IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	SC S50230
	)	
Plaintiff-Respondent, Respondent on Review,	)	Trial Court No. 99100124C
	)	
vs.	)	
	)	
GARY DYLAN CAVAN,	)	Appellate Court No. A111776
	)	
Defendant-Appellant, Petitioner on Review.	)	

BRIEF ON THE MERITS OF AMICUS CURIAE JURY SERVICE RESOURCE CENTER IN SUPPORT OF DEFENDANT-APPELLANT

Petition to Review the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Malheur County
Honorable FRANK J. YRAGUEN, Judge

Opinion Filed: December 11, 2002
Author of Opinion: Kistler, J.
Before: Edmonds, Presiding Judge, Deits, Chief Judge, *vice* Warren, S.J.

PETER A. OZANNE #74246
Executive Director
PETER GARTLAN #87046
Chief Deputy Public Defender
1320 Capitol St. NE, Suite 200
Salem, Oregon 97303-6469
Phone: 378-3349
Attorneys for Petitioner on Review

ROSE JADE #95310
PO Box 2104
Newport, OR 97365
Tel: 541 265 2526

Attorney for Amicus Curiae
Jury Service Resource Center

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
JENNIFER S. LLOYD #94372
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: 378-4402
Attorneys for Respondent on Review

2/10/04

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Cases Cited

LAWS

U.S. Constitution

Oregon Constitution

Statutes

OARs

Orders

Other Sources

BRIEF OF AMICUS JURY SERVICE RESOURCE CENTER

STATEMENT OF FACTS RELATING TO THE ARGUMENT OF AMICUS CURIAE

The crime in this case occurred on August 26, 1999 (AC ER-6).[1] By September 9, 1999, Defendant had been disciplined by DOC for the assault, receiving 180 days disciplinary segregation, 56 days of loss of privileges upon release from segregation, $400 worth of fines payable to the DOC, and ordered to pay restitution to DOC in the amount of $132.90 for replacement of state property (Order signed 9/7/1999) (see AC ER-6-8). His would be the second criminal jury trial held at SRCI.

The desire to hold Defendant's trial at the prison was voiced *sua sponte* by the Court (Judge Yraguen) after he had already announced his intent to hold *all* criminal trials involving inmate-defendants inside the state prison.[2] The court's intent to hold

---

[1] Amicus Curiae cites to the record and attachments as follows: **AC ER** = Amicus Curiae's Excerpt of Record (references to the trial record on file at the Supreme Court, copies attached hereto). **AC APP** = Amicus Curiae's Appendix of Public Records, copies attached hereto, which records this court may take judicial notice of pursuant to ORS 40.065-ORS 40.080. When citing to the parties briefs filed in the Court of Appeals, CA = Court of Appeals.

[2] At a omnibus pre-trial hearing on the prison courtroom site in front of Judge Murgo, (see State v. Cechmanek, #99029486C) (referenced hereafter as Omnibus hearing 6/22/1999), Malheur County District Attorney Pat Sullivan testified that she understood it was "Judge Yraguen's plan at this point" to have all inmate trials held inside the prison. 6/22/1999, tape 2A at 614, Testimony of Malheur Co. D.A. Pat Sullivan on direct examination by the defense. DA Sullivan had been meeting and would continue to meet with SRCI officials and Malheur County Judges to discuss the SRCI Courtroom facility. See e.g., AC APP G1, I1-2, J1-2, K1, L1-3, and N104.

Defendant's trial inside SRCI was repeatedly communicated to the parties pre-trial. State v. Cavan, Respondent's Brief, CA, SER-7 (citing a letter from Judge Yraguen to SRCI inmate Cory Lewis, that *all* inmate trials would be held inside the prison). See also, State v. Lewis, Appellant's Brief, CA, ER-5, citing an announcement by the trial court, made on Feb. 2, 2000, that Mr. Lewis' trial would be held at the prison, and giving the parties an opportunity to respond. On March 3, 2000, the trial Court again informed Defendant that the trial may be held at SRCI (TX 13-14, AC ER-10, 11) and gave the defendant an opportunity to file a pre-trial motion addressing that decision. (Respondent's Brief, CA, SER-2). Defendant objected at the hearing to the prison location (TX 13-14, AC ER 9, 10). After Mr. Lewis' defense attorneys objected to the prison location on constitutional grounds (March 8, 2000), the State moved "that all trials be held at the Malheur County Circuit Court [in Vale]," until the Court issued a formal omnibus opinion ruling on all the constitutional objections. Parties were awaiting a ruling from Judge Luukinen, following a series of omnibus hearings that had been held on the legality of the prison courtroom

---

> [E]arly on, we [referring to himself and Presiding Judge Pratt] decided that this particular facility would be limited to those cases that involve inmates who are accused of alleged offenses, and that we would not try any other matters physically out here...We would not prosecute for any crime that did not occur on the physical premises [of the prison]...I would have to admit we have never even discussed [trying] guard on guard [assaults] but I guess, theoretically, with regard to our intent, then, I would have to say yes [we would try that case at the prison], because that was our intent...[W]e premised [it upon the crime being committed at the facility].

Omnibus Hearing 6/22/1999, tape 3B at 420, 527-567, testimony of Judge Yraguen on direct examination by the State.

site, subsequent to the trial of State v. Jackson (reported at 178 Or App 233, 36 P3d 500 (2001)).[3] (During one of the omnibus hearings (6/22/1999), the Malheur County District

---

[3] Judge Yraguen testified that leading up to the Jackson trial he had worked closely with the Department of Corrections in setting up the courtroom inside the DOC facility. Omnibus Hearing, 6/22/1999, tape 3B at 447, Testimony of Judge Yraguen on direct examination by the State:

> Fred Kems was the superintendent [of DOC] by the time...the legislation was approved in 1989...for the [prison] siting process, we [Malheur County] were selected [for the prison site]...and...the initial plans were being drawn [by] and architectural firm out of Santa Monica, California. And it was at that time that the Department of Corrections gave me the authority to be able to sit down and discuss with those particular folks the inclusion of at least some sort of capability to have court proceedings held physically inside the institution.

Omnibus Hearing 6/22/1999, tape 4A at 129, Testimony of Judge Yraguen on cross-examination.

> Long before [CJO 99-030] arose, during the time of [State Court Administrator] Bill Linden...and Chief Justice Petersen...I at least alerted them to the fact that we were going forward with the video [facilities at SRCI] as well as the fact that we were contemplating a [courtroom] site inside the prison. But it was strictly informational, on one, in other words, no one gave any particular authorization. This Order [CJO 99-030] is specific. But please realize in January of 1998 [CJO 98-007] there was also a general Order entered by Chief Justice [Carson] and we viewed, that that particular Order gave us the authority to do what we did, with regard to holding trial here. In going through our [OJD] Legal Counsel Linda Zuckerman, the question was put to me, well, would you feel more comfortable with a specific Order? And I said yes...so then, an Order was drafted and entered. But it was not along the lines of somehow the Chief Justice was doing something [on Feb. 1, 1999 with CJO 99-030] that hadn't already been authorized by his Order a year earlier.

Omnibus Hearing 6/22/1999, tape 4A at 156, Testimony of Judge Yraguen on cross-examination. *See also* AC APP H1-2, 10/25/98 Request from Judge Yraguen to Zuckerman.

> ***
>
> Defense Counsel: What conversations did you have with [Chief] Justice Carson that resulted in him signing this Order [CJO 99-030]? What argument did you put forth to him?
>
> Judge Yraguen: I never had a direct conversation with the Chief Justice regarding signing the particular Order. My conversation would be indirect, through our Legal Counsel [Linda Zuckerman]...I did talk to Linda Zuckerman, [of the] State Court Administrator's Office.
>
> ***

Defense Counsel: What kind of constitutional considerations did you deal with in planning the preparation of this siting?

Judge Yraguen: I did – what limited research – and it was limited because there was very little with regard to video...and also, what I could find with regard to the viability of having a courtroom facility inside a state institution. I went through the National Center for State Courts, to attempt to determine what – if anything – they had, and quite frankly I got very, very little. So far as there being some sort of a constitutional prohibition or – on the other hand – a constitutional authorization. In other words, it seemed to be an area where we were entering into sort of a new area that had really not been dealt with through the case law.***Please realize too that we were attempting to deal with the local jail issue. We knew that we could not handle physically, a trial such as the Jackson trial that we tried in February [1999], with sixteen inmate witnesses [at the local Vale courthouse]. We knew, in the 1980's, that we were not physically capable of being able to do that. With regard to our facilities. And the idea then was, well how can a rural jurisdiction be able to handle those kinds of matters on an ongoing basis, provide whatever protections are needed, and be able to – in essence – do that particular part of what's associated with the siting of a prison. So, you know, this wasn't something that just popped into my mind, it was something that was really getting to me. For instance, the first person that I ever heard the idea of siting from, was Zadine Auyer [phonetic], who was co-publisher of the Malheur County Enterprise. Then Max Larocks, County Judge, and then [Malheur Co. D.A.] Pat Sullivan was involved. And then we just, it was sort of an informal group behind the scenes, as to how can we in fact consider the various things associated with the prison in this type of community?"

