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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 9

OSCAR SANDERS,

Respondent.

20 Eagle Street
Albany, New York
January 5, 2023

Before:

ACTING 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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1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 Number 9, People v. Oscar Sanders.

3 Good afternoon.

4 MR. MCREYNOLDS: Good afternoon, Your Honors.

5 May it please the Court. Chase McReynolds of
6 Davis Polk, counsel with Legal Aid Society, on behalf of
7 defendant, Appellant Oscar Sanders.

8 This was a close case where the jury deliberated
9 for ten hours over three days and submitted nine notes.
10 Before the jury ever finalized its verdict, the trial court
11 committed reversable error by shackling Mr. Sanders for no
12 reason.

13 Today, I plan to concentrate on this
14 unconstitutional error and Mr. Sanders's life sentence,
15 which was the product of a fatally flawed sentencing
16 procedure.

17 JUDGE WILSON: Let me just ask you about the - -
18 - the shackling for a moment. It isn't a hundred percent
19 clear from the record the way I read it, but it seemed as
20 if this particular judge had a policy of always handcuffing
21 the defendants in - - - from the point in time when the
22 jury said - - - returned the note saying, we have a
23 verdict, while the sentence was being pronounced. Is that
24 your understanding of that practice there?

25 MR. MCREYNOLDS: Correct, Your Honor.



1 The record supports that the defense counsel
2 objected to this routine policy by the trial court, and
3 that's all the record reflects.

4 JUDGE GARCIA: I'm sorry, Counsel. Just so I'm
5 clear, I did read it as he's shackled during the - - -
6 after the verdict, right?

7 MR. MCREYNOLDS: Your Honor, he was handcuffed -
8 - -

9 JUDGE GARCIA: I'm sorry, handcuffed after the
10 verdict.

11 MR. MCREYNOLDS: He was handcuffed before the
12 jury entered the courtroom to read its verdict, and before
13 - - -

14 JUDGE GARCIA: I see.

15 MR. MCREYNOLDS: - - - the jury was polled.

16 JUDGE GARCIA: I see.

17 So the - - - the handcuffing takes place, then
18 the jury comes in. So he's handcuffed when the jury comes
19 in, they read their verdict, they're polled, I understand
20 the objection was made, and that's - - - that's the record
21 we have here. And in addition to Judge Wilson's indication
22 that this is the judge's policy, right?

23 MR. MCREYNOLDS: Yes, with one other point, Your
24 Honor, and that's Mr. Sanders, like everyone else in the
25 courtroom, was asked to rise - - -



1 JUDGE GARCIA: Yes.

2 MR. MCREYNOLDS: - - - when the jury entered, and
3 that would have made his handcuffs even more apparent to
4 the jury.

5 ACTING CHIEF JUDGE CANNATARO: So - - - yeah, I
6 was going to ask you that - - - to elucidate that part of
7 the record. Your position is that the handcuffs were
8 visible during the delivery of the verdict?

9 MR. MCREYNOLDS: Correct, Your Honor.

10 The record doesn't reflect - - -

11 JUDGE SINGAS: Well, that's speculation, right?
12 I mean, you don't - - - nobody noted that for the record.

13 MR. MCREYNOLDS: Nobody noted the visibility of
14 the handcuffs, Your Honor, but that's not what is required
15 for a constitutional error under this court's - - -

16 JUDGE RIVERA: But nobody said it wasn't visible,
17 but defense counsel made that representation as part of the
18 objection?

19 MR. MCREYNOLDS: That's right, Your Honor.

20 JUDGE RIVERA: Prosecutor didn't say, no, they're
21 not, they're covered. Court didn't say, keep his hands
22 under the table?

23 MR. MCREYNOLDS: No, Your Honor.

24 The record we have is that the Court overruled
25 the objection, and in the same breath asked the jury to



1 enter the courtroom.

2 JUDGE RIVERA: Let me ask you this, let's just go
3 with this assumption that it is a policy, that is how
4 defense counsel described it and no one said otherwise.
5 Because it's a policy, is it then subject to harmless
6 error? Is there any argument that it shouldn't be subject
7 to harmless error because it's a - - - it's a routine
8 handcuffing, which is exactly what the court index said is
9 absolutely unconstitutional?

