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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 194

EMIL BEST,

Appellant.

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27 Madison Avenue  
New York, New York 10010  
October 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Linda Ferrara  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Best.  
2 Counsel, would you like any rebuttal time?

3 MS. FEMAN: I respectfully request one  
4 minute for rebuttal.

5 CHIEF JUDGE LIPPMAN: One minute.  
6 Go ahead, you're on.

7 MS. FEMAN: May it please the Court, Tammy  
8 Feman for Appellant Best.

9 There should not be routine handcuffing  
10 without basis of all defendants in non-jury  
11 proceedings within the State of New York.

12 CHIEF JUDGE LIPPMAN: What's the difference  
13 between the non-jury and a jury, if any, in this  
14 particular context of this kind of situation?

15 MS. FEMAN: In this particular situation,  
16 the fundamental rights that are involved would be  
17 exactly the same; a defendant has a right to be  
18 presumed innocent. A defendant has a right to sit  
19 next to his defense attorney at his trial and to  
20 participate meaningful (sic) in his trial. He has a  
21 right to stand there free of restraints and decide  
22 whether or not he wants to take the stand --

23 JUDGE READ: But don't you think it's  
24 different if it's a non-jury trial? I mean part of  
25 the reasoning behind that is it could influence the

1 jury. I mean presumably a judge understands that  
2 somebody is innocent until they're proven guilty.

3 MS. FEMAN: Well the presumption that a  
4 judge would understand that someone is innocent until  
5 proven guilty is immediately rebutted in these  
6 circumstances. You have a judge who is immediately  
7 making a determination without any record basis that  
8 this particular defendant is guilty, that he is  
9 worthy of having handcuffs - - -

10 CHIEF JUDGE LIPPMAN: So is the rule the  
11 same if - - - in your view, you're advocating that  
12 the rule is the same if there's no record support?  
13 It doesn't matter whether there's a jury, a non-jury,  
14 it's per se a violation?

15 MS. FEMAN: Exactly. If there's - - - if  
16 the trier of fact does - - - if the trier of fact is  
17 a judge and there is no record basis for the  
18 handcuffing, then the rule is that the error existed  
19 under People versus - - -

20 JUDGE CIPARICK: Well, at trial - - - at  
21 trial, counsel complained, and the cuffs were removed  
22 from the back and placed in the front, and then  
23 counsel lodged no further complaint or objection and  
24 so - - - is even this issue even preserved  
25 sufficiently - - -

1 MS. FEMAN: Well - - -

2 JUDGE CIPARICK: - - - for our review?

3 MS. FEMAN: - - - well, it's our position  
4 that we don't have a preservation problem first and  
5 foremost because this is a fundamental constitutional  
6 error.

7 JUDGE READ: So it doesn't need to be  
8 preserved?

9 MS. FEMAN: So it's a structural error that  
10 would fall under Patterson under mode of proceedings  
11 error. It's a fundamental constitutional right. But  
12 even on the face of this record, we don't have - - -  
13 if we had to have any - - -

14 JUDGE CIPARICK: We have allowed shackling,  
15 I suppose, when there are security concerns, as long  
16 as the judge places the reasons on the record. We've  
17 allowed it.

18 MS. FEMAN: Yes, if the judge were to place  
19 specific reasons that show there's an essential state  
20 interest for the shackling specific to the defendant  
21 in this case, then shackling would - - - shackling or  
22 handcuffing would be allowed.

23 CHIEF JUDGE LIPPMAN: Does it matter that  
24 the judge in this case knew that the defendant had a  
25 prior record that might lead him to do this? He

1 still has to place it on the record.

2 MS. FEMAN: The point is that the judge  
3 still has to place it on the record. And the fact  
4 that the judge - - -

5 JUDGE SMITH: Even if no one asks him to?

6 MS. FEMAN: Even if nobody asked him to.  
7 The fact that the judge might have known a defendant  
8 had a record - - -

9 JUDGE SMITH: And aren't we going to get  
10 into a lot of trouble with - - - aren't we going to  
11 wind up reversing a lot of convictions if every time  
12 a judge who might not happen to know but we haven't  
13 yet said what you're asking us to say, that you've  
14 got to - - - that you can't handcuff anybody without  
15 placing specific reasons on the record. How many  
16 judges do you think are handcuffing people not  
17 knowing that? And if the lawyer doesn't stand up and  
18 say, Judge, you can't do that, what's so - - - what's  
19 the - - - you know, aren't we going to have a major  
20 problem?

