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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,

-against-

MARK HARTLE,  
  
Appellant.

NO. 17

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20 Eagle Street  
Albany, New York  
February 9, 2023

Before:

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

Appearances:

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Nicole Oranges  
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1           ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2           number 17, People v. Hartle.

3           MR. CIRANDO: Good afternoon, Your Honor. May it  
4           please the Court, John Cirando from Syracuse on behalf of  
5           the Appellant. And I would request two minutes for  
6           rebuttal, if necessary.

7           ACTING CHIEF JUDGE CANNATARO: You have two  
8           minutes, Mr. Cirando.

9           MR. CIRANDO: Thank you.

10          This is an appeal from a memorandum in order of  
11          the Third Department affirming the denial of our client's  
12          CPL article 440 Motion. There's two issues that I'd like  
13          to discuss this afternoon.

14          Briefly, the denial of meaningful assistance of  
15          counsel. Sort of a unique situation here. This district  
16          attorney was being investigated and retained an attorney to  
17          represent her during the course of the investigation. The  
18          services terminated prior to my client's retaining of this  
19          attorney.

20          However, when he was arraigned, everybody in the  
21          courtroom knew that he - - - that the defense attorney had  
22          represented the DA except my client. The Third Department  
23          indicated in a footnote in the decision that he should have  
24          been informed of the essence - - - informed of this  
25          relationship.



1 JUDGE TROUTMAN: How did that conflict, as you  
2 suggest, operate on the defense here?

3 MR. CIRANDO: It operated on the defense because,  
4 Your Honor, the essence of the attorney-client relationship  
5 is the trust and confidence that the client has in me as  
6 their attorney. And my client indicated that he would not  
7 have retained this attorney if he knew the attorney had  
8 represented the district attorney and he - - - if he  
9 learned of it during the course of the proceedings, he  
10 would have fired him. So I think it goes beyond the trial,  
11 it goes into the - - - obviously that - - -

12 JUDGE RIVERA: That goes to what - - - assuming  
13 and accepting the statements as true, I'm not challenging  
14 them otherwise, that only goes to the client's preference.  
15 If I had known, this wouldn't be the representative I have  
16 chosen, right? But how does it address Judge Troutman's  
17 question about the impact on the defense itself? I mean,  
18 one could want a different lawyer. Even if you've got a  
19 great lawyer who - - -

20 MR. CIRANDO: Very good lawyer. Very good.

21 JUDGE RIVERA: - - - did a spectacular defense  
22 for you. And he did.

23 MR. CIRANDO: It operates on the defense because  
24 the relationship between Ross, the attorney, and the DA, we  
25 submit, impacts on the trial strategy of the defense



1 attorney so that he doesn't stream into the same area.

2 JUDGE WILSON: You're saying he's not going to be  
3 as aggressive in - - -

4 MR. CIRANDO: Yes.

5 JUDGE WILSON: - - - challenging things the DA's  
6 doing because that's his former client?

7 MR. CIRANDO: The - - - right at the start of  
8 trial, I think it came about where there was a four-page  
9 report given, and then it becomes a five-page report. The  
10 DA was blaming it on the state police investigator. And  
11 the judge gave the choice of either having a mistrial  
12 because she did something wrong, which was declined. They  
13 ended up with a - - - I'd say a milquetoast charge for  
14 failing to do the - - - failing to do the blanket. But - -  
15 -

16 JUDGE WILSON: Can I move you to the other issue  
17 so we - - -

18 MR. CIRANDO: Yes.

19 JUDGE WILSON: - - - don't run out of time? I'm  
20 sorry.

21 MR. CIRANDO: Yes. Yes. Yes, sir.

22 The other issue is newly discovered evidence.  
23 There were text messages and telephone call - - - and  
24 photographs between the defendant and J.B. These were  
25 deleted by the Defendant, before his arrest.



1 JUDGE WILSON: Were some deleted automatically -  
2 - -

3 MR. CIRANDO: Yes.

4 JUDGE WILSON: - - - by the software?

5 MR. CIRANDO: Yes.

6 JUDGE WILSON: Were some deleted deliberately by  
7 him before his arrest?

8 MR. CIRANDO: Yes.

9 JUDGE WILSON: Were any deleted by him  
10 deliberately before his arrest but knowing he was going to  
11 be arrested?

