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COURT OF APPEALS

STATE OF NEW YORK

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TUCKETT,

Appellant,

-against-

NO. 39

STATE OF NEW YORK,

Respondent.

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92 Court Street  
Binghamton, New York  
March 13, 2025

Before:

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

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Tuckett v. State of New York.

3 MS. MCCARTHY: Good morning. May it please the  
4 court. Katie McCarthy, on behalf of claimant-appellant,  
5 Ali Tuckett. I'd like to reserve three minutes for  
6 rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MS. MCCARTHY: Thank you. This appeal presents  
9 two distinct reversible errors which explain how the trial  
10 court below reached a decision so inconsistent with the  
11 overwhelming record proof that Mr. Tuckett spent years in  
12 prison for a crime that never happened. First, this court  
13 has long held that due process requires a decision be based  
14 solely on evidence in the record. That core principle was  
15 violated here when the trial judge, by her own words,  
16 relied on extrinsic evidence to rule against Mr. Tuckett.

17 JUDGE CANNATARO: Counsel, does due process have  
18 a sort of contextual gloss to it because, you know, I think  
19 a lot of times we talk about due process in the context of  
20 criminal proceedings where someone is at risk of loss of  
21 liberty and you want to ensure the integrity of the  
22 process. This is obviously a different case. The person  
23 who was the defendant is now a claimant. They're seeking  
24 money damages from the state based on their claim of, you  
25 know, improper conviction of a crime. And my understanding

1 is that in this type of civil, not criminal proceeding,  
2 there can be certain procedural irregularities that maybe  
3 extraneous bits of evidence get into - - - or extraneous  
4 facts get into a judge's decision-making, and that doesn't  
5 amount to a violation of due process. Would you agree with  
6 that?

7 MS. MCCARTHY: I would not, Your Honor, based on  
8 this court's precedent, and in particular, I direct the  
9 court to Simpson v. Wolansky. And there in that case, this  
10 was an evaluation of an administrative hearing. And the  
11 court acknowledged that the regular rules of evidence don't  
12 necessarily apply there, but that the fundamental  
13 requirement of a fair trial is the entitlement of the party  
14 whose rights are being determined to be fully apprised of  
15 the proof to be considered with a concomitant opportunity -  
16 - -

17 JUDGE CANNATARO: Agreed. We - - - we want  
18 judicial decisions to be based on record evidence.

19 MS. MCCARTHY: Yes.

20 JUDGE CANNATARO: But if the process - - - in a  
21 civil case like this, if the process is corrupted to some  
22 degree, we approach it from a totality of the  
23 circumstances. In other words, if the error is not  
24 fundamental to - - - to the underlying integrity or  
25 fairness of the outcome, it can be excused, can it not?

1 MS. MCCARTHY: At - - - if - - - that's true, but  
2 I don't even think we're in harmless error land here  
3 because what we're talking about is the judge making very  
4 clear in her decision that she's relying on both extra  
5 record and inadmissible - - -

6 JUDGE HALLIGAN: But at that point, do you - - -

7 JUDGE TROUTMAN: But can you look at what the  
8 court did rely on if there is record support for the  
9 decision even though the court relied on things or  
10 considered things - - - I'm sorry - - - admitted things  
11 that shouldn't be if there is record support for properly  
12 admitted evidence, can't the decision be sustained?

13 MS. MCCARTHY: Well, first, Your Honor, for many  
14 of these examples, and I'm happy to get into them, there is  
15 not record evidence to sustain them. But more than that,  
16 the primary danger that this court has said in relying on  
17 extrinsic evidence is that the individual doesn't have  
18 notice that that evidence is going to be considered.

19 JUDGE HALLIGAN: So do you agree that there is -  
20 - - I take the Appellate Division as dividing in part on  
21 the question of whether or not - - - what I think both - -  
22 - all of the other - - - the Appellate Division justices  
23 say is hearsay whether it is or isn't set to the side,  
24 whether that's harmless or not. Do you agree that that's  
25 the correct analytical framework here, that if we were to

1 conclude that there was hearsay admitted, or I know you  
2 also argue there were documents relied on outside the  
3 record, that we would then look, as the Appellate Division  
4 did, to see how that actually affected the Court of Claims  
5 judge's findings?

6 MS. MCCARTHY: Well, we would say that, here, if  
7 - - - there's no question that that - - - so taking the  
8 hearsay did impact it, which the State has conceded - - -

9 JUDGE HALLIGAN: Well, just - - - but my question  
10 is, do you agree that in a case where we were to conclude  
11 that it did not significantly affect the findings, that it  
12 would not require reversal? In other words, are you  
13 arguing for a per se reversal rule here, or are you arguing  
14 that under these circumstances reversal is required?

15 MS. MCCARTHY: Under these circumstances - - -

16 JUDGE HALLIGAN: Okay.

17 MS. MCCARTHY: - - - Your Honor.

18 JUDGE HALLIGAN: So where in your brief do you  
19 make the argument that, in light of the other findings that  
20 the Court of Claims judge made, that the findings that you  
21 argue rely on what you say is hearsay were not - - - were  
22 not harmless? I looked in your brief, and I wasn't sure I  
23 saw that argument laid out. So that's why I wanted to  
24 understand whether you thought that was the right  
25 framework.

1 MS. MCCARTHY: Well, Your Honor, respectfully, I  
2 think we do lay it out in saying that the prejudice here is  
3 not speculative because Mr. Tuckett didn't have the notice  
4 that evidence, like the hearsay evidence, would be  
5 considered by the court, and so was deprived expressly by  
6 the court of an opportunity to rebut evidence she ended up  
7 relying on.

8 JUDGE CANNATARO: Can I just ask you to specify  
9 which pieces of evidence you're referring to in that  
10 statement - - - hearsay evidence?

