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Murray N. Caplan

PRESUMPTIVE POSSESSION OF WEAPONS: NEW YORK'S CONTROVERSIAL STATUTE

On March 28, 1973, the State Police stopped Melvin Lemmons for speeding on the New York State Thruway. Jane Doe[1] was seated in the front alongside Lemmons, and Raymond Hardrick and Samuel Allen were seated in the rear. Lemmons was arrested and placed in the patrol car after a radio check mistakenly indicated that he was wanted by the Detroit, Michigan Police Department. One of the police officers returned to the car to ascertain the identities of the three remaining occupants. He looked through the window on the passenger's side and spotted a handgun protruding from Jane Doe's handbag, which was located on the floor of the car between the right door and the front seat. The officer then placed the three passengers under arrest. A subsequent search revealed a second gun in the handbag, and a machine gun and more than a pound of heroin in the trunk. Lemmons, Hardrick, Allen, and Doe were acquitted of charges stemming from the discovery of the machine gun and the heroin;[2] however, they were each convicted on two counts of felonious possession of a gun in violation of New York Penal Law section 265.05 (2).[3] Lemmons, Hardrick, and Allen were sentenced to seven years imprisonment on each count, sentences to run concurrently.

At trial, the prosecution based its entire case on section 265.15(3) of the New York Penal Law,[4] which makes the presence of a weapon

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1. Jane Doe was the fictitious name used by the court to describe a youthful offender who was tried with the other defendants, convicted and sentenced to five years probation. She did not participate in the appeal of this case.

2. At the trial the prosecution relied on the statutory presumptions contained in New York Penal Law § 265.15(1) and § 220.25(1) to establish the defendants' constructive possession of the machine gun and the heroin, respectively. These provisions make the presence of a controlled substance and a machine gun in a vehicle presumptive evidence of their possession by all the occupants thereof. The prosecution also offered the testimony of one witness who claimed she had seen the defendants place something in the trunk of the borrowed vehicle they were using at the time of their arrest. However, the defendants introduced two witnesses whose testimony was apparently sufficient to impeach the testimony of the prosecution's witness and to convince the jury not to invoke the inferences permitted by these presumptions.

3. N.Y. PENAL LAW § 265.05(2) (McKinney 1967) (current version at N.Y. PENAL LAW § 265.02(4) (McKinney Supp. 1977-1978)) in relevant part provided:

> "Any person who has in his possession any firearm which is loaded with ammunition, . . . is guilty of a class D felony."

4. N.Y. PENAL LAW § 265.15(3) (McKinney Supp. 1977-1978) provides:

> The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presump-

in an automobile presumptive evidence of its possession by all occupants at the time the weapon is found.[5] No evidence, other than the defendants' presence in the car, was introduced to establish their control over the guns. Section 265.15(3)(a) makes the presumption inapplicable to weapons found "upon the person" of one of the automobile's occupants. Accordingly, defendants Lemmons, Hardrick, and Allen argued that the presumption did not apply to them since the guns found in the handbag were on the person of Jane Doe.[6] The defendants also argued that the presumption was unconstitutional as applied. Both of these arguments were rejected by the trial court. Defendants Lemmons, Hardrick, and Allen appealed their convictions, which were affirmed by the Appellate Division, Third Department,[7] and by the New York Court of Appeals.[8] The defendants then filed

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tive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same.

5. McCormick, McCormick's Handbook of the Law of Evidence § 342, at 804 (2d ed. 1972), provides a brief explanation of the use of presumptions in criminal cases:

> A true shifting of the burden of producing evidence to the defendant in a criminal case would mean that the court would be compelled to direct the jury to find against him with regard to the presumed fact if he fails to introduce sufficient proof on the issue. . . . [A] directed verdict or a peremptory ruling against the accused in a criminal case, even as to a single element of the crime, is abhorrent to the criminal law. Therefore, modern draftsmen, while retaining the term presumption for criminal cases, have reduced the effect of presumptions in those cases to that of a standardized inference. The jury is permitted but not required to accept the existence of the presumed fact even in the absence of contrary evidence.

But see note 41 *infra* regarding modern criminal law theorists' skepticism of such "permissible inferences."

6. In support of this contention, the defendants cited the following cases: People v. Moore, 32 N.Y.2d 67, 295 N.E.2d 780, 343 N.Y.S.2d 107, *cert. denied,* 414 U.S. 1011 (1973) (search of defendant's handbag permissible as part of a frisk of her person); People v. Pugach, 15 N.Y.2d 65, 204 N.E.2d 197, 255 N.Y.S.2d 863 (1964), *cert. denied,* 380 U.S. 936 (1965) (upheld a frisk of defendant's briefcase finding that a firearm concealed in the briefcase carried by the defendant was in effect concealed on the defendant's person); People v. Bowles, 29 A.D.2d 996, 289 N.Y.S.2d 526 (3d Dep't 1968), *cert. denied,* 396 U.S. 865 (1969) (search of defendant's trousers, which were on the floor of defendant's room, justified and reasonable as part of the frisk of the defendant).

7. People v. Lemmons, 49 A.D.2d 639, 370 N.Y.S.2d 243 (3d Dep't 1975), *aff'd,* 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976).