12 MR. CIRANDO: No.

13 JUDGE WILSON: My understanding is that in the  
14 440, the Court ordered the production by the People of  
15 J.B.'s phone, and that didn't happen? And what you were  
16 trying to do was to say whether the People, all this time,  
17 had in their possession either some of the texts that you  
18 were ultimately able to recover from the Defendant's phone,  
19 whether those had been deleted either by her or  
20 automatically or whatever, and whether because the period -  
21 - - the relatively short period of time that the People had  
22 produced what they had taken from J.B.'s phone didn't match  
23 up with the period of time - - - well, they're two things.

24 There was some overlap, and you were able to  
25 recover things ultimately from the Defendant's phone that



1 were not - - - that were within the time period the People  
2 had searched but were not what the People had produced to  
3 you.

4 MR. CIRANDO: Right.

5 JUDGE WILSON: And there were also other texts  
6 from a different period of time that you don't know whether  
7 they were on J.B.'s phone or recoverable from J.B.'s phone?

8 MR. CIRANDO: Correct. Yes, Your Honor.

9 JUDGE WILSON: Okay. So that's sort of the lay  
10 of the land?

11 MR. CIRANDO: Yes. And with one caveat.

12 JUDGE WILSON: Yup.

13 MR. CIRANDO: On the chart in our brief, there  
14 was an August 14 picture that was sent by J.B. to the  
15 defendant, that was recovered. The state police did an  
16 examination that from June to September, curiously enough,  
17 that photograph was not, I don't think, recovered by the  
18 state police.

19 JUDGE GARCIA: Is that a Snapchat screenshot? Is  
20 that the one you're talking about?

21 MR. CIRANDO: Some of those are Snapchats, yes.

22 JUDGE GARCIA: So as I understand what you  
23 offered was material recovered from the Defendant's phone.

24 MR. CIRANDO: Yes.

25 JUDGE GARCIA: That's it, right? You didn't go



1 to Snapchat to see if they had anything, right?

2 MR. CIRANDO: No, it was all - - - it was  
3 everything out of the Defendant's phone.

4 JUDGE GARCIA: So the newly discovered evidence  
5 that you've offered at the trial level, 440 court, was only  
6 material you recovered from the Defendant's phone?

7 MR. CIRANDO: Yes. Yes. And curiously, when we  
8 started and we were first in the court, the trial court  
9 indicated to the district attorney, I think it's 456, 459,  
10 460, go check with her and see what's going on, get her  
11 phone and see what's up with her phone. They never did  
12 that.

13 JUDGE WILSON: So 454 to 455, I will direct them  
14 to inquire about the alleged victim's phone and have that  
15 sent to their expert and provide that to you so that your  
16 expert can look at it, and that way everybody gets a fair  
17 shot of what's going on here.

18 MR. CIRANDO: That didn't happen.

19 JUDGE WILSON: That's the way I read the record.  
20 It didn't happen?

21 MR. CIRANDO: No. No.

22 JUDGE SINGAS: But the Defendant knew about the  
23 text and the photographs and chose not to cross-examine the  
24 victim about that? It wasn't for lack of having the  
25 evidence; it was a trial strategy that the trial strategy



1 was it never happened.

2 MR. CIRANDO: I think you have to go back - - -  
3 you have to go back to the start of the trial, Your Honor.  
4 The start of the trial before there was talk about a plea  
5 bargain, the mother insisted that there be forceable  
6 compulsion, okay? The mother insisted that any plea had to  
7 be forceable compulsion to protect her daughter's  
8 reputation.

9 And counsel, I think, indicated that no good  
10 attorney would ask a question without knowing the answer,  
11 especially on cross-examination of the J.B., if they didn't  
12 have specific evidence in front of him that this is what  
13 she had said.

14 JUDGE SINGAS: But they knew the evidence. His  
15 position was there wasn't forceable compulsion?

16 MR. CIRANDO: Yes.

17 JUDGE SINGAS: So I guess I'm having trouble - -  
18 -

19 MR. CIRANDO: No, his position was there was  
20 nothing - - -

21 JUDGE SINGAS: - - - wrapping my head around a  
22 trial strategy where the Defendant makes a deliberate  
23 decision to delete evidence, which goes against his  
24 position that this never happened. And then when that  
25 fails, now saying, you know what, if I had had these





1 pictures, I could have pursued a defense of no forceable  
2 compulsion, when really the fact that you didn't have the  
3 photographs didn't preclude that defense.

