presumption  
12 a legal theory, and if that presumption was im - - -  
13 improper legal theory, how can we tell which theory  
14 the - - - the jury actually convicted him on?

15 MS. HEALY: I think you can tell which  
16 theory he was convicted of because they found him  
17 guilty of criminal possession of marijuana. They  
18 clearly found that he constructively possessed the  
19 drugs because they found that the drugs - - -

20 JUDGE SMITH: Okay, but how do you mean - -  
21 -

22 MS. HEALY: - - - were hidden in the  
23 closet.

24 JUDGE SMITH: I mean how - - - but how - -  
25 - I mean they - - - it may well be that they - - -



1 know they didn't deliberate separately on the  
2 marijuana and the cocaine? They may have just - - -  
3 you know, maybe they start by saying the cocaine's  
4 easy; we've got the room presumption. Now let's talk  
5 about the marijuana?

6 MS. HEALY: Because I - - - I think that it  
7 shows that they relied upon the constructive  
8 possession. And again, I - - - I would say that it's  
9 harmless error because of the overwhelming nature of  
10 the evidence that was presented.

11 CHIEF JUDGE LIPPMAN: Okay, let's hear from  
12 your adversary.

13 Thanks, counselor.

14 MR. DAVISON: Good afternoon, Your Honors.  
15 I - - - I - - - I think it's pretty clear that the  
16 court has a - - - a good understanding of what the  
17 legislative intent is behind this statute. And - - -  
18 and - - - and that is that when the police are  
19 executing a warrant on a drug factory, if they get  
20 inside and everybody heads for the hills, everybody  
21 who was in there when they went in is presumed to  
22 have possession of any drugs that are found in plain  
23 view.

24 JUDGE PIGOTT: You think somebody - - -  
25 there - - - there has to be testimony from somebody

1           that the person was in the room?

2                       MR. DAVISON:  I don't think - - - I would  
3           argue that the person does have to be in the room  
4           under the language of the statute, but I don't think  
5           it matters in this case.  I think there is - - -  
6           there are a slew of cases that - - - that - - - that  
7           the - - - the People have cited that have to do with  
8           people in adjoining rooms.  But in those situations,  
9           you know, it's - - - it's possible that the people  
10          fled to the adjoining rooms when the police came in.  
11          Or perhaps like Mr. Alvarez, in his case he was the  
12          only person in the apartment, and when the police  
13          came he bailed out the window.  But this - - - this -  
14          - -

15                      JUDGE GRAFFEO:  So if the - - - if the  
16          police see someone walking out the door of an  
17          apartment and they apprehend that person in the  
18          hallway, does the presumption apply or not apply?

19                      MR. DAVISON:  It - - - it - - - perhaps if  
20          it - - - you know, if it's in conjunction with - - -  
21          with a raid.  But this - - - this was not.  This - -  
22          - this was a situation where the - - - the - - - the  
23          whole investigation was - - - there was - - - there  
24          was no warrant.  There was no probable cause to  
25          believe this was a drug factory.  You had four parole

1 officers outside concerned that this guy was living  
2 in a house where he was not supposed to be living,  
3 not an approved residence by the parole authorities.

4 JUDGE PIGOTT: But didn't - - - didn't they  
5 - - - weren't they more suspicious than simply not an  
6 approved residence?

7 MR. DAVISON: They were - - - they had  
8 suspicions. They had like a two-week-old tip that  
9 this was a stash - - - a stash house. And - - - and  
10 it - - - they - - - and - - - and it's - - - it's  
11 clear that the police and the parole officers were  
12 exchanging information about him all - - - all  
13 through this investigation. But the - - - the path  
14 that they chose to do the investigation was not to  
15 get a warrant but to use the authority of the parole  
16 officers to confront him and say do you live here or  
17 not, because - - -

18 JUDGE READ: So if they had a warrant and  
19 the same thing had happened, the same facts had  
20 developed - - - he'd walked out, two, three minutes  
21 later, they picked him up - - - it would be okay?

22 MR. DAVISON: I - - - that's a different  
23 case. And - - - and - - - and - - -

24 JUDGE READ: Presumption would apply in  
25 that case?

1 MR. DAVISON: Pardon?

2 JUDGE READ: The presumption would - - -  
3 would - - - would apply in that case?

4 MR. DAVISON: You know, I don't - - - I  
5 don't want to - - - to say that it would. I - - - I  
6 would leave that for another day. But - - - but I  
7 think it points to the difference between that case  
8 and this case, because they - - - they didn't have a  
9 warrant. They were just there to - - - to ask him  
10 questions.

