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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 62

GUERRA (DIEGO),

Respondent.

20 Eagle Street
Albany, New York
May 21, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is People v. Guerra.

3 MR. BLIRA-KOESSLER: Good afternoon. May it
4 please the Court, Chris Blira-Koessler for the office of
5 Melinda Katz, Queens County DA, for Appellant.

6 At the start, I'd just like to request two
7 minutes of - - - of rebuttal time.

8 CHIEF JUDGE WILSON: Yes.

9 MR. BLIRA-KOESSLER: Thank you very much.

10 The Appellate Division in this case made several
11 fundamental errors. The first such error was deciding that
12 counsel had no strategy. The record clearly refutes that.
13 Counsel's strategy was to reduce the CSAM that the jury saw
14 - - -

15 JUDGE HALLIGAN: Counsel, can I just ask you so
16 I'm clear, there are a lot of counts in this case. Can you
17 clarify for me what the People's theory was as to the
18 videos and the images? I - - - I take it perhaps it was
19 different with respect to the counts on the videos that - -
20 - where there was no material remaining on the laptop, but
21 it had been used as a conduit. Can you lay that out for
22 me?

23 MR. BLIRA-KOESSLER: It's a little bit confusing.
24 I mean, there - - - there was really no CSAM whatsoever on
25 the laptop. They'd all been taken - - -

1 JUDGE HALLIGAN: I thought that there were images
2 in the unallocated space as to the - - - the - - - well,
3 there were images in the unallocated space and that a
4 number of the counts pertained to that; is that right?

5 MR. BLIRA-KOESSLER: Not - - - not images you
6 could see with the naked eye - - -

7 JUDGE HALLIGAN: Right.

8 MR. BLIRA-KOESSLER: - - - and images you needed
9 forensic software - - -

10 JUDGE HALLIGAN: But with the forensic software
11 you could see - - -

12 JUDGE CANNATARO: You needed forensic software?

13 MR. BLIRA-KOESSLER: Right. Right. You needed
14 the special forensic software that also wasn't on the
15 laptop.

16 JUDGE HALLIGAN: But was your theory that the
17 existence of those images, as seen by the forensic
18 software, was what equated to possession?

19 MR. BLIRA-KOESSLER: Right. Possession and
20 promotion.

21 JUDGE HALLIGAN: Okay.

22 MR. BLIRA-KOESSLER: Some of the videos
23 overlapped with what - - -

24 JUDGE HALLIGAN: Right.

25 MR. BLIRA-KOESSLER: - - - Det. Tatum had

1 previously seen when he used the - - -

2 JUDGE HALLIGAN: Understood. And so with respect
3 to the - - - the videos, it seemed to me that you had
4 perhaps two sets of counts, if I'm understanding correctly.
5 One set of counts that - - - that corresponded to the use
6 of the laptop as a conduit, but for which there were no
7 more images or screenshots remaining in the unallocated
8 space.

9 MR. BLIRA-KOESSLER: Right.

10 JUDGE HALLIGAN: And then some counts that
11 related to screenshots remaining in the unallocated space;
12 is that right?

13 MR. BLIRA-KOESSLER: Yeah. I think thirteen of
14 the images - - - really the images in the unallocated space
15 were the ones that he saw using the Ares random software.
16 Another four were just there.

17 JUDGE HALLIGAN: And so - - -

18 MR. BLIRA-KOESSLER: There were other images
19 found as well. And those were the other counts of
20 possession. Just the images that were found on the laptop.

21 JUDGE HALLIGAN: Okay. So with respect to the
22 images that remained in the unallocated space,
23 understanding that it was visible only with the forensic
24 software.

25 MR. BLIRA-KOESSLER: Right.

1 JUDGE HALLIGAN: Right? Tell me if you would,
2 why it is that paragraph 5 of the stipulation didn't
3 preclude a defense to knowing possession. What was the
4 defense that remained in light of paragraph 5 of the
5 stipulation?

6 MR. BLIRA-KOESSLER: Well, I mean, the defense
7 always was throughout the trial identity that he didn't
8 perform the actus reus. It - - - it didn't really - - -
9 this is the other thing. The Appellate Division found - -
10 -

11 JUDGE HALLIGAN: Wait. Let me just press you on
12 that if I can.

13 MR. BLIRA-KOESSLER: Sure.

14 JUDGE HALLIGAN: So - - - so to the extent you
15 read paragraph 5 as saying - - - I think it was
16 uncontroverted, if I'm remembering correctly, that he
17 possessed the laptop itself?

18 MR. BLIRA-KOESSLER: Correct. No. That - - -
19 that was not in dispute.

20 JUDGE HALLIGAN: And his defense, in part, was so
21 did other people.

22 MR. BLIRA-KOESSLER: His defense was that
23 somebody else did.

24 JUDGE HALLIGAN: Other people used it.

25 MR. BLIRA-KOESSLER: Right. He wasn't - - -

1 JUDGE HALLIGAN: He was not the exclusive user,
2 right?

3 MR. BLIRA-KOESSLER: Right.

4 JUDGE HALLIGAN: But if paragraph 5 says that
5 possession of the images is - - - equates to knowing
6 possession and he possesses the laptop, then how does he
7 make out that - - - that defense? Maybe someone else also
8 possessed it, but how does he defend against knowing
9 possession in light of that paragraph?

10 MR. BLIRA-KOESSLER: He - - - he defends against
11 it because there was no charge, stip, evidence, anything
12 that said just possessing the laptop alone was enough. It
13 was always came down - - -

14 JUDGE HALLIGAN: I understand.

15 MR. BLIRA-KOESSLER: - - - to the videos and
16 images.

17 JUDGE HALLIGAN: But by virtue of inference, how
18 does he defend against it?

19 MR. BLIRA-KOESSLER: I mean, there - - - there's
20 no inference you can draw, at least by my reading of the
21 record, where you can say, well, he possessed the laptop
22 and that means he has the images. Remember, the images
23 weren't actually on there. They were in unallocated space.
24 Nobody could see them without that forensic software.

25 JUDGE HALLIGAN: I thought that that - - -

1 MR. BLIRA-KOESSLER: So it wasn't about having
2 the laptop. It was about, were you the person that
3 performed the affirmative acts to get those images onto the
4 laptop? Who did that? That was his defense. He said I
5 didn't do it. It was somebody else in the house. And that
6 was the only defense that was really supported by the
7 evidence in the case.

8 There were many people who lived in the house.
9 He made a statement saying, it wasn't me. I didn't do it.
10 Didn't have the forensic software. Didn't have the USB
11 drive. Nothing visible on the computer. It was all in the
12 unallocated space.

13 JUDGE CANNATARO: So are you arguing right now
14 that his possession of the laptop was never seriously in -
15 - - in contention during any part of this?

16 MR. BLIRA-KOESSLER: No. I mean, he said he
17 found it in the garbage and he likes to repair laptops. He
18 said that during his statement.