10 MR. MCREYNOLDS: Your Honor, we don't argue that
11 harmless error. Here, harmless error is a - - - is a fair
12 argument to make, but there is no harmless error because at
13 the moment that - - - at the moment that the jury saw Mr.
14 Sanders in handcuffs, that crucial moment, the verdict was
15 not yet final.

16 JUDGE GARCIA: Counsel, do we - - - and you're
17 going to give facial talents to the policy, I take it. But
18 do we - - - and it seems like the Appellate Division did
19 this. It seems as if the Appellate Division, in their
20 harmless error analysis, factored in the stage of the
21 proceeding, right? I mean, they did - - - it's a polling
22 error. You know, it would be apparent in the polling of
23 the jury, that's where the harm would take place, right?
24 In the polling, because the trial is over, the evidence is
25 in, the verdict is rendered, it just hasn't been given. So



1 the verdict's the verdict when they talk into the
2 courtroom. It hasn't affected the piece of paper they
3 have.

4 But do we do that? Should we take into account
5 that in the harmless error analysis, that this error is in
6 the - - - would have taken place in the polling of the
7 jury?

8 MR. MCREYNOLDS: No, Your Honor.

9 That was actually an argument that counsel - - -
10 defense counsel brought up in the federal case Deck v.
11 Missouri. And - - -

12 JUDGE GARCIA: The death penalty phase?

13 MR. MCREYNOLDS: Yes, correct. That was at the
14 death penalty phase of the trial.

15 JUDGE TROUTMAN: And is polling an indispensable
16 part of the process here?

17 MR. MCREYNOLDS: Yes, Your Honor.

18 Under New York criminal procedure law, the
19 verdict is not final until the jury has been polled, if
20 defense counsel exercises its right to poll the jury.

21 And so here, the People don't dispute that it was
22 improper for Mr. Sanders to be handcuffed at that time.
23 Rather, the People would just argue that there was no error
24 because the shackles were not visible. But as we've
25 already been over, the record supports the exact opposite,



1 and under this court's standard in People v. Cruz, there is
2 enough of a record to support constitutional error here.

3 JUDGE TROUTMAN: And is it correct here that no
4 reason was given specifically as to this defendant of the
5 necessity of handcuffing or shackling?

6 MR. MCREYNOLDS: That's right, Your Honor.

7 Although the - - - both the federal and state
8 constitutions require a case specific on the record finding
9 of necessity for a defendant to be shackled during the
10 criminal proceedings, that was not done here.

11 JUDGE WILSON: I think you said you also - - -

12 JUDGE GARCIA: I'm sorry. Go ahead, Judge
13 Wilson.

14 JUDGE WILSON: I was going to move to the
15 sentencing, but if you want to continue here.

16 JUDGE GARCIA: Oh, no. I just have one more
17 question then.

18 Deck, death penalty phase of the proceeding - - -
19 did they in Deck, and I just - - - I - - - I can't think of
20 it offhand - - - did they in Deck look at the potential
21 error through the lens - - - I know they said they applied
22 the rule - - - did they look at a harmless error analysis
23 in Deck through the lens of that particular part of the
24 proceeding? And I found it was error in Judge Breyer's
25 opinion.



1 But I don't recall, did they factor into their
2 analysis the fact that it was the death penalty phase
3 rather than the guilt phase of that trial - - -

4 MR. MCREYNOLDS: I don't - - -

5 JUDGE GARCIA: - - - despite the way they came
6 out?

7 MR. MCREYNOLDS: Not that I recall specifically,
8 Your Honor. But there were - - - there were prior - - -
9 Deck relied on precedent that the shackling of a defendant
10 in front of the jury at both - - - in the Holbrook case, in
11 both the guilt phase and the penalty phase of trial is so
12 inherently prejudicial that it should be prohibited - - -

13 JUDGE GARCIA: Right, but there is a harmless
14 error analysis, right?

15 MR. MCREYNOLDS: There is still a harmless error
16 analysis.

17 ACTING CHIEF JUDGE CANNATARO: And that rule is
18 an absolute one. Because - - - I mean, you've heard the
19 question now a couple of times. The evidence is all in,
20 the deliberations have taken place, the verdict has been
21 committed to writing, we presume, the only thing that could
22 possibly be affected by the error temporally is the polling
23 of the jury, and you're saying that that doesn't matter,
24 you know - - - is the law that it's absolutely at any phase
25 of the trial, and you don't factor in where it's happening

1 as part of the harmless error analysis?