8. People v. Lemmons, 40 N.Y.2d 505, 354 N.E.2d 836, 387 N.Y.S.2d 97 (1976).

petitions for writs of habeas corpus in the District Court for the Southern District of New York, asserting that New York's statutory presumption was unconstitutional as applied and on its face. The district court ruled that the statutory presumption was unconstitutional as applied and granted the writs.[9] The Second Circuit Court of Appeals, Judge Mansfield writing for the majority, affirmed the issuance of the writs and *held:* It cannot be said with substantial assurance that an inference of possession of a gun by a car's occupants is more likely than not to flow from the gun's presence in the vehicle, therefore New York Penal Law section 265.15(3) is unconstitutional on its face. *Allen v. County Court, Ulster County,* 568 F.2d 998 (2d Cir. 1977), *cert. granted,* 47 U.S.L.W. 3188 (U.S. Oct. 3, 1978) (No. 77-1554).

I. The Requirements of Due Process: The Second Circuit Reviews Section 265.15(3)

Judge Mansfield outlined the development of United States Supreme Court cases that have imposed increasingly stringent standards to be applied in testing a statutory presumption's conformance with the requirements of due process.[10] He noted that when the substantial equivalent of section 265.15(3) was first enacted by the legislature in 1936,[11] the most current statement of law regarding statutory presumptions was *Morrison v. California.*[12] In that case, Justice Cardozo formulated the "comparative convenience" test: A presumption can only be constitutional when there is a "manifest disparity in convenience of proof and opportunity for knowledge."[13] Nine years later,

9. Allen v. County Court, Ulster County, No. 76 Civ. 4794 (S.D.N.Y. April 19, 1977).

10. McCormick, *supra* note 5, § 344 at 811, provides the following explanation for the development of these due process requirements:

> In criminal cases, even though its effect may be no more than that of a permissible inference, a presumption may be sufficient to take an otherwise defective prosecution case to the jury and ultimately result in a conviction that otherwise could not have occurred. Furthermore, the existence of the presumption as to a particular element of the crime may force the defendant to introduce proof in rebuttal, including his own testimony, and thus force him to waive his constitutional right to remain silent. A recognition of the impact of these procedural consequences has caused the courts to review the creation and use of presumptions in the light of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

11. N.Y. Penal Law § 1898-a (1936) (current version at N.Y. Penal Law § 265.15(3) (McKinney Supp. 1977-1978)).

12. 291 U.S. 82 (1934).

13. *Id.* at 90-91.

in *Tot v. United States*,[14] the Supreme Court rejected Justice Cardozo's test. The Court reasoned that the creation of a presumption cannot be justified merely because a defendant has greater access to information regarding a presumed fact than does a prosecutor. In almost all criminal cases, the Court explained, the defendants are more familiar with the facts than the prosecution. Thus, if the comparative convenience test were sufficient to justify a statutory presumption, "the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt."[15] The Court in *Tot* ruled, therefore, that to uphold the validity of a statutory presumption, there must be a "rational connection" between the fact proved and the ultimate fact presumed.

Judge Mansfield next cited *United States v. Gainey*[16] and *United States v. Romano*[17] as examples of cases properly applying the "rational connection" test established in *Tot*. In *Gainey*, the Court was asked to invalidate a statute providing that presence near an illicit still was sufficient to establish the offense of carrying on an illegal distilling business. This offense encompasses any act connected with the operation of a still. Noting that "strangers to the illegal business rarely penetrate the curtain of secrecy,"[18] the Supreme Court found the requisite rational connection between the proved fact—presence near a still, and the ultimate fact presumed—the broad offense of participation in an illegal distilling business. In *Romano*, however, the Supreme Court held a similar though more specific statutory presumption unconstitutional. At issue in *Romano* was the statutory presumption that presence near an illicit still was sufficient evidence to establish the offense of possession, custody, or control of the still. The Court stated that a defendant's presence at a still indicates the likelihood that he participated in the illegal scheme, and that such evidence would therefore be relevant and admissible in a trial on a possession charge. Nevertheless, the Court concluded that the connection alone was "too tenuous to permit a reasonable inference of guilt . . . ."[19] Drawing an analogy to *Romano*, Judge Mansfield reasoned that in a similar way, presence in an automobile containing a firearm would be

14. 319 U.S. 463 (1943).
15. *Id.* at 469.
16. 380 U.S. 63 (1965).
17. 382 U.S. 136 (1965).
18. 380 U.S. at 67-68.
19. 382 U.S. at 141.

relevant and admissible in a trial on a possession charge, but would be insufficient in itself to permit a reasonable inference of guilt.

Judge Mansfield next considered *Leary v. United States,*[20] in which the Court added more bite to the "rational connection" test. A "criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[21] Judge Mansfield noted that *Leary* raised the possibility that a presumption might be required to satisfy the criminal reasonable doubt standard if proof of the crime charged or an essential element thereof depended on the use of the presumption.[22] This issue was not considered in *Allen,* however, because the presumption in question did not even satisfy the "more likely than not" test set out in *Leary.*

Applying the *Tot-Leary* standards to the instant case,[23] Judge Mansfield concluded that "this statutory presumption must be declared unconstitutional on its face unless it can be said with substantial assurance that an inference of possession . . . of a gun by a car's occupants is more likely than not to flow from the gun's presence in the vehicle."[24] He acknowledged that section 265.15(3) of the Penal Law makes the presumption inapplicable in situations that would otherwise result in especially irrational connections between the proved and presumed facts.[25] Nonetheless, Judge Mansfield found no rational basis for the presumption at issue, and noted that in many situations occupants of a car would not even know there was a gun in the vehicle, or, if they did know, they might not have had access to it. The court considered factors such as the ease with which a gun can be concealed in a car and the frequency of situations in which occupants of a car are not well acquainted with one another.

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20. 395 U.S. 6 (1969).

21. *Id.* at 36.

