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COURT OF APPEALS

STATE OF NEW YORK

MATTERS OF:

MEKAYLA S. AND GABRIEL H.,

NO. 6

20 Eagle Street
Albany, New York
January 7, 2026

Before:

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

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 matters of Mekayla S. and Gabriel H.

3 MS. WALL: The Center for Family Representation
4 by Emily Wall for the appellant.

5 I'd like to request two minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MS. WALL: The abuse findings in this case were
8 based solely on three video clips that a child
9 pornographer, 150 miles away from the family's home,
10 offered to the FBI while they were executing a search
11 warrant on his home. These video clips had timestamps from
12 two and a half years earlier, and no information was
13 provided about the cameras that recorded these videos,
14 about how the child pornographer created these clips, or
15 what he had done with them in the intervening years.

16 JUDGE HALLIGAN: In your view, is there any way
17 that this video could have been authenticated?

18 MS. WALL: Your Honor, I think in this case, the
19 video may have needed to be authenticated by an expert who
20 could testify that it hadn't been altered in the time since
21 it had been recorded.

22 JUDGE CANNATARO: And why don't we have that
23 here? Since there was someone who came in and offered an
24 opinion about the unaltered state of the video.

25 MS. WALL: The FBI agent testified that he didn't

1 observe any signs that indicated that the videos were
2 altered, but he was not qualified as an expert. He didn't
3 say that he had any training in identifying altered videos
4 or any expertise in identifying altered videos.

5 JUDGE SINGAS: So why isn't that a weight issue
6 versus an admissibility issue?

7 MS. WALL: Your Honor, there - - - because
8 there's no evidence that he had any ability to detect an
9 altered video beyond an average person.

10 JUDGE TROUTMAN: Didn't he talk about the fact
11 that he had investigated child pornography cases, and based
12 upon that experience, he did not see that there was any
13 alteration. Why is that not sufficient?

14 MS. WALL: Because, Your Honor, his - - - he did
15 testify that his beat was child pornography, but he didn't
16 testify as to any particular experience in identifying
17 altered videos.

18 JUDGE TROUTMAN: Can you use - - -

19 MS. WALL: And it - - -

20 JUDGE TROUTMAN: - - - circumstantial evidence to
21 authenticate?

22 MS. WALL: Certainly, Your Honor. I've - - -
23 yes.

24 JUDGE TROUTMAN: And here, besides not having the
25 voyeuristic person come in who made the videos in the first

1 instance, there was other evidence regarding how the house
2 looked, who was involved. Wasn't certain information
3 verified that was consistent with that which was depicted?
4 Who the people were, where they were located, they found
5 them, et cetera. Why is that not enough?

6 MS. WALL: Because, Your Honor, that is the same
7 type of evidence that this court said was not sufficient
8 authentication in People v. Patterson.

9 In People v. Patterson, the videos had been
10 authenticated by a detective who testified that he was able
11 to identify the store owner in the video, and he was - - -
12 he testified that the video accurately represented the
13 actual physical layout of the store.

14 But this court said that that was not sufficient
15 authentication and called it a foundational vacuum because
16 there was no evidence about how the recordings had been
17 made. There was a two-week gap between when the recordings
18 had purportedly been made - - -

19 JUDGE TROUTMAN: But wasn't there more here about
20 the layout of the house and - - - despite the significant
21 passage of time - - - were not the cameras located, pointed
22 in a certain direction that was consistent with the
23 accuracy of that which was recorded?

24 MS. WALL: And I think - - - yes. And I think
25 that's the same as what was in Patterson. The detective

1 said that the video, you know, accurately reflected the
2 actual physical layout of the store.

3 JUDGE TROUTMAN: What about the mother
4 acknowledging that was her, those are her kids, her
5 boyfriend?

6 MS. WALL: The mother was able to identify her
7 daughter and her boyfriend in the screenshot that the
8 police investigators showed her from the video. But that
9 doesn't demonstrate that the videos were not altered, which
10 I think is the - - - you know, the significant issue here.
11 The - - -

12 JUDGE TROUTMAN: Did the court have before it
13 evidence of alteration? Or was there just an accusation
14 that it could be possibly altered?

15 MS. WALL: There was an objection to the
16 authenticity of the videos on the basis that the
17 petitioner, DSS, had not demonstrated that the videos were
18 unaltered, which is part of what they have to demonstrate
19 to authenticate video.

20 JUDGE TROUTMAN: So all you have to do - - - so
21 in your estimation, all you have to do is make an
22 accusation that they could be possibly altered? Whether or
23 not there is actual evidence of alteration that's on the
24 person offering it?

25 MS. WALL: Yes. The person offering the evidence

1 needs to demonstrate that the video is genuine and that it
2 hasn't been altered.

3 JUDGE RIVERA: You're saying that's a threshold
4 burden?

5 MS. WALL: I'm sorry?

6 JUDGE RIVERA: That's a threshold burden?

7 MS. WALL: Yes.

8 JUDGE SINGAS: What about the fact that some of
9 the instrumentalities of the crime were actually found, and
10 corroborate the videotapes? Isn't that more than
11 Patterson?

12 MS. WALL: I think that that is similar to
13 Patterson. Some of the objects that were seen in the
14 videos were found in the home. But that still - - -

15 JUDGE TROUTMAN: But this case is different.
16 There were the conduct engaged in by the abusive
17 perpetrator, used certain instruments, those are distinct
18 things. That's more than just a generality of this is the
19 place, this is the same store; is it not?

20 MS. WALL: It may be somewhat different. I would
21 note that in Patterson, also, the detective was able to
22 identify the jacket that the defendant was wearing, and it
23 was the same - - -

24 JUDGE TROUTMAN: But let's - - -

25 MS. WALL: - - - the same jacket.

1 JUDGE TROUTMAN: - - - there's conduct that was
2 purported to be displayed in these videos. There were
3 items consistent with that activity of abuse. Is that not
4 more than Patterson?

5 MS. WALL: I don't know if it's significantly
6 more than Patterson. It's - - - you know, the objects and
7 the setting, the background are the same. And - - - but it
8 still doesn't demonstrate that the video was - - -

9 JUDGE TROUTMAN: But the objects were used to
10 facilitate the abuse upon the child is the allegation,
11 correct?

12 MS. WALL: Correct. Yes.

13 JUDGE TROUTMAN: And those objects that were
14 purported to be depicted were then discovered, albeit with
15 the significant pass of time at that house, correct?