4 MR. CIRANDO: As Judge Richards said, the  
5 possession of this information would have made trial  
6 strategy completely different, and it would have been a  
7 different trial.

8 JUDGE SINGAS: I agree with you, Mr. Cirando; I  
9 guess I'm having difficulty because the Defendant made the  
10 conscious decision to delete it.

11 MR. CIRANDO: Before he was arrested. The victim  
12 also made the conscious decision to delete it from her  
13 phone, too. He deletes it so he looks good; she deletes it  
14 so he looks worse.

15 JUDGE SINGAS: Well, maybe because she's a child.

16 JUDGE GARCIA: But I don't see anything in the  
17 record that there was any effort made at that time, and I  
18 understand the position later that we couldn't have done  
19 it, but there's no record of it; instead, it was attempted.

20 MR. CIRANDO: It wasn't attempted, but I don't  
21 mean to be impolite, but if you couldn't do it in '17 - - -

22 JUDGE GARCIA: Well, they couldn't do it through  
23 the one method that you have an affidavit for, but there  
24 was never any attempt at that time to do it. So we don't  
25 know if there were other methods at that time, if it was

1 possible. And to Judge Singas' point, I believe there's a  
2 plea offer on the record without any issue of consent that  
3 the Court approved for five years.

4 These photos, in a way, convict on one count.  
5 Because you can't argue it never happened anymore, and  
6 she's underage. So how is that not a trial strategy?  
7 Especially when you reject a plea that was essentially the  
8 equivalent of that count?

9 MR. CIRANDO: It's not a trial strategy, because  
10 number one, you don't have the evidence. You don't have  
11 the evidence.

12 JUDGE GARCIA: You never asked for it. You never  
13 tried to get it. And you knew it was there.

14 MR. CIRANDO: Well, he - - - but the technology -  
15 - -

16 JUDGE TROUTMAN: Are you suggesting that it was  
17 generally known what was on there and not specifically, so  
18 that impacted counsel's decision-making?

19 MR. CIRANDO: I think all of this I think is  
20 something that you would ask counsel at a hearing. First,  
21 in our - - -

22 JUDGE WILSON: Did you - - -

23 MR. CIRANDO: - - - roadmap is we want a hearing.

24 JUDGE WILSON: And you asked for a hearing on  
25 this below, correct?



1 MR. CIRANDO: Yes.

2 JUDGE WILSON: And didn't get one?

3 MR. CIRANDO: Right. I think a lot of the things  
4 that the court is pointing out is things that would be  
5 answered at a hearing.

6 JUDGE WILSON: Would you agree that it would make  
7 a difference to your argument if we knew that the Defendant  
8 had deliberately deleted the emails - - - texts, I guess,  
9 knowing that he was about to be arrested or indicted, or  
10 whether his software was set up so the text messages were  
11 deleted automatically after thirty days? Would that make a  
12 difference to your argument?

13 MR. CIRANDO: I think that the bad part for our  
14 argument would be if he was under the impression that he  
15 was being investigated for something, which there's none -  
16 - - that is not in the record. So we would submit that  
17 that did not take place.

18 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.  
19 Cirando.

20 MR. CIRANDO: Thank you, Your Honor. Oh,  
21 hopefully - - - one thing, Your Honor. Hopefully the  
22 Respondent will indicate why they didn't follow the judge's  
23 directions as far as the phone and speaking to the victim.

24 ACTING CHIEF JUDGE CANNATARO: Let's see.

25 MR. CIRANDO: Thank you.



1 MR. PEABODY: May it please the Court, Matthew L.  
2 Peabody, assistant district attorney, St. Lawrence County  
3 on behalf of the Respondent.

4 I'm going to, very quickly, just address the  
5 ineffective assistance through the operation of a conflict  
6 of interest real quickly because it seems that the focus in  
7 this issue is on the newly discovered evidence.

8 But with respect to the conflict of interest, I  
9 think that what Appellant is urging is for this Court to  
10 adopt a new standard that would state that defense counsel  
11 has a duty to advise clients of every potential conflict  
12 that could possible exist on whether or not that has any  
13 effect on the defense at all. And that's clearly, I don't  
14 think, a standard that we can adopt here. I think if you  
15 look at the conflict of interest, and there's no dispute by  
16 the parties or anyone that it was a potential conflict of  
17 interest at the time of this Defendant's trial, the  
18 standard requires that he show that I had an operation on  
19 the defense. And he wants to kind of skirt around that and  
20 say, well, it would have affected my decision to hire this  
21 attorney in the first place.