11 MS. MCCARTHY: Yes. So with respect to the  
12 hearsay evidence, we did object to the introduction of that  
13 evidence. And then there's - - -

14 JUDGE GARCIA: So what specifically - - -

15 MS. MCCARTHY: - - - certainly did not have  
16 notice - - -

17 JUDGE GARCIA: - - - what specific hearsay?

18 MS. MCCARTHY: Yes. The - - - Nate's purported  
19 statement to Ofc. Cornell that he felt better after he told  
20 his mother the false allegations. And he - - - his - - -

21 JUDGE SINGAS: And was that preserved, that  
22 argument?

23 MS. MCCARTHY: I believe it is, Your Honor. For  
24 - - - we did object in the first instance to the State's  
25 attempt to elicit it. Our objection was overruled, and the

1 judge said that because Nate was subject to cross-  
2 examination, this could come out. But practically  
3 speaking, what animates the court's concerns about hearsay  
4 is that it's unreliable. And in this case, Nate testified  
5 first. He was the first witness at the trial. And  
6 notably, the State never asked Nate if he actually made  
7 either of these statements. So what we had here were Ofc.  
8 Cornell and ADA Rossi - - -

9 JUDGE GARCIA: Could you have recalled him at  
10 that point?

11 MS. MCCARTHY: I do not believe the court would  
12 have allowed us to recall him, but we did not try to.

13 JUDGE TROUTMAN: But you can seek to recall  
14 witnesses.

15 MS. MCCARTHY: That's true, Your Honor. But  
16 here, the - - -

17 JUDGE TROUTMAN: And in civil trials, it - - - it  
18 happens more often than in criminal trials.

19 MS. MCCARTHY: That may be true, Your Honor. But  
20 ultimately, it's clear that the court did consider this  
21 hearsay evidence for the truth. She says she's considering  
22 it for the truth - - -

23 JUDGE TROUTMAN: But you're entitled not to a  
24 perfect trial, but a fair trial. So the question still  
25 goes back to, is there record evidence to support the

1 decision here - - -

2 MS. MCCARTHY: But - - -

3 JUDGE TROUTMAN: - - - even - - - even with the  
4 imperfect seeping in. Is that not true?

5 MS. MCCARTHY: This, respectfully, was not a fair  
6 trial. And the court can and should look cumulatively at  
7 the errors here. It's not just about the hearsay that was  
8 considered. It's also about - - -

9 JUDGE TROUTMAN: So are you saying it doesn't  
10 matter if there is record support for the court's decision  
11 beyond the hearsay?

12 MS. MCCARTHY: I'm saying, if there - - - if it's  
13 of a quibbling nature, there's no reason to believe that  
14 there would be a different outcome. If there were a new  
15 trial, then, yes, we're in a different universe. But here,  
16 this goes to the heart of the matter. The court said in  
17 her decision - - -

18 JUDGE TROUTMAN: And we're talking about a judge  
19 trial, right?

20 MS. MCCARTHY: Yes. We're talking about the - -  
21 -

22 JUDGE TROUTMAN: And how does that impact this?

23 MS. MCCARTHY: Well, here, because the judge sat  
24 as the finder of fact, this court has said that when the  
25 judge allows in inadmissible evidence, or there's an

1           indication that the judge considered improper evidence,  
2           then absent some clear indication, otherwise, it cannot be  
3           presumed that the judge, as fact finder, didn't err in that  
4           respect.

5                         JUDGE HALLIGAN: That again, suggests to me that  
6           you're proposing some sort of per se rule. As Judge  
7           Troutman says, we would all like there to be perfect  
8           trials, but there are errors that are made, and generally,  
9           a reviewing court looks at what the impact of that error  
10          was as against all of the other proof that was before the  
11          judge that might support the findings. And so if that's  
12          the - - - if that's the path that we were to decide is  
13          appropriate to take, what is your argument as to why the  
14          specific - - - let's start with the hearsay, if we can. I  
15          believe it's the ADA and the - - -

16                         MS. MCCARTHY: Officer.

17                         JUDGE HALLIGAN: - - - police officer, right?  
18          Why is it, in your view, that if we were to agree that  
19          that's hearsay, that the reliance - - - and you're right,  
20          the Court of Claims judge does reference that testimony,  
21          that the reliance on that for the truth of the matter  
22          requires reversal given that there is other evidence before  
23          the Court of Claims judge that the Court of Claims judge  
24          relies on.

25                         MS. MCCARTHY: Because as the State concedes at

1 page 51 of their brief, Tuckett could not meet his burden  
2 precisely because Nate's prior inconsistent statements so  
3 impaired the credibility of the recantation. That is in  
4 reference to these hearsay statements.

5 JUDGE HALLIGAN: I don't take the State - - - I'm  
6 sure the State will tell us, but I don't take the State to  
7 be - - - to be saying that - - - to be conceding that, if  
8 we were to view those statements as hearsay, that they were  
9 not harmless and require reversal. What about the other  
10 evidence and the findings that the Court of Claims judge  
11 makes? Is - - - why is that not sufficient?

12 MS. MCCARTHY: Well, because the judge - - - we  
13 can't - - - based on what the judge wrote, taking the judge  
14 at her words, she was looking at extra record and  
15 inadmissible evidence. And so we can't - - -

16 JUDGE HALLIGAN: Among other things, though. And  
17 I don't think you're arguing, but tell me if I'm wrong,  
18 that the only thing she was looking at - - - okay. So  
19 isn't the question before us whether what she was looking  
20 at was sufficient to support the findings that she made?

21 MS. MCCARTHY: Respectfully, I don't believe so,  
22 Your Honor. And I would - - -

23 JUDGE HALLIGAN: Well, what is the question we  
24 should ask?

25 MS. MCCARTHY: Well, I would direct the court to

1           - - - in Matter of Kelly, which is a decision by this court  
2 where, because the Appellate Division relied on facts  
3 outside the record in their review, the court reversed.  
4 And that was there because the - - -

5           JUDGE CANNATARO: So you are looking for a per se  
6 rule?

7           MS. MCCARTHY: No. I think that this is an  
8 opportunity for the court to clarify that even in Court of  
9 Claims trials, which may be, you know, less formal than a  
10 federal jury trial, for example, that the basic rudiments  
11 of due process still apply. You - - - you're entitled to  
12 notice.

13           JUDGE HALLIGAN: Even if we were to agree with  
14 that proposition, right? I think that in a - - - you know,  
15 in any trial courtroom, that it's not the case that one  
16 mistake that is made by a judge, where an appellate court  
17 decides, for example, that a piece of evidence was, in  
18 fact, hearsay and not have come in, that doesn't  
19 necessarily require reversal. I take it you agree with  
20 that, right?

21           MS. MCCARTHY: I do, Your Honor.

22           JUDGE HALLIGAN: So we're just trying to - - -  
23 what I'm trying to understand anyway is, why is it that if  
24 we agreed with you on the hearsay and agreed with the  
25 Appellate Division that that was hearsay, why is that

1 sufficient to require us to order a new trial here given  
2 that there's other evidence?

