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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 204

HECTOR SANTIAGO,

Appellant.

20 Eagle Street
Albany, New York 12207
October 17, 2013

Before:

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

Appearances:

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1 CHIEF JUDGE LIPPMAN: 204, People v.
2 Santiago.

3 Counsel, do you want any rebuttal time?

4 MS. KORNFEIND: Yes, two minutes, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead.

8 MS. KORNFEIND: Svetlana Kornfeind for
9 appellant, Hector Santiago.

10 Your Honors, the evidence that Mr. Santiago
11 knowingly possessed the cocaine in the - - - in the
12 hidden trap in the car was entirely circumstantial,
13 and - - -

14 CHIEF JUDGE LIPPMAN: Well, it's - - -

15 MS. KORNFEIND: - - - because it was in - -
16 -

17 CHIEF JUDGE LIPPMAN: - - - it's based on
18 the automobile presumption, right?

19 MS. KORNFEIND: Yes.

20 CHIEF JUDGE LIPPMAN: So was that direct -
21 - -

22 MS. KORNFEIND: The Court - - -

23 CHIEF JUDGE LIPPMAN: What's the automobile
24 presumption? Is that direct evidence? Is that --
25 what is it?

1 MS. KORNFELD: No, the automobile
2 presumption is an inferential tool. It was enacted
3 by the legislature to - - - to give the - - -

4 CHIEF JUDGE LIPPMAN: So if it's
5 inferential, you automatically get the circumstantial
6 evidence charge?

7 MS. KORNFELD: Well - - -

8 JUDGE GRAFFEO: Do you have any burden to
9 produce any evidence or any proof - - -

10 MS. KORNFELD: No, there - - -

11 JUDGE GRAFFEO: - - - to overcome that
12 inference?

13 MS. KORNFELD: No - - - no, the inference
14 was enacted to give the People a prosecutable case,
15 to allow them to establish a prima facie case. The
16 inference is based - - - all they have to prove
17 directly is that the defendant was in the car and
18 that the contraband was in the car. And then the
19 jury is charged that a - - - that there is a
20 permissible inference of guilt. So by definition,
21 this is a wholly circumstantial - - -

22 CHIEF JUDGE LIPPMAN: So in every case like
23 this you get the charge?

24 MS. KORNFELD: Yes, and I'd like to - - -

25 CHIEF JUDGE LIPPMAN: And I guess - - -

1 MS. KORNFEIND: - - - explain why.

2 CHIEF JUDGE LIPPMAN: - - - my question is

3 - - -

4 JUDGE GRAFFEO: It's automatic - - -

5 CHIEF JUDGE LIPPMAN: - - - where - - -

6 JUDGE GRAFFEO: - - - that's the rule

7 you're looking for?

8 MS. KORNFEIND: I would like to explain

9 why. Yes - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but let me - - -

11 -

12 MS. KORNFEIND: - - - that is the rule.

13 CHIEF JUDGE LIPPMAN: - - - let me go what

14 I'm driving at. Assuming that's the case, that you

15 get it because it's an inference and you get the

16 charge, do we tilt the tables here so in favor of the

17 - - - the defendant that really, you know, the

18 prosecutor - - - the prosecutor can't eliminate any

19 hypotheses?

20 MS. KORNFEIND: But - - - no, I - - -

21 CHIEF JUDGE LIPPMAN: Does it keep the

22 balance that was intended under the statutory scheme?

23 MS. KORNFEIND: Right, no, I understand

24 your concern. It does not undermine the value of the

25 automobile presumption.

1 CHIEF JUDGE LIPPMAN: Tell us why.

2 MS. KORNFELD: Yes.

3 CHIEF JUDGE LIPPMAN: That's what interests
4 me, yeah.

5 MS. KORNFELD: Okay. Because the - - -
6 with - - - it permits the People to prosecute what
7 was heretofore, before then, an unprosecutable case,
8 right? It gives them this permissive inference; they
9 can take it to the jury. Once it goes to the jury,
10 you know, then it's a permissive inference of guilt.
11 But there are - - - there may be other inferences,
12 and there probably are, because direct facts give
13 rise to multiple inferences. And this court has
14 recognized in - - - from decade and decade in many,
15 many cases that the - - - the process involved in
16 analyzing and weighing these inferences arising from
17 direct facts is very complex. And in fact, choosing
18 among competing inferences is also a very complex
19 process. And it's for this reason that the court has
20 long required this charge. And this charge, as
21 stated in Sanchez with the exclusion language, tells
22 the jury that - - - that they can convict if they
23 find a perm - - - an inference of guilt, which they
24 will find if they draw the automobile presumption.
25 That inference of guilt must flow reasonably and

1 fairly from the evidence, and - - - and the evidence
2 must exclude, beyond a reasonable doubt, every
3 reasonable hypothesis of innocence.