22 JUDGE RIVERA: What about the argument that it  
23 did impact on the trial and defense counsel's conduct,  
24 because defense counsel basically pulled punches. Well,  
25 made decisions that were not solely focused on his client



1 at the time, but on the possible impact on his prior  
2 client, or at least the prior representation.

3 MR. PEABODY: I think that argument's completely  
4 unsupported by the record. I think if you want to delve  
5 into that, and actually look at the record in terms of what  
6 evidence is there that this conflict had no operation on  
7 the defense, I think there's plenty of examples contained  
8 in the record that we have here.

9 Although we don't have here - - - although we  
10 don't have, for the record, supplied to you, we don't have  
11 it included the full trial transcripts. We have included  
12 the cross-examination of the pertinent parties, the main  
13 victim being the most important. I think a review of that  
14 cross-examination which is on the record's 391 through 435  
15 shows that they did a successful job of impeaching her,  
16 drawing out concerns and issues with her testimony that  
17 would be ripe for a jury in terms of their credibility  
18 determination. Things like she didn't tell anyone because  
19 she was afraid they wouldn't believe her, but in fact,  
20 there was proof that allegations of this nature had been  
21 raised in her family before and had been.

22 JUDGE WILSON: You had wanted to spend more time  
23 on the second issue, so maybe I'll scoot you over there.

24 MR. PEABODY: Thank you, Your Honor. I'll move  
25 right over to there. So I think focusing on the newly



1 discovered evidence issue at its principal, I think we have  
2 to look at the two places the Court draws its rule of law  
3 from. We can either analyze it under CPL 440.10, I think  
4 it's (1)(g), which gives some strict language about what  
5 new evidence is and why a Defendant would be entitled to  
6 vacate a prior conviction, or at least to have a prior  
7 conviction reconsidered. And then we also have this  
8 Court's six-factor test that was somewhat recently  
9 reconfirmed in Salemi. It's an older test; it's been in  
10 existence for over a hundred years here in New York State.

11 JUDGE TROUTMAN: So what's your position as to -  
12 - -

13 MR. PEABODY: Well - - -

14 JUDGE TROUTMAN: - - - the evidence here?

15 MR. PEABODY: Well, I think if you focus on both  
16 of those standards, they require in common plain language  
17 that it be newly discovered.

18 JUDGE WILSON: At the 440, the ADA who appeared  
19 there said, I think our position is, yeah, it's newly  
20 discovered.

21 MR. PEABODY: No. No. I don't believe that  
22 we've ever conceded that, Your Honor.

23 JUDGE WILSON: I'm reading you the transcript  
24 from 453 of the record. It says, He wants us to take a  
25 position as to whether or not this is legitimate newly



1 discovered evidence. I think our position is, yeah, it's  
2 newly discovered. We're not taking issue with the fact  
3 that it wasn't previously available. The question now we  
4 have - - - now we have to evaluate it. And we just need a  
5 copy of it.

6 That's right there.

7 MR. PEABODY: Thank you, Judge. I apologize.  
8 With all due respect to ACTING CHIEF Haberkorn I disagree.  
9 I think a plain definition of the word discovered applies,  
10 not having knowledge of it.

11 JUDGE WILSON: Okay. But it's a little difficult  
12 when you're in the court of instance on the 440 saying,  
13 we're not taking - - - we agree this is newly discovered,  
14 and then come up here and argue the opposite.

15 MR. PEABODY: But it's - - - outside of that  
16 transcript, Your Honor, the argument before the Third  
17 Department, and the argument in the briefs here, has been  
18 that this isn't newly discovered - - -

19 JUDGE WILSON: Well, you can argue things in  
20 front of the Third Department that aren't preserved. That  
21 doesn't mean we can get to them.

22 MR. PEABODY: But we've - - - our position, at  
23 least my position, has always been that this isn't newly  
24 discovered. That that word has a definition, a plain  
25 meaning. CPL 440 doesn't define it. Salemi doesn't define



1 it.

