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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 94

ANTHONY BERRY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 05, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.

2 First matter on this afternoon's calendar is

3 number 94, People v. Anthony Berry.

4 Counsel.

5 Ms. ZOLOT: May it please the court,

6 Barbara Zolot for Appellant Anthony Berry. I'd like

7 to reserve two minutes for rebuttal, please.

8 CHIEF JUDGE DIFIORE: You have two minutes.

9 Ms. ZOLOT: Your Honors, Mr. Berry's

10 conviction for unlawful dealing with a child cannot

11 stand, because the People indisputably established

12 only a failure to act, and Mr. Berry had no legal

13 duty toward the children. It's a foundation of

14 criminal law that criminal liability requires an

15 actus reus and a mens rea.

16 While in New York, the actus reus

17 requirement can be satisfied by an omission or a

18 failure to act, it's equally the case that - - - for

19 that omission to count for criminal liability

20 purposes - - -

21 JUDGE PIGOTT: Can you draw a line for us

22 and when and when not, you know, this statute would

23 apply in situations such as this?

24 Ms. ZOLOT: Well, the statute actually has

25 two components. There is the affirmative act part of

1           it, which is for example permitting a child to enter.  
2           No legal duty would be required of anyone in that - -  
3           - in that situation, because it's an affirmative act,  
4           similar to most other criminal statutes. The  
5           Government is saying, refrain from doing this,  
6           refrain from permitting this child to enter.

7                        But then there's this other component of  
8           the statute, permitting the child to remain. That  
9           allows for liability to be imposed, essentially by  
10          doing - - - for doing nothing, for failing to act,  
11          for passive acquiescence, allowing the children to  
12          stay there.

13                       JUDGE PIGOTT: In looking - - - in looking  
14          at this situation and - - - and in your brief, let's  
15          assume two people are married, but the husband isn't  
16          - - - isn't living with the wife, and a situation  
17          similar to this would happen, but he happens to be  
18          there that particular day, at that particular time;  
19          we'd have no problem convicting him, right?

20                       Ms. ZOLOT: Well, probably not, depending  
21          on the husband's relationship with the children. I  
22          mean, if he's still in a position of parental  
23          responsibility towards the children, if he is still  
24          acting as a parent or in loco parentis, which is - -  
25          -

1 JUDGE PIGOTT: And yet, if they were  
2 divorced and she had sole custody, we'd say, well,  
3 now he's not, even though - - -

4 Ms. ZOLOT: Well, I'm not sure it turns on  
5 their legal status as much as his relationship to the  
6 children.

7 JUDGE PIGOTT: Relationship or status?

8 Ms. ZOLOT: I think in loco parentis, for  
9 example, is really about the responsibilities that  
10 you've assumed with respect to the children so that  
11 you're, for all intents and purposes, their parent.

12 JUDGE FAHEY: Well, could - - - could  
13 there be a - - -

14 CHIEF JUDGE DIFIORE: Counsel, why is there  
15 no view of the evidence that the jury credited the  
16 police testimony, with respect to this man's presence  
17 in the apartment, the fact that they went in there,  
18 he is in his boxers, he is in the bed with the  
19 children, he is - - - the cable bill is in his name,  
20 he gives that address - - -

21 Ms. ZOLOT: Right.

22 CHIEF JUDGE DIFIORE: - - - as his address  
23 on a prior occasion.

24 Ms. ZOLOT: Well, there is no question he  
25 was present, but the question here is whether - - -



1 under the statute?

2 Ms. ZOLOT: That's a very good point. That  
3 goes to my first point that this statute is kind of a  
4 weird hybrid. That would be an affirmative act,  
5 you're permitting the children to enter. What  
6 distinguishes this case is that he - - -

7 JUDGE GARCIA: Why permitting to remain?

8 Ms. ZOLOT: Well, it's a tougher question,  
9 but I would say that we're talking about a duty  
10 created by relationship to the children. But there  
11 are - - - duties can be created by other  
12 circumstances, for example, if - - - if the defendant  
13 himself or herself creates the peril - - - creates  
14 the peril, that might create a duty. And in your  
15 crack house situation, if you're running the crack  
16 house - - -

17 JUDGE GARCIA: But that's the whole point  
18 of permitting to come in and, you know, this - - -  
19 whatever the description of is the activity, that's  
20 the peril, right, it's in the statute, what the peril  
21 is, so you're permitting someone to remain in a place  
22 where that activity is going on, and to the Chief  
23 Judge's question, why isn't there enough in the  
24 record here to say that?

