No. 120133

IN THE SUPREME COURT OF ILLINOIS

In the matter of BENNY M., Alleged to be a person subject to involuntary administration of psychotropic medication People of the State of Illinois, Petitioner-Appellant v. Benny M., Respondent-Appellee	Appeal from the Appellate Court Second Judicial District No. 2-14-1075 Original appeal from the Circuit Court of Kane County No. 2014 MH 103 Honorable Robert Villa, Presiding Judge

BRIEF OF RESPONDENT-APPELLEE, BENNY M.

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TABLE OF CONTENTS

POINTS AND AUTHORITIES

I. This case should be dismissed as moot, because the State, as the complaining party in this Court, has not analyzed mootness or demonstrated how a mootness exception applies at this level of review.

II. If this appeal is not dismissed as moot, then this Court should find that the appellate court was correct in reversing the trial court.

D. Though not addressed by the appellate court, this Court should require trial courts to give counsel the opportunity to present reasons for removing shackles.

E. Keeping Benny shackled was prejudicial, and the appellate court correctly assigned the burden to the State to prove that the error of shackling Benny did not contribute to the trial court's judgment.

STATEMENT OF FACTS

Benny M.'s involuntary-medication trial occurred over two days. (C.28-30; R.1,61) The trial was conducted in the courtroom on-site at the Elgin Mental Health Center campus, in the Center's Kilbourne Administration Building. (C.8,10-15) On each court date, security officers transported Benny by van from his Elgin unit to the Kilbourne Building's courtroom in shackles – that is, with cuffs secured around his wrists and feet, connected to a waist belt. (C.13; R.4,118)

Security removed the shackles on the first court date, and Benny attended the nearly 90-minute trial with freedom of movement. (C.28; R.118) Security did not remove the shackles on the second court date so Benny's counsel had to ask for their removal: "before we proceed, my client is wearing shackles. I would ask that they be removed." (R.63)

The trial court asked whether there was any objection. (R.63). The State's attorney and the treating psychiatrist were both present, but said nothing. (R.63)[1] The trial court asked, "for security purposes, is there anything I should know about or – (sic)." (R.63) The security officer who transported Benny from his Elgin unit to the Kilbourne courtroom said "He's listed as high elopement risk." (R.63) Benny commented, "I figured that." (R.63) The security officer then offered "I have documentation if you would like to see that." (R.63)

The following exchange then occurred:

> *Trial court*: I would be happy to [see the documentation] if that's what security is representing to the court. I don't think there is any – excuse me. I

[1] The treating psychiatrist was present for continuation of her testimony begun on the first day of trial. (R.59,63,68)

> don't think there is any reason to doubt the veracity. I will review them (sic).
>
> (Pause)
>
> *Trial court*: Have you had a chance to review this beforehand?
>
> *Benny M.'s trial counsel*: No, Judge. -
>
> *Trial court*: Patient transport checklist. -
>
> *Benny M.*: I just want to say something. High risk for - elopement, where am I going to go? I'm trapped. -
>
> *Benny M.'s trial counsel*: Be quiet. -
>
> *Benny M.*: I said I wanted to be here, and I was willing to - even be present in this crap. This is kind of interesting. I - mean I can laugh about it, too. I have a sense of humor.
>
> *Trial court*: I will leave him in custody in the shape he is in now. The request is denied. Are you prepared to proceed with [cross-examination of] Dr. Luchetta?
>
> *Benny M.'s trial counsel*: Yes.

(R.63-64)

Although the trial court paused to review the security officer's "patient transport checklist," it did not tender the document to either Benny's counsel or the State's attorney for review, even when Benny's counsel advised the court that she had not been given an opportunity to review the document. (R.63-64) The trial court also did not make the document part of the record in this matter. (C.1-34)

Benny's counsel then asked for her client's right hand to be unshackled so that they could communicate in writing during the court proceeding: "so he can take some notes, if I have any questions [for him] or there's issues we need to raise (sic)." (R.65) While Benny's counsel was making the request and the trial court was

answering that "There's obviously got to be a balance of whatever security feels is necessary and his ability to participate," Benny was commenting "Do you think I am going to take the pen or something and try to stab someone with it?" (R.65)

The trial court asked Benny's counsel whether she felt her client would be unable to participate in the proceedings with his hands restrained and she answered "Certainly with his right hand restrained, yes." (R.66)

The trial court questioned Benny about whether he was right-handed or left-handed then ultimately ruled that "If there is a need to take notes, I will consider your request," though Benny's counsel had just stated the purpose of removing Benny's shackles was so that he could take notes and also to communicate with her. (R.65,66) Benny remained fully shackled for the duration of the three-hour proceedings that day, at times expressing discomfort and pain. (C.30; R.129,144,145)

Regarding the petition at issue, the treating psychiatrist specifically did not allege – and the trial court did not find – that Benny had engaged in "threatening behavior," one of three bases for a petition for involuntary treatment pursuant to the Mental Health and Developmental Disabilities Code. (C.3; R.180-181) 405 ILCS 5/2-107.1(a-5)(4)(B) (West 2017). Instead, the petition alleged the other two bases: that Benny had deteriorated in his ability to function and had exhibited suffering. (C.2-3)

Benny was at Elgin Mental Health Center because he had been found "unfit to stand trial" for an alleged battery against his mother. (R.11,12) His treating psychiatrist testified that his mother visited him several times while Benny has been

hospitalized at Elgin, and Benny testified that when his mother visits he gets to "sit down and have a meal with her, like a regular person" – without shackles – and is able to "hug her and give her a kiss at the end" of the visits. (R.90,120)[2]

Benny went to the gym and weight room at Elgin, and met weekly with his counsel, all without shackles. (R.117-120) Benny testified that he would be shackled, however, during trips back and forth between Elgin and Cook County, where his criminal case was pending. (R.119)[3]

There was no testimony during the trial that Benny had attempted to elope either from the hospital or from the courtroom during proceedings on earlier dates. (R.1-140)

The court found Benny subject to involuntary medication based in part on Benny's speaking out in the courtroom. (C.32-33; R.181-182). Benny appealed. (C.34)

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[2] The trial court struck hearsay statements the State elicited with respect to Benny's criminal case. (R.93) In doing so, the trial court noted that the current proceeding was about involuntary medication only, and not about whether a violent offense may have been committed sometime in the past. (R.93)

[3] Benny had attained fitness to stand trial at some point and Elgin transported him back to the Cook County Jail. (R.12,71) But Benny did not stand trial, although both Elgin and Cook County forensics concurred that Benny was fit to do so. (R.71) Instead, he was at Cook County Jail for "several weeks or months" according to Dr. Luchetta, awaiting trial until he allegedly lost his "fitness" and was sent again to Elgin. (R.71-72) Cook County Jail's Cermak Hospital provides mental-health treatment and files involuntary-treatment petitions in Cook County. *See* Cook County Circuit Court, County Division, case-management and hearing-date schedule for civil involuntary mental-health cases at http://www.cookcountycourt.org/Portals/0/County%20Division/Schedules/County%20schedule.PDF. It is therefore unclear why Benny was returned to Elgin rather than treated at the Cook County Jail's hospital. Benny was not convicted in Cook Co. 13 CR 2864, and his matter was taken "off call" pursuant to his discharge on July 10, 2015.

The appellate court reversed, finding that the trial court had wrongly kept Benny shackled, over his objection, during the three-hour hearing based only on an unidentified security officer's "patient transport checklist." *In re Benny M.*, 2015 IL App (2d) 141075, ¶¶30,33. The appellate court found prejudice because the trial court based its decision for involuntary psychotropic medication, in part, on Benny's speaking out in court. *Id*. at ¶36. The appellate court noted Benny had no option but to use his voice in court because the trial court even denied a request to unshackle Benny's writing hand. *Id*. at ¶31. The appellate court found that the trial court had not followed its earlier *Mark P.* decision, a decision that stopped short of explicitly requiring a *Boose* hearing in mental-health cases, but held "[a]t minimum, a respondent appearing before a judge for trial or hearing should not be shackled without good cause shown on the record." *Id.* at ¶27, *citing In re Mark P.*, 402 Ill. App. 3d 173, 178 (2nd Dist. 2010), *citing People v. Boose*, 66 Ill. 2d 261 (1977). The appellate court here explicitly held that the *Boose* presumption against restraints applies in civil involuntary mental-health proceedings and that the *Boose* factors should be considered in deciding whether a respondent must remained shackled in future proceedings under the Mental Health Code. *Id.* at ¶29.

ISSUES PRESENTED FOR REVIEW

I. - Whether this case should be dismissed as moot, because the State, as the complaining party in this Court, has not analyzed mootness or demonstrated how a mootness exception applies at this level of review.

II. - Whether, if this Court reviews this case under a mootness exception, this Court should find that the appellate court was correct in reversing the trial court.

A. - Whether the appellate court was correct that the trial court erred when it failed to make an independent assessment of the need for keeping Benny shackled and instead deferred to security.

