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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 8

SANDRA DIAZ,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 6, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 8, People v.  
2 Diaz.

3 Counselor, would you like any rebuttal  
4 time?

5 MS. SKOLNICK: I would. Two minutes,  
6 please.

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

9 MS. SKOLNICK: Thank you. Crediting the  
10 People's evidence here, all we have is a striving  
11 mother who is taking good care of her kids, and in  
12 whose bedroom is found a small amount of contraband,  
13 largely hidden from view. The question - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but there's  
15 lots of things that - - - that were just there and in  
16 - - - that weren't hidden from view, right?

17 MS. SKOLNICK: That's correct. There were  
18 - - -

19 CHIEF JUDGE LIPPMAN: I mean - - - I mean,  
20 you - - - you can't live in a place, and apparently  
21 there is evidence that she lived there, and turn a  
22 blind eye to the scales and the paraphernalia and all  
23 this stuff that's there, and - - - and, you know, on  
24 what basis where - - - could - - - can she say that I  
25 didn't understand that there was some kind of - - -

1 particularly in relation to the child charge - - -  
2 that there's some kind of commercial enterprise going  
3 on? What basis in relation to the facts as we know  
4 them, could she, with a straight face, say that I  
5 really didn't understand that?

6 MS. SKOLNICK: Well, if you look carefully  
7 at what was recovered here, it's really not clear  
8 that there was a commercial enterprise going on.

9 JUDGE READ: Does it have to be? Does it  
10 have to be a commercial enterprise?

11 MS. SKOLNICK: Our position is that  
12 ongoing, open use and sale are things that would fall  
13 within the statute. Our position is that her conduct  
14 does not fall within that definition here, and the  
15 People's proposed reading of the statute has such  
16 dramatic reach - - -

17 CHIEF JUDGE LIPPMAN: Is it - - - is it  
18 commer - - - yes or no, is it commercial in nature?  
19 Does it have to be commercial?

20 MS. SKOLNICK: Commercial is one thing that  
21 could meet the, um - - - could meet the requirements  
22 of the law, but our position is really that the  
23 statute is intended to get at places like opium dens,  
24 and that was the historical, um, understanding of  
25 what was criminalized under the statute. And so

1 private possession of certain contraband items - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but what about  
3 if there's private possession that's going on there,  
4 but on its face it's obvious that somebody is selling  
5 this stuff, even if it's not you. Aren't - - - don't  
6 you - - - wouldn't that qualify you under the  
7 statute?

8 MS. SKOLNICK: Well, as a - - - as a  
9 preliminary matter, she was acquitted of the  
10 paraphernalia possession.

11 JUDGE READ: But the other - - - the fellow  
12 wasn't. The other - - -

13 MS. SKOLNICK: He wasn't.

14 JUDGE READ: Right?

15 MS. SKOLNICK: But if you - - -

16 CHIEF JUDGE LIPPMAN: She knows it's there,  
17 whether it's hers or not, right?

18 MS. SKOLNICK: Well, we don't know that.  
19 It was - - - it - - -

20 CHIEF JUDGE LIPPMAN: Well, but can't all  
21 the circumstances tell us that she did? Or enough of  
22 an inference that she did for the statute to - - -

23 MS. SKOLNICK: Again, if you really look at  
24 what was recovered, I don't think that inference - - -

25 -

1 CHIEF JUDGE LIPPMAN: Okay, why don't you  
2 go into - - -

3 MS. SKOLNICK: Okay, so - - -

4 CHIEF JUDGE LIPPMAN: - - - exactly what  
5 was there, on the counters - - -

6 MS. SKOLNICK: Right.

7 CHIEF JUDGE LIPPMAN: - - - in open view.  
8 What was it that was recovered?

9 MS. SKOLNICK: Ten to eleven full glassines  
10 were in open view. Everything else was hidden in  
11 drawers and, in fact, many of the items - - -

12 CHIEF JUDGE LIPPMAN: In her drawers?

13 MS. SKOLNICK: - - - were hidden in the  
14 rooms - - - in the drawers of the room that was  
15 normally hers. So - - -

16 CHIEF JUDGE LIPPMAN: So - - - so if it's  
17 in her room and she's living there and it's in the  
18 drawers, that doesn't give us any basis?

