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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 18

JOSEPH SPOSITO,

Appellant.

20 Eagle Street
Albany, New York
January 10, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay. Appeal number 18 on
2 this afternoon's calendar is the People of the State of New
3 York v. Joseph Sposito.

4 Thank you. Good afternoon, counsel.

5 MS. ALDEA: Good afternoon, Your Honors. May it
6 please the court. My name is Donna Aldea, and I represent
7 Mr. Sposito.

8 Your Honors, counsel's error in this case - - -

9 CHIEF JUDGE DIFIORE: Counsel, do you care to
10 reserve any rebuttal time?

11 MS. ALDEA: Oh, I do. Thank you, Your Honor.
12 Two minutes, please.

13 Your Honors, counsel's error in this case handed
14 the People literally the only direct proof at their trial
15 of the only contested element of this - - -

16 JUDGE GARCIA: Didn't they have the victim's
17 testimony in forensics?

18 MS. ALDEA: That wasn't direct proof, Your Honor,
19 and the reason for that was the only contested element here
20 was physical helplessness. And the problem with that was
21 that the victim testified that she had no memory. So there
22 was no - - - she wasn't able to say I didn't consent. She
23 wasn't able to say I didn't speak. She wasn't able to say
24 - - -

25 CHIEF JUDGE DIFIORE: What about her BAC?



1 MS. ALDEA: Excuse me, Your Honor?

2 CHIEF JUDGE DIFIORE: What about her BAC?

3 MS. ALDEA: Her BAC, actually, the expert
4 testified here, and this is actually an error in
5 respondent's brief, so I might as well address that. The
6 expert testified here not that she was definitely
7 unconscious. In fact, what the expert testified to is that
8 her BAC, when extrapolated at .26 at the time - - - at
9 around the time when they were having sex, would have been
10 on the Garriott scale at a level that could have
11 constituted, based on an individual's particular ways of
12 processing alcohol among other things, unconsciousness, or
13 excitement, or confusion. And so there was never any
14 testimony from the expert that she was definitely
15 unconscious.

16 JUDGE FAHEY: I thought he used the words,
17 "stupor".

18 MS. ALDEA: Stupor is the level of the Garriott
19 scale.

20 JUDGE FAHEY: I see.

21 MS. ALDEA: So that's what it's called. But then
22 he actually explains - - - or she, I'm not sure if Barbieri
23 was (indiscernible) - - -

24 JUDGE FAHEY: I've done a lot of DWIs, and 2 - -
25 - .236 is a pretty high DWI.



1 MS. ALDEA: Yes, Your Honor. It is. However,
2 look, on that point, I mean, I'm not arguing legal
3 sufficiency, right?

4 JUDGE FAHEY: Right.

5 MS. ALDEA: But on that point, when we look at
6 the evidence that we had in this record, what we had was we
7 had a complainant who couldn't testify as to whether she
8 was speaking or conscious or not. We had her friends that
9 testified that at a time when she was in the bar right
10 after she threw up when the expert said from then on BAC
11 goes down, not goes up. So once she emptied her stomach,
12 her friends were saying she was still talking, she was
13 having a conversation in the bar, she was walking - - -

14 JUDGE FAHEY: One of the - - - one of the - - -

15 MS. ALDEA: - - - of her own accord.

16 JUDGE FAHEY: One of the most challenging thing
17 for you, I would think, in the defendant's statement to the
18 police officers, I think there was a question if she didn't
19 respond when he had knocked on the door. Isn't that the
20 toughest thing you got to deal with here?

21 MS. ALDEA: Well, that is the claim here.

22 JUDGE FAHEY: What - - - what - - - what's - - -
23 what's the exact statement, the exact response that's in
24 there?

25 MS. ALDEA: The exact response - - - so he,



1 basically, the part of the interview that should - - - the
2 whole interview should not have come in entirely.

3 JUDGE FAHEY: That's a separate question. Let's
4 just stay with this for - - -

5 MS. ALDEA: Right.

6 JUDGE FAHEY: - - - a second.

7 MS. ALDEA: So the part of the interview that
8 shouldn't have come in at the very end, so literally in the
9 last couple of minutes in the interview itself prior - - -

10 JUDGE FAHEY: Right.

11 MS. ALDEA: - - - to the invocation of the right
12 to counsel, he is confronted by the police, told that the
13 story he gave before must be bull shit. That no one's
14 going to believe him. That if this goes into evidence at
15 trial - - -

16 JUDGE FAHEY: Right.

17 MS. ALDEA: - - - everyone's going to know he
18 lied for three hours. And so then they said, so you know,
19 what really happened and he said there was no answer at the
20 door when I knocked, which was contrary to his testimony
21 before that she said come in. There was no answer. She
22 didn't respond when I asked her if I can come into bed,
23 which is contrary to his testimony before that she had
24 invited him in. And she never spoke. She just mumbled or
25 murmured or made a sound when I asked her if I could have



1 sex with her, which was directly contrary to the three
2 hours that the jury had heard before. So that was
3 devastating. The direct proof of physical helplessness
4 here came only from that videotaped statements.

