No. 23-972

In the
Supreme Court of the United States

ANGELA GERMAINE SPENCER, BY AND THROUGH NEXT FRIEND AND MOTHER OF A. S., A MINOR,
Petitioner,

v.

HARRISON COUNTY, TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

OTHER AUTHORITIES

STATEMENT OF FACTS

On May 10, 2017, Judge Joe Black found probable cause existed and issued an Order for Immediate Custody of A.S. for assaults on a public servant occurring on April 28, 2017 and May 10, 2017. ROA.441. This Order held probable cause existed for the immediate custody of A.S. in the Harrison County Juvenile Detention Center. ROA.441.

The Motion for Immediate Custody alleged that A.S.'s assault on a teacher was delinquent conduct for the purpose of Section 51.03 of the Texas Family Code. ROA.442-443. The Order of Immediate Custody, signed by County Court at Law Judge Joe Black, found that "there are reasonable grounds to take Plaintiff into custody pursuant to Section 52.01 (a)(1) of the Texas Family Code." ROA.441. The Order of Immediate custody served as both an arrest warrant and a commitment ordering the Harrison County Juvenile Detention Center keep A.S. in its custody "until duly discharged by this Court." ROA.441. As such, the Harrison County Juvenile Detention Center would have been in violation of a facially valid and legally enforceable Court Order had it not accepted A.S. into custody, or had it released A.S. prior to the Juvenile Court ordering his release, which happened on May 12, 2017, two days after Petitioner's admission. ROA.441, 447.

Pursuant to the Order of Immediate Custody, on May 10, 2017, A.S. was detained by the Marshall Independent School District Police Department

("MISDPD")[1] on the charge of Assault on a Public Servant, and was brought to the Harrison County Juvenile Detention Center by MISDPD officers Johnson and Roge at approximately 2:17 p.m. ROA.444-446.

Before A.S. was accepted into the custody of the Harrison County Juvenile Detention Center and the MISDPD officers left, A.S. was searched, in their presence, with a body pat down by a trained and certified officer of the Harrison County Juvenile Detention Center, and a metal-detecting wand was run over all areas where a weapon or other metal contraband might have been hidden underneath his clothing, in compliance with the Center's policy for searching each juvenile detained at the facility. ROA.418, 409, 597.

At no time was a body cavity or strip search performed on A.S. ROA.418, 409, 482, 597-598. At the end of the intake process, A.S. was allowed to shower and directed to a private changing room where he changed from his school clothes into the standard Juvenile Detention Center uniform. ROA.420-421. No Harrison County Juvenile Detention Center staff observed A.S. shower or change clothes. ROA.420-421.

The intake and orientation process was performed by trained and certified officers of Harrison County Juvenile Services, during which A.S. was asked for basic information, informed of the rules while in

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[1] MISDPD is not an office or department of Harrison County, is not under the control of Harrison County and is not funded by Harrison County.

detention, provided information regarding a hotline to the Texas Juvenile Justice Department if he felt his rights were violated or if he was abused, and provided information on how to complete a grievance form if he felt his rights were violated by the Harrison County Juvenile Detention Center or its staff. ROA.420-421, 434-435, 437-440. A.S. was also given a medical health screening, a risk and needs assessment, and an assessment for mental health. ROA.420-421, 434-435, 437-440.

The assessment for mental health, called the "MAYSI-2," showed that A.S. scored a "caution" level on suicidal ideation. ROA.418-420, 434-435, 438-439, 455-466. His score on suicidal ideation was a 2. ROA.418-420, 434-435, 438-439, 455-466. The scores on the MAYSI-2 are from 0 to 5, with 5 being the highest level. ROA.418-420, 434-435, 438-439, 455-466. With A.S.'s score of 2, detention facility staff called the crisis hotline at Community Healthcore (which is the State's local mental health authority in that region) at 3:18 p.m. ROA.418-420, 434-435, 438-439, 455-466. The information on A.S.'s suicidal ideation score was relayed to the individual, "Anna," at the crisis hotline. ROA.418-420, 434-435, 438-439, 455-466. "Anna," at the crisis hotline, informed the detention facility staff that at that time, A.S. did not meet the criteria for a mental health professional to come to the facility for a face-to-face mental health assessment. ROA.418-420, 434-435, 438-439, 455-466.

Even though A.S. did not meet Community Healthcore's criteria for further mental health assessment or action, Juvenile Detention Center staff

placed A.S. on a "cautionary" status per departmental policy and in conjunction with Texas Juvenile Justice Department standards. ROA.419-420, 434-435, 438-439. He was placed on observation by certified facility staff, and he was observed in his housing unit at least every 10 minutes by certified facility staff. ROA.419-420, 434-435, 438-439. This is a more frequent observation period than normal because he had scored a level 2 on suicidal ideation on the MAYSI-2 (juveniles who do not score high, or do not show signs of suicidal ideation, are observed every 15 minutes while in their individual housing units). ROA.419-420, 434-435, 438-439. This was to make sure A.S. did not attempt to cause harm to himself. ROA.419-420, 434-435, 438-439. He remained on this "cautionary" status for the entire duration of his detention. ROA.420, 434-435, 438-439.

Following the intake process, A.S. took a shower at 4:37 p.m., changed into a standard detention facility uniform for juveniles, and all the property on his person was logged and placed in the secured property room in a bin to which his name was assigned. ROA.420. No medications were in his property or brought to the detention facility for him during his stay. ROA.420, 517-518.