19 MS. SKOLNICK: There's no evidence of when  
20 it was put there, and - - - so we don't know when she  
21 last had access to those drawers. We don't know, you  
22 know - - -

23 CHIEF JUDGE LIPPMAN: But it's her place,  
24 isn't it?

25 MS. SKOLNICK: It is her apartment, but

1           that's not dispositive - - -

2                         JUDGE READ: She was found - - -

3                         MS. SKOLNICK: - - - on the issue.

4                         JUDGE READ: She was found, sort of, on the  
5           threshold of that bedroom, wasn't she, when - - -  
6           when the police came in?

7                         MS. SKOLNICK: She was. However, the  
8           police also testified that she warned them about the  
9           bedbug infestation, corroborating that she was not,  
10          in fact, sleeping there. But even if she was, we  
11          don't know that she saw the items that were placed in  
12          the drawer. And in any case, the items were really  
13          consistent with Rivera's use, not with sale. There  
14          were thirty-one full glassines in total, ten of which  
15          were placed by - - - by the bedside, and the others  
16          had a stamp that didn't match the stamps that were  
17          recovered from - - -

18                         JUDGE PIGOTT: You realize, though, that  
19          you're arguing really fine points about how children  
20          are going to be raised and - - - and suggesting that  
21          even though you have this heroin addict who may or  
22          may not be dealing with the scales and the glassine  
23          envelopes and everything else, that that's okay to,  
24          you know - - - that doesn't mean you're - - - you're  
25          - - - you're not raising your children well.

1 MS. SKOLNICK: Well, our - - - our position  
2 is - - - is not just an opinion about, you know, how  
3 to raise children. ACS came in here and conducted an  
4 investigation and concluded that these children were  
5 really well cared for. And the issue is really  
6 whether this statute is meant to get at this conduct,  
7 where there are other ways to get it - - - drug  
8 possession - - - to get it, you know, harming - - -

9 JUDGE RIVERA: So is your argument that  
10 possession isn't activity under the statute?

11 MS. SKOLNICK: Precisely.

12 JUDGE RIVERA: Is that what it boils down  
13 to?

14 MS. SKOLNICK: Possession is not an  
15 activity being maintained - - -

16 JUDGE RIVERA: Why is it not an activity?

17 MS. SKOLNICK: Well, if you look at the  
18 definition of "activity", Black's defines it as  
19 collective acts, implying something more, you know,  
20 that is ongoing and not just a single incidence.

21 JUDGE PIGOTT: So you're saying there was  
22 no - - - there was no drug activity in this  
23 apartment?

24 MS. SKOLNICK: No drug activity being  
25 maintained or conducted, so even if there was - - -

1 JUDGE PIGOTT: Right. There's no drug  
2 activity in the apartment?

3 MS. SKOLNICK: Right.

4 JUDGE RIVERA: The - - - the mere fact of  
5 possession, you claim, is not an activity?

6 MS. SKOLNICK: Right. First - - -

7 JUDGE RIVERA: If it's not an activity,  
8 what is it?

9 MS. SKOLNICK: It's a - - - it's an  
10 offense. It's - - -

11 JUDGE RIVERA: There's an act of choice  
12 behind it.

13 MS. SKOLNICK: It's an act - - - it is  
14 activity that - - - activity that is private that is  
15 behind closed doors in the parental bedroom does not  
16 fall within the terms of the statute here. And again  
17 - - -

18 JUDGE PIGOTT: So if the - - - if the  
19 parents - - - if the parents are using drugs - - -  
20 heroin, whatever - - - in their - - - in their  
21 apartment in - - - but only in their bedroom, that  
22 does not affect the kids, and therefore it's not  
23 unlawfully dealing with children?