5 JUDGE GARCIA: So if they hadn't had the video
6 statement, in your view, it wouldn't have gotten to a jury?

7 MS. ALDEA: No, Your Honor. I'm not saying that.
8 And I'm not arguing legal sufficiency. There were
9 definitely inferences, inferences that were consistent with
10 physical helplessness, but were also consistent with the
11 fact that she was conscious, drunk, and didn't remember.
12 And so the problem here is that what you would have wound
13 up with without the video is exactly what the trial judge
14 said he said. He said - - -

15 JUDGE GARCIA: So - - -

16 MS. ALDEA: - - - I heard all of the evidence,
17 and when I heard all of the evidence, I said I wasn't sure
18 what happened here. I didn't know what had happened was
19 the trial judge's quote. But then I saw the video. And
20 even after I saw the first part of the video, I still was
21 unsure. But then I saw the last five minutes and the trial
22 judge said and then there was no doubt in my mind what
23 happened.

24 JUDGE GARCIA: So, I'm sorry - - -

25 MS. ALDEA: There was reasonable doubt without



1 the video.

2 JUDGE GARCIA: I'm sorry. I - - - I understand
3 that point. So the - - - as I understand what happened
4 below is you got a hearing on the 440.

5 MS. ALDEA: Correct.

6 JUDGE GARCIA: So what you're asking us to do is
7 to find as a matter of law that there was no for - - - no
8 reasonable view that this attorney could have made a
9 strategic decision that getting in the corroborating
10 statements from the first part of that statement which were
11 the only evidence that would have supported his testimony
12 was outweighed by - - - you know, outweighed the statements
13 at the end of the tape. That there's no conceivable
14 strategic reason that would pass muster.

15 MS. ALDEA: Well, I mean, there are two parts to
16 that. First of all, in terms of no conceivable strategic
17 reason, it's not a strategic reason, right? It's a
18 reasonable strategy. It has to be a reasonable strategy.
19 There is not a reasonable strategy in the world that can
20 explain a defense attorney waiving a meritorious
21 suppression motion that he would have won, just waiving it
22 rather than going through it. And then at the conclusion
23 of that, after that waiver, literally consenting, handing
24 the People the only - - -

25 JUDGE FEINMAN: Just to - - - to - - - to get the



1 result that you were urging us to reach, do we actually
2 have to decide a suppression hearing that actually hasn't
3 happened?

4 MS. ALDEA: No, no, Your Honor. Well, I mean, I
5 think you can. So People v. Clermont is instructive on
6 that. And in that case, what happened is there was an
7 ineffective assistance of counsel claim premised on
8 counsel's failure to properly argue a suppression hearing
9 or raise the claims in a suppression hearing resulting in
10 suppression of a gun. And what's interesting is the
11 majority said look, doesn't matter if he would have won or
12 lost. It was a close call under De Bour, so what we should
13 do is we should remand for the hearing.

14 Now, Judge Rivera in her dissent actually said
15 look, I don't think this was a close call. I think this
16 was clear under De Bour, and because it's so clear on this
17 record, we the Court of Appeals, can simply say grant
18 suppression and then remand for a new trial. So - - -

19 JUDGE FEINMAN: With all due respect to my - - -
20 my colleague, it was a dissent though.

21 MS. ALDEA: Well, but - - - but my point is with
22 respect to what the court can do, the court's power, if
23 this is really clear, is a matter of black letter law,
24 which is what I'm saying here. There's no way, no - - -
25 there's not even a conceive - - - I don't even think the



1 People posit an argument as to the merits of the
2 suppression hearing. There's no question he would have
3 wanted it to be brought in.

4 JUDGE GARCIA: But isn't - - - this is so
5 different, it seems to me - - -

6 JUDGE FAHEY: Well, if he - - - I'm sorry, Judge.
7 You go ahead.

8 JUDGE GARCIA: - - - than a gun, I mean, it seems
9 to me hard to, you know, you don't - - - you lose a
10 suppression motion on a gun, the gun comes in. You get a
11 shot at the witnesses in cross-examination. There's no
12 reason why you would want the gun in because if you
13 suppress the gun, if it's a possession case, it's basically
14 the end of the day. For the prosecution here, arguably,
15 there is a corroborating reason. You may disagree with it.
16 But isn't that exactly what we grant a hearing for? It's
17 not that you have no relief here. It's what's being
18 afforded as an opportunity for counsel to come in and time
19 after time this court has said if there is an issue as to
20 that, the proper remedy is a hearing. You air this out. I
21 think there's things in the record here that you can
22 produce, not in front of us, but at such a hearing to go to
23 the motivations for failing to ask for that hearing.

24 MS. ALDEA: But Your Honor, the court here - - -
25 first of all, he did ask for the hearing. He then waived



1 it. So there is a difference here.

2 Secondly - - -

3 JUDGE GARCIA: Maybe he decided on a different
4 strategy.

5 MS. ALDEA: - - - the posture - - -

6 JUDGE GARCIA: That's what the hearing would
7 (indiscernible).

8 MS. ALDEA: But the posture is very different
9 here. First of all, the record clearly shows that the
10 reason that counsel waived the hearing - - - and it's
11 actually in his statement in the record, which was
12 completely ignored to the Appellate - - - by the Appellate
13 Division, and completely contrary to their deemed potential
14 strategy, he said the hearing - - - the case is on for
15 suppression - - - for a suppression hearing, for a
16 suppression of your statement which won't be granted.
17 Counsel made - - -

18 JUDGE GARCIA: Where - - - where is that in the
19 record?

20 MS. ALDEA: That's on page, I believe from
21 memory, A-3 - - - 369.

22 JUDGE GARCIA: Where is that? Where does that
23 appear?

24 MS. ALDEA: That is an email correspondence that
25 actually - - -



1 JUDGE FAHEY: So that's not in the record then,
2 really.

3 JUDGE GARCIA: Yeah, that's 440.

4 MS. ALDEA: Well, actually, Your Honor - - -

5 JUDGE FAHEY: That's - - -

6 MS. ALDEA: It - - - it - - - whether it's in the
7 record or not, here's the problem - - -

8 JUDGE FAHEY: Well, then let me stop you. It's
9 kind of a difficult area for us to get into. We recognize
10 that it's been referenced to in the briefs, but - - - but
11 I'm not sure whether we should be considering it or not.
12 Let me take a step back a second.