25 Ms. ZOLOT: Not even the People dispute

1 that there was no parental type relationship here.

2 JUDGE GARCIA: Neither am I with you, but  
3 why do you need it? The statute doesn't say that.

4 Ms. ZOLOT: The stat - - - well, it would  
5 actually be totally antithetical to the Law of New  
6 York and elsewhere for the statute to have to say  
7 that, because the normal rule in New York and  
8 elsewhere in the United States is that action is not  
9 required absent a legal duty.

10 JUDGE RIVERA: What - - - what's the  
11 authority to permit the children to remain? How do -  
12 - - what control does he have over any of their  
13 actions?

14 Ms. ZOLOT: I'm sorry.

15 JUDGE RIVERA: What - - - what's the  
16 authority for the defendant to permit the children to  
17 remain, or to enter due to anything?

18 Ms. ZOLOT: Right, well - - -

19 JUDGE RIVERA: I'm asking - - -

20 Ms. ZOLOT: That goes to - - - right, there  
21 really is no authority of any kind, I mean he has - -  
22 -

23 JUDGE ABDUS-SALAAM: What if this person  
24 owned the house, or the - - - was a lessee on the - -  
25 - on the lease of the apartment, and could say, you

1 have to leave. Right, there's - - - that would be an  
2 authority, because I control this premises.

3 Ms. ZOLOT: Well, there are two different  
4 kinds of authority which we discussed in our brief.  
5 There is control over the premises, which Mr. Berry  
6 did not have either, but someone could have in - - -  
7 on premises - - -

8 JUDGE ABDUS-SALAAM: Well, that's  
9 debatable, right? I mean, based on the conviction by  
10 the jury, that may be debatable about whether he had  
11 any control over the premises.

12 Ms. ZOLOT: True. That's debatable control  
13 over the premises, but since the People's theory here  
14 was solely on his failure to act, they chose that  
15 theory. Liability was predicated on a failure to  
16 act, and under long standing principles of statutory  
17 law and common law, if liability is predicated on a  
18 failure to act, then there must be a legal duty to  
19 ask.

20 JUDGE STEIN: Well, can legal duty be based  
21 on something less than in loco parentis? I mean, in  
22 loco parentis is a very, very high standard. I mean,  
23 under certain circumstances, we have found people  
24 responsible if they were babysitters, or you know, if  
25 they were in a position of being responsible for the

1 children at that particular period of time, why  
2 wouldn't that be enough to create a legal duty?

3 Ms. ZOLOTT: Well, whether or not that could  
4 be, and in fact, the law has been very strict, at  
5 least in the common law on in loco parentis, there  
6 wasn't any - - - there wasn't sufficient evidence of  
7 that here either. The People presented zero evidence  
8 of Mr. Berry's responsibilities towards these  
9 children. There was only a dearth of evidence; there  
10 was no affirmative evidence here. So no matter how  
11 low the standard were, the evidence would be  
12 insufficient to meet it.

13 I, you know, it - - - it appears that  
14 should sort of end your question but - - -

15 JUDGE FAHEY: Well, I guess the point is -  
16 - - is you're arguing for that the standard has to be  
17 in loco parentis, and to follow up on Judge Stein's  
18 point, let's assume it doesn't have to be in loco  
19 parentis, all right, what would the standard be?  
20 What would the People have to show then?

21 Ms. ZOLOTT: Well, they have to show the  
22 source of - - - they have - - - I'm actually not sure  
23 where they would be drawing that duty from, I mean,  
24 they would have to show that - - - that he had a duty  
25 to act towards these children.