21 MS. FEMAN: We're not going to have a major  
22 problem. And specifically with regard to this case,  
23 the lawyer stood up and four times the lawyer said,  
24 "Judge, please remove the handcuffs."

25 JUDGE SMITH: And every time - - -

1 JUDGE READ: Well - - - and the judge did  
2 do something - - -

3 JUDGE SMITH: - - - the judge - - -

4 JUDGE READ: The judge did respond to that.  
5 I mean, the judge did, as Judge Ciparick described,  
6 respond to that and he's put the cuffs in front, and  
7 then the attorney said nothing.

8 JUDGE CIPARICK: He said, "Thank you." The  
9 attorney said, "Thank you."

10 JUDGE READ: He didn't object.

11 MS. FEMAN: The attorney said thank you at  
12 the pre-trial proceedings and then on the very next  
13 proceeding when it - - - two weeks later when the  
14 trial began, the attorney made the same objection,  
15 "Judge, please remove the handcuffs." The attorney -  
16 - -

17 JUDGE SMITH: It is - - -

18 JUDGE GRAFFEO: There's no indication that  
19 this defendant was restricted in his ability to  
20 confer with his attorney, was there?

21 MS. FEMAN: Well - - -

22 JUDGE GRAFFEO: The record doesn't disclose  
23 that.

24 MS. FEMAN: - - - well, the point is that  
25 handcuffs and shackles are inherently prejudicial.

1 The - - -

2 JUDGE GRAFFEO: Even if we agree with you  
3 under the Clyde case, can we apply a harmless error  
4 analysis?

5 MS. FEMAN: Well the - - - applying a  
6 harmless error analysis in this case, the evidence is  
7 a far cry from overwhelming. We have a limited - - -

8 CHIEF JUDGE LIPPMAN: What's the standard,  
9 counsel?

10 MS. FEMAN: It - - - he would - -

11 CHIEF JUDGE LIPPMAN: What's the standard  
12 for harmless analysis?

13 MS. FEMAN: - - - it would be harmless  
14 beyond a reasonable - - - a harmless error beyond a  
15 reasonable doubt. It would be the good old-fashioned  
16 constitutional harmless error analysis in this case.  
17 And we have a complainant who testified that he  
18 didn't know what the statements involved in this case  
19 meant. He testified that even in his supporting  
20 deposition, he said he didn't understand what the  
21 defendant was telling him and this is an endangering  
22 the welfare of a child case. If the complainant  
23 didn't understand - - -

24 JUDGE SMITH: Is it unusual for children  
25 not to understand things that are still kind of bad

1 for them to hear? I mean children usually don't  
2 understand when their welfare is in danger. That's  
3 why we trust adults and not children to make those  
4 decisions.

5 MS. FEMAN: But in this case, you have the  
6 complainant testifying specifically that he didn't  
7 think the defendant was going to harm him; and there  
8 needs to be some showing of harm for an endangering  
9 the welfare of a child case.

10 JUDGE SMITH: Doesn't there just have to be  
11 a threat of harm?

12 MS. FEMAN: There needs to be a threat of  
13 harm. And this complainant testifies that he did not  
14 feel harmed. Even when he testified - - - even when  
15 he was asked if he felt violated, he uses the word "I  
16 guess I did. I think this was just something that  
17 was unusual." This complaint - - - this evidence  
18 shows that this complainant did not feel that he was  
19 in any real harm.

20 JUDGE SMITH: In just stepping back and  
21 looking at it with common sense, can you really  
22 persuade us that there's any likelihood that this  
23 judge would have acquitted this guy if he hadn't been  
24 in handcuffs?

25 MS. FEMAN: Yes, we absolutely can, because

1 we have a situation here where we have a record of  
2 the judge at one point actually saying with regards  
3 to the defendant's prior record, his NYSED, the judge  
4 says, "I don't know if it" - - - meaning the NYSED -  
5 - - "is going to have absolutely any affect on the  
6 trier of fact in this case but I don't know why it  
7 really matters."