16 MS. WALL: Yes.

17 JUDGE TROUTMAN: And were they located consistent
18 - - - that's okay.

19 MS. WALL: Well, Your Honor, I would just note.
20 I mean, I don't know that anyone specifically identified
21 that it was the same objects. There were similar types of
22 objects found in the family's home, as were seen in the
23 video.

24 JUDGE TROUTMAN: Could you ever authenticate
25 without the perpetrator or the victim?

1 MS. WALL: Yes. I believe that the - - - the
2 video could have been authenticated by an expert who
3 testified that the video was a genuine video that was - - -

4 JUDGE TROUTMAN: And you're saying this - - - the
5 FBI agent wasn't sufficient expert?

6 MS. WALL: He was not an expert because he had no
7 specialized training or experience.

8 JUDGE CANNATARO: Counsel, that answer is a
9 little troublesome to me. I mean, I understand that you're
10 following Patterson, and I appreciate that, you know,
11 there's a wisdom and almost a prescience in Patterson about
12 the admission of these videographic evidence.

13 But if you're saying that it's only an expert - -
14 - like a qualified court certified expert in the field,
15 that's not something that's required to lay foundations for
16 most types of evidence. And I'm wondering if you're
17 setting an impossibly high bar for this specific kind of
18 prosecution. To the point where we might be saying, you
19 know, you might as well not even try in this type of case
20 unless you're prepared to find, pay for, and bring in an
21 expert.

22 MS. WALL: Well, Your Honor, I would note that
23 this is a very unusual case.

24 JUDGE CANNATARO: It is.

25 MS. WALL: I've never seen anything like this

1 before. And the fact that an expert might be required in
2 this case does not mean that an expert would always be
3 required to - - -

4 JUDGE CANNATARO: Well, for - - -

5 MS. WALL: - - - authenticate a video.

6 JUDGE CANNATARO: - - - for purposes of giving an
7 opinion about the manipulation of digital video, it sounds
8 to me like you are saying in all those situations, you do
9 need an expert. And I'm very concerned that there's a lot
10 of video evidence being used in trials all over New York
11 right now.

12 MS. WALL: Well, and Your Honor, I don't think
13 I'm actually saying that in - - - like a - - - the person
14 would have to be certified as an expert. But in this case,
15 there wasn't any basis to find that the FBI agent had any
16 greater - - -

17 JUDGE CANNATARO: Well, then I go back - - -

18 MS. WALL: - - - ability to detect - - -

19 JUDGE CANNATARO: - - - I go back to Judge
20 Trkoutman's question. He's an FBI agent. He toils in the
21 field of child pornography. I don't know if he said I have
22 some degree of familiarity with these videos, but if - - -
23 you know, if he is an investigator of child pornography,
24 that can almost be assumed.

25 So what's insufficient about this agent's

1 qualifications - - - experience and qualifications?

2 MS. WALL: I think it would be speculative to say
3 that every FBI agent who - - - who investigates child
4 pornography has experience and an ability to identify
5 altered videos. A lot of times, I think, for child
6 pornography it doesn't matter if the video is real or not.

7 CHIEF JUDGE WILSON: Could Mr. White have
8 authenticated this sufficiently?

9 MS. WALL: Potentially. I mean, the - - - he was
10 - - -

11 CHIEF JUDGE WILSON: I mean, that is ordinarily
12 what you do, right? Is if somebody took a picture of
13 something or made a video of something, you would bring in
14 the person who did that to say, here's what I did, and then
15 you could cross-examine them.

16 MS. WALL: That's correct. And Mr. White or - -
17 - and potentially the cameras that were retrieved from the
18 family's home they could have put in evidence - - -

19 CHIEF JUDGE WILSON: So can I also ask you? Have
20 - - - I assume you have not seen the video?

21 MS. WALL: I have not seen the video.

22 CHIEF JUDGE WILSON: Okay.

23 JUDGE GARCIA: Let me ask - - -

24 CHIEF JUDGE WILSON: Yeah.

25 JUDGE GARCIA: - - - one question.

1 MS. WALL: I understand that the - - - it was
2 destroyed.

3 CHIEF JUDGE WILSON: Yeah. And so you would not
4 - - - but when there was a earlier discussion about whether
5 these objects are the objects in the video - - -

6 MS. WALL: I don't know.

7 CHIEF JUDGE WILSON: - - - you don't know.

8 JUDGE GARCIA: We talked a lot about Patterson.
9 Is there any difference in the standard or in the review
10 standard of evidence - - - the standard for admission of
11 evidence in family court versus criminal proceeding?

12 MS. WALL: Not in terms of authenticity, because
13 authenticity goes to relevance. And in family court
14 evidence has to be relevant to be admitted in a fact-
15 finding proceeding.

16 JUDGE GARCIA: So it's a very high - - - fairly
17 high standard? It is abuse of discretion, and I think
18 Judge Bellacosa in Patterson talks about that.

19 But my concern would be in family court where you
20 have a video and you have some authentication and it shows
21 a third-party, not the parent, but abusing the child in
22 this type of situation. And under this standard we would
23 say there's this video, it clearly shows this child being
24 abused, but we can't let it in. It's the only evidence,
25 and therefore, go home and continue your lives.

1 And you are putting that child in danger based on
2 the same - - - potentially, based on the same evidentiary
3 standard you would use to convict someone?

4 MS. WALL: And I would note that that's not the
5 situation as to my client into - - - in this.

6 JUDGE GARCIA: No. But if the tape stays out, it
7 stays out, right? It doesn't come in against anybody.

8 MS. WALL: That's correct, Judge.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. PAJAK: Good afternoon. I'm Dave Pajak. I
11 represent a seventeen-year-old high school junior, Gabriel,
12 who was found to have been derivatively abused by his
13 mother.

14 I'm going to assume, for the sake of argument, so
15 I can get to the point that my client would like me to get
16 to.