2 So then we're left with what is the plain  
3 definition of the word discovered? We can go back to law  
4 school and look at Black's Law Dictionary, which defines  
5 discovery as the act or process of finding or learning  
6 something that was previously unknown. We can go to  
7 Merriam-Webster's dictionary for a definition of the actual  
8 transitive verb discovered - - -

9 JUDGE RIVERA: Yeah. But looking at  
10 440.10(1)(g), it says new evidence has been discovered, so  
11 I take your point about how to deal with the undefined  
12 nature of those terms. But then it says, which could not  
13 have been produced. Doesn't that seem to suggest that the  
14 point of discovery is whether or not you could have brought  
15 it forth to the Court?

16 MR. PEABODY: I think that's exactly right, and  
17 in this situation, we have two things to consider with  
18 respect to that. One, it couldn't have been produced,  
19 because the Defendant himself destroyed it. And two he  
20 doesn't show any diligence in trying to use it - - -

21 JUDGE WILSON: Well, well - - -

22 JUDGE RIVERA: What about the stuff that's  
23 automatically deleted? What about the stuff that's  
24 automatically deleted?

25 MR. PEABODY: Well, I don't think there's any





1 proof in the record that establishes that that's case. But  
2 even so - - -

3 JUDGE RIVERA: Well, let me ask you  
4 hypothetically.

5 MR. PEABODY: Let's assume - - -

6 JUDGE RIVERA: Is the rule you're looking for  
7 that's even something that's automatically deleted?

8 MR. PEABODY: No. I think - - - so let's assume  
9 that these things are automatically deleted, so at the time  
10 that he's developing his trial strategy with his attorneys,  
11 he's aware of the context but no longer has ability to get  
12 it. Well, then I think we're into the due diligence  
13 requirement. They do nothing to try to attempt to attain  
14 this material and I think that the report that we have  
15 now - - - I think it's important to draw a distinction and  
16 actually look at what the expert says in that report.

17 JUDGE RIVERA: Yeah, but again, 440.10(1)(g),  
18 talking about due diligence is which could not have been  
19 produced by the Defendant at the trial even with due  
20 diligence.

21 MR. PEABODY: Right.

22 JUDGE RIVERA: I'm not sure what's the due  
23 diligence you're talking about, but even with. And so if  
24 the expert's affidavit is that I couldn't root right this  
25 material until I've got this update. Once I have this



1 update, I was able to root it, I immediately turned it over  
2 to them.

3 MR. PEABODY: But that's not what the expert's  
4 report says.

5 JUDGE RIVERA: Okay.

6 MR. PEABODY: I think if you read that you'll see  
7 very clearly what he actually says is the Kingo Root  
8 software that I used it existed and was developed first in  
9 2013.

10 JUDGE RIVERA: Um-hum.

11 MR. PEABODY: This trial happens later in 2016.

12 JUDGE RIVERA: Um-hum.

13 MR. PEABODY: And he says, and he basically says  
14 that, I used technology developed by Kingosoft in 2017. He  
15 doesn't say that the technology as it existed at the time  
16 of Defendant's trial wouldn't have been able to do this.

17 MR. PEABODY: But it does clearly say that the  
18 reality is with these older Androids technologies evolves  
19 over time and that's what lets you access. I mean, take  
20 Mr. Cirando's point, if it's not accessible in to,  
21 whatever, 2017, the likelihood of it having been accessible  
22 years before is zero.

23 MR. PEABODY: But we don't know that it wasn't  
24 accessible in 2017.

25 JUDGE RIVERA: Well, why not have a hearing on



1 that? I mean, it's possible to read the affidavit as I've  
2 suggested. So why not just have a hearing on that? Go  
3 ahead, cross the expert. Bring on your own expert.

4 MR. PEABODY: Well, I think that on that issue, I  
5 don't think that that would be determinative to the whole  
6 analysis. Because even - - - even if - - -

7 JUDGE WILSON: I do want to - - - I do want to -  
8 - -

9 MR. PEABODY: - - - we could say he's excused  
10 from having had exercised due diligence because it would  
11 have been impossible, we're still left with considering the  
12 other five factors of Salemi and what does newly discovered  
13 mean?

14 JUDGE WILSON: I do want to ask you about J.B.'s  
15 phone. And why it wasn't produced, and why it shouldn't be  
16 produced and have a hearing to find out what's on it. It  
17 seems to me it could be quite relevant, right? For  
18 example, there's a period of time you did search, and you  
19 didn't produce some of the stuff they were able to root  
20 from the Defendant's phone that were texts back and forth  
21 between the two of them.