22. 568 F.2d at 1006 n.14 (citing 395 U.S. at 36 n.64); *see* text accompanying notes 40-42 *infra.*

23. The defendants' convictions were based on a statute which provides that the presence of a gun in a car (the proved fact) is sufficient evidence to permit the jury to infer the possession of such gun by all persons in the car (the presumed fact). Under the New York Penal Law, to "possess" is "to have physical possession or otherwise to exercise dominion or control over tangible property." N.Y. PENAL LAW § 10.00 (8) (McKinney 1975).

24. 568 F.2d at 1007.

25. *See* note 3 *supra* for the exception to § 265.15(3).

II. The New York Court of Appeals Reviews Section 265.15(3)

At trial, and on appeal to the state courts, the defendants argued that the presumption was unconstitutional as applied. The New York Court of Appeals, however, made no mention in its opinion of any conclusion regarding the strength of the connection between the proved and presumed facts. An examination of that court's opinion reveals its failure to consider the due process requirements established in *Tot* and *Leary*.

Judge Jasen initiated the majority opinion by noting that prior to the enactment of the presumption in question it was generally impossible to establish possession in a situation like *Allen*. Courts had thus been forced to release all of the defendants.[26] In response to what a New York Supreme Court Justice had considered an "urgent need"[27] for remedial action, the legislature, according to Judge Jasen, "took heed" of this plea and enacted the statutory presumption.[28] A major portion of Judge Jasen's opinion is devoted to an explication of this perceived need.

Judge Jasen disposed of the defendants' contention that the statutory presumption was inapplicable to them because the guns were found "upon the person" of Jane Doe (in her handbag): If the fact that the weapons were found in a personalized container could preclude the use of the presumption, "[a]stute illegal possessors of weapons" could use such containers to evade joint responsibility.[29] He expressed concern that such reasoning might be applied to "briefcases, shopping bags with groceries, cartons, suitcases, or the myriad of other things that people frequently carry or transport."[30] The resultant potential for escaping responsibility would defeat legislative intent and "return the law to the early days of this century when law enforcement was easily frustrated . . . ."[31] Furthermore, said Judge Jasen, absent "clear indication" that the weapon was on the person of one

26. *See* People v. Lemmons, 40 N.Y.2d 505, 510, 354 N.E.2d 836, 839, 387 N.Y.S.2d 97, 100 (1976) (citing People *ex rel.* DeFeo v. Warden, 136 Misc. 836, 241 N.Y.S. 63 (Sup. Ct., Kings Co. 1930)).

27. 136 Misc. 836, 241 N.Y.S. 63 (Sup. Ct., Kings Co. 1930).

28. People v. Lemmons, 40 N.Y.2d 505, 510, 354 N.E.2d 836, 839, 387 N.Y.S. 2d 97, 100 (1976).

29. *Id.* at 511, 354 N.E.2d at 840, 387 N.Y.S.2d at 101.

30. *Id.*

31. *Id.*

occupant, the question of the presumption's applicability should be left to a jury.[32]

In reaching its conclusion, the New York Court of Appeals relied heavily on an analysis similar to comparative convenience. This type of analysis focuses on the practical necessity for the presumption in situations in which a particular element of the crime is especially difficult for the prosecution to establish. A court using the test compares the information available to the prosecution against that information normally available to the defendant. If it finds that in regard to a particular element of the crime it would be significantly more convenient for the defendant to explain his innocence than for the prosecution to establish his guilt, the presumption stands and the burden of going forward with evidence shifts to the defendant. As indicated earlier, the United States Supreme Court rejected the comparative convenience test more than thirty-five years ago because the test did not meet the due process requirements embodied in the fifth and fourteenth amendments. As *Tot* explained, if comparative convenience were the sole test for determining a presumption's constitutionality, the legislature could effectively restructure the criminal justice system by placing the defendant in the position of having to establish his innocence. The comparative convenience test was, therefore, reduced to a mere corollary of the rational connection test, admissible for consideration only after the presumption has satisfied the requirements of due process. Nonetheless, Judge Jasen emphasized the practical considerations giving rise to the enactment of the presumption without first examining the presumption to determine whether the proved and presumed facts were even rationally related.

The same mistaken analysis was applied by the New York Court of Appeals to the "upon the person" exception. Judge Jasen expressed his fear that if this case were to be found within the exception, defendants in many similar situations would also escape the reach of the presumption. By stating that such a result would return the law to the days when enforcement was easily frustrated, the court indicated that its primary concern was to avoid returning to the prosecution the heavy burden of establishing possession. The court never questioned whether a weapon concealed in a woman's handbag is more likely than not possessed by all the occupants of the car in which it is found. In contrast, the court's most conclusive statement on this

32. *Id.* at 511-12, 354 N.E.2d at 840-41, 387 N.Y.S.2d at 101.

issue was that "the placement of a weapon in a handbag *does not necessarily indicate* that the owner of a handbag is in the sole and exclusive possession of the weapon."[33]

Judge Wachtler, dissenting in part, acknowledged the due process requirements established in *Tot* and *Leary*. Yet, he found it rational to infer from a person's presence in an automobile that he had actual or constructive possession of a weapon found in that vehicle. In determining the presumption's applicability in this case, however, Judge Wachtler agreed with the defendants that the "upon the person" exception controlled. He stated that where weapons are in a woman's handbag, located within her reach, the "inference that all the occupants possessed these weapons hardly follows, naturally and rationally, from these circumstances."[34] Furthermore, "this conclusion is inescapable in the light of the historical origin of this statute as *formulated within due process requirements.*"[35] Judge Wachtler thus recognized that the legislature, in devising exceptions to the presumption, had excluded those situations in which its application would have most blatantly violated the demands of due process. These exceptions are clearly outside the boundaries of the due process requirements, and therefore the closer a given fact situation is to one of these exceptions, the more likely it is to violate due process. Accordingly, the question of whether the defendants fell within one of the statutorily provided exceptions, like any question pertaining to the presumption's applicability, must be reviewed in the light of the requirements of due process.