17 Let's assume, for the sake of argument, without
18 conceding that an adequate foundation was laid - - - and I
19 think it would be very dangerous to say, in this case, that
20 an adequate foundation was laid - - - because as a short
21 step from there to the YouTube video situation we had in
22 the People v. Franzese case, where YouTube submitted a
23 certification, yes, this is a genuine, bona fide YouTube
24 video, and therefore we're going to admit it in evidence.

25 JUDGE GARCIA: Do you think that's similar to an

1 FBI agent doing an investigation and coming in and
2 testifying about a video they recovered from a - - -

3 MR. PAJAK: Yes, I do.

4 JUDGE GARCIA: - - - child pornographer?

5 MR. PAJAK: Because you - - - your - - - the FBI
6 agent and YouTube can talk about what's coming out of the
7 funnel, but they're not talking about what's going into the
8 funnel. The FBI agent can say this is what we have in our
9 files. This is what we received, and it's bona fide,
10 genuinely what we have, just like YouTube.

11 JUDGE CANNATARO: So you're saying an FBI agent
12 wouldn't know about faking - - - you know, couldn't look at
13 a video, and say, well, it looks like this, but based on my
14 experience, that's a fake. Right?

15 MR. PAJAK: Well, some of them might. But this
16 FBI agent, I think, admittedly had no expertise in
17 detecting fakes.

18 JUDGE CANNATARO: Admittedly? What do you mean?

19 MR. PAJAK: I think that's what he said. Of
20 course, I could get him wrong.

21 JUDGE GARCIA: So if you were the attorney for
22 the other child in this case that was actually allegedly
23 abused, your position would be the same as to that video?
24 That it's very dangerous to admit that video?

25 MR. PAJAK: Yes.

1 JUDGE GARCIA: It would?

2 MR. PAJAK: Because you're - - -

3 JUDGE GARCIA: And you would think it would be
4 fine for that child to go back into the home because of the
5 authentication problem?

6 MR. PAJAK: If I were the attorney for Mekayla?

7 JUDGE GARCIA: Yes.

8 JUDGE SINGAS: Yes.

9 MR. PAJAK: Representing that child? I can't
10 speak to that, really.

11 JUDGE GARCIA: But would - - - your position
12 would have to be the same as to the authentication of the
13 video? That that's problematic.

14 MR. PAJAK: Okay. Then, yes. On that point,
15 yes. I would have to say, yeah. It's very dangerous for
16 the reason I stated, because - - -

17 JUDGE RIVERA: In that case, your client herself
18 denies the abuse occurred.

19 But can you address, since you're representing
20 Gabriel, can you address the dispositional order?

21 MR. PAJAK: All right. Thank you. Yes.

22 The dispositional order, I think, starts with the
23 finding of derivative abuse, which I would also contest.
24 But getting right to placement, what we're missing in this
25 case is that family court stopped when she found derivative

1 abuse. The Family Court Act doesn't let you stop there.

2 Before you place that child, there is Section
3 1052. It says, okay, even if you find that this child was
4 abused by this parent, you have to go through these steps
5 in Section 1052. And those steps are you must find or you
6 must see to it as the Family Court judge, that family court
7 efforts were made to prevent or eliminate the need for
8 placement, and that removal is in the child's best
9 interest. You have to find those things.

10 In our case, we had an order of protection in
11 place. Dan could not come near the kids. Another order of
12 protection - - - an additional order of protection also
13 could have been put in place. And I don't think there was
14 one telling Mom explicitly don't let Dan near the kids. If
15 there wasn't an order - - - such an order, there should
16 have been and it wasn't. And it - - - but if there is an
17 order of protection - - - in this case, there was the order
18 of protection in place. So you had that bulwark.

19 Secondly, Mom had a job. She moved out. She had
20 her own apartment. Dan was out of the picture. He's been
21 out of the picture. And at the time this dispositional
22 order came down, that videotape was already three years
23 old. So in all that time, if - - - Mom's not letting Dan
24 back in the house. She's not letting Dan see the kids.
25 Where's the beef?

1 JUDGE SINGAS: Well, what - - - how come the beef
2 isn't when they told the mother don't tell him about this
3 investigation that's pending and keep your kids away from
4 him. And she didn't do that. And she refused to look at
5 the videotapes which showed the abuse of her daughter?

6 MR. PAJAK: That's a very, very good piece of
7 beef there.

8 JUDGE SINGAS: Thank you.

9 MR. PAJAK: The problem I have with that, though,
10 is that Mom would have a good reason not to want to watch
11 that videotape. I mean - - -

12 JUDGE TROUTMAN: But doesn't Mom have a
13 responsibility to protect her children and to know or be
14 aware of things that may cause them harm, or persons?

15 MR. PAJAK: It would be nice if family court had
16 not destroyed the tape, because then we could all hear
17 Mekayla crying out. And is it the kind of cry that would
18 prompt a mother to say what is going on in the living room?
19 Or is it the kind of cry that says, oh, she's having
20 another fight with her brother?

21 CHIEF JUDGE WILSON: Is that common - - -

22 JUDGE SINGAS: Well, why can't - - -

23 CHIEF JUDGE WILSON: - - - in your experience,
24 that family court destroys evidence before appellate
25 review?

1 MR. PAJAK: I've had family court in Erie County
2 especially, they've lost evidence before. It's been
3 misplaced. I understand it's a very busy place with a lot
4 of volume.

5 CHIEF JUDGE WILSON: Well, this was by court - -
6 -

7 MR. PAJAK: It's not limited to Erie County.

8 CHIEF JUDGE WILSON: - - - order I think, right?

9 MR. PAJAK: I'm sorry?

10 CHIEF JUDGE WILSON: This was - - - this was by
11 court order, I think. No?

12 MR. PAJAK: Oh, yeah. It was destroyed by court
13 order.

14 CHIEF JUDGE WILSON: Is that common? I mean, you
15 can see why that makes appellate review difficult.

16 MR. PAJAK: It's very difficult. I would like to
17 listen to it - - - I don't want to watch it, but I'd like
18 to listen to that piece - - -

19 CHIEF JUDGE WILSON: Nobody wants to watch it.

20 MR. PAJAK: - - - where Mekayla cries out.
21 Because that's a very - - - that would be a very telling
22 piece of audio evidence.

23 JUDGE RIVERA: Okay. Can you address why - - -
24 getting back to your client. Why it was not in the child's
25 best interest to keep them from the mother and to continue

1 their placement in foster care?