13 MS. ALDEA: Can I just address that one part?

14 JUDGE FAHEY: No. Let me just ask my question.
15 Then if you want, you can go ahead.

16 MS. ALDEA: Okay.

17 JUDGE FAHEY: My question is this. Let's assume
18 that he has a colorable claim - - - first off, he's gonna -
19 - - he's got - - - he's gotten the suppression hearing and
20 he has a colorable certainly claims to make at the
21 suppression hearing. He has a chance of winning this
22 suppression hearing. So then the call becomes whether or
23 not you want the confession or the - - - the interview,
24 excuse me, to be suppressed.

25 And if that's the question, then really, we - - -



1 we would have to determine that he would have no strategic
2 reason for wanting that interview suppressed. And when I
3 look at it, I say well, it seems that counsel was arguing
4 that the consistent behavior that the defendant is really
5 showing by this interview, and it's essential to his
6 defense and his defense theory.

7 CHIEF JUDGE DIFIORE: He's embracing that
8 statement.

9 MS. ALDEA: Yeah, here's the problem though. If
10 suppression is granted, that's all premised on the fact
11 that defendant testified at trial.

12 JUDGE FAHEY: Right.

13 MS. ALDEA: If the supre - - - which is a product
14 of counsel's error in not moving to suppress the statement.

15 JUDGE FAHEY: Well, I - - - I - - - I would view
16 it the opposite way. You could also argue it could go the
17 other way. The other thing is too, is that as Judge
18 DiFiore says, we have to embrace this. This is the only
19 chance we have. It's not a winning strategy, obviously,
20 but it is - - - I can't call it automatically an
21 illegitimate strategy.

22 The second part is is that the 440 hearing
23 doesn't solve this problem at all because it's something we
24 have to address because the 440 goes to whether or not he
25 viewed the entire tape, a separate issue.



1 MS. ALDEA: Correct. Well, that's true. On the
2 440 point - - - I recognize that my time is up. If I may
3 just answer the one question.

4 CHIEF JUDGE DIFIORE: I did want to direct you to
5 the 440 point.

6 MS. ALDEA: Okay. So on the 440 point, here's
7 the problem. This claim, it's kind of odd posture, because
8 there are really three separate consolidated appeals before
9 this court. 440 is really the opposite of a direct appeal,
10 right, because it deals with off-the-record claims. But
11 for ineffective assistance of counsel, because we look at
12 meaningful representation and totality, there could be a
13 meshing.

14 The problem is this though. The 440 hearing,
15 there are, of course, off the record claims about counsel's
16 ineffectiveness that are not currently before this court
17 about his preparation, whether he even reviewed the tape,
18 and there's a lot of evidence that he didn't - - - other
19 things, whether he consulted with experts, et cetera.

20 However, however, because the Appellate Division
21 explicitly ruled that counsel could have watched the whole
22 tape and made a determination based on having reviewed that
23 record and had a legitimate strategy to put that in, the
24 trial court now, if it conducted the 440 hearing, would be
25 bound by that Appellate determination. It couldn't find



1 otherwise. It's not accurate to say - - -

2 JUDGE GARCIA: But don't we do that - - - don't
3 we do that all the time when something comes here on a
4 direct appeal, don't we often say this is for 440 because
5 you could have had a legitimate reason for doing it, which
6 seems to me what the Appellate Division was saying here.
7 And then go bring a 440 which is, you know, go make that
8 argument. And that 440 hearing, you're not bound by us
9 saying there could be a reasonable strategy here.

10 MS. ALDEA: Well - - -

11 JUDGE GARCIA: Isn't that exactly what happened
12 only at the Appellate Division?

13 MS. ALDEA: No, Your Honor, because here, again,
14 there can't be a reasonable strategy because the problem is
15 it's twofold. First, you waive a suppression hearing that
16 you already have in your hand. Secondly, whether he
17 watched the Appell - - - the only question at the hearing
18 would be did he - - -

19 JUDGE GARCIA: But that's a different argument.

20 MS. ALDEA: - - - watch the tape.

21 JUDGE GARCIA: That's the hearing argument.
22 That's there is no reasonable strategy.

23 MS. ALDEA: Right.

24 JUDGE GARCIA: Mr. - - - attorn - - - this
25 defense attorney from the first action, why did you do



1 this, that defense attorney gives a strategy and a
2 conclusion is that it is not a reasonable strategy. All
3 that the Appellate Division, I think, was doing here was
4 saying there are conceivable strategies here. We don't
5 know if that was the strategy or not. That's what the
6 hearing, I'm guessing, in a 400 -

7 MS. ALDEA: But - - -

8 JUDGE GARCIA: - - - would be as when we send it
9 back for this.

10 MS. ALDEA: But that's my point about A-369 which
11 I didn't get to fully address. That is specifically
12 counsel's admission as to why he waived the hearing. In
13 other words, suppression would be granted.