In contrast to Judge Wachtler's dissent, the majority concluded that unless the defendants were clearly within the statutory exception, the question of the presumption's applicability should be left for the jury to decide. It is the responsibility of the court, however, to insure that the application of the statutory presumption comports with the requirements of due process before it is submitted to the jury. *Tot, Leary,* and countless other cases affirming the principles that they embody,[36] have transformed the question of whether the presumed fact is more likely than not to flow from the proved fact, into more than a mere factual question. The question is rather one of law as well,

33. *Id.* at 511, 354 N.E.2d at 840, 387 N.Y.S.2d at 101 (emphasis added).

34. *Id.* at 515, 354 N.E.2d at 843, 387 N.Y.S.2d at 103 (Wachtler J., dissenting in part).

35. *Id.*, 354 N.E.2d at 843, 387 N.Y.S.2d at 104 (emphasis added).

36. *See, e.g.,* note 38 *infra.*

which must be resolved by the court before the presumption can be submitted to the jury for consideration.

Judge Jasen's disregard of the constitutional tests established in *Tot* and *Leary* necessitated the Second Circuit's review of the entire development of due process standards. Judge Mansfield stated that: "Nothing in the *Lemmons* decision or others upholding the presumption demonstrates that the state courts or legislature have ever attempted to justify this firearm presumption as *Leary* requires."[37] In light of the fact that these due process requirements are not novel to the New York courts,[38] Judge Jasen's opinion becomes even more

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37. 568 F.2d at 1008. It should be noted in response to Judge Mansfield's justifiable criticism of the New York courts and legislature, that in the past, several lower courts have taken it upon themselves to insure the requirements of due process were not violated. In People *ex rel.* Dixon v. Lewis, 249 A.D. 464, 293 N.Y.S. 191 (3d Dep't 1937) *aff'd per curiam,* 276 N.Y. 613, 12 N.E.2d 603 (1938), appellants Dixon and Latham appealed from orders dismissing writs of habeas corpus, challenging the constitutionality of N.Y. PENAL LAW § 1898-a (the substantial equivalent of N.Y. PENAL LAW § 265.15(3)). The court reversed the orders and sustained the writs of habeas corpus. Although the majority did not specifically declare the statute unconstitutional, Justice Rhodes, concurring, made clear his opinion that the statutory presumptions did not comport with the due process of law:

> [T]he Legislature has not the power to declare that certain facts shall be sufficient to prove the thing sought to be established, when it is apparent that such facts do not in reason and logic possess such inherent probative force and value; otherwise the Legislature might by fiat create a presumption which would permit the guilt of the defendant to be declared without actual proof thereof. There must be a rational connection between the facts proven and the ultimate fact sought to be established.

249 A.D. at 468-69, 293 N.Y.S. at 193. When the court of appeals affirmed the order sustaining the writs, it did not, however, pass on the constitutionality of the presumption. The court said that the question could not be reached, since the information failed to state a crime. People *ex rel.* Dixon v. Lewis, 276 N.Y. 613, 12 N.E.2d 603 (1938).

Similarly, the New York supreme court in People *ex rel.* Schubert v. Pinder, 170 Misc. 345, 9 N.Y.S.2d 311 (Sup. Ct., Queens Co. 1938), and in People *ex rel.* Fry v. Hunt, 29 N.Y.S.2d 927 (Sup. Ct., Wyoming Co. 1941), *motion granted,* 289 N.Y. 653, 44 N.E.2d 625 (1942), sustained writs of habeas corpus discharging prisoners from custody, on the grounds that the statutory presumptions (N.Y. PENAL LAW § 1898-a) on which their convictions were based did not comply with the requirements of due process.

38. As early as 1893, Justice Peckham of the New York Court of Appeals, in a comment regarding the use of presumptions in criminal prosecutions, stated:

> [T]he fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary . . . .

People v. Cannon, 139 N.Y. 32, 43, 34 N.E. 759, 762 (1893).

In People v. McCaleb, 25 N.Y.2d 394, 255 N.E.2d 136, 306 N.Y.S.2d 889 (1969), the New York Court of Appeals upheld a statute providing that occupation of an automobile without the owner's consent is sufficient evidence to infer that the occupant has knowledge of the lack of consent. Noting the nature of "joy riding," the court accepted the state's argument that it is more likely than not that one youth, in the company of another with an automobile, would know whether his companion has consent to use

curious. The circumstances of this case may explain the court's preoccupation with the practical benefits of the presumption, as well as the court's failure to apply the appropriate standard of review. The defendants were occupants of a car containing two handguns, one machine gun, and over a pound of heroin.[39] Despite obvious implications of the guilt of at least one occupant, it is doubtful that any would have been convicted of possession of the handguns in the absence of the statutory presumption. At trial, the presumption served as a priceless tool, enabling the prosecutor to obtain convictions by merely establishing each defendant's presence in the automobile at the time the firearms were found. The value of this statutory presumption should not be underestimated in the light of the exceptionally difficult task faced by prosecutors attempting to prove possession in these situations. Nonetheless, the practical necessity for such a presumption cannot justify its use when the fact presumed bears only the most tenuous relationship to the fact actually established. The goal of the judicial system is not simply to convict; it is equally, if not more important, to acquit the innocent. The due process tests of *Tot* and *Leary* safeguard the innocent and insure that laws meant to convict the guilty do not, through broad language, trap the innocent.