8 So you have a judge who made a negative  
9 determination of the defendant, who decided that this  
10 defendant was guilty and then acted on that very  
11 negative determination.

12 CHIEF JUDGE LIPPMAN: What was the  
13 defendant's defense here of - - - didn't he - - - was  
14 he saying "oh, it's just a joke," was that his - - -  
15 what does that mean - - -

16 MS. FEMAN: Defendant's defense - - -

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MS. FEMAN: - - - was that this was male  
19 bantering. You have to remember, this was a  
20 defendant who had limited intellectual functioning.  
21 So you have to look at it in the context of two  
22 children talking to one another. And the defendant -  
23 - - the defendant's defense was that they were  
24 bantering back and forth. He never intended to harm  
25 the complainant. The complainant did not feel that

1 he was being harmed. And then the defendant - - -  
2 this is the defendant's bench trial.

3 JUDGE SMITH: He offered a twelve-year-old  
4 boy fifty dollars to expose himself. It sounds like  
5 endangering the welfare of a child to me.

6 MS. FEMAN: But in the context of this  
7 case, that offer was made in a - - - according to the  
8 complainant's testimony, in a low whisper and then  
9 the defendant immediately got out of the car. There  
10 was nothing acted upon. There was no way for that to  
11 go into the - - -

12 JUDGE SMITH: Well that's why the name of  
13 the crime is endangering; it's not injuring the  
14 welfare.

15 MS. FEMAN: But it wasn't likely to take  
16 place. And by the complainant's own account, the  
17 complainant did not believe that he was in any danger  
18 or that there was any harm. And to - - - and in this  
19 situation where you have a judge who is making an  
20 initial negative determination about this defendant,  
21 the judge in this case was saying this client must be  
22 sitting before me as if he is a dangerous individual.  
23 That's - - - that completely took away the  
24 defendant's right to - - -

25 JUDGE SMITH: Aren't you really making - - -

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JUDGE CIPARICK: How many appearances did -  
- - is it in the record or do you know how many  
appearances did this defendant make before this  
judge, before the trial?

MS. FEMAN: There were two pretrial  
proceedings where objections were made regarding the  
handcuffing; and, in fact, in one of them the trial  
court decided that it wasn't necessary to handcuff  
the defendant at all. And the trial court went again  
- - - went against the court - - - the court security  
who asked that as a matter of protocol, this  
defendant continue to be restrained - - -

JUDGE GRAFFEO: If - - -

MS. FEMAN: - - - even in a pre-trial  
hearing. Then there was a second incident - - -  
instance, additional pre-trial proceedings where the  
defendant was again handcuffed and his attorney  
objected. And then there were two more times at  
trial; as the trial began and then on a continuation  
of the trial.

CHIEF JUDGE LIPPMAN: Okay, counsel.  
You'll have your rebuttal. Thanks.

MS. FEMAN: Thank you.

MS. HERSHEY: Good morning. My name is

1 Joanna Hershey and I represent the respondent in this  
2 case.

3 CHIEF JUDGE LIPPMAN: Counsel, what's the  
4 importance of the judge not putting this on the  
5 record? Shouldn't he put a - - - something on the  
6 record that indicates why he's handcuffing a  
7 defendant in public view in the middle of the trial,  
8 is trying to confer to his counsel or in the  
9 appearances of such, shouldn't there be something on  
10 the record?

11 MS. HERSHEY: That certainly would have  
12 been better in this case. However - - -

13 CHIEF JUDGE LIPPMAN: Why isn't it  
14 essential? Why isn't that a requirement before you  
15 put someone in handcuffs or shackles or whatever the  
16 restraint is?

