IN THE SUPREME COURT OF THE STATE OF OREGON

APR 2 9 2004

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

RESPONDENT'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District 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
Office of Public Defense Services
PETER GARTLAN #87046
Deputy Public Defender
1320 Capitol Street NE, Suite 200
Salem, Oregon 97303-6469
Telephone: (503) 378-3349

Attorneys for Defendant-Appellant

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
JENNIFER S. LLOYD #94372
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

The state accepts defendant's statement of the case. The state rejects the statement of facts offered by *amicus* because it is argumentative and to the extent that it relies on material not in the record before this court.[1]

Questions Presented

1. Is the guarantee of an impartial jury in Article I, section 11, implicated by the judge's choice in designating the location of the trial? Even if actual or likely juror bias may result from the location of and characteristics of the trial proceeding itself, can a defendant establish actual or likely bias based on categorical speculations about the likely responses of potential jurors to certain security and administrative requirements of the facility?

2. Does the practice of holding a trial in a courtroom located on property that holds a prison constitute a *per se* inherently prejudicial practice? Even if it is, did the state's essential interest in the security of the proceedings and ensuring the presence of defendant, a violent offender and known flight risk, justify its use in this case?

---

[1] The sheaf of attachments that accompanied *amicus*'s memorandum in support of defendant's petition for review is comprised entirely of materials not in the record before this court. (Attachments to brief in support, Att-4 to Att-225). This court should disregard it in its entirety. *Amicus* also has appended to its brief on the merits a supplemental excerpt of record, to which the state has no objection. However, it also has attached an "appendix" that consists entirely of material not in the record, including correspondence by *amicus* and by other persons long after this trial concluded, a portion of the transcript in another case, and the *voir dire* proceedings in this case, which have not been designated as part of the record. (AC App A-1 to App T-3). The state objects to that material, and asks this court to disregard it.

3. Is the guarantee of a public trial violated by holding the trial at a location that is accessible to the public, simply because the location is at a prison and those who attend are required to comply with the security and administrative requirements of the facility?

Proposed Rules of Law

1. The characteristics of the trial proceeding itself cannot provide a basis for a claim based on the right to an impartial jury established by Article I, section 11. Moreover, even if a defendant may invoke section 11 to challenge aspects of the trial proceeding that may result in juror bias, defendant failed to establish, as a factual matter, the necessary showing of actual or likely bias. His speculations about the states of mind of potential jurors are not supported by any evidence that tends to support the necessary premise of his argument.

2. In the prosecution of an inmate for offenses he committed in prison, the trial court's decision to hold the trial in a courtroom connected to the prison is not an inherently prejudicial practice that, under the Due Process Clause, must be subjected to close scrutiny. Because the practice is not inherently prejudicial, and defendant in this case failed to establish actual prejudice, his claims fail. Moreover, even if the practice were inherently prejudicial, the state's interests in this case justified its use.

3. A trial at a facility other than a courthouse is accessible to the public even if the facility requires the attending public to comply with security or administrative requirements different from those imposed in a courthouse facility.

Summary of Argument

The Court of Appeals correctly rejected defendant's constitutional challenges to the trial court's decision to hold defendant's trial for crimes he committed in prison in a courtroom at Snake River Correctional Institution. Defendant's arguments were based on unsupported speculations regarding the effects of the institutional setting on the states of mind of jurors and members of the public.

Defendant's claim that the trial site violated his right to an impartial jury fails. His claim is not cognizable under the impartial-jury guarantees of the state and federal constitutions because the focus of those provisions is not on the "fairness" of the trial procedures, but on the effects on jurors of factors extrinsic to the trial. Moreover, there is no basis for a conclusion that a trial held in a courtroom on prison grounds is *per se* unconstitutional, and defendant points to nothing in the record that would tend to show that any of the jurors who ultimately were empanelled was biased or otherwise not impartial.

Likewise, the Court of Appeals correctly rejected defendant's claim based on the Due Process Clause. Holding a trial in a courtroom located on prison grounds is not an inherently prejudicial practice. Because defendant failed to prove that he was actually prejudiced, he was not entitled to prevail on his claim. Moreover, even if the location were inherently prejudicial, it was justified under the circumstances of this case.

Defendant's argument that he was denied a public trial lacks any merit. The prison ensured that any interested member of the public would be admitted to view the trial from an area of the prison generally open to the public. There was ample

seating for viewers immediately outside a glass wall in the courtroom. Viewers could see the entire proceeding from that location, and had the aid of a speaker system and an attended video monitor displaying the proceedings from another vantage point within the courtroom. The record does not show that the security procedures were significantly more restrictive than those in an average courthouse. Defendant's trial was open to the public.

ARGUMENT

A. Introduction

Defendant was charged in Malheur County with a number of offenses arising out of his assault of a correctional officer while he was an inmate at Snake River Correctional Institution (SRCI). At arraignment, the court informed him that the trial may be held in a courtroom at SRCI.

ORS 1.085 provides:

> (1) Except to the extent otherwise specifically provided by law, the Chief Justice of the Supreme Court shall designate the principal location for the sitting of the Supreme Court, Court of Appeals, Oregon Tax Court and each circuit court. For each circuit court there shall be a principal location in each county in the judicial district.
>
> (2) The Chief Justice may designate locations for the sitting of the Supreme Court, Court of Appeals, Oregon Tax Court and each circuit court other than those designated under subsection (1) of this section. Other locations for a circuit court shall be in the judicial district.

Before instituting trials at the courtroom at SRCI, the trial court sought the permission of Oregon Supreme Court Chief Justice Wallace P. Carson, Jr., to use the courtroom located at the Snake River Correctional Institution as a permissible location for

holding criminal trials. The Chief Justice approved that request by issuing Order No. 99-030, which provides:

> The Circuit Court of Malheur County, as it deems necessary or required, may designate the Snake River Correctional Institution as one of the locations in which it sits, in addition to any other designated location within the judicial district.

(SER 1).[2]

Pretrial, defendant filed a written objection to holding the trial in the courtroom at SRCI. Based on information that he had about a trial that previously had been held at that location, he argued that the procedure would violate his right to a public trial.[3] He also argued that the trial site would violate his right to an impartial jury on the ground that holding the trial on prison grounds, which subjects jurors to certain security measures that, he asserted, create an apprehension on the part of jurors that they are not secure. (App Br, ER 8). He also argued that a prison setting "gives the jury the impression that defendant is a dangerous individual," and he asserted that SRCI has a tradition of being a holding facility for sexual offenders, the stigma of which would overcome the presumption of innocence to which defendant was

---

[2] That order is not part of the record in this case, but the state asks this court to take judicial notice of the order. OEC 201(b) (providing for judicial notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned); OEC 201(d) (judicial notice mandatory if requested by a party and supplied with the necessary information).

[3] Defendant appears to have been referring to the trial procedure used in *State v. Jackson*, in which a different procedure was used. In that case, the public was able to view the proceedings only from a remote area *via* a live video feed. The defendant in that case appealed, arguing that the procedure violated his right to a public trial, and the Court of Appeals agreed and held that there was "no substantial showing of a need" in that case to conduct the trial within SRCI in a room not open to the public. 178 Or App 233, 244, 36 P3d 500 (2001). The state did not petition for review in that case.

entitled. (App Br, ER-8). Finally, he noted a case in which the Alaska Supreme Court had concluded that a criminal defendant's right to an impartial jury was violated by a trial at a prison site, even though the defendant in that case had been permitted to wear civilian clothing and the court had issued an instruction to the jury not to infer guilt from the site of the trial. (App Br, ER 8).[4] His "impartial jury" claim also was based on the Due Process Clause. (Resp Br, SER 8). Defendant did not offer any evidence to support his representations that jurors feel unsafe in a prison setting, or that potential jurors would be likely to know that SRCI has a large population of sexual offenders or that they would be actually biased or likely to be biased against defendant on that or any other ground.