B. - Whether the appellate court correctly found that the trial court failed to state its findings for keeping Benny shackled.

C. - Whether, as the trial court has the obligation to show good cause on the record for in-court shackling, Benny had no obligation to put in evidence the transport checklist the trial court relied on to keep Benny shackled.

D. - Whether, though not addressed by the appellate court, this Court should require trial courts to give counsel the opportunity to present reasons for removing shackles.

E. - Whether keeping Benny shackled was prejudicial, and the appellate court correctly assigned the burden to the State to prove that the error of shackling Benny did not contribute to the trial court's judgment.

III. - Whether, if this Court reviews this case under a mootness exception, it should adopt the standards of Rule 943 that limit shackling of minors in delinquency proceedings because the Juvenile Court Act's purpose of rehabilitation and protection of the public is similar to that of the Mental Health Code's goals of treatment and protection of the public, and both statutes stem from the State's *parens patriae* interest. Moreover, there are medical and therapeutic considerations in mental-health proceedings not present in criminal cases.

ARGUMENT

I. This case should be dismissed as moot, because the State, as the complaining party in this Court, has not analyzed mootness or demonstrated how a mootness exception applies at this level of review.

This case is now moot, as the 90-day order in this matter expired going on three years ago, on January 1, 2015. (C.32) Although moot, the State has not demonstrated that this case meets an exception to the mootness doctrine for review in this Court. For this reason, this matter should be dismissed.

When appealing an otherwise moot matter, the appellant has the burden of demonstrating that a mootness exception applies. *In re a Minor*, 127 Ill. 2d 247, 258 (1989). The appellant or complaining party at this stage of review is the State.

The State would have this Court believe that once a mootness exception is established at a lower-level of review – by a different appellant – it is established for each generation of review, without looking at the current complaining party before it. State's brief at 13 (footnote 1) and 16 (footnote 2). However, if that were true, there would be no need for this Court to analyze whether mootness exceptions apply in otherwise moot cases that reach the highest level of review in Illinois where the appellate court had previously applied a mootness exception. *See, e.g., In re Andrew B.*, 237 Ill. 2d 340, 346-347 (2010); *In re James W.*, 2014 IL 114483, ¶¶18-21; *In re Lance H.*, 2014 IL 114899, ¶¶12-14; *In re Rita P.*, 2014 IL 115798, ¶¶29-40.

Here, the State did not analyze whether a mootness exception now applies at the Supreme Court level in this matter, but refers to mootness only in two footnotes. State's brief at 13 (footnote 1) and 16 (footnote 2). The State claims in these footnotes that the public-interest exception now applies and that the parties here

"agree" on this. *Id.* But the State argued in the appellate court that the public-interest exception did not apply because there was no need for further guidance. State's appellate-level appellee's brief at 20 (citing *In re Mark P.*, 402 Ill. App. 3d 173 (2nd Dist. 1010)). And the State did not ask, and Benny M. does not agree, that this appeal – at this level – now meets the public-interest exception to mootness.

Also in a footnote, the State notes that it agreed with Benny M. that the capable-of-repetition-yet-evading-review exception to mootness applied at the lower, appellate level, of review, when Benny was the complaining party. State's brief at 13 (footnote 1). Here, however, the State offers no analysis how the exception can apply now.

The State, as the complaining party here, fails to analyze mootness or demonstrate how this case now meets an exception to the mootness doctrine.

The public-interest exception does not apply here.

The public-interest exception to mootness is "narrowly construed." *In re Alfred H.H.*, 233 Ill. 2d 345, 355-356 (2009). This means the party asserting the public-interest exception is required to make "a clear showing" of all three criteria before a court can review an otherwise moot case. *Alfred H.H.*, 233 Ill. 2d at 356. These criteria are as follows:

> (1) the question presented is of a public nature;
> (2) there is a need for an authoritative determination for the future guidance of public officers; *and*
> (3) there is a likelihood of future recurrence of the question.

Alfred H.H., 233 Ill. 2d at 355, *citing to People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622 (1952) (italics added). The State is the party asserting the public-interest

exception at this level – not Benny M. – but it provides no "clear showing" of how the current case meets each of the criteria.

Other than its two footnotes to its brief, and its original appellate-level argument against the public-interest exception, the State's only other mention of the public-interest mootness exception is a conclusory statement in its petition for leave to appeal that the exception should now apply: that is, the Second District's application of a "criminal standard" for shackling respondents in civil mental-health proceedings will cause disarray in the law and lacks precedence. State's PLA at 19; State's brief at 13 (footnote 1) and 16 (footnote 2); State's appellate-level appellee's brief at 20. But here, the State does not assert the appellate court was wrong to explicitly apply a "criminal standard" for shackling to mental-health recipients in civil mental-health proceedings and instead asks this Court to examine the appellate court's determination that the trial court abused its discretion in Benny's case. Compare State's PLA, Argument I, with State's brief in this Court. This type of review is akin to sufficiency-of-the-evidence review that this Court held not to meet the public-interest exception. *Alfred H.H.*, 233 Ill. 2d at 356-357.

Despite the State's speculation, there is no disarray in the law or diverging approaches on the shackling issue. Instead, *Mark P.* and *Benny M.* are the only two cases (from the same Appellate district) addressing this issue and they are in accord. *See, generally, Mark P.*, 402 Ill. App. 3d 173; *Benny M.*, 2015 IL App (2d) 141075; *but see Andrew B.*, 237 Ill. 2d 340, 347 (2010) (applying public-interest exception to moot case due to disagreement among appellate districts) and *Rita P.*, 2014 IL

115798, ¶38 (applying public interest exception to moot case due in part to inconsistent positions among different counties' State's attorneys).

The State has also failed to demonstrate a "substantial likelihood" that the material facts of Benny's case are likely to recur. *Alfred H.H.*, 233 Ill. 2d at 358. The State argues this Court should reverse the appellate court's determination that the trial court abused its discretion by making no findings on the record before deciding to keep Benny in shackles over the objection of his trial counsel. See State's brief at 16, summary of argument. The State asks this Court to excuse the lack of findings, and to consider any facts in the record, taken as a whole, to support the trial court having kept Benny shackled. State's brief, Argument 4. But fact-oriented, "[s]ufficiency of the evidence claims are inherently case-specific reviews that do not present the kinds of broad public interest issues" for application of the public-interest exception. *Alfred H.H.*, 233 Ill. 2d at 356-357.

The public-interest exception requires the party asserting justiciability to clearly show each element of the exception in order for this Court to apply it. *Alfred H.H.*, 233 Ill. 2d at 356. Where a case calls only for fact-specific review, and "'does not present a situation where the law is in disarray or there is conflicting precedent,'" then the public interest exception does not apply. *Alfred H.H.*, 233 Ill. 2d at 357-358 (citation omitted).

The capable-of-repetition-yet-evading-review exception does not apply here.

The capable-of-repetition-yet-evading-review exception to mootness focuses on whether the question is likely to occur again involving the same complaining party who is requesting application of the exception. *In re Alfred H.H.*, 233 Ill. 2d

345, 358 (2009). For the capable-of-repetition exception to apply here, the State – as the complaining party – must demonstrate two elements: "the challenged action must be of a duration too short to be fully litigated prior to its cessation and there must be a reasonable expectation that the same complaining party would be subjected to the same action again." *Alfred H.H.*, 233 Ill. 2d at 358.

Other than Footnote 1 to its brief, the only other mention of the capable-of-repetition mootness exception is a conclusory statement in the State's petition for leave to appeal: "the capable of repetition yet evading review exception to the mootness doctrine also would be applicable since the respondent could be subject to further mental health proceedings where the shackling issue could again arise." State's PLA at 19. Thus the State ignores the first criterion altogether and ignores that *it* – not Benny M. – is now the complaining party at this level of review.

Notably, the situation here is different than in most mental-health appeals, where it is the aggrieved mental-health respondent arguing for application of the capable-of-repetition exception. When a mental-health respondent appeals an involuntary mental-health order, he is appealing a 90- or 180-day order that has expired by the time of appellate review, and but for that review would have no redress. *See, e.g. In re Amanda H.*, 2017 IL App (3d) 150164, ¶¶26-28. The State is not in this position.

Under the exception, there must be a reasonable expectation that the *same complaining party* – here, the State – would be subjected to the same action again. The State does not show that it could be subjected to the same action again, nor is it discernible what this action may be, as the State is not subject to shackling. Instead,

the State puts forth Benny M. as the person who could be subjected to shackling again, but he is not the complaining party at this level of review. State's PLA at 19. Benny sought review at the appellate level to obtain relief should he face a similar issue in the future, where the appellate resolution "would have some bearing" if the issue were to arise in a subsequent case against him. *Alfred H.H.*, 233 Ill. 2d at 360. Benny now has his resolution. The appellate court resolved Benny's shackling issue by pointing out the errors in his case and by explicitly setting out clear procedures for a trial court to follow and factors for the trial court to consider should he face being shackled in any future mental-health proceedings. *Benny M.*, 2015 IL App (2d) 141075. The State cannot use him as the complaining party here to engineer a mootness exception.