3 MS. MCCARTHY: Because this - - - the nature of  
4 that evidence is not quibbling, which has been the court's  
5 standard. So here - - -

6 JUDGE HALLIGAN: Why not?

7 MS. MCCARTHY: Because the trial judge expressly  
8 wrote in her decision that she was crediting Nate's  
9 original accusations in large part due to this hearsay  
10 evidence. She, in fact, says about the alleged statement  
11 to Cornell, importantly, Nate said this. She said it  
12 points to the truth of his original accusations. This is  
13 essentially all that she - - -

14 JUDGE TROUTMAN: Does the court indicate that  
15 that is the only reason that it found the recantation not  
16 credible?

17 MS. MCCARTHY: No. The court also pointed to  
18 this court's language in Celentano and said that there is a  
19 long held presumption that recantation - - -

20 JUDGE CANNATARO: Well, leaving Celentano out - -  
21 - and that's important, and you have to get to it. But  
22 there was more factual basis for the court's determination  
23 simply than this alleged hearsay. The court talked about  
24 Nate's affect and other aspects of his credibility with  
25 respect to the recantation beyond just the hearsay.

1 MS. MCCARTHY: Yes, Your Honor. And if this were  
2 just a credibility determination we didn't agree with, we  
3 wouldn't be here. But as the State acknowledges on page 66  
4 of their brief, the court gave more weight to the evidence  
5 supporting the veracity of the allegations - - -

6 JUDGE TROUTMAN: But credibility is, in fact, for  
7 the trier of fact.

8 MS. MCCARTHY: Of course, Your Honor.

9 JUDGE TROUTMAN: And in a Court of Claims trial,  
10 it's the judge.

11 MS. MCCARTHY: Yes. But the judge didn't just  
12 consider or rely on credibility. And so we know here that  
13 what the judge also did was assume that other prior fact  
14 finders had found Nate's allegations to be credible. She  
15 talked about this vetting process of numerous adults  
16 trained in assessing these sorts of allegations. But the  
17 Bivona social worker, the grand jury, the therapist, none  
18 of them testified before the Court of Claims. And the - -  
19 - the same problem is compounded by her explicit reliance  
20 on Judge Argento.

21 JUDGE CANNATARO: So are you saying it was  
22 inappropriate for the trial judge to consider, as part of  
23 their fact finding process, that when this original  
24 allegation was made, it was brought to police officers,  
25 district attorneys, and then it was testified to under oath

1 in court, and it was found to be credible in each instance,  
2 that's off limits for part of a judge's deliberative  
3 process?

4 MS. MCCARTHY: It's not off limits, but in any  
5 wrongful conviction case, there's going to be evidence that  
6 a fact finder previously credited, otherwise, for example,  
7 Mr. Tuckett would never have been convicted.

8 JUDGE RIVERA: So let's take out everything you  
9 argue was inadmissible, hearsay, and evidence that - - -  
10 well, that never should have been admitted, right? Let's  
11 just take all of that out. What is left, and why is that  
12 not enough to sustain the court's decision?

13 MS. MCCARTHY: What's left based on the court's  
14 decision is Celentano and the court's purported  
15 determination that Nate gave a weak justification for his  
16 recantation. Otherwise, what the judge points to, and this  
17 is on record 21 in the decision for saying that she did not  
18 find the recantation believable, she points to Celentano,  
19 the weak justification, and then to ADA Rossi and judge's -  
20 - - Judge Argento's stated observations about Nate when he  
21 made the recantation.

22 JUDGE RIVERA: And that's not good enough  
23 because?

24 MS. MCCARTHY: Well, for one, those - - - those  
25 stated observations should not have been relied on. But

1 also, what's critical here is neither ADA Rossi nor Judge  
2 Argento had all of the evidence that the judge had here.  
3 And that was the - - -

4 JUDGE TROUTMAN: Is there a difference between  
5 relying on a prior transcript that's not in the record as  
6 opposed to a decision?

7 MS. MCCARTHY: Well, here, either way, it was  
8 improper. The court, of course, can take judicial notice  
9 of the existence of a decision, but not of anything that's  
10 disputed in that decision. What's important is that Judge  
11 Argento, neither during the trial, nor the - - -

12 JUDGE TROUTMAN: So courts can't take judicial  
13 notice of court decisions. Is that what you're saying?

14 MS. MCCARTHY: The court can as, for example,  
15 this court has found in Long, take judicial notice of the  
16 date of a court decision. But that's different than saying  
17 that the judge gets to rely on the extra record evidence  
18 that's in that decision. That decision was not in the  
19 record. We know it because the judge herself cites it as  
20 an exhibit to the claim - - -

21 JUDGE TROUTMAN: But you're - - -

22 MS. MCCARTHY: - - - the claim we filed in 2017.

23 JUDGE TROUTMAN: You're saying the court cannot  
24 rely upon - - - I just want to be clear. You're saying it  
25 cannot rely upon, not only not a trial transcript, but the

1 court cannot rely upon the decision even though it is a  
2 court decision?

3 MS. MCCARTHY: For the purposes of determining  
4 whether or not the recantation was credible, that's  
5 correct. Judge Argento didn't testify in the Court of  
6 Claims trial, and frankly, if - - -

7 JUDGE TROUTMAN: Can the court consider that  
8 there was a trial before?

9 MS. MCCARTHY: Necessarily, in any wrongful  
10 conviction case, there will be a prior trial. And so of  
11 course, we're not disputing that, previously, a fact finder  
12 in this case, Judge Argento, found it credible.

13 JUDGE CANNATARO: So the court can't consider  
14 anything beyond the fact of a conviction. That's the only  
15 - - - unless it's admitted into the record at the  
16 subsequent hearing for this claim?

17 MS. MCCARTHY: No. I think that there's a  
18 distinction, though, in saying repeatedly that the judge is  
19 relying on Judge Argento purportedly doubting the validity  
20 of the recantation, Judge Argento's stated observations,  
21 quoting Judge Argento's decision. The reason that we have  
22 the Court of Claims trial is that judge is sitting as the  
23 finder of fact, and we have new evidence that came out for  
24 the first time in the Court of Claims trial. Judge Argento  
25 never heard that the reason Nate made up the false

1           accusations is because he was caught watching gay  
2           pornography. His - - - he was raised in an extremely  
3           fundamentalist Pentecostal household, and it was suggested  
4           to him - - - this came out again for the first time during  
5           the Court of Claims trial, that if he said that this was  
6           somehow due to Mr. Tuckett, he would get out of trouble.

7                   JUDGE CANNATARO: You don't dispute, do - - - I  
8           don't think you do, but I just want to check that - - -  
9           that the judge could evaluate the credibility of that  
10          explanation for the recantation? Because I'll tell you,  
11          quite frankly, I'm having a hard time understanding how his  
12          use of pornography relates to the allegation of sexual  
13          abuse by his uncle.