2 MR. PAJAK: What is the point in putting Gabriel
3 in foster care? Their - - - the department's point was - -
4 -

5 JUDGE TROUTMAN: What about the fact that if
6 Mother is denying - - - if something actually happened, and
7 she's denying it happened. She won't even take the
8 measures necessary to know one way or the other. Does that
9 not impact concern about how she would care for the other
10 child, when there are circumstances that may arise as to
11 his care?

12 MR. PAJAK: That would impact concern, certainly.
13 But to place this child in foster care and then tell him
14 you can't go back home until Mom admits, I think it's a
15 little heavy-handed.

16 JUDGE SINGAS: But why isn't it a safety issue?
17 Like, let's suppose it's not these facts.

18 And if you'll indulge me, Chief, I know the light
19 is on.

20 Let's suppose that the facts were that there was
21 a pitbull in the house. And the pitbull attacked the
22 daughter: bit her, terrorized her, scratched her, mentally,
23 physically abused her. There's a videotape of it. The boy
24 lives in that house. The mother refuses to acknowledge
25 that that kind of abuse happened and will not look at the

1 videotape, will not look at the only evidence that will
2 either verify or not whether that abuse happened. Do you
3 think that child, first was - - - your client in that
4 situation, is derivatively abused?

5 And if so, why can't the court say we're taking
6 this kid out because this mother is not protecting him?

7 MR. PAJAK: In that pit bull situation, I would
8 agree. Definitely that child should be removed from that
9 house.

10 JUDGE SINGAS: Okay. So what makes it different
11 that it's a sex offender?

12 MR. PAJAK: Because in this case, Gabriel was not
13 necessarily in the line of fire.

14 JUDGE SINGAS: But we don't know that Gabriel is
15 in the line of fire in my hypothetical either?

16 MR. PAJAK: Well, a pit bull, I think, is a
17 little different than a fellow that you've already kicked
18 out of the house.

19 JUDGE SINGAS: Well, you could remove the dog
20 from the house.

21 MR. PAJAK: Yeah. That - - - that's true. And
22 in this case, family court removed the dog. Dan's gone.
23 He's gone. He's gone from the house. Now, if mom has been
24 letting Dan back in the house and they've been seeing each
25 other through the back door, and - - - you know, during

1 Gabriel's visits and this, that would be a different
2 situation. But that's not on these facts.

3 CHIEF JUDGE WILSON: Part of your - - -

4 MR. PAJAK: We don't have - - -

5 CHIEF JUDGE WILSON: Part of your point, as I
6 understood it was family court should have made some
7 findings one way or the other, and might have had
8 discretion to make findings but didn't?

9 MR. PAJAK: Yeah. Yeah. Family should have - -
10 - family court should have made findings. The Appellate
11 Division could have made findings. Those findings weren't
12 made.

13 But on this record, I'm saying that there is no
14 reason to have put Gabe in foster care three years after
15 the event. What was the point? To get Mom to admit? And
16 then what would be the benefit of that after all this time
17 has elapsed? He's - - - he's sixteen years old now.
18 You're not going to lay a hand on Gabriel.

19 CHIEF JUDGE WILSON: I take it your point is that
20 he would like to return to his mother?

21 MR. PAJAK: Absolutely. That's - - - you - - -
22 you can't know how much he wants to return.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. PAJAK: Thank you.

25 MS. OZZELLA: Good afternoon.

1 Madison Ozzella, Erie County Department of Social
2 Services, Office of Counsel for the respondent.

3 As the court has already heard, the trial court
4 did make a finding of abuse against the appellant, and a
5 finding of derivative abuse relative to child Gabriel. And
6 that finding was upheld by the Appellate Division, who did
7 find the DVD had been appropriately admitted into evidence
8 and that a proper foundation had been laid.

9 I know my opposing counsel relies heavily on
10 Patterson, but I would direct the court's attention to
11 People v. Goldman, which was determined by this court. I
12 think it's much more - - - it's a closer analysis to the
13 facts that we have in the case at hand. In addition - - -

14 JUDGE RIVERA: How is that?

15 MS. OZZELLA: So much - - -

16 JUDGE RIVERA: Go - - - go ahead. Go ahead.

17 MS. OZZELLA: I apologize, Judge.

18 Much like in - - - in Goldman, in addition to the
19 contents that are on the DVD themselves, there was a social
20 media handle associated with the defendant in that case.
21 Here, we had testimony from the FBI agent of the email
22 address that was ultimately used to trace the DVD back to
23 the Buffalo area where, ultimately - - -

24 JUDGE RIVERA: But Goldman was to establish
25 motive. This is to establish the actual abuse occurred.

1 MS. OZZELLA: So I believe whether it's being
2 used for motive or to prove an element of a crime, which is
3 not necessarily - - -

4 JUDGE RIVERA: Yes.

5 MS. OZZELLA: - - - super analogous in an abuse
6 case in family court as it would be in criminal, it still
7 has to be authenticated. Whether someone is offering a DVD
8 to prove motive, they're still asserting to the court or
9 the jury that it is factual, that it is authenticated. To
10 say whether it's being offered to prove an element of a
11 crime or motive it still has to - - -

12 JUDGE TROUTMAN: And why is the authentication
13 here sufficient?

14 MS. OZZELLA: So here, in addition to testimony
15 by the FBI agent of how it was found, the handle on the
16 email of the first initial, the last name, a business that
17 was able to be tracked back to the Buffalo area, directly
18 to this household. We have the driver's license, DMV photo
19 that was matched, the child's student ID, the
20 identification by the appellant of her boyfriend and - - -

21 JUDGE RIVERA: Well, all of that could be
22 completely accurate. The question is whether or not the
23 sexual abuse is a deep fake?