The State thus has not demonstrated that the capable-of-repetition-yet-evading-review exception to mootness applies to it as the complaining party in this Court.

As neither the public-interest nor the capable-of-repetition-yet-evading-review exceptions apply here, this Court should dismiss the State's appeal.

II. If this Court reviews this case under a mootness exception, then this Court should find that the appellate court was correct in reversing the trial court.

Benny M., who was not alleged to be harmful, was shackled on his way to court and kept in shackles based only on a transport checklist instituted in reaction to an escape attempt during transport by a different recipient two months before Benny's proceedings. Frank J. Mautino, Illinois Auditor General, *Performance Audit,*

Department of Human Services' Forensic Patient Transport Procedures, August 2016, 20, 26-27, http://www.auditor.illinois.gov/Audit-Reports/Performance-Special-Multi/Performance-Audits/2016_Releases/16-DHS-Forensic-Transport-Full.pdf.

The trial court was aware of Benny's shackles because Benny's counsel requested their removal. The trial court denied the request, though it failed to engage in an independent assessment about whether shackles were necessary and provided no reasons for its decision. For these reasons, the appellate court was correct to reverse the trial court.

The use of shackles on a criminal defendant or a juvenile offender in a court of law is considered presumptively improper. *People v. Boose*, 66 Ill. 2d 261, 265 (1977); *In re Staley*, 67 Ill. 2d 33, 36-37 (1977). This is true whether or not there is a jury. *Staley*, 67 Ill. 2d at 37; *In re A.H.*, 359 Ill.App.3d 173, 183-184 (2005). Shackles are disfavored for three reasons. First, with a jury, there is a risk of prejudice because the defendant is present in shackles. *Boose*, 66 Ill. 2d at 265. As Justice Posner has succinctly stated: "[t]he sight of a shackled litigant is apt to make jurors think they're dealing with a mad dog."*Maus v. Baker*, 747 F.3d 926, 927 (7th Cir. 2014). Second, shackles restrict the ability of the person on trial to assist his counsel during the trial and can interfere with his ability to communicate with his lawyer. *Deck v. Missouri*, 544 U.S. 622, 631 (2005), *citing Illinois v. Allen*, 397 U.S. 337, 344 (1970); *Boose*, 66 Ill. 2d at 265; *Staley* 67 Ill. 2d at 36-37. Finally, the use of shackles also "'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Deck*, 544 U.S. at 631, *quoting Allen*, 397 U.S. at 344. The courtroom's formal dignity, which includes the respectful treatment of litigants,

reflects the importance of the proceedings at issue, the gravity of any deprivation of an individual's liberty, and the seriousness of purpose in our judicial system and its power to inspire confidence in its outcomes. *Deck*, 544 U.S. at 631. Use of shackles without justification undermines this important part of procedural justice. *Id.*

Accordingly, trial courts must determine whether there is a manifest need for shackles, make findings detailing the reasons to keep a party shackled, and provide counsel an opportunity to provide reasons why shackles should be removed. *Boose*, 66 Ill. 2d at 266; *In re Mark P.*, 402 Ill. App. 3d 173, 178 (2nd Dist. 2010). As the trial court here did none of these things, the appellate court was correct to reverse this matter.

A. The appellate court was correct that the trial court erred when it failed to make an independent assessment of the need for keeping Benny shackled and instead deferred to security.

Here, the trial court was aware that Benny M. was in shackles in the courtroom on the second day of the trial. Benny M.'s counsel made the trial court aware that her client was still in shackles after being transported from his Elgin Mental Health Center unit to the facility's courtroom and asked for removal of the shackles. (C.13; R.63,118) Having been made aware that Benny M. was in shackles in the courtroom, the trial court was then obliged to either order Benny released from the shackles or hear evidence to support the manifest need for Benny to remain in them. *In re Jonathon C.B.*, 2011 IL 107750, ¶76; *Mark P.*, 402 Ill. App. 3d at 178.

The trial court made no independent assessment here to determine whether any need existed for Benny to remain shackled in the courtroom. (R.64) Moreover, the State did not object to Benny's counsel's request to remove the shackles. (R.63)

Cf. People v. Kelley, 2013 IL App (4th) 110874, ¶27 (State objected to defense counsel's request to remove shackles and stated reasons for objection). Benny's doctor, who was present in the courtroom, did not object either. (R.63-64) Instead, the only information the judge relied on was from an unidentified security officer who had transported Benny from his unit to the courtroom. (R.63) That security officer informed the trial court that Benny was listed as a high-elopement risk on a "patient transport checklist," and handed the transport checklist to the trial court. (R.63) Based on this checklist, the trial court decided to leave Benny shackled. (R.64)

The trial court relied on no other information. It did not question Dr. Luchetta, the treating psychiatrist. (R.64) It did not question the unidentified security officer either, instead stating it had no reason "to doubt the veracity" of the paper that person handed to the court. (R.63) Because the trial court relied on only one factor – Benny's alleged elopement risk – it abdicated control of its courtroom to an unidentified transporting security officer and his transport paper. *See Jonathon C.B.*, 2011 IL 107750, ¶72 (courts are generally presumed to know and follow the law *unless the record shows otherwise*).

Transporting security officers have security as a priority, and may face a sobering audit process if one of their charges escapes. *See, generally, Performance Audit*, *supra.* It thus should come as no surprise when security officers prefer someone they are escorting to remain as secure as possible. *Lemons v. Skidmore*, 985 F.2d 354, 358 (1993). However well-intended, such officers cannot be considered impartial. *Id.* Moreover, theoretical security reasons alone are generally insufficient

to warrant physical restraint in the courtroom. *People v. Allen*, 222 Ill. 2d at 348. Additional security rather than shackles may address any courtroom concerns, as shackles "should not be permitted unless there is a clear necessity for them." *Staley*, 67 Ill. 2d at 38. It was thus error in the *Lemons* case for a trial court to defer to the Department of Corrections in keeping a defendant shackled in court, without conducting a hearing to decide, for itself, whether in-court shackles were necessary. *Id.* at 356, 358. Likewise, the appellate court was correct in finding that the trial court erred in deferring to security here. *Benny M.*, 2015 IL App (2d) 141075, ¶30, *citing to Mark P.*, 402 Ill. App. 3d at 177.

The State suggests that the trial court here did not give "blind deference" to the transporting officer, but instead examined "evidence" and gave Benny's counsel a chance to review the "evidence." State's brief at 27. But there was no evidence. The "evidence" the State refers to here is the transport checklist; however, the trial court did not file or admit this checklist as evidence. (R.63-64; C.1-34) Also, the transport checklist was for purposes of forensic-patient transport, a document now required in transporting all forensic patients hospitalized at Elgin. *Performance Audit* at 9-13, 20. The trial court thus relied on a transport document that noted Benny to be a flight risk during transport to court. With the trial court conducting no additional inquiry, its decision to keep Benny shackled was a wholesale delegation of its authority and did indeed amount to blind deference to the transporting officer. *Lemons*, 985 F.2d at 358; *see also People v. Reese*, 2015 IL App (1st) 120654, ¶103, *citing People v. Allen*, 222 Ill. 2d at 348 (trial court improperly deferred to officers in keeping defendant in shackles).

B. The appellate court correctly found that the trial court failed to state its findings for keeping Benny shackled.

Since *Boose*, trial courts have been on notice that they must state reasons on the record to support in-court shackling of a party appearing before it. *Boose*, 66 Ill. 2d at 266. And since *Mark P.*, trial courts have had guidance that this requirement applies in mental-health proceedings. *Mark P.*, 402 Ill. App. 3d at 178. A trial court can exercise its discretion to keep a mental-health respondent shackled, but, "at minimum," the court must establish "good cause shown on the record" in order to do so. *Id.*

Here, the trial court stated only "I will leave him in the custody in the shape he is in now. The request [to remove shackles] is denied." (R.64) This does not satisfy the requirement that a trial court show good cause on the record. *Benny M.*, 2015 IL App (2d) 141075, ¶¶27,33, *citing Mark P.*, 402 Ill. App. 3d at 178. The State argues that findings are not necessary and that good cause can be inferred from the record. State's brief at 23, 26, 28, 31. But good cause cannot be inferred; current Illinois law requires the trial court's reasons justifying shackles to be on the record. *Mark P.*, 402 Ill. App. 3d at 178; *Boose*, 66 Ill. 2d at 266; *Staley*, 67 Ill. 2d at 38, *citing to Boose*, *Id.*; Ill. S. Ct. R. 430 (eff. July 1, 2010); Ill. S. Ct. R. 943 (eff. Nov. 1, 2016).