11 JUDGE SMITH: And you're - - - you're - - -  
12 you're saying it'd be a different case if this was a  
13 raid and he just happened to anticipate the raid by  
14 walking out the door a minute before it happened?

15 MR. DAVISON: Then - - - then - - - that -  
16 - - that would be a very good question. And - - -  
17 and - - - and then maybe Daniels would apply. But I  
18 - - - I - - - it - - - on - - - with respect to  
19 Daniels, I - - - I think the district attorney is  
20 misreading what happened in Daniels. Daniels was the  
21 owner of the apartment, but he was - - - and they - -  
22 - the police watched him leave. But they - - - they  
23 - - - he was - - - he - - - he was quite a ways away  
24 at the time that the police went in. And there - - -  
25 there - - - the issue in Daniels was whether the



1 accomplice testimony could be corroborated by the  
2 drug factory presumption. And this court wrote with  
3 respect to two of the codefendants, Cooper and Evans,  
4 who were in the apartment when the raid took place,  
5 the presumption applied to them and it - - - it could  
6 corroborate the accomplice testimony. The - - - the  
7 court wasn't saying that with respect to Mr. Daniels.  
8 With respect to Mr. Daniels, it was like this case.  
9 It - - - it was what - - - as part of the - - -

10 JUDGE SMITH: So you're - - - you're saying  
11 the drug presumption wasn't applied to Daniels in the  
12 Daniels case?

13 MR. DAVISON: I - - - the - - - the - - -  
14 the issue in Daniels was could the drug presumption  
15 be used to corroborate accomplice testimony. And - -  
16 - and it applied with respect to two codefendants,  
17 Cooper and Evans, who were inside the - - - the - - -  
18 the premises, because they were in close proximity to  
19 the drugs. They - - - the court didn't say that it  
20 was applying to Mr. Daniels himself, even though he -  
21 - - he was the owner of the premises, he - - - or  
22 tenant. He - - - he had left.

23 But it - - - it - - - it points out the  
24 problem, I think, in this case that - - - that - - -  
25 that Mr. Daniels may have had a pretty good

1           constructive possession case.  If the apartment - - -  
2           if the lease on the apartment was in his name, it - -  
3           - there was - - - it - - - it was a constructive  
4           possession case.

5                        JUDGE RIVERA:  Well, where - - -

6                        MR. DAVISON:  There was no - - -

7                        JUDGE RIVERA:  - - - where was he?  Wasn't  
8           he right outside the apartment?

9                        MR. DAVISON:  I don't know if he was in the  
10          building or - - - or had left the building.  But he  
11          was - - - he was nearby the buil - - - the police had  
12          watched him leave the building.  But I don't recall  
13          exactly where he was when - - - when they apprehended  
14          him.

15                       JUDGE ABDUS-SALAAM:  Wasn't he in the car  
16          or trying to get out of the car?

17                       MR. DAVISON:  Oh, in - - - in Mr. Kims'  
18          case, yes.  He had - - - he had left the premises, he  
19          and - - - and Mr. Sawyer, who ended up testifying  
20          against him, had - - - had left the premises.  
21          They're - - - they're in his gray Chevy Suburban, I  
22          think it was.  And the parole officers pull up behind  
23          them, and they think it's a robbery.  Sawyer  
24          testifies at trial we thought it was a robbery.  And  
25          - - - and Mr. Kims put the SUV into reverse, realizes

1 he can't go anywhere, and when he does that, the  
2 parole officers take their guns out and show their  
3 badges.

4 JUDGE READ: So - - - so I'm - - - I'm we  
5 talked before what the rule was. I'm - - - what - -  
6 - what are the elements that you would say have to be  
7 - - - have to present in a case for there to be close  
8 proximity?

9 MR. DAVISON: The - - - the - - - it has to  
10 be - - - the - - - the - - - the person has to be  
11 found within the premises. That - - - that would be  
12 the - - - the bright-line rule that I think this  
13 court has - - - has proposed.