17 MS. HERSHEY: Right. When there is a real  
18 impact that the shackles would have on a - - - the  
19 defenseability of unfair trial - - -

20 CHIEF JUDGE LIPPMAN: Why wouldn't there be  
21 an impact? Judges are human beings.

22 MS. HERSHEY: Well, here there was no  
23 impact. I don't think the record supports that.

24 CHIEF JUDGE LIPPMAN: Why? Why is there no  
25 - - -

1 MS. HERSHEY: There was no impact on the  
2 presumption of innocence. There's no indication that  
3 he's - - -

4 JUDGE JONES: Don't you think this record  
5 might have shown a predisposition of this judge to  
6 find this defendant guilty?

7 MS. HERSHEY: I don't think the record  
8 supports that - - - that argument. In this case, we  
9 have a judge who has seen this defendant on numerous  
10 occasions, has seen the defendant both shackled and  
11 unshackled, has conducted a Sandoval hearing where  
12 she's privy to his criminal history; and this court  
13 has allowed that judges can preside over bench trials  
14 after being privy to facts that are later deemed  
15 inadmissible at trial.

16 CHIEF JUDGE LIPPMAN: But doesn't - - - but  
17 doesn't the judge have to make a record as to why  
18 they are restraining a defendant?

19 MS. HERSHEY: I would submit that where  
20 there's a threat to their constitutional rights that  
21 that is the case; and that's what this court said in  
22 Cruz and in Clyde and that's why - - -

23 CHIEF JUDGE LIPPMAN: Why is there no  
24 threat to this defendant's constitutional rights?  
25 He's a human being - - -

1 MS. HERSHEY: There's - - -

2 CHIEF JUDGE LIPPMAN: -- and deserves some  
3 dignity, doesn't he?

4 MS. HERSHEY: Well this was an extremely  
5 brief bench trial.

6 CHIEF JUDGE LIPPMAN: But I am asking you,  
7 he's a human being who's got a right to infer - - -  
8 confer with his counsel, and he's got a right to  
9 human dignity and to sitting there in a dignified  
10 fashion, and he's handcuffed for no apparent reason  
11 that we can discern.

12 MS. HERSHEY: Well - - -

13 CHIEF JUDGE LIPPMAN: Don't you think that  
14 it should be a requirement that the judge put on the  
15 record why this person is being restrained?

16 MS. HERSHEY: Respectfully, I think that  
17 the requirement should be applied only when there is  
18 a real threat to a constitutional violation - - -

19 JUDGE PIGOTT: Let's assume for a minute  
20 that - - - and I know this is not this case because  
21 the security earlier on said that, you know, they  
22 weren't going to take them off because it's against  
23 security protocol and she overruled that - - -

24 MS. HERSHEY: Yes.

25 JUDGE PIGOTT: - - - which I thought was

1 absolutely proper. But if we decided that, you know,  
2 a judge or even a hearing officer says look, I'm  
3 listening to all these traffic infractions. These  
4 people are scaring the hell out of me. I want every  
5 one of them shackled when they come in here to talk  
6 about their speeding tickets. We'd think that was  
7 ridiculous, and we would think that that puts a poor  
8 light on our justice system. We just don't shackle  
9 people who are innocent; and until they're proven  
10 guilty, they're innocent.

11 So doesn't it send a bad signal, even if it  
12 is a non-jury, to say we're going to shackle you  
13 because we just like shackles and we don't think it's  
14 going to infect us?

15 MS. HERSHEY: In that situation, that would  
16 send an extremely bad message to the public but  
17 that's simply not what we're dealing with here. We  
18 have a criminal trial, not a traffic ticket and  
19 there's no - - -

20 JUDGE PIGOTT: But we didn't have any  
21 reason for it, as the Chief Judge is saying. If  
22 there - - - if she had said, you know, you had a  
23 rough time in the prison and I don't want you to have  
24 a rough time out here, so I am going to request that  
25 not leg shackles but just, you know, shackles in

1 front and as the attorney said, I can live with that,  
2 then everything would be fine. But if it looks like  
3 it's a policy, you would agree that that would be a  
4 problem, wouldn't you?

5 MS. HERSHEY: Yes. And this court has said  
6 that it - - - that it should not be a routine adjunct  
7 to simply place people in shackles.

8 CHIEF JUDGE LIPPMAN: How do we know what  
9 happened in this case if he doesn't put it on the  
10 record?

11 MS. HERSHEY: Well that - - - that's the  
12 reason why we believe it should be preserved. We  
13 don't really know what the basis for this court's  
14 decision was, but what we do know is that she made a  
15 sort of compromise ruling to move the handcuffs to  
16 the front.