4 CHIEF JUDGE LIPPMAN: So this is the right
5 balance in your - - -

6 MS. KORNFEIND: It is the right balance,
7 because if you take Mr. Santiago's case, there is a
8 reasonable hypothesis consistent with innocence.
9 He's a passenger in the car. There is no evidence
10 connecting him to the car - - -

11 CHIEF JUDGE LIPPMAN: Sealed under this - -
12 -

13 MS. KORNFEIND: - - - to the driver.

14 CHIEF JUDGE LIPPMAN: - - - this thing,
15 yeah.

16 MS. KORNFEIND: It's a sophisticated,
17 electronic trap that's purposely designed - - -

18 JUDGE SMITH: Well, you're - - -

19 MS. KORNFEIND: - - - to conceal the contra
20 - - -

21 JUDGE SMITH: - - - you're not asking us to
22 decide that there's a reasonable inference consistent
23 with innocence; you want us to say that the jury
24 could have found one.

25 MS. KORNFEIND: Exactly. What I'm saying

1 is that the error wasn't harmless because there was a
2 significant probability that the jury would have
3 found one. And - - -

4 JUDGE GRAFFEO: But the difficulty I'm
5 having is your previous statement that it should be
6 automatic. Maybe in this case, because the drugs are
7 hidden in a trap, he might not be aware that it's
8 there. I could see where you're asking for the
9 circumstantial evidence. But say there's three
10 people in a car and the drugs are found on the back
11 seat, you know, something that it's - - - that it's a
12 bit more obvious that the occupants of the car were -
13 - -

14 MS. KORNFELD: Right.

15 JUDGE GRAFFEO: - - - aware of the presence
16 of the drugs.

17 MS. KORNFELD: Right.

18 JUDGE GRAFFEO: Is it still automatic then
19 - - -

20 MS. KORNFELD: Right.

21 JUDGE GRAFFEO: - - - that we have - - -

22 MS. KORNFELD: Let's say that - - -

23 JUDGE GRAFFEO: - - - the charge?

24 MS. KORNFELD: - - - the drugs were on the
25 seat next to Mr. Santiago, okay, in that type of case

1 - - - or even take our co-defendant, who was the
2 driver and owner of the car - - - and there the jury
3 is given the charge, and they're told that they have
4 to exclude every reasonable hypothesis consistent
5 with innocence.

6 JUDGE SMITH: You say still - - -

7 MS. KORNFELD: But there isn't - - -

8 JUDGE SMITH: - - - even under those facts,
9 he's still entitled to the circumstantial evidence
10 charge?

11 MS. KORNFELD: Absolutely, just as in the
12 Brian case - - -

13 JUDGE SMITH: There would come a point, I
14 suppose, where its absence might be harmless?

15 MS. KORNFELD: Of course. I mean, if you
16 take - - - if there are drugs in a bag right next to
17 the defendant, there is not going to be a reasonable
18 hypothesis consistent with innocence, and if the jury
19 can eliminate it. What the charge does is in the
20 cases like Mr. Santiago's, where the defendant should
21 not have been convicted, those will be filtered out.
22 In the cases where - - - where the jury can exclude a
23 reasonable hypothesis of innocence, the defendant
24 will be convicted. I mean, the automobile
25 presumption was never intended to guarantee

1 convictions for the prosecution, and it shouldn't be,
2 and then it would - - -

3 JUDGE SMITH: What do you - - -

4 MS. KORNFELD: - - - have the effect of -
5 - -

6 JUDGE SMITH: What do you do with the cases
7 that say that he's not entitled to the charge if - -
8 - if the People's case wasn't wholly circumstantial?
9 Because they say it wasn't wholly circumstantial
10 because he stipulated that the cocaine was cocaine.

11 MS. KORNFELD: Right, but - - - but what
12 they're saying - - - if what they're saying were the
13 rule, rarely - - - very, very rarely - - - would any
14 case - - - because there's always going to be direct
15 evidence that a crime was committed - - -

16 JUDGE SMITH: So you're really saying that
17 when we - - - we have cases that say it has to be
18 wholly circumstantial. You're saying those cases
19 don't really mean what they say?