The State refers to *People v. Wilkes*, for example, to suggest that if "the only reason" for shackles is "obvious" from the record, then the trial court need not state its reasons on the record. State's brief at 32, *citing Wilkes*, 108 Ill. App. 3d at 464. The *Wilkes* case was decided, however, before this Court codified *Boose* in 2010 with Rule 430. *Compare Wilkes*, 108 Ill. App. 3d at 460 (decided 1982), *with* Ill. S. Ct. R. 430 (eff. July 1, 2010) (requiring "specific findings"). Moreover, the trial court was

able to let "the record speak for itself" in *Wilkes* as the defendant was on record as having eloped from the courthouse after a lunch break during the trial at issue in his appeal. *Wilkes*, 108 Ill. App. 3d at 462.

Even if findings on the record were not required, and a general review of the record for inferences to support shackling a litigant with mental illness during his court proceeding were permissible, the record here does not present such support. Here, no one testified that Benny needed additional security in the courtroom. (R.1-140) Yet the State asks this Court to infer that perhaps courtroom security justified keeping Benny shackled. State's brief at 33. The State cites, for example, to Benny's criminal charges (State's brief at 33), but the alleged victim of the charges – Benny's mother – did not testify at the involuntary-medication trial. (R.1-140) Benny testified that his mother now visits him at Elgin, that they share a meal together when she visits, and he hugs and kisses her goodbye when she leaves. (R.120) His treating doctor confirmed that his mother visits and that she has seen the two of them together in the visitation room at Elgin. (R.90) And Benny is not shackled during these visits. (R.120)

The State, as the representative of all the people, including Benny, had a duty to assure that Benny was not wrongly restrained in court based on unproven criminal charges. *See People v. Oden,* 20 Ill.2d 470, 483 (1960) ("it is the rule that the State's attorney in his official capacity is the representative of all the people, including the defendant, and it is as much his duty to safeguard the constitutional rights of the defendants as those of any other citizen"). Rather than trying to imply

here that Benny was dangerous (although the petition did not so allege, (C.3)), the State should honor the presumption of innocence.

Further, there is no indication in the record that courtroom security was a concern. The courtroom involved here was not in a public setting, where members of the general public were present. The court proceedings here took place in a courtroom on the Elgin Mental Health Center campus, in the Kilbourne Administration Building. (C.8,10-15) 405 ILCS 5/3-800(a) (West 2017) ("[t]o the extent practical, hearings shall be held in the mental health facility where the respondent is hospitalized"). Unlike in proceedings that occur in county courthouses, here there were no security concerns for unsecured courthouse staff areas or public areas of the court building. *See People v. Kelley*, 2013 IL App (4th) 110874, ¶¶28. (defendant held properly shackled in part due to security concerns and ability to reach courthouse staff and public from courtroom). Trained Elgin Mental Health Center staff would be present in Elgin's Administrative Building where the courtroom is located, but not members of the general public.

The State also refers to the trial court's visual observation of Benny as a possible justification for additional security, but omits that no one was then alleging Benny to be harmful. (State's brief at 33) His treating doctor did not allege Benny to be in need of involuntary medication owing to harmful behavior. (C.3) Likewise, the trial court did not find that Benny met the "threatening behavior" element of the involuntary-medication statute. (R.180-181) *Cf. Kelley*, 2013 IL App (4th) 110874, ¶¶28,29 (defendant who had hit his head against a wall and physically lashed out was properly kept shackled in court). The appellate court pointed out the lack of

harmful behavior as a basis to keep Benny shackled, noting the trial court appeared to give no consideration to whether Benny currently posed a risk of harm to others. *Benny M.*, 2015 IL App (2d) 141075, ¶32. The appellate court emphasized that "[t]he underlying petition to medicate the respondent does not provide any support for inferring that such harm was likely: it alleged only that he was suffering and his mental state deteriorating, not that he had exhibited any violent behavior." *Id.*

Further, the "patient transport checklist" was a document intended for purposes of properly transporting Benny between his unit and the courtroom only, as its name indicates: "patient *transport* checklist." (R.63-64, italics added) *See* Frank J. Mautino, Illinois Auditor General, *Performance Audit, Department of Human Services' Forensic Patient Transport Procedures*, August 2016, 20, 26-27, http://www.auditor.illinois.gov/Audit-Reports/Performance-Special-Multi/Performance-Audits/2016 Releases/16-DHS-Forensic-Transport-Full.pdf (explaining use of "security devices" on forensic recipients during transport for court or other off-ground appointments).

Although the transport checklist reportedly noted Benny as being at "high risk" for elopement during transport, no one explained the basis for this notation. (R.63-64) Further, there was no evidence that Benny had ever attempted to elope during transport trips as a forensic patient. (R.1-146) This is true even though he had been transported back and forth between Elgin and Cook County, and back and forth between his unit and the Elgin courtroom, during his hospitalization at Elgin. (R.12,71-72; C.27,28,30) Thus, contrary to the State's assertion, justification that

Benny was at "high risk" for elopement was not "amply clear on the record." State's brief at 33.

Regardless of Benny's elopement risk during transport, there was no evidence presented that he was at risk of elopement from the courtroom. (R.1-140) *Cf., e.g.*, *Wilkes*, 108 Ill. App. 3d at 462 (in-court shackles appropriate for defendant who eloped from the courthouse during his trial); *State v. Tolley*, 226 S.E.2d 353, 370-371 (N.C. 1976) (in-court shackles appropriate for defendant who previously eloped from courthouse during preliminary hearing); *People v. Moen*, 491 P.2d 858, 861-862 (Idaho 1971) (in-court shackles appropriate for defendants who were being tried for escaping jail); *People v. Mendola*, 140 N.E.2d 353, 354-355 (N.Y. 1957) (in-court shackles appropriate for defendant who previously escaped from jail after physically threatening guards). Benny's shackles were removed on the first day of his trial, yet there is no evidence that he tried to escape the courtroom that day. (R.118)

C. As the trial court has the obligation to show good cause on the record for in-court shackling, Benny M. had no obligation to put in evidence the transport checklist the trial court relied on to keep Benny shackled.

Because there is a presumption against a defendant being shackled in court, the trial court bears the burden of ensuring good cause shown on the record to keep a defendant shackled. *Boose*, 66 Ill. 2d at 266; *Staley*, 67 Ill. 2d at 38, *citing to Boose*, *Id.*; Ill. S. Ct. R. 430 (eff. July 1, 2010) (codifying *Boose*); Ill. S. Ct. R. 943 (eff. Nov. 1, 2016) (requiring hearing before keeping juvenile in shackles during court). The same is true before a mental-health respondent can be shackled during his court proceeding. *In re Mark P.*, 402 Ill. App. 3d 173, 178 (2nd Dist. 2010). Thus, it was the

trial court's responsibility to support its order to keep Benny M. shackled on the second day of his proceedings. *Id.*

But the State attempts to conflate the trial court's obligation to make its record of good cause shown for keeping Benny in shackles with Benny's obligation here to provide a complete record on appeal, and suggests this Court should fault Benny for the trial court's omitting to file the patient transport checklist. State's brief at 25. The State incorrectly, and with no citation to the record, calls the transport checklist "evidence." State's brief at 27. Had the trial court submitted the document into evidence, it would have been part of the record here; if the trial court relied on that document to keep Benny shackled in the courtroom, it should have made that document part of the record. *Mark P.*, 402 Ill. App. 3d at 178. Or, if not the trial court, "the burden rests on the State to show the necessity of extreme physical security measures." *People v. Brown*, 45 Ill. App. 3d 24, 27 (4th Dist. 1977).

Essentially, the State is confusing a document that the trial court did not make part of the record with the appellant failing to file a complete record. State's brief at 25, citing to *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-392 (1984); *Midstate Siding & Window Co. v. Rogers*, 99 Ill. 2d 389, 319 (2003). In both cases the State cites, trial-court proceedings occurred that were not recorded, and no bystander's reports were provided on appeal. *Foutch*, 99 Ill. 2d at 392; *Midwest Siding*, 99 Ill. 2d at 319. Unlike in *Foutch* and *Midwest Siding*, Benny M.'s court proceedings were recorded and Benny has filed a complete record. (C.1-34; R.1-193) Only the trial court is at fault if it relied on a document to keep Benny in shackles, but then did not make the document part of the court file. *Cf. Bowers v. State*, 507 A.2d 1072, 1073-

1074 (Md. 1986) (memorandum of sheriff's department charged with courtroom security, regarding defendant's transport and in-court need for shackles, included in court record).

Notably, the document the State complains is absent is one that Benny had no control over, contrary to the State's belief (without citation to the record) that the trial court "ma[de] sure" Benny's counsel "had the opportunity to review" the checklist. State's brief at 27. As the appellate court explained, the description in the record of the transport checklist is sufficient for purposes of review, because the actual content of the document is not in question – the document provides that Benny was to be transported in shackles because of "high risk" for elopement. *In re Benny M.*, 2015 IL App (2d) 141075, ¶30, footnote 2. (R.64) This is a document that had only recently come into use for transporting forensic patients after a July 2014 incident where an Elgin forensic patient escaped from a van stopped at a gas station during a trip from Elgin Mental Health Center to the Lake County Courthouse in Waukegan. *Performance Audit* at iii-iv, 9-13, 20. The event triggered immediate and corrective actions to prevent future escapes during transport, including use of a "patient transport checklist." *Id.* at iv, 9, 13, 14, 20.

