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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 14

DAKOTA W. BALDWIN,

Appellant.

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20 Eagle Street  
Albany, New York  
February 8, 2023

Before:

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

Appearances:

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Cynthia R. Piett  
Official Court Transcriber



1                   ACTING CHIEF JUDGE CANNATARO: Our next appeals  
2 are 14 and 15, People v. Baldwin and Ba.

3                   MS. WEISS: Good afternoon, Your Honors. Clea  
4 Weiss on behalf of Dakota Baldwin. May I reserve two  
5 minutes for rebuttal?

6                   ACTING CHIEF JUDGE CANNATARO: Yes. Two minutes.

7                   MS. WEISS: Thank you.

8                   JUDGE TROUTMAN: In this particular case, isn't  
9 Mr. Baldwin now released?

10                  MS. WEISS: That is correct.

11                  JUDGE TROUTMAN: So why isn't the case moot?

12                  MS. WEISS: So there's - - - this case is not  
13 moot, and I would submit it's not moot for three reasons.  
14 If this court disagrees with me on those reasons, I would  
15 also submit that an exception to mootness is applicable  
16 here.

17                  But the three reasons that I would submit that  
18 the appeal is not moot: The first deals with Correction  
19 Law Section 201 subsection 9. This is a law that was  
20 repealed in April of 2022 of this year. And it's a law  
21 that required that parolees pay a fee of thirty dollars per  
22 month for the pleasure of parole supervision. And it was  
23 applicable to Mr. Baldwin at the time that he was paroled.

24                  And it's my position that if a court determined  
25 that his sentence of two to four years is unduly harsh and



1 severe and reduced it to one-and-a-half to three years, he  
2 would be entitled to a return of those funds that he had to  
3 pay during that year when he was on parole supervision. So  
4 that's one reason. There's an economic injury to Mr.  
5 Baldwin that, I think, keeps this from being moot.

6 And then there's two reasons having to do with  
7 the continuing consequences, concrete consequences of the  
8 length of a sentence even after a defendant has finished  
9 serving his sentence. And one of those is specific to New  
10 York. It has to do with Sandoval compromises. Which is  
11 when, you know, the people are allowed to cross-examine a  
12 defendant who chooses to exercise his or her right to  
13 testify. And the compromise is you don't get to go into  
14 the details of the conviction; you don't necessarily get to  
15 say what the conviction is, but you can ask a defendant  
16 "were you convicted of a felony".

17 And often times, they - - - the people are  
18 allowed to use, as evidence, the length of a sentence as a  
19 way of indicating to the jury the severity of a prior  
20 conviction. So the length of a sentence has evidentiary  
21 value to the people in a Sandoval context. And therefore,  
22 has a continuing injury to any defendant who might sustain,  
23 you know, a further prosecution.

24 And in the third area, in which the length of a  
25 sentence has a continuing consequence, has to do with,



1 again, further prosecution. It may be considered in a bail  
2 determination. And it would certainly be considered in a  
3 future sentencing proceeding, judges who are paying  
4 attention to the theory of deterrence. Many judges think  
5 that, you know, there should be progressively longer  
6 sentences, and even if you're not subject to second felony  
7 offender or predicate felony sentencing, the length of your  
8 first sentence often informs what the length of a  
9 subsequent sentence should be.

10 So there are - - - there's three reasons I would  
11 submit that the length of Mr. Baldwin's sentence, one, very  
12 concrete to Mr. Baldwin having to do with the fees he paid,  
13 and two, that would be as to any defendant who is seeking  
14 to have the length of their sentence --

15 JUDGE TROUTMAN: What's the exception you claim  
16 if we disagree with you?

17 MS. WEISS: If Your Honors disagree -- you know,  
18 this is a significant and important - - - it's a novel  
19 question about the exceptional circumstances standard used  
20 by the Third Department. And significant and novel  
21 questions not been previously passed upon, that can be an  
22 exception to mootness. This case is fully briefed before  
23 Your Honors.