14 JUDGE GARCIA: But that's an email.

15 MS. ALDEA: Yeah - - - yes, Your Honor, but
16 here's the problem with it. As a - - - an officer of the
17 court, a district attorney cannot take a position or cannot
18 argue a fact of law before any court that is contrary to
19 what he knows the truth to be. Okay? Everybody in this
20 case, including the assistant district attorney knew that
21 the reason that counsel waived the hearing was because he
22 said suppression won't be granted. I'm going to lose on
23 the merits. And that's objectively unreasonable.

24 The district attorney then goes to the Appellate
25 Division and then tells them, oh, well, here's a possible



1 strategy. He didn't waive it because he thought he would
2 lose, he waived it for a different reason. He waive - - -

3 JUDGE GARCIA: Don't they get into issues of - -
4 -

5 MS. ALDEA: - - - it because he thought he might
6 win.

7 JUDGE GARCIA: I'm sorry, counsel. Wouldn't that
8 get into issues of the timing of that email and the timing
9 of development and strategy and when did - - - that really
10 aren't - - - one, the email isn't even in front of us in
11 this direct appeal. Isn't that all part and parcel to this
12 hearing as to what counsel was thinking and doing on a
13 record that's collateral to the direct appeal.

14 MS. ALDEA: It's not collateral, Your Honor.
15 This is a direct appeal claim. Their ineffective
16 assistance of counsel's claims based on counsel's errors in
17 waiving defendant's Constitutional rights that this court
18 routinely resolves without a 440 hearing. And this is one
19 of them.

20 CHIEF JUDGE DIFIORE: Counsel, do you care to
21 spend a moment addressing the request for the post-
22 conviction DNA testing?

23 MS. ALDEA: Yes, Your Honor. So if - - - if we
24 win, just for clarification on this point, in other words,
25 if the - - - the case is reversed and remanded, then at



1 that point, that actually becomes moot, because once he has
2 a retrial, he'll be able to test the evidence and my hope
3 is, of course, that that's how it goes, then the court
4 doesn't have to address that.

5 In the event that that's not the case, then with
6 respect to the post-conviction DNA testing, the Appellate
7 Division erred, because what the Appellate Division
8 concluded is since both - - - both counts here, both the
9 rape and the - - - and the second count with the sexual - -
10 -

11 CHIEF JUDGE DIFIORE: Criminal sex act.

12 MS. ALDEA: - - - act were not based on physical
13 compulsion or force, but rather were based on physical
14 helplessness. The nature and extent of the injuries, which
15 is all of the - - - all the DNA could have dissipated or
16 could have - - - could have removed the taint of, is not
17 relevant. It doesn't matter. And the problem with that -
18 - -

19 CHIEF JUDGE DIFIORE: How is it relevant?

20 MS. ALDEA: It's relevant because in this case,
21 the People's argument - - - you don't just look to the
22 statutory elements, you look to how the People prove their
23 case. So the People tried to prove physical helplessness
24 by saying the nature of these injuries was such that it
25 couldn't possibly have been the product of consensual sex.



1 Now, that was contrary to their expert's testimony that
2 said it absolutely could have been, however, that's what
3 they did. So that's number one.

4 Number 2, which I think is probably easier and
5 far more direct on that point is actually that the second
6 count, the sexual act count, was premised entirely on the
7 injuries to the victim's anus. So the anal injuries were
8 the only proof of that. And if she had had sex with
9 somebody else in a bathroom, anal sex with somebody else in
10 the bathroom - - -

11 JUDGE FEINMAN: Well, on that point, isn't there
12 DNA evidence at trial from that - - - the anal swab showed
13 that was consistent and a mix with DNA from the defendant?
14 Isn't that in the direct testimony at 48 in the - - -

15 MS. ALDEA: Actually, the testimony was - - -

16 JUDGE FEINMAN: The testimony of Mr. McTarr - -

17 MS. ALDEA: Actually, the testimony, I believe
18 was that the perianal swab - - - and I'll quote to the
19 record on it - - -

20 JUDGE WILSON: That's the perianal, but he's
21 asking about the anal.

22 MS. ALDEA: Yeah, I - - - I think that - - -
23 well, the perianal, which is the one around the anus had
24 only the complainant's DNA on it, not Sposito's. But
25 again, regardless of whether that's the case or not, the



1 standard is not that this would have absolutely precluded a
2 guilty verdict. The standard is that if the DNA testing
3 had been done, that would have created a reasonable
4 probability of a more - - - of a better verdict. On that
5 count, where the injury is directly relevant, the Appellate
6 Division's reasoning falls apart.

7 JUDGE FEINMAN: So - - - so your point is that
8 the second count would have gone?

9 MS. ALDEA: Yes. The second count certainly
10 would have been affected. Now I can't tell you - - -

11 CHIEF JUDGE DIFIORE: Did he also request testing
12 on her underwear?

13 MS. ALDEA: I believe he did request test - - -

14 CHIEF JUDGE DIFIORE: He did?

15 MS. ALDEA: Well, actually, I'm not sure if he
16 did request testing on her underwear or not as part of that
17 motion. I know that what he really wanted - - - I think he
18 did, but I know that what he really wanted to test was he
19 wanted to test the two blood stains on the jeans. And the
20 reason for that was that that was consistent with a tear or
21 an injury that would have bled, which is what was found in
22 the anal region. And he wanted to test that because there
23 was no way based on all the testimony here that the blood
24 could have gotten onto the jeans based on the sexual act.