14 JUDGE SMITH: Does he have to be where he  
15 can see or touch the drugs?

16 MR. DAVISON: The - - - I would think - - -  
17 I would think so, but I don't think the court has to  
18 go that far in his case. I think - - -

19 JUDGE SMITH: It actually doesn't make much  
20 sense to apply it to someone if you don't have any  
21 confidence that he ever saw that the drugs were  
22 there.

23 MR. DAVISON: I - - - I - - - that's - - -  
24 that's true. And there are - - - there are cases out  
25 there where - - - where, you know, people ha - - -

1 well, like the pizza delivery guy, happened to be in  
2 the wrong place at the wrong time. And - - - and  
3 they get charged on the basis of the room  
4 presumption. And you have to sort it out later on.

5 JUDGE GRAFFEO: So how do you reconcile  
6 Alvarez? Because he was out the window, so he's not  
7 on the premises.

8 MR. DAVISON: They - - - I would argue as a  
9 - - - as - - - as a defense attorney that - - -

10 JUDGE GRAFFEO: Was that wrongly decided?

11 MR. DAVISON: Pardon?

12 JUDGE GRAFFEO: Are you going to say it's  
13 wrongly - - - that case was wrongly decided?

14 MR. DAVISON: I - - - I would - - - I would  
15 argue that it was, because he was not on the  
16 premises. But - - - but I don't think the court - -  
17 - this court has to say so, because - - -

18 JUDGE SMITH: You - - - you - - - you might  
19 be - - - we - - - we might be - - - you might be able  
20 to say if he's an immediate flight. I mean if he - -  
21 - if he - - - if he leaves the premises when he see  
22 them to get away from the police officers at the  
23 moment they - - - moment they enter, maybe that's  
24 within the presumption?

25 MR. DAVISON: That's - - - that's the

1 difference. The - - - that - - - that's - - - the -  
2 - - Mr. Alvarez's flight was prompted by the arrival  
3 of the police. It's - - - it's - - -

4 CHIEF JUDGE LIPPMAN: But this isn't that  
5 case?

6 MR. DAVISON: But this isn't that case.  
7 These two men had left the building well before - - -  
8 and - - -

9 CHIEF JUDGE LIPPMAN: What about the - - -  
10 what about the constructive possession?

11 MR. DAVISON: The - - - the - - -

12 CHIEF JUDGE LIPPMAN: I mean they found the  
13 pot in the - - - you know.

14 MR. DAVISON: Well - - -

15 CHIEF JUDGE LIPPMAN: Why wouldn't it apply  
16 to all the contraband?

17 MR. DAVISON: If - - - if - - - if this  
18 case had been tried as a straightforward constructive  
19 possession case, we wouldn't be here.

20 JUDGE SMITH: Why is - - - why is - - - the  
21 - - - the evidence of constructive possess - - -  
22 possession is - - - is - - - let's say, for the sake  
23 of argument, it's overwhelming. You agree it's  
24 pretty strong. Well, why isn't the error harmless?

25 MR. DAVISON: It - - - it's harmless (sic)

1 for exactly the reasons that this court outlined in  
2 Martinez. You - - - it's - - - it's wrong for an  
3 appellate court to try to go inside the minds of a  
4 jury and - - - and figure out why they - - - they  
5 ruled the way they did.

6 JUDGE SMITH: And I - - - I know - - - I  
7 grant you Martinez says that. But isn't that what we  
8 do in every harmless error case is try to fig - - - I  
9 mean in every case it's theoretically possible that  
10 the jury fastened - - - fast - - - fastened on some  
11 trivial little - - - little thing that was  
12 erroneously before it?

13 MR. DAVISON: The - - - not - - - not a  
14 harmless error in - - - in - - - in - - - I - - - I  
15 think as Judge Abdus-Salaam was getting at, when you  
16 - - - when the - - - the error is the court  
17 instructing the jury that there - - - that there can  
18 be this presumption. You know, that as a matter of  
19 law, you can, if you want, presume that - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but is it  
21 really speculative in this case to say that they  
22 would have delivered the same verdict as to, you  
23 know, the cocaine possession counts? Is that  
24 speculation in the particular facts of this case?