24 MS. SKOLNICK: Precisely. That is our  
25 position and - - -

1 CHIEF JUDGE LIPPMAN: Your - - - your - - -  
2 your position is it may be something that's  
3 criminally - - - that they're criminally responsible  
4 for, but not under this section of the statute?

5 MS. SKOLNICK: Exactly, and the reason is  
6 that if that - - - if - - - if this court adopts the  
7 People's interpretation, there's no way to  
8 distinguish between a trafficking situation, a  
9 situation of open use - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but - - - but  
11 again, even if you say it's got to be commercial, if  
12 it's in a storage cabinet in the bedroom that you  
13 live in, and it's clear that it's stuff that goes  
14 towards sale, it's - - - it's - - - it's a knowledge  
15 - - - that isn't the whole purpose of this style - -  
16 - statute that you have a knowledge that what's  
17 happening here - - - again, even if you use the words  
18 to interpret to mean commercial, that you have a  
19 knowledge - - - there are children in the apartment,  
20 and this is what's going on.

21 So even if - - - I guess, my point is, even  
22 a more limited view that let's assume it has to be  
23 commercial, how in the world would you not say that  
24 the defendant understood that there were kids there  
25 and that a lot of this stuff, it's commercial use,

1 when she lives there and it's all over the place?

2 MS. SKOLNICK: Well, it's - - - it's not  
3 all over the place. It is hidden - - -

4 CHIEF JUDGE LIPPMAN: It's in places on  
5 window sills; it's in places - - - if it's her  
6 bedroom, you know, that you - - - you would kind of  
7 know if it - - - it - - - what this is for, you know,  
8 the envelopes and the, you know, the scale, and - - -  
9 and - - - and all this - - - this stuff.

10 MS. SKOLNICK: Just to - - - to clarify the  
11 record, the - - - the only thing that was in open  
12 view was the ten glassines that were on the  
13 nightstand. Everything else was hidden in drawers.  
14 And really what the statute - - -

15 CHIEF JUDGE LIPPMAN: She could have  
16 constructive possession of all this stuff, couldn't  
17 she?

18 MS. SKOLNICK: Perhaps. She wasn't found  
19 guilty of having constructive - - -

20 JUDGE PIGOTT: Well, the - - - the  
21 Appellate Division said, "Although Defendant's  
22 position was that the drugs and paraphernalia found  
23 in her apartment were solely attributable to the co-  
24 defendant, the evidence supports the conclusion that  
25 the defendant exercised dominion and control at least

1 jointly with the defendant over the contraband". And  
2 they've got - - - they find that was the jury's  
3 determination and they had a right to make that and  
4 the facts support it.

5 MS. SKOLNICK: Right, but even - - - our  
6 position is that even if she had possession, which we  
7 don't concede, but even if she did know about all of  
8 this and knew on some level that this was going on,  
9 it was behind closed doors. She wasn't allowing the  
10 children access to the room. And to - - -

11 CHIEF JUDGE LIPPMAN: She knew that sale  
12 was going on?

13 MS. SKOLNICK: I don't believe that that -  
14 - - that is actually - - -

15 CHIEF JUDGE LIPPMAN: If we knew that sale  
16 - - -

17 MS. SKOLNICK: - - - supported.

18 CHIEF JUDGE LIPPMAN: - - - was going on?  
19 If she knew it, that's enough, right - - -

20 MS. SKOLNICK: Perhaps.

21 CHIEF JUDGE LIPPMAN: - - - under the  
22 statute?

23 MS. SKOLNICK: But that's not what's going  
24 on here, and our position is that under the - - -

25 CHIEF JUDGE LIPPMAN: You're saying that

1 she doesn't know that that's what's going on. That  
2 even though in her own bedroom there's all this stuff  
3 that would lead any kind of objective person to look  
4 at it and say, gee, someone's selling something here.