17 CHIEF JUDGE LIPPMAN: Yeah, but if it's  
18 violating his constitutional rights then it doesn't  
19 matter, does it, whether it's preserved?

20 MS. HERSHEY: If this court were to find  
21 that the constitutional rights were violated. I  
22 submit that it didn't happen here.

23 CHIEF JUDGE LIPPMAN: Why not? What - - -  
24 how can, without any rationale whatsoever, you say to  
25 someone you're going to get a fair trial but you're

1 going to sit there in handcuffs during the entire  
2 trial. How is that not violative of his rights?

3 MS. HERSHEY: Because the decision to put  
4 the defendant in handcuffs had absolutely no effect  
5 whatsoever on the verdict here. It didn't affect his  
6 ability to assist in his defense.

7 CHIEF JUDGE LIPPMAN: Would you want to  
8 argue this case in front of us in handcuffs? Do you  
9 think that would in any way influence us as to what  
10 we're going to do in this case?

11 MS. HERSHEY: I'd prefer not to, but I  
12 don't think that would affect your ability - - -

13 CHIEF JUDGE LIPPMAN: You don't think - - -

14 MS. HERSHEY: -- to be a judge.

15 CHIEF JUDGE LIPPMAN: - - - you don't - - -  
16 you think it would be harmless or that it would have  
17 any impact, it would be okay?

18 MS. HERSHEY: I think it would be harmless,  
19 yes, and in this case it certainly was harmless.

20 JUDGE SMITH: There is a point though when  
21 we become - - - and I guess Buchanan shows this - - -  
22 where we are concerned not just with the impact on  
23 the fact finder - - -

24 MS. HERSHEY: Right.

25 JUDGE SMITH: - - - but also just with the

1 impact on the dignity of the system or the - - -  
2 there's something basically offensive about the  
3 restraint. Where is that point? When does that  
4 consideration kick in?

5 MS. HERSHEY: Well that certainly was a big  
6 concern for this court in Buchanan, but that was a  
7 very different situation because there there was  
8 basis on the record to show that the stun belt  
9 actually affected this defendant's ability to assist  
10 in his defense. He complained about actual physical  
11 discomfort and, in fact, had a doctor monitoring him  
12 during the trial because he was wearing the stun  
13 belt.

14 JUDGE SMITH: And the court sent him to a  
15 doctor who said there's no problem.

16 MS. HERSHEY: Well the doctor did prescribe  
17 him hydrocortisone cream. He had welts on his body.  
18 This was not - - - it was not a de minimis restraint  
19 the way that placing handcuffs in the front would be.  
20 It's just an egregious situation compared to this  
21 case.

22 JUDGE SMITH: There's - - - you're saying  
23 that it's - - - there's a point where it's too much  
24 and this isn't it.

25 MS. HERSHEY: Yes.

1 JUDGE SMITH: And so - - -

2 CHIEF JUDGE LIPPMAN: Well if you're - - -

3 JUDGE SMITH: - - - for this sort of thing,  
4 as long as there's no impact on the fact finder,  
5 there's no problem.

6 MS. HERSHEY: As long as there's no impact  
7 on the fact finder or on the defendant's ability to  
8 really participate in his defense.

9 CHIEF JUDGE LIPPMAN: But what makes you  
10 think that if you were - - - again, I put you in or  
11 put me in the defendant's shoes, and if the defendant  
12 has handcuffs and his lawyer is next to him, he's  
13 trying to participate in his trial, you think that as  
14 a matter of form, period, we can say that it did - -  
15 - doesn't affect your right to participate at all?  
16 You think you would feel just as free to say oh, I'm  
17 in handcuffs but, gee, what do you think we should do  
18 here or what's happening? To me, isn't almost on its  
19 face influenced his ability to confer with his  
20 counsel and have a fair trial - - -

21 MS. HERSHEY: I don't think you can - - -

22 CHIEF JUDGE LIPPMAN: - - - to participate  
23 in his defense?

24 MS. HERSHEY: I think you have to look at  
25 each case as a fact - - -

1 CHIEF JUDGE LIPPMAN: But I'm asking you to  
2 put yourself in the defendant's shoes.

3 MS. HERSHEY: In this particular - - -

4 CHIEF JUDGE LIPPMAN: Would you feel that  
5 way?

6 MS. HERSHEY: In this particular case, I  
7 don't think it had any impact whatsoever on his  
8 ability to speak to his attorney, confer with  
9 counsel. There's no jury present. He doesn't have  
10 to worry about jangling chains.

