IN THE SUPREME COURT OF THE STATE OF OREGON

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

PETITIONER'S BRIEF ON THE MERITS

On the Defendant's 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.

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BRIEF ON THE MERITS

Statement of the Case

This is a criminal case in which petitioner-defendant (defendant hereafter) prays for reversal of his convictions for assault I, inmate in possession of a weapon, and assaulting a public safety officer because his criminal jury trial was held inside the Snake River Correctional Institution, a state penal facility.

Summary of Arguments

I. **Right to an Impartial Jury.** Article I, section 11 guarantees a criminal defendant the right to a jury that is not biased in favor of or against either party and will make its decision based *only* on evidence produced at trial and the legal standards provided by the court. The prison setting introduces a significant influential factor that is extrinsic to the evidence and the jury instructions.

A jury trial in prison biases the jury against the defendant and in favor of the state. As in shackling cases, the jury will infer that the trial is being conducted in prison because the defendant is dangerous and, therefore, likely guilty of the charged offense.

However, in addition to the prejudice associated with shackling, the prison setting creates a complex and ultimately impermissible relationship between the jury and the guards, leading to jury identification with and bias in favor of the guards and the state.

In this case, the jury was subject to visitor restrictions such as hand stamping, storage of effects in lockers, passage through a metal detector,

permission to enter and depart, escort for smoking breaks, and acknowledgement of a possible hostage situation. In the controlled but potentially eruptive prison environment, the guards represent the line of defense between the jury and the inmates. That relationship fosters a sense of dependency on and identification with the guards. In this case, the victim was a prison guard. The jury's dependent relationship with the guards naturally biased the jury in favor of the victim and against defendant.

Finally, the loss of jury impartiality (and even the risk of loss) is unnecessary. In the appropriate case, the security concerns that a particular defendant may pose can be addressed by the use of unseen restraints, such as a leg brace. There is no need to introduce the novel and complex prejudices associated with a prison setting when the perceived security threat can be addressed without an overt display of restraint.

II. **Due Process Analysis.** A reviewing court is to look at a challenged practice and determine whether it is inherently prejudicial. If the practice is inherently prejudicial, the state has the burden of showing that the practice advances an essential state policy and does so in the fairest and most reasonable manner. The practices of shackling a criminal defendant or forcing a defendant to wear prison clothing during trial are recognized as inherently prejudicial practices.

Of the five state courts to have considered an on-site prison trial, one has categorically rejected it, two have decided that the prosecution failed to show

justification for it, and the final two employed "close judicial scrutiny" and concluded that the practice was non-prejudicial in those individual cases, primarily because the defendant was an inmate charged with a violent crime. In this case, the Court of Appeals held that the practice was inherently prejudicial.

Like shackling and forcing a criminal defendant to wear prison clothing, conducting a trial in prison is inherently prejudicial. It conveys the message that defendant is dangerous and thereby erodes the presumption of innocence. Further, it introduces unnecessary and impermissible factors into the jury determinations, such as jury reliance upon and identification with the prison guards.

Defendant's behavioral history in prison and in the courtroom does not justify a prison trial, an inherently prejudicial practice. Apart from the incident that formed the basis for the trial, defendant was involved in four minor incidents and two more major incidents while incarcerated. Close judicial scrutiny of those incidents does not support the conclusion that defendant posed a security risk in a courtroom.

Even if defendant qualified as an escape risk or disruptive element in the courtroom, the choice of conducting a trial in prison was not the fairest and most reasonable means of achieving the state's interest in promoting security. The use of unobtrusive leg braces would have addressed those concerns without the attendant prejudices associated with visible restraints or a prison trial.

Finally, it is difficult to conceive of circumstances that would warrant a prison trial, as a matter of due process law. Shackling has been a disfavored

practice for centuries. Prison trials represent a regressive trend. The justification for prison trials and visual shackling should correspondingly diminish with the development of non-visual restraints.

III. Public Trial Analysis. A public trial improves the likelihood that the accused will not be unjustly convicted, reminds court officers of their duties and responsibilities, encourages witnesses to come forward, and discourages perjury. Any institutional change to the nature of public trials should be carefully scrutinized. Prison trials tend to promote the perception that the crime is atypically serious and the accused is likely guilty. Although a determined member of the public could have gained access to this trial after going through the normal restrictions for visitors at the prison, prison trials are essentially inconsistent with the concept of a public trial and do not promote the values of a public trial. Whereas courthouses tend to be centrally located and readily accessible to the public, prisons are typically located outside the town center and access is restricted. Attendance at prison trials will likely never rival the attendance at courthouse trials. Locating trials at prison will tend to remove criminal law from society and likely create equal protection concerns if the practice is limited to inmates.

Summary of Facts

The facts stated in the Court of Appeals opinion read as follows:

"While defendant was an inmate at SRCI, he attacked a corrections officer and repeatedly hit him with a homemade sap. At one point during their struggle, defendant bit off a piece of the correction officer's cheek and tried to spit it into the officer's mouth. Other officers arrived and helped subdue defendant. As he was being led away, defendant raised his arm in a 'victory salute.' The state charged defendant with first-degree assault, second-degree assault, fourth-degree assault, assaulting a public safety officer, and being an inmate in possession of a weapon.

"Based on defendant's extensive disciplinary record in the prison system, his involvement in an earlier violent escape attempt at another facility, and the unprovoked nature of this attack, the state proposed holding defendant's trial in a courtroom constructed in the visiting area of SRCI. The state reasoned that defendant would pose a serious safety risk if he were transported to Vale for trial. The state also noted that the assault occurred at SRCI and that '[a]ll but one of the witnesses will be either inmates, corrections officers or [SRCI] staff.' Finding that defendant posed a 'clear and present danger' and citing an 'overriding public interest,' the trial court overruled defendant's objections and decided that it was appropriate to hold the trial at SRCI. After considering the state's evidence, which defendant did not dispute in any substantial way, the jury found defendant guilty on all counts.

"On appeal, defendant argues that holding his trial at SRCI violated his right to a public trial, an impartial jury, and due process. * * *
* * *

"The record shows that the state has constructed a courtroom in the visiting area at SRCI. The courtroom provides space for the judge, both parties to the dispute, and the jury. Although the general public cannot sit in the courtroom because of its size, members of the public can sit outside the courtroom and view the proceedings through several large windows opening onto the courtroom. The viewing area contains approximately 50 seats for the public. It permits the members of the public who attend to see all the proceedings. The judge, the witness stand, the jury, and both counsel tables area are all visible from the public viewing area. The audio portion of the trial is broadcast to the public by speakers. In short, the public had full audio and visual access to the

courtroom during defendant's trial, and the jury could see the members of the public." *State v. Cavan*, 185 Or App at 369-370.

The record reflects additional facts regarding defendant and the courtroom setting. Defendant was 18 years old at the time of trial (Tr 125). The courtroom is located on institutional grounds in the visiting center (Tr 105). Jurors and visitors must have their hands stamped and are directed to store their effects in lockers (Ex 202). Jurors and visitors must pass through a metal detector (Ex 202). The doors are locked behind them, and visitors can not leave the building without the permission of an unseen guard located in a control center (Tr 35). Visitors must sign a document acknowledging that the prison will not recognize their presence in the event of a hostage situation. (Defendant's memorandum of law, at 8). Any juror who wanted a smoke break during trial was escorted outside the main gate.[1] Jury selection occurred at SRCI on June 26, 2000 (Tr 30).[2]

Evidence Relevant to Security Risk Posed By Defendant

The prosecutor submitted Department of Corrections Records, police reports and court documents to support its argument for trial at SRCI (see Respondent's Brief at Supplemental ER 10 –31). Those documents reflect the following incidents, in chronological order.