24 JUDGE TROUTMAN: What about likelihood of  
25 recurrence here in the Third Department?



1 MS. WEISS: Likelihood of recurrence, this is -  
2 - - this standard is no longer used in the third  
3 department, based on my understanding, but it is still  
4 employed from time to time in the Appellate Division First  
5 Department and in the appellate terms. And some county  
6 courts - - - county courts are often not publishing their  
7 appellate decisions when they sit as appellate courts, but  
8 this is a standard that is used by county courts as well.

9 So there is some - - - there is some chance that  
10 it would occur, whether to Mr. Baldwin or not, but I think  
11 that this is a significant question. It's a question this  
12 court has not ruled - - - has not addressed the Appellate  
13 Division's sentences powers since 1992 in Delgado. And  
14 this is a novel issue that is ready for this court to  
15 decide.

16 JUDGE SINGAS: But regardless of what they said  
17 the standard was, they did look at the correct factors, as  
18 we laid them out. So what are we to do about that?

19 MS. WEISS: Well, so I think the standard of  
20 review is important. And I disagree with opposing counsel  
21 that the extraordinary circumstances are unduly -- or  
22 excuse me - - - or abuse of discretion test is a test. I  
23 think it is a standard of review. And I think we need to  
24 take the Appellate Division at their word when they have  
25 been repeating this standard over and over again since the



1 1970s, that that's what they're doing. They're not  
2 actually conducting --

3 JUDGE SINGAS: They told us what they were doing.  
4 They were looking at defendant's mental health, his  
5 substance abuse struggles, criminal history, the nature of  
6 the assault. They were doing what we asked them to do.  
7 They might have mischaracterized the standard, but in their  
8 analysis, they actually used the factors that we said are  
9 appropriate.

10 MS. WEISS: So one thing that I look at in the  
11 decision in Baldwin is that the - - - the Third Department  
12 writes the record reflects that the court reviewed the  
13 presentence investigation report. And then going into the  
14 details, as Your Honor said, of what's in there, and that's  
15 abuse of discretion review. They are looking at what  
16 county court was doing and kind of giving their stamp of  
17 approval to it.

18 JUDGE GARCIA: Counsel, isn't - - - isn't that  
19 really what happened in Delgado? I mean, it's almost the  
20 exact same language, right? We take - - - we read the  
21 Appellate Division's statements that the sentencing courts  
22 did not abuse their discretion to mean that the Appellate  
23 Division did not find the sentence as unduly harsh or  
24 severe under the circumstances. And that's pretty much the  
25 same language you have in the Appellate Division here in



1 Baldwin. Why doesn't the same rule apply that we applied  
2 in Delgado?

3 MS. WEISS: So I think there's a couple important  
4 differences. And one is the extraordinary circumstances  
5 language which this court did not address in Delgado. And  
6 then I would also point out that the Third Department  
7 standard has been used since the 1970s as an entrenched  
8 standard that they repeat over and over again.

9 And I mean, Delgado is a decision that is a  
10 little - - - has some internal contradiction. On one hand,  
11 they say the Appellate Division should make this decision  
12 without deference to the trial court. And then they say,  
13 but we read this language to mean that it's - - - they're  
14 actually conducting unduly harsh and severe review.

15 And I think Delgado desperately needs to be  
16 clarified because, you know, with the Third Department, we  
17 don't have just the one-off case using abuse of discretion  
18 review. It is every single case that this - - - that they  
19 have been repeating this standard of review.

20 Meanwhile, Delgado says, that's not the standard  
21 of review. And in Mr. Baldwin's case, we see that the  
22 actual review they're conducting, the way they've written  
23 about it in the decision, truly is an abuse of discretion  
24 review. And I think that Delgado needs to be reenforced  
25 and it needs to be clarified.

1           You know, many jurisdictions - - - every  
2 jurisdiction has a mechanism for ensuring consistency in  
3 criminal sentences. Some jurisdictions use sentencing  
4 guidelines, whether mandatory or advisory.

5           JUDGE TROUTMAN: So in the very least, you  
6 believe that the courts need - - - it needs to be clear to  
7 the courts that they can review the sentence regardless of  
8 what happened at the trial court level, and that they have  
9 a right to review it without extraordinary circumstances,  
10 in the interest of justice?