On the evening of May 10, 2017 at approximately 6:00 p.m., Angela Spencer approached juvenile probation officer Gala Parker in the juvenile detention center parking lot while Ms. Parker was walking to her car to leave for the day. ROA.430-431. During this conversation, Parker told Angela Spencer that she needed to bring any medication A.S. was taking to the

detention center, and Angela Spencer informed Parker that A.S. was not on any medication. ROA.431.

Angela Spencer did not bring any medication to the detention facility or indicate to any detention facility staff that A.S. was on any medications. ROA.518-519. In her deposition, when asked why she did not take A.S.'s medication to the detention center on her visit, she replied "Honestly, I didn't trust them medicating my kid, I just - - I have fears about it because of everything that was going on with the district, you know, everything that was happening. So, I just had trust issues; so, I didn't want them medicating my kid." ROA.518.

A.S. was introduced into the general population with other juveniles in the pre-adjudication facility, and **assigned an individual cell**, specifically "C2." "C2" is the second closest room to the control room on the "C" pod in which pre-adjudication juveniles are housed. ROA.420-421, 482. The control room is the central hub of the detention facility which is staffed 100% of the time. ROA.421. The facility staff in the control room can see real-time security camera feed from each of the two pods ("B" and "C" pods), as well as the indoor gym and outdoor recreation yard, classrooms, and other areas of the facility. ROA.421. From the control room, the staff member assigned to control room duty is also able to view down each pod with his or her own eyes without use of the security cameras. ROA.421.

During the entirety of A.S.'s stay in detention, there were 16 other juveniles in the pre-adjudication portion of the facility with him. ROA.423, 435. A.S. did not

receive any "write ups" for incidents, or have any instances of behavior warranting disciplinary action, nor was A.S. a victim of abuse by other juveniles or facility staff with whom he had contact. ROA.423, 435. By his own account, A.S. had no problems with any of the detention facility staff or other juveniles during the entirety of his stay at the juvenile detention center, and everyone was nice to him the whole time he was there. ROA.504-508, 510.

A.S. was scheduled for an initial hearing before the juvenile court on May 12, 2017 at 8:45 a.m. ROA.423. While at the detention facility, A.S. was prepared for transport to the courtroom by the probation staff. ROA.423. Dressed in standard detention clothing, A.S. was leg-shackled and handcuffed with a "belly belt" for safety and security reasons. ROA.423-424. This applies to all juveniles being transported to court or any other destination from the detention facility and ordered by the Juvenile Court Judge. ROA.424.

Rather than being taken by probation staff through the public areas of the courthouse, A.S. and the other juvenile going to court that morning were taken through the secure entrance of the Harrison County Sheriff's Office in the basement (which requires an electronic code to be entered) and then up to the first floor of the courthouse on the non-public elevator (which requires a key). ROA.424. After stepping into the waiting room outside the juvenile courtroom, A.S.'s handcuffs were removed, but his leg shackles remained, as is ordered for **all** juveniles who are taken to juvenile court to see the Juvenile Court Judge. ROA.424. The leg shackles are left on to prevent a

juvenile from escaping custody when transported to Court from the detention facility. ROA.424.

Once both juveniles and the probation staff entered into the waiting room, a probation staff member checked the courtroom to make sure there were no adult inmates in the courtroom. ROA.424. Once it was determined there were no adult inmates present, A.S. and the other juvenile were taken into the courtroom and seated in the jury box. ROA.424-425.

A.S.'s mother signed a form stating that she did not want an attorney appointed to A.S. for his initial detention hearing. ROA.425, 500. When court was about to begin on May 12, 2017, no retained attorney was present to represent A.S. for his scheduled detention hearing. ROA.425. The previous day, however, on May 11, 2017, the Juvenile Court Judge had appointed Brendon Roth, attorney at law, to represent A.S. for his detention hearing on May 12, 2017, in case A.S.'s mother had not retained an attorney to represent him that day in court. ROA.425. Brendan Roth was present for the detention hearing on May 12, 2017, and represented A.S. in court. ROA.425. A.S. and his mother met with Mr. Roth in a private room to discuss his case prior to the hearing. ROA.523.

At the close of A.S.'s detention hearing, the juvenile judge ordered A.S.'s release from detention with conditions. ROA.447-449. It was also ordered that A.S. receive a psychological evaluation to possibly diagnose and address any mental health issues or mental disabilities of which the juvenile court and the Harrison County Juvenile Services Department should be aware. ROA.449. Rather than A.S. staying in

detention and waiting for the psychological evaluation to be performed, A.S. was released with the court-ordered psychological evaluation pending and with the instruction to comply with his release conditions. ROA.425,447-449.

A.S.'s entire time detained at the Harrison County Juvenile Detention Center was 1 day, 19 hours, and 55 minutes. ROA.426. The Harrison County Juvenile Detention Center serves as a holding facility, and provides basic care as well as limited rehabilitation services to juveniles brought in by law enforcement agencies and probation departments while awaiting a hearing and/or disposition by a juvenile court or the district attorney's office. ROA.426-427.

Harrison County Juvenile Services has an agreement with the Marshall Independent School District to provide education to juveniles that are detained. ROA.427. A.S. was provided educational services while detained at the Juvenile Detention Center. ROA.484, 486. Several of Angela Spencer's sorority sisters worked at the Harrison County Juvenile Detention Center. ROA.520. Everyone at the Detention Center was polite to A.S. ROA.508, 521. As admitted by Ms. Spencer, the staff members were "really trying to make sure that he (A.S.) was going to be okay without his mom," and they all treated A.S. well and were nice to him. ROA.521.