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1 Court: "There can't be any tobacco products on the property of Snake River. So what we've done is, we've made arrangements that in the event that becomes necessary, then we simply have to conduct you out the main gate. You'll simply take your smoke break, then we'll bring you back." (Tr 34).

2 Defendant did not designate voir dire as part of the record on appeal.

July 15, 1998; location: Oregon Youth Authority (Supp ER 27-32). Defendant was an in-custody juvenile at the Oregon Youth Authority (OYA). There are two separate "pods" at OYA, and each pod has two tiers of rooms or cells. Sometime during breakfast on July 15, 1998, there was a disruption that prompted staff members to direct the juveniles to their rooms. Juvenile James threw a tray at staff member Lisenbee. Defendant threw an apple onto the top tier. Juvenile Roberts threw a tray onto the floor. Defendant threw his milk onto the stairs. Defendant and Juvenile wrestled with staff member Lisenbee. Juvenile Roberts struck staff members Branch and Amy Pena. Juvenile struck staff members Lisenbee and Demus. Juvenile Dodgin struck staff member Demus. The four staff members ultimately retreated into the inner office and locked themselves from the four disruptive juveniles (Roberts, Dodgin, and defendant). The report concludes that Juvenile Roberts was the "jailhouse lawyer" and leader, Dodgin was an instigator, was a follower, and defendant "would get involved just to get involved." SER 31. As a result, defendant pleaded guilty to one count of criminal conspiracy, one count of attempted escape in the first degree, two counts of assault in the second degree, four counts of assault in the third degree, and two counts of criminal mischief in the first degree (SER-32).

July 5, 1999; location SRCI (Supp ER 22-23, 26). After lights out, defendant pinned his cellmate Burns to the floor and "was pushing Burn's face with his hands to the floor." Officer Wilcox gave defendant three orders to stop, but defendant did not comply. Wilcox called for a "response team." When the

response team arrived, defendant complied with its order, stood up, and placed his hands behind his back. Defendant was handcuffed and taken to segregation.

August 15, 1999; location SRCI (Supp ER 21). Defendant refused an order to move into his cell.

September 15, 1999; location SRCI (Supp ER 19-20). Defendant was kicking his door. An officer told defendant to stop, but defendant continued to kick the door. The officer told defendant to back up for the purpose of being restrained, but defendant refused. The officer called a sergeant. The sergeant ordered defendant to submit to restraints, and defendant complied.

October 11, 1999; location SRCI (Supp ER 17-18). There had been two "cell extractions" of other inmates. The "unit was filled with the smell of O/C spray" from the extractions. During a check of the tiers, an officer noticed defendant sitting on his concrete bed platform with a cloth wrapped around his face and his mattress "wrapped around and tied to his desk." The officer believed that defendant was preparing to be extracted from his cell. The officer ordered defendant to position himself to be "restrained at the cuff port." Defendant refused. The report does not reflect what occurred next, however, the findings and conclusions from the disciplinary hearing reflect that defendant "refused to comply with a valid order in the presence of others" and was fined $75 and lost recreation yard privileges for two weeks.

February 11, 2000; location SRCI (Supp ER 24-25). Two officers went to defendant's cell and told him to "back up and be restrained." Defendant asked, "what did I do?" An officer told defendant to back up and be restrained

because he was going to "pull his paper products." Defendant did not comply. An extraction team formed. The extraction team used "O.C" spray and extracted defendant from his cell. There were "no injuries to inmate Cavan or to cell extraction staff."

ARGUMENT

Defendant maintains that conducting his trial within a state penal facility violated separate constitutional provisions: (1) the Article I, section 11 right to an impartial jury, (2) the 14th Amendment Due Process right to a fair trial and (3) the state and federal constitutional rights to a public trial.

I. Article I, section 11 right to an Impartial Jury

This section of the brief presents two primary issues. The first issue is whether defendant's challenge to the prison setting for his criminal trial is cognizable under the "impartial jury" phrase in Article I, section 11.[3] The Court of Appeals held that the "impartial jury" phrase does not countenance the claim. *State v. Cavan*, 185 Or App 367, 372, 59 P3d 553 (2002).

Assuming the Court of Appeals was incorrect and defendant's Article I, section 11 right to an impartial jury provides a basis to challenge the prison trial

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[3] Article I, section 11 provides in relevant part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * *."

setting, the second and substantive issue is whether the on-site[4] trial at the Snake River Correctional Institution (SRCI) violated that right. This brief addresses each issue in turn.

A. Defendant's objection to the on-site prison setting for his criminal trial states a cognizable claim under the Article I, section 11 right to an impartial jury.

The Court of Appeals agreed with the state and held that defendant "does not have a cognizable Article I, section 11, challenge" to the prison trial setting. *Cavan,* 185 Or App at 373. The Court of Appeals identified defendant's claim as a "generalized right to a fair trial" and observed that this court's opinion in *State v. Amini,* 331 Or 384, 392, 15 P3d 541 (2000) "expressly declined to 'expand the guarantee of a trial by an impartial jury into an unqualified guarantee of a fair trial." *Cavan,* 185 Or App at 374.

Defendant agrees that *Amini* holds that Article I, section 11 is not a blanket guarantee of a "fair trial" or a state constitutional analogue for all the protections afforded by the federal constitutional Due Process clause. The issue, though, is whether defendant's specific claim is a generalized invocation of a right to a fair trial or, instead, is a type of claim that is either recognized by Article

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[4] Defendant employs the term "on-site" to mean within the perimeter of the institution, such that visitors and jurors are required to undergo the security checks attendant with admission to the institution. By comparison, California has provisions for conducting trials in buildings that are located outside the prison compound and to which jurors can drive to and enter without the security regulations attendant to the typical prison setting. *See, People v. England,* 100 Cal. Rptr. 2d 63, 83 Cal. App. 4th 772 (2000), discussed *infra*.

I, section 11 caselaw or has roots in the protections guaranteed by the right to a impartial jury. In defendant's view, Article I, section 11 caselaw already recognizes his claim, which is a request for a different setting or "venue" based on the prejudice associated with the prison setting. Two cases resolve the issue, *Amini,* 331 Or 384 and *State ex rel Ricco v. Biggs,* 198 Or 413, 255 P2d 1055 (1953).

The question in *Amini* was whether a criminal defendant could challenge a jury instruction (that informed the jury about some of the consequences of a finding of guilty but insane) as violative of his Article I, section 11 right to an impartial jury. This court analyzed the text and history of the clause, noting, *inter alia*, that by the mid-fifteenth century "the jury had evolved into a 'body of impartial men who come into court with an open mind." *Amini,* 331 Or at 390, quoting Theodore F.T. Plucknett, *A Concise History of the Common Law,* 129 (5th ed 1956). This court summarized its historical survey as follows:

> "The foregoing history of the trial by jury reveals that, by the eighteenth century, the requirements of an impartial jury reflected several related concerns, including that jurors be honest, that they not be interested in the outcome of the case, and that they be free from influence by the parties, particularly by the state." *Amini,* 331 Or at 391.