20 MS. KORNFELD: No, I'm - - - I'm saying
21 they do mean what they say. In all of these cases -
22 - -

23 JUDGE SMITH: They don't say what it sounds
24 like they say?

25 MS. KORNFELD: - - - in Cleague, in

1 Sanchez, in Ford, in Benzinger, in all of those
2 cases, there was direct evidence that a crime had
3 been committed. What was at issue was the
4 defendant's culpability in committing that crime, and
5 that's what - - - when we - - -

6 JUDGE SMITH: You mean the defendant's
7 state of mind?

8 MS. KORNFELD: No, the - - - the conduct
9 and the state of mind. In a case like - - -

10 JUDGE SMITH: But I guess - - - I guess
11 what I'm suggesting is that it does look to me like
12 in most of the cases where you say where the only
13 thing you need an inference for is to figure out
14 what's in the defendant's mind, then you don't have
15 to give this - - -

16 MS. KORNFELD: No, then you don't - - -
17 then you don't.

18 JUDGE SMITH: Um-hum.

19 MS. KORNFELD: But in the - - - in a case
20 that - - - that relies wholly on the automobile
21 presumption - - - and I'm setting aside now
22 constructive possession - - - in wholly the
23 automobile presumption, that is, by definition,
24 wholly inferential. It's knowing possession.

25 JUDGE SMITH: Well, a presum - - - a

1 permissive presumption is an inference by definition,
2 isn't it?

3 MS. KORNFELD: By definition, yes. And -
4 - - and because it is a case - - - it is a case - - -

5 JUDGE ABDUS-SALAAM: Counsel, would that be
6 true if there were no passenger in the car in the
7 front seat but just in the back seat, and the driver,
8 and the driver was being charged with the drugs?

9 MS. KORNFELD: Again, if you're referring
10 to our case - - - I mean, in our case there was a man
11 who got into the back seat who was being - - -

12 JUDGE ABDUS-SALAAM: No, no, no, I'm saying
13 eliminate - - -

14 MS. KORNFELD: Just in general?

15 JUDGE ABDUS-SALAAM: - - - eliminate the
16 passenger, Mr. Santiago - - -

17 MS. KORNFELD: Right.

18 JUDGE ABDUS-SALAAM: - - - in the front
19 seat, who's sitting over top of the drugs, and let's
20 say there was either no passenger in the car - - -

21 MS. KORNFELD: Just the driver.

22 JUDGE ABDUS-SALAAM: - - - just the driver,
23 who owns the car, too, and would presumably know - -
24 -

25 MS. KORNFELD: Well, I think in that case

1 - - -

2 JUDGE ABDUS-SALAAM: - - - about the trap.

3 MS. KORNFELD: - - - and taking our case,
4 with regard to the driver, I think the jury could
5 easily have excluded a reasonable hypothesis of
6 innocence for the same reason that this court said -

7 - -

8 JUDGE SMITH: Are you saying - - -

9 MS. KORNFELD: - - - in Brian - - -

10 JUDGE SMITH: Are you saying that case, the
11 driver - - - the hypothetical case where the driver
12 is the only guy in the car, are you saying he's not
13 entitled to the charge or are you saying the absence
14 of the charge would be harmless?

15 MS. KORNFELD: No, I'm saying that every
16 defendant who's convicted under the automobile
17 presumption when it's charged - - -

18 JUDGE SMITH: So you say - - -

19 MS. KORNFELD: - - - must get the charge.

20 JUDGE SMITH: - - - he is entitled to the
21 charge, but his absence might be harmless if the case
22 were strong enough.

23 MS. KORNFELD: Yes. Yes. I mean, and
24 that's up to the jury. And as I said, it won't, in
25 any way, undermine the value of the automobile

1 presumption because all it's going to do is screen
2 out cases - - -

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 Thanks. You'll have rebuttal time. Let's hear from
5 your adversary.

6 Counsel?

7 MS. FISCH COHEN: Good afternoon. Beth
8 Fisch Cohen for respondent.

9 CHIEF JUDGE LIPPMAN: Counsel, why isn't
10 the automobile presumption just obviously - - - by
11 nature it's an inference. Why shouldn't you be
12 entitled to the charge? Why doesn't it make sense in
13 the automobile presumption, and again, there may be
14 times that it's, you know, harmless in the end.
15 What's the policy reason why it makes sense?