5 MS. SKOLNICK: Well, again, we don't - - -  
6 there's no evidence that she did - - -

7 CHIEF JUDGE LIPPMAN: You're saying there's  
8 not enough to make that conclusion?

9 MS. SKOLNICK: Right. Commercial activity  
10 that is taking place in an open and obvious way that  
11 she knew about might fit under the statute, but  
12 that's not the situation that we have here.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.  
14 You'll have your rebuttal. Let's hear from your  
15 adversary.

16 MS. SCHLOSSBERG: May it please the court,  
17 I'm Karen Schlossberg, on behalf of the People of the  
18 State of New York. Those were the - - -

19 CHIEF JUDGE LIPPMAN: Counsel, using the  
20 terms that the statute uses, does it have to be  
21 commercial?

22 MS. SCHLOSSBERG: It does not have to be  
23 commercial. I agree - - -

24 CHIEF JUDGE LIPPMAN: Why not? What do  
25 those words mean?

1 MS. SCHLOSSBERG: Like, I agree that if it  
2 is, we still have legal sufficient - - - legally  
3 sufficient evidence, but the reason it doesn't have  
4 to be commercial is because there's absolutely  
5 nothing in the statute that says it has to be  
6 commercial. The statute uses the word "activity".  
7 And my adversary is ob - - -

8 CHIEF JUDGE LIPPMAN: Activity maintained,  
9 conducted - - -

10 MS. SCHLOSSBERG: Activity - - - right,  
11 exactly. My ad - - -

12 CHIEF JUDGE LIPPMAN: What do those things  
13 mean when put together?

14 MS. SCHLOSSBERG: Well, my adversary's  
15 giving you dictionary definitions of the word  
16 activity, but we don't need to go to the dictionary,  
17 because the statute itself defines activity. It  
18 says, refers - - - the statute refers to "criminal  
19 activity as defined by the specific articles of the  
20 Penal Law that" - - - and the specific articles of  
21 the Penal Law, not just 220, although 220 is the one  
22 that's relevant here, to - - -

23 CHIEF JUDGE LIPPMAN: So if there's any  
24 kind of activity - - - if you take your - - - your  
25 kid to a concert where there's drugs going on, you're

1 under this section of this statute?

2 MS. SCHLOSSBERG: You know, thankfully,  
3 that's not the case that's before the court right  
4 now. I think - - -

5 CHIEF JUDGE LIPPMAN: No, no, but I'm  
6 asking you - - -

7 MS. SCHLOSSBERG: I think - - - I think as  
8 - - -

9 CHIEF JUDGE LIPPMAN: - - - if under your  
10 interpretation, you know, or - - - or - - - if the  
11 parent has pot - - - has pot in a locked box, qualify  
12 under the statute?

13 MS. SCHLOSSBERG: I think as a technical  
14 matter, the words of the statute - - - the statute  
15 does cover those situations. If they're - - - if  
16 they're an ser - - - an extreme situation were ever  
17 to bubble up and come before a court, could a court  
18 interpret - - - could a court figure out a way to  
19 interpret the terms in such a way that it'd impose  
20 some limit on those statute's scope, I think  
21 probably, maybe - - -

22 CHIEF JUDGE LIPPMAN: Well, otherwise, it's  
23 unlimited. I mean, those situations that I gave you,  
24 you wouldn't say it comes under the statute.

25 MS. SCHLOSSBERG: But - - -

1 CHIEF JUDGE LIPPMAN: You wouldn't  
2 prosecute for that, would you?

3 MS. SCHLOSSBERG: Well, we - - -

4 CHIEF JUDGE LIPPMAN: But you're saying - -  
5 -

6 MS. SCHLOSSBERG: - - - we wouldn't  
7 prosecute for - - -

8 CHIEF JUDGE LIPPMAN: - - - you wouldn't  
9 prosecute, but it technically comes under the  
10 statute?

11 MS. SCHLOSSBERG: It technically comes  
12 under the statute. It's not - - - those cases aren't  
13 here. We would have to - - -