The state responded to defendant's objection by arguing that holding the trial at SRCI was justified in this case. In support, the state presented more than 100 pages of material documenting defendant's history of violence, his prior attempt to escape from custody, and his general defiance of institutional and prison authority. (*See* Resp Br, SER 12-32).[5] In addition, the state expressed concern about security based on the brutal and unprovoked nature of defendant's attack on the correctional officer who was the victim in this case. (Resp Br, SER 10-11; Tr 27).

The first trial that was held at the facility at SRCI was that in *State v. Jackson*, in which the Court of Appeals later reversed the defendant's conviction. 178 Or App

---

[4] That case is *Bright v. Alaska*, 875 P2d 100 (Alaska Ct App 1994).

[5] The state appended relevant portions of that material to its respondent's brief for illustrative purposes.

233, 244, 36 P3d 500 (2001). Between the time of that trial and the trial in this case, the institution had made changes to the courtroom and viewing area in order to satisfy concerns about the "public" nature of the site that had been voiced by Judge Charles E. Luukinen, the presiding judge of the circuit court for the twelfth judicial district, in criminal cases involving three other defendants. In his memorandum opinion in those cases, Judge Luukinen concluded that the procedure that had been proposed by the state in those cases – a procedure that was identical to that used in the *Jackson* trial[6] – was insufficient to protect the defendants' right to a public trial. Judge Luukinen concluded that the "public trial" guarantee required the trial to be conducted in the physical presence of the public. (Resp Br, SER 37). He also described the importance of "de-prisonizing" the trial when members of the public are admitted:

> The courtroom area is in the area where public access (visitation) is regularly allowed, although controlled. Although the courtroom itself is small, one sidewall is essentially all glass. Public seating could be used outside this window area as long as audio supplementation is used. The Courtroom area is in fact a courtroom, with all the normal courtroom facilities including a jury box.
>
> Adequate advance notice of the location of the trial must be given to the public. Persons attending the trial should expect a normal security evaluation including scanners and search of all carried items.
>
> No specific number of the general public must be accommodated; only that there be sufficient access to ensure that the trial is readily accessible to members of the general public.

---

[6] The state originally had proposed that the trial would be held in the SRCI courtroom, and that the public would not be permitted to enter SRCI to view the trial. Instead, the prosecution intended to do a "live" audio/video telecast of the proceedings, which would be broadcast to an empty room in the Malheur County courthouse. (Resp Br, SER 37). The state is aware of no case, other than *Jackson*, in which that procedure has been used.

> Any trial held in the SRCI courtroom must involve affirmative actions to open the trial process to the public and to minimize the intangible factors present in the physical location of the trial on SRCI property. If those factors are adequately addressed, trial can occur at SRCI for [defendants] who qualify for trial at SRCI on a case by case basis.

(Resp Br, SER 38).

Defendant's objection to the SRCI trial site in this case was based on his erroneous assumption that the *Jackson* procedure would be used. However, at the hearing on the objection, the prosecutor represented to the trial court that, since the *Jackson* trial, the institution had implemented Judge Luukinen's recommendations. The prosecutor stated:

> They have agreed to open the proceedings to the general public. Obviously contingent on space. In other words, not * * * there's a finite number of people that can fit in the area, but they're anticipating that that should be a fairly large number of people because they're going to set up rows of folding chairs there on the other side of the glass, and allow anyone to come in who needs to come in. They're not going to do background checks on people who come to the Trial. They've also agreed to lessen the initial – some of the initial security things coming in the door and several other specific items in terms of addressing the second issue of making it a less prison-like in the atmosphere. It will probably be, as I said, open to the public to come in and sit in those rows, come and go. They'll have access freely to the bathrooms in the foyer. And the – they did propose some specific things with regard to entry and exit of the facility itself.

(Tr 24-25). The prosecutor offered and the court received as evidence an e-mail describing the process that SRCI had agreed to use in holding trials on the premises. That e-mail described the following steps in the process for admitting potential jurors:

- The institution would conduct a criminal-history check on the potential jurors identified by the court before trial;

- Upon arrival, members of the jury would be required to store their effects in lockers in the lobby of the Visitor Center; and

- Each juror would be required to have his or her hand stamped, and would be required to go through a metal detector.

(Resp Br, SER 39). It also described the procedure for admitting the public, which included the steps listed above, but without a criminal-history check. (*Ibid.*). In addition, the e-mail states that members of the public would be admitted, and that the institution would create an area in the Visitor Center for public seating. (*Ibid.*). It also provided that members of the public would have access to the restrooms in the lobby of the Visitor Center, but recommended that they use those facilities only during breaks in the proceedings. (*Ibid.*).

The trial court considered the arguments of both parties as to the security risks that would be involved in transporting defendant and the other inmate witnesses to the county courthouse and in holding the trial at that location. It concluded that holding the trial at SRCI was justified because defendant posed a "clear and present danger" and that, because of "major" security concerns, there was an "overriding public interest" in holding the trial at that location. (Tr 28). Because the defense had not seen the e-mail offered by the state, the court stated that defendant could file a written response. (Tr 25). He declined to do so.

On the day of trial, defendant renewed his objection to the trial site:

> [DEFENSE COUNSEL]: * * * According to Judge [Luukinen's] letter there's a requirement that we – that before any hearing can be held, or a Trial could be held out here, efforts have to be made to deprisonize the Institution. That is – [TAPE BAD – INAUDIBLE] a

Correctional Facility. I have seen absolutely no efforts to deprisonize it. I look out, I still see the bars, the walls – [TAPE BAD – INAUDIBLE] remain here, indicating this is a Correctional Facility that we can't bring contraband in without being prosecuted. Contraband being any number of innocuous things that we use every day in our lives. We have to go through the metal detectors [TAPE BAD – INAUDIBLE] the doors are locked. We cannot leave without permission from some anonymous person within the Control Center that we cannot see. Opening the door to let us in and out. In other words, there's been no effort to eliminate the indicia of this being a Prison, or to deprisonize this [INAUDIBLE]. Consequently, we don't meet his standard.

THE COURT: Alright. Thank you. That is subject to interpretation, of course, that will simply have to be something that we settle[] on subsequent review. We view that we have taken care of everything that we have specifically [been] directed to address in Judge [Luukinen's] decision – and we are reading the opinion in the same way that you. And whether you are correct, or whether we are correct will simply remain the normal appellate process. Okay. Thank you [gentlemen]. Go ahead and take your break.

[PROSECUTOR]: Judge are we going to have a video of the Courtroom surroundings, so that the Appellate Court does have the ability to review just what the jurors see here, 'cause this looks just like a normal Courtroom to me. Mr. Carlson calls it "bars", it's ornamental grating is what he's calling bars. I think the Court of Appeals would be interested in seeing that characterization when the time comes.[7]

THE COURT: I would suggest that if you do want a video prepared to introduce as an exhibit, simply apart from the normal evidentiary exhibits, that you do so. Quite frankly, I have never been in a Courtroom quite this open, and airy, but, in any event, we each will be subject to our own interpretation of what it looks like, and what the effect is, if any. Okay. We will be at recess then. Thank you gentlemen.

(Tr 35-36).

---

[7] Two videotapes were offered at trial; one of the viewing area itself and one of the proceedings inside the courtroom. (Exs 203, 204). Neither depicts the "bars" or "ornamental grating" described by the lawyers.

The court received two videotapes of the facility as court exhibits at trial. (Tr 157). One, Exhibit 203, shows the area from which the public was able to view the proceedings. It shows the large double doors through which the public can enter, and a large open lobby area with large windows to the outside. The tape shows offices to the side of the reception desk, an area accommodating several vending machines, a small area with five bays that appear to be designed to allow visits with inmates. The viewing area itself is a very large area, a distance from the reception area, with 50 chairs (five rows of 10 each) directly outside a wall of windows. There are also a large number of plastic chairs, stacked together, that appear to be available for use if necessary. The tape shows seven people viewing the trial from the rows of chairs. Through the windows, the observers can see, from the side, the judge, the witness stand, and counsel tables. An observer also can see all twelve jurors directly facing the windows. A speaker system ensures that the attending public can hear, as well as see, the proceedings. (*See* Ex 203).