***

Defense Counsel: So basically, would you characterize you concerns that led to this decision, as one of efficiency? Courtroom efficiency?

Judge Yraguen:***Yes, efficiency would be one consideration. Security would be an ongoing consideration too, simply with regard to being able to move inmates through our particular [Vale courthouse] facility and to our courtrooms upstairs. I guess economy, transportation considerations, guard time.***My sheriffs here were saying 'wait a minute, I'm not interested in getting into this unless we can do things in a manner other than the sheriff's office being responsible.' So...it was a number of different concerns."

Omnibus Hearing, 6/22/1999, tape 4A at 251-382, Testimony of Judge Yraguen on direct examination by Defense Counsel. See also minutes from SRCI Courtroom Proposal/Facility meetings, APP G1, H1-2, I1-2 (mentioning video conference w/ AAG Van Valkenburg), J 1-2, K1, L1-3, M1.

Defense Counsel: Just to clarify here, in your responses today you keep referring to 'we' and 'our legal counsel' etc., and so far, those that have been questioned have denied having much participation or knowledge about what went on, and keep referring to the fact that you are the person who almost solely and single-handedly spearheaded and

Attorney testified that since SRCI had opened in 1991, and up until State v. Jackson on 2/9/1999, *all* SRCI inmate-defendants had been transported and tried at the Vale County Courthouse.[4] Thus, until 1999, an inmate's violent history apparently could not *necessitate* a prison trial.

At the time Defendant's trial took place, only one other criminal jury trial had been held inside the prison: State v. James Jackson, which appeal was then pending (185

---

orchestrated this effort. So who are we talking about, who are you talking about when you use the term 'we' – the plural?
Judge Yraguen: Other than keeping the State Court Administrator's Office and the Chief Justice advised as to what I was contemplating, and other than having the Department of Corrections, specifically through Fred Kearns, through he and his department, to be allowed to pursue the concept involving video as well as a courtroom facility, I would say that you are probably correct. It is me. On the other hand...other people did have involvement."
Defense Counsel: Did you have a committee formally organized to discuss these issues and explore the plans, the siting of the courtroom prison?
Judge Yraguen: No.
Defense Counsel: Did you have any public hearings on this issue?
Judge Yraguen: No.
***
Defense Counsel: Did you ever contact the defense bar as a group to suggest that they provide some input into having the trials in the prison?
Judge Yraguen: No.

Omnibus Hearing 6/22/1999, tape 4A at 260-300, Testimony of Judge Yraguen on direct examination by Defense Counsel.

[4] Omnibus Hearing 6/22/1999, tape 2A at 697, Testimony of Sullivan on direct examination by Defense Counsel.

Or App 367 (Nov. 28, 2001)). After the Jackson trial was over, the county, SRCI and the Court met to evaluate the Jackson trial procedures and to make changes (AC APP L1-3).[5]

On March 26, 2000, Defendant filed a Motion and Order to Subpoena More Than Ten Witnesses. On March 30, Defendant filed a Memorandum in Support of Objection to Trial at SRCI (TX 22; AC ER 12). Judge Luukinen's Letter opinion was issued April 11, 2000 (State's Brief, CA, SER-33-38; see also TX 24; AC ER 14). On or before May 4, 2000, a meeting was held at SRCI with OJD and DOC officials to discuss the details of how the next criminal jury trial would be accommodated by the Department of Corrections at SRCI. (State's Brief, CA, SER-39; see also TX 24; AC ER 14).

On May 2, 2000 Defendant's original defense counsel (Maloney) had moved to withdraw, and about this time Defendant's substitute (2nd) defense counsel (Carlson) was court-appointed (TX cover sheet, AC ER 9).

On May 4, 2000, Pamela Barton, Trial Court Administrator for Malheur County Circuit Court, sent out an email "memorandum" summarizing the agreed-upon arrangements by DOC and OJD (State's Brief, CA, SER-39; see also TX 24; AC ER 14). The email was addressed to Judge Pratt, Judge Yraguen, the Malheur County district

---

[5] See Meeting notes, SRCI Courtroom Critique 2/19/99. See also Letter from Judge Yraguen to SRCI Captain Maas, 6/17/1999 stating that "It is this Court's position that Snake River Correctional Facility should use its normal institution practices involving any inmates involved in hearings held at the institution when it does *not* involve a jury." (AC APP M1, emphasis added).

attorney's office, to Dept. of Corrections officials, and to Oregon Judicial Department officials.

On June 6, 2000, the State (Malheur Co. District Attorney) finally filed a Motion and Memorandum requesting that the trial be held at SRCI. The State's basis for the prison trial location was primarily focused on the alleged security threat that Defendant posed:

1. Defendant's disciplinary record, including Defendant's involvement in a previous violent escape attempt.

2. Alleged facts surrounding the current charges ("vicious nature of this attack," an "unprovoked attack of a corrections officer").

3. An assertion that the Defendant posed a serious safety risk during transport from the prison to the county courthouse.

4. That the Defendant had filed notice of an intent to subpoena "numerous" inmates witnesses.

5. That the alleged assault occurred at SRCI.

6. That all but one witnesses would be either inmates, correctional officers, or staff from SRCI.

State v. Cavan, Respondent's Brief CA A111776 pg SER-10.

On June 12, 2000 a pre-trial hearing was held during which defense counsel first received notice of the May 4, 2000 email memorandum. Defendant argued that the State had not met it burden that the inmate could *not* be tried at Vale, and that the prison courtroom was not sufficiently "de-prisonized." (TX 22-33, AC ER 12). The trial court

overruled his objections. (TX 28; AC ER 16). On June 21, 2000, Judge Yraguen also wrote trial counsel a letter, asserting that:

> My Staff and I met this morning with SRCI personnel who will be involved in providing services for the upcoming trial...Mr. Cavan will not be shackled but will be wearing leg braces and a belt under his clothing...A luncheon buffet will be provided by SRCI (paid for by the Court) in the Visitor's Center for the members of the Jury, the Defense Counsel, the District Attorney, the Court and Court Staff...Deputy Mooney of the Malheur County Sheriff's Office will be monitoring the jury panel and basically handling traffic control regarding the jurors...Public viewing will be accommodated through visitors not only being able to see proceedings through the glass windows via speaker but also through a television monitor attached to a video feed from the courtroom.

(AC ER-2-4).

Defense Counsel wrote the court, referencing Judge Luukinen's opinion, and renewed his objection to the prison courtroom (AC ER-5).

Ultimately, the trial at issue was held in the Snake River Correctional Institution, at the initial request of the Court, joined in by a motion from the State, and over the continuing objection of the Defendant. (Some type of juror orientation apparently took place the week before, off the record, the content of which the defendant objected to at sentencing.[6]) Voir dire took place at the prison. AC ATT 2-62. The trial was held in the small room off to one side of the visiting lobby. The defendant was forced to wear leg braces, and had a belt (presumably a stun belt) under his clothing (AC ER-2).[7] During the

---

[6] See TX pg 204 –05, AC ER 24-25.

[7] These security precautions seem quite excessive in light of the fact that his trial had been moved into the prison allegedly to provide better security. See e.g., People v. Barnum, 86 Cal. App. 4th

trial there were also three to four uniformed guards in the small room with the jury and other court workers (Tr. Exh. 203). The public was completely excluded from the courtroom (Tr. Exh. 203, 204); those interested were forced to watch court through a wall barrier having windowpanes.[8] The public included, at times, six to eight uniformed guards (Tr. Exh. 204). The record is incomplete, but the video (Tr. Ex. 204) appears to reflect the presence of only two non-uniformed persons in the public seating area.

The Defendant did not ask for a jury instruction on disregarding the location of the courtroom or the other extraordinary security measures. The Defendant did not object to

---

731, 104 Cal. Rptr. 2d 19 (2001) affirmed 29 Cal. 4th 1210, 64 P3d 788, 131 Cal. Rptr. 2d 499 (2003):

> Defendant was a prime candidate for shackling, both because of his status as an ASU inmate and given the particulars of his history of disobedience and violence against those in authority. The trial court ruled no stun belt or visible shackles were to be used [at the courtroom on prison grounds]. Had the trial been conducted in Susanville, instead of the prison, defendant's flight and violence risks would have been weighed quite differently.

Defendant represented himself pro se at trial, and failed to preserve numerous errors.