16 MS. FISCH COHEN: Because when you have a
17 presumption, both the legislature and this court has
18 already determined that there was a reasonably high
19 degree of probability that the fact - - - that the
20 inference flows from the fact. This court said in
21 Leyva - - -

22 JUDGE SMITH: Well, if there weren't a
23 reasonably high degree of probability, you wouldn't
24 let the jury draw the inference at all. But
25 shouldn't you warn the jury that it's got to be

1 careful about drawing that inference?

2 MS. FISCH COHEN: But the reason for a
3 circumstantial evidence charge is to protect against
4 low-grade and unwarranted inferences. Since this
5 court has already determined that this is not a
6 low-grade inference - - - this court said we do not
7 believe people transporting dealership quantities of
8 drugs drive around with innocent friends or pick up
9 strangers.

10 JUDGE SMITH: So you're saying that the
11 circumstantial evidence charge only applies where
12 it's you call - - - what you would call a low-grade
13 inference?

14 MS. FISCH COHEN: That's the rationale for
15 the circumstantial evidence.

16 JUDGE SMITH: But I mean, I would think we
17 wouldn't let a low-grade inference go to the jury
18 anyway. I mean, if a jury couldn't reasonably find
19 something beyond a reasonable doubt, then you've got
20 more problems than the charge.

21 MS. FISCH COHEN: It's not only because of
22 a low-grade inference; the other concern is inference
23 upon inference. Here the inference goes to the
24 defendant's operation of mind. And this court has
25 repeatedly stated that mens rea is usually proved

1 circumstantially.

2 JUDGE PIGOTT: How does the defendant
3 overcome that inference?

4 MS. FISCH COHEN: He doesn't have to put on
5 any proof under the presumption. They tell the jury
6 you're free to reject the presumption - - -

7 JUDGE PIGOTT: How - - -

8 MS. FISCH COHEN: - - - if you want.

9 JUDGE PIGOTT: How does he overcome that
10 presumption?

11 MS. FISCH COHEN: He - - -

12 JUDGE PIGOTT: Can you give me an example
13 where - - - where - - -

14 MS. FISCH COHEN: A defendant can testify
15 or - - -

16 JUDGE PIGOTT: That's what I thought you'd
17 say. So if you've got somebody who - - - you know,
18 who's already a predicate felon, or has a rather
19 sketchy background, and he says if I get up there,
20 they're just going to say isn't it true that you've
21 been busted for marijuana six times, and I can't
22 disprove it is obviously the case, which is I asked
23 for a ride downtown, the guy said hop in, and I can't
24 say anything about that because I'm going to get
25 murdered on direct.

1 MS. FISCH COHEN: But there are ways that a
2 defense counsel can get facts out and can - - - that
3 would help the case, not - - - it's not only if the
4 defendant testifies. There might be evidence. Let's
5 say there was surveillance ahead of time and they
6 actually saw that this car had picked someone up. I
7 mean, they were watching this car for more than
8 thirty minutes beforehand.

9 JUDGE PIGOTT: I appreciate that. What I'm
10 saying is that - - - that there are cases where even
11 though there is the presumption that the
12 circumstantial evidence charge can apply, would you
13 agree? You're not saying under no circumstance can
14 you get a circumstantial evidence charge in an
15 automobile presumption case?

16 MS. FISCH COHEN: We're actually saying
17 that there's a natural tension between the
18 circumstantial evidence charge and between a
19 presumption - - -

20 JUDGE PIGOTT: So you're saying - - -

21 MS. FISCH COHEN: - - - because - - -

22 JUDGE PIGOTT: You're saying never, and
23 your opponent is saying always.

24 MS. FISCH COHEN: That's correct.

25 JUDGE PIGOTT: Is there a middle ground?

1 MS. FISCH COHEN: There may be a middle
2 ground based on a case, but we think that any time
3 you have the presumption, you should not need a
4 circumstantial evidence charge.

5 CHIEF JUDGE LIPPMAN: Does it matter in
6 this case that you have this deadbolt, you know, over
7 it, that it's a sort of unusual thing; it's a
8 sophisticated thing that's not easily, you know,
9 ascertainable that it's there?