Those present also could see a television monitor to the side of the windows in the viewing area. An attendant was seated next to the monitor. (*See* Ex 203). Part of that "broadcast" was recorded, and the tape, Exhibit 204, also was received as a court exhibit. The tape shows that members of the public viewing the monitor could see, from a different vantage point, the judge, the witness stand, the entire jury box, and both counsel tables, at all times. The courtroom bears no visible indicators that it is located on prison grounds. (*See* Ex 204).

Defendant offered no evidence showing or describing the exterior of the facility, the approach thereto, or the nature of the entryway into the Visitor Center. He offered no evidence of the amount or the duration of the contact that either the jurors or the members of the public would have with the corrections staff.[8] Defendant also failed to offer any evidence showing that the actual or likely responses of potential jurors or the public to the facility were at all consistent with his assertions in the trial court.

Defendant was convicted at trial before a jury, and appealed. On appeal, he reasserted his claims that holding the trial at SRCI violated his right to an impartial jury, his right to due process of law, and his right to a public trial. The Court of Appeals rejected both arguments and affirmed the judgment. *State v. Cavan*, 185 Or App 367, 59 P3d 553 (2002).

On review, defendant asserts that the Court of Appeals erroneously rejected his arguments. *Amicus* makes a "public trial" argument, but also makes a number of arguments that defendant has not raised in this proceeding. In the sections that follow, the state addresses only those arguments that are properly before this court –

---

[8] *Amicus* refers several times to "armed guards," stating that the courtroom was "filled with armed guards," and that more armed guards watched the proceeding through the glass window. (Amicus Merits Br 35). Those assertions are wholly unsupported by the record. They also are highly unlikely to be consistent with the policies of the facility, given the exposure that the corrections officers have to inmates, as well as the fact that the officers spend most of their time in situations in which they are significantly outnumbered by inmates.

i.e., those that have been raised by defendant – and responds to the concerns raised by *amicus* within the argument in response to defendant's "public trial" challenge.[9]

B. Defendant failed to establish a violation of his right to an impartial jury.

As stated above, defendant argued at trial that the trial site violated his right to an impartial jury under Article I, section 11, of the Oregon Constitution, on the ground that jurors would feel insecure in the facility, and on the ground that their partiality would be affected by the "stigma" that he asserted attaches to prisoners at SRCI because of the large number of sexual offenders housed there. (Resp Br, SER-8).[10] He did not offer any evidence to demonstrate that jurors or potential jurors would be likely to have those reactions. The trial court rejected defendant's arguments opposing the trial site.

The court's decision regarding a particular juror's actual bias will not be disturbed absent a finding of an abuse of discretion. *State v. Nefstad*, 309 Or 523, 528-29, 789 P2d 1326 (1990); *State v. Montez*, 309 Or 564, 789 P2d 1352 (1990). The same is true when the "impartial jury" claim is predicated on a trial court's denial of a motion for change of venue, which requires a predictive determination of the reasonable likelihood of a community's bias. *See State v. Fanus*, 336 Or 63, 78, 79 P3d 847 (2003) (a motion for change of venue is addressed to the "sound discretion"

---

[9] Because, as discussed in footnote 1, the attachments to the memorandum filed by *amicus* in support of the petition for review, as well as the entirety of the appendix to *amicus*'s brief on the merits are not part of the record before this court, the state does not address them in this brief.

[10] Article I, section 11, provides, in part: "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury[.]"

of the trial court); *State v. Pratt*, 316 Or 561, 570, 853 P2d 827, *cert den* 510 US 969 (1993) (such motions are reviewed for abuse of discretion). The threshold question whether a particular claim is cognizable under the impartial-jury clause is a question of law. *See State v. Amini*, 331 Or 384, 389-93, 15 P3d 541 (2000) (reviewing as such).

On appeal, defendant's legal theories underlying his impartial-jury claim shifted from those raised in the trial court. He again argued that a trial held at a prison *per se* violates a defendant's right to an impartial jury, but that argument was based in part on new theories are not supported by the record. First, he compared the use of a courtroom on prison grounds to "shackling" of criminal defendants because it tends to suggest that the defendant "is dangerous and posed a heightened security risk." (App Br 13). He also argued – as he did at trial – that a prison trial setting renders jurors fearful, and that that "emotional and mental impact of a prison setting unnecessarily and impermissibly impacts the jury's ability to perform its duties impartially." (App Br 24). Finally, he argued, for the first time, that the trial setting changes the nature of the relationship between jurors and the state, and that, because of that setting, "the jury will subconsciously renounce its role as impartial representative of the community and, instead, align itself with the state, the entity that provides the jury safety and security in the intimidating prison setting." (App Br 14).

In addition to his argument that a trial at a prison is inherently unconstitutional, he argued on appeal that, even if a trial may be held at a prison under certain circumstances, it was inappropriate in this case. (App Br 15). He argued that his past

history, which included an escape attempt, other violent incidents, and numerous disciplinary violations, was not a sufficient basis for holding the trial at SRCI.

The state responded that defendant had not established a violation of the impartial-jury guarantee for two reasons:

> Defendant has not designated the *voir dire* proceedings as part of the record on appeal, and does not argue that any particular juror was biased. Nor is there anything in the record to support a finding that any juror was biased or a determination that the jurors would have any tendency to base a decision on anything other than the evidence. Rather, defendant first asserts that there is a sufficient generalized "prejudice" inherent in the procedure that this court should conclude that it *per se* violated his right to an impartial jury. * * * Then he argues that, even if a trial held at a prison courtroom does not *per se* violate his right to an impartial jury, the facts did not justify it in this case. * * * Both arguments fail.

(Resp Br 10-11).

The Court of Appeals rejected defendant's impartial-jury argument. It concluded that defendant's reliance on the "impartial jury" guarantee of Article I, section 11, was misplaced because he was not arguing that the jury was biased or was likely to be affected by factors *extrinsic* to the trial proceeding itself. 185 Or App at 372-73. Instead, defendant challenged the trial court's decisions regarding the way that the trial will be conducted – decisions which, "at their core," do not implicate juror bias, but which instead "go to a defendant's ability to convey the merits of his or her case to the jury in a forum that does not unnecessarily add legitimacy to the state's assertion that the defendant is guilty or unfairly minimize the impact of the defendant's evidence and arguments." *Ibid.* The court noted that defendant's reliance in his impartial-jury claim on cases involving the shackling of criminal defendants

was misplaced because those cases are based on the Due Process Clause, and not the right to an impartial jury. *Id.* at 373, n 9.

In reaching that conclusion, the Court of Appeals relied primarily on this court's opinion in *Amini*. In that case, this court held that the impartial-jury guarantee in Article I, section 11, is not a generalized right to a fair trial. This court reviewed the history of the provision and concluded that the right to an impartial jury was intended

> to prevent an individual who already has formed an opinion or is interested in the outcome of the case from sitting as a juror. We conclude that the guarantee of 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.

331 Or at 391. This court stated that the guarantee encompasses two broad purposes: (1) to prevent the seating of a juror who is biased or interested in the outcome of the proceedings; and (2) 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. *Ibid.* Both of those purposes relate only to the composition of the jury or the characteristics of the jurors who actually serve or the pool of those eligible to serve. That is, the focus of the impartial-jury guarantee is on the jurors themselves, not on the characteristics or manner of conducting the trial.

This court has never applied the impartial-jury guarantee to anything other than the composition of the jury itself, whether in the context of a challenge based on actual bias or a challenge based on the likelihood of actual bias in the population of potential jurors. Defendant's current claim – that holding a trial at a prison violates

his rights due to the assumptions he makes about the effects on the proceedings that he claims jurors' fear of a prison setting and their anticipated alliance with corrections staff will have – is not of that type.

In his argument to the contrary, defendant relies on this court's recognition that one purpose of the impartial-jury guarantee in section 11 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. Defendant argues that the issue of potential juror prejudice resulting from a characteristic of the trial procedure itself is analogous and that the impartial-jury guarantee applies in that context, as well. Defendant's broad reading of the impartial-jury clause extends far beyond the historical purposes of section 11, as described by this court in *Amini*. His reading would open the door to "impartial jury" claims based on any and all aspects of criminal trials that arguably could lead to bias or identification with one side or the other. Such claims would not be limited to trials in non-traditional locations, but could include courthouse location, courtroom design, arrangement of counsel tables, judges' rulings on objections and trial motions, jury instructions, and any other aspect of a trial that the defendant claims is unfair to him. The impartial-jury provision was not intended to apply to situations beyond the actual composition of the jury.