SUMMARY OF THE ARGUMENT

After a diligent search for cases that address whether it is unconstitutional to leave a juvenile in shackles during a probable cause hearing or a pre-determination hearing before a juvenile court judge, Respondent has not found any cases holding that such an event constitutes a constitutional violation. The adversarial rights of a juvenile defendant in a proceeding to determine delinquency (similar to the adversarial rights in the guilt/innocence or liability phase of a criminal or civil trial), do not exist in the context of a probable cause hearing or a pre-determination hearing. There are no cases that have ever found such a right to exist. Stated as succinctly as possible, a juvenile does not have a constitutional right to have leg shackles removed during a probable cause or pre-determination hearing. Additionally, the Juvenile Court Judge requires shackles to remain in place during probable cause or pre-determination hearings. The County Court at Law Judge is a state actor, not a County actor. The State Juvenile Court Judge controls matters that occur in her court, not the Harrison County Juvenile Board. The Harrison County Juvenile Board is the policymaker for juvenile services in Harrison County.

First, in this case, there is no underlying constitutional violation, and second, there is no unconstitutional Harrison County policy, custom or practice that was ever adopted with deliberate indifference by the Harrison County Juvenile Board. The requirements for County liability as set forth in *Monell* and its progeny do not exist.

ARGUMENT AND AUTHORITIES

I. Issue One: Whether Petitioner has shown that Harrison County violated Petitioner's Fifth and Fourteenth Amendment rights because Petitioner's feet remained shackled during the short pre-detention hearing.

The pretrial detention of juveniles[2] without a Fourth Amendment[3] determination of probable cause would violate the Fourth Amendment. *Moss v. Weaver,* 525 F.2d 1258, 1259-1260 (5th Cir. 1976). As noted in the Statement of Facts, the Juvenile Court in this case made a determination of probable cause prior to the detention of Petitioner. That fact is not disputed. The "Order of Immediate Custody," signed by Judge Joe Black, found that "there are reasonable grounds to take" A.S. into custody "until duly discharged by this Court." After A.S. was taken into custody on May 10, 2017, a "Pre-Determination Hearing" was set for May 12, 2017 – less than 48 hours later. It was at this Pre-Determination hearing that leg shackles were left

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[2] In this instance, the hearing complained of occurred two days after the Court made the probable cause determination and involved a pre-detention hearing where the Court would decide whether to release the juvenile pending a formal "adjudicatory hearing."

[3] The Fifth Circuit noted that this is a Fourth Amendment determination as opposed to an application of variable due process under the Fourteenth Amendment. *Moss,* 525 F.2d at 1259-1260; *Gerstein v. Pugh,* 420 U.S. 103, 125 (1975). The strong principles embedded in the Bill of Rights are not to be put aside merely because the pre-determination hearing is not formally viewed as part of a criminal justice case. *Id.*

on A.S. while he was in front of the Judge. At the close of this hearing, the juvenile judge ordered A.S.'s release from custody with conditions.

A juvenile, in a pre-determination hearing is not entitled to adversarial safeguards under a Fifth or Fourteenth Amendment due process analysis – safeguards such as competent sworn testimony with witnesses subject to cross-examination. *Id.* at 1260. The Fourth Amendment itself does not require such adversary safeguards in a probable cause analysis or a pre-determination hearing and there is no exacting insistence on certainty as there is under a reasonable doubt or even a preponderance standard, and there is less need for the assurances of reliability that the adversary system provides. *Id.* After all, the question of probable cause has for many years been resolved in nonadversary proceedings based on hearsay and written testimony, usually in the context of a magistrate's decision on whether or not to issue an arrest warrant. *Id.* at 1261. Additionally, requiring adversary hearings in cases of pretrial detention hearings would result in pretrial delay and destroy the distinct advantages that the Supreme Court believes juvenile tribunals get from their informal nature. *Id.*

The Fifth Circuit has, for over 40 years, expressed its concerns of subjecting the juvenile court system to the traditional delay, the formality, and the clamor of the adversary system. *Id.*; *McKeiver v. Pennsylvania,* 403 U.S. 528, 545 (1971). The Fifth Circuit has also held that "the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel," or other adversary safeguards.

Moss, 525 F.2d at 1261*; Gernstein v. Pugh,* 420 U.S. 103, 122. The Fifth Circuit case law is very clear that there is no guaranteed right to hear and cross-examine witnesses at a juvenile pre-determination hearing. *Moss,* 525 F.2d at 1261. The two types of juvenile court proceedings that are at "a critical stage" are: 1) a juvenile court proceeding where delinquency is determined and commitment to an institution may result; and 2) a juvenile court proceeding on the issue of whether the juvenile court should waive jurisdiction and transfer the case to "adult" court. *Moss,* 525 F.2d at 1261; *In re Gault,* 387 U.S. 1, 8 (1967); *Kent v. U.S.,* 383 U.S. 541, 560-63 (1966). In the two types of juvenile cases that are at a "critical stage," the exclusionary rule applies,[4] search and seizure protections of the Fourth Amendment apply,[5] right to appropriate notice, right to counsel, right to confrontation, right to cross-examination, and the privilege against self incrimination all apply.[6] Aside from the two types of juvenile proceedings that have been determined to be at a "critical stage," no adjudicative or adversary safeguards have ever been required.