11           MS. WEISS: That's correct, Your Honor. And it's  
12 not just a right but it's a duty because the legislature  
13 has set unduly harsh and severe as a standard. And in New  
14 York state, our legislature - - - our system is that we  
15 create consistency in sentencing from county to county and  
16 from judge to judge through appellate sentencing review.

17           JUDGE TROUTMAN: So you're saying at - - - in the  
18 very least, that clarification is valuable here - - -

19           MS. WEISS: Yes, Your Honor.

20           JUDGE TROUTMAN: - - - going forward?

21           MS. WEISS: It is valuable because the appellate  
22 - - - the legislature has vested our Appellate Divisions  
23 with this power, as in Delgado, without deference to the  
24 trial court to make a plenary decision, to review, you  
25 know, all of the factors de novo and to decide - - -



1           ACTING CHIEF JUDGE CANNATARO: Why should we be  
2 concerned in that regard, given that they did a full sort  
3 of examination of all the circumstances that would be  
4 appropriate for them to review?

5           MS. WEISS: Well, because, Your Honor, they did  
6 not review it with the correct standard of review in mind.  
7 If they were to go back and look, is Mr. Baldwin's sentence  
8 unduly harsh and severe, as opposed as to, hey, are there  
9 extraordinary circumstances here, or did the judge abuse  
10 his discretion, you could well reach a different result in  
11 - - -

12           ACTING CHIEF JUDGE CANNATARO: Are you reading  
13 the decision that they were deferring to the lower court's  
14 findings with respect to the factors that they were looking  
15 at?

16           MS. WEISS: Yes, Your Honor. That is how I read  
17 this decision, where they are basically reviewing what  
18 county court did and did not review. And then, you know,  
19 concluding that there is no abuse of discretion.

20           ACTING CHIEF JUDGE CANNATARO: Okay. Thank you.

21           MS. WEISS: Thank you.

22           MR. PERSICHINI: May it please the Court. Counsel  
23 Zach Persichini on behalf of the County of Chemung.

24           I would like to start by addressing some of the  
25 cases. I know we talked a little bit about how the Third



1 Department may have started to change, what is perceived as  
2 their standard. And I know in the reply brief, appellants  
3 cited a number of cases from 2021 and 2022, where the Third  
4 Department is no longer using that extraordinary  
5 circumstances language or abuse of discretion language.

6 I would submit that if you delve further into  
7 those cases, I think that actually makes our point a little  
8 bit. If you delve further into those cases and each of  
9 those cases - - - Streeter, Sanders, Machia, and I believe  
10 Lancaster (ph.).

11 JUDGE TROUTMAN: So would you start with the  
12 premises that the case is moot or not?

13 MR. PERSICHINI: Of course, yes.

14 JUDGE TROUTMAN: And then, you would go to as to  
15 whether there are exceptions to the mootness doctrine?

16 MR. PERSICHINI: Absolutely, yes. That - - -  
17 that's absolutely correct. I would talk about those four  
18 cases -- Machia, Streeter, Sanders, and Lancaster; four of  
19 those that were cited in the reply brief. Each of those  
20 cases cites an underlying Third Department case that talks  
21 about extraordinary circumstances or abuses of discretion.  
22 Which goes to our argument that this is more of an argument  
23 about semantics that we don't like the term, extraordinary  
24 circumstances. We're fine if we were to just talk about  
25 age, criminal history, nature of the crime.



1                   Once we turn --

2                   JUDGE RIVERA: Well, let's stay with this  
3 mootness issue, though, more expressly in terms of what  
4 counsel has argued. What about this argument that there is  
5 an economic injury and that's at least one ground for why  
6 it's not moot?

7                   MR. PERSICHINI: I do not have a great answer for  
8 that. I would just focus on - - - I guess, I would turn to  
9 the fact that maybe it would not be moot. I do think this  
10 is an important issue and there may be a need for  
11 clarification.

12                   Similar to the decision in Romer - - - Romero,  
13 this court's decision in Romero that sort of told the lower  
14 court - - - the appellate departments, hey, maybe make sure  
15 you use the correct standard or maybe make sure you focus  
16 on more recent case law when discussing weight of the  
17 evidence.