As every forensic patient must now be "placed in security devices" during transport, their "patient transport checklist" is now required to follow them on trips, as it contains information that is useful to security escorts for whatever type of trip the recipient is taking on a particular day. *Id.* at 20, 26. The checklist provides information "such as trip type, trip date, elopement risk criteria met, elopement risk recommendation, patient legal status, and identifying patient information (for

example, height, weight, tattoos/scars, clothing descriptions)." *Id.* at 20. The transport checklist here thus concerned transport by Elgin staff, in compliance with Department of Human Services transport procedures only; it had nothing to do with whether Benny would be at risk of elopement once transport was complete and he was ensconced in the enclosed space of the courtroom.

The State's focus on the transport checklist is thus a diversionary tactic, drawing this Court away from the fact that the trial court was fully aware of Benny's shackles, yet did not meet its burden of showing good cause on the record why it kept Benny shackled during his second day of trial. *Jonathon C.B.*, 2011 IL 107750, ¶76; *Mark P.*, 402 Ill. App. 3d at 178. At best, the transport checklist is a "vague document [that] was not subject to adversarial testing, and other [actual] evidence severely undercut[] its force." *People v. Robinson*, 375 Ill. App. 3d 320, 331 (2007).

D. Though not addressed by the appellate court, this Court should require trial courts to give counsel the opportunity to present reasons for removing shackles.

The trial court's failures to make an independent assessment and to provide reasons for its decision were not its only errors. The trial court also gave no opportunity to Benny's counsel to present reasons why his shackles should be removed. (R.64) As the State agrees, the respondent must be given the chance to argue against imposing restraints. State's brief at 21, citing *Boose*, 66 Ill. 2d at 266; *Allen*, 222 Ill. 2d at 348; *Tolley*, 226 S.E.2d at 368-69. *See also People v. Urdiales*, 225 Ill. 2d 354, 419 (2007) (in-court shackles held appropriate in part because court gave defense counsel opportunity to offer reasons why defendant should not be shackled). Here, rather than giving Benny's counsel an opportunity to present

reasons why Benny's shackles should be removed, the trial court made its decision and immediately resumed the trial. (R.64)

Giving the shackled party the opportunity to present reasons why his shackles should be removed is of such import that this Court has included this requirement in both the criminal and juvenile shackling rules. Ill. S. Ct. R. 430 (eff. July 1, 2010), Ill. S. Ct. R. 943(b) (eff. Nov. 1, 2016). If this this Court reviews this case under a mootness exception, the same requirement should be applied when trial courts consider in-court shackling of mental-health respondents.

E. Keeping Benny shackled was prejudicial, and the appellate court correctly assigned the burden to the State to prove that the error of shackling Benny did not contribute to the trial court's judgment.

As the U.S. Supreme Court observed, "shackles are inherently prejudicial," and their negative effects may not be reflected in a trial transcript. *Deck*, 544 U.S. at 635. The appellate court here was correct that keeping Benny in shackles was prejudicial to his case. The court found Benny's shackles prejudicial because (1) they hindered his defense by causing him agitation and by impeding his ability to communicate with counsel, and (2) they prejudiced the factfinder because the judge based his findings in part on what he termed Benny's "outbursts" that stemmed in part from his shackling. *Benny M*. 2015 IL App (2d) 141075, ¶¶ 34-36.

The State insists that shackling Benny was harmless, and urges this Court to view shackling in light of regular civil cases, and not under the standard applied by the appellate court here: that the State must prove, beyond a reasonable doubt, that shackling did not contribute to the trial court's judgment. State's brief at 35-36; *Benny M*. 2015 IL App (2d) 141075,¶¶ 34-36 *citing In re A.H.*, 359 Ill. App. 3d 173,

183 (1st Dist. 2005). The State wants to compare the errors in civil proceedings between two private parties to the error of shackling a mental-health respondent during a hearing about whether he will be subject to court-authorized medications under the State's *parens patriae* interest. State's brief at 36, *citing to e.g.* cases about malpractice, *Simmons v. Graves*, 198 Ill. 2d 541, 566-567 (2002); stock devaluation, *Fried v. Polk Bros., Inc.*, 190 Ill. App. 3d 871, 883 (2nd Dist. 1989); conversion, *Nehring v. First Nat'l Bank*, 143 Ill. App. 3d 791, 805 (2nd Dist. 1986); peer review by a private health care center, *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 513 (1989); and a contract for the sale of real estate, *Welsh v. Jakstas*, 401 Ill. 288, 294 (1948); *but see* State's citation to *People v Delvillar*, 235 Ill. 2d 507 (2009) (affirming denial of criminal defendant's motion to withdraw his guilty plea).

But parties in regular civil cases are not typically subject to shackling, do not face loss of their liberty, nor are those cases decided under the higher clear-and-convincing burden of proof. *In re Stephenson*, 67 Ill. 2d 544, 553 (1977); 406 ILCS 5/3-808 (West 2017). When the appellate court reviewed the rare civil case when a party was shackled, it was in a termination-of-parental-rights proceeding where an inmate-father was contesting the termination of his parental rights. *In re A.H.*, 359 Ill. App. 3d 173, 176-177 (1st Dist. 2005). As he had been convicted of several felonies and was in prison at the time of the termination proceeding, he was transported to court in shackles. *Id.* at 176, 180. The appellate court found in an opinion authored by Justice Theis, "even assuming that [the *Boose* standard] would apply exactly as it would in a criminal case, we find that any error would be harmless beyond a reasonable doubt." *A.H.*, 359 Ill. App. 3d at 182. The court further

explicitly stated, "[w]here such an error has occurred, "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict.'" *Id.* at 183 *citing Deck*, 544 U.S. at 635, *quoting Chapman v. California*, 386 U.S. 18, 24, (1967).

Application of this standard to the State, the proponent of the argument that the court's error was harmless and "the beneficiary of the error," is proper when the respondent raised the issue at trial. *Davis v. State*, 195 S.W.3d 311, 317 (2006) *citing Deck* at 2015-2016. Unlike the shackling cases where counsel was silent about shackles, failed to object, or acquiesced in their use, counsel here did not forfeit the shackling issue. *Jonathon C.B.*, 2011 IL 107750, ¶¶ 65-66, 71 (where counsel was completely silent about shackling)*; People v, Hyche,* 77 Ill. 2d 229, 240-241 (1979) (where counsel failed to object); *Allen,* 222 Ill. 2d at 344 (where counsel acquiesced to keeping his client in a stun belt). Instead, Benny's counsel brought the shackles to the trial court's notice, moved for them to be removed, and even after the judge denied her request, persisted that "at a minimum" the court free Benny's writing hand. (R.65-66) Further, she elicited testimony from Benny showing he was not shackled elsewhere at Elgin when going to different locations. (R.63, R.118-120) Finally, she raised Benny's shackling in closing argument, informing the court that Benny had cramps from the shackles and thus had to stand at times during the hearing. (R.163) As Benny did not forfeit the issue, the appellate court was correct in placing the burden on the State to show that his shackling did not contribute to the trial court's granting the order for psychotropic medication. *Benny M.*, 2015 IL App (2d) 141075, ¶¶ 34-36.

Benny's shackling hindered his defense.

The appellate court's finding that Benny's shackling prevented Benny from communicating with counsel and caused him agitation is correct and supported by the record. Though the trial court had denied her motion to remove Benny's shackles, Benny's counsel nevertheless specifically requested that the court "at a minimum" free Benny's hand so he could take notes, answer her questions, and raise any potential issues. (R.65) But the court declined even this request. (R.65) Paradoxically, the judge commented, "I have a tendency to take a lot of notes." (R.142) Despite understanding the importance of taking notes, the judge did not give Benny the same opportunity, and prevented Benny from effectively assisting in his defense and from silently and privately communicating with counsel.

Communication with counsel is undoubtedly a central aspect of the right to counsel. The U.S. Supreme Court has found that a defendant has a right to unrestricted access to his lawyer for advice during trial on a variety of trial-related matters. *Perry v. Leeke*, 488 U.S. 272, 284 (1989) *citing Geders v. United States*, 425 U.S. 80, 88 (1976). A court order that prevents consultation between an attorney and client during trial impinges on the right to counsel. *Geders,* 425 U.S. at 91. A respondent generally "is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he (may) have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." *Geders*, 425 U.S. at 89, *quoting Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). The necessity of conferring with counsel is particularly important for a person who had been found unfit for his criminal trial.