24 MS. OZZELLA: So I think going back to what the
25 court had raised earlier on. In addition to just the

1 individuals that are on the DVD - - - we keep talking about
2 the three years. The fact that these items are still in
3 the house three years later, I think is significant - - -

4 CHIEF JUDGE WILSON: Well, when you say, "these
5 items", you mean what?

6 MS. OZZELLA: So - - -

7 CHIEF JUDGE WILSON: Items that are similar to
8 ones that were seen on the video?

9 MS. OZZELLA: Yes. So the items that were - - -

10 CHIEF JUDGE WILSON: You haven't seen the video
11 either?

12 MS. OZZELLA: I have, Judge. I - - - I
13 prosecuted at the trial.

14 CHIEF JUDGE WILSON: You have seen it?

15 MS. OZZELLA: Yes, I have.

16 CHIEF JUDGE WILSON: So why was it destroyed?

17 MS. OZZELLA: So I think part of the concern is,
18 and we keep talking about showing this DVD to an expert or
19 having it present for appeal, I think the concern is every
20 time someone reviews this video, the child is being
21 revictimized. It's child sex abuse material. I think that
22 was the trial court's concern in finding that balance of
23 protecting the evidence - - -

24 JUDGE RIVERA: How are you going to do an appeal
25 without evidence?

1 JUDGE CANNATARO: So - - -

2 JUDGE RIVERA: How are you going to do an appeal?

3 MS. OZZELLA: I believe it was the thought
4 process of the trial court to protect that child's privacy
5 and not have - - - to limit the number - - -

6 JUDGE HALLIGAN: Is that typical? I mean, how
7 would one do appellate review in this or any case, perhaps
8 where the question is the age of the person who's being
9 videoed? How can you do review?

10 MS. OZZELLA: So I would say - - - I would say
11 it's not typical. But I think as the court's already
12 indicated, this case, in general, is unusual, in that we
13 have a DVD that is depicting the act. Even much of the
14 criminal cases are not typically footage of the actual
15 crime. This is, I think, an unusual circumstances.

16 And I think going to the question of
17 authentication does not necessarily require the viewing of
18 the DVD. Because in order for a judge - - -

19 CHIEF JUDGE WILSON: Well - - -

20 MS. OZZELLA: - - - even at the trial level to
21 view it - - -

22 JUDGE RIVERA: I don't understand how the judge
23 orders destruction of the record. I mean, that - - - I
24 don't even understand what's going on there. But - - -

25 JUDGE GARCIA: Were you put on notice?

1 JUDGE RIVERA: - - - please go - - - go back to
2 the question of the expertise of the FBI agent. Did the
3 FBI agent testify that they were familiar with methods for
4 alteration?

5 MS. OZZELLA: So I don't know that he
6 specifically outlined all of his credentials. But did talk
7 about having some experience with performing digital
8 forensic work, that he had been handling crimes against
9 children, and detailed how he came to obtain the DVD.

10 I think it's also important to note he testified
11 that Mr. White, to his knowledge, had not been given a plea
12 bargain or some kind of incentive to provide - - -

13 JUDGE RIVERA: Was he prosecuted? Is there
14 something that you can comment on regarding why White was
15 not used as a person who could assist with authentication?

16 MS. OZZELLA: I don't think I can specifically
17 say why he was not - - -

18 JUDGE RIVERA: All right.

19 MS. OZZELLA: - - - brought in to testify.

20 JUDGE HALLIGAN: Was there any objection by any
21 party to the order regarding destruction of the tape?

22 JUDGE GARCIA: Was there a notice given of it?

23 MS. OZZELLA: I apologize. This was so long ago.
24 I don't want to state with specificity whether or not an
25 objection was made.

1 JUDGE HALLIGAN: You don't recall if there was
2 notice either?

3 MS. OZZELLA: I do not recall specifically as to
4 how that order came into existence, Your Honor. So I don't
5 want to speak to that.

6 CHIEF JUDGE WILSON: Was Mr. White available? I
7 mean, could you have gotten testimony from him?

8 Let me ask it differently. Do - - - can you
9 recall any reason why that would not have been possible?

10 MS. OZZELLA: I think part of the concern was Mr.
11 White obviously had his own criminal matter going on at the
12 same time, hence the fact the FBI was at his residence and
13 came to find this. He seemed to be - - -

14 JUDGE HALLIGAN: Is that a concern about his
15 credibility as a witness or something else?

16 MS. OZZELLA: I think the concern was more he
17 seemed rather busy keeping himself out of prison at the
18 time as - - -

19 JUDGE HALLIGAN: And so what? He didn't show up?

20 MS. OZZELLA: - - - to not - - - to not be asking
21 him to potentially be transported to family court to come
22 testify in this matter.

23 JUDGE TROUTMAN: If he were to testify, would it
24 involve him admitting that he did commit the crime that he
25 was being investigated by the FBI in order to authenticate

1 this video?

2 MS. OZZELLA: I think certainly we would
3 potentially have some Fifth Amendment right concerns
4 considering he was being investigated relative to child
5 pornography.

6 CHIEF JUDGE WILSON: Well, didn't he already tell
7 the FBI agent in sum and substance? I mean, you're - - -
8 essentially, what you're relying on is statements he made
9 that bear on authenticity, that he made to the FBI agent
10 that are now coming in through the FBI agents instead of
11 through him, right?

12 MS. OZZELLA: To a degree. I think it's what
13 ultimately the FBI agent found. Yes, Mr. white directed
14 the FBI agent to the location and the computer. But all of
15 that did track back to the Buffalo area. The first
16 initial, the last name, the location of the company.

17 JUDGE HALLIGAN: But I thought that part of the
18 representation was the way in which the videos got on his
19 computer in the first place? I mean, isn't that important
20 to understanding whether or not it was sufficiently
21 authenticated by the FBI agent?

22 MS. OZZELLA: I think he had indicated it - - -
23 it was through the webcam. The email came about because
24 that was how he had been logging into the webcam, was his
25 represented - - -

1 JUDGE HALLIGAN: "He", Mr. White?

2 MS. OZZELLA: Yes. I apologize.

3 JUDGE HALLIGAN: So he, Mr. White - - - so Mr.
4 White then had, in fact, made some admissions? I don't
5 know to what extent. But some admissions regarding his
6 participation in these activities, I take it?

7 MS. OZZELLA: I certainly don't do criminal law.
8 I guess it would be the question of whether or not logging
9 into someone's web camera and stumbling upon child
10 pornography is perhaps the same of actively procuring it
11 and storing it.

12 JUDGE CANNATARO: I understand why your reference
13 to these facts are foundational in the sense of a time and
14 a place. But with respect to this whole concept of
15 manipulation and - - - you know, the ease with which
16 digital video can be manipulated, increasing every day,
17 does that evidence tell us anything about that?