25 And the reason for that was she was undressed



1 before they had sex. The jeans were found on the floor
2 under the bed. There - - - and then afterwards, she never
3 put them back on. So if the blood was there before and
4 there was Brady material that the People had they disclosed
5 showing - - -

6 CHIEF JUDGE DIFIORE: Wasn't this way
7 speculative?

8 MS. ALDEA: Well, that - - - so that's the Brady
9 material. So the Brady material that the People had, it
10 was disclosed by the prosecution that the police had
11 received reports that the complainant had had sex with
12 somebody in the bar pr - - - in the bathroom prior to her
13 going back to the house where she ultimately had sex with
14 Mr. Sposito. And so based on that information, that was
15 the really the nature for wanting to do the test of that.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. ALDEA: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MR. WETMORE: May it please the court. Michael
20 Wetmore on behalf of the respondent, the People of the
21 State of New York.

22 At the time of the representation, the People's
23 evidence really kind of put forth one - - - one defense
24 that this counsel had available to him, and that was the
25 defense of consent. A very reasonable defense when you



1 have a situation such as this. It was a rape. It's not a
2 case of mistaken identity. And I think if counsel had
3 raised an alibi defense, we'd all kind of be here
4 scratching our heads.

5 So at the time of the representation, the way the
6 People's proof appeared, counsel had that kind of defense
7 to go after. And although he ultimately was granted a
8 Huntley hearing, he - - - he waived it. He waived it for a
9 strategic reason. Strategic reasons that - - - that
10 actually helped set forth that defense. So really, it was
11 - - - it did two things. It leant credibility to the
12 defendant's testimony. And it got the defendant's story
13 out in front of the jury more times than his story would
14 have been out in front of them had they not had the video
15 in evidence.

16 So I - - - I think it's quite clear, too, that
17 when you take a look at the actual interview, what the
18 defendant testi - - - testified at trial and what the
19 defendant said during the interview are consistent. And I
20 - - - I've actually even compiled a list of things that are
21 - - - that are almost identical to the things that he - - -
22 that he said in the interview.

23 JUDGE GARCIA: There seems to have been a
24 suggestion that everyone in this case knows that there was
25 no strategic reason here. How do you respond to that?



1 MR. WETMORE: I - - - I think a strategic reason
2 was actually born out throughout counsel's case in chief,
3 his opening statement, his closing argument. His idea was
4 that what Sposito was saying mere hours after the sexual
5 intercourse was exactly what he was telling the jury
6 eighteen months after the sexual intercourse at trial. So
7 it's consistent because - - -

8 JUDGE FEINMAN: So - - - so he actually gets to
9 use impermissible bolstering this way by saying not only am
10 I saying it to you now at trial, but it's exactly what I
11 told them the minute it happened.

12
13 MR. WETMORE: So - - - so that's exact - - - in a
14 very clever way, actually, what counsel did here was he got
15 embolstering evidence right under the prosecutor's nose.

16 So the jury actually heard about this interview
17 and the defendant's story in the defense opening, defense
18 counsel talked about it and he goes on to say that none of
19 the people that the DA calls were in the room that - - -
20 early that morning on October 3rd. So he's setting it up.
21 The sex was not just consensual, she wanted it. She asked
22 for it. She encouraged it. She moaned for it is what he
23 said. And then he goes on to say that he made a number of
24 different times. He was free to leave. He - - - he sat
25 there and didn't have to write a statement, but he did. He



1 told them everything. So that's just in counsel's opening.

2 Then the jury gets to hear this interview,
3 Sposito's story, and the People's case in chief when the
4 People played the interview, call one of the investigators
5 to the witness stand. Then the jury gets to hear Sposito's
6 story when Sposito testifies and takes the stand. Then
7 again, in the prosecutor's closing argument, the video gets
8 played another time. Gets to hear Sposito's story again.
9 And then obviously, in counsel's summation, defense
10 counsel's summation, he gets that story out in front of
11 them again.

12 So the rationale here, I think the legitimize
13 strategy is quite clear. The more likely the jury hears
14 something - - -

15 JUDGE FEINMAN: What would have happened if you
16 had the hearing, the judge says after the hearing there's a
17 Miranda violation, and not only that, but I think that the
18 statement was involuntary in the traditional sense. You
19 know, he was deprived water, or he was deprived food. He
20 was deprived sleep, and all of those things. If the
21 statement was found to be involuntary in the traditional
22 sense, not just the Miranda violation, does that change the
23 analysis?

24 MR. WETMORE: No, because I think at that point,
25 counsel would be boot strapped in his defense. He doesn't



1 get to rely on that video. The jury gets to hear the
2 defendant's story once at that point. And they get to hear
3 it from the defendant at trial. Which isn't exactly
4 helpful. It's not an - - -

5 JUDGE FEINMAN: No, but my - - - my point if they
6 look at footnote 3 in the reply brief, right, because then
7 you could have put it in a cross-examination, but would you
8 be able to put the whole thing in if there was a
9 traditional voluntariness? In other words, the second part
10 where he actually makes the admission, would that come in?