18                   But we still see that you used the correct  
19 analysis in your understanding, despite using maybe an  
20 older standard. Here, that could, I guess, be the  
21 argument, is that even if this court were to believe that  
22 the Third Department used an incorrect standard, or maybe  
23 extraordinary circumstances shouldn't be used, I would  
24 submit that the analysis performed by the Third Department  
25 was correct, and there would be - - - would have been and

1 would be no need to - - -

2 JUDGE WILSON: How do we know that? How do we  
3 know that the analysis - - - it would have been the same  
4 had they not used extraordinary circumstances, and instead,  
5 said, unduly harsh and severe?

6 MR. PERSICHINI: That's a question - - - I  
7 actually want to talk about that in particular because  
8 similar to Romero - - - not to just go back to Romero, but  
9 similar to Romero, the court noted that, say, the Third  
10 Department in this case did not talk about anything. They  
11 just said, we're not going to - - - we're not - - - we do  
12 not find the sentence to be unduly harsh or severe. That  
13 would have been the end of it. They could have summarily  
14 just rejected it, similar to Romero.

15 The Second Department often does that. The  
16 Second Department often does not get into any analysis.  
17 That is where, I guess, there is the presumption that the  
18 appellate judges throughout the state understand the law.  
19 They understand - - -

20 JUDGE WILSON: It seems, to me, there's two  
21 things, though. One is what are the set - - - what's the  
22 set of ingredients you're looking at. And the other is  
23 what is the recipe, right?

24 And so to say, I looked at, you know, the - - -  
25 the recipe for ice cream and it's vanilla, and cream, and



1 milk, and salt, and sugar. And you also looked at that  
2 same thing, but if you put it in an ice cream churner and I  
3 bake it, we're going to wind up with very different things.

4 And so when you say, well, you - - - they could  
5 tell you - - - they could fail to tell you what the  
6 ingredients they looked at are, but they told you what the  
7 recipe is, that is they put it in an ice cream churn.  
8 Well, if they wound up with ice cream and we've already  
9 said we don't need to know what the ingredients are, that's  
10 one thing. But on the other hand, saying that we've both  
11 looked at the same set of ingredients and it doesn't really  
12 matter how we characterize the recipe, doesn't convince me.

13 MR. PERSICHINI: Throughout - - - I guess, I  
14 would submit that throughout this state - - - we're - - -  
15 we're never going to have, like, a set standard throughout  
16 the state - - - or a set test, I would say.

17 JUDGE WILSON: Well, isn't that what we try to  
18 impose on people?

19 MR. PERSICHINI: Try to, yes. And there is - - -

20 JUDGE WILSON: We, as the Court of Appeals, not  
21 just in - - -

22 MR. PERSICHINI: Correct.

23 JUDGE WILSON: - - - this area, in every area.  
24 We're trying to create a uniform body, and we use words.  
25 And - - -



1 MR. PERSICHINI: Correct.

2 JUDGE WILSON: - - - we try to make sure that  
3 those words are followed. If somebody deviates from those  
4 words, we're worried about that.

5 MR. PERSICHINI: That is where I would say there  
6 is the discretion. That's left to the discretion of the  
7 appellate department. And each appellate department is  
8 going to have different judges that are going to change.  
9 They're going to have different attorneys bringing  
10 different arguments. And that is where, on each individual  
11 case - - -

12 JUDGE WILSON: Is the standard - - -

13 MR. PERSICHINI: Standard would never change.

14 JUDGE WILSON: Okay. So you would agree, for  
15 example, that one Appellate Division part - - - department  
16 couldn't say, our test for interest of justice, reduction  
17 of a sentence is if the sentence is illegal, then we'll  
18 reduce it, but otherwise, we won't. That would be an  
19 inappropriate test.

20 MR. PERSICHINI: If - - - can you repeat that?

21 JUDGE WILSON: Sure. Suppose the Department  
22 said, our test for interest of justice, reduction of a  
23 sentence is illegal sentence, only if a sentence is illegal  
24 will we reduce it; otherwise, we won't. Is that in some  
25 other department, there's a different standard. Can we



1 correct that?