Moreover, counsel may need to confer with her client in order to effectively represent him. Shackles, as this Court found, "hinder[] the defendant's ability to *assist* counsel." *Allen*, 222 Ill. 2d at 346 [italics added]. Indeed, Benny's counsel indicated to the court one reason for removal of at a minimum his hand from shackles was to allow him to respond to her questions in writing. (R.65) Communication in writing allows counsel to focus on the proceedings and not be distracted by a client sitting next to her talking during the proceedings. *See Davis*, 195 S.W.3d at 314 (describing counsel's explanation that writing is preferable to talking because the latter distracts him from the trial). Indeed, the trial judge here informed Benny that his interruptions interfered with his counsel's ability. (R.100)

As the court prevented Benny from communicating in writing, the only option he had was to communicate verbally, causing repeated interruptions of the proceedings. When his counsel was about to start her cross-examination of the psychiatrist, Benny said, "I don't have paper and pencil. This doesn't make sense." (R.67) Soon after his counsel started her cross-examination, Benny asked, "May I ask a few questions?" (R.70) Later during the cross-examination, when counsel attributed the side effect for men of breast enlargement to the wrong medication (Haloperidol), Benny spoke out to tell her the correct medication (Risperidone) that causes that side effect. (R.87-88) Also during his counsel's cross-examination of the psychiatrist, Benny's interruptions caused counsel to request a break to talk to Benny, and prompted the court to rebuke Benny for interrupting his counsel while she was trying to cross-examine the psychiatrist. (R.73, 99-100) These examples show that had the court not prevented Benny from communicating with his counsel

by writing, he could have written down his questions to be asked by his counsel and he could have provided helpful information to her, rather than interrupting the proceedings to make verbal statements. Thus the record shows prejudice in restricting Benny's ability to communicate with and assist his counsel.

Further, as the appellate court found, the record shows the shackles impeded Benny's ability to focus on the proceedings and caused him agitation. *Benny M.*, 2015 IL App (2d) 141075, ¶ 36. Courts have long recognized that shackles carry negative cognitive and physical effects. The U.S. Supreme Court observed, "'shackles impos[e] physical burdens, pains, and restraints, tend to confuse and embarrass' defendants' 'mental faculties' and thereby tend 'materially to abridge and prejudicially affect his constitutional rights.'" *Deck*, 544 U.S. at 631 *quoting People v. Harrington*, 42 Cal. 165, 168 (1871). Another court also articulated the problem: a person's "'mind should not be disturbed by any uneasiness his body or limbs should be under.'" *Eaddy v. People*, 115 Colo. 488, 491 (1946) *quoting State v. Temple*, 194 Mo. 37 (1906).

The record here shows that having his hands and legs shackled caused Benny physical pain. Benny himself said he was in pain, and his attorney explained that throughout the entire hearing Benny was complaining to her about the shackles, and that he had to stand up from time to time due to cramps. (R.145-146, 163).

The shackles also distressed and agitated Benny. For instance, when the assistant state's attorney asked about whether he was participating in any less restrictive treatment options Benny focused only on restrictions and replied, "Lesser restrictive treatment? How do you define – right now I'm shackled. I got

cuffs. I'm – I'm in restraints is another way of putting it." (R.106). When his own attorney tried to follow up about less restrictive treatment, Benny similarly replied, "This is very restrictive —" (R.118) After Benny finished testifying, and the court told him he may step down, Benny commented, "If I'm still able to walk." (R.128) Benny made other comments about his restricted ability to move, saying, "This is why I'm suffering and deteriorating. I mean look at this. I'm walking like a cripple, and I'm not." (R.145-146) After two hours of being shackled, Benny felt the shackles tighten, and accused the security officer of tightening them. (R.145; C.30) When the security officer offered to fix the tight shackles, he said, "I don't need you to take hold of my arm. I need you to take these damn cuffs off." (R.145) Finally, he said, "I don't want to be chained. For what? Why—" (R.182) Benny's statements reveal his distress and agitation at being shackled.

Thus, the record shows that Benny's shackling was prejudicial as the shackles cause Benny physical pain and agitation, and impeded his ability to confer with and assist counsel in his defense.

Shackles prejudiced the factfinder.

This Court has recognized that even in bench trials there is a presumption against shackling. *In re Staley*, 67 Ill. 2d 33, 37 (1977). Every individual has the right to appear in a court whether for a jury or a bench trial "'with the appearance, dignity, and self-respect of a free and innocent man.'" *Id. quoting Eaddy*, 115 Colo. at 492. Even in bench trials, a fact-finder can be prejudiced by the sight of shackles because "visible shackles give the impression to any trier of fact that a person is violent, a miscreant, and cannot be trusted." *People v. Best*, 19 N.Y. 3d 739, 746

(2012) (Lippman, Ch. J., dissenting) *citing People v. Clyde*, 18 N.Y. 3d 145, 158 (2011), (Lippman, Ch. J., dissenting). New York's chief judge noted a court that kept a defendant shackled "intimated that it believed defendant to be a dangerous character who needed to be restrained, which inevitably affected its role as factfinder before a scintilla of evidence was presented. The use of shackles without record justification in a bench trial presents a scenario with unique dangers." *Id.* at 745. Another court similarly observed, "The trial judge's distrust of the accused is implicit in cases where he permits or orders the shackling of the accused during the progress of the trial." *State v. Wendel*, 532 S.W.2d 838, 841 (Mo. Ct. App. 1975).

The State contends that the risk of unfair prejudice from shackles in bench trials is minimized, and cites a passage that judges can set aside their personal backgrounds and base their decisions solely on the evidence. State's brief at 39. But Benny's case is not about the judge's personal background, which is not even part of the record. The question of prejudice here concerns the sight of the shackles and their impact on the court's judgement. Indeed, a judge may be influenced by the visual appearance of people before him. *See People v. Kennedy,* 191 Ill. App. 3d 86, 90 (1st Dist. 1989) (describing the judge's disparaging commentary about witnesses he found not credible, and finding, "The trial judge must have guessed from the witnesses' clothing and mien that they were thieves, drug users, welfare recipients and fornicators.") Studies show that judges rely on the same cognitive decision-making process as laypersons, and like everyone, are influenced by what they see and hear. Chris Guthrie et al, *Inside the Judicial Mind*, 86 Cornell L. rev. 777, May 2001; Shankar Vidantam, *How Elections Influence Judges,* Hidden Brain, May 25,

2017, at http://www.npr.org/2017/05/25/529977252/how-elections-influence-judges.

But even if the sight of the shackles alone did not prejudice the judge, the effect of the shackles did. They caused Benny to speak out loud not only because the trial court prevented him from communicating with his attorney in any other way, but because of the agitation they caused Benny. (R.65, 67, 145-146, 182); *Benny M.*, 2015 IL (2d) 141075, ¶36. The trial court specifically supported its authorization of psychotropic medications in part on what it termed Benny's "outbursts," defined, incidentally, as "a violent expression of feeling." (R.181-182) https://www.merriam-webster.com/dictionary/outburst. But these so-called "outbursts" were due in part to Benny's distress about being shackled as described above. *Benny M.*, 2015 IL App (2d) 141075, ¶ 36. That the court characterized Benny's comments as "outbursts" itself shows the court expressed prejudice against Benny. The trial court did not at all note that Benny had not once spoken out of turn during the first day of trial when he was not shackled, though the assistant state's attorney had pointed that out in closing. (R.142) The trial court did not note Benny addressed the judge respectfully as "sir," and asked permission before getting up to present demonstrative evidence. (R.109-110). Instead, the court found the statutory element of suffering proved due in part to Benny's "outbursts." (R.181-182); 405 ILCS 5/2-107.1 (a-5)(4)(B) (West 2017).

The trial court's additional finding that the State proved the statutory element of deterioration is also connected to Benny's shackling. Specifically, the court found, "[Benny] has gone from a point where he was previously found or

restored to fitness and has deteriorated back down to that where he cannot be otherwise restored to fitness." (R.181) Where the psychiatrist testified that medication had previously made Benny fit for trial (R.12,14,45) and where the State argued that Benny's alleged lack of fitness justifies court-ordered medication (R.142), it is foreseeable that the judge would order medication as he felt Benny could not control himself and could not stop interrupting the proceedings to the point that he had Benny removed from the courtroom. (R. 144-146, 99-101) It cannot be said that the shackles did not contribute to the trial court's judgment.

Although the State contends that a lack of findings supporting Benny's shackling was not prejudicial,[4] the record shows otherwise. That the court made a quick decision to keep him shackled with no justification was not lost on Benny. After the court had already refused to free Benny from shackles, and when his counsel was asking the court to at a minimum release only one of Benny's hands so he could write, Benny interjected, "Do you think I'm going to take the pen or something and try to stab someone with it?" (R.65) This commentary from Benny reflects that he understood the judge to be treating him as dangerous, unpredictable, and not to be trusted. As a chief justice of New York's highest court stated, a court that keeps a person shackled "intimate[s] that it believe[s] [the person] to be a dangerous character who need[s] to be restrained." *Best*, 19 N.Y. 3d at 745, (Lippman, Ch. J., dissenting). Further, as argument III discusses, when people are treated with dignity and understand the reasons for a court's judgment, they are more likely to accept even when the outcome is not in their favor. Thus, had there

been a justifiable reason to keep Benny in shackles that was explained to Benny, Benny may have accepted the court's judgment, rather than having so-called "outbursts."