Based on its analysis, this court concluded as follows: "We conclude that the guarantee of a trial by an 'impartial jury' means trial by a jury that is not biased in favor of or against either party, but is influenced in making its decision only by evidence produced at trial and legal standards provided by the trial court." *Amini,* 331 Or at 391.

This court noted that its caselaw promoted two "two broad purposes of the guarantee of trial by an impartial jury." *Amini*, 331 Or at 391. The first purpose is to prevent someone with a bias or interest in the outcome of the case from serving on a jury. The second purpose is "to establish the right to a change of venue if pretrial publicity prevents an impartial jury from being drawn from the citizens of the county in which the crime was committed." *Amini*, 331 Or at 391, citing, *State ex rel Ricco v. Biggs*, 198 Or 413 (a criminal defendant charged with a misdemeanor has an Article I, section 11, right to move for a change of venue). *See also, State v. Montez*, 309 Or 564, 789 P2d 1352 (1990) (motion for change of venue based on Article I, section 11), *State v. Langley*, 314 Or 247, 839 P2d 692 (1992) (same).

This court also held that the guarantee of an impartial jury does not end with jury selection but, instead, continues through trial: "* * * this court has recognized that it is possible that a juror, who had been impartial at the outset, might be subjected to improper influences * * *[.]" *Amini*, 331 Or at 392. This court emphasized that "[t]he guarantee of an impartial jury therefore is the source of law for assessing alleged juror impartiality *throughout* the course of a criminal trial." *Amini*, 331 Or at 391 (emphasis supplied), citing, *State v. Pratt*, 316 Or 561, 575, 853 P2d 827 (1993) (mistrial motion based on alternate juror's remarks to bailiff during trial).

Article I, section 11 of the Oregon Constitution is derived directly from Article I, section 13 of the Indiana Constitution of 1851. Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional*

Convention of 1857, 468 (facsimili reprint, 1984). Though not determinative of the issue presented here, Indiana recognizes that placing defendant in ankle bars or restraints during trial states a cognizable claim under Article I, section 13 of the Indiana Constitution. *Hall v. State,* 159 NE 420, 423 (1928). In *Hall*, the Indiana Supreme Court commented that "[I]n the modern courtroom as little show of arms must be made as possible, and ordinarily the necessary restraint can be accomplished by placing ununiformed [sic] guards near the prisoner, or, as was done in this case, by shackling his ankles." *Hall,* 159 NE at 423. That court cited Blackstone for the common law tradition that a prisoner should not be brought before the bar in restraints unless there is manifest danger of escape. *Hall v. State,* 159 NE at 423. The court held that ankle shackling in that instance did not offend the Indiana Constitution because that defendant "had secured a revolver and shot at the sheriff, had attempted to escape, that his codefendant had escaped, and that effort might be made to release the prisoner during the trial [.]" *Hall,* 159 NE at 424.

Defendant's claim in the present case falls squarely within the protections guaranteed by the Article I, section 11 right to an impartial jury. The constitutional phrase guarantees that a criminal defendant will be judged by jurors who "'come into court with an open mind'" and who reach their decision based "only by evidence produced at trial and legal standard provided by the trial court." *State,* 331 Or at 390-91, quoting Theodore F.T. Plucknett, *A Concise History of the Common Law,* 129 (5th ed 1956).

As will be discussed more fully below, defendant's claim is that conducting a criminal trial within a state penal institution shrouds the proceedings in an atmosphere that impermissibly affects the jury's "open mind" and reduces the probability that the jury will render its decision based *only* on evidence produced at trial and the court's instructions. For example, a criminal defendant charged with murder of a child could invoke Article I, section 11 to challenge trial by a jury in a courtroom whose walls displayed gruesome photographs of other child murder victims. The claim would be cognizable under Article I, section 11 because that kind of photographic display would impermissibly impact the jury's ability to render its decision based solely on the evidence presented at trial. Assuming a constitutional violation in that example, the remedy would not be a trial in the same courtroom by a different jury but removal of the photographic display or removal of the trial to another, more neutral courtroom.

The same analytical model applies to pretrial publicity. When individual jurors express a predisposition that discloses that the juror would have difficulty rendering a decision based solely on the evidence and the court's instructions, the remedy is removal of the juror for cause. *Montez,* 309 Or 564; *see also, Morgan v. Illinois,* 504 US 719, 112 S Ct 2222, 119 L Ed2d 492 (1992) (jurors who will automatically vote for or against the death penalty without considering the aggravating or mitigating evidence or the judge's instruction are not impartial within the meaning of the Sixth and Fourteenth Amendments). When pretrial publicity or local notoriety make it unlikely that an impartial jury can be impaneled, the remedy is removal of the trial to a different venue. *State v.*

Rogers, 313 Or 356, 836 P2d 1308 (1992) (motion for change of venue denied; trial court's determination that petit panel would be impartial entitled to great weight), *State ex rel. Ricco v. Biggs*, 198 Or at 433 (Article I, section 11 right to an impartial jury applies to misdemeanor defendants).

B. *The Merits: Conducting a criminal trial within a state penal institution violates a defendant's Article I, section 11 right to an impartial jury.*

Defendant did not designate *voir dire* as part of the record. Consequently, defendant does not argue that the trial court erred by impaneling this particular jury. Rather, defendant maintains that the prison setting affected the impartiality of the jury, as a matter of law. In other words, the question is not whether this particular jury had lost its impartiality while another jury might have remained impartial. Rather, the question is whether the prison setting denied defendant his right to an impartial jury. Consequently, this case is not analogous to the trial court's assessment of the impartiality of an individual juror or even the effect of pretrial publicity in an individual case. *See*, *Montez*, 309 Or 564, *Rogers*, 313 Or 356. The degree of pretrial publicity will vary from case to case, and a jury's awareness of that publicity will vary from juror to juror. In those instances where pre-trial publicity and individual juror's knowledge of extrinsic facts will vary, the trial court's *ad hoc* determinations and assessments will be given deference. *See, e.g., Rogers*, 313 Or 356 (motion for change of venue denied; trial court's

determination that petit panel would be impartial entitled to great weight). Unlike the variations of pretrial publicity and individual juror's awareness of that publicity, the prison setting is a constant, and the impact of that constant on the jury's capacity to be impartial is to be evaluated as a matter of law.

For example, and returning to the hypothetical used earlier, the question whether a defendant accused of child murder would secure an impartial jury if tried in a courtroom that contained a grotesque photographic display of unrelated child murder victims would *not* turn on the particular jury panel. Rather, the question would reduce to an assessment of whether the photographic display would impermissibly affect *a* jury's ability to remain impartial. In other words, the constitutional issue would not turn on the individual juror responses or the trial judge's estimation of the display's impact on the jury. Rather, the question of law for an appellate court would remain whether that type of setting would, as a matter of law, encumber a jury's ability to render its decision based solely on "evidence produced at trial and legal standards provided by the trial court." *Amini*, 331 Or at 391. *See, e.g., Rideau v. Louisiana*, 373 US 723, 727, 83 S Ct 1417, 10 L Ed2d 662 (1963) (trial court improperly denied motion for change of venue where film interview of defendant's uncounseled stationhouse confession was broadcast on television three times in a parish of 150,000 people: "But we do not hesitate to hold, *without pausing to examine a particularized transcript of the voir dire examination of the members of the jury*, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" (Emphasis supplied.))