25 MR. DAVISON: I - - - I agree that it is

1 speculative, and that's why I think - - -

2 CHIEF JUDGE LIPPMAN: Even with the  
3 marijuana?

4 MR. DAVISON: The - - - the - - - even with  
5 the marijuana. The - - - the - - - the - - -  
6 - the marijuana was a - - - was a - - - a different  
7 situation. It was - - - it was found in a closet.  
8 There was - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but that's the  
10 point.

11 MR. DAVISON: And - - -

12 CHIEF JUDGE LIPPMAN: They found that in  
13 the closet, and there's constructive possession.

14 MR. DAVISON: Um-hum.

15 CHIEF JUDGE LIPPMAN: So what about this  
16 stuff that's all over the place?

17 MR. DAVISON: The - - - the - - - I - - - I  
18 think - - - I - - - as - - - as I said, I think the -  
19 - - the problem is that the - - - the - - - the error  
20 was in an instruction from the court. It's a - - -  
21 the court's responsibility to instruct the jury on  
22 the law. And it - - - and then it's the jury's  
23 responsibility to find the facts based on those  
24 instructions.

25 JUDGE SMITH: But - - - but you're not

1           saying that - - - that no error in instruction can  
2           ever be harmless?

3                       MR. DAVISON:  The - - - I mean - - - the -  
4           - - I - - - I - - - what I'm saying is that this  
5           particular error in instructing as to a presumption,  
6           is - - - is - - - is not harmless.  The - - - the - -  
7           - I - - - you know, there are - - - I mean clearly  
8           there are cases where instructions on - - - have been  
9           held to be harmless error.  I'm thinking of  
10          circumstantial evidence cases that usually - - - they  
11          - - - almost - - - this court has said almost always  
12          if - - - if circumstantial evidence instruction is  
13          requested and not given, it's error.  But there can  
14          be situations where it's harmless error.  I - - - and  
15          - - - and I think in this situation, because the  
16          instruction has to do with a presumption, I don't  
17          think it can be harmless.

18                      JUDGE PIGOTT:  Well, presumptions - - -  
19          presumptions are pretty powerful.  I mean you got the  
20          court saying that you can do this.  You can presume  
21          that these drugs belong to this defendant.  Now the  
22          defendant, of course, need not testify, in most cases  
23          won't.  And - - - and he or she could be sitting  
24          there staring at a presumption that is improperly  
25          given for which there's very little to say, because



1           they can't - - - they can't take the stand for one  
2           reason or another. In this case, you know, maybe  
3           they didn't want to take the stand over the  
4           marijuana. But now is stuck with the presumption  
5           that need not have been given with respect to these  
6           drugs because he wasn't in the room.

7                         MR. DAVISON: That's correct. And it - - -  
8           it does, in effect, shift the burden of him to come  
9           for - - - to come forward with - - - with proof to  
10          rebut the presumption. So the - - - the - - - and I  
11          think when you get right down to it, the - - - the -  
12          - - as Judge Read was asking what the - - - what the  
13          rules should be, the - - - you know, the - - - the -  
14          - - the legislative intent envisions a raid. It  
15          envisions the police coming there to - - - to execute  
16          a warrant or - - - or - - - or - - - or to find  
17          drugs.

18                         And in this - - - this situation, they - -  
19          - they turn it on its head. They - - - they came  
20          there to ask him questions. They - - - they arrest  
21          him in the driveway. He's handcuffed. He's secured.  
22          He's not going back into the house. And they - - -  
23          they - - - they - - - they do this protective sweep.  
24          They find the drugs inside. They go; they get their  
25          warrant and seize the drugs. And say aha, now we've

1           stuck you with this room presumption. The - - - it's  
2           - - - it - - - it turns the whole process on its head  
3           to - - - to - - - to use evidence that they found  
4           later on to say that you can be presumed to possess  
5           it because we want you to.

6                         And that - - - that kind of leads to the  
7           other points that I had in the brief, the - - - the  
8           point about the - - - the protective sweep. I think  
9           it would be - - - a - - - a stretch for this court to  
10          say that the protective sweep in this case was proper  
11          because there was never any evidence of weapons. No  
12          - - -

13                        JUDGE SMITH: But you - - - could you talk  
14          very briefly about the Molineux issues?

15                        MR. DAVISON: The Molineux, I - - - I think  
16          the Molineux violations are so egregious that under  
17          this court's decision in Marano (ph.), that would be  
18          enough to send the case back for a new trial by  
19          itself, the - - - the evidence of gang membership.