In addition, the standards of review established by the Supreme Court in *Tot* and *Leary* offer the criminal defendant only the bare minimum protection of his due process rights. Modern criminal law theorists currently argue for more stringent standards for the review of criminal presumptions.[40] They contend that the defendant's right

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that vehicle. The court weighed the presumption against the tests embodied in *Tot* and *Leary* and concluded that the statute satisfied due process.

In People v. Levya, 38 N.Y.2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975), the New York Court of Appeals also acknowledged the due process requirements of *Tot* and *Leary*. The court relied on the 1972 INTERIM REPORT OF THE TEMPORARY STATE COMMISSION TO EVALUATE THE DRUG LAWS, which stated that it would be unlikely that persons transporting large quantities of dangerous drugs would go driving with innocent friends or pick up strangers. Accordingly, it upheld the constitutionality of a statute making the presence of a dangerous drug in an automobile presumptive evidence of knowing possession by each person in the auto at the time the drugs are found.

39. *See* note 2 *supra* regarding defendants' acquittal of charges for possession of the machine gun and heroin.

40. *See, e.g.*, Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases; A Theoretical Overview*, 79 YALE L.J. 165 (1969); Holland & Chamberlin, *Statutory Criminal Presumptions: Proof Beyond a Reasonable Doubt?*, 7 VAL. L. REV. 147 (1973); Comment, *Criminal Statutory Presumptions and the Reasonable Doubt Standard of Proof: Is Due Process Overdue?*, 19 ST. LOUIS U.L.J. 223 (1974); Comment, *Statutory Criminal Presumptions: Reconciling the Practical With the Sacrosanct*, 18 U.C.L.A. L. REV. 157 (1970).

to have every element of the crime proved beyond a reasonable doubt is not sufficiently protected by the "more likely than not" test enunciated in *Leary*.[41] The Supreme Court itself has acknowledged the possibility that greater protection of the defendant's due process rights may be required.[42]

III. Constitutionality of New York Penal Law Section 265.15(3) "As Applied" vs. "On Its Face"

An important element of the Second Circuit's opinion was its decision to hold the presumption unconstitutional on its face rather than as applied, despite the state's contention that the "on its face" issue was not properly before the circuit court. At trial and on appeal before the state courts, the defendants had only argued that the presumption was unconstitutional as applied. Thus, since the defendants argued in the federal courts that the presumption was unconstitutional on its face, they were asking the court to consider a different claim—one that had to be addressed by the state courts before a federal court could consider the habeas corpus petition.[43]

Judge Mansfield rejected the state's argument because the ultimate question for disposition—whether there exists a sufficient con-

41. Ashford & Risinger, *supra* note 40, offer the following analysis: When a criminal presumption is applied, the court charges the jury that while the presumed fact must on all evidence be found beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact. The justification for concluding that the presumption does not deny the defendant his right to have a jury find every element of the crime beyond a reasonable doubt is based on the premise that the jury is permitted but not required to find the existence of the proved fact as sufficient evidence of the presumed fact. It is a difficult task, however, for the jury to determine whether a particular element of a crime has been established beyond a reasonable doubt. When faced with this task, the jury will rely heavily on the judge's instructions that in the eyes of the law the facts proved constitute sufficient evidence to justify a finding of the fact presumed beyond a reasonable doubt. The jury, having found the proved fact, and having been informed that a finding of the presumed fact is correct in the eyes of the law, will look to see if there is evidence tending to disprove the presumed fact. If no evidence rebutting the presumed fact has been introduced, the jury will most likely find the existence of the presumed fact beyond a reasonable doubt. In such instances, the defendant will be deprived of his right to a fair and independent jury determination. Defendants subject to the presumption in question would often be faced with the impossible burden of rebutting an inference of possession by being forced to explain the presence of weapons they knew nothing about. In such situations, a finding by the jury of the presumed fact, possession of the weapon, seems an almost unavoidable result.

42. *See* Barnes v. United States, 412 U.S. 837, 842-46 (1973); Turner v. United States, 396 U.S. 398, 416 (1970); Leary v. United States, 395 U.S. at 36 n.64.

43. Applicants for federal habeas corpus relief must first exhaust available state remedies, 28 U.S.C. § 2254(b)-(c); *see* Fay v. Noia, 372 U.S. 391, 434-35 (1963).

nection between the proved and presumed facts—was substantially the same regardless of the context in which the law was considered.[44] He also noted that since the New York Court of Appeals had failed to declare the presumption unconstitutional as applied in a situation such as *Allen,* it is inconceivable that the court would hold the presumption unconstitutional on its face. In support of its apparent bypass of state exhaustion requirements, the court cited *Stubbs v. Smith.*[45] In that case, the Second Circuit refused to require the habeas petitioner to exhaust his state court remedies on the issue of the constitutionality of this same presumption, despite the fact that the question had not been raised in either the state or district court.[46] The court in *Stubbs* reasoned that the highest state court had already rejected the substance of petitioner's legal claim and that there was no indication that the New York Court of Appeals would depart from its prior decisions.[47]

Judge Mansfield, explaining the reason for the court's broad holding, said that when the requisite connection between proved and pre-

44. The circuit court found support for its assertion in Picard v. Connor, 404 U.S. 270 (1971). In *Picard,* the Supreme Court acknowledged instances in which the ultimate question for disposition would remain the same despite variations in the legal theory. Specifically, the Court reasoned that it is the substance of federal habeas corpus claims which must first be presented to the state courts in order to exhaust state remedies.