III. If this Court reviews this case under a mootness exception, it should adopt the standards of Rule 943 that limits shackling of minors in delinquency proceedings because the Juvenile Court Act's purpose of rehabilitation and protection of the public is similar to that of the Mental Health Code's goals of treatment and protection of the public, and both statutes stem from the State's *parens patriae* interest. Moreover, there are medical and therapeutic considerations in mental-health proceedings not present in criminal cases.

Shackling people with mental illness at their civil mental-health proceedings carries considerations different than those at play in criminal trials. As this Court said, "Mental illness is not a crime, and a person in need of mental health treatment is not by reason thereof a criminal." *In re Stephenson*, 67 Ill. 2d 544, 556 (1977). After the appellate court's opinion here adopting the *Boose* factors from criminal cases to hearings under the Mental Health Code when there was no other standard for courtroom restraints, this Court promulgated Rule 943 setting forth limitations on shackling minors in delinquency proceedings. Ill. S. Ct. R. 943 (eff. Nov. 1, 2016). Because of the similarities in purpose of the Juvenile Court Act and the Mental Health Code, this Court should adopt the standards of Rule 943 to proceedings under the Mental Health Code.

This Court has the authority to adopt the Rule 943 standards in an opinion here. This Court has established factors to guide trial courts before when it set out procedures and factors for courts to consider in the *Boose* case. *Boose*, 66 Ill. 2d at

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[4] Finding Benny's unjustified shackling itself prejudicial, the appellate court did not

266; *See also In re Israel*, 278 Ill. App. 3d 24, 37 (2nd Dist. 1996) (establishing factors for court to consider when determining whether the respondent lacks capacity under section 2-107.1 of the Code). Moreover, because the appellate court's application of the *Boose* factors to mental-health proceedings was not necessary to its reversal of the trial court order, this Court can affirm the appellate court while also adopting Rule 943's scheme for determining whether there is a manifest need for shackles.

Although the State contends that the appellate court announced new procedures under *Boose* and then reversed the trial court for failing to follow them, the State mischaracterizes the appellate court's treatment of *Boose*. State's brief at 13, 14, 34. The appellate court did not reverse the trial court's order for failure to follow *Boose*, but instead reversed the trial court for failing to follow the principles established by prior case law, namely the *Mark P.* case. The court specifically noted "we do not fault the trial court for failing to apply this exact analysis [from *Boose*]."*Benny M.* 2015 IL App (2d) 141075, ¶ 29. Only after finding the trial court failed to apply previously established factors did the appellate court hold that, from here on forward, *Boose* applies to proceedings under the Mental Health Code. Thus, if this Court chooses to review this matter, it can affirm the appellate court's reversal while also establishing a rule more compatible with civil mental-health proceedings now that is has already crafted Rule 943 for juveniles. This Court may do so expeditiously in an opinion here, rather than writing a new rule specific only to mental-health proceedings. Or, should this Court dismiss this matter as moot, the

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address whether it found the lack of findings prejudicial.

Mark P. case (as the State agreed below, see Arg. I herein) and now *Benny M.* provide sufficient guidance regarding shackling in civil mental-health cases.

The appellate court itself noted that not all of the *Boose* factors are relevant in mental-health proceedings. *Benny M.*, 2015 IL App (2d) 141075, ¶26. For instance, the court found that the risk of violence, revenge, or rescue by others and the size and mood of the audience are unlikely to be relevant in mental-health proceedings. *Id.* Moreover, the State itself argued, before this Court set forth Rule 943, that this Court should craft a rule applicable in non-criminal cases. State's brief at 34-35.

Similar to Rule 943, this Court should adopt here that the presumption against restraints applies in *all* proceedings under the Mental Health Code, and not just in proceedings on the ultimate questions of whether the respondent is subject to involuntary admission or court-authorized psychotropic medication or electroconvulsive therapy. *See* Ill. S. Ct. R. 943(a) (eff. Nov. 1, 2016) (setting forth standards for "during a court proceeding"); *c.f.* Ill. S. Ct. R. 430 (eff. July 1, 2010) (limiting the rule to "trial proceedings in which the defendant's innocence or guilt is to be determined…") Thus, the presumption against restraints would apply in all instances when respondents appear in court consistent with respondents' right to be present "at any hearing held under this Act…" 405 ILCS 5/3-806(a) (West 2017).

Further, this Court should adopt the three reasons from Rule 943 for a showing of necessity for restraints, i.e., (1) to prevent physical harm to the respondent or another person; or (2) because the respondent has a history of

behavior[5] that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or (3) because there is a well-founded belief that the respondent presents a substantial risk of flight from the courtroom. Ill. S. Ct. R. 943(a) (eff. Nov. 1, 2016).

Importantly, this Court should also adopt the least-restrictive-alternative standard not contained in the *Boose* factors yet so critical to mental-health law. Rule 943 specifically requires courts to determine whether there are "less restrictive alternatives to restraints" that will prevent flight or physical harm, and if the court authorizes restraints that they are "least restrictive restraints necessary." Ill. S. Ct. R. 943 (a), (c) (eff. Nov. 1. 2016). The least-restrictive-alternative doctrine is central to mental-health law. As noted by a mental-health law scholar, "Perhaps no other principle has permeated the full body of mental disability law and litigation as has the doctrine of the least restrictive alternative." Michael L. Perlin, *"Their Promises of Paradise": Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, 37 Hous. L. Rev. 999, 1010-1011 (2000). At least one jurisdiction recognizes the importance of taking into account the least restrictive use of restraints for people with mental illness. Back in 1982, corporation counsel for a Wisconsin county advised that a mental-health respondent is "entitled to the least restrictive restraint during transportation and

[5] Although Rule 943 specifies "disruptive behavior," this Court should omit reference to "disruptive" behavior as justification for restraints as it is not sufficient to warrant restraints –chemical or physical—under the Code. 405 ILCS 5/2-107 (West 2017). Moreover, in 2001, the legislature repealed "disruptive behavior" as one of

during a hearing." 71 Op. Att'y Gen. 183, 183 (1982), at https://docs.legis.wisconsin.gov/misc/oag/archival/_66; *See also Illinois v. Allen*, 397 U.S. 337, 344 (1970) (finding that "no person should be tried when shackled and gagged except as a last resort.") Thus, this Court should make explicit, whether or not it retains the appellate court's application of the *Boose* factors, that trial courts must consider whether there are less restrictive alternatives to shackles if finding that restraint is necessary.

This Court should apply the Rule 943 standards to mental-health cases because there is a similarity of purpose in delinquency cases and in mental-health cases. The purpose of the Juvenile Court Act is to "secure for minors subject to the Act 'such care and guidance * * * as will serve the safety and moral, emotional, mental, and physical welfare of the minor and the best interests of the community.'" *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006) *quoting* 705 ILCS 405/1–2(1) (West 2004). The General Assembly stated the Act "'shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court.'" *Id. quoting* 705 ILCS 405/1–2(2) (West 2004). In addition to the goal of rehabilitating minors the Juvenile Court Act is also designed to protect the public. *Id.* at 520.

The Mental Health Code similarly carries the twin goals of treatment and protection of vulnerable individuals with mental illness and also protection of the public. The Code "represents a serious attempt to provide beneficial treatment and care for [people with mental illness] with the minimum ostracism and confinement

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the bases for an involuntary-treatment petition. *In re Jennifer H.*, 333 Ill. App. 3d

consistent with protection of the public." *Stephenson*, 67 Ill. 2d at 554. Like proceedings under the Juvenile Court act, mental-health proceedings are not criminal in nature though respondents retain due process rights. As this Court deemed undesirable any steps that "might erode the differences between mental health commitment proceedings and traditional criminal trials," Rule 943, rather than *Boose*, provides a better fit for judicial determinations for restraining respondents in court rooms or hospitals where hearings are held. *Id.* at 556, *See* 405 ILCS 5/3-800(a) (West 2017) (expressing a preference for hearings to be held at "the mental health facility where respondent is hospitalized.")

Further, mental-health and delinquency proceedings stem from the same State interest of *parens patriae*. Delinquency cases "are protective in nature." *In re Jonathon C.B.*, 2011 IL 107750, ¶ 144, *as modified on denial of reh'g* (Nov. 28, 2011), (Freeman, J. dissenting) *citing In re Rodney H.*, 223 Ill. 2d 510, 520 (2006). In proceedings under the Juvenile Court Act, "'[t]he relationship between the minor and the court is open and in the nature of *parens patriae.*'" *Id. quoting In re W.C.,* 167 Ill.2d 307, 325–26 (1995). Similarly, the Mental Health Code reflects the State's legitimate *parens patriae* interest in the well-being of individuals who lack capacity to make their own treatment decisions. *In re C.E.*, 161 Ill. 2d 200, 217-218 (1994). *Parens patriae* "represents an expression of the general power and obligation of the government as a whole to protect minors and the infirm." *In re S.G.* 175 Ill. 2d 471, 488 (1997). Illinois law recognizes that people with disabilities are "favored persons in the eyes of the law and courts have a special duty to protect their rights." *Bruso by*

427, 431 (3rd Dist. 2002).