1 JUDGE FAHEY: Let's say it has to be more  
2 than he is in the presence of the children, all  
3 right.

4 Ms. ZOLOT: I would say that if you like in  
5 it to say a statute that goes a little broader than  
6 in loco parentis, thinking of, for example,  
7 260.10(1), which is a particular kind of statute that  
8 actually criminalizes a failure to act - - -

9 JUDGE FAHEY: Um-hum.

10 Ms. ZOLOT: - - - or a reporting statute,  
11 or something like that, well, then you could say,  
12 there I think it's a caregiver or a guardian, but  
13 someone who has assumed responsibility for the  
14 children in some way, short of a parental  
15 responsibility; that's utterly lacking here. So I  
16 would say 260.10(1) is maybe your best guidance for  
17 broadening it beyond in loco parentis, but still not  
18 happening - - - just happen to be present.

19 CHIEF JUDGE DIFIORE: Thank you, Ms. Zolot.

20 Ms. ZOLOT: Thank you.

21 CHIEF JUDGE DIFIORE: Ms. Vee.

22 MS. VEE: Thank you, Your Honor.

23 Excuse me. Your Honors, the People would  
24 respectfully submit that viewing all the evidence, and the  
25 inferences which may be drawn in the light most favorable

1 to the People, the Appellate Division correctly held that  
2 the evidence established that the defendant knowingly  
3 permitted three underage children to remain in an  
4 apartment - - -

5 JUDGE STEIN: What - - - what if the next  
6 door neighbors knew that there was drug - - - there  
7 were drugs in the apartment, and - - - and saw the  
8 children go into the apartment, would the next door  
9 neighbors have a duty to - - - to keep them from  
10 going into that apartment?

11 MS. VEE: I don't believe so, Your Honor.  
12 I don't think - - -

13 JUDGE STEIN: Why not? How is that  
14 different from - - - what if the next door neighbors  
15 just stopped over for a few minutes, and would - - -

16 MS. VEE: I understand, Your Honor, yes. I  
17 don't believe that that sort of a situation is what  
18 this - - - this statute was meant to apply to. That  
19 the next door neighbor who suspects, or maybe really  
20 knows that there might be drug dealing going on next  
21 door, and that there is children who live there.

22 And the reason why is because I believe  
23 that the statute envisions that the defendant who was  
24 charged and convicted, in this type of situation, is  
25 someone who has a certain - - - at least some type of

1 connection to control over the situation at hand.

2 JUDGE FAHEY: Let's follow up on that then.  
3 Let's say that the codefendant in the case, let's say  
4 that person had intimate relations with someone else  
5 other than this man, this - - - this particular  
6 defendant, would every person that she had intimate  
7 relationship with be eligible to be charged under  
8 this statute?

9 MS. VEE: - - - No, not necessarily. I  
10 think what - - -

11 JUDGE FAHEY: They came into the apartment,  
12 they were there more than once, they had intimate  
13 relations, knew that the person was a drug dealer,  
14 knew that there were three children there. Under  
15 this theory, it would seem that that would be the  
16 case.

17 MS. VEE: I think what it would be is that  
18 the situation of - - - if there's a person who had  
19 some sort of connection to control over the  
20 situation, like this defendant did - - -

21 JUDGE FAHEY: So all right, let's go to the  
22 control then. Where is the control?

23 MS. VEE: I think the control would be sort  
24 of, for example, if we look at the facts before this  
25 court, and again, this is the situation before it.

1 We had a defendant who clearly had a very strong  
2 connection to both TH, the apartment, and her  
3 children. By her own account, he slept over at her  
4 place at least once or twice a week in the - - - in  
5 the two months before he was arrested.

6 JUDGE PIGOTT: What do you think he should  
7 have done?

8 MS. VEE: I'm sorry.

9 JUDGE PIGOTT: What should he have done?

10 MS. VEE: He should have made sure that  
11 there was a situation where these children were not  
12 exposed to this drug activity.

13 JUDGE PIGOTT: What should he have done?  
14 In other words - - -

15 MS. VEE: He could've gotten - - - he  
16 could've gotten the children out of the apartment - -  
17 -

18 JUDGE PIGOTT: So is there any thought in  
19 your mind that if he took these three kids out of  
20 that apartment, he could be charged with custodial  
21 interference, possibly kidnapping, any number of  
22 charges, because - - -

23 MS. VEE: Well, he - - -

24 JUDGE PIGOTT: Okay, I'm sorry.

25 MS. VEE: He could have at least tried - -

1 - maybe called 9-1-1, ACS, or even better, this is  
2 what he could've done. He could've gotten the drugs  
3 out of the apartment.