14 CHIEF JUDGE LIPPMAN: That might be a scary  
15 statute, you know?

16 MS. SCHLOSSBERG: Well, we would have to  
17 have - - -

18 CHIEF JUDGE LIPPMAN: You got to have - - -

19 MS. SCHLOSSBERG: - - - full briefing on  
20 the implications - - -

21 CHIEF JUDGE LIPPMAN: - - - if you have a  
22 kid in the house - - - if you have an older brother  
23 in the house who's the suspect and - - -

24 MS. SCHLOSSBERG: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - and you leave

1 the kid alone with - - -

2 MS. SCHLOSSBERG: I think one of the - - -

3 CHIEF JUDGE LIPPMAN: - - - with the other  
4 - - - with the brother?

5 MS. SCHLOSSBERG: I think - - -

6 CHIEF JUDGE LIPPMAN: Under the statute,  
7 it's unlimited.

8 MS. SCHLOSSBERG: No, it's not unlimited.  
9 First of all, it's very carefully prescribed. It  
10 only refers to specific crimes that have been defined  
11 by the legislature, right. Specific crimes.

12 Secondly, a lot of the hypotheticals, although  
13 they're interesting fodder for conversation, they  
14 rely on fudging of certain terms. For example - - -

15 CHIEF JUDGE LIPPMAN: Assume - - - assume  
16 we disagree with you. Assume for the sake of  
17 argument - - - tell me why it's commercial in this  
18 particular case.

19 MS. SCHLOSSBERG: Okay.

20 CHIEF JUDGE LIPPMAN: Assume it has to be  
21 some kind of commercial use.

22 MS. SCHLOSSBERG: Okay. I will. Okay.  
23 Assume it has to be commercial - - - I just - - - can  
24 I just finish the one thing I wanted to say about  
25 that? Because I think that the hypotheticals really

1 do a lot of times rely on fudging of the terminology.  
2 They - - - the defense - - - my adversary talks about  
3 suspecting things from happening. And the statute  
4 actually requires reason to know.

5 CHIEF JUDGE LIPPMAN: Okay, now - - -

6 MS. SCHLOSSBERG: You have to be a valid  
7 interest.

8 CHIEF JUDGE LIPPMAN: - - - tell me why  
9 this is commercial - - -

10 MS. SCHLOSSBERG: Okay, so it's commer - -  
11 -

12 CHIEF JUDGE LIPPMAN: - - - if we interpret  
13 those buzzwords - - - activity, maintain, conducted -  
14 - - as commercial, why in this case, is it a valid  
15 charge for this offense?

16 MS. SCHLOSSBERG: The notion that - - - the  
17 notion that these drugs were in this apartment for  
18 someone's personal use is - - - is obviously false.  
19 I mean, there's thirty-one glassines of heroine.  
20 There's thirty-five pills of a cutting agent. There  
21 are empty glassines. There are stamps and ink pads.  
22 There's 385 dollars in cash that nobody wants to  
23 claim as theirs. There's a scale, there are spoons,  
24 there is rubber bands. There's all kinds of  
25 trafficking equipment.

1           It's not hidden in drawers. I mean, the  
2 drawers were closed, but we're talking about this  
3 defendant, Sandra Diaz's nightstand by her bed; on  
4 top of the nightstand are the glassines containing  
5 heroine. In the top drawer of that nightstand - - -  
6 we're talking about a two- to three-foot tall  
7 nightstand next to her bed - - - in the drawer, with  
8 her personal items, her mail, her toiletry items, are  
9 all of the traff - - - all of the packaging  
10 paraphernalia that was - - -

11           JUDGE RIVERA: It's the amounts - - -

12           MS. SCHLOSSBERG: - - - that was in the  
13 drawer.

14           JUDGE RIVERA: - - - it's the equipment.  
15 It's the proximity to everything that's hers.

16           MS. SCHLOSSBERG: It's in her drawer. On  
17 the window sill, there's a little three - - - three-  
18 drawer plastic container that has three, you know - -  
19 - three drawers sitting on the window sill. On top  
20 of it is her sewing machine. In the drawer that has  
21 her jewelry, her pearls, that's got twenty glassines  
22 of - - - of heroin in it.