Being restrained by handcuffs or shackles briefly during a pre-determination hearing, a proceeding that is clearly not considered a "critical stage" in the juvenile process, has never been found by any Court to

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[4] *U.S. v. Doe,* 801 F.Supp. 1562, 1567 (E.D. Tex. 1992).

[5] *New Jersey v. T.L.O.,* 469 U.S. 325, 333 (1985).

[6] *McKeiver v. Pennsylvania,* 403 U.S. 528, 533-535 (1971).

constitute a constitutional violation, nor has it ever been determined that a juvenile has a right not to be restrained during a pre-determination or probable cause hearing. This case does not present any unusual circumstance that would justify the creation of a new constitutional right in this regard.

After a diligent search for cases that address whether it is unconstitutional to leave a juvenile in shackles during a pre-determination hearing before a juvenile court judge, Respondent has not found any cases holding that such an event constituted a constitutional violation.

The Supreme Court has determined that the due process clause of the Fifth and Fourteenth Amendments has long forbidden routine use of visible shackles **during a jury trial,** absent a trial court determination that restraints are justified by a state interest specific to the particular defendant on trial. *Deck v. Missouri*, 544 U.S. 622, 622-23 (2005).

There are also cases out of the State of Oregon, the State of Illinois and the State of Washington that deal with restraints used in courtrooms **during actual delinquency proceedings** where the Court is determining whether the juvenile is delinquent and what the term of detention will be, and they have opined that shackling a juvenile is unconstitutional. Respondent will address the cases out of each of these States.

In the State of Oregon, in 1995, the Court of Appeals of Oregon held that **during the juvenile's actual delinquency hearing,** the Juvenile Court's

failure to grant the juvenile's motion to order his leg chains removed in court was harmless error because there was no evidence that the Court's credibility determinations were impermissibly skewed, no indication that the leg chains adversely affected the juvenile's decision to testify and no indication that the juvenile's right to consult with counsel was impaired in any fashion. *State ex rel. Juvenile Department of Multnomah County v. Millican*, 138 Or.App. 142, 147-49 (1995). In 1980, in *State v. Moore*, 45 Or.App. 837, 839-841 (1980), the Court held that shackling a criminal defendant **in an actual juvenile delinquency hearing** is potentially prejudicial by impinging on the defendant's Fifth Amendment and due process rights against self-incrimination by mute testimony of violent disposition. To restrain a defendant in that type of proceeding without substantial justification is a ground for reversal, but a trial judge has the discretion to order shackling of the defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior. Neither of these cases contemplate a "stand alone" constitutional claim for money damages.

In the State of Washington in 2002, the Court of Appeals of Washington, Division 1, held that it was harmless error during an **adjudication of delinquency** when a juvenile appeared in restraints at a bench trial on a felony harassment charge, as the likelihood of prejudice was greatly reduced since the proceeding was without a jury. *State v. E.J.Y.*, 113 Wash.App. 940, 951-953 (2002).

In Illinois, the Appellate Court of Illinois, Third District, held that a juvenile **in a delinquency proceeding** should not be required to appear shackled in the courtroom except when it is necessary and when there are no other less extreme measures available. *In re: Derwin Staley*, 40 Ill.App.3d 528, 530-533 (1976). A good reason must be shown by the state to justify shackling a defendant during his trial before it is determined whether he is innocent or guilty. *Id.* The Supreme Court of Illinois considered the *Staley* case on appeal, and the Supreme Court affirmed the Court of Appeals and held that the rule that an accused should not be subjected to physical restraint while in court unless the restraint is necessary to maintain order is just as applicable to trial by the court as it is to trial by jury. *People v. Staley*, 67 Ill.2d 33, 36-38 (1977). While the Illinois Supreme Court acknowledged that there may be circumstances that justify the restraint of an accused, the accused must pose an escape or safety threat, and that fact must be clearly established in the record. These cases did not recognize a stand alone cause of action for money damages.

There are no cases where a Court has found that use of a shackle is unconstitutional in a probable cause hearing or a pre-determination hearing. Respondent does not believe, for the reasons set forth above, that there was any constitutional violation attributable to Harrison County. However, even if there was a constitutional violation, no violation occurred through the deliberate indifference of Harrison County or its Juvenile Probation Board. While Petitioner cites some authority that an alleged constitutional claim can always have nominal damages awarded, and damages

such as embarrassment and humiliation can be assumed in such cases, Petitioner never pled for nominal damages and Petitioner did not testify or present any evidence of any injury or damage resulting from embarrassment or anything else.

A. Specific Cases Cited by Petitioner

To a very large extent, Petitioner hangs his hat on *United States v. Sanchez-Gomez*, 859 F.3d 649, 659-71 (9th Cir. 2017), *vacated and remanded*, 584 U.S. 381, 138 S. Ct. 1532, 200 L. Ed. 2d 792 (2018). While the *Sanchez-Gomez* cases are extremely interesting to read, the Supreme Court vacated the Ninth Circuit's judgment and remanded with instructions to dismiss the case as moot. *Id.* For that reason, Respondent would strongly suggest that case not be given any weight, and certainly not the weight of the other cases which have been cited in the arguments of the Parties hereto.

The other cases cited by Petitioner, can be grouped as follows.