10 MS. FISCH COHEN: Well - - -

11 CHIEF JUDGE LIPPMAN: Does that fact
12 pattern mean anything?

13 MS. FISCH COHEN: - - - it is a fact that -
14 - - that is relevant, of course. But it also goes to
15 the fact that this was a trap and an operation and it
16 sort of also bolsters the fact that they're not
17 likely to be driving around with innocent passengers
18 - - -

19 CHIEF JUDGE LIPPMAN: Because it's
20 sophisticated works against the defendant, in your -
21 - - from your perspective?

22 MS. FISCH COHEN: Yes, but also, this court
23 - - - first of all, there is direct testimony, well
24 beyond the fact that there - - - the weight of the
25 drugs. The People proved, by direct evidence, the

1 defendant's identity, his presence in the car, and
2 his immediate proximity to the kilogram of cocaine
3 that was found - - -

4 JUDGE SMITH: You're making the wholly
5 circumstantial argument?

6 MS. FISCH COHEN: Yes, this is not a wholly
7 - - -

8 JUDGE SMITH: Did Jus - - -

9 MS. FISCH COHEN: - - - circumstan - - -

10 JUDGE SMITH: Did Justice McLaughlin make -
11 - - decide on that ground?

12 MS. FISCH COHEN: Yes, they were - - -

13 JUDGE SMITH: What did he say - - -

14 MS. FISCH COHEN: The jury was charged on
15 both - - -

16 JUDGE SMITH: No, no, no, in deciding not
17 to give the charge, what was Justice McLaughlin's
18 rationale?

19 MS. FISCH COHEN: Justice McLaughlin said
20 that it - - - that in a - - - he sort of said that in
21 a presumption case it is wholly - - -

22 JUDGE SMITH: Okay.

23 MS. FISCH COHEN: - - - that the mens rea
24 is circumstantial.

25 JUDGE SMITH: Yeah, aren't you - - - I

1 guess what I'm saying is under LaFontaine aren't you
2 limited to what he said? Can you make the wholly
3 circumstantial argument without violating LaFontaine?

4 MS. FISCH COHEN: We - - - yes, we
5 presented the direct evidence, and the court's ruling
6 was not entirely clear what he was saying, but since
7 he presented both theories - - - he did present the
8 theory of the - - - of constructive possession. He
9 wasn't convicted only of that. And he found that the
10 - - - that circumstantial evidence charge wasn't
11 required for the constructive possession either,
12 which also goes to refute the defendant's suggestion
13 this would be an unprosecutable case without the
14 presumption. All the presumption does is authorize
15 the argument that a jury is already entitled to make,
16 that they're already entitled to draw. And here the
17 evidence pointed only to that conclusion. There was
18 - - -

19 JUDGE SMITH: I'm still not clear what
20 you're doing about LaFontaine. I don't see the
21 wholly circumstantial theory in the trial court's
22 decision.

23 MS. FISCH COHEN: I - - - I - - - it is a
24 little bit hard to ascertain exactly what the judge
25 said. I mean, if you - - -

1 JUDGE SMITH: So you're basically saying
2 where it's ambiguous, read it broadly and then avoid
3 LaFontaine problems?

4 MS. FISCH COHEN: Yes. But I do also think
5 the fact that he was convicted under both theories is
6 important to consider on that issue.

7 If you look at the facts of Daddona, that's
8 another case - - - you asked about the fact that it
9 was a deadbolt here. In Daddona, this - - - the
10 defendant was convicted of unlicensed vehicle
11 dismantling. It was like a chop shop case, and the
12 defendant directed cars in and out of a driveway.
13 This court found that they did not need a
14 circumstantial evidence case - - - excuse me, a
15 circumstantial evidence charge. The direct evidence
16 of the directing in and out went to the element that
17 he was acquiring motor vehicles. But the jury still
18 needed to presume that cars were actually being
19 disassembled in this garage where the defendant
20 wasn't standing; he was in the - - - in the driveway.
21 And they also needed to infer that the defendant's
22 intent was to disassemble the cars. All of that was
23 necessary to convict him of the charge. But this
24 case found that, based on the direct evidence, they
25 did not need the circumstantial evidence charge. The

1 reason why I think that's relevant is that it goes
2 not only to the defendant's operation of mind, which
3 clearly this court has said you don't need a
4 circumstantial evidence charge when it only goes to
5 the mens rea, but also those were underlying facts
6 that they needed to presume.