Bruso v. Alexian Bros. Hosp., 178 Ill. 2d 445, 454 (1997) *citing Macdonald v. La Salle National Bank,* 11 Ill.2d 122, 125, (1957); *Van Buskirk v. Van Buskirk,* 148 Ill. 9, 26 (1893); *In re Guardianship of Mabry,* 281 Ill.App.3d 76, 85 (4th Dist. 1996). Because of the commonality in the State's interest in these two classes of proceedings, this Court should adopt the better-suited Rule 943 standard for mental-health cases.

Rule 943 recognizes that not all of the considerations applicable to an adult criminal defendant are relevant to a determination whether to shackle a minor. Under the rule, whether to restrain a minor is not based on their criminal charges, their age, physical attributes, criminal record, "risk of mob violence," the size and mood of the audience, the nature and physical security of the courtroom, or evidence of a plan to escape, as under *Boose*, 66 Ill. 2d at 266-267. Instead, the Rule 943 factors do not rely on criminal charges or on the potential actions of others (as in "mob violence") or factors within the control of the court, such as the security of the courtroom. Ill. S. Ct. R. 943(a) (eff. Nov. 1. 2016); *See Staley*, 67 Ill. 2d at 38 (observing that "if guards or deputies were not present they should have been summoned in order to resolve the security problem.") The factors are narrowly designed to protect the physical safety of the minors and others and to prevent escape, and consider only whether the minor has a history or recent behavior of physical harm, or whether there is a "well-founded belief" that the minor presents "a substantial risk of flight from the courtroom." Ill. S. Ct. R. 943(a) (eff. Nov. 1, 2016). Thus the Rule 943 factors are linked to a respondent's behavior and actions rather than their status, i.e., the nature of the criminal charges and their physical size. These narrow Rule 943 considerations should also guide trial courts in mental-

health cases.

Limiting restraint use to only those mental-health respondents with a demonstrated need for them promotes the Code's goal of limiting ostracism and also respects the fact that people with mental-illnesses are not more likely to be violent than other parties to civil proceedings, contrary to the stigmatized perception that the general public may harbor. Indeed, as the U.S. Department of Health and Human Services publicizes

> The vast majority of people with mental health problems are no more likely to be violent than anyone else. Most people with mental illness are not violent and only 3%-5% of violent acts can be attributed to individuals living with a serious mental illness. In fact, people with severe mental illnesses are over 10 times more likely to be victims of violent crime than the general population.

Mental Health Myth and Facts, U.S. Dept. of Health and Human Services, at https://www.mentalhealth.gov/basics/myths-facts/.

Shackling of mental-health respondents should be done sparingly as it implicates special considerations due to their mental-health diagnoses. Courts have long recognized that shackling affects individuals' mental faculties and thus their ability to defend themselves. As far back as 1871, the Supreme Court of California found that shackling without cause "inevitably tends to confuse and embarrass [a person's] mental faculties, and …especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf." *People v. Harrington*, 42 Cal. 165, 168 (1871) *quoted in Deck v. Missouri*, 544 U.S. 622, 631 (2005). An 1895 treatise on criminal procedure similarly noted the impact of

shackles on a person's ability to think clearly, and advised that a defendant "'should have the unrestrained use of his reason'" and thus shackles should only be used in extreme and exceptional cases. Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L. Rev. 214, 224-225, Winter 2015, *quoting* 1 Bishop, *New Criminal Procedure* § 955, at 572-73 (4th ed. 1895) (internal quotations omitted). For people with mental-health symptoms that may already impair their thinking and judgment, shackles add another impediment to their participation in their hearings.

Moreover the use of restraints for people with mental-illnesses is not solely a question of court security and a respondent's right to a fair hearing and to effective assistance of counsel. It also encompasses medical and therapeutic considerations that are not forefront in criminal proceedings. These concerns are reflected in the Mental Health Code, which enacted a restraint provision in 1979 based on a rule used by the Department of Mental Health and Developmental Disabilities. Governor's Commission for the Revision of the Mental Health Code of Illinois, *Report*, 1976, at 29; 405 ILCS 5/2-108 (West 2017). The Code provides that only a physician or other clinician may order restraints for a limited period of time under limited circumstances and under frequent observation. Specifically, restraints may "be used only as a therapeutic measure to prevent a recipient from causing physical harm to himself or physical abuse to others. … In no event shall restraint be utilized to punish or discipline a recipient, nor is restraint to be used as a convenience for the staff." 405 ILCS 5/2-108 (West 2017). Due to concerns about the restrained individual's physical condition, the Code places time limitations on the use of

restraints by mental-health facilities. It restricts their use to two hours unless a supervisory nurse or physician conducts a personal examination and confirms in writing that the "restraint does not pose an undue risk to the recipient's health in light of the recipient's physical or medical condition," and requires a qualified person to observe the restrained individual "as often as is clinically appropriate but in no event less than once every 15 minutes." 405 ILCS 5/2-108(a), (f) (West 2017). The Department's rules for transporting recipients from Elgin's forensic units similarly express a concern for recipients' physical well-being, and require that a person trained in cardiopulmonary resuscitation be present with shackled recipients during transport. *Performance Audit, supra* at 39.

The Department's concerns for medical and physical safety are not idle. There are reported cases where restrained individuals have been injured and have even died from being subjected to restraints. U.S. Gen. Accounting Office, GAO/HEHS-99-176, *Mental Health: Improper Restraint of Seclusion Use Places People at Risk* (1999). The potential for adverse effects from restraints may be exacerbated for people taking psychotropic medications, as the medications affect a person's heart rate, ability to release body heat, and can cause sudden death. Wanda K. Mohr, PhD, RM, FAAN et al, *Adverse Effects Associated with Physical Restraint*, The Canadian Journal of Psychiatry, June 2003.

Importantly, restraint use can also cause psychological harm and trauma. Restrained individuals may perceive the use of restraints as "punitive and aversive with potential for traumatic sequelae." *Id.* Research shows that restraining people who have been abused often causes those people to re-experience their trauma and

results in setbacks in their treatment. GAO/HEHS-99-176, *supra* at 9. As noted above, people with mental illnesses are 10 times more likely to be victims of violence than the general population. Additionally, at least half of women treated in mental-health facilities have a history of physical or sexual abuse. GAO/HEHS-99-176, *supra* at 9. Restraints can thus represent a "reenactment of [the women's] original trauma," and restraint use is associated with traumatic emotional reactions such as fear, rage, and anxiety. Mohr, *supra*.

These intense emotions and psychological harm can thus not only impede a person's ability to participate in their court proceedings, but being shackled in court may shape their perception of whether they received a fair hearing. The perception of having a fair hearing is therapeutic to mental-health respondents because it maintains their sense of dignity and makes them feel they are taken seriously. Michael Perlin, *Mental Disability Law: Civil and Criminal*, vol. 2 2nd ed. 1999, page 500. Also, the way courts treat respondents affects their response to medical treatment. Bruce J. Winick, *Civil Commitment: A Therapeutic Jurisprudence Model*, 146-147 (2005). When respondents are afforded dignity and respect and feel heard in mental-health proceedings, they are more likely to accept the outcome of the hearing. Winick, *supra* at 146-147. This is important in the context of commitment and medication hearings because if a person accepts treatment, this Court has recognized that the treatment will be more effective. *In re Hays*, 102 Ill. 2d 314, 319-320 (1984). Thus, when a court treats respondents fairly, they are more likely to accept the outcome and in turn are more likely to benefit from court-authorized treatment. Winick, *supra* at 147. Fair hearings free from unnecessary restraints are

consistent with the State's *parens patriae* duty to its residents with disabilities, and promotes the Code's purpose of providing effective and humane treatment with minimum ostracism. *Stephenson*, 67 Ill. 2d at 554. Shackles, on the other hand, suggest "that the justice system itself sees a 'need to separate a [respondent] from the community at large.'" *Deck*, 44 U.S. at 630, *quoting Holbrook v. Flynn*, 475U.s. 560, 569 (1986).

Thus, Rule 943, more so than the *Boose* factors, captures the therapeutic intent of the Mental Health Code.

CONCLUSION

This matter is moot, as Benny M.'s involuntary-medication order expired going on three years ago. Because the State has not analyzed mootness or demonstrated how a mootness exception applies at this level of review, and because neither the public-interest nor the capable-of-repetition-yet-evading-review exceptions apply from the perspective of the State as the complaining party, this appeal should be dismissed.

If this Court finds that a mootness exception applies at this level of review and decides this case on the merits, Benny M. asks this Court to uphold the Appellate Court's decision that reversed the trial court, and also apply aspects of Rule 943 to in-court shackling of civil mental-health respondents – a rule that was not in existence when the appellate court decided *Benny M.*

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, the rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 46 pages.

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