[8] This fact distinguishes this case from all other reported prison courtroom cases. No reported prison courtroom case references a barrier between the public and "courtroom well" in addition to forcing the court workers and public to remain inside a locked prison. See e.g., State v. Kell, 61 P3d 1019 (Utah 2002) and companion case State v. Daniels, 40 P3d 611 (Utah 2002) (codefendants in aggravated murder trial held at prison); Bright v. State, 875 P2d 100 (Alaska 1994); Foley v. Commonwealth, 429 Mass 496, 709 NE 2d 794 (1999); State v. Lane, 60 Ohio St. 2d 112, 397 NE2d 1338, 1340-43 (Ohio 1979); Vescuso v. Commonwealth, 5 Va App 59, 360 SE2d 547 (VA 1987). Howard v. Commonwealth, 6 Va App 132, 367 SE 2d 527 (1988).

the excessive security measures and restraints on the basis of the 6th and 8th Amendments to the U.S. Constitution,[9] and Art. I sections 11, 13 and 16 of the Oregon Constitution.[10]

Inherent in the decision by Judge Luukinen and Judge Yraguen to allow the trial to be held at SRCI, was an implicit finding that OJD Head Administrator and Oregon Supreme Court Chief Justice had authorized the prison to be used as a public courtroom, by signing CJO 99-030, although that exact phrase does not appear.[11] Similarly, it is

---

[9] **The 8th Amendment to the U.S. Constitution** states in relevant part: Bail, fines and punishments. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

[10] **Or. Const. Art. I section 13** states in relevant part: Treatment of arrested or confined persons. No person arrested, or confined in jail, shall be treated with unnecessary rigor.—

Or. Const. Art. I section 16 states in relevant part: Excessive bail and fines; cruel and unusual punishments; power of jury in criminal case. Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.—In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.

The use of "stun belts" has come under increasing scrutiny. See e.g., Shelly Dahlberg, THE REACT SECURITY BELT: STUNNING PRISONERS AND HUMAN RIGHTS GROUPS INTO QUESTIONING WHETHER ITS USE IS PERMISSIBLE UNDER THE UNITED STATES AN TEXAS CONSTITUTIONS, 30 St. Mary's L.J. 239 (1998) (arguing that use violates the 8th Amendment to the U.S. Constitution and infringes upon the Sixth Amendment right to counsel).

[11] See AC ATT-72 (Amicus Curiae attachments to brief in support of petition) Pursuant to ORS 1.002, the Chief Justice of the Oregon State Supreme Court is the head administrator of the State Courts. The Chief Justice may promulgate CJOs under the authority of ORS 1.002(a):

> **ORS 1.002** Supreme Court; Chief Justice as administrative head of judicial department; presiding judges as administrative heads of courts. (1) The Supreme Court is the highest judicial tribunal of the judicial department of government in this state. The Chief Justice of the Supreme Court is the presiding judge of the court and the administrative head of

> the judicial department of government in this state. The Chief Justice shall exercise administrative authority and supervision over the courts of this state consistent with applicable provisions of law and the Oregon Rules of Civil Procedure. The Chief Justice, to facilitate exercise of that administrative authority and supervision, may: (a) Make rules and issue orders appropriate to that exercise.

Judge Yraguen contacted the Chief Justice about courtroom plans for SRCI on 12/1/1995:

> "What I have visualized for some time is a facility where we can handle habeas corpus and post-conviction proceedings by video from the Courtroom to Vale without having to travel to the SRCI. The multi-purpose courtroom at SRCI will also have the capability of being transformed into a courtroom (through the use of roll-in/roll-out sections) for trials at the facility (including jury trial capabilities) itself without ever having to transport any prisoner out of SRCI for court.

See AC App J, Memo from Judge Yraguen to Chief Justice Carson, Dec. 1, 1995 re: SRCI/Malheur Cir. Ct. Video Hookup. Judge Yraguen provided the Chief Justice with a written proposal dated October 21, 1998. (see AC Att-74-77, previously filed at attachments to brief in support of Def's petition for Review). In notes memorializing a "SRCI Courtroom Facility Meeting" held Oct. 21, 1998, it appears that the favored plan was not to actually hold jury trials at SRCI, but to video-feed trials to Vale. (AC APP G1). DOC wanted an opinion from the Attorney General's office whether only allowing an inmate to appear by video would violate the inmate's confrontation rights. DOC also intimated that it would "talk with Texas," and "check with DOC regarding obtaining an internal legal opinion." (AC APP G1). Judge Yraguen intimated that he would "check with the [State Court Administrator's Office] regarding obtaining an internal legal opinion." (AC APP G1). Malheur County D.D.A. Norris indicated that he would "then be willing to discuss [the matter] with the appellate division; we then will decide whether we need to pursue a formal Attorney General's Opinion." (AC APP G1). The group concluded that "if we cannot do jury trials by video...where should be plan on conducting such proceedings [within SRCI]?...Question: Can we accommodate a courtroom in the [room adjacent to the visitor's center]...Can we accommodate a courtroom in that space available or do we have to go to another area? ...General consensus is that we can utilize the area planned for the courtroom by configuring a courtroom in the round. (AC APP G1).

On October 25, 1998, Judge Yraguen wrote State Court Administrator Kingsley Click a "request for legal counsel assistance." (AC APP H1-2). He did not raise any questions about the rights of the public or court workers. (AC APP H1-2).

On November 17, 1998, another meeting was held. DOC reported that DOC counsel (Jeff Van Valkenburg) intimated that the District Attorney should request a DOJ opinion. "Discussion about who would pay for such and if we want to request such without any idea of what we might get back?" (AC APP I1-2). In preparation for an upcoming Nov. 27, 1998 meeting, DOC counsel AAG Van Valkenburg was going to "appear" before the meeting attendees by video. It was determined to be Judge Yraguen's responsibility to submit plans for the "courtroom in the

inherent in the record that the Executive Department, including the Superintendent of SRCI, the Director of the Department of Corrections, the Governor, and Malheur County Sheriff similarly gave their full approval to this joint endeavor, as evidenced in the arrangements:

1. The trial court's Order that certain court staff and court-appointed attorneys appear inside the prison for the purpose of working during the trial.

2. Malheur County Sheriff's willing on-the-job participation in the event. (TX 35; AC ER 19 L4)

3. The trial court's summoning of prospective jurors, and requiring trial counsel to subpoena witnesses, to appear and remain inside the prison for the trial (or face a

---

round." (AC APP I1). The group came up with 10 reasons for justifying holding inmate trials inside the prison (AC APP I2):

> Working on answer as to why a courtroom should be located at SRCI?
> Reduce the transport of inmates to county seat: security for the public
> Cost savings to county for transport & housing of inmates
> Do not want [these] high security inmates in [county] jail facility
> Do not [have the] jail resources to be able to handles these high security inmates
> [Create] disincentive to filing [for jury trial/witness appearance] simply to get a trip out of the institution
> Promote efficient use of time
> Protection of DOC Corrections Officers by holding those who do commit crimes accountable for their actions
> Has potential of reducing recidivism involving criminal conduct within the institution
> Will increase the overall efficiency and effectiveness of the criminal justice system of which the courts are one of the integral parts
> Increase public awareness and information regarding the operation of Department of Corrections facilities within their jurisdictions

SRCI Courtroom Meeting, 11/17/98 (AC APP I 1-2).

Another meeting was held 12/13/1998 between SRCI, Oregon State Police, the Malheur Co. DDA and Judge Yraguen, regarding preparations for the State v. Jackson trial. See AC APP N1-4.

financial penalty and/or possible arrest for disobeying a court summons) (see ORS 656.732, 654.130 and 183.440).

4. The Department of Corrections (DOC) actions taken to accommodate the jury trial inside the medium security prison facility. Although SRCI normally employees strict access and security regulations, these regulations were changes (lowered) to allow the public to enter the secure perimeter.[12]

Apparently no Department (Executive or Judicial) has been openly queried or formally accepted responsibility or acknowledged liability for any injuries that might be incurred during trials held at SRCI. (AC APP O-T). (The Dept. of Cousumer and Business Services has recently docketed a complaint about the working conditions inside the SRCI courtroom, and opined that the prison courtroom issue "it is a very complex matter." (AC APP S1)).

In the Court of Appeals, Defendant complained of violations of rights personal to him. No party raised any objections regarding the safety rights of workers or public attendees.[13]

---

[12] As explained in State v. Cavan, 185 Or App 367, 370 n 5 (2002): "the staff at SRCI did not perform background checks on members of the public wishing to view the trial, although persons wishing to view the trial had to go through the usual security procedures before entering the visiting area." The prison thus lowered or ignored at least some of its standard and *usual* prison security safeguards, as those have been set out in OARs.

[13] See e.g., State v. Cavan, Appellant's Brief, (A111776) pg 3 Questions Presented: "Does a jury trial in a prison setting violate a criminal defendant's Article I section 11 right to an impartial jury or his Fourteenth Amendment Due Process right to a fair trial? Does a jury trial in a prison setting violate a defendant's right to a public trial or the proscription against secret courts?

The parties have never precisely documented the geographical and architectural boundaries of the SRCI state court prison courtroom. For instance, neither video exhibit in this case is particularly accurate.[14] However, it is a matter of public record that the prison is state – not county – property, and in the event of an emergency at the prison (riot, hostage-taking) a Letter of Agreement sets forth that the Department of Corrections,

---

[14] There are two video-exhibits (AC ER-1). Exhibit 203 is an 8mm videotape, that apparently is not viewable at the Supreme Court, due to its format and the fact that the Court does not have a player or adapter (conversation with Records clerk Feb.2, 2004). Exhibit 204 is a VHS videotape.