2 MR. MCREYNOLDS: Yes, Your Honor.

3 That should be - - - we have cases at the
4 Appellate Division where - - - only a few months ago, the
5 Third Department held in People v. Cain, where the
6 defendant was shackled during a grand jury proceedings,
7 that that was sufficient - - -

8 ACTING CHIEF JUDGE CANNATARO: That's the very
9 beginning, you know. I - - - like I said, all the evidence
10 is in, the case has been deliberated, the verdict is down,
11 it's just polling at this point. It's hard to understand
12 how that could not matter.

13 MR. MCREYNOLDS: I understand - - -

14 JUDGE RIVERA: Let me ask it this way - - -

15 MR. MCREYNOLDS: Yup.

16 JUDGE RIVERA: - - - this may help you to address
17 what I think Judge Cannataro is getting to.

18 At what point in the proceeding is the defendant
19 declared - - - as a legal matter, declared and found
20 guilty?

21 MR. MCREYNOLDS: After the polling is complete
22 and the judge directs the clerk to enter the verdict.

23 So up until that point, the prophylactic rule
24 should be that during criminal proceedings, there is
25 unconstitutional error. And then whether or not the error

1 was harmless is a separate question.

2 JUDGE SINGAS: Was there any indication that - -
3 - during the polling, was there any hesitation on any part
4 of any juror concerning the verdict?

5 MR. MCREYNOLDS: The record - - - there may have
6 been, Your Honor, but the record just reflects a question
7 and answer. So I think the simple answer is no.

8 JUDGE SINGAS: Okay.

9 JUDGE GARCIA: It seems also that - - -

10 JUDGE SINGAS: So do you think that's something -
11 - -

12 JUDGE GARCIA: Sorry.

13 JUDGE SINGAS: - - - that we should consider in a
14 harmless error analysis?

15 MR. MCREYNOLDS: I don't think so, Your Honor.
16 And the reason - - - may I answer the - - -

17 JUDGE TROUTMAN: Is it because - - - is it
18 because if they see the handcuffs, if there was someone who
19 had a hesitation or felt that they were unduly pressured,
20 or something improper happened in the jury room - - - once
21 they see the handcuffs, Okay, then I was wrong, and they
22 don't say anything?

23 MR. MCREYNOLDS: That's one point, Your Honor.

24 That - - - especially here where the
25 prosecution's theory at trial was that Mr. Sanders was



1 prone to anger quickly and prone to physical outbursts.
2 Seeing Mr. Sanders in handcuffs at that crucial point
3 would've only served to reinforce the prosecution's
4 narrative.

5 And the other reason is that I think generally
6 during polling, the record is, you know, boom, boom, boom,
7 quick question and answer. So I'm not sure logistically if
8 most records would ever reflect hesitation.

9 What we do have is deliberations over three days,
10 submitting nine notes on the most hotly contested issues of
11 the trial.

12 ACTING CHIEF JUDGE CANNATARO: Thank you,
13 Counsel.

14 JUDGE GARCIA: It seems - - - I'm sorry. It
15 seems like - - - just to finish this point, and I'm sorry I
16 keep cutting you off Judge Wilson, but - - -

17 ACTING CHIEF JUDGE CANNATARO: You're good.

18 JUDGE GARCIA: This timing - - - I thought about
19 this. My view is your view that the verdict isn't entered
20 until, if there's a request for polling, they do the
21 polling and then it takes place.