1. *Prison setting is inherently prejudicial; it permeates trial, impresses jury with state power, erodes presumption of innocence, induces juror identification with corrections staff, and reinforces jury apprehension of inmate defendants*

Since at least 1883, Oregon court has recognized that a criminal defendant has a common law right to be tried without visible restraints, absent a particularized showing of necessity. *Guinn v. Cupp*, 304 Or 488, 493, 747 P2d 984 (1987), *citing State v. Smith*, 11 Or 205, 8 P 343 (1883). In *State v. Smith*, 11 Or 205, this court cited the lead 19th century American case on the issue, *State of Missouri v. Kring*, 1 Mo. App 438 (1876), a murder trial. Because defendant Kring had assaulted the victim's husband in open court during an earlier proceeding, the trial court required him to stand trial in handcuffs. The Missouri Court of Appeals surveyed common law, which instructed that even "though under indictment of the highest nature, as murder or high treason, the prisoner must be brought to the bar without irons or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured by irons." *State of Missouri v. Kring*, 1 Mo. App 438, Westlaw version at p. 4[5] (citing 4 Blackstone 322).

The common law drew a distinction between ankle restraints (fetters) and handcuffs. The former was permitted only when there was evidence of escape; handcuffs were virtually never permitted: "And though fetters be allowed on the

feet, in case of danger of an escape, all the authorities say that his hands must not be bound, as was done in the case at bar." *Missouri v. Kring,* 1 Mo. App 438, Westlaw version at p. 4 (citations omitted). The common law rule apparently rested on several rationales, including that a prisoner before the bar should have a clear mind that "should not be disturbed by any uneasiness his body or limbs should be under" and that a prisoner should not suffer "ignominy or reproach" attendant to an appearance in restraints. *Kring,* 1 Mo. App 438, Westlaw version at 4 (citations omitted).

The Missouri court reversed the conviction, because Kring had been handcuffed. It reasoned that the evidence was insufficient to establish that defendant posed a continuing threat to anyone in the courtroom. Tellingly, it noted that even if there had been sufficient evidence of that, "Officers of the court could have been placed around him, if he was considered dangerous to by-standers; or he might have been placed in an inclosed [sic] space within the bar of the court, as was the English custom." *Missouri v. Kring,* 1 Mo. App 438, Westlaw version at p. 5.

Consequently, Oregon common law, too, has recognized and sought to avert the prejudice associated with trying a criminal defendant in restraints. That recognition falls logically within the concept of an "impartial jury" described in Article I, section 11. *See, United States F. & G Co. v. Bramwell,* 108 Or 261,

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[5] Defendant was unable to obtain a printed version of the opinion, and the Westlaw version does not indicate page breaks in the official reporter. Consequently, page citations are to the Westlaw version of the opinion.

266, 217 Pac 332 (1923) (common law persists unless changed by legislative enactment).

Similarly, the United States Supreme Court recognizes that shackling a criminal defendant or forcing a criminal defendant to appear in prison clothing undermines the presumption of innocence and is inherently prejudicial for 14th Amendment Due Process purposes. *Holbrook v. Flynn*, 475 US 560, 106 S Ct 1340, 89 L Ed2d 525 (1986) *citing Illinois v. Allen*, 397 US 337, 344, 90 S Ct 1057, 25 L Ed2d 353 (1970) (binding and gagging)[6]; *Estelle v. Williams*, 425 US 501, 504-05, 96 S Ct 1691, 48 L Ed2d 126 (1976) (prison clothing: "* * * the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment.")

All but one court to consider on-site prison trials have expressly or implicitly concluded under various analyses that the practice is inherently prejudicial and, if permissible, the practice must be justified by an essential state interest and narrowly tailored to meet that interest. For example, Ohio categorically prohibits it. *Ohio v. Lane*, 60 OHIO St 2d, 112, 379 NE2d 1338 (1979) (Due Process, public trial, and equal protection analysis). Alaska would contemplate it only in exceptional circumstances that demonstrate "compelling reasons" for doing so. *Bright v. Alaska*, 875 P2d 100, 109 (1994) ("public trial"

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[6] Though *Illinois v. Allen*, 397 US 337, involved a defendant who complained that he was denied a Sixth Amendment right to be present at his trial after being bound, gagged, and ultimately removed from the courtroom for his obstreperous behavior, the Court later adopted the analysis and reasoning for Fourteenth Amendment Due Process purposes in *Holbrook v. Flynn*, 475 US 560.

analysis; circumstances did not satisfy the test). Virginia would permit it only in exceptional circumstances "showing some clear and present overriding public interest or justification." *Vescuso v. Commonwealth of Virginia*, 360 SE2d 547, 551 (1987) (public trial analysis; exceptional circumstances not established). *Compare, Howard v. Commonwealth of Virginia*, 6 Va App 132, 367 SE 2d 527 (1988) (no inherent prejudice where jury trial was held in a room that "in all respects resembled a courtroom" located in the prison administration building *outside* the prison perimeter and jurors were not required to "pass through gates or other security devices.")

Utah has permitted on-site prison trials, but only after a "case by case" analysis. *State of Utah v. Kell*, 2002 UT 106, 61 P3d 1019, 1026-27 (2002), *State of Utah* v. *Daniels*, 2002 UT 2, 40 P3d 611 (fair trial, equal protection, public trial analyses).

If forcing a criminal defendant to appear in shackles or prison garb is inherently prejudicial, then conducting the trial in prison is surely inherently prejudicial. In *Estelle v. Williams*, 425 US at 504, the Court reasoned that forcing a defendant to wear prison clothing erodes the presumption of innocence. *A fortiori*, a prison trial is at least as prejudicial as prison clothing because the setting enfolds the defendant in prison accoutrements, in effect, constituting an ominous and omnipresent form of visible shackling.

Yet, even apart from its impact on the jury's perception of the defendant, a prison trial affects the jury and jury impartiality qualitatively differently than mere prison clothing. By definition a prison is not part of ordinary free society.

Instead, it is secure housing specifically designed to contain an unruly and dangerous subset of individuals. The evidence in the record establishes that visitors were admitted through locked doors, hands were stamped, valuables were locked away, and visitors were asked to sign an acknowledgement that he or she would not be "recognized" in the event of a hostage situation.

This is vastly different from a typical courtroom setting located in a city center. Typically, the courthouse is part of community architecture and community fabric. Though modern courthouses may have security checkpoints at entrances, jurors and members of the public typically have free access to the building once inside.

By contrast, a prison is socially and physically located outside the normal community, a place where visitors and jurors are involuntarily subject to regulation and dependent on prison staff for protection and security, even as to the most mundane activities such as taking a smoking break. The prison environment is palpably oppressive. The Alaska Court of Appeals notes that, "prisons are perfused with physical manifestations of the coercive power of the state." *Bright v. Alaska*, 875 P2d at 109 (holding that prison trials violate the right to a public trial, though "compelling reasons" might justify holding trials of exceptional cases in prison.)

Further, the prison atmosphere conflicts with the very nature of a trial. The rules of evidence and the formal atmosphere of a courtroom are designed to provide the jury with relevant evidence in a near laboratory setting for the purpose of conducting a clinical, scientific reconstruction of a past event. By

design, trials are intended to be free from distracting and emotionally charged evidence that might induce the jury to render its fact-finding decision on an emotional or visceral basis. See, e.g., OEC 403.[7] The heavy, burdensome atmosphere of the prison setting frustrates that goal.