1. Parties Should Not be Unnecessarily Restrained in Front of a Jury

In *In re C.B.*, 386 Ill. App. 3d 735, 744-45, 898 N.E.2d 252, 260-61 (2008), *aff'd sub nom. In re Jonathon C.B.*, 2011 IL 107750, 958 N.E.2d 227, *as modified on denial of reh'g* (Nov. 28, 2011), the Appellate Court held that the trial court erred in permitting the criminal defendant to be: 1) brought into court in the presence of the jury by the jailer with handcuffs; 2) while also handcuffed to another prisoner; and 3) to remain so manacled during the greater part

of the trial; to which the defendant at the time objected and excepted. Although it is within a Court's discretion to restrain the defendant and will not be reversed absent an abuse of that discretion, the court must hold a hearing outside the presence of the jury, allowing the defendant's attorney the opportunity to argue why the defendant should not be shackled. *Id.* at 744. If the trial court orders the defendant to remain shackled, the court must also state the reasons for its decision on the record. *Id.* In Illinois, this rule applies to both bench and jury trials on the merits of the criminal case. *Id.* (citing *People v. Strickland*, 363 Ill.App.3d 598, 603, 300 Ill.Dec. 297, 843 N.E.2d 897, 901 (2006)). The court held that the shackling of an accused should be avoided if possible because shackling: (1) tends to prejudice the jury against the accused; (2) restricts the accused's ability to assist his counsel during trial; and (3) offends the dignity of the judicial process. *Id.* (citing *People v. Boose*, 66 Ill.2d 261, 265, 5 Ill.Dec. 832, 362 N.E.2d 303, 305 (1977)). Therefore, *Boose* held that an accused should not be kept in restraints while in court and in the presence of the jury unless there is a manifest need for such restraints. *Id.* The *Boose* court set out factors to be considered by the trial judge in making his determination, and stated that the record should clearly disclose the reason underlying the trial court's decision for the shackling, and show that the accused's attorney was given an opportunity to oppose this decision. *Id.* Thereafter, in *In re Staley*, 67 Ill.2d 33, 7 Ill.Dec. 85, 364 N.E.2d 72 (1977), the court extended *Boose* protections to juveniles being tried in delinquency proceedings. The *Staley* court noted that there is no jury trial in delinquency proceedings, but pointed out that the "possibility of prejudicing a jury,

however, is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity for doing so." *Id.* at 37. An accused also has the right to stand trial "with the appearance, dignity, and self-respect of a free and innocent man." *Id.* The court also noted that shackling restricts the ability of an accused to cooperate with his attorney and to assist in his defense. *Id.* Therefore, the reasons for forbidding shackling were not limited to trials by jury. The rule in Illinois, however, is limited to trials.

In *People v. Best*, 19 N.Y.3d 739, 744-45, 979 N.E.2d 1187, 1189 (2012), the Appellate Court noted that the District Court had articulated no justification, let alone one specific to the defendant, for ordering the defendant's continual restraint. While such a basis may very well have existed, the court's failure to say so on the record constituted a violation of defendant's constitutional rights under *Deck*. *Id.* at 744 (citing *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005)). However, in New York, a constitutional harmless error analysis applies to shackling violations. *Id.* In this case, the Court concluded that the trial court's omission was indeed harmless. *Id.* A constitutional error may be harmless where evidence of guilt is overwhelming and there is no reasonable possibility that it affected the outcome of the trial. *Id.* It must also be noted that *Best* involved a criminal case, an adult defendant and a jury trial on the merits.

In *Sides v. Cherry*, 609 F.3d 576, 578-86 (3d Cir. 2010), the Third Circuit decided that "fairness in a jury trial, whether criminal or civil in nature, is a vital

constitutional right," and that concerns over restraints should extend not just to criminal defendants, but to inmates bringing civil actions and inmate-witnesses as well. The Third Circuit Court of Appeals held that requiring a party in a civil trial to appear in shackles "may well deprive him of due process unless the restraints are necessary," and a district court's decision to restrain an inmate physically during a civil trial is reviewed on an abuse of discretion standard. *Id.* at 581. District courts should balance the prejudice to the prisoner-plaintiff against the need to maintain safety or security. *Id.* District courts have a "responsibility to determine whether [a prisoner-plaintiff's] due process right not to appear before the jury in shackles ... [is] outweighed by considerations of security." *Id.* When a district court determines that restraints are necessary, it should "impose no greater restraints than are necessary, and must take steps to minimize the prejudice resulting from the presence of the restraints." *Id.* at 581-82. When physical restraints are necessary, a district court "should take appropriate action to minimize the use of shackles, to cover shackles from the jury's view, and to mitigate any potential prejudice through cautionary instructions." *Id.* District courts should hold a proceeding outside the presence of the jury to address the issue with counsel. *Id.* at 582. If there are genuine and material factual disputes regarding the threat to courtroom security posed by a prisoner-plaintiff, an evidentiary hearing is called for. *Id.* In determining whether an inmate should be physically restrained during trial, district courts may rely on a variety of sources, including (but not limited to) records bearing on the inmate's "proclivity toward disruptive and/or violent conduct" (such as the inmate's