Moreover, defendant cites no legal authority that would support a conclusion that holding a trial in a courtroom on prison grounds is a *per se* violation of the right to an impartial jury. Although he compares it to shackling, courts have uniformly

held that a trial court has discretion to shackle a criminal defendant when the circumstances justify it. *Guinn v. Cupp*, 304 Or 488, 493-94, 747 P2d 984 (1987); *see also State v. Kessler*, 57 Or App 469, 645 P2d 1070 (1982). There is no *per se* prohibition on shackling. Thus, those cases do not support his argument that trials on prison grounds will violate the criminal defendant's right to an impartial jury. In fact, it is unclear whether those cases are properly analyzed under the "impartial jury" guarantee at all. Rather, courts uniformly have discussed the issue either in the context of the common-law right not to be restrained during trial or under the federal Due Process Clause. *See Guinn*, 304 Or at 493-94, 747 P2d 984 (1987) ("At common law, a criminal defendant had the right to appear at trial free of restraint, absent a substantial showing of necessity for confinement. * * * This is also a due process right[.]"), *citing State v. Smith*, 11 Or 205, 8 P 343 (1883); *Williams*, 425 US at 505; *Allen*, 397 US at 344; *see also State v. Kessler*, 57 Or App 469, 645 P2d 1070 (1982) ("[b]y showing that he was required to wear leg shackles, without a showing of substantial necessity, defendant has demonstrated a violation of his due process right to a fair trial").[11]

In any event, defendant's "shackling" analogy is flawed. First, the concerns underlying the general prohibition on shackling exist whenever a defendant is tried while in visible restraints. Any shackling case will raise the same concerns that jurors

---

[11] Although the Court of Appeals addressed the issue under the "impartial jury" guarantee in *State v. Merrell*, 170 Or App 400, 403, 12 P3d 556 (2000), it did so based on its opinion in *State v. Amini*, 143 Or App 589, 593, 963 P2d 65 (1998), which this court later reversed. *Merrell* does not survive this court's decision in *Amini*.

will see the shackles and will infer from the fact that he is chained up that the defendant is dangerous. It will also raise concerns about the physical interference with the defendant's ability to move and to communicate with counsel. However, it is more difficult to reach similarly categorical conclusions about holding a trial on prison grounds. The particular characteristics of each prison location will differ. *Compare State v. Lane*, 60 Ohio St 2d 112, 397 NE 2d 1338 (1979) (trial was held within maximum-security prison within 12-foot-high double walls, with visible armed guards, high guard towers, and barred windows) *and Howard v. Commonwealth of Virginia*, 6 Va App 132, 367 SE2d 527 (1988) (prison courtroom indistinguishable from courthouse courtroom). The exterior and interior of different sites will vary, as will their likely effects on different jurors or potential jurors. Although defendant makes the bald conclusion that a prison is "palpably oppressive" (Merits Br), that may or may not be true in all cases. The record in this case does not demonstrate that it is true of the SRCI facility. As stated above, defendant offered no evidence showing the exterior of the facility, the nature of the entry to the facility, or to its actual or likely effect on jurors.

Defendant also compares the prison atmosphere to that of the "typical" courtroom setting in a city center. (Merits Br 21). He acknowledges that modern courthouses will tend to have security checkpoints at their entrances, but states that they are different because jurors typically have "free access" to the building once inside. Those assertions, however, are not supported by the record. The amount and the degree of security measures will vary from facility to facility, and, in light of

current concerns about terrorism and ensuring national security, are likely to be increasing. Although defendant seems confident that jurors have the ability to move freely about the courthouse while serving, that assertion lacks support in the record and likely is inconsistent with the experience of people who have been called for jury service, been seated in the jury assembly room, given coded tags, and instructed to remain in the room until told otherwise. In addition, those who are called to a courtroom for jury selection and, ultimately, for trial, necessarily are limited by their duties in their ability to roam the building, communicate with others, and even to eat, drink, and use the restroom facilities as they please.

The other reason that defendant's "shackling" analogy fails is that, unlike shackles, which, both figuratively and literally attach to the defendant personally, the location of the trial does not restrain or communicate anything about the defendant himself. There is a direct connection between a criminal defendant's shackles, clothing, or other personal accoutrements and the jurors' perceptions of what those items say about the defendant. Here, aside from the fact that defendant was an inmate at SRCI – a fact that would be obvious at trial – the trial location said nothing about defendant personally. The effects about which defendant speculates are much more attenuated. He argues that jurors are likely to be fearful and that that generalized fear will somehow affect their decision as to the defendant's guilt or innocence. He also argues that jurors are likely to feel that their safety is dependent on the corrections officers and therefore will identify with them and therefore will align themselves with the state's position in the criminal prosecution. The speculative nature of those "If X,

then Y, then Z" propositions demonstrates exactly why this court should not adopt a *per se* rule banning trials held in courtrooms on prison grounds.

Defendant also argues that this court should assume that, because of the location, jurors will want to prefer to limit the amount of time that they spend serving as jurors. He asserts that that preference would cause jurors to make the decision to end jury deliberations as soon as practicable, and that jury deliberations "could" in some unspecified way be affected by the prison setting. (Merits Br 25-26). That reasoning is no more a reason to *per se* ban any trials at a prison location than it would to hold that courts cannot hold trials during Spring Break or the World Series. Although any manner of distractions may affect individual jurors in the way that defendant describes, there is no reason why the *voir dire* process and jury instructions are insufficient to identify and eliminate that risk. If a trial court, over the defendant's objection, empanels a juror who is actually biased, then the defendant's right to an impartial jury has been compromised. However, without a claim that a member of the jury was in fact biased, or, alternatively, a showing that the pool of jurors has been irreparably polluted by extrinsic influences, he has no claim under the impartial-jury guarantee.

Even if defendant's argument were cognizable under the impartial-jury clause, he is not entitled to relief. Defendant failed to establish with any evidence that the prison site was at all likely to compromise the jurors' impartiality. In any case involving a challenge to a juror for cause, there necessarily is some evidence in the record relating to the characteristics or attitudes of the particular juror. Moreover, in

all of the cases in which either this court or the United States Supreme Court have addressed issues relating to the effect of publicity or the presence of other factors creating a *risk* that the jury's verdict will be based on something other than the evidence, the defendant had offered evidence to support his claim. *See Flynn*, 475 US at 571, n 4 (social science study regarding effects of prison clothes and prison guards on jury verdicts); *see, e.g., Fanus*, 336 Or at 74-75 (news articles, testimony regarding number of television reports, pretrial poll of local residents regarding exposure to information and opinions regarding defendant's guilt); *State v. Barone*, 329 Or 210, 218-19, 986 P2d 5 (1999) (juror questionnaires); *State v. Langley*, 314 Or 247, 259-62, 839 P2d 692 (1992) (news and magazine articles and jurors' responses to *voir dire* questioning); *State v. Rogers*, 313 Or 356, 363-65, 836 P2d 1308 (1992) (jurors' responses to questioning regarding pretrial publicity).

Moreover, this court expressly has held that such evidence is required. In *State v. Busby*, 315 Or 292, 301, 844 P3d 897 (1993), this court rejected the defendant's claim that OEC 609, which provides for the admission of prior convictions for impeachment purposes without a balancing of probative value and risk of prejudice, violated his right to an impartial jury under section 11 based on his assertion that "[j]uries will conclude a defendant is guilty based upon his prior convictions" and that jury instructions on the proper use of prior convictions are futile. *Busby*, 315 Or at 301. The defendant in that case argued that his right to an impartial jury was compromised by the rule because it led him to choose not to testify. This court

concluded that his bare assertion regarding the risk of prejudice could not establish a claim based on the impartial-jury clause:

> We acknowledge that the threat of *potential* prejudice from the introduction of impeachment evidence may create a dilemma for a defendant with regard to the decision whether to testify. But we decline either to presume harm to defendant, when nothing in the record casts doubt on the jury's impartiality, or to assume that defendant was deprived of an impartial jury.