22 So that means to me either it was not on J.B.'s  
23 phone, because I suppose it had been deleted. Which then  
24 might bear on the question of whether other things were  
25 intentionally or not intentionally deleted.

1           It might be that you might now be able to root it  
2           for lack of a better word. And that may bear on the  
3           question of whether or not it was technologically possible  
4           at the time to get that kind of information off of a phone.  
5           I don't know if her phone was the same type as his, so  
6           that's also another question.

7           And then there's a long period of time most of  
8           the texts that the Defendant has identified that go - - -  
9           that suggest perhaps, a lack, of forceable compulsion, are  
10          from a period of time the People didn't attempt to retrieve  
11          from the phone.

12          And so that also seems like something you'd want  
13          to know as to whether that's there, whether that's deleted,  
14          whether those - - - you know, it bears on what we're trying  
15          to figure out here.

16          MR. PEABODY: I don't see how it bears on whether  
17          this is newly discovered evidence and meets the factors  
18          under Salemi, whether or not the evidence existed on the  
19          victim's phone. I think that what we have with respect to  
20          the victim's phone, and if you take it in the context of  
21          the report we now have on the Defendant's, what we have  
22          with the victim's phone is it was analyzed by the state  
23          police. They did produce a forensic report. And they  
24          stated that the reason they didn't do the extraction that  
25          was done by the Defendant's experts is it's - - - it's just



1 not a process that they do. Rooting of a cellphone  
2 inevitably destroys that forever. And the state police  
3 forensics don't typically do analysis of evidence that's  
4 going to destroy that evidence.

5 JUDGE WILSON: Where is that in the record?

6 MR. PEABODY: I don't believe that's in the  
7 record, Judge, because we haven't supplied our own expert  
8 opinion about this analysis. But that is my understanding  
9 of the rooting process and why the state police don't do  
10 it, ever.

11 The other thing to I think that's - - - to answer  
12 that question, with respect to what we do have in the  
13 record before us. I think that that's so hypothetical that  
14 it doesn't factor in here, because if you look at even what  
15 we've - - - was recovered from the Defendant's phone, in  
16 there you can see gaps in the text messages that are  
17 unnatural.

18 For example, if you look at the record on page  
19 204, you'll see a conversation that - - - that kind of  
20 starts out of nowhere. He - - - you're following the texts  
21 chronologically, and the Defendant will say, how was your  
22 day? And then two hours later, he texts again, what's  
23 that? And she responds, a singing kind of show.

24 So in between there, you realize there's a  
25 conversation that took place and it's not captured here,



1 for whatever reason. Even his rooting of the phone. It's  
2 not like we're looking at a one hundred percent complete  
3 picture of what's there. It's completely incomplete.

4 And so to assume that doing this to the victim of  
5 a crime like this, years after a conviction at trial, and  
6 forcing her to turn over this phone, we're going to root  
7 it, we're going to look in it again, and assuming that that  
8 would produce evidence that she had or had not deleted  
9 this - - -

10 JUDGE WILSON: Well, you were ordered to do it,  
11 right?

12 MR. PEABODY: Yes. That is correct, Judge.

13 ACTING CHIEF JUDGE CANNATARO: Thank you.

14 MR. PEABODY: Thank you.

15 MR. CIRANDO: I'll be very brief, Your Honor. I  
16 think my opposing counsel has made a good argument for me  
17 as why there should be a hearing. And for the - - - Judge  
18 Wilson's indication that there was the order to go to her  
19 and turn over the phone, or get the phone. And when we  
20 were in court, the phone was in their case box of material.  
21 So they had the phone all along. They didn't tell Judge  
22 Richards until the - - -

23 JUDGE GARCIA: And counsel - - -

24 MR. CIRANDO: - - - second time we came back.

25 JUDGE GARCIA: Counsel, what's the view - - -



1 your view of the relevance of the victim's phone?

2 MR. CIRANDO: The relevance of the victim's phone  
3 is to show that she deleted the messages, so that he would  
4 look bad.

5 JUDGE GARCIA: But how is that relevant to your  
6 newly discovered evidence motion?

7 MR. CIRANDO: Because the motion relates to the  
8 issue of, in part, forceable compulsion.

9 JUDGE GARCIA: Right.

10 MR. CIRANDO: But I think - - -

11 JUDGE GARCIA: Isn't that more a prosecutorial  
12 misconduct case? One, if they didn't examine the phone  
13 properly, or if they didn't turn over material to you that  
14 they had, that's exculpatory. So what's the relevance of  
15 the victim's phone to your newly discovered evidence?