18 MS. OZZELLA: So perhaps not specifically.
19 However, there's a lot of detail in the video beyond what
20 we've kind of already gone over. That the offender says
21 the child's name, is - - - there's a part where she's
22 rubbing her arm, he's asking about her shot. The medical
23 records were moved into evidence to show the child had
24 recently had an - - -

25 JUDGE CANNATARO: And what is it about that that

1 can't be faked?

2 MS. OZZELLA: I suppose it adds to the
3 unlikeliness that the video had been faked. I think
4 requiring the petitioner - - -

5 JUDGE RIVERA: Well, the question is the portion
6 of the abuse, the sexual abuse, whether or not that's
7 faked. Right?

8 MS. OZZELLA: I think - - -

9 JUDGE RIVERA: And a - - - and a pornographer may
10 very well - - - I mean, he's already hacking left and right
11 - - - might very well be able to take a video and
12 manipulate it, in part for their own purposes?

13 MS. OZZELLA: So I think the question of
14 authentication, I think, goes to the video as a whole. I -
15 - - I don't know that it necessarily is narrowed down
16 specifically to one part of the video. I think it's
17 whether the DVD as a whole was authenticated.

18 JUDGE CANNATARO: The question of authentication
19 really is, is this document - - - is this piece of evidence
20 what it purports to be? And when you're talking about
21 video, as I said, especially in the 21st century, you
22 really have to ask whether or not it's a real original and
23 not a subsequent manipulation. And I haven't heard
24 anything so far that would give great assurance about that
25 part of the authentication process. Other than what you

1 said about the FBI investigator. Who also then admitted he
2 doesn't have much experience in digital manipulation.

3 MS. OZZELLA: So I don't think he admitted he
4 does not have much experience in that. I - - - I don't
5 think he necessarily outlined all of his credentials going
6 - - - as opposing counsel indicated, he was not qualified
7 as an expert. I don't think there was ample testimony
8 about all of his credentials. He did make reference to the
9 fact that he does perform digital forensic work, and that
10 he did not make - - -

11 CHIEF JUDGE WILSON: Was there a reason you
12 didn't try to qualify as an expert?

13 MS. OZZELLA: I believe the DVD had it - - - was
14 able to have a foundation laid without requiring that he be
15 qualified. And even the case relied upon by opposing
16 counsel talks about how a lay witness does have the ability
17 to lay a foundation to authenticate this type of evidence.

18 JUDGE SINGAS: Was there any evidence that Mr.
19 White knew this family?

20 MS. OZZELLA: Not that I am aware of.

21 JUDGE SINGAS: So in order to fabricate or create
22 a deep fake, he would have to know what the inside of the
23 house looked like; he would have to know how the furniture
24 was laid out; he would have to know what the stuffed
25 animals looked like that were in the girl's room; he would

1 have to know at what point she got her shots, correct?

2 MS. OZZELLA: I certainly agree with what Your
3 Honor is indicating. Yes.

4 JUDGE SINGAS: And is there any evidence that
5 they had any association, or that there was any motivation
6 for why he would want to set this person up?

7 MS. OZZELLA: Nothing that I'm aware of was
8 presented - - -

9 CHIEF JUDGE WILSON: Have you - - - have you seen
10 deepfakes of real events where a piece of the event has
11 been changed using a real person? President Obama, so
12 things like that. I mean, is it possible that he hacked
13 into a real video where nothing happened and altered a
14 piece of it?

15 MS. OZZELLA: I suppose in this day and age most
16 things are possible. I- - - I think asking - - -

17 CHIEF JUDGE WILSON: Well, isn't it actually kind
18 of - - - you can find it all over the internet now?

19 MS. OZZELLA: Likely. I - - - I think it's - - -

20 CHIEF JUDGE WILSON: Well, let me ask you this.
21 I - - - I don't know a whole lot about child pornography.
22 But if you're a child pornographer and you're either
23 selling or trading the stuff or whatever you do with it, if
24 you have a really good fake, is it going to matter to your
25 customers?

1 MS. OZZELLA: I would imagine not, Your Honor. I
2 - - - I think the question is, what is a - - - as the court
3 was indicating, what is a reasonable standard for the
4 burden on the petitioner as to what is required to move in
5 this foundation? And People v. Goldman was only, I guess,
6 at this point six years ago. It's not like it's been forty
7 years and technology has wildly changed since then.

8 JUDGE RIVERA: But the burden is a - - - part of
9 the burden is to show there's no alteration. And if you
10 don't have someone on the stand who can provide a basis for
11 reaching that conclusion, you haven't met your burden.

12 MS. OZZELLA: Agreed. I think, again, that case
13 talks about distinctive identifying characteristics, which
14 we have here. I think it's proving that it hasn't been - -
15 - that it's authenticated to what end? It has to be a
16 hundred percent that I have to convince the court?

17 JUDGE CANNATARO: Did you just say that digital
18 technology hasn't changed a lot in the last forty years?

19 MS. OZZELLA: No, Your Honor. I indicated that
20 the Goldman case is only from six years ago, as opposed to
21 a case that is forty years old, which obviously technology
22 has changed much more rapidly.

23 JUDGE CANNATARO: Can I ask you just a
24 hypothetical question?

25 MS. OZZELLA: Yes, Judge.

1 JUDGE CANNATARO: And I know you're not an expert
2 and I'm not an expert either and we're trying to figure
3 this out all together. But I feel like we're at the point
4 now where you don't even have to be a technical expert,
5 because now we have AI, and AI helps you do everything. I
6 could get an image of that fireplace - - - this is all on
7 my computer at home. And then I think I could, given
8 enough time and practice - - - a few days maybe - - -
9 digitally insert people doing something. People I know
10 doing something that you should never do in front of a
11 fireplace at the Court of Appeals.

12 Would you - - - would you agree that we're
13 probably at that point in our society?

14 MS. OZZELLA: With technology, quite possibly.
15 Maybe more than a couple of days, Judge, but yes.

16 JUDGE CANNATARO: A week. Give me a week.

17 JUDGE RIVERA: Okay. So your light is on.

18 Could you address - - - because we haven't
19 discussed this at all - - - the standard for abuse under
20 1012(e) - - - excuse me. Romanette (iii)(A) whether it
21 should have been or should know?