Ibid. Defendant's claim fails for the same reason. His bare speculation that jurors will respond in a particular way to the presence and designated roles of corrections staff or to the characteristics of the facility itself is insufficient to establish any actual or likely bias on the part of jurors in general. *See Montez*, 309 Or at 594 (rejecting argument that "common sense and human experience" suggest a police officer could not serve as a fair and impartial juror: "As with any prospective juror, the inquiry is whether the officer can try the case impartially and follow the trial court's instructions.").

However, even if a trial on prison grounds necessarily would raise those concerns in the abstract, defendant still cannot prevail. The fact remains that, if those concerns do not culminate in actual bias among the jurors who ultimately hear the case, defendant's constitutional right to an impartial jury has not been diminished. *See Rogers*, 313 Or at 372 ("[B]ecause defendant has not asserted that any of the three jurors was actually biased or incapable of being an impartial juror [because of their status as state employees], there can be no successful contention that defendant's state or federal constitutional rights to a fair and impartial jury were violated."); *State v. Barone*, 328 Or 68, 72, 969 P2d 1013 (1998) ("impartial jury" guarantee does not

give a defendant the right to exclusive control over the composition of the jury; rather, it guarantees the impartiality of the jury that sits on the particular case); *see also State v. Douglas*, 310 Or 438, 442, 800 P2d 288 (1990), *quoting State v. Megorden*, 49 Or 259, 263-64, 88 P 306 (1907), *in turn quoting Loggins v. The State*, 12 Tex App 65, 85 (1882) ("All that the constitution, all that the law, requires and demands is a trial 'by an impartial jury.' If he makes no complaint or has no complaint to make of it as finally organized, the presumption is legitimate that it is impartial.").

In sum, even if defendant's claim regarding the trial location is cognizable under Article I, section 11, it fails for a lack of proof.

C. The trial site did not violate defendant's rights under the Due Process Clause.

Below, defendant argued, based on the same speculations that he used to support his "impartial jury" claim, that the trial site infringed on his right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution.[12] The Court of Appeals correctly rejected that argument.

The Due Process Clause includes the right to a fair trial. *Holbrook v. Flynn*, 475 US 560, 567, 106 S Ct 1340, 89 L Ed 2d 525 (1986). A central principle of that right is that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Ibid.*, *quoting Taylor v. Kentucky*, 436 US 478, 485, 98

---

[12] The Fourteenth Amendment provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

S Ct 1930, 56 L Ed 2d 468 (1978). The adversary system and the presumption of innocence generally are sufficient to protect those interests:

> [The right to a fair trial based on the evidence] does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

Flynn, 475 at 568. Some trial practices, however, are so prejudicial that their prejudicial effect cannot be overcome by the adversary system, and thus violate the right to a fair trial. Defendant asserts that holding the trial at the courtroom at SRCI falls into that category. (Merits Br 17). He is wrong.

Analysis of the fairness of trial procedures under the Due Process Clause has two prongs. First, the question is whether the challenged practice is "inherently prejudicial" to the defendant's right to a fair trial. If it is not inherently prejudicial, then the defendant must prove actual prejudice in order to establish a constitutional violation. *Flynn*, 475 US at 568; *citing Williams*, 425 US at 503-04. If it is an inherently prejudicial practice, then the state must establish that an essential state interest justifies its use in the particular case. *Flynn*, 475 US at 568-69. Defendant's claim in this case fails for two reasons. First, holding the trial at SRCI was not inherently prejudicial, and defendant showed no actual prejudice from that procedure.

Moreover, even if the procedure were inherently prejudicial, it was justified in this case by the state's essential interest in security and order in the proceedings based on defendant's history of violence and resistance and hostility to authority, including his prior escape attempt.

1. The trial site was not "inherently prejudicial" under the circumstances.

Whether a courtroom arrangement is inherently prejudicial to the right to the defendant's right to a fair trial requires an examination whether "an unacceptable risk is presented of impermissible factors coming into play." *Holbrook*, 475 US at 570, *quoting Williams*, 425 US at 505. The first case in which the United States Supreme Court recognized that prejudice may be inherent in a court procedure was *Turner v. Louisiana*, 379 US 466, 85 S Ct 546, 13 L Ed 2d 424 (1965). In that case, two deputy sheriffs who were key witnesses in the felony murder trial were also placed in charge of the jurors, who were sequestered and "placed in charge of the Sheriff" by the trial judge. *Id.* at 467-68. The jurors were in the constant company of deputy sheriffs, including the two trial witnesses. The deputies drove the jurors to a restaurant for each meal, and to their lodgings each night. The deputies ate with them, conversed with them, and did errands for them. *Id.* at 468. The Court concluded that due process includes the right to a fair trial in a fair tribunal:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. * * * "A fair trial in a fair tribunal is a basic requirement of due process." * * * In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." * * * His verdict must be based upon the evidence developed at the trial. * * *

> This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.

Id. at 472 (citations omitted). The court concluded that the basic guarantees of the right to a trial by jury are subverted if the "evidence developed" against the defendant does not come from the witness stand, where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. *Id.* at 472-73. In that case, because the credibility of the witnesses was essential to the determination of guilt, "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.* at 473. Because the relationship between the deputies and the jurors "was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial," and the defendant's fate necessarily "depended upon how much confidence the jury placed in these two witnesses," the court concluded that the procedure utilized by the court violated the basic guarantees of a fair trial. *Ibid.*

In *Estelle v. Williams*, the Court reviewed the claim of a criminal defendant who had held in custody pending his felony assault trial, and who been tried while wearing prison-issued clothing. 425 US at 502. The defendant had not objected to being tried in prison clothing. *Ibid.* The Court recognized that certain trial practices pose such a probability of deleterious effects on the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." *Id.* at 504. In that case, the Court noted that other courts, with very few exceptions, had determined that a defendant should not be required to go to trial in prison or jail clothing because of

the possible impairment of the presumption of innocence and the requirement that guilt be established beyond a reasonable doubt by probative evidence. *Id.* at 502-03. Because a constant reminder of the fact that a defendant has been held in custody pending trial is "so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 505. However, the Court acknowledged that "such factors cannot always be avoided." *Ibid.* Specifically, the Court referred to its opinion in *Illinois v. Allen*, in which it had expressly recognized that removing a disruptive defendant from the courtroom – or the alternatives of shackling or binding and gagging him – may have an effect on the jury's feelings about defendant, but that, in some circumstances, the practice may be necessary. *Williams*, 425 US at 505. Nonetheless, the Court noted that, unlike the physical restraints permitted in *Allen*, compelling an accused to wear jail clothing furthers no essential state policy. *Ibid.*

The Court, however, rejected a *per se* rule that would invalidate all convictions where a defendant had appeared in identifiable prison clothing. It noted that, in that case, the Fifth Circuit had acknowledged that the harmless-error doctrine applied, but that it had concluded that the trial of the accused while in prison clothing was not harmless under the circumstances of that case. *Id.* at 506. The Court noted that the Fifth Circuit had, in other situations in which the accused was tried for an offense committed in confinement, or in an attempted escape, refused to find reversible error, stating, "No prejudice can result from seeing that which is already known." *Id.* at

507, *quoting United States ex rel. Stahl v. Henderson*, 472 F2d 556 (5th Cir), *cert denied* 411 US 971 (1973). Even where an accused is held pretrial, however, and jurors otherwise would not learn of his incarceration, the Court refused to say that a constitutional violation necessarily will occur. The Court held that the particular evil that was proscribed by the Due Process Clause is compelling a defendant, against his will, to be tried in jail attire. *Id.* at 507. Therefore, because the defendant had not objected to being tried in prison clothing, the Court held that there was no constitutional violation. *Id.* at 512-13.