2 MR. PERSICHINI: I guess, I would argue that that  
3 is the discretion of that appellate department and that is  
4 - - - so in the matter - - - it's a matter of discretion  
5 analysis in the interest of justice. Now, that would be an  
6 extreme, but I would submit - - -

7 JUDGE WILSON: Attempt to - - -

8 MR. PERSICHINI: Yes.

9 JUDGE WILSON: - - - make my hypothetical  
10 statement.

11 MR. PERSICHINI: I would submit that that would  
12 be in the appellate department's discretion. The appellate  
13 departments throughout the state have talked about this  
14 extraordinary circumstances. They - - - the Second  
15 Department has cited that, Fourth Department, First  
16 Department, but every department looks at the same factors.

17 And I understand that we label things  
18 "extraordinary circumstances". Some departments label them  
19 "mitigating factors". That's another term. In fact, in  
20 this case, mental health was termed a mitigating factor.

21 So my argument would be that if it's a mitigating  
22 factor in one sense and it's an extraordinary circumstance  
23 in another, I don't know that those are different things.  
24 We might not like - - -

25 JUDGE WILSON: Of course, in the SORA context, we



1 consider those very different things.

2 MR. PERSICHINI: Yes. Understood.

3 JUDGE WILSON: Those exact same words.

4 MR. PERSICHINI: And - - - but that is not the  
5 case here, I would submit.

6 ACTING CHIEF JUDGE CANNATARO: Counsel, I - - -  
7 I'm more concerned about the abuse of discretion language.  
8 You know, that suggests, and your adversary suggested, that  
9 maybe they were looking at it with the wrong eye. In other  
10 words, they were - - - they were looking at the right  
11 ingredients, but they were baking it instead of putting it  
12 in the - - - the ice cream maker. How do we know that that  
13 didn't happen here?

14 MR. PERSICHINI: We'll go back to the presumption  
15 of the - - - that the appellates would know the law; they  
16 would do the right analysis. But I would also go to the  
17 fact that in this particular case, they did talk about how  
18 the county court reviewed presentence investigation. They  
19 talked about the factors. They also did talk about how  
20 their - - - they understand that this is the maximum  
21 sentence for an attempted assault second, which would give  
22 credence to the idea that they are - - - they are looking  
23 at the factors we consider, which includes the type of  
24 sentence - - - the - - - the crime, the nature of the  
25 crime.





1           Again, this was a reduced felony, so there's  
2 actually an assault second reduced. He pled to an  
3 attempted assault second. So that - - - we know that  
4 they're not just relying on the presentence investigation.  
5 We know that they're also looking at the sentence, the type  
6 - - - the nature of the crime in this case.

7           And again, I would submit the appellate  
8 department, almost every case probably - - - or criminal  
9 case probably has this type of argument, that a sentence  
10 was unduly harsh or severe. They've handled hundreds of  
11 these types of arguments, hundreds of these types of  
12 decisions. If we say that they did not have the right  
13 analysis in this particular case, then, I guess, we would  
14 be questioning whether there had - - -

15           ACTING CHIEF JUDGE CANNATARO: You don't  
16 disagree, do you, that the whole thing would be so much  
17 simpler if it didn't say, abuse of discretion? That - - -  
18 that wasn't necessary language in order to resolve this  
19 excessive sentence question, was it?

20           MR. PERSICHINI: I guess, it would not be  
21 necessary language, but then you get to the point where  
22 would you - - - would we rather have a world like the  
23 Second Department often does, where they just don't give  
24 any of their analysis; we have no idea, often times, what  
25 their thinking is or what type of factors they're looking

1 at. They will just simply use a line that says, we find  
2 the sentence is not unduly harsh or severe.

3 I understand Your Honor's point about  
4 extraordinary circumstances. Maybe if it was - - - maybe  
5 if they just talked about "we looked at his age, his  
6 criminal history."

7 JUDGE RIVERA: So maybe we should say, you have  
8 got to explain. Maybe that resolves the concern you have  
9 raised.

10 MR. PERSICHINI: I don't disagree with that. I  
11 think that would go towards my previous infatuation with  
12 the Romero case that talks about, essentially, that point.  
13 That maybe we see that they did the right analysis, but  
14 maybe we should remind them not to use extraordinary  
15 circumstances. That language is maybe not necessary in  
16 this case or future cases.