45. 533 F.2d 64 (2d Cir. 1976). For other cases sanctioning a futility of exhaustion argument *see, e.g.,* Sarzen v. Gaughan, 489 F.2d 1076, 1082 (1st Cir. 1973); Ham v. North Carolina, 471 F.2d 406, 407-08 (4th Cir. 1973); Perry v. Blackledge, 453 F.2d 856, 857 (4th Cir. 1971), *cert. denied,* 417 U.S. 21 (1974).

46. The court in *Stubbs* never reached the question of whether the presumption satisfied the "more likely than not" standard of *Leary.* The court held that even if the use of the presumption was unconstitutional error, that error was rendered harmless by the fact that there was enough circumstantial evidence to establish the appellant's possession of the weapon beyond a reasonable doubt. 533 F.2d at 70-71.

47. A futility of exhaustion argument is even more convincing in the case at hand than it was in *Stubbs.* In *Allen,* the circuit court was able to rely on the state court's decision in *Lemmons* as additional support for a futility of exhaustion argument, since the New York Court of Appeals was even unwilling to find the presumption unconstitutional as applied. The value of *Lemmons* becomes more apparent when compared with the cases cited to support a futility of exhaustion argument in *Stubbs. Stubbs* cited People v. Russo, 303 N.Y. 673, 102 N.E.2d 834 (1951), and People v. Levya, 38 N.Y. 2d 160, 341 N.E.2d 546, 379 N.Y.S.2d 30 (1975). As conceded by the court in *Stubbs,* 533 F.2d at 69, *Russo* had been decided prior to *Leary,* and the decision upholding this same statutory presumption had been reached on the basis of the *Tot* rational connection test, not on the more stringent standards later established in *Leary.* In *Levya,* the court reviewed the constitutionality of a different presumption permitting the inference of possession of a controlled substance by all persons inside an automobile in which the drug was found. The circuit court in *Allen* distinguished *Levya,* noting that in upholding the statutory presumption "the *Levya* court had before it a report indicating that the New York legislature may have actually found the connection required by *Leary.*" 568 F.2d at 1008-09 n.18.

sumed facts depends only on one or two clearly identifiable factual considerations not specifically mentioned in the statute, the court has not hesitated to restrict itself to an "as applied" holding.[48] He reasoned, however, that it is much different when the relationship between proved and presumed facts depends on a large variety of circumstances. In this latter case, the court would be forced to examine carefully the nature and quality of the evidence to determine if the presumption could be constitutionally applied.[49] And, such an approach would resemble "more a holding as to the sufficiency of the evidence than the 'more likely than not' determination required by *Leary*."[50] Other Second Circuit opinions were cited in support of the proposition that sufficiency of evidence is a question of state law that federal courts have traditionally refused to consider in habeas petitions.[51] The court concluded that by limiting itself to an as applied holding, the end result would be "wholesale conversion of state law issues into due process questions."[52] "[E]very prisoner to whom this presumption had been applied could effectively challenge the suffi-

48. The circuit court cited Turner v. United States, 396 U.S. 398 (1970) and United States v. Gonzalez, 442 F.2d 698 (2d Cir. 1971) (en banc), *cert. denied sub nom.* Ovalle v. United States, 404 U.S. 845 (1971), in support of this proposition. In *Turner,* the Supreme Court reviewed a statutory presumption which provided that when a person is shown to have possession of a narcotic drug (the proved fact) it is permissible to infer that the drug was illegally imported and that the possessor knew of its illegal importation. The Supreme Court noted that thefts of cocaine from legal sources inside the United States are sufficiently large as to render the presumption invalid as applied to Turner, who possessed what the Court considered to be a small quantity of the substance. However, the Supreme Court acknowledged the possibility that the presumption might be valid with regard to larger amounts of cocaine which would be less likely to come from United States sources. In *Gonzalez,* the Court held that the same statutory presumption was valid when applied to possession of larger amounts of cocaine.

49. The state in its brief before the United States Court of Appeals criticized the district court for doing precisely what Judge Mansfield sought to avoid. The Attorney General argued:

> By concluding that the facts of this case did not support the presumption of possession, the District Court implicitly ruled upon the sufficiency of the evidence before the jury. It is almost axiomatic that a federal habeas corpus court may not sit as an appellate court to review the sufficiency of the evidence in support of a conviction unless the conviction is so totally devoid of evidentiary support as to be a violation of due process.

Brief for Appellant at 14, Allen v. County Court, Ulster County, 568 F.2d 998 (2d Cir. 1977).

50. 568 F.2d at 1010.

51. *Id.,* citing Terry v. Henderson, 462 F.2d 1125, 1131 (2d Cir. 1972); United States ex rel. Griffin v. Martin, 409 F.2d 1300, 1302 (2d Cir. 1969); United States ex rel. Mintzer v. Dros, 403 F.2d 42 (2d Cir. 1967), *cert. denied,* 390 U.S. 1044 (1968).