In *Turner* and *Williams*, the Court acknowledged that certain practices are inherently prejudicial and that a defendant is not required to prove actual prejudice under those circumstances. In *Turner*, it was the close out-of-court association between trial witnesses and the jurors throughout a prolonged trial. In *Williams*, the Court recognized that, as a general matter, to compel an accused to wear prison-issued clothing may prejudice the jury; however, the court acknowledged that, in some circumstances – for example, when a defendant is on trial for an offense committed while in custody – there is no inherent prejudice.

Subsequently, in *Flynn*, the Court rejected the defendant's argument that his right to due process of law was violated by the visible presence of four armed and uniformed state troopers, who, for security reasons, were present in the first row of the spectators' section at the armed-robbery trial of the defendant and several codefendants. The defendant argued that the officers' presence would suggest to the jury that defendants were of "bad character." 475 US at 563. The Court

acknowledged that certain practices are inherently prejudicial because they impair a defendant's due-process right to have his or her guilt or innocence determined "solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Id.* at 567. However, the Court noted that the adversary system and the presumption of innocence generally are sufficient to protect those interests, and stated that, "When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained." *Id.* at 568.

The Court then addressed whether the conspicuous deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, "like shackling, should be permitted only where justified by an essential state interest specific to each trial," and concluded that it is not. *Id.* at 569. The Court stated that the primary feature that distinguishes the use of identifiable security officers from practices that may be inherently prejudicial is the "wider range of inferences that a juror might reasonably draw from the officers' presence":

> While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become insured to the presence of armed guards in most public places; they are doubtless

> taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Id. at 569. Although the Court recognized that visible security in a courtroom, might, under certain circumstances, create the impression in the minds of the jury that the defendant is dangerous or untrustworthy, "reason, principle, and common human experience" counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. *Ibid.*, *quoting Williams*, at 504. Rather, in view of "the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate." *Id.* at 569. The Court then concluded that the defendant had failed to show that an unacceptable risk of prejudice flowed from the presence of the troopers, and that there was no showing that their presence branded the defendant with an "unmistakable mark of guilt." *Id.* at 571. The Court noted that, although the defendant had relied on a social-science study in an attempt to show the risk of prejudice, the results were inconclusive. *Ibid.*

In this case, too, there was a much wider range of inferences than to assume defendant's guilt from the holding of the trial at the prison. The jurors quickly learned that defendant was an inmate at the time he attacked the corrections officer. As the Court of Appeals recognized, they also easily may have assumed that the practice was a standard one done for administrative reasons. *Cavan*, 185 Or App at 376. The defendant, his sole witness, and five of the seven witnesses called by the state were either inmates or employees of SRCI. (See Tr 45, 51, 54, 60, 104, 112, 125). Jurors could very well have concluded that the trial site was chosen for the convenience of the witnesses and parties, and for resource reasons. The state

disagrees with the Court of Appeals' ultimate conclusion that the risk of singling out the defendant in an impermissible way is so great that use of a prison courtroom is an inherently prejudicial practice. *Id.* at 375. It is not uncommon for county courts to have "annexes" or courtroom facilities that are separate or distant from the county courthouse. In those cases, jurors are likely to believe that the trial site has something to do with ease of administration of the trial, even if there is no obvious connection between the trial site and the type of offense or offender. Here, where there was a clear connection between SRCI and the parties and witnesses, there is no reason to believe that jurors would be likely to assume otherwise.

In addition, jurors might have believed in this case that the SRCI site was to defendant's benefit, or at least that it was done for the purpose of allowing him to illustrate his defense theory. Defendant's defense was a loosely threaded choice-of-evils defense. He argued that he attacked the officer so that he would be placed in segregation to separate himself from other inmates and officers. The defense closing argument is illustrative:

> [DEFENSE COUNSEL]: * * * [Young inmates] have to defend themselves the only way they can, and that's by being placed in segregation.
>
> Now, * * * inmates [cannot] just ask for a private cell. That would be ridiculous. There aren't that many private cells. This ain't sandals in the Bahamas. So, what does Mr. Cavan, you know, anywhere else he would be called Master Cavan in the old days, because of his youth. So what does Master Cavan do? He finds a way to get – get away from his cell mates, the rapists, the people who abuse children. Now think about it, if these same people were on the outside, they would have rules prohibiting them from having contact with sixteen year olds. Yet the government throws them into a cell, locks the door, and turns out the lights.

(Tr 176). Defendant testified that he initially had given the officers the benefit of the doubt, but that they had "total control over everybody there." (Tr 127). He testified that the officers refuse to allow inmates to shower, to take recreational breaks, and that they take the inmates' property, stating, "People are helpless in there." (Tr 127). As to his motive for assaulting the officer, he testified that, on the date of the offense, he was anxious and couldn't concentrate, and that he wanted to go into segregation because he just wanted to be alone. (Tr 131).

Holding the trial at SRCI was not inherently prejudicial. Although such a trial site would create an unacceptable risk of prejudice in a case in which the defendant was held in custody pretrial for an offense committed outside the institution, there is no unacceptable risk of prejudice in a case in which the jurors inevitably will learn that the offense was committed in the institution. "No prejudice can result from seeing that which is already known." *Williams*, 425 US at 507, *quoting United States ex rel. Stahl*, 472 F2d at 557.

Because the trial site was not inherently prejudicial, defendant had the obligation of establishing actual prejudice. He made no such showing. Instead, he made only bare speculations that jurors were likely to think he was a sexual offender because of the alleged reputation of the particular facility. In addition, he argued that jurors would tend to feel unsafe. Neither of those speculations about the *risk* of prejudice and the potential effects on the jurors' decision-making process are borne out by the record. Defendant's current argument – that the jurors were likely to feel that their safety depended on the corrections staff, and thus would tend to align

themselves with the state in the criminal prosecution – is an attempt to conjure up the situation in *Turner*; however, that comparison fails. In this case, there is no evidence as to what, if any, indicia existed that reminded the jurors that they were in a secure facility, or that there may be risks to their safety. And nothing in the record shows that a juror who felt unsafe would be likely to transfer his or her loyalties to the security staff, and, by extension, to the prosecution in a criminal case.

Nor did defendant designate as part of the record on appeal the transcript of the *voir dire* of the potential jurors in this case. Thus, he cannot show that the jurors in fact harbored the prejudice that he claimed would result from the trial site. In sum, defendant failed to establish that the fairness of his trial was impaired by the trial site. Moreover, as shown below, even if this court concludes that the trial site was inherently prejudicial, it was justified by the compelling interests of the state in this case.

2. Even if the trial site was inherently prejudicial, it was justified in this case.

The Court in *Flynn* acknowledged that the state has a legitimate interest in maintaining control and continued custody of a defendant who previously had been determined to be a flight risk. 475 US at 536. In this case, the trial court found as fact that defendant posed a "clear and present danger," and that it had "major" security concerns. (Tr 28). The court concluded that the state's "overriding public interest" in security justified holding the trial at SRCI. (Tr 28). Because there is ample evidence in the record to support it, the court's finding that defendant was a danger and posed a security threat is binding on appeal. *Ball v. Gladden*, 250 Or 485,

443 P2d 621 (1968); *see also State v. Johnson*, 335 Or 511, 523, 73 P3d 282 (2004) (stating standard). Although the court's choice in how to address the state's concerns was not the only possible choice, it was a reasonable one. The state's interest in maintaining security and control of defendant was implicated in this case, and the decision to hold the trial at the courtroom at SRCI furthered the state's interest.

Defendant suggests a "less restrictive alternative" analysis, arguing that, in light of the security concerns, the trial court had an obligation to analyze all of the available options and to choose the "fairest and most reasonable option." (Merits Br 29). Although his sentiment is appealing in the abstract, he misstates the proper standard. Defendant appropriates that language from the opinion in *Illinois v. Allen*, in which the Court held that the trial court, in removing the disruptive defendant from the trial court, had chosen one of three possible ways of addressing the problem. The Court recognized that other methods – including the threat of contempt and binding and gagging a present defendant – might be permissible ways to serve the same purpose. The Court stated that trial courts confronted with similar situations must be "given sufficient discretion to meet the circumstances of each case," and stated that, although the trial court permissibly had concluded that removal of the defendant was appropriate in that case, "in some situations which we need not attempt to foresee, binding and gagging might possibly be the fairest and most reasonable way" to handle a defendant who engaged in that behavior. *Allen*, 397 US at 344. In stating its holding, the Court stated that removal of the defendant from his own trial was not the only way that the trial court could have solved the problem, but held that nothing in

the record showed that the judge did not act completely within his discretion. *Id.* at 347.