4 JUDGE PIGOTT: Of course. But the - - -  
5 but you're not charging him with the drugs; you're  
6 charging him with the kids. And my thought is that  
7 you're thinking, well, maybe he could have called 9-  
8 1-1; that's not - - - that's not a very tight rule to  
9 say, you're going to be charged with a crime if you  
10 don't do this.

11 MS. VEE: No, but that's what I mean, it's  
12 not necessarily - - - even necessarily having to call  
13 9-1-1.

14 JUDGE PIGOTT: I don't mean to fence - - -

15 MS. VEE: He could have separated - - -

16 JUDGE PIGOTT: - - - but let me just  
17 interrupt you for a minute. You said, take the kids.  
18 I think that that could subject him to worse charges  
19 than - - - than any misdemeanor, and - - - and do you  
20 really think that's - - - that's the answer that he  
21 had to say to a mother, I'm taking your children  
22 because you're dealing in drugs?

23 MS. VEE: Well, he could have at least then  
24 had to make sure that the drugs were not in the  
25 apartment. He could've separated the childr - - -

1 the idea - - - the objective of this statute - - -

2 JUDGE STEIN: Well, why couldn't have - - -  
3 why couldn't the neighbor, with whom they are  
4 friendly, and who stops by for tea, and who knows the  
5 drugs are there, why - - - why are they any different  
6 then? They - - - they come a couple of times a week,  
7 every Tuesday and Thursday, they come and they have  
8 tea, and they know the mother, and they - - - they  
9 know the children, and why is that any more of a  
10 connection than - - -

11 MS. VEE: The next door neighbor is  
12 different, because that next door neighbor who just  
13 comes by once, or just suspects that there is drug  
14 activity next door, doesn't have - - -

15 JUDGE STEIN: No, no, that's not - - -  
16 that's not my - - - my scenario here. My scenario is  
17 they are friends, they live next door, every Tuesday  
18 and Thursday they come over, twice a week, they have  
19 tea, they know if - - - they don't just suspect, they  
20 know because the mother has told them she is dealing  
21 drugs, because that's the only way she can make any  
22 money to feed her kids.

23 MS. VEE: That's definitely a closer case. I  
24 mean, that person might very well - - - I - - - I would -  
25 - - I think that person would be a harder case for the

1 People certainly to bring that case and make - - -

2 JUDGE FAHEY: It's - - - I - - - it's - - -

3 JUDGE STEIN: What makes - - - what makes  
4 it different?

5 MS. VEE: Because that person doesn't have  
6 as much of a connection to the situation at hand.  
7 Namely what - - - that the children are being exposed  
8 to drug activity.

9 JUDGE STEIN: How - - - how is that  
10 different than this defendant who says that he shows  
11 up a couple of times a week to crash, and then leaves  
12 in the morning?

13 MS. VEE: Because the evidence established,  
14 and viewing that evidence in the light most favorable  
15 to the People showed that they were - - - certainly  
16 there was drugs in the kitchen, exposed on the plate  
17 in the - - - in the kitchen on the - - - on the  
18 exposed shelf, there was drugs found in a pair of  
19 men's pants that were lying five feet away from where  
20 he was sleeping in his boxer shorts. He had kept  
21 clothes in the bedroom - - -

22 JUDGE STEIN: Well, he wasn't convicted of  
23 any drug related crimes.

24 MS. VEE: He was not, but that doesn't mean  
25 that he didn't - - -

1 JUDGE STEIN: Not even constructive  
2 possession, right?

3 MS. VEE: No. I mean, we would submit, as  
4 the Appellate Division found, really all that really  
5 means is that perhaps that the jury found that there  
6 wasn't proof beyond a reasonable doubt that he  
7 possessed those drugs, he wasn't in constructive  
8 possession of drugs. That doesn't mean - - -

9 JUDGE RIVERA: Is - - - is possession the  
10 activity under the statute, by the way?

11 MS. VEE: No, it's knowing or having reason  
12 to know that there is drug activity taking place.

13 JUDGE RIVERA: But what's the activity?

14 MS. VEE: Here - - - well, TH admitted - -  
15 -

16 JUDGE RIVERA: Selling from the premises;  
17 is that the activity?

18 MS. VEE: It doesn't necessarily have to be  
19 even selling, it's that there is drug activity as  
20 defined by Penal Law - - - section 220 in the Penal  
21 Law.