52. 568 F.2d at 1010 n.21.

ciency of the evidence in his case by claiming that the evidence was insufficient to support the use of the presumption against him."[53]

Judge Timbers of the Second Circuit, concurring, argued that the statutory presumption should be held unconstitutional as applied. He acknowledged that the reason the Second Circuit has avoided considering sufficiency of evidence claims "stems from a desire to avoid intrusions into matters properly the province of the state courts," but argued that moreover, this policy "has the virtue of prudently avoiding unnecessary constitutional showdowns."[54] Judge Timbers questioned the logic of avoiding sufficiency of evidence claims in order to guard against unnecessary federal-state conflict when such a policy requires the federal courts to declare the New York statutory presumption unconstitutional on its face, an act which he considered "the most extreme form of exacerbation of federal-state relations."[55]

Judge Mansfield offered another argument in favor of holding the statutory presumption unconstitutional on its face rather than as applied. He stated that in order for the presumption to be constitutional as applied, the requisite relation between a defendant's presence in a car containing a weapon and his possession of that weapon would have to be established by independent evidence. Noting the "fruitlessness" of such an approach, Judge Mansfield explained that "[i]n effect the validity of the presumption would be upheld only in instances where the evidence would, independent of the statute, support an inference of possession."[56] In practice, Judge Mansfield's prediction is

53. *Id.*

54. 568 F.2d at 1011 (Timbers, J., concurring).

55. *Id.*

56. *Id.* at 1010. The courts of both Illinois and New Jersey have upheld the constitutionality of statutory presumptions practically identical to the statutory presumption in question, on an "as applied" basis. An examinaion of these decisions reveals that the independent evidence presented in support of the constitutionality of these presumptions would probably have been sufficient in itself to support an inference of possession. In People v. Hood, 49 Ill. 2d 526, 276 N.E.2d 310 (1971), the Supreme Court of Illinois held the statutory presumption constitutional as applied in the light of the court's finding that the defendant was the driver of the vehicle and in control of the vehicle, and that the shotgun was located under the seat of the defendant. In State v. Hock, 54 N.J. 526, 257 A.2d 699 (1969), *cert. denied,* 399 U.S. 930 (1970), the Supreme Court of New Jersey relied on independent evidence connecting appellant Hock with the possession of a revolver, and thereby upheld the constitutionality of the statutory presumption as applied. Hock occupied the right front seat of an automobile. Police had ordered the driver of the automobile to drive to police headquarters. On the way, the officer following saw Hock bend forward toward the floor for an appreciable amount of time. The gun was found under Hock's seat upon arrival at the station. In State v. Blanca, 100 N.J. Super. 241, 241 A.2d 647 (Super. Ct., App. Div. 1968), the court upheld the use of the statutory presumption stating that "the validity and applicability of N.J.S. 2A: 151-7, N.J.S.A., must be judged in the light of the

not without merit. In almost any case in which sufficient circumstantial evidence has been presented to render application of the presumption constitutionally sound, the jury would probably rely on that independent evidence, rather than the presumption, in deciding whether to infer possession beyond a reasonable doubt. At least in theory, however, there would exist some situations in which the circumstantial evidence would be sufficient to satisfy the "more likely than not" standard of *Leary,* and yet be insufficient to support an inference of possession independent of the presumption. In those situations, a perfectly functioning jury could not find the element of possession beyond a reasonable doubt without the aid of the presumption.

IV. Have We Seen the Last of New York Penal Law Section 265.15(3)?

On January 17, 1978, Justice Rubin of the Supreme Court of Queens County rendered a decision in the case of *People v. Williams.*[57] Defendant Williams had been found guilty of the felony of criminal possession of a weapon in the third degree. The jury had been instructed regarding the presumption of possession under section 265.15(3) of the New York Penal Law. Relying on *Allen,* Williams moved to have the guilty verdict set aside. Justice Rubin denied the defendant's motion, finding the presumption constitutional as applied to the facts in the case.[58]

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totality of circumstances in a particular case." 100 N.J. Super. at 249, 241 A.2d at 651. The "circumstances" supporting the use of the presumption in this case could certainly have supported an inference of possession independent of the presumption. In this case, appellants used pistols in the perpetration of a robbery. Within an hour after the robbery, the police found both pistols on the floor of the car, one alongside each appellant. Later witnesses even identified the pistol found alongside each appellant, as the same one used by that appellant in the robbery.

57. 93 Misc. 2d 93, 402 N.Y.S.2d 289 (Sup. Ct., Queens Co. 1978).

58. Since *Williams,* the New York Supreme Court in People v. Joseph, 93 Misc. 2d 267, 402 N.Y.S.2d 751 (Sup. Ct., N.Y. Co. 1978), and in People v. Handre, 94 Misc. 2d 217, 404 N.Y.S.2d 273 (Sup. Ct., Kings Co. 1978) also considered the constitutionality of the statutory presumption in question. In *Joseph,* Justice Milonas dismissed an indictment which rested almost entirely on the presumption. He noted the fact that the New York Court of Appeals has "declined to confront directly the constitutionality of the statutory presumption," 93 Misc. 2d at 271, 402 N.Y.S.2d at 754, and referred to the opinion of the Second Circuit as "extremely persuasive." *Id.* at 270, 402 N.Y.S.2d at 753. Justice Milonas acknowledged the fact that the Second Circuit's decision is not binding upon the state courts. Yet, he argued that this does not mean the New York courts are obligated to ignore that holding. In conclusion, Justice Milonas stated that in regard to federal matters the federal courts speak with supremacy.

In disregarding the Second Circuit's decision in *Allen,* Justice Rubin stated:

> When a conflict regarding the constitutionality of a state statute exists as between a state court and a federal court, other than the Supreme Court of the United States, the state court is not bound by the federal court's reading of the statute. More specifically, in the event of contrary views between the New York Court of Appeals and a United States Circuit Court of Appeals, the rulings of the New York Court of Appeals are controlling upon all state courts.[59]

There is substantial support for the contention that the New York Supreme Court was not bound by the Second Circuit's decision in *Allen.*[60] An examination of the cases relied on in *Williams,* however, raises the question of whether the decision of the New York Court of Appeals was actually controlling upon the New York Supreme Court as Justice Rubin contends.[61] In any event, Justice Rubin did not merely follow the ruling of the New York Court of Appeals with blind allegiance.