Exhibit 203 is a video and audio tape of behavior that took place inside the small courtroom on 6/26/2000, as captured on a fixed camera mounted near the ceiling behind counsel table. It does not include the entire trial (e.g., no voir dire), but does include portions of the trial, the conversation between the judge, victim and District Attorney about the victim's injuries after the jury went out to deliberate, and a complaint from a member of the public (Mr. Perez) to the court about the window and light "glare" that was obstructing the spectator's ability to see the proceeding through the barrier. There were approximately four uniformed officers in the room. Facial expressions of court workers are impossible to discern.

Exhibit 204 is a short amateur videotape showing portions of the prison's visiting area at different times. It shows persons (presumably jurors) walking into the larger room, it shows the large, empty visiting room, several empty smaller rooms, and short glimpses of the trial staging. It shows the view from the outside larger room looking into the small room in which the court workers are sitting and working. It is very hard to see details of any people inside the courtroom due to the reflection and glare of the window. This exhibit also shows that at the time it was filed, one of the doors leading into the small courtroom was open but blocked by a tripod holding a speaker. Also, at the time it was filed, there were ten observers sitting outside the room facing the jurors, eight of whom are uniformed guards (presumably Correctional Officers). One such spectator who was sitting in the front row occasionally waved a small baby up and down in front of the windowed barrier. There is no evidence in the record to prove what the court workers could or could not see from their point of view during the trial.

An October 1995 Report of the Malheur County Grand Jury sets forth a description of the perimeter fencing (AC APP A1), including the razor wire, and mentions an escape of a "medium level prisoner walking out of the main gate." (AC APP A1), and the "plan for riot or mass disturbance." (AC APP A3).

Oregon State Police and the Oregon National Guard will share responsibility.[15] Judge Yraguen participated in a 3/16/1998 meeting with Executive Department agents about this Letter of Agreement (AC APP E1). Approximately three months later, on June 11, 1998, there was a riot at the prison during which warning shots were fired. (AC APP F1-2). Plans for a prison courtroom revved up thereafter, between the D.A., DOC and Judge Yraguen (AC APP G-K).[16] It is clear from the map of SRCI (see AC APP B3 & E2) that the SRCI courtroom – located inside the Visitor Center -- is within the secure perimeter of the prison. On the other hand, the SRCI Administration Building is not (Ibid).[17] Officers are trained to use escalating levels of force depending on what security zone

---

[15] This 9-pg Letter of Agreement is signed 6/18/93 and 1/21/93 and on file with the State. It cites ORS 190.110, 40.035 through 401.115 and Gov. Exec. Order EO-91-17 as authority. It supersedes the Letter of Agreement between the Governor's Office, Dept. of Corrections and Oregon State Police dated 9/4/1987.

[16] See AC App R-S, Memo dated Dec.30, 1998 from Malheur Co. DA Ofc Mgr Donna Patterson to Judge Frank Yraguen. See AC APP J1-2, notes regarding SRCI preparations for the State v. Jackson trial (reported at State v. Jackson, 178 Or App 233, 36 P3d 500 (2001)).

[17] This fact distinguishes this case from the California prison courtroom cases. In the California cases, the prison courtroom is located outside of the secure perimeter in a small administrative building. Technically, it is on prison grounds, but the public can freely walk in and out. The most recent California case emanating from this courtroom is People v. Barnum, 86 Cal. App. 4th 731, 104 Cal. Rptr. 2d 19 (2001) affirmed 29 Cal. 4th 1210, 64 P3d 788, 131 Cal. Rptr. 2d 499 (2003) a case in which the defendant appeared pro se, and in which the appellate court found that he failed to argue prejudice stemming from the location of the courtroom upon prison grounds. As stated in People v. England, 83 Cal. App. 4th 772, 100 Cal. Rptr. 2d 63 (2000):

> The courtroom at High Desert State Prison was physically and visually remote from the facilities and activities of the prison...as the courtroom was located in a building outside the prison wires.

People v. England, 83 Cal. App. 4th 772, 777 100 Cal. Rptr. 2d 63, 66 (2000).

their human target is in. See e.g., Firearms Test – Part Two "Use of Force" (AC APP E3).[18]

There are five distinct areas inside the prison that persons had to enter in order to reach the courtroom (note: only the last two areas are shown on the State's videotapes):

1) Driving onto DOC property and parking in the assigned parking lot (AC ATT 64-67).

2) Entering the Visitor's Center through an entrance/lobby area (room A) containing bathroom and storage lockers (AC ATT 68).

3) Passing through a metal detector (AC ATT 68) and then entering a sally port (room B), that separates the entrance area (A) from the large SRCI visiting room (room C).

4) Entering the large SRCI visiting room (room C) (AC ATT 69, 71, see also Tr. Exh. Video 203). During trials, the public was allegedly allowed to enter this room (room C) in order to "attend" the state trial (taking place in room D). Public attendees were not allowed to enter into room D, but were forced to stay outside the courtroom (room D) and watch the courtroom activity through the glass windows. They were provided an audio broadcast of the courtroom proceedings through audio speakers located in room C.

5) Entering a smaller room referred to as the courtroom (room D) in which the judge, jurors, litigants, attorneys and witnesses sat and worked, which room is separated from the larger adjacent room C by computer operated locked doors and a wall of glass windows. (AC ATT 70, see also Tr. Exh. Video 204). It appears that during at least a portion of the trial in this case, one of the doors to room D was propped open,

---

[18] Items AC APP E2-3 were handouts at the 3/16/1998 Prison meeting on security that Judge Yraguen attended. Item AC APP B3 was part of the Minutes of a Malheur County Prison Advisory Committee Meeting 9/26/1996 regarding the "structure" of the Committee itself, and a proposed shooting range at SRCI. Judge Yraguen described this Committee as "informal." The Ontario Chief of Police resigned from it on 5/12/97, concerned about its legality and authority. AC APP D1.

although blocked by a tripod holding an audio speaker (see trial exhibit 203, video, at 5:00:12).[19]

Prison riots are not new to Oregon: there was a large riot at OSP in the 1960's.[20] SRCI has had at least one riot (AC APP F1-2). Oregon news media carry prison riot and hostage stories (e.g., the Arizona, January 2004 hostage situation).[21]

---

[19] Apparently this exhibit is in 8mm video format, which is unviewable at the Supreme Court building due to a lack of equipment. The State AG's office graciously loaned Amicus curiae a copy of a this exhibit that had been transferred to VHS format. Amicus curiae anticipates that the State or Defendant will be submitting a copy of the VHS formatted exhibit 203 into the record so that it will be readily available to the court and public for viewing at the Supreme Court. This exhibit does not show the entrance into the prison, or the passageways through the sally port and into the large visiting area. It also does not show what was seen from the jurors' point of view, or the view as seen from the judge's bench, from the witness stand, what the court reporter could see, what trial counsel could see, or what defendant could see. It is a very limited video of the courtroom set-up. The other video exhibit of record is from a fixed lens video camera situated in the upper corner of the courtroom. It too is a limited video of the prison courtroom layout.

[20] These riots were discussed during the 6/22/1999 omnibus hearing, tape 2B at 018-050, Testimony of Sullivan on direct examination by the defense.

[21] Out of state riots were discussed during the 6/22/1999 omnibus hearing, tape 2B at 037, Testimony of Sullivan on direct examination by the defense. References were made to "riots...in Idaho where they burned down buildings and people were killed and things like that. New Mexico [riots]."

SUMMARY OF ARGUMENT

Court workers (e.g., jurors, court staff, attorneys, witnesses and attending members of the press) are employees, or indirect employees, and thus have a right to work in a presumptively safe courtroom environment. Litigants and members of the public who wish to attend a public trial also have a right to attend a presumptively safe courtroom.

Under Oregon law, a prison is an inherently violent environment. A trial that is held within an inherently violent environment is not a public trial. Forcing jurors, court staff, attorneys, witnesses and attending members of the public to endure an inherent risk of violence, and to assume that risk of violence in order to access a state court criminal trial proceeding is unlawful and against public policy.

The public record reflects an excessive commingling of Executive and Judicial Department powers in the accommodation of state criminal courts inside SRCI.

The trial court erred in interpreting CJO 99-030 as authorizing the holding of state court criminal jury trials inside the Snake River Correctional Institution.

Although a trial judge or Executive Dept. agent has the capacity to waive redress in tort or worker's compensation for himself, he does not have the authority to waive it for third parties. There is nothing in the record to show that prospective jurors, empaneled jurors, court staff, attorneys, witnesses or any members of the public knowingly and intelligently consented to such waiver and assumption of risk as operates by law.

Excluding the public from the courtroom, and requiring the public to view the trial through a barrier, violated the defendant's and the public's rights to a public trial.

Defendant's conviction should be vacated, a re-trial barred on double jeopardy grounds, the opinions in State v. Cavan, 185 Or App 367 (2002) and State v. Lewis, 185 Or App 378 (2002) overruled, and the State enjoined from holding future trials within the prison.

ARGUMENT

A. Court workers (e.g., jurors, court staff, attorneys, witnesses and attending members of the press) - - whether employees or indirect employees - - have a right to work in a presumptively safe courtroom environment. Oregon State Employment Act (ORS Chapter 654 (including both the OSEA and the ELA)).[22] Oregon has not yet

---

[22] ORS **654.003.** Policy. The purpose of the Oregon Safe Employment Act is to assure as far as possible safe and healthful working conditions for every working man and woman in Oregon, to preserve our human resources and to reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human suffering, that is created by occupational injury and disease.