14                   MS. MCCARTHY: Because he was found by his  
15          brother watching gay pornography and masturbating, and his  
16          family felt that that was inappropriate behavior, in  
17          particular, the nature of the pornography. He had been  
18          taught that this was the worst sin that could be committed,  
19          watching gay pornography, being interested - - -

20                   JUDGE CANNATARO: So he decided, well, let me  
21          just blame my uncle?

22                   MS. MCCARTHY: No. He said that he - - - he was  
23          - - - so Mr. Tuckett, for context, at that time, was the  
24          only member of the family who had been to prison. He was  
25          sort of the black sheep of the family. He dressed

1           differently. He talked differently. The rest of the  
2           family were very fundamentalist. And so in the course of  
3           Nate being questioned by his mother, by his aunt, by his  
4           brother, he said it was suggested to him that maybe this  
5           came from Mr. Tuckett, who he hadn't seen for months. This  
6           came about a year after the alleged abuse.

7                        JUDGE CANNATARO: Is this - - - are you talking  
8           about the semen - - - is this about, like, the semen that  
9           the - - -

10                      MS. MCCARTHY: It's - - - it's - - -

11                      JUDGE CANNATARO: - - - brother saw?

12                      MS. MCCARTHY: Well, the brother saw a white spot  
13           on the bed post that he thought was semen that Nate may  
14           have been masturbating. And Nate has explained now that he  
15           had a Nintendo DS that could connect to the internet. He  
16           was watching pornography. His brother found him watching  
17           the pornography. He involved more members of the family.  
18           And they were saying to Nate, what are you doing? And  
19           instead of accepting that he might be exploring his own  
20           sexuality, it was suggested to him maybe this influence,  
21           this interest in the pornography came from your uncle, the  
22           one who's been in prison. And Nate said - - - at this  
23           trial, he testified in front of the judge repeatedly, I  
24           said, no; I said, no. But then I was frustrated - - -

25                      JUDGE CANNATARO: That's a very elaborate

1 construction of a false accusation. I mean, would you say  
2 that - - - does that seem like something that happens all  
3 the time to you?

4 MS. MCCARTHY: I would say it happens quite - - -  
5 quite often in these cases of child sex abuse where false  
6 allegations are raised. Children are - - -

7 JUDGE GARCIA: The judge - - - since he's the  
8 trier of fact here, the judge could reject that story,  
9 right?

10 MS. MCCARTHY: The judge is entitled to reject  
11 it, but not - - - here, we don't know that the judge relied  
12 solely on that - - -

13 JUDGE GARCIA: So would we just send this back if  
14 we agree with you and just say, don't consider X and just  
15 do this again - - -

16 MS. MCCARTHY: I - - -

17 JUDGE GARCIA: - - - so they could just make a  
18 new decision based on what we say is now record evidence?

19 MS. MCCARTHY: Well, Judge Martin has retired, so  
20 I believe it would be a different judge if you sent it  
21 back. But yes, conceivably, the court could do that. But  
22 I do think that the precedents will require that, to the  
23 extent that this evidence is out there now, Mr. Tuckett had  
24 the ability to rebut it, and he was precluded from doing  
25 that. The court said, everything about the - - - the

1 investigation in the criminal trial is irrelevant.

2 JUDGE GARCIA: What if we say - - -

3 JUDGE HALLIGAN: But are you challenging that? I  
4 thought you were really relying on the hearsay - - - what  
5 you say is hearsay evidence and the admission of evidence  
6 you say was - - - the reliance on evidence you say was  
7 outside the record.

8 MS. MCCARTHY: Yes. And - - - but in particular,  
9 evidence outside the record. The court - - - we know this  
10 was a virtual trial. We delivered a lot of impeachment  
11 material to the court. So the court had - - -

12 JUDGE HALLIGAN: But you're not claiming - - -  
13 you're not claiming that we should reverse - - - I don't  
14 take you to be, but that we should reverse because there  
15 was evidence like the polygraph excluded, are you?

16 MS. MCCARTHY: It - - - but it's part and parcel,  
17 Your Honor. Because this - - - we're saying that the court  
18 violated due process by relying on evidence that Mr.  
19 Tuckett didn't have notice. And here, we're saying, to the  
20 point of prejudice, it's not speculative that we could have  
21 explained and we could have rebutted a lot of that  
22 evidence.

23 JUDGE GARCIA: If the court isn't going to  
24 consider that evidence on a remittal if we were to do that,  
25 why would you have to rebut it?

1 MS. MCCARTHY: Well, if - - - if the court were  
2 to give strict instructions that only the evidence that the  
3 criminal - - - the Court of Claims trial were to be  
4 considered, then I think that that's right because we were  
5 told ahead of time, this trial must be kept narrow. We  
6 were entitled to rely on that ruling. And the only  
7 evidence in the actual record from the Court of Claims  
8 trial is that Nate, since the time he turned fourteen, for  
9 over a decade, has completely and unequivocally recanted  
10 these abuse allegations. There's no consideration by the  
11 judge, and this goes critically to the second point, of  
12 what motive Nate would have now, as a fourteen-year-old, a  
13 fifteen-year-old, a sixteen-year-old, a twenty-three-year-  
14 old, to say that this didn't happen. It's incredibly  
15 embarrassing for him to have to go repeatedly to the  
16 District Attorney's Office - - -

17 JUDGE TROUTMAN: That is speculation, but there  
18 are reasons why a fourteen-year-old boy would not wish to  
19 have people believe that they were assaulted by a person of  
20 their same gender.

21 MS. MCCARTHY: Well, there's absolutely nothing  
22 about that in the record.

23 JUDGE TROUTMAN: Exactly. Exactly. But there  
24 are reasons. You - - - I only stated that because you said  
25 there is no reason that they would recant.

1 MS. MCCARTHY: But in fact - - - and this is, to  
2 be clear, outside the record, but Judge Argento did explore  
3 that at the hearing, and Nate said, no. No one outside of  
4 his family even knew about this. What happened was his  
5 mother asked him, what's going on with you? And he took  
6 the opportunity to tell the truth. He is subjecting  
7 himself - - -

8 JUDGE TROUTMAN: But again, we go back to the  
9 issue of credibility. Credibility is for the finder of  
10 fact. And with respect to this overall decision, the  
11 question is, what was admissible in the record? And was  
12 that - - - that which was admissible sufficient to sustain  
13 the decision?