22 JUDGE RIVERA: Okay, but what - - - okay,  
23 so what is it?

24 MS. VEE: So in this case it was possession  
25 of a lot of drugs in this apartment.

1 JUDGE RIVERA: So it's mere possession.

2 MS. VEE: Possession, possession with  
3 intent to sell. TH did - - - did not - - -

4 JUDGE RIVERA: But we do have the sales  
5 component in this.

6 MS. VEE: There was in this case, there  
7 certainly - - - yes, there was.

8 JUDGE RIVERA: But I'm asking to you under  
9 the rule. Do you need a sales component?

10 MS. VEE: No, you don't necessarily need a  
11 sale, no, you don't.

12 JUDGE RIVERA: So mere possession.

13 MS. VEE: Possession can be enough, yes.  
14 And here he had - - -

15 JUDGE FAHEY: So - - - so what's the  
16 standard, what's the rule? How do we measure this?  
17 Defense counsel is arguing for in loco parentis. I'm  
18 having a difficult time seeing how we would possibly  
19 measure this in this circumstance.

20 MS. VEE: Yeah, well, we would cer - - - we  
21 would submit definitely it's not in loco parentis. I  
22 mean, there's nothing in the statute itself in this  
23 history - - -

24 JUDGE FAHEY: But let's say we agree with  
25 you - - - let's say we agree with you, what is this -

1 - - what is the rule, what - - - what is the standard  
2 upon which you would have us determine and  
3 distinguish between people who are permitting and  
4 people who are not. Because permission implies that  
5 you have the authority to permit. So what's our  
6 standard?

7 MS. VEE: I would submit that - - - I would  
8 submit that it - - - there is an inference here that  
9 there is a certain level of control over the  
10 situation, over the situation at hand for the  
11 defendant has some sort of control of the situation  
12 in order to be found guilty of this crime.

13 JUDGE RIVERA: Does that mean not - - - not  
14 any responsibility or - - - excuse me, not  
15 responsibility, authority over the conduct of the  
16 children?

17 MS. VEE: No.

18 JUDGE RIVERA: She is talking about  
19 relationship to the children, you are talking about -  
20 - -

21 MS. VEE: Right.

22 JUDGE RIVERA: - - - the circumstances,  
23 which sounds to me like you're talking about control  
24 over the premises.

25 MS. VEE: It doesn't even necessarily mean

1 control over the premises itself. Control of the  
2 situation. Here, there was a lot of drugs in this  
3 apartment. And he has a very active role - - -

4 JUDGE RIVERA: I know you keep talking  
5 about drugs, I am not asking about drugs. I'm  
6 talking about, how are you going to have the kind of  
7 control you're talking about when you have no  
8 authority vis-a-vis these children?

9 MS. VEE: He - - - I would submit that he  
10 does and that he could. He could have at least tried  
11 to get them out of the apartment. If he doesn't  
12 physically take them out of the apartment, he  
13 certainly could have - - -

14 JUDGE RIVERA: Okay. So the mother is  
15 there, with all the drugs, and he says, I'm taking  
16 the kids. You think he could do that under the  
17 statute, when the mother says, these are my children,  
18 you're leaving before they go?

19 MS. VEE: Well, he could try it or he could  
20 take the drugs out of the apartment. Have - - - tell  
21 her, these drugs can't be in the apartment. He has  
22 to at least make some effort. On this evidence here,  
23 nothing. Nothing to that effect.

24 JUDGE RIVERA: You think this was - - -  
25 this is what the statute means, that you have to pick

1 up this controlled substance, physically remove it  
2 from the premises?

3 MS. VEE: It depends on what the  
4 circumstances are. In this situation, he certainly  
5 could have tried, he could have told her, you can't  
6 have these drugs in the apartment. And - - - and the  
7 both of them living there.