22 But it seems that you could have a ministerial
23 requirement, and we've had them in not in this context, so
24 that officially the verdict doesn't get in, and the person
25 may be shackled - - - if they may be shackled during that -



1 - - okay. I think that'd be hard to argue that it isn't
2 harmless, even though it's before the - - - you know, the
3 actual verdict is entered.

4 But, Deck, it's a death penalty phase. He's
5 already been found guilty. I mean, guilt or innocence has
6 been established, and they still said it was error to
7 shackle.

8 So it seems to be the guilt or innocence
9 determination, and unless it's lodged can't be the
10 determinative factor, right? It's - - - it's the potential
11 harm to the defendant. And here the argument is the harm
12 is polling and the influence of the jury seeing him in
13 shackles during the polling process, right?

14 MR. MCREYNOLDS: That - - - I would generally
15 agree, Your Honor, with the caveat that there are two
16 prongs as you know to harmless error, the second being that
17 the evidence - - - the first being the People need to prove
18 that there was no reasonable possibility that the shackling
19 contributed to the verdict; the second being the evidence
20 must be overwhelming. And here, the People cannot meet
21 their burden.

22 JUDGE GARCIA: Oh, I see. Thank you.

23 JUDGE WILSON: And I - - - Counsel had said he
24 wanted to touch on the - - - the other issue he wanted to
25 address was the sentencing issue, which I'd like to hear



1 you on.

2 And it's - - - I think - - - you can say whatever
3 you want. But specifically I think not wanting to
4 characterize the People's argument, but it's basically, no
5 harm, no foul here because the prosecutor put in all the
6 evidence that the court should have put in, and so this is
7 okay.

8 So if you could address that, I'd appreciate it.

9 MR. MCREYNOLDS: Yes, Your Honor, gladly.

10 ACTING CHIEF JUDGE CANNATARO: Summarily, yeah.

11 MR. MCREYNOLDS: Quickly.

12 The language of the statute itself says that the
13 court must submit an order, give notice of that order at
14 least twenty days before the sentencing, of the factors in
15 the defendant's background and prior criminal conduct,
16 which the court deems relevant for the purpose of
17 sentencing.

18 The legislature made the determination where
19 we're talking about the potential for life sentence that is
20 at the court's discretion, that the defendant must go into
21 that sentencing hearing with the full opportunity to
22 prepare for the factors that the court has deemed relevant.

23 Here, that did not happen. There was no order.
24 There was no - - - there were no court factors published or
25 filed. And there was no notice of the hearing even. So



1 not only was there not substantial compliance with the
2 statute, which is what the First Department held, there was
3 no compliance whatsoever with the statute.

4 ACTING CHIEF JUDGE CANNATARO: Thank you.

5 MR. MCREYNOLDS: Thank you.

6 MR. TISNE: May it please the Court. I'm Philip
7 Tisne for the respondent.

8 In the unique circumstances of this case, there's
9 no reasonable possibility that the brief handcuffing of the
10 defendant affected the jury's verdict.

11 JUDGE RIVERA: So before we get to that, let's
12 pick up on the points I think that Judge Garcia was making
13 and asking of defense appellate counsel.

14 So Deck is about the sentencing phase, and as I
15 understood Deck, Deck was merely addressing preliminarily
16 the question of whether or not the existing jurors prudence
17 on the constitutional prohibition on routine shackling,
18 physical restraints, should apply once the guilt phase is
19 over, because the prior jurors had been on the guilt phase,
20 because the concern about the presumption of their
21 innocence being maintained no longer is at play.

22 That is how I understood Deck, which then gets us
23 back to whether or not we are still at a guilty phase in
24 this case. Can you address that before you get to the
25 whole harmless error?



1 MR. TISNE: Well, no. I think that's right. I
2 think there can still be error of a constitutional
3 magnitude in this context. I think Deck leaves open the
4 question of harmlessness. I think Clyde, in this court,
5 answers that question.