The lay juror is naturally apprehensive of the prison surroundings, fearful of the inmates, and dependent on the guards to provide security from the inmate population. Any doubt about the dangerousness of the environment and the people locked in it dissipates in the face of the notice to visitors that they will not be "recognized" should they become hostages.

The prison setting creates a unique and impermissible dynamic between the jury and the guards. The United States Supreme Court acknowledged the danger of jury identification with guards in *Turner v. Louisiana*, 379 US 466, 85 S Ct 546, 13 L Ed2d 424 (1965). There, two deputies arrested defendant for murder, obtained his confession, and became the two primary state witnesses at trial. Pursuant to Louisiana law, the jury was sequestered throughout the three-day trial under the direction of the sheriff's office. The two arresting deputies were part of the sheriff's staff that was in regular contact with the jury: "The deputies ate with them, conversed with them, and did errands for them." *Turner v. Louisiana*, 379 US at 468. The Court held that this procedure violated Due Process and reversed, noting:

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[7] OEC 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

> "The role that Simmons and Rispone played as deputies made the association even more prejudicial. For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial." *Turner v. Louisiana,* 379 US at 474.

In defendant's view, the likelihood of jury identification with the guards is even more obvious in the present case. Not only was the jury dependent on the guards for security, but the primary charge in this case was assault against a prison guard. In other words, the jury was asked to return a verdict on someone accused of attacking a member of the jury's very security force. Surely, it is a reasonable psychological proposition that one would not willingly or wisely undermine one's security force when in a hostile environment. Accordingly, a reasonable juror would naturally identify with and favor its security team.

By historical design, the jury represents the community:

> "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana,* 391 US 145, 156, 88 S Ct 1444, 20 L Ed2d 491 (1968).

The traditional courtroom setting reduces the risk of jury identification with and dependence on the correction's staff and, instead, reaffirms the jury's traditional role as independent arbiter. The jury is not an overt protectorate of the executive branch; rather, the jury is an independent extension of the community. Unless a criminal defendant pleads guilty or waives his right to a jury, a defendant can not be incarcerated until a jury (not the executive branch)

has determined that the defendant committed a crime punishable by incarceration. A physical setting that overtly places the jury in the hands of the executive branch for safety and security unacceptably erodes jury independence and impartiality because it renders the jury reliant on the executive branch for its safety and well being. Far from being a neutral site, the prison setting introduces atypical and altogether unnecessary pressures on the typical lay juror.

The Ohio Supreme Court has determined that trials in prison erode the presumption of innocence, affect the jury's ability to be impartial, and chill a defendant's rights to obtain witnesses. *State v. Lane*, 60 Ohio St 2d 112, 114, 397 NE 2d 1338 (1979). That court found that the Ohio state constitutional right to an impartial jury, as well as the federal right, categorically prohibits jury trials in prison, reasoning, in part, as follows:

> "The prison environment which is laden with a sense of punishment of the guilty within transmits too great an impression of guilt on the part of the inmate who is on trial. The Sixth Amendment to the United States Constitution and Section 10 of Article I of the Ohio Constitution guarantee every accused in a criminal proceeding the right to be tried by an impartial jury. This court does not believe that a trial within a maximum security penitentiary with a 12-foot high double walls, armed guards, high guard towers and visible barred windows allows a jury to maintain the delicate posture of impartiality which is a mainstay of our judicial system. * * * 'It is reasonable to assume that the jurors in a criminal trial in a penitentiary are aware that their personal safety while within the institution lies with the prison administrators and personnel. By being required to place their trust in the prison authorities, it is not unrealistic to view this as a subtle, even if sub-conscious threat to the impartiality of each juror, especially when those protecting them are assailed from the witness stand.'" *State v. Lane*, 114, 397 NE 2d at 1341, quoting the Court of Appeals opinion.

For example, it is not difficult to imagine the burdensome impact that a prison setting would have on a typical 21-year old juror. Indeed, nationwide "Scared Straight" programs feature animated inmates lecturing "at risk" children and juveniles in the prison setting for the purpose of shocking the youth away from unlawful behavior. Like the anvil to the hammer, the prison setting is itself a critical player in the "scared straight" message.

And it is not enough for the state to argue that jurors who are intimidated by the prison setting could be excused for cause. A criminal defendant is entitled to a fair cross section of society, not merely its most hard-bitten members. Further, even those jurors who might represent that they are unaffected by the prison setting may well be unaware of the impact of the prison on their psyche. *See, e.g., Holbrook v. Flynn*, 475 US 560, 570, 106 S Ct 1340, 89 L Ed2d 525 (1986) ("Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.")

It is easy to imagine that a typical lay person would prefer to avoid the prison setting. If that is so, then it is also logical to assume that jurors assigned to a prison trial would prefer to limit the time spent in prison. (The rhetorical question looms, how many individuals willingly linger in a prison longer than necessary?) Therefore, it is reasonable to assume that a typical lay juror in a prison trial would wish to end the jury duty as soon as practicable, and that would logically mean ending jury deliberations as soon as practicable. Consequently, it

is reasonable to assume that jury deliberations could be affected by the prison setting.

Far from being a neutral site that reinforces the independent role of the jury, the prison setting introduces atypical and altogether unnecessary pressures on the typical lay juror and on the appearance and performance of the adversarial system. If the Indiana Supreme Court opined in 1928 that necessary restraint in the "modern courtroom" could be achieved with plainclothes officers instead of visible restraints, certainly there should be little basis for regressing to even more obvious forms of restraints such as trial in prison. There is simply no need to jeopardize the impartiality of a jury trial by conducting it in prison.

2. *Because prison setting is inherently prejudicial as a matter of law and over-responsive to any risk of escape or violence, reversal is required*

As noted above, all the courts presented with the prison trial question agree that the practice is inherently prejudicial (though justifiable under some analyses, for example, Due Process, Equal Protection, or public trial analyses). Oregon has a common law tradition against visible shackling of criminal defendants, unless there is a compelling need to do so. Likewise, shackling or forcing a criminal defendant to wear prison clothes before the jury is inherently prejudicial for Due Process analysis, as a matter of law.

The common law analysis, *supra*, and due process analysis, *infra*, acknowledge that a criminal defendant's conduct can cause him to lose or waive

the right to appear unrestrained. However, even when the exceptional criminal defendant poses an escape risk or a threat of courtroom disruption, the court is authorized to impose a measured remedy tailored to the individual risk. By contrast, the prison trial setting is categorically over-responsive to the risks of escape or disruption and introduces harms beyond those associated with visible restraints.

Further, both the escape risk and the risk of violent disruption can be addressed in a typical courthouse by non-visible restraints, such as the use of an unseen leg brace. An unseen leg brace addresses the risks of escape and assault, removes the prejudice associated with visible restraints, and removes the additional prejudices associated with the prison setting.

If the prison setting prejudices a jury for reasons independent of the evidence, then a criminal defendant has been denied his Article I, section 11 right to an impartial jury. *State v. Amini,* 331 Or 384.