11 CHIEF JUDGE LIPPMAN: How would you know  
12 that, counsel? How would you know that?

13 MS. HERSHEY: I don't know that, but based  
14 upon this record - - -

15 CHIEF JUDGE LIPPMAN: So how would you come  
16 to this conclusion?

17 MS. HERSHEY: This record does not show  
18 that there's - - -

19 CHIEF JUDGE LIPPMAN: Because you want to  
20 say just on its face it's okay. But there's got to  
21 be a rationale, why is it okay? It would seem to me  
22 common sense would say the opposite, that if I'm  
23 sitting and I can't - - - in handcuffs, I'm  
24 uncomfortable, I'm flustered and it affects the way I  
25 - - - my defense is carried out. I can't really

1 confer with my counsel. I would think without  
2 anything else that would be the logical conclusion to  
3 draw, aside from the dignity of the proceedings,  
4 aside from the effect on the fact finder. It would  
5 seem to me almost a given that you really, you know,  
6 don't have the opportunity to really have a full  
7 defense or to participate in the defense.

8 MS. HERSHEY: Well I disagree with that  
9 outcome of your thinking. I do believe that in some  
10 cases it would have no impact whatsoever on the  
11 ability to speak to counsel or assist in a defense  
12 and this is a particular reason - - -

13 CHIEF JUDGE LIPPMAN: You're saying - - -

14 MS. HERSHEY: - - - why a proper objection  
15 is important.

16 CHIEF JUDGE LIPPMAN: - - - you're saying  
17 you disagree - - - and you could disagree with the  
18 judge, that's okay. You're saying you disagree  
19 because you think the logic is the opposite? That  
20 the logic is that if you're sitting there with  
21 handcuffs in front of you that you could fully  
22 participate in your defense? Without knowing more,  
23 that's the conclusion you come to?

24 MS. HERSHEY: I think there's no indication  
25 that that would impact your ability to speak with

1 your counsel, no.

2 JUDGE CIPARICK: Well assuming we disagree  
3 with you, what about the harmless error analysis?

4 MS. HERSHEY: Harmless error analysis does  
5 apply to cases involving shackling. This court has  
6 said as much in Cruz and Clyde. Here there's no  
7 reasonable possibility that the decision to place the  
8 defendant in handcuffs affected the verdict in any  
9 way.

10 CHIEF JUDGE LIPPMAN: Why not, counselor?  
11 Where's the overwhelming evidence? You have a, by  
12 anyone's standards, a dim defendant who - - - the  
13 whole defense to this thing is, oh, I didn't - - -  
14 you know, it was a joke. You have a child who is,  
15 you know, saying what happened. Where is the  
16 evidence that would make this harmless error analysis  
17 come out that oh, yes, it's obviously harmless? Why  
18 do you say that there's no possibility?

19 MS. HERSHEY: There's - - - there is  
20 overwhelming evidence of this defendant's guilt. We  
21 have a - - -

22 CHIEF JUDGE LIPPMAN: What's the  
23 overwhelming evidence?

24 MS. HERSHEY: - - - we have a statement of  
25 admission by this defendant where he acknowledges all

1 of the statements he made.

2 CHIEF JUDGE LIPPMAN: The defendant has the  
3 same mental intelligence as the child.

4 MS. HERSHEY: There's no record evidence of  
5 that at all, other than mere speculation. The  
6 evidence is actually clear that the defendant can  
7 appreciate the nature of his actions. He's able to  
8 tell the police that he knew he had problems, he  
9 needed counseling for his problems. He admits that  
10 he offered to pay money to a child to expose himself  
11 sexually. I think this is a classic case of  
12 endangering the welfare of a child. And because the  
13 defendant really doesn't rebut what has been said,  
14 the evidence is overwhelming that he knew or should  
15 have known that this comment was likely to harm the  
16 child.