6 But I - - - the People's position is not that
7 there could not be categorically an error of the one they
8 alleged occurred here. Our position is simply that if
9 there was an error, setting aside preservation, setting
10 aside whether it was actually seen to the jury - - - if
11 there was an error, in the unique circumstances of this
12 case, where the jury's heard all the evidence, they've
13 deliberated about all the evidence, they've come to a
14 decision that the evidence proves the guilt beyond a
15 reasonable doubt - - -

16 JUDGE TROUTMAN: So is polling not a significant
17 part of the proceedings when the verdict has not even been
18 entered until after that's done, if it's requested?

19 MR. TISNE: No, but I - - - no. It's an
20 important part, but I think it influences what we're
21 talking about when we're talking about a harmless error
22 analysis - - -

23 JUDGE GARCIA: So isn't that - - - this is not
24 error, assuming these other things you're assuming for this
25 question.



1 Your position isn't that this can never be error
2 to shackle in - - - during a verdict and before polling if
3 polling is asked for, that could never be an error. Or are
4 you endorsing a blanket policy, which this judge may have
5 had, that a shackle during a verdict?

6 MR. TISNE: So I want to be careful about how I
7 answer this. It is not the case that an error like this
8 could never be error. There's a lot of negatives there, so
9 I want to make sure I'm clear about that.

10 It is possible for a shackling error, assuming
11 everything - - - yes.

12 JUDGE WILSON: In between the jury saying we have
13 a verdict and actually reading the - - - before the poll -
14 - -

15 MR. TISNE: Yes.

16 JUDGE WILSON: - - - there could be an error in
17 that interstitial period. So what would be an example of
18 that?

19 MR. TISNE: Well, so for instance, if the court
20 had a policy of routinely shackling defendants in the
21 courtroom without giving any individualized explanation
22 for, and that's of course what they've alleged here. We
23 have arguments that that was not what happened here, and we
24 think the record is not clear on that.

25 But again, even if you assume that all of that is



1 true - - -

2 ACTING CHIEF JUDGE CANNATARO: The record is not
3 clear on the fact that the judge gave - - - the trial judge
4 gave no explanation whatsoever for - - -

5 MR. TISNE: Well, so the - - - this is another
6 unique aspect about this case. The judge did give - - - or
7 somebody on behalf of the court did give an explanation - -
8 -

9 ACTING CHIEF JUDGE CANNATARO: On the record?

10 MR. TISNE: No, there was an off the record
11 exchange that happened before we have the on the record
12 comment by counsel in which counsel is apparently told,
13 Your client's going to be in handcuffs, and gives some
14 justification for that which then prompts counsel when he
15 gets back on the record to say, I've just learned that this
16 is because of the court's policy.

17 JUDGE GARCIA: Are you asking for a
18 reconstruction hearing then? Should we send it back and -
19 - -

20 MR. TISNE: No. We've framed it as a failure of
21 defense to make a proper record, and I think - - -

22 JUDGE TROUTMAN: But at that point when you're
23 back on the record, it's the judge's court. It's the
24 judge's responsibility to respond and make the record clear
25 as to why if said policy was in place, or if there was no



1 such policy, isn't it?

2 MR. TISNE: Well, I agree. I also agree that it
3 wouldn't be the - - - would be extraordinary to expect the
4 People to make a record in support of an application that
5 they haven't asked for in support of - - -

6 JUDGE TROUTMAN: No, not the People. When the
7 defense brings it to the attention of the court, it is the
8 court's responsibility to respond with respect to why - - -
9 why are you ordering my client to be shackled. You're
10 saying whatever happened, whatever the defense then tried
11 to put on the record, it wasn't enough for preservation?

12 MR. TISNE: No, I - - - and I don't want to
13 belabor this point, because I - - - at the end of the day,
14 this case turns on - - - this point turns on harmlessness.

15 I think perhaps what happened with this
16 particular judge is having just given his explanation off
17 the record, having got back on the record, and having had
18 counsel object to say not, You haven't sufficiently
19 articulated your justification, but having the objection
20 be, You've articulated your justification, and I just don't
21 think it warrants handcuffing my client, that the judge
22 then said, Okay, fine; I disagree.