19 JUDGE GARCIA: It was possession of the images?

20 MR. BLIRA-KOESSLER: It's possession of the
21 videos and the images.

22 JUDGE CANNATARO: But that's my question because
23 I think what I'm hearing from my colleagues, and at least
24 that's what I gathered, was that that portion of the
25 stipulation essentially established as a conceded fact, as

1 an agreement, that whoever possessed the laptop knowingly
2 possessed the CSAM that was on it.

3 MR. BLIRA-KOESSLER: But I mean, the only
4 definition of possession and promotion we had throughout
5 this entire trial was the one in the court's charge. That
6 required affirmative acts, not just simply, hey, I've got
7 the laptop, that means that I'm the possessor.

8 The court even told the jury viewing is not
9 enough. So if you have direct contact with the images and
10 you view them, and that's not enough for possession, how
11 can anybody possibly find under the facts of this case, the
12 jury, whoever, that, oh, I have the laptop, that means that
13 I possess the images on it.

14 CHIEF JUDGE WILSON: Well, but isn't - - -

15 MR. BLIRA-KOESSLER: It was always the images and
16 videos.

17 CHIEF JUDGE WILSON: - - - isn't - - - isn't it a
18 fair interpretation, a possible interpretation, let's say,
19 of the jury's question are we bound by the stipulation that
20 they think there's some relationship between possession of
21 the laptop and what they have to decide?

22 MR. BLIRA-KOESSLER: Well, they - - - they never
23 asked that though. That's the thing we have to - - -

24 CHIEF JUDGE WILSON: But they did - - -

25 MR. BLIRA-KOESSLER: - - - read the form of the

1 question.

2 CHIEF JUDGE WILSON: - - - they asked that,
3 didn't they?

4 MR. BLIRA-KOESSLER: They did? Sorry, I didn't
5 catch that.

6 CHIEF JUDGE WILSON: Did not they ask, are we
7 bound by the stipulation?

8 MR. BLIRA-KOESSLER: Right. But they gave no
9 indication they thought laptop possession was enough and
10 there was no basis to assume - - -

11 CHIEF JUDGE WILSON: Did the court - - -

12 MR. BLIRA-KOESSLER: - - - they would think that.

13 CHIEF JUDGE WILSON: Did the court ever answer
14 that question?

15 MR. BLIRA-KOESSLER: The court provided - - - I -
16 - - I think the court gave the best answer it could under
17 the circumstances.

18 CHIEF JUDGE WILSON: What did it - - - what did
19 it answer as to whether they're bound by the stipulation?

20 MR. BLIRA-KOESSLER: That the stipulation is an
21 agreement between the parties that a certain fact is not an
22 issue. The parties have stipulated to what you see in
23 these stipulations. The facts and the stipulations.

24 Basically, what the jury was asking - - - asking
25 was what is the legal import of this stipulation? And now,

1 the court could have said, hey, yes, the stipulation is
2 binding and the court would have been correct because
3 that's the point of a stipulation. You enter into a
4 stipulation to take away an issue of fact from the jury.

5 But the court didn't do that. And that - - -
6 that in and of itself was pretty favorable to the defense.

7 JUDGE RIVERA: Does - - - does your argument rest
8 on what I thought I heard you say before that there is a
9 countervailing charge regarding possession? So if - - - if
10 - - - even if one could read the stipulation as perhaps as
11 being suggested from members of the bench that there's a
12 direct charge to the jury regarding possession, that would
13 negate that kind of reading?

14 MR. BLIRA-KOESSLER: Correct. The actual charge
15 to the jury that was given on more than one occasion is you
16 have to have affirmative acts. It's not just having the
17 laptop. It's having those images, downloading them, saving
18 them, obtaining them. You have to actually do something
19 with them. So it's not just the fact that he had the
20 laptop.

21 JUDGE RIVERA: Did - - - did the charge describe
22 what the acts would be or simply say acts or?

23 MR. BLIRA-KOESSLER: No. It said - - - I mean, I
24 - - - I can read the actual charge. But it basically said
25 saving, downloading, for promotion, and also procuring - -

1 -

2 JUDGE GARCIA: But counsel - - -

3 MR. BLIRA-KOESSLER: - - - which is obtaining.

4 JUDGE GARCIA: - - - I guess I'm - - - maybe I'm
5 just missing something. But it - - - it seems like the
6 real issue here was I had this hardware. Did I know what
7 was on it? Right? Did I know? Because his defense is
8 it's not my computer. I found it in the garbage or
9 whatever.

10 What you're saying about you have to do
11 something, download it, that could have been done by
12 whoever had the hardware, right? Somebody could have done
13 that. Then I found it in the garbage.

14 So what in the instructions was the jury made - -
15 - a finding by the jury required that this defendant knew
16 those images were on the laptop? Because the stipulation,
17 if you just read it, seems to cause some confusion over
18 that.

19 MR. BLIRA-KOESSLER: I - - - I - - - I really
20 don't think it causes any confusion because it's based upon
21 a well-settled - - -

22 JUDGE GARCIA: But listen to the first part of my
23 question.

24 MR. BLIRA-KOESSLER: All right.

25 JUDGE GARCIA: What else in the charge - - - and

1 I'm sorry I doubled up on you there. What else in the
2 charge would require the jury to find - - - which I think
3 we would agree they would need to find - - - that this just
4 wasn't a piece of hardware on the desk that this defendant
5 found the garbage, but that this defendant knew there were
6 child - - - there was child pornography on that?

7 MR. BLIRA-KOESSLER: I mean, the charge
8 specifically required affirmative acts like printing,
9 saving, downloading - - -

10 JUDGE GARCIA: But somebody could have done that
11 before I found the computer?

12 MR. BLIRA-KOESSLER: But that - - - that's the
13 whole defense. You - - - you - - - you hit the nail on the
14 head. That's his defense. Somebody else did it - - -

15 JUDGE GARCIA: And so - - -

16 MR. BLIRA-KOESSLER: - - - and the images weren't
17 on there. I didn't know they were there - - -

18 JUDGE GARCIA: - - - my problem is - - -

19 MR. BLIRA-KOESSLER: - - - because I don't have
20 the special forensics software - - -

21 JUDGE GARCIA: - - - they could believe that
22 defense and still convict him - - -

23 MR. BLIRA-KOESSLER: No. They can't.

24 JUDGE GARCIA: - - - based on the stipulation.

25 MR. BLIRA-KOESSLER: No, they cannot. Absolutely

1 not.

2 JUDGE GARCIA: Because you're just saying it just
3 needed to be downloaded and then you knew it was there.
4 And you had a computer that it was downloaded on, so.

5 MR. BLIRA-KOESSLER: But - - - but - - - but you
6 see, I think, with all due respect, you're stuck on the
7 possession of the laptop thing, which nothing - - - which
8 nothing in this case says is enough. You have to actually
9 put it on the computer. His defense was somebody else did
10 that. It wasn't me. Therefore, I didn't know about it.
11 So knowledge was derivative.