criminal history and prison disciplinary record), and the opinions of "correctional and/or law enforcement officers and the federal marshals." *Id.* Although a district court may rely "heavily" on advice from court security officers, it "bears the ultimate responsibility" of determining what restraints are necessary, and "may not delegate the decision to shackle an inmate to the marshals." *Id.* If a trial court delegates the shackling decision to court security officers, "that is not an exercise of discretion but an absence of and an abuse of discretion." *Id.* In the *Sides* case, the Court adopted the Deputy Marshal's advice, but the Court acknowledged that the Marshal's view was only a recommendation and that the Court "could have the shackles removed." *Id.* The Third Circuit, however, held that it did not need to determine whether the District Court abused its discretion because it concluded that any error was harmless. *Id.* at 584. The Third Circuit recognized that trial courts have the weighty responsibility of ensuring the security of their court rooms, and endorse their broad discretion in determining whether it is necessary to have a prisoner-party or witness physically restrained during a civil trial. *Id.* at 585-86. So long as a district court engages in an appropriate inquiry and supplies a reasonable basis for its decision, the Third Circuit will always defer to its determination that physical restraints are necessary to ensure courtroom security, as the trial judge is uniquely positioned and qualified to make that determination. *Id.* at 586. Importantly here, the *Sides* case involved a jury trial on the merits of an adult defendant in a criminal case.

In *United States v. Henderson*, 915 F.3d 1127, 1132-41 (7th Cir. 2019), the Seventh Circuit held that a due-process challenge to a judge's shackling order can be effectively reviewed as part of the "regular appeals process," so Henderson did not lack an adequate remedy. Accordingly, the Court declined to construe the notice of appeal as a petition for mandamus and was left with an interlocutory appeal that did not fall within the collateral-order doctrine. *Id.* at 1129. Consequently, the Seventh Circuit dismissed the appeal for lack of jurisdiction. *Id.* However, the Seventh Circuit went on to reiterate that the trial judge was the person responsible for making the decisions, and the judge could not simply delegate that responsibility to the Marshals Service or other correctional or security staff. *Id.* at 1135-36. Although a trial court's decisions about the required level of security during a trial are entitled to deference, those decisions must be made by the court itself; the trial judge may not delegate his discretion to another party. *Id.* While the trial court may rely 'heavily' on the marshals in evaluating the appropriate security measures to take with a given prisoner, the court bears the ultimate responsibility for that determination and may not delegate the decision to shackle an inmate to the marshals. *Id.* at 1136. This need for a decision by the judge runs through the Supreme Court's decisions on courtroom restraints, as well. *Id.* The Fifth and Fourteenth Amendments prohibit use of physical restraints visible to the jury "absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* (citing *Deck v. Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007 (2005)). The *Henderson* and

Deck Courts made it clear: the level of security needed during trial is to be determined by the Judge, not security personnel.

In *United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015), the Eleventh Circuit stated as follows:

> [I]t is laid down in our ancient books that, though under an indictment of the highest nature, [a defendant] must be brought to the bar without irons.... But ... a difference was taken between the time of arraignment and the time of trial; and accordingly the [defendant] stood at the bar in chains during the time of his arraignment.

4 William Blackstone, Commentaries *321 (footnotes omitted); *see also* Trial of Christopher Layer, 16 How. St. Tr. 94, 100-01 (K.B. 1722) ("No doubt when he comes upon his trial, the authority is that he is not to be 'in [chains]' during his trial.... Here he is only called upon to plead by advice of his counsel; ... when he comes to be tried, if he makes that complaint, the Court will take care he shall be in a condition proper to make his defense...."). The Eleventh Circuit emphasized that the Supreme Court made clear in *Deck* that the rule "was meant to protect defendants appearing at trial before a jury." *Id.* (quoting *Deck v. Missouri*, 544 U.S. 622, 626, 125 S. Ct. 2007, 2011 (2005)). Indeed, as the Eleventh Circuit pointed out, the Second Circuit had also held that the rule does not apply to sentencing proceedings without a jury, *United States v. Zuber*, 118 F.3d 101, 102 (2d Cir.1997) ("[T]he rule that courts may not permit a party to a jury trial to appear in court in physical restraints without first conducting an independent evaluation of the need for these restraints

does not apply in the context of a non-jury sentencing hearing."). *Id.* Because the rule against shackling pertains only to a jury trial, the Eleventh Circuit held that it did not apply to a sentencing hearing before a district judge. *Id.*

In *United States v. Zuber*, 118 F.3d 101, 103-06 (2d Cir. 1997), the Second Circuit rejected, as a matter of law, the contention that the district court erred in deferring to the recommendation of the Marshals Service on the need to restrain the defendant at his sentencing hearing, and the Court wrote to distinguish the *Zuber* case from those in which the Court has required an independent, on the record, judicial evaluation of the need to employ physical restraints in court. Courts have recognized the danger to a criminal defendant in being required to appear before a jury in physical restraints. *Id.* at 103. In particular, "courts [have] found that the appearance of the [party] in shackles would prejudice the jury, causing them to believe that the person was dangerous." *Id.* Accordingly, the Second Circuit has held that a presiding judge may not approve the use of physical restraints, in court, on a party to a jury trial unless the judge has first performed an independent evaluation, including an evidentiary hearing where necessary, of the need to restrain the party. *Id.* The possibility that jurors will be prejudiced by the presence of physical restraints is not the sole rationale for placing strict limitations on their use in court, but juror bias certainly constitutes the paramount concern in such cases. *Id.* at 103-04. Indeed, courts will find harmless error where it is determined that the use of restraints was unlikely to have influenced members of the jury.