8 JUDGE ABDUS-SALAAM: But what if he had  
9 done that and then got - - - and the police raided  
10 right after that, and he's charged, so he takes the  
11 stand and says, I, you know, I tried to get the  
12 mother - - -

13 MS. VEE: Um-hum.

14 JUDGE ABDUS-SALAAM: - - - does that save  
15 him?

16 MS. VEE: It might. I mean, before jurors,  
17 they may feel that in that situation - - -

18 JUDGE PIGOTT: You know the mights are what  
19 troubles me, you know - - -

20 MS. VEE: But we don't have that here. I'm  
21 sorry.

22 JUDGE PIGOTT: If we had a law that says  
23 you can't speed down Eagle Street, and somebody is  
24 going seventeen miles an hour, and we say, hey,  
25 you're speeding. He says, well, how do you decide

1 speeding? Well, it kind of depends on the situation,  
2 and you were going seventeen miles an hour when there  
3 were - - - there were people gathered outside, so  
4 that's speeding. Somebody else goes down at sixty  
5 miles an hour, is that speeding? Well, it depends on  
6 the situation. If it's four the morning, no. And we  
7 don't - - - we don't like laws like that. We want  
8 laws that you could follow. That, you know, that  
9 tell you what's right and what's wrong.

10 MS. VEE: I would submit that this law is  
11 perfectly valid, and it's also - - - by the way, I  
12 mean, there is not that there - - - the defendant has  
13 not made any challenge to the constitutionality in  
14 the statute, so - - -

15 JUDGE PIGOTT: No, I'm just - - -

16 MS. VEE: So I would submit that what it  
17 means - - -

18 JUDGE PIGOTT: Go ahead, why don't you  
19 finish.

20 MS. VEE: Oh sure, I'm sorry. Did I  
21 interrupt you; I'm so sorry.

22 JUDGE PIGOTT: It's okay, go ahead.

23 MS. VEE: Okay. The wording of the statute  
24 is, when a person knowingly permits a child under  
25 eighteen to enter or remain in a premises where he

1 knows or has reason to know that unlawful drug  
2 activity in this case is taking place, that he can be  
3 held liable.

4 Your Honor, Justi - - - Judge Garcia, you  
5 mentioned for example a situation, but by - - - if we  
6 were to adopt - - -

7 JUDGE GARCIA: Just to get back to that  
8 situation for a second, is the People's theory in  
9 this case, and I think there was some suggestion by  
10 counsel, is the People's theory that it was an action  
11 - - - an affirmative act by the defendant, or however  
12 it was phrased, because it seems to me, could the  
13 rule be you have to have some authority over the  
14 premises or the children?

15 And is that - - - would a rule like that -  
16 - - would the theory of the People's case here be  
17 consistent with a rule like that?

18 MS. VEE: In - - - under the facts of our  
19 case, yes, he has certainly had enough - - - the  
20 evidence here show that he definitely had a strong  
21 connection to this apartment.

22 JUDGE RIVERA: What - - - what about - - -

23 MS. VEE: He stayed there fairly regularly.

24 JUDGE RIVERA: What about the dog walker?

25 I give the keys to the dog walker.

1 MS. VEE: Dog walker.

2 MS. VEE: Dog walker comes in to get the  
3 dogs, he sees the drugs all over the place, the  
4 fourteen year old is playing on the TV.

5 MS. VEE: That might be - - -

6 JUDGE RIVERA: What does that dog walker  
7 have to do?

8 MS. VEE: You know, again - - -

9 JUDGE RIVERA: Does he have to take the  
10 drugs instead of the dog?

11 MS. VEE: Well, that might be a closer - -  
12 -

13 JUDGE RIVERA: Does he call 9-1-1?

14 MS. VEE: That might be a closer situation.  
15 Again, I would submit - - -

16 JUDGE RIVERA: I know, but this is the  
17 point, where are we drawing those rules?

18 MS. VEE: But Your Honors, that - - -

19 JUDGE RIVERA: Where do we draw the line?

20 MS. VEE: Those are not the facts before  
21 this court. And I would submit that - - - that we do  
22 - - - this is very important that this court look at  
23 the circumstances, look at the evidence that was  
24 produced in this particular case.