Finally, defendant maintains that the unlawful infringement of the right to an impartial jury is conclusively prejudicial. In other words, reversal is required upon the determination that a defendant was unlawfully denied an impartial jury. *See, e.g., State v. Brown*, 310 Or 347, 800 P2d 259 (1990) (trial court's failure to instruct the jury on an element of the offense was both plain error and harmful as a matter of law, despite overwhelming evidence on the element in the record); *State v. Osborne,* 54 Or 289, 299, 103 P 62 (1909) (denial of right to public trial is "conclusively presumed" to be prejudicial). A reviewing court could not say that

there is little likelihood that the presence of a biased or prejudiced jury did not affect the outcome of a trial. *State v. Hansen,* 304 Or 169, 743 P2d 157 (1987).

II. The Prison Setting Violated Due Process

A. The Analytical Model

The 14th Amendment[8] guarantees a criminal defendant due process of law. Due process includes the right to a fair trial. A fair trial means a trial using procedures that are consistent with traditional and evolving standards of Anglo-American jurisprudence. *See, e.g., Patterson v. New York,* 432 US 197, 97 S Ct 2319, 53 L Ed2d 281 (1997) (reviewing common law and surveying contemporary nationwide practices to conclude that a New York law that placed burden on defendant to prove affirmative defense of extreme emotional disturbance does not offend due process). The right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent jurors.'" *Irwin v. Dowd,* 366 US 717, 722, 81 S Ct 1639, 6 L Ed2d 751 (1961) (defendant has a right to impartial factfinder, that is, one who though aware of the underlying incident is yet 'indifferent' and has not formed a firm opinion), *Murphy v. Florida,* 421 US 794, 95 S Ct 2031, 44 Led2d 589 (1975) (same).

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[8] The 14th Amendment reads in relevant part:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

The United States Supreme Court uses a two-pronged analytical model to analyze the fairness of a particular trial procedure. First, the Court determines whether the procedure is inherently prejudicial. For this determination, a court is to "look at the scene presented to the jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial [.]" *Holbrook v. Flynn,* 475 US 560, 572, 106 S Ct 1340, 89 L Ed2d 525 (1986). In this regard, the courts "must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Estelle v. Williams,* 425 US 501, 504, 96 S Ct 1691, 48 L Ed2d 126 (1976). The Court cautioned that because jurors "will not necessarily be fully conscious of the effect [the practice] will have on their attitude [,]" the question is not whether jurors actually "articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook v. Flynn,* 475 US 560, *quoting Estelle v. Williams,* 425 US at 505.

If the procedure is inherently prejudicial and therefore poses a "threat to the fairness of the fact-finding process" the Court will employ "close judicial scrutiny." *Estelle v. Williams,* 425 US at 503-04, *Holbrook v. Flynn,* 475 US at 568. At this juncture the burden shifts to the state to demonstrate under close judicial scrutiny that the practice was the "fairest and most reasonable" (*Illinois v Allen,* 397 US at 344) method of advancing an "essential state policy." *Estelle v. Williams,* 425 US at 505, *Holbrook v. Flynn,* 475 US at 568. The state has the burden to demonstrate that the inherently prejudicial procedure was "justified by

an essential state interest specific to each trial." *Holbrook v. Flynn*, 475 US at 569. For example, in *Illinois v Allen*, 397 US 337, 344. 90 S Ct 1057, 25 L Ed2d 353 (1970), the Court held that binding and gagging a criminal defendant was presumptively prejudicial and that "no person should be tried while shackled and gagged except as a last resort." Similarly, the Court has determined that forcing a criminal defendant to wear jail or prison clothing at trial is inherently prejudicial and subject to close judicial scrutiny.[9] *Estelle v. Williams*, 425 US 504-05 (forcing a criminal defendant to wear prison clothing is inherently prejudicial because it "may affect a juror's judgment"; but defendant failed to properly preserve the issue in that case).

On the other hand, if the challenged procedure is not inherently prejudicial, the burden is on the defendant to show actual prejudice. *Holbrook v. Flynn*, 475 US 572. For example, the petitioner in *Holbrook v. Flynn* claimed that the presence of four state troopers in the front row at his joint trial with six co-defendants was inherently prejudicial. The Court disagreed, reasoning that, unlike shackling, there existed a "wider range of inferences that a juror might reasonably draw from the officers' presence" other than the inferences prejudicial to defendant. *Holbrook v. Flynn*, 475 US at 569. For example, the Court explained, the jury might infer that the officers were there to guard against disruptions outside the courtroom, inside the courtroom, or were merely "elements of an impressive drama [rather] than * * * reminders of the defendant's

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[9] Oregon recognizes a common law right to be free of restraint at trial, absent a substantial showing of necessity. *Guinn v. Cupp*, 304 Or 488, 493, 747 P2d 984 (1987), *State v. Smith*, 11 Or 205, 8 P 343 (1883).

special status." *Holbrook v. Flynn*, 475 US at 569. Having found the procedure not inherently prejudicial, the Court concluded that the defendant "had failed to carry his burden" of establishing prejudice. *Holbrook v. Flynn*, 475 US at 572.

B. A prison setting for a jury trial is inherently prejudicial and does not withstand close judicial scrutiny in this instance; further, unseen restraints satisfy security needs and eliminate the need for prison trials

The first question is whether the practice of conducting a trial in a prison setting is inherently prejudicial, like making defendant wear prison clothes, or, instead, akin to having state troopers sitting in the front row and therefore not inherently prejudicial. If the former, then the state has the burden to demonstrate under "close judicial scrutiny" that the procedure was "justified by an essential state interest." *Flynn*, 475 US at 569. If the practice of conducting jury trials in prison is not inherently prejudicial, then the burden is on defendant to show prejudice. *Flynn*, 475 US 560

It is important to remember that the present case involves a trial on prison grounds in the visitor's center. The visitors and jurors were required to pass through security to enter the building. Consequently, the present case is distinguishable from those cases where the trial occurred on prison grounds but outside the prison walls. *See, People v. England*, 100 Cal. Rptr. 2d 63, 83 Cal. App. 4th 772 (2000) (trial in a courtroom that the jurors could drive to, that was outside the "prison wires," and was "visibly remote" from the prison facilities did not violate the California Standards of Judicial Administration); *Howard v. Virginia*, 6 Va App 132, 367 SE 2d 527 (1988) (no inherent prejudice where jury

prejudice where jury trial was held in a room that "in all respects resembled a courtroom" located in the prison administration building outside the prison perimeter and jurors were not required to "pass through gates or other security devices.")

The courts that have considered the practice of on-site prison jury trials find it inherently prejudicial, either expressly or implicitly. For example, Ohio categorically prohibits it. *Ohio v. Lane*, 379 NE2d 1338 (1979) (Due Process, public trial, and equal protection analysis). Alaska would contemplate it only in exceptional circumstances that demonstrate "compelling reasons" for doing so. *Bright v. Alaska*, 875 P2d at 109 ("public trial" analysis; circumstances did not satisfy the test). Virginia would permit it only in exceptional circumstances "showing a clear and present overriding public interest or justification." *Vescuso v. Commonwealth of Virginia*, 360 SE2d 547, 551 (1987) (public trial analysis; exceptional circumstances not established). Only Utah has approved on-site prison trials, but only after a "case by case" analysis. *State of Utah v. Kell*, 61 P3d 1019, 126-27 (2002), *State of Utah* v. *Daniels*, 40 P3d 611 (fair trial, equal protection, and public trial analyses),[10]

In other words, though the cited cases involve analyses under several constitutional provisions, there appears to be near unanimity that the practice of

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10 The Utah cases are somewhat internally inconsistent. Although that court reasons that trying an inmate in a prison courtroom for a violent crime committed within a prison "does not per se present an unacceptable risk of bringing into play impermissible factors which might erode the presumption of innocence [,]" they nonetheless conduct a "case by case evaluation" to determine whether to hold a trial in prison. *Utah v. Kell*, 61 P3d 1026.

conducting jury trials in prison is inherently prejudicial. The Court of Appeals reached the same conclusion in the present case: "Given *Holbrook's* reasoning, we hold that trying an inmate within a prison is an inherently prejudicial practice." *Cavan,* 185 Or App at 374.