23 JUDGE TROUTMAN: Why was it harmless here?

24 MR. TISNE: Why was it harmless here?

25 JUDGE TROUTMAN: Yes.



1 MR. TISNE: Because a harmless error turns on
2 whether there's any reasonable possibility that the error
3 affected the verdict, and again, where the jury's already
4 heard all of the evidence, deliberated on the evidence,
5 comes to a decision that it proves the defendant's guilt
6 beyond a reasonable doubt, and written on the verdict form
7 that we think this defendant is guilty - - -

8 ACTING CHIEF JUDGE CANNATARO: Can we view this
9 from a somewhat more traditional perspective?

10 We heard about - - - many hours of jury
11 deliberation and many notes that were given, which I think
12 was Counsel's effort to say the jury was really struggling
13 with the evidence that was presented in this case.

14 So can you speak to the overwhelming quality of
15 the evidence of guilt, which is what I think would make the
16 error harmless?

17 MR. TISNE: That's right.

18 Well, part of traditional error analysis, of
19 course, involves an assessment of whether the evidence was
20 overwhelming, and we think the evidence was overwhelming.

21 ACTING CHIEF JUDGE CANNATARO: Is that one of
22 your arguments here, that the evidence - - -

23 MR. TISNE: Yes, it is.

24 ACTING CHIEF JUDGE CANNATARO: So tell me about
25 that.



1 MR. TISNE: The main disputed issue at the trial
2 was the defendant's intent, and the proof on that score was
3 very strong.

4 You had two medical experts say that this injury
5 was inconsistent with a blunt force trauma, as would be
6 explained if the defendant, perhaps, punched the defendant
7 and accidentally cut him.

8 You have the victim who said, I felt myself get
9 cut when the defendant dragged his hands slowly down the
10 side of my face. Of course, which is inconsistent with an
11 accidental injury.

12 You have the photos, of course, themselves that
13 show the injury, which is common sense; not something that
14 looks like an accident.

15 You have the testimony from multiple witness that
16 the defendant's conduct was threatening and aggressive
17 towards the victim himself, proving that he had a
18 motivation to hurt the victim.

19 And then, of course, you have the testimony that
20 days before the graduation, the defendant armed himself by
21 hiding a scalpel blade in his hat, the very same hat that
22 he then wore to the graduation, suggesting a level of
23 premeditation that was inconsistent with accidental injury.

24 There was overwhelming proof that the defendant
25 intentionally slashed this victim, and that's reflected in



1 the fact that after the jury got all of the information
2 that it had requested about the assault charges, that it
3 deliberated for two hours and came back with the unanimous
4 verdict on both of those counts.

5 So no - - - I mean, I think there is a way to
6 conceive harmless error analysis in this context that
7 doesn't require a finding of overwhelming evidence. But
8 make no doubt, the evidence was overwhelming on this - - -

9 JUDGE RIVERA: Yes. As I understood your
10 argument on the harmless error, it sounded to me like a per
11 se rule.

12 Once the jury has reached a verdict and announced
13 to the clerk or whoever - - - or the officer, whoever's
14 available to them - - - or sent the note to the judge
15 saying we've reached a verdict, then it's done. You can
16 shackle someone, and that is completely harmless because
17 the jury has made its decision.

18 MR. TISNE: No, and I think here the defense - -
19 -

20 JUDGE RIVERA: Well, then I misunderstood you
21 because I thought that's where you were starting.

22 MR. TISNE: No.

23 JUDGE RIVERA: Okay.

24 MR. TISNE: And let me be clear, I think the
25 defense and the People agree here that prejudice in this



1 context really is measured by whether there's a realistic
2 possibility that any juror was considering recanting their
3 vote to convict.

4 JUDGE RIVERA: But that - - - that's illusory.
5 No one can ever say that. You're not going to be able to
6 say that. That is an insurmountable burden on the
7 defendant.

8 MR. TISNE: I think - - -

9 JUDGE RIVERA: But what is considered
10 unconstitutional conduct - - -

11 MR. TISNE: Your Honor - - -

12 JUDGE RIVERA: - - - by the court?

13 MR. TISNE: - - - I disagree. I agree that it is
14 - - - would be an extraordinary case, I agree that those
15 are rare cases, but there are things that happen in trials
16 all the time would suggest extraordinary levels of juror
17 dissent.