14 MS. MCCARTHY: Well - - - and respectfully, here,  
15 the - - - we don't need to prove to a certainty that this  
16 is all the judge relied on. But what we do need to make is  
17 a sufficient showing that the judge relied on extrinsic and  
18 inadmissible evidence. And - - - and I submit we have made  
19 that showing. The judge, by her own words, talks about  
20 what Oniris testified to at the criminal trial. Oniris'  
21 criminal trial testimony was not in evidence. She didn't  
22 testify at the Court of Claims trial. The judge made  
23 findings that could only have come from that testimony.

24 JUDGE TROUTMAN: But others did testify at trial.  
25 Nate testified at trial. And some of the - - - there is

1 other record evidence that can support some of the things  
2 that related to her testimony. Is that not correct?

3 MS. MCCARTHY: I don't think that Mr. Tuckett  
4 saying that she may have testified at the Court of Claim -  
5 - - at the criminal trial, but he wasn't a hundred percent  
6 sure is a sufficient basis for that. But regardless,  
7 there's no question the judge also had the criminal trial  
8 testimony of Nate's brother, Emil, as well as his aunt,  
9 Irene. And repeatedly, in her decision, she says, this  
10 caused family members, including Elizabeth, to question.  
11 Several members observed grooming behaviors. Family  
12 members who believe the accusation - - - the only family  
13 member who testified before the Court of Claims was  
14 Elizabeth. So we're not in the land of a quibbling nature  
15 or speculation. The judge was expressly relying on, even  
16 citing to, evidence that's outside the record.

17 JUDGE CANNATARO: No, no, no. But there was  
18 testimony, I think, by both Tuckett and Nate that they were  
19 spending time together alone in the room, and - - - and  
20 that Tuckett paid a lot of attention, maybe the most amount  
21 of attention of all the family members to him. Isn't - - -  
22 couldn't that be what the judge is referring to as grooming  
23 behaviors?

24 MS. MCCARTHY: Well, I don't know where grooming  
25 behaviors came from because, frankly, that is a term of art

1 that was never even raised at the criminal trial. But  
2 moreover, yes, Ali - - - Mr. Tuckett did tease Nate, and  
3 there's some evidence of that in the record. But the  
4 difference here is that the trial judge clearly read the  
5 criminal trial testimony, and the family members testimony  
6 there was influenced by the false allegations - - -

7 JUDGE CANNATARO: But all I'm asking is, weren't  
8 there certain parts of the criminal trial testimony that  
9 were in fact confirmed to have occurred as part of the  
10 record in this hearing?

11 MS. MCCARTHY: There were, but none of that went  
12 to the - - - there was never any witness to this alleged  
13 abuse. And none of it goes to whether Nate's original  
14 accusation was true. The fact that Mr. Tuckett was  
15 collecting unemployment after being laid off from Kodak and  
16 would spend his days playing video games is not evidence of  
17 child sexual abuse. And so the fact, in fact, that they  
18 both admit, yes, we would play video games up there in the  
19 room. At the end of the day, the evidence was that Nate  
20 has been completely consistent and clear this crime never  
21 happened, and there is absolutely zero evidence to the  
22 contrary that the State put on.

23 CHIEF JUDGE WILSON: Counsel, you're - - - you're  
24 way over your time.

25 MS. MCCARTHY: I know. I apologize.

1 CHIEF JUDGE WILSON: Thank you.

2 MS. MCCARTHY: Thank you.

3 CHIEF JUDGE WILSON: We have your rebuttal.

4 MR. BRADY: Good morning, Your Honors. Frank  
5 Brady, on behalf of respondent.

6 JUDGE TROUTMAN: Do you agree that the decision  
7 perhaps wasn't written in a manner that's stellar judicial  
8 writing?

9 MR. BRADY: Yes.

10 JUDGE TROUTMAN: And with respect to the decision  
11 itself, what did - - - what is in the record that would  
12 sustain it?

13 MS. MCCARTHY: Well, if we're talking about the  
14 hearsay statements, those statements were admissible under  
15 the state of mind exception to the hearsay rule. That's -  
16 - - that's my first position with respect to that,  
17 actually. And as to one of the statements, the first  
18 statement that was made to Ofc. Cornell, there was no  
19 objection to the admission of that statement.

20 JUDGE HALLIGAN: If we disagree with you on that,  
21 then tell me, if you will, why that was harmless. Why  
22 aren't the dissenters in the Appellate Division correct if  
23 - - - if the - - - the testimony from - - -

24 MR. BRADY: If - - -

25 JUDGE HALLIGAN: - - - Cornell and Rossi was



1 inadmissible hearsay?

2 MR. BRADY: If you were to reach the - - - the  
3 first statement of - - - again, I - - - I don't think it -  
4 - -

5 JUDGE HALLIGAN: Right.

6 MR. BRADY: - - - was preserved. I think there's  
7 other evidence that this court relied on besides those - -  
8 -

9 JUDGE HALLIGAN: So - - - so when - - -

10 MR. BRADY: - - - statements, you know.

11 JUDGE HALLIGAN: - - - when we look - - - when we  
12 look at that, right, what the Court of Claims judge says  
13 first is that Cornell and Rossi's testimony point to the  
14 truth of N.M.'s accusations, right? And in terms of the  
15 rest of the evidence that the Court of Claims judge is  
16 relying on, some of it is demeanor, but some of it seems to  
17 me to perhaps be - - - for example, the judge says that  
18 N.M. didn't waver with trained adults, right? That is  
19 perhaps predicated on believing that the accusations were  
20 truthful in the first instance. And so if the basis for  
21 the truth of those accusations was out, maybe that is too.  
22 So what specifically would you point us to other than Rossi  
23 and Cornell?

24 MR. BRADY: I think the - - - with respect to the  
25 statements to professionals who are trained in - - - in



1 listening and hearing about - - - and talking about child  
2 sex abuse, we're talking about an inference that the court  
3 made because Nate spoke to a social worker from the child -  
4 - -

5 JUDGE HALLIGAN: You mean not wavering?

6 MR. BRADY: Yes. I think - - -

7 JUDGE HALLIGAN: But if - - - if - - -

8 MR. BRADY: Well - - -

9 JUDGE HALLIGAN: But doesn't that turn on whether  
10 or not the Court of Claims judge believes the truth of the  
11 accusations in the first instance, which the judge says is  
12 believable because of Cornell and Rossi's testimony?