11 MR. WETMORE: Does the court mean with respect to
12 the jackhammering comment, or with respect to - - - I mean
13 - - -

14 JUDGE FEINMAN: The part where he makes the
15 admissions, actually.

16 MR. WETMORE: Right. So he - - - he - - - in
17 terms of admissions, I mean, he admits to the sex. I don't
18 consider that as admissions, though, because I - - - I
19 think what counsel was doing here was he was conceding
20 ground on one area and ultimately ground on another - - -

21 JUDGE RIVERA: Would it - - - what - - - but no,
22 but his posi - - - but as you said is that it's consensual?

23 MR. WETMORE: Yes.

24 JUDGE RIVERA: He's not admitting rape.

25 MR. WETMORE: Right. And I don't think there was



1 ever any admission to any kind of rape in - - - in the
2 interview whatsoever.

3 JUDGE GARCIA: But to - - - to go to Judge
4 Feinman's point, which is, I think, as I'm understanding
5 it. Let's say that that a different way. The statement
6 suppressed on the not the you know he was deprived of food
7 and water but on traditional - - - he wasn't Mirandized.
8 He then takes the stand. Could he be cross-examined, you
9 know - - - would the statement be valid for cross-
10 examination purposes anyway, and to what extent?

11 MR. WETMORE: To - - - to the extent that it was
12 inconsistent - - -

13 JUDGE GARCIA: Right.

14 MR. WETMORE: - - - with his trial testimony.

15 JUDGE GARCIA: Right. And was it?

16 MR. WETMORE: So when he changes his - - - his
17 version kind of at the end of the interview, so when they -
18 - - that's when the detective sergeant comes in and they
19 begin yelling at him and telling them they believe your
20 story is bull shit you need to change it, then his story
21 starts to change.

22 So if Sposito go - - - so let's say it gets
23 suppressed hypothetically from a - - - from a Miranda
24 context, and Sposito goes to trial. He testifies. He
25 takes the witness stand. If he testifies that it's



1 consensual, the whole video doesn't get to come in, just
2 that end part where he had changed his story because he was
3 being berated by - - - by the officers.

4 So I think - - - and again, counsel is not under
5 oath here. He doesn't actually - - - we haven't had the
6 440 hearing yet as Your Honor noted. But I think it is
7 quite clear that counsel saw that he was at a crossroads
8 where it was either go forward with the suppression
9 hearing, perhaps succeed, and then - - - and maybe it gets
10 thrown out and you just have the defendant's testimony, or
11 waive the suppression hearing, forego any suppression
12 argument, and use it to our advantage.

13 JUDGE GARCIA: But isn't the point, I guess, even
14 if you got it thrown out, you'd still - - - if your - - -
15 if your only defense is calling the defendant, you'd still
16 get the bad parts in without getting the good parts in.

17 MR. WETMORE: Ab - - - absolutely, and - - - and
18 I don't think he would want that. I - - - he want - - - he
19 wanted the jury to hear the story as many times as he
20 could. And what's really interesting is Sposito's story
21 was not inconsistent with what the victim testified to at
22 trial. So if you take a look at the victim's cross-
23 examination, counsel actually kind of went into that
24 direction and used a lot of what Sposito was saying in his
25 - - - in his questions to the victim. So he asks her, he



1 then asked you - - - and this is on page 1415 of the
2 record. "He then asked you if you want me to be in you,
3 then you put my dick inside of you." And the victim
4 responds, "No, I don't remember that, no. I mean, that's
5 awful, no. I don't remember that at all. And I don't
6 believe that that happened." Well, that's pretty
7 compelling for the jury, because she's not saying, no, I
8 was there, I was conscious, and I remember what happened,
9 and this was not it. She's saying she does not remember.
10 She doesn't believe it happened. But it plays into his
11 theory that she was regretting consensual sexual
12 intercourse. And - - - and I think that's quite
13 compelling. And I think that can actually be borne out on
14 this record.

15 So another thing that I want to point out, if
16 this court is inclined to see that there was an error here,
17 see that if there is no reasonable strategy whatsoever, it
18 has been almost bifurcated by the Appellate Division,
19 right? So it's been sent back down for a 440 hearing. I
20 mean, rather than have this court reverse here, I'd urge it
21 to - - - to you know, let's see what Mr. - - - let's see
22 what defense counsel has to say about what his strategy
23 was. Put him under oath. Have him be subject to direct
24 examination, cross-examination, and have him give some
25 direct testimony - - -

1 JUDGE RIVERA: If we were to decide as a
2 reasonable strategy, how does that impact the 440?

3 MR. WETMORE: I'm sorry?

4 JUDGE RIVERA: If we were to decide there's a
5 reasonable strategy, or at least the record seems to
6 provide one, how does that impact the 440?

7 MR. WETMORE: So I - - - I think - - - because
8 the 440 actually encompasses other issues outside of just
9 this - - -

10 JUDGE RIVERA: Yes, correct.

11 MR. WETMORE: - - - so I - - - I do think that if
12 counsel actually did not watch the video, then I think that
13 does need to be explored in the 440 hearing. And I don't
14 think that would change that whatsoever, because it really
15 essentially was bifurcated by the Appellate Division.