23           I mean, this - - - the notion that she's  
24 not involved or that she doesn't know that there's  
25 heroin and these packaging materials, this

1 trafficking equipment - - - the scale is in her  
2 bedroom - - - it's - - -

3 JUDGE RIVERA: What is she found guilty of?

4 MS. SCHLOSSBERG: Say that again?

5 JUDGE RIVERA: What is she found guilty of?

6 MS. SCHLOSSBERG: She's found guilty of  
7 possession of mar - - - of - - - of controlled  
8 substance. She's not - - -

9 JUDGE RIVERA: Not a sale or - - -

10 MS. SCHLOSSBERG: Not a sale and not of - -  
11 - not - - - she does - - - they found that she did  
12 not possess, herself, the trafficking equipment, but  
13 - - -

14 JUDGE READ: What about Rivera? What was  
15 he found guilty of?

16 MS. SCHLOSSBERG: He was found guilty also  
17 of this seventh-degree possession, 220.03, but he was  
18 also convicted of possessing the trafficking  
19 equipment. The jurors thought that - - - apparently  
20 thought that they belonged to him. But it was her -  
21 - -

22 JUDGE ABDUS-SALAAM: So counsel, do you  
23 agree that possession is not activity under the  
24 statute?

25 MS. SCHLOSSBERG: I do not agree. I think

1 activity is very carefully defined in this statute.  
2 It says - - - I have the words of the statute right  
3 here. "Activity involving controlled substances as  
4 defined by Article 220". As defined by Article 220.  
5 And Article 220 says possession is a crime.

6 So I don't really understand how you look  
7 at that and say that possession is not activity.  
8 Activity is a thing that a person does, according to  
9 the dictionary. And this statute defines activity as  
10 relevant to this statute as defined by Article 220.

11 JUDGE ABDUS-SALAAM: Your adversary also  
12 says that, you know, ACS came in and did an  
13 assessment and didn't take these children out of the  
14 apartment. So does that suggest that they didn't  
15 think that there was a - - - you know, a dangerous  
16 situation for these children?

17 MS. SCHLOSSBERG: I don't know the answer  
18 to that question. I mean, I - - - I do think that  
19 unlike the, for example, endangering the welfare of a  
20 child statute, where we have to have - - - we have to  
21 show that the behavior is - - - in a manner - - -  
22 that the person acted in a manner unlike - - - I'm  
23 sorry - - - likely to be injurious to the welfare of  
24 the child, we don't have any injury requirement here  
25 or even a likelihood of injury requirement. It's

1 about how the parent or - - - or the guardian or  
2 whoever is acting - - -

3 JUDGE PIGOTT: But she got probation. Did  
4 she - - - did she - - - and she didn't lose her  
5 children here, I assume?

6 MS. SCHLOSSBERG: Correct. But you know,  
7 she's living - - - these children - - - this was - -  
8 - this was an apartment that was being - - - it was  
9 under investigation, the jurors heard, for a year,  
10 and the - - - the activity going on in that apartment  
11 justified a judge issuing a search warrant, probable  
12 cause for the search warrant for these officers to go  
13 in.

14 It's not just a person who came in the  
15 night before with some heroin that he was going to  
16 bring to Great Adventure with the kids. This was - -  
17 - there was activity going on, however you look at -  
18 - - however you interpret these terms, however you  
19 look at the statute. The evidence in this case  
20 certainly justified the defendant's convictions, for  
21 sure. And the - - -

22 JUDGE ABDUS-SALAAM: During the course of  
23 this investigation, were there - - - was there  
24 evidence of sales going on? Were there people going  
25 in and out of the apartment or undercover buys or

1 anything like that?