12 JUDGE CANNATARO: I think it's this language - -
13 -

14 MR. BLIRA-KOESSLER: It was secondary to
15 possession.

16 JUDGE CANNATARO: - - - in paragraph 5 of the
17 stipulation, the whoever possessed these videos and images
18 - - -

19 MR. BLIRA-KOESSLER: Right.

20 JUDGE CANNATARO: - - - knowingly had in his or
21 her possession and control or knowingly accessed with
22 intent to view a performance. So how - - - I - - - I - - -
23 I think what I - - - what you might be arguing and tell me
24 if I've got it, I took whoever possessed these videos to be
25 roughly equivalent to whoever had the computer, which is

1 where the images were - - - the laptop - - - knowingly
2 accessed with intent to view.

3 But you're saying whoever possessed these videos
4 is more like whoever downloaded them, saved them - - -

5 MR. BLIRA-KOESSLER: There we go.

6 JUDGE CANNATARO: - - - put them on a thumb drive
7 - - -

8 MR. BLIRA-KOESSLER: Affirmative acts. That's
9 the critical - - -

10 JUDGE CANNATARO: It's not having the - - -

11 MR. BLIRA-KOESSLER: It's not having the laptop.

12 JUDGE CANNATARO: - - - hardware. It's - - -
13 it's the downloading and all that stuff?

14 MR. BLIRA-KOESSLER: That's really his defense.
15 I just had it. I didn't put it on there. It was there
16 before I got it. That was the crux of his whole defense.
17 And if the jury is presumed to follow the court's
18 instructions, it has to interpret those terms in that stip
19 about possession and promotion in light of the court's
20 charge that says you need affirmative acts.

21 JUDGE CANNATARO: And then to make out that
22 argument, that that possession means that, you know - - -

23 MR. BLIRA-KOESSLER: Right.

24 JUDGE CANNATARO: - - - saving, downloading - - -

25 MR. BLIRA-KOESSLER: That's the only definition.

1 JUDGE CANNATARO: - - - you go to the charge.

2 MR. BLIRA-KOESSLER: Right.

3 JUDGE CANNATARO: And you're saying the charge
4 stresses that possession in this context means saving,
5 downloading, et cetera, et cetera.

6 MR. BLIRA-KOESSLER: Not only the charge,
7 everything throughout the trial. There was never any
8 contention by anybody that - - - I mean, certainly we
9 didn't argue, oh, well, he has the laptop, that means he's
10 guilty. That - - - that was never the case.

11 The court never said that. We didn't say that.
12 The defense didn't defend on that basis. The basis they
13 defended on was always, as counsel said throughout the
14 trial, identity.

15 JUDGE HALLIGAN: But I - - - I think - - -

16 JUDGE SINGAS: So what's the purpose - - -

17 JUDGE HALLIGAN: - - - the - - - the question and
18 - - - the question that defense counsel raises at several
19 junctures. First, I think when the jury requests the
20 stipulation and they ask to have it read. And then the
21 second day when they ask when there - - - if there - - -
22 the second question they asked if they're bound, is - - -
23 is that not confusing?

24 I mean, maybe you can through this cross-
25 referencing to the instruction, understand the - - - the

1 paragraph 5 which says whoever possessed them knowingly had
2 them in their possession and then cross-reference it to the
3 paragraph of the instruction which says you also have to
4 have affirmative acts. But I think defense counsel
5 suggesting that's very confusing and - - - and some
6 explanation would be helpful.

7 So why wasn't it necessary to give some
8 clarification at that point?

9 MR. BLIRA-KOESSLER: The - - - the jury wasn't
10 asking for clarification. I mean, except to the extent the
11 promotion, the jurors explicitly asked about that.

12 JUDGE CANNATARO: Well, they did say are we bound
13 by the stipulation?

14 JUDGE SINGAS: Can I ask you, what was the
15 purpose of the stipulation? Why - - - like, what did the
16 defendant gain by entering the stipulation? Because there
17 was an agreement about which photographs would be shown - -
18 - five or six. What was the purpose of the stipulation?

19 MR. BLIRA-KOESSLER: Well, I mean, there - - -
20 there was only an agreement because of the stipulation.
21 You - - - you - - - you may be referring to something that
22 happened during the first trial when the prosecutor asked
23 the court to admit everything if the jury asked. And then
24 he got - - -

25 JUDGE SINGAS: Right. And they said no, only

1 these images, and that's going to hold for the second trial
2 as well. So I'm just trying to get out, like, why did this
3 defendant enter into this stipulation?

4 MR. BLIRA-KOESSLER: Because there - - - there
5 was no way around - - -

6 JUDGE SINGAS: What did they gain here?

7 MR. BLIRA-KOESSLER: - - - basically. I mean,
8 the court proposed it and they continue to discuss it
9 after. I think the court was just a bit, maybe angered, or
10 irate at the prosecutor for making a suggestion like that
11 because he even said - - - the judge even said that defies
12 the whole spirit of the stipulation. So it wasn't a ruling
13 that.

14 JUDGE TROUTMAN: If we - - -

15 MR. BLIRA-KOESSLER: No.

16 JUDGE TROUTMAN: If we disagreed with you and
17 said that the attorney was ineffective because of the
18 stipulation, does it impact all the counts or just some?

19 MR. BLIRA-KOESSLER: If - - - if you agree with
20 the majority and say that yes, she was ineffective, does it
21 impact all? I mean, the majority reversed on all the
22 counts. So I - - - I might be inclined to say - - - I
23 don't know if there's a way of parsing out - - -

24 JUDGE HALLIGAN: Do you think - - -

25 MR. BLIRA-KOESSLER: - - - but it - - - it may -

1 - - I'm sorry to interrupt you. I just - - -

2 JUDGE HALLIGAN: No. I was just going to follow-
3 up. Go ahead, please.

4 JUDGE TROUTMAN: I - - - I just want to know.

5 JUDGE HALLIGAN: Sorry.

6 JUDGE TROUTMAN: So you're saying they're - - -
7 they're all in or all out?

8 MR. BLIRA-KOESSLER: I don't know. I'm thinking
9 about that, though. I'm - - -

10 JUDGE TROUTMAN: Okay.

11 MR. BLIRA-KOESSLER: I'm giving it a moment of
12 thought.

13 JUDGE HALLIGAN: While - - - while you think
14 about it.

15 MR. BLIRA-KOESSLER: That's a good question. I
16 didn't anticipate that - - -

17 JUDGE RIVERA: We'll have rebuttal.

18 MR. BLIRA-KOESSLER: Yeah.

19 JUDGE HALLIGAN: While you think about it on
20 rebuttal.

21 MR. BLIRA-KOESSLER: Sure.

22 JUDGE HALLIGAN: To - - - to add on to Judge
23 Troutman's question, if I can.

24 MR. BLIRA-KOESSLER: Sure.

25 JUDGE HALLIGAN: Does the stipulation, in your

1 view, apply equivalently to the video-related charges and
2 the image-related charges?