Agencies and courts distinguish between "direct" and "indirect" employees, typically concluding that the OSEA only applies to "direct" employees. See e.g., AC APP S1. As stated by this Court in Miller v. Georgia-Pacific Corp., 294 Or. 750 (1983):

> ORS Chapter 654 is broken up into the Oregon Safe Employment Act [OSEA] (ORS 654.001,295, ORS 654.991) and the Employer's Liability Act (ELA) (ORS 654.305-.335)...This court has repeatedly construed the ELA "to apply to employees of a person other than the defendant, if their work requires them to come within the risk of injury from the defendant's instrumentalities... Before the ELA can be made the basis of a claim for relief by an injured worker suing a defendant other than an employer of the worker, however, the defendant must be in charge of or have responsibility for work involving risk or danger in either (a) a situation where defendant and plaintiff's employer are

simultaneously engaged in carrying out work on a common enterprise, or (b) a situation in which the defendant retains a right to control or actually exercises control as to the manner or method in which the risk-producing activity is performed.

***

[A] typical ELA allegation [is that] the work "involved risk and danger," that "the plaintiff was an employee exposed to said risk and danger" and that the defendants "failed to use every device, care or precaution which it is practicable to use for the protection and safety of life and limb and that the defendants failed to furnish plaintiff a place of employment which was safe..."***[A typical answer to such an allegation is for] defendants [to] affirmatively allege[] that the plaintiff was contributorily negligent and that at the time of the accident, plaintiff "was a foreman or other person having charge of the particular work then being carried on...and...was under a duty to see that the requirements of the Employer's Liability Act were complied with at that time." This defense involves the so-called "vice-principal rule."

***

As stated at the beginning of this opinion, the Oregon Safe Employment Act was enacted in 1973. This code was enacted for essentially the same reasons as its predecessor safety acts were enacted – "to assure as far as possible safe and healthful working conditions for every working man and woman in Oregon***." (Emphasis added) . ORS 654.330. It aims to achieve occupational health and safety in "***every place, whether fixed or movable or moving, whether indoors or out or underground, and the premises and structures appurtenant thereto, where either temporarily or permanently an employee works***and every place where is carried on any process, operation or activity related, either directly or indirectly, to an employer's industry, trade, business or occupation***." ORS 654.005(9). Although adherence to safety standards may be of particular importance in "work involving risk or danger to the employees" (the workplace of the ELA, ORS 654.305), the standards apply to all workplaces. The Court of Appeals erred in limiting the application of the safety codes to only ELA workplaces.***We add, however, that safety code standards are minimum standards. A showing of compliance with such minimum standards does not foreclose a plaintiff from pleading and proving that other precautions could and should have been taken, either under general negligence standard or under the ELA standard.

Miller at 294 Or 750, 755-60 .

Occupational Safety & Health Div. v. Don Whitaker Logging, Inc., 329 Or 256 (1999):

The legislature delegated broad rule making authority to the Director of the Department of Business and Consumer Services (Director) to enforce the OSEA...Under that grant of authority, the Director promulgated OAR 437-01-760(3)(c), which sets out the circumstances under which the state will hold employers responsible for the acts of their supervisors.

issued an opinion as to whether jurors are covered by Worker's Compensation, or whether the ELA ORS 654.305 et seq) applies to them. Other jurisdictions have tackled the subject.[23]

B. Litigants and members of the public who wish to attend a public trial -- whether deemed social or business invitees -- also have a right to a safe courtroom.[24]

Jurors are not slaves or indentured servants. Treating them as such violates the 13th Amendment to the U.S. Constitution, and/or Art. I section 18 of the Oregon Constitution:

13th Amendment to the U.S. Constitution. Section 1. Slavery and involuntary servitude abolished. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have
been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Or. Const. Art. I section 18: Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation[.]

[23] See Robert Morse, JURORS AS WITHIN COVERAGE OF WORKERS' COMPENSATION ACTS, 13 ALR 5th 444 (1993) (collecting cases). See also Evan Seamone, A REFRESHING JURY COLA: FULFILLING THE DUTY TO COMPENSATE JURORS ADEQUATELY, 5 NYU J Legis & Pub Pol'y 289 (2001/2002).

[24] **ORS 654.305** Protection and safety of persons in hazardous employment generally. Generally, all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger **to the employees or the public** shall use every device, care and precaution that is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

The legislature had delegated the responsibility to provide "suitable and sufficient" courtrooms to the counties. ORS 1.185.[25] ELA broadens the scope of those who are held accountable:

> ORS 654.305 Protection and safety of persons in hazardous employment generally. Generally, all owners, contractors or subcontractors and other persons having charge of, or responsibility for, any work involving a risk or danger to the employees or the public shall use every device, care and precaution that is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

C. Under Oregon law, OAR 291-016-0030(7); ORS 291-016-0010(3), a prison is an inherently violent environment, and any person entering a prison does so at their own risk.[26] The courtroom at issue is found within the SRCI prison. Therefore, under law, the

---

[25] **ORS 1.185.** Provision of courtrooms, offices and jury rooms by county; payment of expenses. (1) The county in which a circuit court is located or holds court shall: (a) Provide suitable and sufficient courtrooms, offices and jury rooms for the court, the judges, other officers and employees of the court and juries in attendance upon the court, and provide maintenance and utilities for those courtrooms, offices and jury rooms. (b) Pay expenses of the court in the county other than those expenses required by law to be paid by the state. (2) Except as provided in subsection (1) of this section, all supplies, materials, equipment and other property necessary for the operation of the circuit courts shall be provided by the state under ORS 1.187.

[26] **OAR 291**. Department of Corrections. Division **16. Facility Access Procedures.** 291-016-0010 Authority, Purpose, and Policy.

291-016-0010(3) Policy: It is the policy of the Department of Corrections to control access into and out of facilities which physically house inmates in order to maintain the security, sound order, or discipline of the facility. All persons enter a facility at their own risk and will be required to meet the security and control measures enforced at the facility.

SRCI courtroom is not a presumptively safe environment. It is a hazardous environment. This court has recently acknowledged just how dangerous prisons can be. State v. Sparks, SC S46773 (filed 1/23/04).[27] Less than two weeks ago, a female prison guard was finally released after being held hostage for two weeks by Arizona prison inmates.[28]

291-016-0030(7) Physical welfare cannot be guaranteed since there is an inherent risk for violence in a prison environment.

[27] See State v. Sparks, __ Or ___ (2004), discussion under III. Penalty-Phase Assignments of Error, B. Future Dangerousness (relevance of evidence pertaining to weapons confiscated from inmates, prison gangs and the "inmate code."

> The state responds that it presented the evidence for the purpose of explaining to the jurors that inmates have many opportunities to inflict injuries or death on other inmates and that prison staff cannot always control the violence that occurs in prison...In contrast to a juror's knowledge of "outside" society, jurors ordinarily will not have the personal experience or expertise to know what opportunities for violence exist in the prison setting...[T]hat evidence described part of the violent characteristics of the institution in which defendant would be confined in the immediate future. Evidence of that violent institutional environment can assist jurors in understanding whether defendant would face a significant risk in prison of involvement in violent acts against others and, perhaps, the use of weapons that the environment affords...We conclude that the evidence...was properly admissible[.]

State v. Sparks, __ Or ___, ___ (2004).

[28] As stated in the Associated Press report:

> ***The guard, who was taken hostage with a male colleague Jan. 18 [2004] was undergoing medical evaluation Monday..[.] "These are two very violent criminals and you worry always about a female hostage," [corrections spokeswoman Cam] Hunter said...The standoff began Jan. 18 when [inmates] Wassenaar and Coy were released from their separate cells for kitchen duty. They were armed with homemade knives. Their plan...was to break out of the Arizona State Prison Complex-Lewis...After arriving at the kitchen office, they stripped a guard of his uniform and other equipment, handcuffed him, and tied up a kitchen worker with electrical tape...Newly shaved and disguised in the guard's uniform [one inmate] headed to the gate near the tower, leaving [the other inmate] in the kitchen. One of the two officers in the tower mistook [the disguised inmate] for a guard and let him through the gate and into the tower, which is part of one of the highest-security units in the Arizona prison system. [The other inmate] was chased

There was a large riot at OSP in the 1960's.[29] SRCI has had at least one riot in 1999.[30] Prison riots tend to make the news (e.g., the one that took place in Arizona, during January of 2004).[31]

D. A trial that is held within an inherently violent environment is not a public trial within the meaning of ORS 1.040,[32] Article I sections 11[33] and the 6th Amendment to the

---

> across the prison yard and pepper-sprayed by one officer, but [the first inmate] fired shots from the tower, allowing [the second inmate] to join him. What followed was a 15-day ordeal in which negotiators used a robot to deliver such tings as unfiltered cigarettes, a handcuff key, toiletries and food.***

Michelle Rushlo, Associated Press, ARIZONA GUARD THANKFUL FOR NEGOTIATED RELEASE, THE OREGONIAN, Feb. 3, 2004 pg A4.