17 CHIEF JUDGE LIPPMAN: Okay, counselor,  
18 thanks.

19 MS. HERSHEY: Thank you very much.

20 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

21 JUDGE GRAFFEO: If this judge had said I'm  
22 placing handcuffs on the defendant because he  
23 attacked four corrections officers, which apparently  
24 is mentioned somewhere in the briefs, would that have  
25 been enough?

1 MS. FEMAN: It's mentioned somewhere in the  
2 briefs but that's not information that's actually in  
3 the record.

4 JUDGE GRAFFEO: Assume that was - - - that  
5 happened, that this defendant did engage in an  
6 assault with corrections officers while he was in  
7 jail, would that have been adequate - - -

8 MS. FEMAN: Well the point is - - -

9 JUDGE GRAFFEO: - - - if the judge placed  
10 that on the record?

11 MS. FEMAN: The point is the judge needed  
12 to place that on the record so - - -

13 JUDGE GRAFFEO: Would that have been  
14 adequate?

15 MS. FEMAN: It would have been adequate  
16 only so far as if the defense attorney and the  
17 defendant had an opportunity to respond to that. The  
18 defendant is supposed to be warned under the Second  
19 Department Court rules if he's going to be placed in  
20 handcuffs. He's supposed to be warned that if he  
21 continues to be a danger in court or if he acts out  
22 in court, that he will be handcuffed. We don't have  
23 that in this case. We don't have a court - - -

24 CHIEF JUDGE LIPPMAN: Yes, but a well-  
25 documented security reason is enough to - - - in

1           general to shackle or handcuff or whatever it is.  If  
2           it's placed on the record and there's a real security  
3           risk in a general way, security is a valid reason for  
4           it - - - the prominent reason for doing it?

5                   MS. FEMAN:  If it's shown that the security  
6           reason satisfies an essential state interest specific  
7           to the defendant and the defendant also has an  
8           opportunity to respond to it.  This court has never  
9           allowed willy-nilly handcuffing in any - - -

10                   JUDGE PIGOTT:  Well that response would  
11           have been important here because as I understand it  
12           whenever that altercation happened in the jail,  
13           subsequently he was in court without handcuffs.

14                   MS. FEMAN:  That's exactly correct.  So the  
15           - - -

16                   JUDGE PIGOTT:  There was no problem and  
17           then all of the sudden they showed up again at the  
18           trial.

19                   MS. FEMAN:  Right.  The handcuffing took  
20           place after the incident at the jail took - - - the  
21           no handcuffing took place after the incident at the  
22           jail which shows that this court, the bench judge was  
23           acting irrationally.

24                   JUDGE PIGOTT:  Well, your point is the  
25           defendant should have at least been able to make the

1 argument. You know, Judge, I don't know why you're  
2 doing it now because you know - - -

3 MS. FEMAN: Exactly; when you weren't doing  
4 it before. And the fact that the judge later  
5 handcuffed the defendant further shows that maybe  
6 since it was after the Sandoval that the judge was  
7 acting upon the very information the judge wasn't  
8 supposed to be acting on, which is exactly when the  
9 presumption that a judge will follow the rule of the  
10 law gets rebutted; when the judge makes an error and  
11 then acts on that very error. Just as - - - I think  
12 the best example to show that the presumption gets  
13 rebutted would be if this was a jury trial and we had  
14 a juror who raised their hand and said to the Court,  
15 I can sit on this jury but only so long as you  
16 handcuff and shackle this defendant for the duration  
17 of the trial, without having any reason for making  
18 that request.

19 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
20 you both.

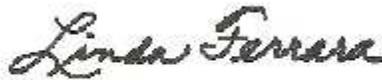
21 MS. FEMAN: Thank you.

22 CHIEF JUDGE LIPPMAN: Appreciate it.

23 (Court is adjourned)  
24  
25

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

I, Linda Ferrara, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE v. EMIL BEST, No. 191 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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