Id. Here, in contrast, it is the alleged prejudice in the mind of the sentencing judge that serves as the basis for the defendant's due process claim. *Id.* at 104. The Second Circuit declined to extend the rule requiring an independent judicial evaluation of the need to restrain a party in court to the context of non-jury sentencing proceedings. *Id.* Either directly or through courtroom deputies, law clerks or secretaries, district judges regularly consult with the Marshals Service regarding precautions to be taken at hearings involving persons who are in custody. *Id.* The Marshals Service is, of course, charged with the movement of persons in custody in and around the courthouse, and responsible also for court security. *Id.* Not surprisingly, in most such cases, a district judge will defer to the professional judgment of the Marshals Service regarding the precautions that seem appropriate or necessary in the circumstances. *Id.* Moreover, it has never been suggested, and it is not the rule, that every time a person in custody is brought into a courtroom in restraints, a hearing on the record with counsel is required, much less an evidentiary hearing and fact-finding by the district judge. *Id.* The Second Circuit traditionally assumes that judges, unlike juries, are not prejudiced by impermissible factors, *see, e.g., LiButti v. United States*, 107 F.3d 110, 124 (2d Cir.1997)). *Id.* For instance, many of the management problems which a trial court invariably has to wrestle with in order to guard against unfair prejudice when one takes the proverbial Fifth simply do not exist in the context of a bench trial. *Id.* A judge conducting a bench trial can hear evidence that he ultimately determines to be inadmissible without prejudice to his verdict, and the Second Circuit made no exception. *Id.* The Second

Circuit presumed that where, as in *Zuber*, the court defers without further inquiry to the recommendation of the Marshals Service that a defendant be restrained at sentencing, the court will not permit the presence of the restraints to affect its sentencing decision. *Id.* The Second Circuit was confident that experienced district judges are able to avoid the influence of inappropriate, irrelevant, or extraneous information. *Id.*

B. Not Every Court Proceeding Requires an Individual Assessment Before Restraining a Juvenile in Court

In *State v. Doe*, 157 Idaho 43, 49-58, 333 P.3d 858, 864-73 (Ct. App. 2014), Doe contended that for a juvenile to be shackled in any juvenile court proceeding, due process requires that an adversarial hearing be conducted, after which a court must make individualized findings about the individual juvenile regarding whether the juvenile may continue to be shackled during subsequent court proceedings. The Appellate Court held that due process requires that juveniles in Idaho be afforded the same rights as adults to be free from physical restraints at trial, absent a finding of necessity on a case-by-case basis, in the equivalent juvenile proceeding in Idaho, which is an evidentiary hearing. *Id.* at 53. However, the Appellate Court in Idaho stated:

> We take care to note that our decision does not extend to the length argued by Doe-that due process prohibits routine shackling of juveniles in any juvenile proceeding, including the preliminary hearing at issue in this case. Although we do not dispute the rationality of

> such an argument, and indeed, strongly suggest that inquiry into the propriety of such a practice, and the extent to which it occurs in Idaho, would be a worthy undertaking by the Juvenile Rules Advisory Committee of this State, we cannot say that such a prohibition is required by due process. Neither the United States Supreme Court nor the Idaho Supreme Court have held that due process prohibits routine shackling of adults in preliminary proceedings, and thus, to adopt Doe's argument in this regard would require us to forge entirely new ground without basis in the existing law of this State.

Id. at 57-58.

In Oregon, in *State ex rel. Juv. Dep't of Multnomah Cnty. v. Millican*, 138 Or. App. 142, 148, 906 P.2d 857, 860-61 (1995), the Appellate Court determined that the presence of shackles affected the trial court's assessment of the evidence, particularly on critical issues of credibility. At the beginning of the delinquency proceeding, the juvenile court stated that the leg chains "won't affect the Court's view of the evidence here." *Id.* The child's trial counsel concurred, stating that she "frankly believe[d] the court can overlook that," and made no record either during or after the proceeding as to any prejudicial impact on the juvenile court as the trier of fact. *Id.* The child argued on appeal, that nevertheless, even if the presence of shackles did not somehow bias the court's assessment of his credibility, his demeanor itself – that is, the manner in which he presented himself to the court through posture, facial expressions, and the like – was

affected by his shackling. *Id.* The Court held that whatever the merits of such a consideration in a different case might be, it was unsupported on the record in *Millican*. *Id.* Based on the Court's independent review of the evidence, the Court did not believe that the trial court's credibility determinations were impermissibly skewed. *Id.* As to the second and third potential sources of prejudice, the Court held that there was no indication in the record that the leg chains adversely affected the child's decision to testify, or inhibited him from consulting with counsel. *Id.* On the record before the Appellate Court, the Court was satisfied that any constitutional error in denying the child's motion to be unshackled was harmless beyond a reasonable doubt. *Id.*

C. Blanket Shackling Applies to Pre-trial Proceedings in Washington State

In *State v. Jackson*, 195 Wash. 2d 841, 847-58, 467 P.3d 97, 100-05 (2020), the Appellate Court held that pretrial shackling without an individualized determination of need violated Jackson's constitutional rights. Consequently, the Washington State Supreme Court extended the trial protections against blanket shackling policies to pretrial proceedings as well. *Id.* The Court noted that it was "well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." *Id.* at 852 (citing *State v. Finch*, 137 Wash.2d 792, 842, 975 P.2d 967 (1999) (plurality opinion)). The Supreme Court in the State of Washington determined that the constitutional right to a fair trial was also implicated by shackling and

restraints at nonjury pretrial hearings. *Id.* at 852. However, trial court judges are vested with the discretion to determine measures that implicate courtroom security, including whether to restrain a defendant in some capacity in order to prevent injury. *Id.* However, that discretion "must be founded upon a factual basis set forth in the record." *Id.* at 852-53. The Court held that a broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be "potentially dangerous" was a failure to exercise discretion. *Id.*

II. Issue Two: Whether Harrison County had a policy, custom or practice of violating the constitutional rights of Juvenile Defenders.