16 JUDGE FEINMAN: But it - - - I - - - I guess the
17 question is is there a limitation on the scope of the
18 hearing if we were to say that there could be a reasonable
19 strategy decision behind this?

20 MR. WETMORE: Yes, absolutely, for waiving the
21 hearing, absolutely. I think - - -

22 JUDGE GARCIA: But doesn't it still have to be
23 shown that that was the strategy? Or is it that there is a
24 possible strategy, even if you had a completely ridiculous
25 strategy. Let's say in this case - - - I'm not saying



1 these are the facts, but this was a loser, you know, this
2 clearly was going to be suppressed and his strategy was I
3 think we're going to lose the suppression motion. Is it
4 still necessary to explore what his actual theory was, or
5 is it the standard that there was a possible reasonable
6 strategy?

7 MR. WETMORE: Well, so the - - - they have to
8 demonstrate the absence of - - - or the defendant has to
9 demonstrate the absence of a legitimate strategy. And - -
10 - and I think I've just given this court two great reasons
11 why they - - - why they can't get there. And they - - -
12 and they've never yet been explained away.

13 CHIEF JUDGE DIFIORE: And counsel, on the issue
14 of the DNA testing, do you care to address that?

15 MR. WETMORE: Yes, thank you, Your Honor. So
16 with respect to the court had some questions about the - -
17 - the DNA testing that was done, specifically with respect
18 to the anal area of the victim. And with respect to my
19 adversary, it's just plainly incorrect.

20 So on - - - on page 48 of the respondent's
21 appendix, the - - - the analyst is saying this, and I - - -
22 I quote. "The anal swab, the interpretation that I came up
23 to was that this profile from the anal swabs is consistent
24 with DNA from the victim and mixed with DNA from the
25 defendant." And he actually goes on to explain that. And



1 he - - - he's clearly referencing a chart that's being
2 displayed to the jury. But he says, "The way we go about
3 doing the actual DNA interpretation is just basically
4 looking at the control sample and comparing it to the
5 evidence. For instance, the first page of the anal swabs
6 has a 13, 14, 15. If we look at the victim's profile, we
7 have a 13, 15. We look at the defendant's profile. There
8 is a 14." So there's clear evidence that the defendant's
9 DNA was mixed with this profile that was developed from
10 swabs of the victim's anus. So there - - - there is no
11 regardless of if they get this tested and it's someone
12 else's DNA, it's not - - - there's no reasonable
13 probability that it's going to change these facts that were
14 already before the jury.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. WETMORE: Thank you. Thank you for your
17 time.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MS. ALDEA: Your Honor, it occurs to me that
20 essentially the position here then is that if you have a
21 murder defendant, for instance, who is being interrogated
22 by the police for three hours and for three hours says I
23 didn't do it, I didn't do it, and gives a ridiculous story,
24 part of which was right here, in this case, part of that
25 part which we're saying counsel strategically would have



1 wanted was the defendant saying that in the middle of sex,
2 he said well if you want me to have sex with you, you will
3 take my penis and put it inside your vagina, which itself
4 strains credulity. That part of it was harmful, too.

5 But it's like having a murder defendant who for
6 three hours is subjected to unmirandized interrogation, for
7 three hours says I didn't do it, and gives increasingly
8 ridiculous versions of why he didn't do it, who then for
9 three hours is forced to change details in his story which
10 the jury saw here when this came into evidence of him
11 admitting, well maybe she didn't put her breasts on my arm.
12 Maybe she wasn't flirting with me. And the story morphs
13 and changes as he's subjected to questioning by the police.
14 It's tantamount to saying that well, there can't really be
15 a harm for a defense attorney saying I could get this
16 suppressed as a matter of black letter law, but I'm going
17 to waive that. I'm going to give that up because at the
18 end - - - when at the end, the - - - the - - - any possible
19 helpful benefit of the video, which in this case, I - - - I
20 submit there was zero. At the end, that murder defendant
21 says the police say you were lying to us all along and he
22 says I did it.

23 And that's the only proof that the People have
24 here of the only contested element which was physical
25 helplessness. There was no other direct proof. Every



1 other proof was circumstantial, and the trial judge himself
2 said would not have supported a guilty verdict because he
3 didn't know there was reasonable doubt.

4 It's incredibly devastating to say that. And to
5 say that there was a potential strategic consideration here
6 because Your Honor was saying that here the defendant
7 testified and it's possible that counsel was saying all
8 along I'm going to have defendant testify, so I want to
9 corroborate his story, that is incredibly legally flawed
10 because the right, the decision of whether to testify at a
11 trial is not counsel's to make. The decision of whether to
12 testify at a trial is defendant's alone to make.

13 JUDGE GARCIA: Let's say the testimony of the
14 counsel is we had already agreed he was going to testify?

15 MS. ALDEA: But Your Honor, he can't, because
16 that decision cannot reasonably be made prior to trial at a
17 suppression hearing. The defendant's decision about
18 whether he wishes to take the stand - - -

19 JUDGE GARCIA: And you have a case for that? You
20 have a case that says a defendant cannot reasonably make a
21 decision to testify before a suppression hearing?