20                        JUDGE SMITH: But you - - - you - - - the  
21          gang - - - the gang membership is - - - is the worst?

22                        MR. DAVISON: Exactly, they - - - no one  
23          has ever - - -

24                        JUDGE SMITH: Do you admit they're entitled  
25          to put in - - - when - - - when the issue is

1 constructive possession, they're entitled to put in  
2 quite a lot about his life as a drug dealer?

3 MR. DAVISON: But not - - - not what they -  
4 - - they were able to put in. They - - - the - - -  
5 this - - - the - - - the judge in the suppression  
6 rule - - - ruling basically allowed them to try to  
7 port - - - portray Mr. Kims as the CEO of a - - - of  
8 - - - of a - - - of a big drug conspiracy.

9 JUDGE SMITH: Wouldn't - - - wouldn't that  
10 be relevant to whether he had constructive  
11 possession? If he was - - - if he was at that moment  
12 the CEO and - - - and all these other people, his - -  
13 - the - - - the alleged accomplices, were his  
14 assistants, wouldn't that be very powerful evidence  
15 of constructive possession of these drugs?

16 MR. DAVISON: It - - - it - - - it would be  
17 - - - it would be probative, but the - - - the  
18 problem is it's - - - it doesn't outweigh the  
19 prejudice, because what you're doing is inviting the  
20 jury to convict him as - - - because he had - - - was  
21 a drug dealer at some time in the past. So he must  
22 have possessed these drugs because - - -

23 JUDGE ABDUS-SALAAM: Tell us why the gang  
24 membership is the worst.

25 MR. DAVISON: I'm sorry?



1 MS. HEALY: The gang membership, I believe,  
2 was properly included to - - - to show the connection  
3 between the different codefendants and the different  
4 test - - - the people who were testifying, Andre  
5 Tillman, Robert Sawyer.

6 CHIEF JUDGE LIPPMAN: You don't think that  
7 prejudicial?

8 MS. HEALY: I believe that it was necessary  
9 and it may have come out on cross-examination. And I  
10 believe that it was - - - it - - - it - - - the  
11 probative value outweighed the prejudicial - - -

12 JUDGE SMITH: Explain - - - explain how his  
13 being a Crip is relevant to any issue in the case?

14 MS. HEALY: I think it showed his  
15 connection to the other people who were testifying,  
16 and I believe it shows his - - - it shows his - - -  
17 his role within the community and his ability to - -  
18 - to - - -

19 JUDGE SMITH: His role in the community  
20 sounds a lot like propensity to me.

21 MS. HEALY: I don't think it was admitted  
22 to show propensity. I believe it was admitted to  
23 show his connection to the other members that were  
24 testifying against him. And I believe he - - -

25 JUDGE SMITH: Just to - - - to - - - we - -

1 - the jury couldn't have figured out that he knew  
2 them unless they knew he was in the Cri - - - that he  
3 - - - he was a Crip?

4 MS. HEALY: I believe it shows hi - - -  
5 their connection as - - - as people who were working  
6 underneath him, and that's - - - that was what made  
7 it relevant. There were people that were working  
8 underneath him, and they were connected to him  
9 because he was the - - - the top of this pyramid of  
10 this organization. And the people who - - - the  
11 other people who testified were kind of underneath  
12 him, and that's what made it relevant and connected  
13 it to the testimony. And I believe that the lower  
14 court did weigh the probative value versus the  
15 prejudice and that they were - - -

16 JUDGE ABDUS-SALAAM: They couldn't have  
17 been working under him without being gang members or  
18 his being a gang member?

19 MS. HEALY: They could have been working  
20 underneath him, but it just shows their connection.  
21 And it shows their relationship to each other and  
22 their relationship to him, and his ability to make  
23 the calls and call the shots and how everyone related  
24 to one another within this case.

25 CHIEF JUDGE LIPPMAN: Okay, thanks,

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

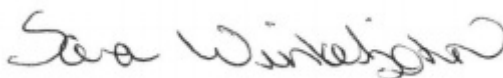
counsel. Thank you both.

(Court is adjourned)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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. Stanley R. Kims, II, No. 155 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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

Agency Name: eScribers

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

Date: September 15, 2014