3 MR. BLIRA-KOESSLER: Yeah. I think so because it
4 was always put together as videos and images. Videos and
5 images. And it was always a theory of the case that he's
6 the downloader, the saver, the one who accessed the Ares
7 network. So you may be right. It's - - - it's - - - it's
8 all or nothing about that. You know, I'm not sure if
9 there's some little twist - - -

10 JUDGE TROUTMAN: That was a question. It was a
11 question actually as to what your - - -

12 MR. BLIRA-KOESSLER: It was a good question. It
13 was - - -

14 JUDGE TROUTMAN: - - - view was?

15 MR. BLIRA-KOESSLER: No, no. It was a good
16 question. I'm just not sure if there's a hook I'm missing
17 to that. But you know, the whole crux or theory of the
18 case was that - - - was that he's the one who did it. They
19 said: wasn't him.

20 The stip used the same terms used by the charge.
21 Jury is presumed to follow the court's instructions. They
22 would have to necessarily apply those terms to the stip.
23 And there was nothing ineffective about it. You know, had
24 - - - had she not agreed to this, there would have been way
25 more CSAM in evidence than three images and three

1 screenshots. And that would have clearly grabbed the
2 jury's attention, and they might not have even given the
3 defense the time of day if they saw all these, you know,
4 terrible images of children being abused.

5 JUDGE RIVERA: Why? I thought the judge had
6 already - - - perhaps I misunderstood. I thought the judge
7 had already said that the same rule as to what was coming
8 in or not coming in from the first trial was going to hold
9 in the second trial, and that's before anyone signed the
10 stip. Or am I misremembering the record?

11 MR. BLIRA-KOESSLER: At - - - at the first trial,
12 the stip wasn't signed according to the record. Then came
13 that incident where, like I was saying, the prosecutor
14 asked to admit everything. Then the judge got a bit irate.
15 But the parties continued to discuss it. So I don't think
16 the ruling was that if the defense wants to get out of it,
17 they're allowed out of it too. It was more to incentivize
18 the prosecutor to sign the stipulation.

19 Because remember, it was the judge's idea. This
20 is how he was going to resolve the motion. Sign a
21 stipulation. He wanted both parties to enter into it. He
22 wasn't going to let both back out or just let the defense
23 get the benefits of it without the knowledge concession.
24 That - - - that wouldn't have made any sense.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. BLIRA-KOESSLER: Thank you.

2 MS. KON: Good afternoon. Hannah Kon of
3 Appellate Advocates on behalf of respondent.

4 JUDGE HALLIGAN: Counsel, why doesn't the
5 instruction cure any issue with the stipulation?

6 MS. KON: Okay. So this is a quote from the
7 judge's - - - the judge instructs the jury: "Possess means
8 to have physical possession or otherwise to exercise
9 dominion or control. Physical possession is possession".
10 And the jury was instructed that.

11 The prosecutor then - - -

12 JUDGE HALLIGAN: No. But if you would focus on
13 the next paragraph, though. "Images stored may constitute
14 evidence of images that were previously viewed, et cetera.
15 Viewing them is not possession. Rather, such affirmative
16 acts such as printing, saving, downloading, or the like,
17 are required to show that the defendant exercised dominion
18 or control".

19 Why doesn't that paragraph address any issues
20 with the stip?

21 MS. KON: Right. Because that paragraph is
22 talking about the alternative dominion or control. It's -
23 - - it's the Kent language, right? You have to do
24 something more than just see the pictures.

25 But physical possession is the first clause.

1 Physical - - - "possess" means to have physical possession
2 or otherwise to exercise dominion and control.

3 So the jury then gets a stipulation that says
4 possess, which the court tells them is physical possession.
5 Whoever possessed these images knowingly did so.

6 JUDGE HALLIGAN: So I - - - I think, and maybe
7 your adversary can address this on rebuttal, but I - - - I
8 took the People to be arguing that the affirmative acts
9 requirement applies to the entirety of the prior paragraph.
10 In other words to the definition of possess both as
11 physical possession or otherwise exercising dominion or
12 control. You have a different view?

13 MS. KON: I - - - I absolutely have a different
14 view. I - - - I - - - I don't really understand that view.
15 Because at the end of that paragraph that Your Honor just
16 read, it - - - it cabins it to dominion or control.

17 JUDGE HALLIGAN: If we read it otherwise, would -
18 - - would that cure the problem? If we read the
19 affirmative acts requirement as applying to both physical
20 possession and dominion - - - dominion or control? Would
21 that ameliorate any confusion?

22 MS. KON: No. Absolutely not. For - - - for all
23 the reasons that Your Honor has brought up when my
24 adversary was arguing, it's - - - it's still incredibly
25 confusing. And we know it was confusing because the jury

1 sends back a note asking if it was bound. That's a - - -
2 that's a giant red flag.

3 JUDGE RIVERA: Did the jury - - - excuse me. The
4 judge give - - - give that charge - - - repeat that charge,
5 word for word, on - - - on the possession?

6 MS. KON: You mean after the note?

7 JUDGE RIVERA: At another time, yes.

8 MS. KON: No. I believe after the note, it only
9 repeated the promotion. The promotion charge.

10 JUDGE RIVERA: Did it repeat this charge at any
11 other point during the charge?

12 MS. KON: The possess?

13 JUDGE RIVERA: Yes.

14 MS. KON: I - - - I don't believe so. You know,
15 it - - - it told the jury that possess means the physical
16 possession. Whoever possessed the laptop then necessarily
17 also physically possessed the - - - the CSAM. Because, as
18 the prosecution told the jury over and over again, the
19 images were there on July 27th when police found the laptop
20 because Det. Connelly was able to look at every single one.
21 And at some point, those images were on the laptop and they
22 were still there on July 27th. And the defendant had sole
23 and exclusive use and possession of that laptop that was
24 used to share the video.

25 So the prosecutor has told the jury over and over

1 again that this laptop, whoever possessed this laptop, also
2 possessed the CSAM.

3 JUDGE HALLIGAN: What's your view as to why
4 defense counsel entered into the stipulation? From the
5 record, I mean.

6 MS. KON: I can't imagine why she would ever do
7 that because she doesn't need to - - -

8 JUDGE GARCIA: What was - - - I guess the other -
9 - - what was the - - - the real intent of that stipulation?
10 Put aside the mistake. Why? What was the purpose of this
11 that benefited the defense?

12 MS. KON: Well, I think the purpose was served by
13 the first two paragraphs, which is just that everyone
14 agreed, it's undisputed, that the performances in these
15 videos met the standard, right, under New York law for
16 child sexual performances. And so there's no reason for
17 the jury to have to see any of the images, because that's
18 all agreed to.

19 And that's how stipulations are supposed to work.
20 They're supposed to be - - -

21 JUDGE TROUTMAN: So the stipulation was to limit
22 the jury seeing some very heinous live videos and hearing
23 sound, correct?

24 MS. KON: Well, the - - -

25 JUDGE TROUTMAN: That was the original purpose.

1 As - - - as Judge Garcia said, regardless of what the
2 identified mistake may be, there was a purpose of trying to
3 carve-out an agreement that both sides could agree to,
4 correct?