2 MS. SCHLOSSBERG: You know what's really  
3 interesting is there's - - - there was the one  
4 statement that the ACS worker made about how the - -  
5 - one of the daughters told her she had seen  
6 narcotics in the apartment at a previous - - - and  
7 the - - - the defendant - - - the codefendant  
8 actually objected at trial saying that was an  
9 uncharge - - - evidence of an uncharged crime. That  
10 was one of the objections.

11 And in fact, my adversary raised that issue  
12 before the Appellate Division, saying it was a  
13 evidentiary error to bring that evidence in, because  
14 it was evidence of an uncharged crime. So I'm not  
15 sure if the People tried to introduce prior evidence  
16 of - - - of ongoing activity, but I think it's kind  
17 of ironic that now one of the criticisms is that we  
18 don't have evidence of ongoing activity.

19 JUDGE PIGOTT: Well, wait, I mean, you  
20 know, if - - - if you have - - - make an objection  
21 and it's sustained, you can't bla - - - say, well,  
22 they were stupid enough to object, and it was  
23 sustained so we don't have the proof we want to put  
24 in. I mean, if it wasn't - - - if it wasn't good  
25 proof, it shouldn't had come in - - -

1 MS. SCHLOSSBERG: Correct, but there's - -  
2 -

3 JUDGE PIGOTT: - - - and then your answer  
4 would be no. There was no activity of people coming  
5 in and out or - - - or - - -

6 MS. SCHLOSSBERG: Well, no, I'm not saying  
7 it was stupid of them to object, Your Honor. What  
8 I'm saying is that there's a certain irony to the  
9 idea that they're saying on the one hand we shouldn't  
10 be allowed to bring in evidence of ongoing activity  
11 at the trial level, and now there's a criticism that  
12 we didn't bring in evidence of ongoing activity.  
13 That's my point.

14 JUDGE PIGOTT: I don't get it. I mean,  
15 that - - - aren't you supposed to bring in evidence,  
16 and if it's objectionable, it's not evidence?

17 MS. SCHLOSSBERG: Well, it's because the  
18 different interpretations of the statute - - -

19 JUDGE PIGOTT: Right. But she was - - -  
20 right - - -

21 MS. SCHLOSSBERG: - - - is the problem.  
22 They're interpreting it in one way at the trial level  
23 and at a different level - - - a different way on  
24 appeal. That's my point.

25 So there was ongoing activity in this case,

1 because that - - - that piece of evidence did come  
2 in. There's certainly evidence - - - oh, and also  
3 the maintained and conducted does not insert a, sort  
4 of, commercial meaning into this.

5 CHIEF JUDGE LIPPMAN: What does it mean?

6 MS. SCHLOSSBERG: I think that the purpose  
7 - - - again, I'm - - - I don't know exactly what the  
8 legislature had in mind, but I think that the purpose  
9 was - - - defense counsel suggests that maybe they  
10 should have said has occurred or is occurring  
11 instead. And I think that maintained or conducted is  
12 a better phrase. Conducted is the same as occurring.  
13 Something being conducted means being carried out.  
14 So the crime is being carried out in the place.

15 And maintained gives the statute - - - also  
16 allows the statute to cover conduct that is more  
17 ongoing, but may not be happening at the precise  
18 moment the children are there. So it covers those  
19 two aspects. Something that's happening currently  
20 and also something that sort of is a more ongoing,  
21 but maybe at the exact moment the children are there,  
22 isn't happening.

23 But it's more precise than saying has  
24 occurred or is occurring. If we had that statute,  
25 we'd bump into problems - - - if we were trying to

1           prove that the children were being allowed on a pla -  
2           - - in a place where something has occurred, at what  
3           point in time has it occurred? When did it occur?  
4           How many times did it occur? We'd be here fighting  
5           that battle. I think that statute would be very  
6           difficult. So - - -

7                       CHIEF JUDGE LIPPMAN: Okay.

8                       MS. SCHLOSSBERG: - - - I - - - I think  
9           that, you know, the question before this court is  
10          simply whether the evidence in this case was legally  
11          sufficient to support this conviction, and I think it  
12          clearly was.