The factual situation involved in *Williams* made any decision exceptionally difficult. Williams was the sole occupant of a vehicle

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In *Handre,* Justice Deeley denied a defendant's motion in which the defendant argued that the Second Circuit's opinion in *Allen* constituted a legal impediment to continuing prosecution under the presumption. The court offered no independent evaluation in its opinion regarding the statutory presumption's compliance with due process. Apparently feeling constrained to follow the decision of the New York Court of Appeals, Justice Deeley stated that "[a]lthough it is heady wine indeed for a trial court to have the opportunity to render unconstitutional the acts of the legislative body, this is a sober, serious decision rarely to be made." 94 Misc. 2d at 220, 404 N.Y.S.2d at 275.

59. 93 Misc. 2d at 94, 402 N.Y.S. 2d at 290 (citing People v. Malloy, 21 A.D.2d 904, 251 N.Y.S.2d 752 (2d Dep't 1964), *rev'd on other grounds,* 22 N.Y.2d 559, 293 N.Y.S.2d 542 (1965)); Walker v. Walker, 51 A.D.2d 1029, 1030, 381 N.Y.S.2d 310, 311-12 (2d Dep't 1976).

60. This proposition is usually based on the fact that the lower federal courts do not exercise jurisdiction over state courts. *See, e.g.,* United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied,* 402 U.S. 983 (1971). *See generally* Annot., 147 A.L.R. 857 (1943).

61. *See* note 59 *supra.* In People v. Malloy, 21 A.D.2d 904, 251 N.Y.S.2d 752 (2d Dep't 1964), *rev'd on other grounds,* 22 N.Y.2d 559, 240 N.E.2d 37, 293 N.Y.S.2d 542 (1965), the appellate division did specifically state that when such a conflict arises, "the rulings of the New York Court of Appeals are controlling on the court." However, the court cited Aronson v. McNeil, 19 A.D.2d 731, 732, 244 N.Y.S.2d 427 (2d Dep't 1963), as its sole support for this proposition. Moreover, while the appellate division in *Aronson* did express its belief that it was constrained to follow the ruling of the New York Court of Appeals, the court offered no precedent in support of its conclusion. In *Walker v. Walker,* the other case cited by Justice Rubin in support of this proposition, the court never addressed the question of whether it must follow the ruling of the New York Court of Appeals in such a situation, 51 A.D.2d 1029 (2d Dep't 1976). To the contrary, the court noted that the issue was whether the court was bound to follow the federal court's holding or, if not so bound, should apply its own reasoning in resolving this case. *Id.* at 1030.

when a weapon was found underneath the driver's seat. Justice Rubin found that "[i]n such a case, a conclusion of possession, actual or constructive, is natural and consistent with life and life's experiences."[62] This is one of the very few factual situations in which a court might legitimately find the presumption constitutional as applied without the support of independent evidence sufficient to establish an inference of possesssion on its own.[63]

Justice Rubin noted the substantial difference between the facts in *Williams* and those in *Allen,* and stated that the facts "suggest that if this case had been the subject of the *Allen* appeal, the United States Court of Appeals might have reached a different result."[64] Although on rare occasions such as this a particular factual situation might make application of the statutory presumption particularly tempting, it is extremely doubtful that the Second Circuit would have reached a different result.[65] Paramount in the minds of the judges of the circuit court was the protection of due process rights. A similar statutory presumption, limited to situations in which there is only one occupant in a car in which a weapon is found, might comport with the requirements of due process; however, the presumption in question was clearly intended to apply to situations in which there is more than one occupant in a vehicle.[66] It is under those circumstances that possession of a weapon found in a vehicle is especially difficult to establish. And, it is under those circumstances that the United States Court of Appeals quite properly found the statutory presumption unconstitutional.

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62. 93 Misc. 2d at 96, 402 N.Y.S.2d at 291. The determination that a statutory presumption is consistent with life and life's experiences is essentially the New York version of the due process test embodied in *Leary. See, e.g.,* People v. McCaleb, 25 N.Y.2d 394, 400-01, 255 N.E.2d 136, 306 N.Y.S.2d 389 (1969); People v. Terra, 303 N.Y. 332, 335, 102 N.E.2d 576, 578 (1951).

63. *See* text accompanying notes 55-56 *supra.*

64. 93 Misc. 2d at 95, 402 N.Y.S.2d at 290.

65. This is, of course, assuming that the issue of the statute's constitutionality on its face would be properly before the court.

66. *See* Defeo v. Warden, 136 Misc. 836, 241 N.Y.S. 63 (Sup. Ct., Kings Co. 1930), in which the court stated:

> The cases construing the word "possession" under section 1897 of the Penal Law make conviction impossible unless there is shown which occupant of the automobile possessed the pistol, and this notwithstanding the fact that its presence in an automobile makes it available for instant use by any of the occupants. . . . This, and similar cases, establishes the urgent need for legislation making the presence of a forbidden firearm in an automobile or other vehicle presumptive evidence of its possession by all the occupants thereof.

See also People v. Anthony, 21 A.D.2d 666, 249 N.Y.S.2d 997 (1st Dep't 1964), *cert. denied,* 379 U.S. 983 (1965).