5 MS. KON: Yes and no. The only reason why I say
6 no - - -

7 JUDGE TROUTMAN: She wasn't trying to limit the
8 jury's exposure to all of that evidence?

9 MS. KON: Well, I think maybe originally she was,
10 but then the court independently said for evidentiary
11 reasons, based on your motion, I'm only going to allow six
12 images to go to the jury. So she doesn't sign the stip.

13 JUDGE TROUTMAN: So you're saying that the court
14 could - - - the court had already determined it was going
15 to limit the People's proof, so she didn't have to stip to
16 anything?

17 MS. KON: Right. That's - - -

18 JUDGE TROUTMAN: The court had the right to do
19 that?

20 MS. KON: Sure. That's why she didn't stip at
21 the first trial. And in the first trial, those same six
22 images are shown as during the second trial, when she does
23 stip. And the court even says - - - at the end of the
24 first trial, he says the ruling I made with respect to the
25 videos that will - - - that will not be shown to the jury -

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JUDGE TROUTMAN: So again, your - - -

MS. KON: That ruling's the rule.

JUDGE TROUTMAN: - - - your - - - your answer is there was no reason for any stip whatsoever?

MS. KON: That's right.

JUDGE TROUTMAN: And so my question to you is does it affect all the counts, the ineffectiveness?

MS. KON: Yes. It affects all the count because the stipulation covers all the counts. It says whoever possess, right? Physical possession. Promotes knowingly. Whoever possesses, knowingly possesses. So it covers every count in this indictment, which is why I think the Appellate Division, you know, correctly realized that, you know, when defense counsel mistakenly stipulates away an entire defense - - -

JUDGE TROUTMAN: And you are - - - just so I'm clear. You are really saying that the court, regardless of the People's assent, the court was ruling without their assent, that they couldn't present all of the evidence? That there was an actual evidentiary ruling without a stipulation that limited what they could offer as to proof?

MS. KON: Yes. We quoted in our brief, and I apologize for not having the - - - the page number of my brief. But we actually quote that part of the brief where

1 the - - - the court says for - - - you know, I'm ruling on
2 the motion, on your motion in limine, and for these
3 reasons, for evidentiary reasons, I'm not doing this. And
4 then he says, you know, when no one can agree on any
5 language, he says stip or don't - - - stip, I don't care.

6 JUDGE TROUTMAN: But the court was - - - so
7 you're not - - - so you are disagreeing with counsel that
8 the court was trying to get the parties to agree to a
9 stipulation. I - - - I know the court wanted one. It - -
10 - it - - -

11 MS. KON: Yes.

12 JUDGE TROUTMAN: - - - the record is clear. But
13 the court was suggest - - - and the court suggested that
14 agreement; did it not?

15 MS. KON: Yes, it did. But then it apparently
16 abandoned that because he said, I mean - - - here, I found
17 the page. Sorry.

18 JUDGE TROUTMAN: How did it - - - how did the
19 court apparently abandon what it was trying to force upon
20 the People?

21 MS. KON: Well, because it - - - it says stip or
22 don't stip, I could care less at this point.

23 JUDGE HALLIGAN: That's the first trial, right?

24 MS. KON: Yes. And then it puts on the record at
25 defense counsel's request that that ruling is going to

1 remain for the second trial. He says it explicitly.
2 That's the ruling of the case, whether the People agree to
3 it or not, that's my ruling. That's on A775. That's what
4 the court says.

5 JUDGE TROUTMAN: And the court had the - - - and
6 that was a proper ruling in your eyes?

7 MS. KON: Yeah. And also I - - - I - - - I
8 wasn't decided. I don't think it can be really appealed
9 now. I don't think it was addressed. I don't think the
10 People have said that that was not a proper ruling at any
11 point.

12 But I think that the thing is that the - - - the
13 note asking for bound, I think that that was a - - - a sign
14 that something is very wrong. Because a jury should really
15 never be asking - - -

16 JUDGE SINGAS: But the jury doesn't say that.
17 The jury says, is the stipulation binding? I mean, I think
18 you're reading a lot into that.

19 MS. KON: No. They say, "are we bound" - - -

20 JUDGE SINGAS: Yes.

21 MS. KON: - - - I believe is the language of the
22 note. Are we bound? And I don't think a jury should be
23 asking if they're bound by stipulation. Because the whole
24 point of a stipulation is that it's a shortcut for elements
25 that are not in dispute. It shouldn't be dispositive - - -

1 JUDGE TROUTMAN: But what in that note suggests
2 confusion as to what the agreement was?

3 MS. KON: I'm sorry?

4 JUDGE TROUTMAN: Where's the confusion in the
5 note? They ask were they bound?

6 MS. KON: Right.

7 JUDGE TROUTMAN: Where's the confusion about what
8 the stip represented?

9 MS. KON: I don't think they - - - I don't think
10 there was confusion. I think they - - -

11 JUDGE TROUTMAN: Okay.

12 MS. KON: - - - I think they were saying - - -

13 JUDGE TROUTMAN: So your problem is what then?

14 MS. KON: My problem is they're saying - - -
15 they're looking at this and saying, well, if he possesses
16 the laptop, he knowingly possesses, that means he's guilty.
17 Are we bound by that?

18 JUDGE SINGAS: Yeah. But is that really true?
19 Because there were no images. There were no videos, right?
20 On that laptop, true? There were no videos on that?

21 MS. KON: When it was found by police.

22 JUDGE SINGAS: Yes. There's no videos on it.

23 MS. KON: Right. But the prosecution said that
24 the videos were on it at some point.

25 JUDGE SINGAS: Based on their forensic accounting

1 of that computer?

2 MS. KON: Right.

3 JUDGE SINGAS: Right. So he's just saying, look,
4 when I picked this up, I opened it up, there's nothing that
5 would indicate there's child porn here. There's no videos.
6 There's no photographs. It wasn't me.

7 But then the jury gets charged, look, in order
8 for you to find this defendant guilty, you have to
9 demonstrate or you have to believe that he engaged in
10 certain affirmative acts. And once the jury heard that,
11 assessed the evidence, they came back with a guilty
12 verdict. Presumably because they found those affirmative
13 acts, not because it was based solely on possession of this
14 laptop which had zero images on it.