17 ACTING CHIEF JUDGE CANNATARO: Thank you.

18 MR. PERSICHINI: Thank you.

19 MS. WEISS: So Your Honors, using an incorrect  
20 standard of review, it distorts what advocates argue for  
21 the Appellate Division, Third Department. It distorts the  
22 analysis that that court undertakes, and it distorts  
23 results.

24 I did look at data from 2012 to 2021, and if this  
25 court pulls every harsh and excessive sentence, every



1 modification by looking at the decretal paragraphs, and  
2 then kind of as the percentages with the number of criminal  
3 appeals decided in each of those years, what I found is  
4 that the First Department modifies 1.9 percent, Second  
5 Department modifies 1.5 percent, the Third Department  
6 modifies .7 percent, the Fourth Department modifies 2.1  
7 percent.

8 So we've got the Third Department modifying  
9 drastically lower amounts of criminal sentences. And that  
10 disparity through the departments is harmful to appellants  
11 within the Third Department. And I think that - - -

12 ACTING CHIEF JUDGE CANNATARO: And do you posit  
13 that's because they're applying the wrong standard?

14 MS. WEISS: I do posit that it's the wrong  
15 standard. And I believe the extraordinary circumstances  
16 standard is a deferential standard. And I - - - if you  
17 look at the Fourth Department's language - - -

18 JUDGE SINGAS: But then wouldn't it be zero? I  
19 mean, the fact that they are reducing sentences, they are  
20 doing an analysis, sometimes they are doing it correctly.  
21 I mean, how are we to presume - - - because I think you're  
22 presuming that they're always doing it wrong, because  
23 they're using the wrong standard. So what about the fact  
24 that when they do it right?

25 MS. WEISS: Well, I think they are always doing



1           it wrong. And when you do it wrong and when you apply the  
2           wrong standard, you still find a couple sentences that are  
3           worthy of modification - - -

4                    JUDGE GARCIA:   - - - find those harsh and  
5           excessive sentences in those small percentage of cases, are  
6           they still saying in those cases, that was an abuse of  
7           discretion, or are they saying, they were unduly harsh and  
8           excessive?

9                    MS. WEISS:   In the cases where they do modify  
10          those few cases, it's one to three per year that the Third  
11          Department modifies. They often go into a more in-depth  
12          discussion about why they're doing it, whether it's the age  
13          of the defendant or certain characteristics.

14                   JUDGE TROUTMAN:   So is it your concern that if  
15          they were clear that they do, in fact, have the power, they  
16          would use it more often?

17                   MS. WEISS:   That is my contention. And - - - and  
18          returning to what the Fourth Department says, they  
19          repeatedly have to remind the people that those - - -  
20          that's not the standard they use. And I think it's telling  
21          that the DAs in the Fourth Department want to use this  
22          Third Department standard. They keep repeating it in their  
23          briefs. They want it because it's a more restrictive, more  
24          deferential standard.

25                   JUDGE SINGAS:   But in those cases where they do



1 exercise it, are they using the correct language or not?  
2 I'm still confused about that.

3 MS. WEISS: So I apologize. I don't have the  
4 case - - - the name of the case off of the top of my mind,  
5 but there's one case where Justice Aarons dissented from a  
6 modification of sentence. And she said, well, I don't find  
7 extraordinary circumstances. Now, I don't think the  
8 extraordinary circumstances phrase showed up in the  
9 majority opinion, but they were just discussing whatever it  
10 was that they found to be extraordinary circumstances.

11 And I agree with opposing counsel, that when the  
12 Third Department does modify, they are looking at the same  
13 sorts of factors that all courts look at when we consider  
14 whether to modify sentences or not. But when you don't  
15 have the right standard of review, you don't analyze the  
16 factors correctly, and you end up at different results.  
17 And the data shows that the Third Department ends up with  
18 different results.

19 ACTING CHIEF JUDGE CANNATARO: Thank you.

20 MS. WEISS: Thank you.

21 (Court is adjourned)

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

I, Cynthia R. Piett, certify that the foregoing transcript of proceedings in the Court of Appeals of Dakota Baldwin v. The People of the State of New York, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Cynthia R. Piett

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