13 MR. BRADY: The court looked at the consistency  
14 of the reporting of the sex abuse to Cornell - - -

15 JUDGE HALLIGAN: Yeah.

16 MR. BRADY: - - - to the assistant district  
17 attorney, who's from the child sex abuse unit, to a - - -  
18 an advocate from the child care - - -

19 JUDGE HALLIGAN: If we didn't have Cornell and  
20 Rossi's testimony, what then would remain of the trial  
21 court's references to testimony that flows from the belief  
22 in the initial accusations?

23 MR. BRADY: Well, we have the testimony that he  
24 was impeached with from the trial, his prior inconsistent  
25 statements that he underwent this sexual abuse when he was

1 - - - when he was cross-examined. He under - - - he was  
2 cross-examined with statements that he made under oath,  
3 attesting - - -

4 JUDGE HALLIGAN: And I think we also have the  
5 delay in the reporting that the judge references from the  
6 mother, right? The - - - I believe the Court of Claims  
7 judge references that the mother delays reporting the  
8 recantation, right?

9 MR. BRADY: There was a delay of about three  
10 months, yes.

11 JUDGE HALLIGAN: And the initial doubts that are  
12 expressed by Justice Argento, right?

13 MR. BRADY: Correct.

14 JUDGE HALLIGAN: So is that enough to render it  
15 harmless if we believe it to be hearsay? How - - - why is  
16 that?

17 MR. BRADY: Well, if you throw out the statement  
18 to Ofc. Cornell - - -

19 JUDGE HALLIGAN: And to Rossi.

20 MR. BRADY: - - - and - - - and throw out the  
21 statement that he was anxious about his health that he made  
22 - - -

23 JUDGE HALLIGAN: Yeah.

24 MR. BRADY: - - - to ADA Rossi. ADA Rossi also  
25 testified that he spoke with him. You know, he met with

1 him like three or four times. He prepped him for trial.  
2 He took him to the courtroom. He showed him the Bible.  
3 And on every opportunity, he said to him, look, if this is  
4 not true, tell me. You're not going to get in trouble.  
5 And you know, like, you should - - - you have to be  
6 completely accurate about this. He gave him many  
7 opportunities to retract his accusation against his older  
8 cousin, and he did not.

9 CHIEF JUDGE WILSON: What do you make of - - -

10 MR. BRADY: And you know - - -

11 CHIEF JUDGE WILSON: What do you - - -

12 MR. BRADY: And actually - - - and ADA Rossi  
13 himself testified that his story was consistent from - - -  
14 from his initial report to Cornell - - -

15 JUDGE HALLIGAN: And that would be - - -

16 MR. BRADY: - - - to the grand jury, to the  
17 trial.

18 JUDGE HALLIGAN: Would that be enough to find the  
19 - - - the recantation unconvincing?

20 MR. BRADY: Yes. Because the burden here is not  
21 on the State. The burden is on the claimant to prove  
22 actual innocence, like, clear and convincing evidence,  
23 unlike at the - - - unlike at the criminal proceeding,  
24 where - - - where that - - - that recantation was  
25 sufficient to cast enough doubt on the claimant's guilt - -

1 -

2 CHIEF JUDGE WILSON: You just mentioned - - -

3 MR. BRADY: - - - when vacating the - - -

4 CHIEF JUDGE WILSON: Sorry. You just mentioned  
5 the court's reference to the grand jury testimony. That's  
6 clearly not in the record, right?

7 MR. BRADY: It's in the record that he test - - -  
8 that he did testify in front of a grand jury.

9 CHIEF JUDGE WILSON: Just that fact, but not that  
10 it was consistent. And you just, as the court did, relied  
11 on consistency with the grand jury testimony.

12 MR. BRADY: Well, the ADA testified that he - - -  
13 that Nate was consistent from his initial report to Cornell  
14 up and through the criminal trial. So that would include  
15 the grand jury.

16 CHIEF JUDGE WILSON: And so you don't think  
17 that's an indication that the court looked at the grand  
18 jury minutes?

19 MR. BRADY: I think it's a little sloppy, but it  
20 doesn't mean that the court looked at the grand jury  
21 minutes. You know, it is not a model of judicial writing.  
22 You know, there are other instances you could point to in  
23 this decision that it's like, kind of head scratching. But  
24 everything that the court cited is in this record or a  
25 reasonable inference from this record. The court found

1 that the recantation was not convincing, at least, to the  
2 clear and convincing evidence standard, and the Appellate  
3 Division affirmed that finding. That finding is really not  
4 - - - and they're not arguing that really - - - or it's not  
5 even before the court whether or not that's a fair  
6 interpretation of the evidence. What they're seeking is a  
7 reversal and a new trial, not based upon the insufficiency  
8 of the evidence because of the claim that these - - - these  
9 alleged errors with respect to the admission of hearsay and  
10 - - - and this claim that the court violated her own ruling  
11 and went outside and looked at testimony - - -

12 JUDGE RIVERA: Well, is - - -

13 MR. BRADY: - - - that she shouldn't have.

14 JUDGE RIVERA: - - - isn't there something - - -  
15 isn't there something to that due process argument that  
16 they are asserting that if they had known that the judge  
17 was going to rely on things that are not in the record,  
18 then they would have put forward some evidence to rebut  
19 that - - - for the judge to consider?

20 MR. BRADY: I don't think it's a question of due  
21 process, but it would be an error if the court did go  
22 outside the record and rely on things and did not - - - and  
23 the other side did not have notice.

24 JUDGE RIVERA: So then why doesn't that get them  
25 a new trial?

1 MR. BRADY: Because that didn't happen here.

2 JUDGE RIVERA: Let's say we disagree with you.

3 MR. BRADY: Okay.

4 JUDGE RIVERA: We disagree with you.

5 MR. BRADY: Okay. The - - - the question is - -

6 -

7 JUDGE RIVERA: What - - - what are you left with

8 - - -

9 MR. BRADY: If you think - - -

10 JUDGE RIVERA: - - - other than you have to say  
11 it's harmless?

12 MR. BRADY: If you think the - - -

13 JUDGE RIVERA: How is it harmless?

14 MR. BRADY: If you think the judge went outside  
15 the record and relied on things in reaching this decision,  
16 then I think you should reverse. But that's not what  
17 happened here. There's the - - - everything in this record  
18 - - - I don't - - - you know, like, I'm prepared to talk  
19 about any particular reference the court made. But these -  
20 - - everything here was in the record or fairly inferred  
21 from the record.

22 JUDGE HALLIGAN: Where do you get the inference  
23 that the door was closed from the testimony that was  
24 properly admitted?