15 MS. KON: So respectfully, I disagree. Because
16 actually, the jury was told over and over that every single
17 one of these photos is on this laptop. If you possess the
18 laptop - - - the other thing is the stipulation had no - -
19 -

20 JUDGE HALLIGAN: Is that true with respect to the
21 videos as well?

22 MS. KON: Not with the videos. The videos were
23 on the laptop in January. So if the jury thinks he
24 possessed - - -

25 JUDGE SINGAS: Right. So there's no videos?

1 MS. KON: Not in July, but in January.

2 So if the jury finds he possessed it in January,
3 then he possessed the CSAM. He was in physical possession
4 even if someone else put it on there in January, even if he
5 had no knowledge it was on there in January - - -

6 JUDGE SINGAS: Yeah. But that's not the charge.
7 The charge says you have to do something affirmatively in
8 order to be - - -

9 MS. KON: No. It - - -

10 JUDGE SINGAS: - - - found guilty.

11 MS. KON: Respectfully, it doesn't. It says
12 possess means to have physical possession or otherwise.

13 JUDGE HALLIGAN: This is your - - - your
14 bifurcation argument about the - - - the instruction,
15 right?

16 MS. KON: I don't - - - I don't really think - -
17 -

18 JUDGE HALLIGAN: - - - and it's either physical
19 possession or dominion and control - - -

20 MS. KON: Right.

21 JUDGE HALLIGAN: - - - and that the affirmative
22 acts only applies to the second piece of that definition,
23 right?

24 MS. KON: Right. And it's right there in the
25 language. And if we're all this confused, I can't imagine

1 how confused the jury must have been. And I think when
2 they sent back that note asking if they're bound, you know.
3 Defense counsel, she was absolutely ineffective - - -

4 JUDGE RIVERA: Is there language in the charge,
5 something that the - - - the parties agreed to in a
6 discussion with the judge? Is it part of the CJI?

7 MS. KON: The - - -

8 JUDGE RIVERA: This particular language that
9 you're saying, the - - - the first part is about physical
10 possession, and then the second part is dealing with an
11 alternative, i.e., dominion and control.

12 MS. KON: Yeah. This is the standard CJI charge.
13 And I mean, I think we all think of possession - - - if you
14 think about possession of a gun. It doesn't matter if you
15 do anything with the gun, if you physically possess the gun
16 and you know that you physically possess it, you're guilty.
17 And that's what happened here.

18 And I think, you know, the interesting thing - -
19 - the unique thing, I think, about this case is that
20 defense counsel realizes the problem and begs the court to
21 remedy her mistake and gives all these suggestions, and
22 Justice Aloise refuses to employ any of them. And I really
23 think that had Justice Aloise done any of those things, we
24 wouldn't be here.

25 So this is was she ineffective? These are

1 mutually reinforcing errors, which is what the Appellate
2 Division, I think, found as well. Is that, yes, she was
3 ineffective for stipulating away the entire defense. And
4 yes, the court erred by refusing to correct her mistake
5 when she asked him to by refusing to meaningfully correct
6 this mistake.

7 If a jury - - -

8 JUDGE HALLIGAN: Which is the O'Rama argument, I
9 take it, you're making, yes?

10 MS. KON: Yes. And the Appellate Division agreed
11 that that was an O'Rama violation. Because if the jury is
12 asking if it's bound, we know that they're not treating a
13 stip as a benign shortcut. We know they're relying on it
14 to decide guilt. And that tells us that the stip is
15 actually stipulating to a disputed element.

16 Stipulations are supposed to - - - are supposed
17 to remove consideration for undisputed elements. Like the
18 - - -

19 JUDGE TROUTMAN: So is it your view the - - - the
20 court was supposed to give a different instruction as to
21 possession when the note came back asking if they were
22 bound by the stip?

23 MS. KON: I think the court should have accepted
24 defense counsel's suggestion that it say the language
25 whoever possessed means knowing possess - - - knowingly

1 possess. Or even just like defense counsel said, ask for
2 clarification. But I think - - -

3 JUDGE TROUTMAN: So you're just saying the
4 submission of the notes speaks for itself, they were
5 confused?

6 MS. KON: Yes. And I - - - well, I think there's
7 two again, mutually reinforcing. We have a stipulation,
8 the language of which is at - - - at a - - -

9 JUDGE TROUTMAN: But you agree, the notes didn't
10 use the word possession, right?

11 MS. KON: I - - - I'm sorry?

12 JUDGE TROUTMAN: The notes didn't ask anything
13 about what is the meaning of possession?

14 MS. KON: Right. They're asking about the
15 stipulation. And the stipulation contains that - - - that
16 wording.

17 JUDGE TROUTMAN: I - - - that's not what I asked.
18 It didn't - - - didn't mention possession, did it?

19 MS. KON: That's right. It doesn't - - -

20 JUDGE TROUTMAN: Thank you.

21 MS. KON: - - - mention possession. I'm sorry if
22 I misunderstood, Your Honor.

23 JUDGE SINGAS: And wasn't the jury charged on
24 viewing computer images of a sexual performance of a child
25 on a computer does not itself constitute possession or

1 control of such images, rather such affirmative acts such
2 as printing, saving, downloading, or the like is required
3 to show the defendant in fact exercised dominion or control
4 over these images on his screen?

5 MS. KON: That's right. Exercise dominion and
6 control. Physical possession is the first. And the
7 alternative is you can exercise dominion and control, and
8 then by the way, like this - - - this court ruled in Kent -
9 - -

10 JUDGE SINGAS: And if we - - - if we're don't - -
11 -

12 MS. KON: - - - just looking at them, doesn't
13 count.

14 JUDGE SINGAS: - - - if we don't agree with that
15 interpretation - - - with your statutory interpretation, do
16 you lose?

17 MS. KON: No. Absolutely not. Because like I
18 said, and like Your Honor's noted, at a bare minimum, this
19 is incredibly confusing language and defense counsel
20 rightly asked the court to clarify this. To make this
21 clear to the jury that knowing - - - knowing possession is
22 required.

23 JUDGE TROUTMAN: And do you agree, though, that
24 when courts respond to a jury note, they respond to the
25 four corners of the note as it's written, correct?

1 MS. KON: Yes. I think - - -

2 JUDGE TROUTMAN: They didn't ask for a definition
3 on possession, did they?

4 MS. KON: No. But I don't think that in order to
5 clarify, to give a meaningful response to this jury, who's
6 asking if they're bound by a note that isn't supposed to -
7 - - to stipulate away a contested evidence - - -

8 JUDGE TROUTMAN: I just asked you a question.
9 When the jury sends a note, the court normally responds to
10 the note as it is written by the jury. And if there's
11 further clarification when the jury comes back, the court
12 then instructs after they respond to that which is
13 specifically there. If there is still further explanation
14 required, the jury normally is invited to so explain. Is
15 that not true?

16 MS. KON: Well, they weren't invited to do that
17 here, even though defense counsel asked.

18 JUDGE TROUTMAN: Did - - -

19 MS. KON: And if I could just - - -

20 JUDGE TROUTMAN: - - - but the court - - - the
21 court responded to the note. That was the judge's
22 responsibility to respond to the note as written. You're -
23 - - you're disagreeing with that?