13                      CHIEF JUDGE LIPPMAN: Okay, thanks,  
14          counsel.

15                      MS. SCHLOSSBERG: Thank you.

16                      CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

17                      MS. SKOLNICK: I do want to pick back up  
18          with some of those hypothetical situations.

19                      CHIEF JUDGE LIPPMAN: Yeah, sure, go ahead.

20                      MS. SKOLNICK: If we include any  
21          possession, we're dealing with any Article 221  
22          possession and any Article 220 possession. That's  
23          noncriminal marijuana possession, as Your Honor  
24          pointed out. And with this misdemeanor, unlawful  
25          dealing, parents are exposed to up to a year in jail

1 and potential removal of children from the home.

2 Here that would be patently absurd, as Ms.  
3 Diaz was found to be a fit mother, to be taking good  
4 care of the kids, and the systems are all working to  
5 insure their - - - their welfare. And here's there's  
6 - - - there's also, you know - - -

7 CHIEF JUDGE LIPPMAN: Well, it doesn't mean  
8 that the person who's going - - - going to look at  
9 whether she's a fit mother has looked at the stuff in  
10 her drawers and, you know - - - that that - - - that  
11 may indicate something very - - - you know, bad is  
12 happening.

13 MS. SKOLNICK: Well, there are other - - -

14 CHIEF JUDGE LIPPMAN: I mean, you could be  
15 declared a fit mother and there's something wrong  
16 that that - - - you know, that raises issues as to  
17 fitness.

18 MS. SKOLNICK: Well, here, you know, that  
19 wasn't substantiated, but in any case - - -

20 JUDGE RIVERA: But, counsel, the People  
21 make an argument that you - - - you just need to read  
22 the statute. And the statute refers to Article 220  
23 on marijuana and 221, and that includes possession.  
24 So - - - and - - - and how do you escape what seems  
25 to be an ironclad argument on the statutory

1 interpretation of this language?

2 MS. SKOLNICK: Because the statute also  
3 includes the terms maintained and conducted, and  
4 those need to be given meaning. Otherwise - - -

5 JUDGE RIVERA: Why isn't the meaning that  
6 your - - - that the People suggest the appropriate  
7 meaning?

8 MS. SKOLNICK: Because that would include  
9 all these scenarios that we - - - we wrote about in  
10 our briefs. All these hypothetical situations. A  
11 parent allowing a child into a park, where he or she  
12 knows that drug activity is - - -

13 CHIEF JUDGE LIPPMAN: You're saying it  
14 can't - - - they can't mean that? Is that what  
15 you're saying here?

16 JUDGE RIVERA: But maybe it shouldn't.  
17 Maybe it does mean that.

18 MS. SKOLNICK: Well, that's - - - that's a  
19 pretty broad rule and that's - - -

20 JUDGE RIVERA: And maybe that's what's  
21 intended.

22 MS. SKOLNICK: I - - - I think the  
23 legislature is trying to get at opium dens, places  
24 like that. Open - - -

25 JUDGE RIVERA: But it doesn't say that.

1 MS. SKOLNICK: There - - - there is  
2 legislative history saying that, and importing and  
3 openness and ongoing that are - - -

4 CHIEF JUDGE LIPPMAN: Well, what about  
5 places where drugs are being sold, not necessarily by  
6 the person, but the person knows that drugs are being  
7 sold in their home, where there are children.

8 MS. SKOLNICK: I urge the court to look  
9 carefully at the evidence that actually - - - the  
10 contraband that actually was found and whether it  
11 really supports an inference that there was sale, or  
12 just for Rivera's personal use.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. SKOLNICK: Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you both.  
16 Appreciate it.

17 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sandra Diaz, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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