Because of the various types of potential prejudice that may stem from the many choices among trial procedures that may serve legitimate state interests, the Court correctly recognized that a trial court must have discretion to choose among those choices. In this case, the court did not abuse its discretion in concluding that holding the trial at SRCI was reasonable, given defendant's past escape attempt while in custody as a juvenile, as well as his assaultive behavior and disciplinary violations since being incarcerated at SRCI soon after his eighteenth birthday.

There is no record in this case as to what other options may have been available to the trial judge when he made the decision to hold the trial at SRCI. Clearly, one of the options was to hold the trial at the courthouse; however, defendant did not suggest any means less restrictive than the SRCI trial site other than his demand that he be tried in the courthouse. Other alternatives may have existed – *e.g.*, imposing physical restraints, gathering and paying extra security for both the courtroom in the county courthouse and for the transport of defendant to and from that location – however, reasonable minds could differ as to the effects of, as well as the effectiveness of, those alternatives.

In this case, the circuit court found that defendant posed a sufficient security risk to justify holding his trial at SRCI rather than having him transported to the county courthouse for trial. That finding is supported by the record, which includes reports of his prior escape attempt, as well as his assaults on other inmates, his

disciplinary violations, and the fact that defendant was being tried in this case for his brutal and unprovoked assault on a correctional officer. (*See* Resp Br, SER 12-32).[13] Although the court could have chosen other means of securing defendant, such as shackling him or using other restraints, its choice to hold the trial at SRCI was "intimately related" to the state's legitimate interest in maintaining the security of the proceedings and justified that decision. *See Flynn*, 475 US at 572 (deployment of troopers to sit behind defendant throughout trial was intimately related to the state's legitimate interests). Moreover, holding the trial at SRCI posed little, if any, risk of unfair prejudice to defendant. Defendant was charged with an offense that he committed while in custody at SRCI. The jury inevitably would learn of his inmate status. In addition, the jury also learned of his prior convictions for violent offenses (Tr 141), his prior disciplinary violations while incarcerated (Tr 145), and his placement in segregation for 22 of his 24 months of his incarceration, based on those violations. (Tr 148).

---

[13] The offenses for which he was being tried involved a premeditated and unprovoked serious assault on a correctional officer while defendant was in prison. Moreover, that type of behavior was not an aberration. The records offered by the state show that, on July 15, 1998 – two years before the trial in this case – while incarcerated in a juvenile detention facility, defendant and other juvenile detainees took over the facility, assaulting staff and attempted to escape. (Resp Br, SER 27-31). They overcame the staff at the facility, necessitating police response. (Resp Br, SER 30). Based on that incident, defendant was convicted of attempted escape, two counts of second-degree assault, four counts of third-degree assault, and two counts of first-degree criminal mischief. (Resp Br, SER 32). In addition, since being incarcerated at SRCI, defendant committed an assault on a fellow inmate in July 1999, and refused to comply with staff orders on multiple occasions, sometimes threatening violence. (Resp Br, SER 16-26). At the time of the trial, he had spent 22 of his 24 months of incarceration in segregation. A psychological report conducted in November 1998 ranks defendant as having a "very high" potential for being assaultive and otherwise violent. (Resp Br, SER 12).

The trial court acted within its discretion in concluding that holding the trial at SRCI furthered the state's legitimate interests and did not unfairly prejudice defendant. The trial site was justified under the circumstances of this case.

D. Defendant's right to a public trial was not violated.

Article I, section 11, provides in part: "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury[.]" Defendant argues that the proceeding in the courtroom in the visitors' area at SRCI was not a public trial. (Merits Br 39).

The trial court rejected defendant's argument that the trial was not accessible to the public and that his constitutional rights were violated by the trial site. (Tr 28). The decision to exclude a member of the public from a courtroom generally is reviewed for abuse of discretion. *State v. Osborne*, 54 Or 289, 292, 103 P 62 (1909). The issue of *whether* the public has been excluded, however, is a question of law, based on the trial court's supportable findings of fact. *See Cavan*, 185 Or App at 370, n 3 (applying standard); *Jackson*, 178 Or App at 244 (same).[14]

The Court of Appeals rejected defendant's argument based on the following facts, the characterization of which defendant does not challenge in this court:

> The record shows that the state has constructed a courtroom in the visiting area at SRCI. The courtroom provides space for the judge,

---

[14] *See also Foley v. Commonwealth*, 429 Mass 496, 709 NE2d 794 (1999) (arraignments held in correctional facility were properly "public" due to the physical layout of the facility and its accessibility to the public); *Jones v. Commonwealth*, 1995 WL 686087 (Va App 1995) (trial held in victim's hospital room outside trial court's judicial circuit did not violate defendant's right to a public trial, where there was no restriction on public's access to the premises or the victim's room).

> 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 of the proceedings. The judge, the witness stand, the jury, and both counsel tables 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. In the ordinary understanding of the term, defendant's trial was public.

Cavan, 185 Or App at 370.[15]

The focus of defendant's argument, below and in this court, is on the prison location itself, and not on the specific characteristics of the trial courtroom in this case. He makes two arguments: (1) that, "because of the restrictions imposed on the visiting public, there is less likelihood that the public will freely attend trial proceedings in prison"; and (2) that, "like shackling the defendant, a prison trial prejudices the jury by communicating the defendant's dangerousness." (Merits Br 40-41). The argument made by *amicus* has a different focus. *Amicus* argues that requiring the public to view the proceeding through a "barrier" – the windowed wall – is the constitutional violation. Although *amicus* faults the state for "refus[ing] to address that issue," (Amicus Br 33), that issue was never raised by defendant, either at trial or on appeal. Defendant's argument has never included an attack on the

---

[15] *Amicus* argues that the proceedings were not actually visible to the public, based on comments by an observer later in the trial, suggesting that his ability to observe was impaired by a "glare" on the window. (Amicus Br Merits 38). That event occurred after the trial court's ruling, and defendant did not raise that issue or renew his objection based on that event. Therefore, to the extent that the window glare implicated defendant's right to a public trial, that legal issue was not presented to the trial court.

existence of the windowed wall, and, perhaps if it had, the trial court would have – as *amicus* suggests – "made room in the courtroom for * * * public spectators, or moved the whole hearing out into the [visiting room]." (Amicus Br 33). Because defendant's argument before the trial court did not complain about the windowed wall, the trial court was unable to address any potential problems such as the "glare" on the glass, or the "disenfranchisement" of public or the trial participants that *amicus* discusses in its brief. Therefore, this court should not address those issues.

In this case, the court ensured that the public was able to both view and hear the proceeding from an area adjacent to the courtroom. Any member of the public who wanted to observe the trial could do so from that viewing area. The trial in this case was "public."

1. The trial was public.

The question in this case is whether the fact that the public had to go to the courtroom at SRCI rather than the courtroom in Vale meant that defendant's trial was not a "public trial" within the meaning of section 11. In analyzing the meaning of an original constitutional provision, this court considers its specific wording, the case law surrounding it, and the historical circumstances that led to its creation. *State v. Harberts*, 331 Or 72, 11 P2d 642 (2000); *see also Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (explaining methodology).

The wording of the public-trial provision of section 11 is simple. It states that, in "all criminal prosecutions" the defendant has the "right to public trial" by an impartial jury. The meaning of that provision as it relates to the issue in this case depends on the meaning of "public" at the time of the adoption of section 11.