24 MS. KON: No. The court responded to the note.
25 He said basically that they were bound. That was wrong

1 because it wasn't a meaningful - - -

2 JUDGE RIVERA: But the note didn't only - - - the
3 note didn't only ask about the stip, correct?

4 MS. KON: Right.

5 JUDGE RIVERA: What else did it ask about?

6 MS. KON: It asked about the promotion counts.

7 JUDGE RIVERA: And what more? I'm looking at it
8 now.

9 MS. KON: Is - - - is procurement the same as - -
10 -

11 JUDGE RIVERA: And what else?

12 MS. KON: - - - as promotion. And can you
13 clarify Counts 1 to 19.

14 JUDGE RIVERA: The charges?

15 MS. KON: Yeah. For 1 - - - 1 through 19.

16 JUDGE RIVERA: Would that not encompass the
17 meaning of possession? If you're clarifying the charges?

18 MS. KON: Yes. I think that in order to give a
19 meaningful response here. And I think we know that the
20 jury - - - that this response really sealed the deal here
21 because the jury sends this note asking, are we bound at 1
22 p.m.? They're presumably brought in, there - - - you know,
23 there's all this argument. So there's a lot of time. And
24 then by 3 - - - 3:05 p.m., they reached a verdict, right?

25 We know that they were relying on this

1 stipulation to decide guilt. That's not how stipulations
2 should work. That's why defense counsel was ineffective
3 for agreeing to stipulate to a stipulation that destroyed
4 the only defense that she had pursued throughout this
5 trial.

6 She says over and over again that the - - - this
7 is a shared computer. That's the heart of her defense.
8 One laptop doesn't equal one user. Her defense was not
9 only that someone put this on the laptop before he
10 possessed it. Her defense was, this is a small place with
11 lots of people living in it, and someone else could have
12 put this on the computer without Mr. Guerra's knowledge,
13 even if he was also in possession of the computer.

14 The stipulation destroyed that - - - that
15 defense, the only one since she had conceded physical
16 possession. That's why the Appellate Division correctly
17 found she was ineffective. And the Justice Aloise refuses
18 - - - you know, refuses to remedy her mistake even after
19 she brings it to his attention. And that's why the court
20 correctly found there was an O'Rama error.

21 So I would ask that this court affirm the
22 Appellate Division's reversal.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. BLIRA-KOESSLER: Just - - - just briefly.

25 The stipulation actually supported the defense

1 because the defense was identity actus reus. And the stip
2 clearly said whoever possessed. So that conveyed to the
3 jury that the issue of identity was in play.

4 It didn't say possession of the laptop. It said
5 of the images and the videos.

6 JUDGE TROUTMAN: What do you say with respect to
7 the O'Rama error?

8 MR. BLIRA-KOESSLER: I - - - I think the court
9 gave the most balanced response it could without veering
10 into yes, it's binding. It -- - it was binding. On an
11 issue of fact, it was binding. If you find - - -

12 JUDGE CANNATARO: Was this an issue of fact?

13 MR. BLIRA-KOESSLER: I mean, the stipulation
14 covered an issue of fact.

15 JUDGE CANNATARO: It seems to cover a lot of
16 ground. You know, I understand the very factual sort of
17 stipulation. We agree that what's on this - - - the images
18 at issue are sexual performances by a child. That - - -
19 that's clearly factual. But this whole thing about if you
20 possess, then you knowingly, you know, whatever - - -
21 whatever the language was. That doesn't sound factual in
22 nature. That sounds almost like a - - - almost like an
23 instruction on the law.

24 MR. BLIRA-KOESSLER: Well, I mean, it's factual
25 in nature in that a finding of knowledge would be

1 derivative of a finding of possession. If you find that
2 the guy possessed, meaning did the affirmative acts - - -

3 JUDGE CANNATARO: Yeah. But in the - - -

4 MR. BLIRA-KOESSLER: - - - necessary, then he
5 knew what they were.

6 JUDGE CANNATARO: - - - we call that constructive
7 possession, which is a - - -

8 MR. BLIRA-KOESSLER: That's based on facts,
9 though. That's based on facts.

10 JUDGE CANNATARO: Based on facts.

11 MR. BLIRA-KOESSLER: There's no definition of the
12 law in the stip itself. The stip isn't instructing them on
13 the law. It's instructing them basically on the same
14 inference that this court has recognized, the possessor is
15 deemed to know what they possess. Without the stip - - -

16 JUDGE RIVERA: Why - - - why isn't she right
17 about the way she suggests that the instruction should be
18 read? That the first part is about physical possession,
19 the second part is about dominion and control.

20 MR. BLIRA-KOESSLER: Right. I mean, that's - - -

21 JUDGE RIVERA: And the stip is about the - - -
22 the physical possession.

23 MR. BLIRA-KOESSLER: Yeah. That - - - that's
24 just not how the court's - - - the court's charge reads
25 because - - -

1 JUDGE RIVERA: So if I go look at the CJI, it
2 won't tell me otherwise?

3 MR. BLIRA-KOESSLER: I'm - - - I'm looking. I
4 mean, the charge here, as far as I'm aware, tracks the CJI.
5 So - - - so we're dealing with the standard.

6 JUDGE RIVERA: There won't be anything in the CJI
7 comments or anything that'll tell me otherwise?

8 MR. BLIRA-KOESSLER: That I don't know because I
9 don't have it in front of me.

10 JUDGE RIVERA: There won't be citations or
11 otherwise.

12 MR. BLIRA-KOESSLER: I mean, I can't answer. All
13 - - - all I can answer is based on the charge here. And
14 the court said 1660 of the record, "viewing computer images
15 of a sexual performance of a child on a computer does not,
16 by itself, constitute possession or control".

17 So it's not like the court is separating out
18 these concepts. It's not like you're saying, oh, yeah, you
19 got physical possession over here. And mind you - - -

20 JUDGE RIVERA: That's - - - that's a different
21 part of the instruction.

22 MR. BLIRA-KOESSLER: That's the part dealing with
23 possession. On 1661 - - -

24 JUDGE RIVERA: Well, I think - - - well, I may be
25 wrong, but I thought she was referring to a different

1 paragraph. You've moved on to a different paragraph.

2 MR. BLIRA-KOESSLER: No, no, no, I think this is
3 the same paragraph. The only possession - - -

4 JUDGE RIVERA: I don't have - - - I don't have it
5 in front of me. I'd have to go back. Okay.

6 MR. BLIRA-KOESSLER: I - - - I think my adversary
7 - - - I don't want to speak for her - - - but I think she
8 was referring to when it said physical possession that
9 could lead them to believe it's physical possession of the
10 laptop. But it doesn't say physical possession of laptop.
11 The only way possession is defined. First, it's defined as
12 being on the same footing as control, and then it's defined
13 through affirmative acts.

14 There - - - there's no - - - I mean that - - -
15 that wouldn't make any sense whatsoever that you have a
16 finding based upon physical possession of a laptop, but
17 then you got to have this other thing, which is a much
18 higher standard of affirmative acts. I mean, why - - - why
19 would the charge read like that?

20 Why would the jury interpret it like that if no
21 one made that argument? I don't know what page the
22 argument she was reading came from, but yeah, I mean, it
23 was out there that it was his laptop. That's sort of
24 circumstantial evidence that he probably had something to
25 do with affirmatively downloading everything. The argument

1 was never, he has the laptop, therefore he's a possessor
2 under the terms of the statute. No - - - nobody said that;
3 the charge didn't say that. The stip didn't say that. The
4 evidence didn't say that. And - - - and that had nothing
5 to do with the defense.