25 JUDGE ABDUS-SALAAM: Yeah, but we're trying

1 to interpret the - - -

2 MS. VEE: There may be closer issues in  
3 other cases - - -

4 JUDGE ABDUS-SALAAM: Aren't we - - - aren't  
5 we also trying to interpret the statute - - -

6 MS. VEE: Yes.

7 JUDGE ABDUS-SALAAM: - - - not just for  
8 this case, but for - - -

9 MS. VEE: Absolutely.

10 JUDGE ABDUS-SALAAM: - - - future cases,  
11 because we're trying to give people some kind of  
12 guidance about their conduct.

13 MS. VEE: Absolutely.

14 But - - - but the kind of rule - - - the kind of  
15 requirements that the defendant is urging here, namely  
16 that you can't be convicted of this crime unless you're a  
17 parent or a guardian of the child at issue. That can't be  
18 because that would mean that the - - - the drug dealer  
19 who, you know, sells in someone else's home, where that  
20 person has children there, he can't be convicted because -  
21 - - or he goes to - - - he sells out of a daycare center -  
22 - -

23 JUDGE STEIN: Well, he did something - - -

24 MS. VEE: - - - he can't be convicted  
25 because he - - -

1 JUDGE STEIN: But he did something  
2 affirmatively; he brought the drugs into that home.

3 MS. VEE: But I don't - - - but I don't see  
4 - - -

5 JUDGE STEIN: Were there were children.

6 MS. VEE: - - - under the law, I don't - -  
7 - there is not a distinction between whether the  
8 person himself is an actual - - - the one dealing the  
9 drugs or not. But - - - what if the person is the  
10 one who is bagging the drugs, or somehow is like a  
11 little less a role but is involved in a drug selling  
12 operation, that is not conducted in the person's  
13 home, it's at a daycare center, there's children  
14 there, none of those children are his children, he's  
15 not the parents to any of these children - - -

16 JUDGE RIVERA: So again, I let in the dog  
17 walker, the dog walker has the keys, sees my children  
18 actually taking drugs.

19 MS. VEE: If there was evidence - - -

20 JUDGE RIVERA: Forget the person was lett -  
21 - - was bagging up the drugs and just - - - the kids  
22 are on the side, or in the bedroom, and don't even  
23 observe that.

24 MS. VEE: If that person was there often  
25 enough, if there was some proof.

1 JUDGE GARCIA: Like if he slept there, if  
2 your dog walker slept there twice a week.

3 MS. VEE: If there was some - - - I - - - I  
4 think that in certain circumstances like that, it  
5 would be - - - there may be very well a situation  
6 where a jury would find that if that person had  
7 enough of a connection to that household and the  
8 children, and that situation - - -

9 JUDGE RIVERA: In my example, they have a  
10 key, and they can walk in and out.

11 MS. VEE: - - - that they could be liable.

12 JUDGE RIVERA: But in my example, they have  
13 a key and they can walk in and out.

14 MS. VEE: With the dog walker?

15 MS. VEE: Sure.

16 JUDGE RIVERA: Right. That - - - that  
17 person might very well, under the circumstances of  
18 the case.

19 JUDGE RIVERA: By the way, does the  
20 defendant here have a key? I'm just - - -

21 MS. VEE: Yes. There was proof that there  
22 was a key as well, along with the drugs in those  
23 men's pants that were lying five feet next - - - in a  
24 - - - five feet away from where he was sleeping in  
25 his boxer shorts.

1 JUDGE RIVERA: Okay.

2 MS. VEE: So yes, he had - - - there was a  
3 - - - and his name was on the cable bill.

4 So again, he had a very close connection to this  
5 apartment and these children. So I would submit, under  
6 the evidence in this case, viewed in the light most  
7 favorable to the People, there was ample evidence to  
8 convict him of this - - - of this particular crime.

9 Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MS. VEE: Thank you.

12 CHIEF JUDGE DIFIORE: Ms. Zolot.

13 Ms. ZOLOT: On this key matter, there was  
14 no proof that the key actually opened the door,  
15 because the police knocked the door down, and  
16 impaired the lock.