[29] These riots were discussed during the 6/22/1999 omnibus hearing, tape 2B at 018-050, Testimony of Sullivan on direct examination by Defense Attorney David Carlson.

[30] See DOC Press Releases regarding a "disturbance" at SRCI on 6/12/1998, attached hereto as AC APP F1 and F2. As of 3/16/1998, SRCI had entered into a Letter of Agreement between the Department of Corrections, Oregon State Police and the Oregon National Guard, for responding to emergencies at SRCI. AC APP E-1. Corrections Officers and police agents are trained to use different levels of force depending on where inmates are relative to the secure perimeter. See AC APP E-3. The Visitor's Center is within the secure perimeters. See AC APP E-2 (map).

[31] Out of state riots were discussed during the 6/22/1999 omnibus hearing, tape 2B at 037, Testimony of Sullivan on direct examination by Defense Attorney David Carlson. References were made to "riots...in Idaho where they burned down buildings and people were killed and things like that. New Mexico [riots]."

[32] **ORS 1.040** Sittings of court to be public; when may be private. The sittings of every court of justice are public, except that upon the agreement of the parties to a civil action, suit or proceeding, filed with the clerk or entered in the appropriate record, the court may direct the trial, or any other proceeding therein, to be private; upon such order being made, all persons shall be excluded, except the officers of the court, the parties, their witnesses and counsel.

[33] **Or. C. Article I section 11** states in relevant part: Rights of accused in Criminal Prosecution. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury..[.]

U.S. Constitution.[34] Such a court is not an "open court" within the definition of Article 1 section 10 of the Oregon Constitution.[35] Holding a criminal jury trial within such an environment also violates the rights of the public under Or. Constitution Article I section 8[36] and the 1st Amendment to the U.S. Constitution,[37] and violates the rights of the workers and the public under Art. I section 10 (open court, remedy) and 20 (equal protection) of the Oregon Constitution,[38] and under the 4th Amendment (freedom from

---

[34] **The 6th Amendment to the U.S. Constitution** states in relevant part: Rights of accused in criminal prosecutions. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the
State..[.]

[35] **Or. C. Article I section 10** states in relevant part: Administration of justice. No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

[36] **Or. C. Art. I section 8** states in relevant part: Freedom of speech and press. No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any
subject whatever; but every person shall be responsible for the abuse of this right.—

[37] **The 1st Amendment to the U.S. Constitution** states in relevant part: Freedom of religion, speech, and press; right to assemble and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right
of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[38] **Or. C. Art. I section 20** states in relevant part: Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.—

unreasonable search and seizure)[39] and the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution.[40] The law clearly states that prison visitors "assume the risk," yet under ORS chap. 654 and tort caselaw, court workers and public invitees *do not* assume the risk. Regardless of which Department(s) and individual actors in the end will be held accountable (beyond the taxpayers), *it is simply unconscionable for the Judicial Department to allow trials to be held inside the prison.* It is similarly ruthless to force civilian people into the prison without providing them clear information about the risks they face, their remedies if hurt or killed, and their rights to refuse to go in.

E. Forcing jurors, court staff, attorneys, witnesses and attending members of the public to endure an inherent risk of violence, and to assume that risk of violence, or

---

[39] Being locked inside a sally port, or a prison "visiting room" in order to appear for your job, appear in response to a subpoena, or to attend public court is an unreasonable seizure.

[40] **The 4th Amendment to the U.S. Constitution** states in relevant part: Security from unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,
and the persons or things to be seized.

The 14th Amendment to the U.S. Constitution states in relevant part:
Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"waive" their statutory and constitutional rights and freedoms in order to access a state courtroom, is against public policy. At the time the Oregon Constitution was drafted, Oregon already had its first prison, and there is no evidence that criminal trials were held there or that the drafters ever anticipated that they would be held there.[41] The custom of *not* holding public trials inside prison is a longstanding one that this Court should uphold. The custom is "engrained into the fabric of our law and has acquired fundamental and basic status."[42] The U.S. Supreme Court has twice recognized ***as fact*** that prisons are not open to the public. "Traditionally, state capital grounds are open to the public. Jails, built for security purposes, are not." Adderly v. Florida, 385 US 39, 42, 17 L Ed 2d 149, 152, 87 S Ct 242, 244 *reh den* 385 US 1020 (1966). "[T]rials have traditionally been open to the public, in contrast to prisons from which the public has been traditionally excluded."

---

[41] As stated on the DOC website:

> History: Oregon State Penitentiary (OSP), Oregon's first state prison, was originally located in Portland in 1851. In 1866 it was moved to a 26-acre site in Salem and enclosed by a reinforced concrete wall averaging 25 feet in height. OSP is the state's only maximum security prison.

http://www.doc.state.or.us/institutions/inst.shtml?osp (last accessed 2/8/04).
Oregon's Constitutional convention took place in 1857. See CHARLES CAREY, THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (1984).

[42] See THOMAS PHILLIPS, THE CONSTITUTIONAL RIGHT TO A REMEDY, 78 NYUL Rev. 1309, 1337 (2003)(discussing state remedy clauses (e.g., Or. Const. Article I section 10) and citing Lankford v. Sullivan, Long & Hagert, 416 So. 2d 996, 1007 (Ala. 1982) (Jones, J., concurring). See also Jonathan Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or L Rev 1279 (1995).

Gannett Co., Inc. v. Depasquale, Co. Court Judge of Seneca County, N.Y., et al., 443 U.S. 368, 392, 99 S Ct 2898, 2912, 61 L Ed 2d 608, 629 n 24 (1979). Our legislature has clearly delegated to the counties – not to the Department of Corrections – the job of providing courtrooms. ORS 1.185.[43]

F. The separation of powers clause has been violated, in the accommodation of state criminal courts inside SRCI, in violation of ORS 1.185, Or. Const. Article III section 1,[44] Or Article IV section 8,[45] and Article VII(Amended), section 1.[46] The public

---

[43] It may be that Malheur *County* needs a new *county* courthouse with larger courtrooms and better security. However it may also be that Malheur *County* should have anticipated the need for a new county courthouse when it successfully lobbied for the construction of the state's largest prison. It may be that the Malheur *County* sheriff doesn't like having to take custody of, guard, and provide housing, food, and medical care for SRCI inmates -- who would otherwise burden the state DOC budget -- during *county* prosecutions of state criminal charges. It may be that the *county* doesn't have the financial resources to handle the prison case traffic. On the other hand, it is the *county's* statutory responsibility to provide these services and facilities, and the *county* prosecutor can always decline to prosecute (especially in light of in-house disciplinary procedures practiced by DOC/SRCI). The *county* can not lawfully be encouraged or allowed to shift its mandated statutory responsibilities onto the State, especially where such burden-shifting violates those statutes, burdens the state, violates fundamental constitutional rights of defendants and the public, and poses a foreseeable and wholly unnecessary risk of violence to court workers, litigants, and public spectators.

[44] **Or. Const. Art. III section 1** provides in relevant part: Separation of powers. The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.—

[45] **Or. Const. Art. VI Section 8**. County officers' qualifications; location of offices of county and city officers; duties of such officers. Every county officer shall be an elector of the county, and the county assessor, county sheriff, county coroner and county surveyor shall possess such other qualifications as may be prescribed by law. All county and city officers shall keep their respective offices at such places therein, and perform such duties, as may be prescribed by law.

record reflects that the trial court's action in this matter could be seen as compromising the judiciary's independence and calling into question its impartiality with regard to inmate-defendants, the county prosecutor and sheriffs, public spectators, and court workers.[47] Similarly, the DOC's willingness to ignore its own security rules, and lower security in order to allow public access into the prison courtroom only *increases* the risk of danger to everyone inside including correctional officers. ***It makes no sense.***

G. The trial court erred in interpreting CJO 99-030 as authorizing the holding of state court criminal jury trials inside the Snake River Correctional Institution, in light of OAR 291-016-1101(3), OAR 291-016-0030(7), ORS 1.040, ORS 1.185, ORS chap 654,

---

[46] **Or. Const. Article VII(Amended) section 1** provides in relevant part: Courts; election of judges; term of office; compensation. The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law[.]

[47] For instance, the trial court could be seen as being in danger of becoming overly dependent on the largess of DOC/SRCI in allowing trials to be held inside DOC (unlike the situation at the county courthouse, the court has no "right" to hold court inside SRCI). The court could also become overly dependent on the county prosecutor to keep filing the necessary motions to "require" holding trials inside the prison (since the Court is not allowed to advocate on behalf of either party, and should have no inside knowledge about the propensities of any particular inmate that might affect the impartiality of the court). A judge who likes holding court inside the prison – despite the inherent risk of violence -- would work to encourage the cooperation of the DOC and the county in allowing him to do so, because he surely cannot depend on inmate-defendants to seek the prison venue. Defendants and members of the public would likely suspect such a judge of being biased against the defendant *and against the public*. Who wants to enter a prison, or have their family or friends have to enter a prison, if there is no essential need to do so?