6 The defense was always one thing. It was based
7 upon affirmative action. There was no basis for a
8 knowledge defense. He never said - - - when he spoke to
9 the police, he said I didn't do it. Somebody else did it.
10 It wasn't, I downloaded something, but I didn't know it was
11 CSAM. So knowledge was never a critical part of the
12 defense here.

13 What counsel tried to do, and this is in her
14 papers, all the papers she filed beforehand, she said, this
15 is very prejudicial, judge. I don't want it in evidence
16 because the jury's not going to be able to look at the
17 evidence. She was seeking to limit it so that the jury
18 could focus on the defense, and she was successful - - -

19 JUDGE TROUTMAN: What about the argument that
20 there was no actual stip because the court - - - there was
21 no need for one?

22 MR. BLIRA-KOESSLER: I don't think that's a
23 reasonable reading of the record. I - - - I - - - I really
24 don't, because again, it comes up at the second trial.
25 Nobody says at the second trial, hey, Judge, you made a

1 ruling. The judge doesn't say he made a ruling that the
2 stip's out. The stip was his idea to begin with. Why - -
3 - you know, why would he just get rid of it? Because he
4 got momentarily annoyed at a suggestion from the prosecutor
5 that she wants to introduce everything if the jury asks for
6 it.

7 If you read that part of the record, I think you
8 can see that the judge got a bit irate at her, but after
9 that they keep discussing it. It doesn't come up that, oh,
10 well, the stip's out of play. They keep discussing and the
11 judge even says, okay, you want the original stip? Okay.
12 We're back to square one.

13 It's never disavowed. It's never abandoned.
14 Even if it was abandoned, it's still discussed at the
15 second trial. So it's still back in play. I don't think
16 there's any reasonable reading of the record where you can
17 say that this judge who proposed the stip in the first
18 place all of a sudden said, eh, I don't want it. I'm just
19 going to go with that original ruling of only three images
20 and three screenshots and that's it.

21 JUDGE RIVERA: You're - - - you're saying the
22 judge proposed the language of this stip?

23 MR. BLIRA-KOESSLER: That's - - - that's what you
24 have in the record of the first trial. He came up with a
25 physical - - - I - - - I don't think it's in the court

1 file, but he came up with it.

2 JUDGE RIVERA: Okay.

3 MR. BLIRA-KOESSLER: But it kind of tracks, to a
4 degree, the language here.

5 JUDGE RIVERA: That might present an obstacle to
6 persuading him that he's wrong, when someone says, I would
7 have been - - - I would never have agreed to that reading,
8 because that would mean I'm ineffective. You're basically
9 telling the judge that you've committed error.

10 MR. BLIRA-KOESSLER: Well, she - - - she - - -

11 JUDGE RIVERA: It was the judge's stip?

12 MR. BLIRA-KOESSLER: I mean, she also said the
13 stip was perfect at one point. She also said that she did
14 a fabulous job. So you know, her - - - her words - - -

15 JUDGE RIVERA: I'm talking at the point in time
16 that the jury sends that note.

17 MR. BLIRA-KOESSLER: Right. That - - - that's
18 what she was - - -

19 JUDGE RIVERA: And is that not a question about
20 how - - - what it should make and what it should do with
21 the stip?

22 MR. BLIRA-KOESSLER: Right. But there's still no
23 basis to assume that they're going on strict liability. I
24 think she was trying to get her client an added benefit.
25 She was effective till the end. Oh, hey, let me try to get

1 around the stip now, right? By getting a knowledge
2 instruction. Because she knew what the charge would be at
3 the end. She knew what the facts were. There's no basis
4 for her to say - - -

5 JUDGE RIVERA: Well, what - - - and why - - - why
6 would - - - if you're correct, why would that matter then?
7 Why not give that? If - - - if you're correct that that's
8 exactly the way this was presented to the jury. What's
9 wrong with saying it again?

10 MR. BLIRA-KOESSLER: Saying possession again?
11 The - - - the definition of possession that they need
12 affirmative acts?

13 JUDGE RIVERA: Explaining that just possessing
14 the laptop is not going to satisfy the charge - - - the
15 element of the charge.

16 MR. BLIRA-KOESSLER: The jury's not asking that.

17 JUDGE RIVERA: If you're saying that's exactly
18 what the jury was instructed, why - - - why fight so much
19 against the judge saying it again?

20 MR. BLIRA-KOESSLER: Number one, the judge's
21 definition of a - - - of a stip was legally correct. And
22 number two, the jury wasn't asking about possession. That
23 wasn't their question.

24 JUDGE RIVERA: But they were asking about whether
25 or not they were bound to the stip. The stip - - - that

1 particular provision is about possession.

2 MR. BLIRA-KOESSLER: They - - - they - - - they
3 were asking if they were bound by - - - by the stip.

4 JUDGE RIVERA: Yeah.

5 MR. BLIRA-KOESSLER: And the court explained what
6 a stip is, but they're still not - - - as you know, Judge
7 Troutman pointed out, that wasn't in the four corners of
8 the question. And notably, they didn't ask anything after
9 - - -

10 JUDGE RIVERA: Well, they asked - - - they asked
11 about many other things in that note.

12 MR. BLIRA-KOESSLER: They asked about other
13 things, but significant - - -

14 JUDGE RIVERA: Including clarify the charges.

15 MR. BLIRA-KOESSLER: Clarify the charges to
16 promotion, correct. But they didn't ask anything after
17 that. After the judge - - -

18 JUDGE RIVERA: 1 to 19.

19 MR. BLIRA-KOESSLER: Say it again?

20 JUDGE SINGAS: 1 to 19 charges. 1 to 19.

21 MR. BLIRA-KOESSLER: Promotion?

22 JUDGE RIVERA: Yeah.

23 MR. BLIRA-KOESSLER: Right.

24 JUDGE RIVERA: Okay.

25 MR. BLIRA-KOESSLER: But after the judge - - -



1 the - - - you know defines the stip - - -

2 JUDGE RIVERA: Yeah.

3 MR. BLIRA-KOESSLER: - - - they don't come back
4 with another note saying, you know, we're still confused.
5 We're thinking about, you know, do - - - do you really need
6 knowledge here? Do you need, you know, like what about
7 possession? Nothing.

8 JUDGE RIVERA: Well, the judge at that point had
9 told them this is an agreement between the parties. It's
10 not for you to consider it.

11 MR. BLIRA-KOESSLER: I mean, it depends what the
12 - - -

13 JUDGE RIVERA: Not to consider the issue
14 underlying.

15 MR. BLIRA-KOESSLER: - - - the form there - - -
16 there then would be after that. But what's significant is
17 that they didn't come back with that. And that's something
18 that goes to prejudice.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. BLIRA-KOESSLER: Which is something this
21 court should consider.

22 Thank you very much.

23 (Court is adjourned)


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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Guerra (Diego), No. 62 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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