To impose liability on a local government under section 1983, proof of three elements are required: 1) a policymaker; 2) an official policy; and 3) a violation of constitutional rights whose "moving force" is the policy or custom. *Monell v. Dep't. of Social Sciences*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978). *Monell* and later decisions reject municipal liability predicated on *respondeat superior*, so any unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur; isolated unconstitutional actions by local government employees will almost never trigger liability. *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th. Cir. 1984), cert. denied, 472 U.S. 1016, 105 S. Ct. 3476 (1985); *McKee v. City of Rockwall*, 877 F.2d 409, 415 (5th Cir. 1989), *cert. denied*, 493 U.S. 1023, 107 L. Ed. 2d 746, 110 S. Ct. 727 (1990).

Municipal liability for Section 1983 violations results if a deprivation of constitutional rights was inflicted pursuant to official custom or policy. Official policy is ordinarily contained in duly promulgated policy statements, ordinances or regulations. But a policy may also be evidenced by custom, that is, a persistent, widespread practice of government officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. *Id.* Actions of officers or employees of a municipality or a county do not render the entity liable under Section 1983 unless they execute official policy as above defined. *Webster v. Houston*, 735 F.2d 838, 841 (5th Cir. 1984). Also, such an unofficial policy must have been effectively "adopted" by a policymaker, who showed deliberate indifference to the persistent widespread practice that was occurring, and the threat of deprivations of constitutional rights it caused, and did nothing to correct it. *Id.* As the *en banc* court stated in *Webster*, if "actions of city employees are to be used to prove a custom for which the municipality is liable, those actions *must have occurred for so long or so frequently that the course of conduct warrants the attribution to the [policymaker] of knowledge that the objectionable conduct is the expected, accepted practice of city employees*." *Id.* (emphasis added).

For a Texas county, its Juvenile Board has policymaking authority over juvenile services, juvenile detention and juvenile probation. *See, e.g. Flores v. Cameron County*, 92 F.3d 258, 264-269 (5th Cir. 1996). For Defendant Harrison County to be liable for the

conduct of the Juvenile Board as policymaker in allowing or implicitly approving a *de facto* policy, the Board must have known of persistent and widespread conduct that was likely to result in the particular violation suffered by the Plaintiff and chose to allow it to continue. *Id.* Deliberate indifference of this sort is a stringent test, and "a showing of simple or even heightened negligence will not suffice" to prove municipal culpability. *See Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1389, 1390 (1997). Stated another way, to establish county liability in this case, the "policy" must have been a "deliberate and conscious choice" **by the Board** to allow the conduct that allegedly caused the injury. *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197 (1989). Likewise, if Plaintiff alleges an official written policy of the County, that too must have been adopted with deliberate indifference to the fact that the policy would result in the particular violation of which Plaintiff complains. *See, e.g. Benavides v. County of Wilson*, 955 F.2d 968, 973-74 (5th Cir. 1992).

In addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation. *Id.* *Monell* describes the high threshold of proof by stating that the policy must be the "moving force" behind the violation. *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-2038. So, in the present case, Plaintiff must plead and prove both the causal link ("moving force") and the county's degree of culpability ("deliberate indifference" to federally protected rights). *Id.* These requirements must not be diluted, for if a court fails to adhere to rigorous

requirements of culpability and causation, municipal liability collapses into respondeat superior liability. *See, e.g. Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998).

Following the orders of the Juvenile Court Judge to keep shackles in place during a probable cause or pre-determination hearing is not a policy of Harrison County.[7] It is pursuant to the Court's order. Juveniles are not shackled during adjudication of delinquency. Petitioner has failed to identify an unconstitutional formal written policy of the Juvenile Board. Petitioner has also failed to prove a particular widely persistent pattern of behavior that could be characterized as an unconstitutional practice or custom adopted with deliberate indifference by the Juvenile Board for the purposes of imposing county liability.

CONCLUSION

After a diligent search for cases that address whether it is unconstitutional to leave a juvenile in shackles during a probable cause hearing or a pre-determination hearing before a Juvenile Court Judge, Respondent has not found any cases holding that such an event has ever been found to constitute a constitutional violation. The adversarial rights of a juvenile defendant in a proceeding to determine delinquency (similar to the adversarial rights in the guilt/innocence or liability phase of a criminal or civil trial), do not exist in the context of a probable cause

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[7] A juvenile could appeal the Court's order, but a judge has absolute immunity for a civil action brought pursuant to 42 U.S.C. § 1983.

hearing or a pre-determination hearing. There are no cases that have ever found such a right to exist. Stated as succinctly as possible, a juvenile does not have a constitutional right to have leg shackles removed during a probable cause or pre-determination hearing. Additionally, the Judge that requires shackles to remain in place during probable cause or pre-determination hearings is a State actor, not a County actor. The State Juvenile Court Judge controls matters that occur in her court, not the Harrison County Juvenile Board – which is the policymaker for juvenile services in Harrison County.

First, there is no underlying constitutional violation, and second, there is no unconstitutional Harrison County policy, custom or practice that was ever adopted with deliberate indifference by the Harrison County Juvenile Board. The requirements for County liability as set forth in *Monell* and it progeny do not exist in this case.

Respectfully submitted,

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