Article I sections 8, 10, 11, 20 of the Oregon Constitution, and the 1st, 4th and 14th Amendments to the U.S. Constitution.[48]

H. Although a trial judge arguably has the capacity to waive redress in tort or worker's compensation for himself, he does not have the authority to waive a third party's remedies. Or. Const. Article I sections 10 (remedies clause), 20, and the 14th Amend. to the U.S. Const.[49] Neither the Oregon Judicial Department nor the Executive Department of Corrections has the authority to waive redress in tort or worker's compensation for such persons.[50] If worker's compensation or liability under the ELA does exist for those workers and members of the public forced to enter the prison in order

---

[48] Arguably, CJO 99-030 does not violate the "private trials" provision of ORS 1.040.

[49] See e.g., Thomas Philips, The Constitutional Right to a Remedy, 78 NYUL Rev. 1309 (2003). See also Jonathan Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or L Rev 1279 (1995).

[50] There is nothing in the record to show that prospective jurors, empanelled jurors, court staff, attorneys, witnesses or any members of the public knowingly and intelligently consented to such waiver. The LEDS sheet reviewed by the trial court did not contain the waiver that is regularly included the Visitor LEDS sheet. Although the trial court, DOC officials and Malheur Co. DDA presumably reviewed the DOC LEDS authorization form on 12/13/99 (see AC APP N-2, N4), it is not clear that they formally reviewed the Visitor Authorization Form (see AC ATT-79, previously submitted as Attachments to Amicus Curiae's Brief in Support of Defendant's Petition for Review). The Visitor Authorization form includes an explicit warning that "Visitors are warned that there are inherent risks in visiting in a correctional facility and the possibility of being taken hostage does exist. Furthermore, the Department's policy is that hostages are not recognized." A DOC escort must sign the form, indicating that he or she has read this warning to the visitor/group. Ibid.

to attend a public court, the workers, the public, *and the taxpayers* have a right to know now. According to DOC's OAR, no one is covered, including the trial judge.

I. Excluding the public from the courtroom, and requiring the public to view the trial through a barrier, separately and additionally violated the public's rights under ORS 1.040, Or. Const. Article I sections 8, 10 and 20, and the 1st and 14th Amendments to the U.S. Constitution. It also violated the defendant's right to a public trial under Or. Const. Art. I section 11 and the 6th and 14th Amendments to the U.S. Constitution.[51]

The Court made no findings requiring or justifying the exclusion of the public from the SRCI courtroom, a decision it made *sua sponte*. The trial court was free to hold court in the larger SRCI visiting room, but chose not to. Judge Yraguen had previously publicly testified that using the larger room was an option. It is plain error for a court to exclude the public from the courtroom without first giving the public notice and opportunity to be heard, and without *making specific findings as to why it was necessary*. Although the Court gave the defendant notice five days before trial that the public would (1) be excluded from the courtroom and (2) be required to sit behind and watch through a barrier (AC ER 3 (second to last paragraph)), the court made no explicit findings of fact that support either of those extraordinary acts. Further, there is no evidence in the record

---

[51] Defendant's counsel did not raise this issue at trial or on appeal below. However, in State v. Lewis, the Defendant did raise the issue as discussed further on.

that the court explained to the jury during *voir dire* that the public would be sequestered behind the wall.[52]

Exclusion of the public. The exclusion of a member of the public from a courtroom, *when raised by the defendant* is generally reviewed for abuse of discretion. State v. Osborne, 54 Or 289, 292, 103 P 62 (1909) (addressing claim under Or. Const. Article I section 11 only). When raised by the press or the public under the free speech or open court laws, stricter scrutiny applies to assess whether an absolute or fundament right has been violated. See e.g, Oregonian Publishing Co. v. O'Leary, 303 Or 297, 736 P2d 173 (1987).[53] Here there is absolutely no reason stated in the record to justify the court's decision to exclude the public: there was no record of hysterics, acting out, etc. by any public spectator "which would lessen the dignity of the court, or bring the administration of justice into disrepute." State v. Osborne, 54 Or 289, 294 (1909).[54] As is

---

[52] See Cavan Void dire TX (VD 29 L 25, pg 30 L 1), where Court indicates to struck juror that she can "remain...[the proceeding] is open if any of you want to remain. Or for that matter, anybody else wants to come in an observe." Same at VD TX 48 L 1. (Voir dire TX was previously submitted as an Attachment to Amicus Curiae's Brief in Support of Def. Pet'n for Review, at pgs AC APP-32, 33, 51.

[53] The third party rights of the public can be raised pre-trial, during trial under Powers v. Ohio, 499 US 400, 111 S Ct. 1364, 113 L Ed 2d 411 (1991).

[54] It may be that this segregation was a condition laid down by DOC/SRCI due to the fact that SRCI was violating its own security OARs by allowing any member of the public to come into the visiting lobby without having to undergo a background LEDS search and sign in. (TX 24; AC ER 14). Thereby, the "attending public" was kept strictly segregated from the inmate. Everyone in the small courtroom – that is everyone in close proximity of the SRCI inmate -- had undergone the full LEDS background check.

clear from Trial Exh. 204, the trial judge could have made room in the courtroom for *at least* one or two public spectators, or moved the whole hearing out into the cavernous (light and airy) main visiting room. Instead, all the court workers were stuffed into the tiny room, and all the public were kept out.

The State refuses to address this issue, by either characterizing the entire visiting room as the courtroom, or simply asserting that the public wasn't excluded (although they were) because they could see *something* through the glass barrier. (See e.g., State's brief, CA pg 18). This is the same "through the looking glass" argument made by the State in State v. Jackson, and which the Court of Appeals rejected.

The Defendant was well guarded, physically restrained by leg braces, preemptively restrained by a stun belt, and within the locked prison. Arguably, he was excessively restrained in violation of his 6th and 8th Amendments to the U.S. Constitution,[55] and Art. I sections 11, 13 and 16 of the Oregon Constitution.[56] Exclusion of the public as a security precaution was wholly unnecessary.

---

[55] **The 8th Amendment to the U.S. Constitution** states in relevant part: Bail, fines and punishments. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [Proposed by Congress in 1789 and ratified by the necessary number of states in 1791]

[56] **Or. Const. Art. I section 13** states in relevant part:
Treatment of arrested or confined persons. No person arrested, or confined in jail, shall be treated with unnecessary rigor.—

This Court should recognize that exclusion of the public does not just affect the defendant. For people excluded from the inner circle, it diminishes their dignity by physically ostracizing them, making it easier for them to feel disenfranchised, missing something, disconnected, not good enough, and unwanted. It's easier for them to become distracted and stop paying attention altogether. The Defendant or witnesses testifying or sitting inside does not have *any* meaningful access to the supportive physical presence of their family and friends who are outside, as compared to the normal situation in a real courtroom. Jurors miss out on this presence of community as well. Sitting inside while others are barred from coming in is not the same as sitting in a public court. Sitting outside is not the same as being inside. Watching through glass and concrete means that you do not get to use all your senses in observing the trial. You do not get to contribute to the trial atmosphere, or indulge in it. The trial may be the *only* time that family and

---

Or. Const. Art. I section 16 states in relevant part: Excessive bail and fines; cruel and unusual punishments; power of jury in criminal case. Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.—In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.

The use of "stun belts" has come under increasing scrutiny. See e.g., Shelly Dahlberg, THE REACT SECURITY BELT: STUNNING PRISONERS AND HUMAN RIGHTS GROUPS INTO QUESTIONING WHETHER ITS USE IS PERMISSIBLE UNDER THE UNITED STATES AN TEXAS CONSTITUTIONS, 30 St. Mary's L.J. 239 (1998) (arguing that use violates the 8th Amendment to the U.S. Constitution and infringes upon the Sixth Amendment right to counsel).

friends can actually see their loved one without a barrier between them, especially if the defendant or witness is incarcerated.

For those inside, it can also be disconcerting and add to the stress. Working while locked in a building, positioned in a small room filled with armed guards, while being watched through a glass window by *more* armed guards is a set up strikingly similar to that used by police for interrogations and lends an air of persecution to the trial.[57] Working inside a small, boxy room when the public excluded (but pressing their noses up

---

[57] As stated by Gisli Gudjonsson in The Psychology of Interrogations, Confessions and Testimony:

> Irving and Hilgendorf describe three general classes of stressors that are relevant to police interrogation situations: (1) Stress caused by the physical environment at the police station; (2) Stress caused by confinement and isolation from peers; (3) Stress caused by the suspect's submission to authority. Each of these classes of stressors can cause sufficient anxiety, fear and physiological arousal in the suspect to markedly impair his performance during interrogation. The physical characteristics of the interrogation environment may cause anxiety and fear in some suspects. This is particularly true if the suspect has never been in a police station before, so that the environment is unfamiliar to him...Further types of stressors associated with the physical environment at the police station are uncertainty and lack of control over the environment. Suspects have little or no control over what is happening. If arrested, they cannot leave the police station until they are told that they are free to go. They cannot move freely within the police station, they are not free to obtain refreshments, make telephone calls, receive visits, or use toilet facilities without permission. They have limited opportunity for privacy, and indeed, interrogators may cause stress by positioning themselves very close to the suspect during interrogation. Such invasion of the suspect's personal space can cause agitation and increased physiological arousal. As suspects have little or not control over the physical environment at the police station ,they are inevitably faced with a number of uncertainties, which include uncertainties about the fulfillment of their basic needs, and not knowing how long they are going to be detained at the police station or what is going to happen to them. The timing and duration of the interrogation, confinement, and social isolation from others, are very important factors[.]