25 MR. BRADY: So - - -



1 JUDGE HALLIGAN: Because I couldn't - - -

2 MR. BRADY: - - - what the - - -

3 JUDGE HALLIGAN: - - - find anything.

4 MR. BRADY: Because Elizabeth - - - what the  
5 court said is that Elizabeth confirmed claimant's frequent  
6 presence at her house from the beginning of 2009 through  
7 the summer of 2009, often playing video games alone in the  
8 bedroom with Nate, and then she says, with the door closed.  
9 Now, that - - - the - - - with the door closed - - - it's  
10 true, Elizabeth did not testify specifically that the door  
11 was closed, but claimant testified that the door was often  
12 closed.

13 JUDGE HALLIGAN: But not - - - not at that - - -

14 MR. BRADY: Nate himself testified - - -

15 JUDGE HALLIGAN: Not at that particular time,  
16 right?

17 MR. BRADY: At the time of the incident?

18 JUDGE HALLIGAN: Yeah.

19 MR. BRADY: Actually, Nate testified that - - -

20 JUDGE HALLIGAN: I thought he said it was - - - I  
21 thought he said either possibly or perhaps or something  
22 like that.

23 MR. BRADY: He said - - - he said his aunt, Iris,  
24 knocked on the door.

25 JUDGE HALLIGAN: And I thought there was a

1 question - - - I don't have it in front of me, but I  
2 thought there was a question along the lines of, was the  
3 door closed? And I thought he said, possibly.

4 MR. BRADY: Yeah. He wasn't - - - he wasn't  
5 always consistent in relating it, but he - - - at one time,  
6 he says that his aunt - - - the testimony is that - - -  
7 this is at page - - - record 104 that - - - that she  
8 knocked on the door. I don't think it's disputed that the  
9 door was closed sometimes. And - - - and as claimant  
10 testified, yes, it was closed sometimes because - - - and  
11 that's at 238 of the record - - -

12 JUDGE RIVERA: It might matter if it was closed  
13 at the date - - -

14 MR. BRADY: Because - - -

15 JUDGE RIVERA: - - - and time of the incident,  
16 right?

17 JUDGE HALLIGAN: Yeah.

18 JUDGE RIVERA: I mean, that would matter.

19 MR. BRADY: Well, the - - - again, the - - -  
20 yeah. Nate said he - - - he - - - they - - - that his aunt  
21 knocked on the door and - - - but it was - - - so - - - and  
22 it was often closed because there was testimony that Nate's  
23 other aunts were running a daycare center - - -

24 JUDGE RIVERA: Right.

25 MR. BRADY: - - - and they wanted the door

1 closed. They didn't want these guys, you know, hanging  
2 around.

3 JUDGE SINGAS: Do you think the court relied on  
4 Judge Argento's decision at all?

5 MR. BRADY: I think the court did look at Judge  
6 Argento's decision. I think claimant invited the judge to  
7 look at Judge Argento's decision. Claimant attached the  
8 decision to the claim, and claimant persistently argued  
9 throughout that - - - that the recantation - - - Nate's  
10 recantation was unwavering including his testimony at the  
11 440 hearing. So it was perfectly - - - you know, not only  
12 did the court take judicial notice of it, but it was  
13 perfectly natural for the court to evaluate the reliability  
14 of the recantation by seeing why the 440 court thought it  
15 was so reliable that it justified, you know, vacating the  
16 judgment. You know, the - - - there might - - - one of the  
17 things that - - - that struck - - - always struck me about  
18 this case from the minute I saw it was, why wasn't the  
19 criminal trial evidence in? It should have been - - - the  
20 testimony the - - - from - - - from Nate at the criminal  
21 trial should have been in evidence. If this court was to  
22 evaluate the reliability of the recantation, the court  
23 should have looked at that evidence to see what he was  
24 actually recanting.

25 JUDGE HALLIGAN: If we were to disagree with you



1 on the harmlessness question, your adversary is asking for  
2 a new trial. Is that necessary? Or could we send it back  
3 with instructions to assess the evidence that is, in fact,  
4 in the record and excluding anything we might deem to be  
5 hearsay?

6 MR. BRADY: I think it would be - - - this - - -  
7 again, the trial judge is not - - - is retired.

8 JUDGE HALLIGAN: Understood. Yeah.

9 MR. BRADY: So - - -

10 JUDGE HALLIGAN: So - - - so in your view, we  
11 would have to send it back for - - -

12 MR. BRADY: I think you'd have to send it back -  
13 - -

14 JUDGE HALLIGAN: - - - a new trial?

15 MR. BRADY: - - - for a new trial. I don't - - -  
16 procedurally, I don't know how another judge could come in.  
17 Because a lot of what the - - - Judge Martin relied on was  
18 demeanor. You know, it's hard for us to, but he testified  
19 in a very flat manner that she just, you know, obviously  
20 found troubling, I would say.

21 JUDGE RIVERA: What if he had not observed - - -

22 JUDGE CANNATARO: What did she say - - -

23 JUDGE RIVERA: - - - she had not observed his  
24 testimony originally, right, when he stated that he had  
25 been abused?

1 MR. BRADY: Judge Martin?

2 JUDGE RIVERA: Correct.

3 MR. BRADY: No. No. That was Judge - - -

4 JUDGE RIVERA: So - - - so to - - - that  
5 assessment of his demeanor seems to be undercut by the fact  
6 that you have nothing to compare it to.

7 MR. BRADY: Well, I think she determined that  
8 someone in his position would have testified a little bit -  
9 - - with a little bit more emotion about something that he  
10 had done that was so - - - presumably so horrible or  
11 something he'd presumably done is - - - you know, he's put  
12 his cousin in prison for four years.

13 JUDGE RIVERA: She doesn't know him. People  
14 react differently.

15 MR. BRADY: No. No, she doesn't. But again,  
16 also, I would point to the testimony of the assistant  
17 district attorney, who went into detail about the - - - his  
18 demeanor when he was initially talking to him before the  
19 criminal trial and - - - and how he - - - how they related  
20 to one another. And then that the ADA who did talk to him  
21 after the recantation, and he said that it was - - - that  
22 his demeanor was unusually flat. And he didn't really  
23 proffer much of an explanation for why he was changing his  
24 demeanor.

25 JUDGE HALLIGAN: On the extra record evidence,

1           you said that you thought that the criminal trial  
2           transcript should have been included in the record.

3                       MR. BRADY: Correct.

4                       JUDGE HALLIGAN: And it seems to me - - - it's -  
5           - - it's clear that there is that and there is other  
6           testimony that was at play but not submitted to the record,  
7           and the judge said it was thrown out. So we can go  
8           through, I guess, and sort of tick and tie and see which of  
9           the judge's findings are otherwise supported by evidence  
10          that is in the record. But given that that happened, and  
11          given your statement, which is, we'd be in a better place  
12          to review this if the criminal trial transcript was  
13          actually in the record, why wouldn't we just send it back  
14          and have that done?