16 MR. CIRANDO: The relevance of the victim's phone  
17 would be to confirm the fact that contrary to what they're  
18 saying - - - they were saying then in county court that it  
19 was not - - - it was not legitimate. This shows a  
20 legitimate - - - a legitimacy to our evidence.

21 JUDGE GARCIA: So authentication is what this is  
22 relevant to?

23 MR. CIRANDO: It's relevant to the whole - - -  
24 the whole motion.

25 JUDGE GARCIA: But how? You're saying, I didn't



1 have this evidence. I now have this evidence. It's on  
2 this phone. It shows X. Assume we accept that it shows X,  
3 what's the relevance of the victim's phone?

4 MR. CIRANDO: Thoroughness. There may be  
5 something more on her phone that wasn't - - -

6 JUDGE GARCIA: It's a more newly discovered  
7 evidence, then?

8 MR. CIRANDO: Yeah. It's more newly discovered.  
9 I think - - - I think all of these problems or issues could  
10 have been solved - - - would be solved at a hearing.

11 JUDGE GARCIA: But there is a threshold showing  
12 that needs to be made before you root a victim's phone and  
13 get a hearing that somehow, one, this is newly discovered  
14 evidence in some way. And two, the relevance of what you  
15 want to do. And I'm still having some trouble  
16 understanding the relevance - - -

17 MR. CIRANDO: The relevance - - -

18 JUDGE GARCIA: - - - of the victim's phone.

19 MR. CIRANDO: The relevance I think would - - -  
20 if they were deleted on the phone and not just sloppily  
21 done. If they were specifically deleted, I think they  
22 would show the victim's position in the case. And it  
23 shows - - - it shows that her testimony was not true.

24 JUDGE SINGAS: So why doesn't the deliberate  
25 deletion by the Defendant play in the same way? Show that





1 he - - - like, how can we claim now that it's newly  
2 discovered when he made a conscious decision to delete it.  
3 And he said it in an affidavit. I believe he said, I did  
4 not want anyone to see them.

5 MR. CIRANDO: And so - - - but it was before he  
6 was - - - that was before he was arrested or being  
7 investigated for the matter. So - - -

8 JUDGE SINGAS: But he knew - - - he knew that he  
9 was an adult male having sexual relations with a child. So  
10 maybe he was deleting them because he didn't want his wife  
11 to see them, maybe he was deleting him because he thought  
12 someone would take offense to that. I mean, there's any  
13 number of reasons why - - -

14 JUDGE GARCIA: Also it's a crime.

15 JUDGE SINGAS: Yeah. It's criminal activity on  
16 his phone that he deleted, and now he comes to this Court  
17 and says it's newly discovered.

18 MR. CIRANDO: It's definitely meets the Salemi  
19 standards. I mean, I think we've laid that out in our  
20 brief.

21 It shows she was trying to put - - - it shows  
22 whether or not she was trying to put herself in a better  
23 light than she actually was in by deleting this material.  
24 And whether it comes out, it comes out a hearing, it may be  
25 prosecutorial misconduct. It may be a violation of Brady

1 material. It may be - - -

2 JUDGE GARCIA: Did you raise any of those issues  
3 below? Brady or prosecutorial misconduct?

4 MR. CIRANDO: That would go into a hearing.

5 JUDGE GARCIA: No. You raised in newly  
6 discovered evidence motion.

7 MR. CIRANDO: Newly discovered - - - well, the  
8 newly discovered evidence is the rubric that allows you to  
9 utilize the telephone. I think the judge - - - didn't the  
10 judge indicate this may be someplace Judge Richards  
11 indicated this may be Brady material. We've got to look  
12 and see what she had. I think the thing that shows the  
13 newly discovered and shows perhaps the district attorney's  
14 conduct stuff is that the - - - what was not recovered when  
15 they recovered. That August photograph was not recovered  
16 from her phone, but it was recovered from his phone.

17 ACTING CHIEF JUDGE CANNATARO: Thank you.

18 MR. CIRANDO: And it came from her.

19 ACTING CHIEF JUDGE CANNATARO: Thank you.

20 MR. CIRANDO: Thank you, Your Honor. Sorry I  
21 went so long.

22 (Court is adjourned)

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

I, Nicole Oranges, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Mark Hartle, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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