18 JUDGE RIVERA: Yeah, at the trial, but actually
19 walking in and being able to say I think that - - - what
20 are they going to do, go to the jurors afterwards and say,
21 Would you - - - when you saw the handcuff, did that change
22 your mind?

23 MR. TISNE: They could.

24 JUDGE RIVERA: Did that affect you?

25 MR. TISNE: They could. They could - - - the



1 jurors could have said - - -

2 JUDGE RIVERA: How is that a workable rule?

3 Rather than making clear that you can't have this kind of
4 policy, and so the court heard, and it is not - - - well,
5 first of all, I don't actually think harmless error applies
6 to this. I think that once you have a policy, it strikes
7 me as very odd to argue for harmless error. Harmless error
8 applies in individualized circumstances.

9 But even on the harmless error, it's just an
10 unworkable rule.

11 MR. TISNE: I think the court - - -

12 JUDGE RIVERA: That rule - - - that doctrine does
13 not exist for something like this.

14 MR. TISNE: So - - - so - - - let me emphasize
15 first that this is a very rare set of circumstances.

16 JUDGE RIVERA: Agreed.

17 MR. TISNE: This is a very limited - - - I mean,
18 sort of - - - courtroom restraints are rare as it is. This
19 is a very sort of unique type of courtroom restraint.

20 JUDGE RIVERA: Except for a judge who has a
21 policy. Wouldn't that make it easier then to decide the
22 case?

23 MR. TISNE: And here's where preservation - - -

24 JUDGE RIVERA: If it's so rare, it will not
25 affect many judges or many cases.



1 MR. TISNE: Judge, here's where preservation I
2 think is a real problem. It's not even so much a problem
3 for the parties, I think it's a problem for the court
4 because I don't think you know what the court's policy is.

5 You know - - -

6 JUDGE RIVERA: Well, it must have been this one.
7 You're saying there was an off the record discussion, and
8 then counsel comes on and says I just learned it's a
9 policy, and the judge doesn't say anything.

10 MR. TISNE: But it could very - - - it could just
11 as easily have been - - - and I agree that I'm engaging in
12 speculation here. But it could just as easily have been
13 where the defendant has an extremely long and violent
14 criminal history, where he is accused of a violent act, and
15 where, if convicted, is facing a very long prison sentence
16 that yes, in those circumstances, I have a policy of
17 requiring a defendant who has not been handcuffed
18 throughout the - - -

19 JUDGE TROUTMAN: But again, it is the judge who
20 controls his or her courtroom, and it is a judge's
21 responsibility to so state that under the circumstances of
22 this particular case, that is the reason of what happened,
23 and we just simply don't have that set forth.

24 JUDGE GARCIA: But wouldn't you read - - -

25 MR. TISNE: Fair enough, Judge Troutman. And my



1 point in making that speculation is just to say if this
2 court is poised to write a decision about an
3 unconstitutional policy, I don't think there is a record
4 for you to say anything definitively about a policy.

5 JUDGE GARCIA: But wouldn't your record - - -
6 your record that you just gave us - - - oh, he's applying a
7 death penalty phase, I mean, what could be worse than that?
8 The person's looking at a death sentence. And this person
9 may be looking at life, but what's - - - you know, why
10 would then there be - - - you per se have a rule in death
11 phase cases, which we don't, that you can check because
12 wow, the stakes are high. The person's been convicted, and
13 they may be executed.

14 MR. TISNE: Well, no. Defendants commit death
15 eligible cases as their first offense, you know, it's not -
16 - - it is possible - - -

17 JUDGE GARCIA: So it's a misstep - - -

18 MR. TISNE: And I'm not foreclosing that in some
19 other case - - - I'm not suggesting that if the policy that
20 I've speculated could have existed in this case was in fact
21 the policy that the court had, that our office would defend
22 it, or say that was not error - - - subject to harmless
23 error review.