15                      MR. BRADY: Well, I don't think you need to  
16          because, first of all, everything - - - everything that's  
17          cited in - - - in the judge's decision is in this Court of  
18          Claims record or is an inference or a fair instance  
19          therefrom.

20                      JUDGE HALLIGAN: Or may well be from the other  
21          transcripts.

22                      MR. BRADY: If you were to send it - - - if - - -  
23          if you were to - - - and I'm not sure what you're asking.  
24          If you're sending - - - if you were to send it back for a  
25          new trial, I - - - I - - - I'd say - - - I would say,

1 signal to the - - - the court that's going to retry it that  
2 they should be looking at the criminal trial transcripts  
3 because how else do you evaluate a recantation?

4 CHIEF JUDGE WILSON: Thank you.

5 MR. BRADY: Thank you.

6 MS. MCCARTHY: Okay. Right. So I would just,  
7 first, like to briefly say that, I think, on the first  
8 error, which is an independent basis for reversal, the  
9 State's concession that this should be reversed if the  
10 judge went outside the record decides it, but I will  
11 briefly mention there's a lot of reliance - - -  
12 overreliance on the testimony of ADA Rossi both by the  
13 trial judge and by the State now. And to be clear,  
14 including the purported hearsay statement that Nate made,  
15 Rossi was testifying completely from memory about events  
16 over eleven years ago. He admitted he took no notes.

17 JUDGE SINGAS: And why isn't that statement a  
18 state of mind exception? Why do we have to accept your  
19 characterization of it as inadmissible hearsay?

20 MS. MCCARTHY: Because it had no relevance other  
21 than for the truth of the matter, which is what the - - -  
22 the judge said. And this court's - - -

23 JUDGE SINGAS: The truth of the matter that he  
24 felt ill or that he felt better now?

25 MS. MCCARTHY: Those statements are introduced to

1 - - -

2 JUDGE SINGAS: That's the truth of the matter.

3 MS. MCCARTHY: - - - only - - - there's no  
4 relevance to whether Nate felt better or not, except to do  
5 exactly what the judge said she was doing, which is take it  
6 as proof of the initial false accusation.

7 JUDGE SINGAS: About the state of mind. When  
8 we're saying the truth of the matter, it's actually the  
9 truth of the matter. I feel bad. I don't feel bad.  
10 That's the truth of the matter.

11 MS. MCCARTHY: But I think Rico and the other  
12 precedents that the State cites are easily distinguishable  
13 on that point there. The fact that the defendant said that  
14 rays from outer space were controlling people and Hugh  
15 Hefner was appearing to him were obviously not meant for  
16 the truth of the matter, but they went to the fact that he  
17 had a delusional state of mind. That's not what we're  
18 talking about here. And - - -

19 JUDGE GARCIA: But the state of mind doesn't have  
20 to be delusional, right? I mean, as a rule isn't the  
21 delusional state of mind, it's state of mind, and it comes  
22 in for that purpose.

23 MS. MCCARTHY: No. But the rule is, even if  
24 there's an exception, the evidence still must be reliable.  
25 Nate was never asked if he actually made that statement.

1           Moreover, Rossi is testifying - - -

2                   JUDGE SINGAS: And so if we disagree with you on  
3           - - -

4                   JUDGE GARCIA: It goes to weight.

5                   JUDGE SINGAS: - - - that, and we think that the  
6           others hearsay statement was not preserved, what are your  
7           other arguments?

8                   MS. MCCARTHY: Well, I - - - I think I'll rest on  
9           our brief with respect to the due process because I would  
10          like to address the second independent basis why the trial  
11          judge's decision must be reversed, which is the fact that  
12          the court misapplied this court's a hundred plus year old  
13          precedent, Celentano, and it elevated dicta in that case  
14          that's both inaccurate and outdated. The court expressly  
15          said here that it is mindful of the long held presumption  
16          that there is no form of proof so unreliable as recantation  
17          evidence. That's how the court starts its analysis of this  
18          case. And that is particularly problematic - - -

19                   JUDGE RIVERA: Did it, though, nevertheless go  
20          through the factors?

21                   MS. MCCARTHY: It did not, Your Honor. It didn't  
22          - - - though it cites Pringle in passing, the court doesn't  
23          even purport to be applying the factors. And as the State  
24          concedes, it certainly did not, for example, consider the  
25          fact that Nate had no motive to lie, and there is no

1 evidence in the record that Nate has a motive to lie now.  
2 We're talking about him coming forward as a teenager and  
3 admitting something incredibly embarrassing and having to  
4 talk repeatedly with people from the District's Attorney's  
5 office about the type of pornography he was watching and  
6 the fact that he put his cousin in prison for something  
7 that never happened. So that, as Nate testified, was very  
8 difficult for him, both in the 440 hearing and in the Court  
9 of Claims trial to be talking about that. This has  
10 fractured their family. I'm not going to beat around the  
11 bush. This is very difficult, given the subject matter and  
12 the consequences for everyone in the family, to talk about.  
13 But there - - - this is not a case where there is, for  
14 example, equivocation to a third-party or evidence that Mr.  
15 Tuckett confessed to the crime previously. We're talking  
16 about Nate coming forward as an adult and saying that he  
17 made up these allegations. And so the court here should  
18 absolutely clarify that the - - -

19 JUDGE RIVERA: Was any of the science on child  
20 sexual abuse recantations presented to the Court of Claims  
21 judge?

22 MS. MCCARTHY: That was something that was  
23 litigated pre-trial because we anticipated that the State  
24 may put on some evidence of child sex abuse accommodation  
25 syndrome. And that is why we had retained Dr. London as a

1           rebuttal expert. But yet again, the court did rule that  
2           this would be a narrow trial and that the pre - - - the  
3           circumstances of the criminal trial were not to be  
4           replayed, and so therefore, we did remove that expert as  
5           well from our witness list. But ultimately, the language  
6           in Celentano is out of step with the science and the  
7           reality that we now know from wrongful convictions that  
8           there are false accusations and there are true  
9           recantations. And so the court should take the opportunity  
10          now to clarify that recantation evidence should be treated  
11          just like any other evidence.

12                           CHIEF JUDGE WILSON: Thank you.

13                           MS. MCCARTHY: Thank you.

14                           (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Tuckett v. State of New York, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Brandon Deshawn*

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