17 My adversary's - - -

18 JUDGE RIVERA: His name is on the cable  
19 bill?

20 Ms. ZOLOT: His name was on the cable bill  
21 - - -

22 JUDGE RIVERA: So in some sense of  
23 connection of a more permanent status to this  
24 particular premises?

25 Ms. ZOLOT: Well I - - - that was the only

1 evidence of his connection to anything, in terms of  
2 the operations of the apartment. I understand this  
3 is sufficient - - -

4 CHIEF JUDGE DIFIORE: What about evidence  
5 of his connection to the children. What - - - was  
6 there testimony that he was sleeping in the bed with  
7 the children?

8 Ms. ZOLOT: There was testimony that he was  
9 sleeping, and the children were in the bed as well  
10 with their mother. However, again, in terms of - - -  
11 and I want to be really clear here, that a number of  
12 the things my adversary has said about how limiting  
13 it to parents would be inconsistent with the statute,  
14 we're talking about a failure to act case. That's  
15 what we're talking about, that's where the  
16 limitations kick in.

17 JUDGE PIGOTT: I don't understand why  
18 that's so exciting. I wouldn't - - - I wouldn't - -  
19 - it seems to me, Judge Rivera's example of a dog  
20 walker - - - anyone who sees children in danger, and  
21 we're saying, you know, if you permit that to  
22 continue, you may be - - - you may be charged under  
23 the statute. What's the downside of that?

24 Ms. ZOLOT: Well, the downside is that New  
25 York, it would really be pretty unprecedented to

1 impose duties on people to act that have never been  
2 imposed before.

3 When there is a statute that has a  
4 reporting requirement, for example, the legislature  
5 is so careful to be very specific about who that  
6 reporting requirement refers to. For example, the  
7 mandatory reporting requirements about child abuse.  
8 You know, there is a list, but it's super specific as  
9 to who has that reporting requirement.

10 260.10(1), which is the closest analogy of  
11 reckless endangerment statute, based on failure to  
12 act, the legislature was very clear about who it  
13 referred to, and it refers to parents, and  
14 caregivers, and guardians, who failed to act to  
15 prevent a child from becoming - - -

16 JUDGE PIGOTT: But if you're dealing with a  
17 child, if you have a child in your car, and you are  
18 smoking marijuana, and there's marijuana in the car,  
19 and that can harm the kid, whether it's your son,  
20 daughter, neighbor's kid, or whatever, why is that  
21 not unlawful dealing with a child?

22 Ms. ZOLOT: Well, that would probably be  
23 reckless endangerment, pure and simple.

24 JUDGE PIGOTT: Well, let's pick on - - -  
25 let's pick on this statute.

1                   Ms. ZOLOT: But for unlawful dealing with a  
2 child, that would be an affirmative act. You are  
3 smoking marijuana; you are committing the illicit  
4 activity that's putting the child in danger,  
5 affirmatively.

6                   But whether your friend sitting next to you in  
7 the car while you're smoking, now has to interfere with  
8 your children, is the question.

9                   JUDGE PIGOTT: But if he is smo - - - if he  
10 is smoking it, then you're free? I don't think we're  
11 making that kind of distinction.

12                   The focus, it seems to me, is on the child. And  
13 you have an obligation to the child.

14                   Ms. ZOLOT: Well, protecting children is a  
15 grea - - - is of course a laudable goal, but it  
16 shouldn't expand criminal liability to the extent  
17 that every conceivable factual circumstance is now,  
18 you know, subjecting someone to criminal liability,  
19 despite limitations in the statutory law, limitations  
20 in the common law, requirements that this court has  
21 itself imposed in cases such as Stein (ph.) and Wong.  
22 That's beyond what we should be doing to protect  
23 children.

24                   JUDGE RIVERA: Your light is off, just a  
25 quick question.

1 Ms. ZOLOT: I'm sorry.

2 JUDGE RIVERA: Do you disagree that  
3 activity in this statute can include just the fact  
4 that the drugs are in the establishment?

5 Ms. ZOLOT: I - - - I disagree with that.  
6 I think that - - -

7 JUDGE RIVERA: Well, then what would it  
8 include?

9 Ms. ZOLOT: It would - - - I believe there  
10 would have to be a commercial type component, and I  
11 think this court in Diaz, while not directly  
12 addressing that question, implied as much. That was  
13 a case where there was paraphernalia and the like.

14 CHIEF JUDGE DIFIORE: Thank you, counsel

15 Ms. ZOLOT: Thank you.

16 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Berry, No. 94 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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