7 JUDGE RIVERA: Your direct evidence comes
8 from the defendant?

9 MS. FISCH COHEN: In this case?

10 JUDGE RIVERA: Yeah.

11 MS. FISCH COHEN: The direct evidence is
12 that he was present, he had - - - we - - - that he
13 had the dominion and control over the area in which
14 the drugs were found. His feet were on top of the
15 trap which contained a kilogram of cocaine.

16 JUDGE RIVERA: But that's how you sit in a
17 car.

18 MS. FISCH COHEN: But that's where he was
19 seated. I mean, there are other spaces - - -

20 JUDGE SMITH: I mean, is it not an
21 inference from those facts that you're asking people
22 to draw that he was in possession of the drugs?

23 MS. FISCH COHEN: Yes, to prove beyond a
24 reasonable doubt, there would have to be an inference
25 of knowing possession, but that's - - -

1 JUDGE SMITH: And is inference the mark of
2 circumstantial test - - - of circumstantial evidence?

3 JUDGE RIVERA: How is it direct?

4 MS. FISCH COHEN: Yes, but not every
5 inference requires a specially crafted jury
6 instruction.

7 JUDGE RIVERA: No, but you said - - - I'm
8 trying to get to the point of the direct evidence.
9 I'm just trying to understand, from your perspective,
10 your argument of what's the direct evidence.

11 MS. FISCH COHEN: Our - - - our point is
12 that dominion and control, in this particular case,
13 was partly supported by direct evidence and partly by
14 the inference. That inference was covered by - - -

15 JUDGE SMITH: I had thought, originally,
16 that maybe that you were relying for direct evidence
17 on the stipulation that the cocaine is cocaine.

18 MS. FISCH COHEN: We - - -

19 JUDGE SMITH: You say that doesn't - - -

20 MS. FISCH COHEN: That - - - that alone
21 would not do it. We were - - -

22 JUDGE SMITH: So you do not suggest we take
23 literally the cases that say if any element is proved
24 by direct evidence you don't need the charge.

25 MS. FISCH COHEN: No, we take from the

1 court's law that the elements have to connect the
2 defendant to the crime. We are not saying that in
3 the abstract, any element. The reason we mentioned
4 the nature of the drugs and the weight of the drugs
5 was to show how many elements were satisfied by
6 direct proof. But we don't think, based on all the
7 case law, that an element standing alone, that
8 doesn't connect the defendant to the crime, would be
9 enough to avoid a circumstantial evidence charge.

10 JUDGE READ: So you rely - - - as direct
11 evidence, you rely on where he's sitting?

12 MS. FISCH COHEN: In part.

13 JUDGE READ: In part. And the rest of it
14 is the weight of the drugs?

15 MS. FISCH COHEN: The defendant's identity,
16 which is often an issue in a circumstantial evidence
17 case - - -

18 JUDGE PIGOTT: Did he concede - - -

19 MS. FISCH COHEN: - - - is not prejudiced.

20 JUDGE PIGOTT: - - - all that - - - can he
21 - - - I said, right, there's drugs, yes, I was
22 sitting in the passenger seat, it was me, but I had
23 no idea that there was any drugs there.

24 MS. FISCH COHEN: I'm sorry?

25 JUDGE PIGOTT: I had no idea there was any

1 drugs there. You told us.

2 MS. FISCH COHEN: If a defendant said that

3 - - -

4 JUDGE PIGOTT: Yeah.

5 MS. FISCH COHEN: - - - that would - - -

6 that would be a different circumstance in that - - -

7 JUDGE PIGOTT: But you don't like my rogue
8 defendant who says I can't go down there and testify
9 because they're going to slice me up.

10 MS. FISCH COHEN: Right, but I'm saying
11 that's not the only way that a defendant can put
12 another argument in front of a jury. There are lots
13 of - - - there are lots of defense theories presented
14 - - -

15 JUDGE PIGOTT: But - - -

16 MS. FISCH COHEN: - - - through a counselor
17 summation and through other evidence.

18 JUDGE PIGOTT: But couldn't he do it
19 through other circumstantial evidence?

20 MS. FISCH COHEN: There are lots of ways, I
21 think, that a defendant could put forth a defense.

22 JUDGE PIGOTT: And then get a
23 circumstantial evidence charge.

24 MS. FISCH COHEN: In a presumption case?

25 JUDGE PIGOTT: Well, we're going that

1 route.