22 MS. OZZELLA: Yes, Judge.

23 So I - - - there's not as much case law as it
24 relates to the knew or should have known. The
25 interpretation of the word allows for abuse. There's ample

1 case law as it relates to it in the neglect statute for
2 excessive corporal punishment. It's being used in this - -
3 -

4 JUDGE RIVERA: So why should that be imported
5 from neglect to abuse?

6 MS. OZZELLA: So just because it's in the neglect
7 statute. I think the phrasing of "allow" is are you
8 allowing it? If you - - - generally, I think that should
9 be interpreted as failing to act, right? You're allowing -
10 - -

11 JUDGE HALLIGAN: But - - - but if you look at the
12 definition in Subsection I, it says the failure of the
13 legally responsible person to exercise a minimum degree of
14 care. That seems distinct to me from actual knowledge.

15 So my question is why should we read abuse - - -
16 why shouldn't we read abuse as requiring actual knowledge,
17 as opposed to a failure to notice where you should have?

18 MS. OZZELLA: So I think it goes back to still
19 the word "allows". Allowing is the failure to act, not
20 necessarily in a way - - -

21 JUDGE HALLIGAN: No. Wait. Why is that?
22 Allowing, I think, could be understood to affirmatively
23 decide to let something take place which would require
24 actual knowledge.

25 MS. OZZELLA: So again going, I guess, even

1 beyond looking at the neglect statute, also looking at the
2 Severe Abuse and Social Services Law, the legislation then
3 adds "knowingly allowed", seemingly meaning an intention to
4 have that mean actual knowledge which they have not
5 included in the Family Court Act.

6 And I know those are two separate statutes, but
7 as the court knows, the Family Court Act does turn to
8 Social Services Law.

9 JUDGE HALLIGAN: So then what's the distinction?
10 I know your light is on. But what's the distinction
11 between abuse and neglect under your reading, in terms of
12 the conduct of the parent or legally responsible person?

13 MS. OZZELLA: So I focus more that it - - - the
14 difference would be the extent of the harm and the nature
15 of the harm. So excessive corporal punishment, depending
16 on the extent of the injuries, can become abuse depending
17 on how injured that child becomes.

18 So I think it's not just the intent of the
19 parent, but also the nature of the harm and the extent of
20 it.

21 JUDGE RIVERA: Could you - - - oh, your light is
22 on. But could you just quickly address the dispositional
23 order?

24 MS. OZZELLA: So I think a lot of assumptions are
25 made about what the trial judge's intentions were. There

1 was no testimony offered at - - - by anyone at the
2 dispositional hearing. The court took judicial notice of
3 the fact finding testimony. And while there is a lot of
4 indication that the respondent - - - the appellant had made
5 progress, addressed concerns, and that it therefore would
6 have been in the child's best interest to return home, she
7 declined to offer any testimony that the judge could have
8 relied upon to support her position.

9 And while I recognize the child, Gabe, is now
10 sixteen years old, even as a teenager, his position is a
11 factor for the court to consider, and that was expressed by
12 the AFC as the child's position.

13 I don't think there's anything to indicate the
14 court did not consider that in making that order of
15 disposition.

16 JUDGE RIVERA: Why - - - what is the point of
17 keeping him in foster care unless she admits that the
18 daughter was abused?

19 MS. OZZELLA: So I don't believe the court
20 explicitly - - - while it is included in the dispositional
21 order, I don't necessarily think there was a threat, more
22 or less, by the judge that absent you making these
23 statements your child will remain in foster care.

24 I think it's how can she demonstrate that she has
25 addressed the concerns that led to the removal of her

1 children if she's unwilling to acknowledge that anything
2 has happened, that there's been no wrongdoing by anyone.
3 How can she demonstrate to this court there'll not be
4 further neglect, further abuse when she fails to appreciate
5 the harm that led to the removal to begin with?

6 JUDGE RIVERA: Well, if she - - - if the abuser
7 is no longer in the home, if she's moved, if she's started
8 her life in a different direction?

9 MS. OZZELLA: So again, she declined to offer any
10 testimony to indicate that she has gone in that direction.

11 Also, the finding of abuse and derivative - - -
12 specifically more so, the derivative abuse is based on her
13 understanding of parenthood is there's such a fundamental
14 defect. I think the question is whether or not that then
15 she's gotten rid of this abuser, if there's still that - -
16 -

17 JUDGE TROUTMAN: With respect to derivative, is
18 there a difference between abuse and neglect? With respect
19 to the dissent here in this case suggests that it wasn't -
20 - - it may be neglect but not abuse as to the son?

21 MS. OZZELLA: So I guess I would look at for the
22 derivative abuse finding, it talks about the fundamental
23 defect that continued to place the child at substantial
24 risk of harm. I think part of the - - - the argument from
25 opposing counsel was that he didn't meet the standard or

1 the definition of an abused child. But there's not a
2 requirement that he have been harmed.

3 And I think you have to make an assumption that
4 the offender wouldn't have perpetrated against him. And I
5 don't know how we make that assumption or having a sex
6 offender living in your home victimizing one child does not
7 place the other at substantial risk of harm to meet that
8 definition, which here, I think it did.

9 JUDGE RIVERA: But when they are no longer in the
10 home? They're no longer present?

11 MS. OZZELLA: Going back to the dispositional
12 order, Your Honor?

13 JUDGE RIVERA: Yes.

14 MS. OZZELLA: So while I guess that that was
15 asserted in the closing argument, and I'm not contesting
16 that fact, it goes back to her defects of what is
17 appropriate parenting. Even though you've gotten rid of
18 this offender, she's demonstrated no understanding of what
19 the problem was, that has been addressed other than - - -

20 JUDGE RIVERA: So what's the fear? In the future
21 she'll have another sex offender in the house?

22 MS. OZZELLA: I think that's part of it, right?
23 Part of the dispositional order is trying to ensure these
24 children are not further neglected, not further abused.
25 And with her choosing to not offer any testimony at any

1 point in time or any evidence whatsoever, that she even
2 understands - - -

3 JUDGE RIVERA: Whose burden was it at the
4 disposition?

5 MS. OZZELLA: To - - - I think it depends on how
6 you look at it. The department. It was the department's
7 burden to prove to the court what would be appropriate. I
8 think it's - - - would be the appellant's burden to prove
9 the contrary of that. The Department did rely on the fact
10 finding testimony, which I think amply demonstrated the
11 appellant's defect in her understanding of parental duty.