22 MS. ALDEA: Well, Your Honor, it's not reasonable
23 because he hasn't seen how the People's proof came out.

24 JUDGE GARCIA: I mean, maybe you can figure it
25 out from the discovery, right, that what is our strategy



1 going into the - - -

2 MS. ALDEA: Your Honor, People v. Nixon, which is
3 a Supreme - - -

4 JUDGE GARCIA: So you have to make that - - -

5 MS. ALDEA: I'm sorry.

6 JUDGE GARCIA: - - - decision at the close of the
7 People's case?

8 MS. ALDEA: The decision is typically made at the
9 close of the People's case, but in any event, again, it's
10 not counsel's to make. And here, we know that counsel made
11 the decision to waive the suppression hearing before any of
12 that came out. And I'm - - - I'm prejudiced and - - -

13 JUDGE FEINMAN: Well, the - - -

14 MS. ALDEA: - - - strategy - - -

15 JUDGE FEINMAN: Well, wait. The decision to
16 testify at trial is the defendant's to make.

17 MS. ALDEA: Correct.

18 JUDGE FEINMAN: The decision to have the hearing
19 or not go forward with the hearing is not necessarily one
20 that belongs to the defendant.

21 MS. ALDEA: It's not defendant's to make.

22 JUDGE FEINMAN: Okay.

23 MS. ALDEA: But what we're - - -

24 JUDGE FEINMAN: So I mean, you know, so the
25 problem that I'm having with your position is that it comes



1 pretty much to a - - - you're asking us almost to adopt a
2 per se rule that if you - - - if you waive a hearing that's
3 been granted for whatever strategic reason you may have,
4 that's per se ineffective.

5 MS. ALDEA: Actually, Your Honor, I'm not. What
6 I'm asking you to do is to apply the meaningful
7 representation standard and to say when the defense
8 attorney furnishes the People with the only direct proof of
9 the only contested element, that is ineffective if he
10 definitely would have won that hearing. And here, he
11 definitely would have won that hearing.

12 And at on that point, Your Honor, actually, the
13 per se rule that's being advocated here and if you step
14 back a little bit, it's really unbelievable, is being
15 advocated by the People. What the People are saying is the
16 only way a defe - - - a defense counsel's decision to waive
17 his client's Constitutional rights to a trial at which his
18 unconstitutionally obtained statements are not used against
19 him. The only way that can be unreasonable is if we show
20 that the attorney never read - - - never knew what the
21 statements were. That's crazy.

22 JUDGE GARCIA: Well, let's say it's a gun.

23 MS. ALDEA: We don't need to show that.

24 JUDGE GARCIA: There's no reasonable strategy not
25 to su - - - move to suppress a gun because if you suppress



1 it the case goes away.

2 MS. ALDEA: And here, there's no reasonable
3 strategy not to move to suppress a confession, which is
4 what this was. The last five minutes of this - - -

5 JUDGE GARCIA: Well, then can - - - we're going
6 to equate a confession with a gun from now on.

7 MS. ALDEA: You equate it because if that's the
8 only direct proof of the element of - - - of the offense,
9 of the element of the offense, then it's the only proof of
10 his guilt. It's the only proof of his guilt because
11 nothing else was contested.

12 JUDGE GARCIA: Can we go back to the wouldn't
13 have gotten to the jury without the confession.

14 MS. ALDEA: Your Honor, you know what? It's
15 possible. It's possible that the trial judge would have
16 granted it. You know it certainly would have happened.

17 JUDGE FEINMAN: Does it matter if it's an
18 admission of some facts, but not a confession?

19 MS. ALDEA: Ex - - - excuse me, Your Honor?

20 JUDGE FEINMAN: Does it matter if it's an
21 admission, you know, a partial admission of some facts, but
22 not a confession?

23 MS. ALDEA: Well, in this case, Your Honor, it
24 was a confession with respect to the element of physical
25 helplessness which again was the only thing that was

1 contested.

2 JUDGE FEINMAN: Okay.

3 MS. ALDEA: But more than that, with respect to -
4 - - to the impact of this on this trial which really goes
5 to the meaningfulness of this decision. With respect to
6 the strategy here, the other part that - - - that really is
7 kind of a I guess, being sidestepped here by the
8 prosecution is that he could have gone through with the
9 suppression hearing, gotten the statement suppressed and
10 then said, okay, I consent to you using it at trial anyway.
11 That would have been his choice to make at that later
12 stage. He could have let the prosecution use it. Why
13 would you give up the right - - - a suppression hearing
14 affords so much more which this court has recognized in
15 other contexts. It affords the defense a preview of the
16 People's case. It affords the defense an opportunity to
17 cross-examine the People's witnesses and to get testimony
18 that they can then use to impeach them. Counsel forfeited
19 all of those things here. What is the strategy for that?

20 JUDGE GARCIA: Wouldn't you also be arguing that
21 the consent to use the statement was ineffective?

22 MS. ALDEA: Excuse me, Your Honor?

23 JUDGE GARCIA: Wouldn't you also then argue the
24 consent to use the statement was ineffective?

25 MS. ALDEA: Well, in this case, Your Honor - - -



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JUDGE GARCIA: Because essentially that's what they were doing.

MS. ALDEA: In this case, Your Honor, it definitely was, but my point is that the harm and the reasonableness of counsel's decision in the absence - - - not of any strategy - - - because it's not enough to say well, we can conceive of possible things that counsel might have been thinking. The requirement is that the strategy be reasonable and legitimate to - - -

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. ALDEA: Thank you.

(Court is adjourned)



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

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Joseph Sposito, No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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