2 MS. FISCH COHEN: I mean, right, I
3 recognize that.

4 CHIEF JUDGE LIPPMAN: Okay.

5 JUDGE RIVERA: So because he's - - -

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 JUDGE RIVERA: I'm sorry. So he's sitting
8 where the trap door - - - his feet are on this trap
9 door. So if he was sitting in the back, are you
10 saying you then don't have the direct evidence or
11 partial - - - what you're calling this, partial
12 direct evidence?

13 MS. FISCH COHEN: Well, it would not be as
14 strong, but based on the fact that this court has
15 recognized the unique nature of a car in terms of
16 drug trafficking, and the recognition that the
17 presumption applies to anyone in the car, drugs
18 secreted in any part of the vehicle, then we would
19 still say you don't need a circumstantial evidence
20 charge if he were seated in the back seat.

21 JUDGE RIVERA: But that just sounds to me
22 circular. It's - - - I've got the presumption, and
23 I've got the direct evidence through the presumption,
24 so - - - I thought you were trying to make a
25 distinction.

1 MS. FISCH COHEN: Well, I think that you
2 could still say he had dominion and control if he
3 were in the back seat. I think it's a weaker case,
4 but I think you could still do it.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 MS. FISCH COHEN: thank you.

7 CHIEF JUDGE LIPPMAN: Thanks.

8 Counselor, rebuttal?

9 MS. KORNFELD: I would just like to say
10 that regardless if he's sitting in the front seat, if
11 he's sitting over it, if - - - if it's not in actual
12 possession, then it's an inference. Any - - - any -
13 - - and the case for that is Brian, and I would like
14 to discuss, in my rebuttal, Daddona and Brian - - -

15 CHIEF JUDGE LIPPMAN: Go ahead.

16 MS. KORNFELD: - - - and to harmonize them
17 with - - -

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MS. KORNFELD: - - - with our case.

20 Daddona has that language that Judge Smith referred
21 to, the all elements of the charge. But then when
22 Daddona actually talks about the case, the - - - it
23 was - - - circumstantial evidence was requested to
24 prove that the defendant knowingly possessed stolen
25 cars. So right away, it's clear that Daddona is

1 about evidence of defendant's guilt; that's the
2 issue. And they said, no, because there was direct
3 evidence that he was waving these cars into the chop
4 shop and they were coming out without parts. And
5 then, of course, because there's some direct evidence
6 and some - - - some circum - - - the mental state was
7 circumstantial, then the constructive possession did
8 not require a circumstantial evidence charge. And
9 similarly, for the acting in concert.

10 In Brian, however, you had direct evidence,
11 from his admissions and from police observation, that
12 he exercised dominion and control over the apartment
13 where the drugs were found. And then Brian, which
14 cited Daddona as a cf., said but there was an
15 additional inference required to prove that Brian
16 exercised dominion and control over drugs hidden in
17 the apartment. So because of that - - - that
18 additional inference that was required, the court
19 said there should have been a circumstantial charge
20 required, but this is the exceptional case where one
21 is not. And of course, one can even understand - - -

22 JUDGE GRAFFEO: Did the legislature
23 somewhat distinguish the automobile presumption, just
24 for that reason, that there's a difference between an
25 apartment or a home and an automobile?

1 MS. KORNFEIND: Right. Well, in the sense
2 that the automobile presumption is a different type
3 of inferential tool. Brian was a constructive
4 possession case. There was - - -

5 JUDGE GRAFFEO: Two different statutes.

6 MS. KORNFEIND: So now I'm - - - I'm
7 addressing - - -

8 JUDGE GRAFFEO: Two different statutes.

9 MS. KORNFEIND: I don't think that
10 presumption, the statutory presumption, was in Brian;
11 it was purely constructive possession.

12 So because our case - - - because our case
13 was - - - they were charged - - - they weren't
14 convicted on both theories. We don't know how they
15 were convicted, but they were charged under both
16 theories.

17 But in Mr. Santiago's case, I would just
18 like to finish by saying the facts are even better
19 than Brian, because in Brian, where there was direct
20 evidence that he controlled the premises, so to
21 speak, in which the drugs were hidden, here there's
22 no connection with Mr. Santiago and this vehicle,
23 much less that additional inference that's necessary
24 to find that he possessed the drugs in the trap.

25 CHIEF JUDGE LIPPMAN: Okay, counselor,

1 thanks. Thank you both. Appreciate it.

2 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Hector Santiago, No. 204, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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