12 JUDGE RIVERA: But the court never actually found
13 that she knew about the abuse, right?

14 MS. OZZELLA: I think if the court found that she
15 should have - - -

16 JUDGE RIVERA: Because of the standard that the
17 court applied?

18 MS. OZZELLA: The - - - I think the court mostly
19 found that she could not have reasonably not known, that
20 she should have known. A reasonable parent would have
21 based on the evidence that was before it.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. OZZELLA: Thank you.

24 JUDGE HALLIGAN: Can you address the statutory
25 question, please?

1 MS. WALL: Sure. About the finding of abuse as
2 to my client? Is that - - -

3 JUDGE HALLIGAN: No. About whether or not - - -

4 JUDGE RIVERA: The standard.

5 JUDGE HALLIGAN: - - - about whether or not abuse
6 - - -

7 MS. WALL: Right.

8 JUDGE HALLIGAN: - - - requires some actual
9 knowledge?

10 MS. WALL: Yes. So I would argue, and a number
11 of the courts that have looked at this, have argued - - -
12 have found that abuse - - - a finding that a parent allowed
13 a child to be sexually abused requires actual knowledge. I
14 think that depends - - -

15 JUDGE HALLIGAN: Well, why is that, though?
16 Based on the statute and your adversaries comment about the
17 way in which the word "allows" is used as well in the
18 neglect provisions?

19 MS. WALL: Right. So as - - - as you pointed
20 out, Judge Halligan, the - - - when - - - in the neglect
21 definition the overall standard is the minimum degree of
22 care standard. And that's where the sort of reasonableness
23 standard comes from. And the idea of knew or should have
24 known being appropriate to find that a parent allowed
25 something to occur.

1 So it's not really the word "allow" that's doing
2 the work of - - - you know saying that what - - - what a
3 parent's knowledge had to have been. It's the minimum
4 degree of care standard.

5 JUDGE HALLIGAN: But it seems like you could read
6 the two provisions, the abuse and neglect provision as the
7 other side suggests, which is as turning on the extent of
8 the injury.

9 So the abuse hinges on physical injury that is
10 grave enough to result in certain consequences. And
11 neglect by comparison - - - you know, is tethered to, for
12 example, a failure to supply with sufficient food,
13 clothing, and shelter.

14 So it seems like a hard question to me.

15 MS. WALL: Well, I don't think that the way the
16 statute is worded supports applying the minimum degree of
17 care standard in the abuse setting.

18 It's - - - the statute defining abuse talks about
19 committing or allowing to be committed certain acts by
20 other than accidental means or certain sex offenses - - -

21 JUDGE HALLIGAN: So the conduct at issue here,
22 which of the neglect provisions the definition of neglected
23 child would it fall under?

24 MS. WALL: Inadequate supervision and
25 guardianship, I would say.

1 JUDGE HALLIGAN: Okay.

2 MS. WALL: But the abuse is more than just the -
3 - - a serious harm to a child. It - - - because there are
4 cases where children have been sexually abused, and only a
5 neglect finding is made because the parent's level of
6 culpability is at the reasonableness. You know, they have
7 failed to be reasonable as a parent, and not that they
8 actually allowed the abuse to occur.

9 If this court were to say that a finding of abuse
10 could be made based on a parent simply, you know, failing
11 to reasonably notice that a child was being abused, that
12 would really collapse the distinction between abuse and
13 neglect. And it would unnecessarily stigmatize the parents
14 who - - -

15 JUDGE SINGAS: Yeah. But there is no distinction
16 between abuse and neglect in the definitions. It's - - -
17 both use the same term: "allow to be inflicted", right?
18 And it only - - - "knowingly allowed" only comes into play
19 when they're talking about severely abused child.

20 So regardless of what courts may be doing or what
21 the policy is, statutorily "allow to be inflicted", is used
22 for both neglect and abuse, and the only time "knowingly"
23 enters the picture is when we're talking about a severely
24 abused child. Am I wrong about that?

25 MS. WALL: Well, Your Honor, at the beginning of

1 the definition of abuse, it says that a parent fails to
2 exercise a minimum degree of care in - - - you know, a
3 number of different ways. And one of those ways could be
4 either inflicting or allowing to be inflicted excessive
5 corporal punishment.

6 But the way that the abuse definition begins,
7 it's either committing or allowing to be committed certain
8 acts against a child.

9 In the case of sex abuse, it's these acts are
10 criminal offenses against the child. And so it's - - -
11 abuse is serious conduct and intentional conduct against a
12 child that's on the level of a criminal offense. And - - -

13 JUDGE SINGAS: I guess my point is, if the
14 legislature wanted to make that distinction, they know how
15 to do it for a severely abused child. They said you
16 knowingly have to do this. They opted not to say that
17 anywhere else in this statute.

18 MS. WALL: And I think - - -

19 JUDGE HALLIGAN: And I think that's important.

20 MS. WALL: I think part of the reason for that
21 might have been that the severe abuse definition has a more
22 serious consequence. It is a cause of action for a
23 termination of parental rights, not just a finding of abuse
24 or neglect.

25 And there's a higher burden of proof in those

1 types of proceedings: clear and convincing evidence.

2 JUDGE HALLIGAN: So under your reading what does
3 "knowingly allows" versus "allows" mean? What's the
4 distinction?

5 MS. WALL: I think the distinction may be that
6 just a sort of over drafting to enhance clarity in the
7 situation where there is a more severe consequence.

8 JUDGE HALLIGAN: "Knowingly allows" means I have
9 a lot of actual knowledge and "allows" means I have actual
10 knowledge?

11 MS. WALL: I don't know that I'm saying that
12 there is any distinction between the two. I think that
13 there may have been an attempt to increase clarity to make
14 in this - - - in the case where there's a more severe
15 consequence and a higher burden of proof.

16 CHIEF JUDGE WILSON: Thank you.

17 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matters of Mekayla S. and Gabriel H., No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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