24 All I'm saying is that we don't know what the
25 policy is, and so if this court is - - - is - - - this



1 court is not in a position to write anything definitively
2 about what the court's policy is, and that that is at least
3 partly a reflection of defense counsel's failure to make a
4 record and as well, of course, the court's failure to
5 articulate the record on that.

6 JUDGE WILSON: Well, I think that's fair, but
7 would I take from the - - - from your point about we don't
8 really know what a juror might have done had the defendant
9 not been in shackles, maybe they would have done exactly
10 what the juror did, which is to say that's my verdict, or
11 might have done something different. Unless there's a - -
12 - you know, a operational concern of some sort, wouldn't it
13 seem better to you, given that uncertainty, to require the
14 statement on the record of why you are restraining a
15 defendant in that interstitial period.

16 Make that the rule, right? Extend the - - - make
17 sure the rule applies to that, because then you would
18 eliminate that uncertainty. You would either have a
19 statement from the court that could then be reviewed for
20 its reasons, or you would have no restraint, in which case
21 you wouldn't have the uncertainty because the juror
22 wouldn't be affected by that.

23 MR. TISNE: And at the end of the day, if that
24 were the rule, so be it. The error would - - - still be
25 harmless.



1 ACTING CHIEF JUDGE CANNATARO: Thank you,
2 Counsel.

3 MR. TISNE: Can I just briefly address - - -

4 ACTING CHIEF JUDGE CANNATARO: You're way over
5 your light. Very briefly say what you want to say.

6 MR. TISNE: The only point is that the statutory
7 purpose of 400.20 is to give the defendant notice of and an
8 opportunity to contest the factors the court is going to
9 consider when it's deciding whether to impose a PFO
10 sentence.

11 The People's motion detailed all those factors.
12 The defendant fully litigated all those factors. The court
13 relied on all those factors. And of course, those are all
14 of the same factors that the court - - -

15 JUDGE RIVERA: So did defendant then waive this
16 argument as a consequence of participating?

17 MR. TISNE: Rather than call it a waiver, what
18 I'd like to say is that the failure of any objection shows
19 that there was no prejudice that the defendant experienced
20 here from what we agree was a statutory violation.

21 JUDGE RIVERA: You mean an objection that there
22 wasn't a court order? Because there was an objection - - -

23 MR. TISNE: He said we have to order a hearing.

24 JUDGE RIVERA: - - - but he made the objection
25 about the court order.



1 MR. TISNE: But what he didn't say was - - - and
2 I have no idea what factors you're going to consider, Your
3 Honor, because you've never issued the addendum to the
4 order that orders the hearing.

5 So there was a statutory violation, there was no
6 prejudice.

7 JUDGE WILSON: Well, how about the - - - how
8 about the object from counsel's point, although I maybe
9 took more than I should've, that some part of the way the
10 statute is structured is to require the court to be the
11 first to exercise its discretion about what the basis, and
12 whether there was going to be a hearing in the first place,
13 that that effectively got turned over to the prosecutor
14 here. So the court didn't independently exercise its
15 discretion about whether to consider a discretionary
16 persistent felony offender, but effectively ceded that to
17 the prosecutor, and you might have had a different result
18 had the court done that initially.

19 MR. TISNE: I think what happened here was the
20 court said I think this defendant might be eligible for a
21 PFO sentence. People draw up the papers.

22 JUDGE WILSON: Right.

23 MR. TISNE: I don't know how frequently this
24 happens in the courthouse. The PFO sentence is not
25 something that happens often in New York County, or really



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ever frankly.

But in this circumstance, it was clear to everybody that all of the factors that the court was going to be considering in making its PFO decision were the factors that were outlined in the People's papers, litigated by the defendant both in writing and orally, and then pointed to by the - - - by the judge when he made his decision.

So again, statutory error, but under this court's decision, there's no prejudice, and so no new sentencing.

ACTING CHIEF JUDGE CANNATARO: Thank you.

MR. TISNE: Thank you.

(Court is adjourned)

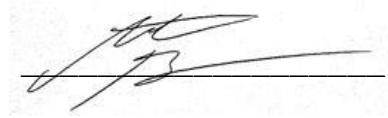


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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Oscar Sanders, No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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