Gisli Gudjonsson, The Context of the Interrogation, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY at pg 27-27 (1992).

to the window) is markedly different than working in a county courthouse or court of appeals building, where people are encouraged to respectfully drop in to watch the proceedings unfold in a time-honored and dignified setting.

Use of a barrier between the public and the courtroom "well." Again, the court made this decision sua sponte, without any findings to support it. [58] There is very little reported caselaw on the use of physical barriers between public spectators and the courtroom "well" (the area containing the court workers (jurors, judge, court reporter, litigants, counsel, witnesses, etc.)). What little caselaw that there is, is not on point. First, in no reported case were the public's rights raised or zealously litigated. Second, all of the reported cases deal with barriers that were erected within the regular county or federal courtroom, that is, one within a regular county or federal courthouse, and *not within a prison.*[59] See e.g., U.S. v. Childress, 58 F.3d 696, 313 U.S. App. D.C. 133 (D.C. 1995); Morgan v. Aispuro, 946 F.2d 1462 (Calif. 9th Cir. 1991) *cert denied* (1992); and United States v. Whitehorn, 710 F. Supp 803 (D.C. 1989). In State v. Lewis, the parties

---

[58] In front of the Court of Appeals, the State argued that "such a limitation would be appropriate in this case based on the court's significant security concerns." Cavon, State's brief, CA pg 18 n 9. If "security" was such a big concern, then why did the Court cram the defendant in with 12 innocent jurors, a court reporter and other civilians yet with no barrier between them? Why did the Court leave one of the barrier (security) doors propped wide open? (See Tr. Exh. 204.) Typically security barriers are used to protect the court workers who are in the "well" from the public, not vice versa. There is nothing in the record to suggest that anyone was expecting disruptive spectators.

[59] Similarly, the few reported "prison courtroom" cases do not involve barriers.

briefed this issue, but only in regards to Article I section 11.[60] Defendant's counsel cited to only one case in his entire brief.[61]

---

[60] In State v. Lewis, the State argued to the Court of Appeals that

> [E]ven assuming that those viewing the trial from the windowed area adjacent to the courtroom did not have unlimited access to the courtroom itself, defendant points to no authority for an assertion that, for that reason, the trial was not public. State's Court of Appeals Brief, pg 7-8.

The State did not cite to any "barrier" cases, but only to prison cases that did not make mention of any barriers employed in the prison courtrooms (State v. Lewis, State's brief pg 7-8 n 5, citing to State v. Lane, 60 Ohio St. 2d 112, 397 NE 2d 1338 (1979) (trial held in prison not a public trial); Vescuso v. Commonwealth, 5 Va App 59, 360 SE 2d 547 (1987) (conviction reversed where Commonwealth offered no justification for holding trial in prison); Bright v. State, 875 P2d 100 (Alaska 1994) (prison trial violated defendant's right to a public trial); People v. England, 83 Cal App 4th 772, 100 Cal Rptr 2d 63 (Cal App 3 Dist) (2000) (trial held outside of prison, but in separate administrative building located on prison grounds, was public trial). The State then argued:

> [To] the extent that requiring the public to view the proceedings through a glass wall is a limitation on public access to the proceeding, there were substantial reasons justifying that limitation in this case. Defendant had a history of frequent violent acts, the bulk of which he committed while incarcerated. He is serving a sentence for a "thrill" killing of two people. Within a month of commencing serving that sentence, he assaulted another inmate. The offense in this case involved an assault on another inmate with a dangerous weapon: specifically a shank. In addition, not long before the trial date he threatened a federal judge with death [via a mailed anthrax threat together with a powdery substance to Boise, ID]. Finally, he had made other threats against people who expressed views other than his own. [Defendant is currently held in the Intensive Management Unit (IMU) because he is considered a high risk to other inmates and staff. Defendant is a documented gang member of the United Aryan Front and an avowed White Supremacist.] [The court acknowledged the testimony of defendant's attorneys from his murder trial that "he remained calm both in and out of the courtroom and presented no special or exceptional security risks" in that case, but nonetheless concluded that the concerns mentioned above would justify holding the trial at SRCI.] Given those circumstances, the trial court, acting within its discretion, reasonably concluded that security concerns justified holding the trial at the SRCI location rather than transporting him to the Malheur County courthouse for a trial at that location.

State v. Lewis, State's brief, pg 3-4, 11-12. The State completely failed to address the issue. Moving the trial to the prison locale is one decision (which the State addressed). Holding the trial inside the small room instead of the larger room is a second, separate decision. Excluding the public from the courtroom is a third, separate decision. Arranging the courtroom so that the

The State's assertion below that the public's view through the glass barrier was "unobstructed"[62] is not supported by the record. There was no evidentiary hearing held during or after the trial to ascertain what the public could or could not see while sitting behind the glass barrier. There is, however, some interesting public record footage on Trial Exhibit 204, recorded after the jury went out to deliberate. A man who had been watching from behind the glass barrier during the court's charge to the jury came in to the courtroom and complained to the trial court about the "glare and lights" that were obstructing his view, and asked whether the window could be removed. Tr. Exh. 204. The Court professed ignorance of the problem, and went out to look in from behind the glass barrier, and can be heard acknowledging the problem.

Finally, if this Court signs off on prison courtrooms with the barrier in place, *amicus curiae* predicts that it will only be a matter of months before the Malheur Co. trial court will be back at it, pushing for trial by video. *Amicus* predicts in that event, that the State will discover that the majority of inmate-defendants are so dangerous that a dozen Correctional Officers, triple leg braces, handcuffs, double stun belts, and sally ports will

---

public would have to peer through a barrier is a fourth, separate decision. The only reasons stated by the State in its brief were the reasons given for making the first decision.

[61] Lewis's appellate attorney complained about a vague record but made no attempt to supplement it, and cited to only one case in his entire brief: the recently decided State v. Jackson, 178 Or App 233 (2001), a case with very distinguishable facts (see State v. Lewis, Defendant's brief, at pg 5).

[62] See State v. Cavan, State's Brief CA, pg 17.

be no guarantee. For these inmates, the public must be 100% excluded from their proximity, and the only reasonably secure and "fair" trial shall be through a television monitor. Their first argument will be: Hey! The Supremes okayed the glass barrier at SRCI. What's the difference between looking through a piece of glass at SRCI, and looking through a piece of glass down at Vale? You want to hear about all the money and time we're going to save?

To be sure, amicus does not mean to belittle the State or minimize the financial costs that a rural county experiences when housing a large prison. But the county asked for the prison, and did so knowing its statutory responsibilities. The county must shoulder them, and not be allowed to shift its responsibilities for courtrooms and jail services to the State, especially when doing so will prejudice the defendant (who is presumed innocent) and needlessly expose court workers and the public to a grave risk of harm. The State courts should honor their long tradition of ensuring litigants, court workers and the public community access to safe and dignified courtrooms. That is -- courthouses, courtrooms and halls that Justice herself would recognize as home.

CONCLUSION

Defendant's conviction should be vacated, and a re-trial barred on double jeopardy grounds. The opinions in State v. Cavan, 185 Or App 367 (2002) and State v. Lewis, 185 Or App 378 (2002) should be overruled, and the State should be enjoined from holding future trials within the prison.

Oregon court workers and public attendees deserve the right to work and attend in a presumptively safe courtroom. Prison is inherently violent and hazardous. Holding court at the home of the victim, or the victim's employer is neither fair nor neutral. There is a long-established public policy against holding public trials inside Oregon prisons. Trial courts must provide an environment that encourages dignity and *insures* fairness and neutrality. We who seek our livelihood, our freedom, our 'day in court,' and our inspiration within the Oregon State Halls of Justice deserve no less.

DATED: February 10, 2004

Respectfully submitted,

Rose Jade OSB #95310
Attorney for Amicus Curiae
Jury Service Resource Center

Attorney Rose Jade
PO Box 2104
Newport, OR 97365
Tel: 541 265 2526

CERTIFICATE OF SERVICE

I certify that on February 10, 2004 I served the foregoing **Application by Amicus Jury Service Resource Center** pertaining to State v. Cavan, Supreme Court SC S50230 on the parties by mailing 2 true copies of same to those shown below at the address given:

PETER A. OZANNE #74246
Executive Director
PETER GARTLAN #87046
Chief Deputy Public Defender
1320 Capitol St. NE, Suite 200
Salem, Oregon 97303-6469

Attorneys for Petitioner on Review

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
JENNIFER S. LLOYD #94372
Assistant Attorney General
400 Justice Building
1162 Court St. NE
Salem, Oregon 9731O

Attorneys for Respondent on Review

DATED this 10th day of February 10, 2004.

Rose Jade
Tel: 541 265 2526