For the reasons stated in the prior sections of the brief and given the conclusions of the foreign courts that have considered the issue, it appears that on-site prison trials are overwhelmingly if not universally considered inherently prejudicial. Consequently, the state bears the burden of demonstrating under close judicial scrutiny that, given the circumstances in this case, having a prison trial was the "fairest and most reasonable" method of advancing an "essential state policy." *Illinois v Allen,* 397 US at 344, *Estelle v. Williams,* 425 US at 505, *Holbrook v. Flynn,* 475 US at 568.

The prosecutor argued that the prison setting was justified by security concerns. The record discloses six incidents relevant to this concern: (1) the July 15, 1998 incident at OYA when defendant joined others and tossed food and struck a staff member, (2) the July 5, 1999 incident when defendant pinned his cellmate to the floor, (3) the August 15, 1999 incident when defendant refused to go into his cell, (4) the September 15, 1999 incident when defendant kicked the door to his cell, (5) the October 11, 1999 incident when defendant refused to come to the cuff port to be cuffed and was ultimately fined $75, and (6) the February 11, 2000, incident when defendant refused to come to the cuff port and was eventually extracted from his cell.

The Due Process question particular to this case is whether the six incidents described above justified risking the inherent prejudices attendant with having the trial at prison, or whether an alternative and less prejudicial method was reasonably available to achieve the same essential state interest.

Of the six incidents, the first and the last are the most serious and will be addressed last. In the second incident, defendant pinned his cellmate to the floor and held him there until complying with an order to release him. There is no reported injury to the cellmate, no assaultive conduct directed at staff, and no reported criminal charges arising from the incident.

In the third incident, defendant refused an order to enter his cell. Again, no reported injuries, no assaultive conduct, and no criminal charges arose from the incident.

In the fourth incident, defendant repeatedly kicked the door to his cell until he ultimately complied with an order to stop. Again, no injuries, no assaultive conduct, and no criminal charges arose from the incident.

In the fifth incident, defendant refused to come to the cuff port to be cuffed. Again, no injuries, no assaultive conduct, and no criminal charges arose from the incident.

In the first incident, defendant apparently "joined in" when other juveniles began a disruption at OYA. It appears that defendant wrestled with and struck one of the staff members during the incident. Admittedly, defendant incurred nine convictions from this incident, but the report decidedly describes defendant not as a ringleader but as someone who joined in once the ringleaders started

the disruption. Further, many of those nine convictions appear attributable to an aid and abet theory of criminal liability, for the report reflects that, as compared with others, defendant's role was decidedly minor.

Finally, in the last incident, defendant refused to come to the cuff port and was ultimately "extracted" from his cell. Defendant does not mean to minimize the disruption that an extraction likely causes to an institution, but even this limited record reflects multiple extractions of inmates other than defendant. Accordingly, extractions do not appear to be unique to defendant. And again, there were no injuries and no criminal charges arising from this incident.

It is noteworthy that there is only one report that even suggests escape--the incident at OYA. Yet, the report underlying the incident does not suggest that the goal of the disturbance was to execute a preplanned escape. Rather, the report reflects an ill-conceived if not spontaneous eruption of frustration with little or no long-range plans to escape or take hostages. Indeed, the staff members retreated and locked themselves into the "inner office" for safety; the four disruptive juveniles did not lock them in the office (Supp ER- 30: "All four staffers enter the inner office and lock themselves away from the four juveniles.")

Under a Due Process analysis, the practice of shackling defendants or forcing them to wear prison clothing is limited to exceptional circumstances. *See, People v. Duran,* 16 Cal 3d 282, 127 Cal Rptr 618, 545 P 2d 1322 (1976) (requiring specific showing of unruliness or "announced intention of escape, or evidence of any nonconforming conduct or planned nonconforming conduct" to support visible restraints). If this record establishes that defendant qualifies as an

exceptional case, then the exception will certainly swallow the rule and justify prison trials for a significantly large portion of inmate criminal defendants statewide.

If the state has successfully managed courthouse trials of all murder defendants and similar notorious individuals throughout its history, surely it can manage the trial of this 18-year old in a courthouse.

The state will likely argue that even if there was error there was no harm in this case because the jury necessarily would have learned that defendant was an inmate. *See, e.g., United States ex rel Stahl v. Henderson,* 472 F2d 556, 557 (5th Cir.), *cert denied,* 411 US 971 (1973) (finding no prejudice where defendant was tried in jail clothes for murdering another inmate while in jail: "No prejudice can result from seeing that which is already known.") (Quoted with approval in *Estelle v. Williams,* 425 US at 507); *see also*, *State of Utah v. Kell,* 61 P3d 1019 (finding no impermissible prejudice because defendant was an inmate tried for a violent crime committed inside a prison.)

While it is certainly true that any jury would have learned that defendant is an inmate, that reasoning alone does not satisfy Due Process. First, there are more inherent prejudices associated with prison trials than with forcing a criminal defendant to wear prison clothes in a courthouse trial. (See section I, *supra.*)

But, more importantly, if the state's reasoning were correct, then *every* jury trial of *every* inmate defendant could be conducted in a prison. That ignores the Due Process standard: Was this procedure the "fairest and most reasonable" method of advancing an "essential state policy" given the circumstances.

Holbrook v. Flynn, 475 US at 568, *Estelle v. Williams*, 425 US at 505, *Illinois v Allen*, 397 US at 344. This prison trial was likely the most administratively convenient, but it was not the fairest and most reasonable method of advancing an essential state policy: "That it may be more convenient for jail administrators * * * provides no justification for the practice." *Estelle v. Williams*, 425 US at 505.

Interestingly, the record reflects that defendant made several court appearances *pro se*, apparently through live video broadcast between SRCI and the courthouse (Tr 1-7). In each of the appearances, defendant was responsive, respectful, and courteous. Although defendant had two significant and four minor disciplinary problems prior to trial, there is no evidence that defendant was a disruptive force in the courtroom or ever threatened to be a disruptive force in the courtroom. Indeed, the record is silent as to defendant's behavior in any prior courtroom appearance in any other case. *Compare, Illinois v. Allen*, 397 US 337 (trial court judge did not abuse his authority by finally removing defendant from courtroom and continuing trial *in absentia* following defendant's repeated obstreperous courtroom outbursts and express refusals to comply with court's repeated warnings); *see also, Court exhibit # 201* (Judge Luukinen's order allowing prison trials for inmates Mahon and Cechmanek charged with assault because, in part, each had plans to "disrupt their trial by jumping into the jury box with the jury present (the Lambeau Leap[11])"), *see also, State v. Farrar*, 309 Or 132, 158, 786 P2d 161 (1990) (the trial court ordered ankle shackles for

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[11] The record does not explain the term "Lambeau Leap," but defendant speculates that the term refers to the practice of Green Bay Packer football players who leap into the stands at Lambeau Field after scoring a touchdown.

defendant who had, *inter alia*, thrown someone out a window, planned some sort of physical disruption at trial, and had threatened to kill several police officer witnesses, the defense attorneys, the prosecutor, and the judge).

Defendant does not have a history of escape or a history of courtroom disruption. In fact, there is no record that he even threatened or intended to disrupt the courtroom. In essence, this record does not reflect that defendant is so unpredictably dangerous or a prolific escape artist that the fairest method of obtaining a secure trial was to conduct the trial in prison. *Compare, Farrar,* 307 Or 132, *supra.*

Further, even if this record supported an argument that defendant posed an exceptional security risk, the court could have ordered defendant to wear unobtrusive restraints during trial in the courthouse. The use of unseen restraints surely constitutes the "fairest and most reasonable" method of advancing an "essential state policy" while completely eliminating the inherent prejudices that necessarily accompany a prison trial. *Illinois v Allen,* 397 US at 344, *Estelle v. Williams,* 425 US at 505, *Holbrook v. Flynn,* 475 US at 568. Indeed, except for virtually unimaginable circumstances, the availability of unseen restraints should categorically eliminate the need for prison jury trials, as a matter of due process law.

III. The Prison Setting Violated Defendant's Rights to a Public Trial[12]

A. A prison trial violated defendant's Article I, section 11 right to a public trial

To determine the meaning of a constitutional provision, this court looks to the specific wording, the case law surrounding it, and the historical circumstances that led to its creation. *Priest v. Pierce*, 314 Or 411, 415-16, 840 P2d 65 (1992).

The 1828 version of *Webster's Dictionary* lists the most relevant definition for the adjective "public" as "Open; notorious; exposed to all persons without restriction."

Webster's Third New International Dictionary (1993) lists the most relevant definitions of the adjective "public" as: "**4 a**: accessible to or shared by all members of the community * * * **5 a:** exposed to general view: CONSPICUOUS, OPEN." *Id* at 1836.

In *State v. Osborne*, 54 Or 289, 292, 103 P 62 (1909), this court indicated that the Article I, section 11, right to a "public trial" was "to the same effect" as the analogous term in the Sixth Amendment. In that case, a prosecution for attempt to commit rape, the prosecutor warned that the trial would contain a "good deal of dirty vulgar language," so trial judge excluded the public. *State v. Osborne*, 54

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[12] Article I, section 11 provides in part:

"In all criminal prosecutions, the accused shall have the right to public trial * * *."

The Sixth Amendment provides in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *."

Or 291.

This court identified multiple benefits to a public trial. For example, the public's presence serves as a monitoring and recording system on the judge and counsel, impressing upon them their ethical and legal duties and responsibilities. *State v. Osborne*, 54 Or at 295, 298. Meanwhile, a closed trial impermissibly impresses the jury with the "enormity of the offense" and thereby causes "prejudice against the person so charged." *State v. Osborne*, 54 Or at 296-97. Further, a person attending trial might "recall facts to which he will call attention, and thus aid in establishing the innocence of the accused." *State v. Osborne*, 54 Or at 297. This court concluded that prejudice was "conclusively presumed" from the denial of a public trial. *State v. Osborne*, 54 Or at 299.

Defendant acknowledges that the determined public could gain access to the trial in this case. The question, though, is whether the prison trial conditions in this case satisfactorily advance the reasons for having the guarantee. Given the primacy of the constitutional right, any institutional changes that limit the right should be carefully scrutinized to prevent erosion of the constitutional guarantee. For the following reasons, the prison trial in this case does not reflect the values embodied in Article I, section 11.

First, because of the restrictions imposed on the visiting public, there is less likelihood that that the public will freely attend trial proceedings in prison. There should be little doubt that most members of the public do not voluntarily enter prisons. There is little about prisons that any reasonable person would find inviting or "open". Apart from inmates and corrections staff, visitors tend to be

relatives of the inmates, legal counsel, or religious proselytizers. Although the record in this case reflects that there were several spectators herded in a single file to the gallery area outside the courtroom's windowed wall, the record does not reflect the actual composition of the gallery. Ex 's 203, 204.

Second, like shackling the defendant, a prison trial prejudices the jury by communicating the defendant's dangerousness.

Whereas courthouses tend to be centrally located and readily accessible to the public, prisons are typically located outside the town center and access is restricted. Attendance at prison trials will likely never rival the attendance at courthouse trials.

On a continuum between the closed proceedings of the Spanish Inquisition or the English Star Chamber on one end and the traditional courthouse trial on the other, the prison trial appears closer to the former than the latter, a development that Article I, section 11 does not allow. Additionally, the practice may raise equal protection questions if the practice is reserved for inmates. Because defendant was denied his Article I, section 11 right to a public trial, prejudice is conclusively presumed and reversal is required. *State v. Osborne*, 54 Or at 299.

B. A prison trial violated defendant's federal constitutional right to a public trial

In a case decided nearly forty years after *State v. Osborne*, 54 Or 289, the United States Supreme Court held that the due process clause of the Fourteenth

Amendment guarantees the right of a public trial to state criminal defendants. *In re Oliver*, 333 US 257, 273, 68 S Ct 499, 92 L Ed 682 (1948). In that case a Michigan judge sitting as both grand jury and judge found that the defendant had committed perjury during the grand jury proceeding, found him in contempt, and sentenced him to 60 days in jail. The Court traced the right to a public trial to an inexact date in English common law. *In re Oliver*, 333 US at 266-67 n 14. The common law preference for public trials was perhaps in response to the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's use of the "lettre de cachet," a king's order to imprison or exile a subject without trial or opportunity to defend oneself. *In re Oliver*, 333 US at 269 n 23. The primary purpose of the right is to "safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 US at 270.

The presence of the public at trial advances at least four goals: (1) it improves the likelihood that a criminal defendant is "fairly dealt with and not unjustly condemned," *In re Oliver*, 333 US at 270 n 25, (2) it reminds the parties and the factfinder of the responsibility they hold and the importance of their function, *In re Oliver*, 333 US at 270 n 25, (3) it encourages witnesses to come forward, *Waller v. Georgia*, 467 US 39, 46, 104 S Ct 2210, 81 L Ed2d 31 (1984), and (4) it discourages perjury. *Waller v. Georgia*, 467 US at 46.

While textually separate from the criminal defendant's Sixth Amendment right to a public trial, the press and the public's First Amendment rights to attend trial combine in an analysis that nearly parallels the Sixth Amendment analysis.

Waller v. Georgia, 467 US at 44-46 (citing various cases). Any pretrial or trial closures are rare and subject to the following test:

> "'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine the closure order was properly entered.'" *Waller v. Georgia*, 467 US at 45, and 47, *quoting Press-Enterprise Co. v. Superior Court of California*, 464 US 501, 104 S Ct 819, 78 L Ed2d 629 (1984).

The state advanced security concerns as the basis for the prison setting. Those concerns can be addressed by means other than introducing the inherent prejudices associated with the closed or semi-closed environment of the prison setting. The "higher values" of a public trial are not outweighed by the security concerns stated on this record.

Conclusion

For the foregoing reasons, defendant respectfully prays that this court reverse the decision of the Court of Appeals and remand this case to the trial court for a new trial.

Respectfully submitted,

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