As defendant correctly points out (Merits Br 39), the adjective "public" was defined in Webster's 1828 Dictionary as "Open; notorious; exposed to all persons without restriction." Noah Webster, *The American Dictionary of the English Language* (1828). However, even defendant does not contend that the right to a public trial requires *actual* exposure to all members of the public without restriction. No trial, whether held in a courthouse or in a town square, can guarantee actual exposure to all members of the public without restriction. There will always be limitations on space, on audio projection, and on visibility of the proceeding. Historically, before technological advances made it possible to provide access to a broader audience, that was even more true. The constitutional guarantee, therefore, cannot be interpreted that literally. Rather, the meaning of "public trial" perhaps is better analogized to another definition listed in Webster's 1828 Dictionary: "Open to common use; as a public road." That definition better makes room for the possibility that not all members of the public can be accommodated at any given time, or under identical circumstances; however, the trial (or road) is no less accessible to the public.

The state was unable to locate any pre-1857 cases directly illuminating the meaning of the term "public trial." However, one case discusses the term "public" in an other context, and may aid in determining the framer's conception of what is "public." In *O'Kelly v. Territory*, 1 Or 51 (Or Terr 1853), the Supreme Court of the Territory of Oregon rejected a criminal defendant's claim that the trial court's journal entries failed to show that any indictment was filed against the defendant. The Court

stated that that "assignment of error is true in point of fact; but avails nothing," stating:

> The indictment, the statute says, "shall be filed and remain as a public record." The indictment, therefore, by filing, becomes *accessible to all persons concerned*, and proves, *per se*, by whom it was found, against whom and for what crime, *in as full and public a manner as the minutes of the court could be made to prove such facts.*

1 Or at 56 (emphasis added). That discussion of the nature of "public records" seems analogous to the trial in this case. That is, in the same way that a public record is accessible to all persons concerned, a "public trial" must be accessible. The trial in this case was public within the common meaning of the term at the time of the adoption of Article I, section 11.

The record of the proceedings of the 1857 Constitutional Convention reflects no specific discussion of the "public trial" provision. Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 120, 310 (1926). Article I, section 11, was based on, and is identical to, Article I, section 13, of the Indiana Constitution, ratified in 1851. *Id.* at 468; Charles Kettleborough, I *Constitution Making in Indiana* 298 (1916; reprinted 1971). Neither the Journal nor the Debates of the 1850-1851 Indiana Constitutional Convention reflect any discussion of the origin of the right to a public trial. *See Convention Journal*, 72, 80, 90, 138, 187, 572, 579, 829, 868, 872 (reprinted 1936); *Debates in Indiana Convention*, 352, 1378, 1389, 1912, 2067 (reprinted 1936).

Although the Indiana courts have never explicitly decided that the state right to a public trial was based on its federal counterpart, *State v. Williams*, 690 NE2d 162,

167 (1997), the Indiana Supreme Court explicitly has stated that those provisions have the same purpose. *Hackett v. State*, 266 Ind 103, 109, 360 NE2d 1000, 1004 (1977). Both the Oregon Supreme Court and this court have intimated the same with regard to the Oregon Constitution. *See Osborne*, 54 Or at 292 ("But, whatever the rule on that subject may be with reference to the national organic law on the subject, the Constitution of our state is to the same effect."); *see also State v. Blake*, 53 Or App 906, 912, 633 P2d 831 (1981) (discussing purposes of Sixth Amendment right to public trial in determining scope of Article I, section 11, right). Although the exact origin of the federal constitutional guarantee of a public trial is obscure, *Re Oliver*, 333 US 257, 266, 68 S Ct 499, 92 L Ed 687 (1948), the United States Supreme Court has described it as "a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v. United States*, 362 US 610, 80 S Ct 1038, 4 L Ed 2d 989 (1960), quoting *Offutt v. United States*, 348 US 11, 14, 75 S Ct 11, 99 L Ed 11 (1954). Thus, it is clear that the federal provision arose out of the common law. Because the Article I, section 11, and federal rights to a public trial share the same purpose, and the federal right is based on the common law, the common law is instructive in determining the meaning of section 11.

The common law concept of a public trial as a protection for the individual and a restraint upon the possible abuse of judicial power has been described as follows:

> [I]t is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, – provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed, – have a right to be present for the purpose of hearing what is going on.

US v. Kobli, 172 F2d 919, 924 (3d Cir 1949), quoting *Daubney v. Cooper*, 10 B & C 237, 240, 109 Eng Re 438, 440 (1829).

The United States Supreme Court has recognized a number of reasons for the constitutional right to a public trial. First, it acts as a "safeguard against any attempt to employ our courts as instruments of persecution." *Re Oliver*, 333 US at 270. That is, the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. *Ibid.* Second, "the presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* at 270 n 25. Third, public trials "come to the attention of key witnesses" previously unknown to the parties. *Id.* at 270 n 24. Those witnesses may then voluntarily come forward and give important testimony. *Ibid.* Fourth, the "spectators learn about their government and acquire confidence in their judicial remedies." *Ibid.*

The proceeding in this case was public, as each of the purposes of the guarantee of a "public trial" were met. First, the public was able to view the proceedings contemporaneously, which served the interest in preventing secret persecution by the government. That is, the trial court and the parties were well aware that the trial was "subject to contemporaneous review in the forum of public opinion," which is a sufficient restraint on possible abuse of judicial power. Second, because of the design of the courtroom and viewing area, the jury and court were able to see members of the public who chose to observe the trial. That fact served the

purpose of reminding the jury and court of the "importance of their functions." Third, due to the provisions made for public observation at SRCI, the proceedings were as likely to "come to the attention of key witnesses" as any trial that might have been held at the courthouse. Fourth, the proceeding permitted any spectators to learn about their government and acquire confidence in the court system. Thus, the provisions made for the trial in this case served the purposes of the "public trial" guarantee.

Few cases across the country have addressed the "public trial" guarantee in the context of a trial in a courtroom at a prison. However, those cases doe not support defendant's argument in this case. None of those cases involves the situation here: a situation in which members of the public were admitted with minimal restrictions and the state established a strong justification for the SRCI trial site.

The trial in *State v. Lane*, 60 Ohio St 2d 112, 397 NE 2d 1338 (1979), was held in a maximum-security prison. The public could enter the prison courtroom only subject to extensive physical and electronic admittance procedures that resulted in temporary confiscation of personal belongings, extensive waiting periods, partial strip searches and additional security clearances at various junctures that were "offensive to the public and to the officers of the court." *Lane*, 60 Ohio St 2d at 120. A sign on the courtroom entrance read "No One Is To Enter Here At Any Hours." *Ibid.* The Ohio Supreme Court held that, due to these facts, in addition to the inhibition on public attendance created by the general public's "fear of entering a maximum security correctional facility," the trial was not a "public trial" as guaranteed by both the Ohio Constitution and the Sixth Amendment.

In *Vescuso v. Commonwealth*, 5 Va App 59, 360 SE2d 547 (1987) (*en banc*), the Virginia Court of Appeals held that the defendants had made a *prima facie* showing that they were denied a public trial, and that, therefore, the state's failure to offer any evidence could not establish that the trial – held within a prison – met the state and federal constitutional "public trial" requirements. In *Vescuso*, the defendants filed motions alleging that the jury trial was scheduled to be held within the medium-security correctional facility, that the courtroom was not open to the general public, that jurors would have to pass through several locked doors and enter the interior of the institution. 5 Va App at 62-63. The commonwealth offered no evidence regarding the facilities or regarding the justification for holding the trial at that location. *Ibid.* The Virginia Court of Appeals thus concluded that the defendants were denied public trials and reversed and remanded for a new trial. *Id.* at 69.

In *Bright v. State*, 875 P2d 100 (1994), the Alaska Court of Appeals unequivocally stated that it was "unwilling to flatly declare that the Alaska Constitution prohibits holding a criminal trial in a prison under any and all circumstances." *Bright*, 875 P2d at 109. However, the court held that, under the circumstances, the trial of the defendant at the prison violated the defendant's right to a public trial. In that case, the court had not made any provisions to allow public observation of the proceeding. There was nothing in the record to indicate that interested persons who went to the county courthouse to observe the trial would have been directed to the prison, "nor is there any indication that these interested persons (or casual observers) would have been allowed entry to the prison." *Ibid.* Thus, in

light of the complete lack of public access, the Alaska Court of Appeals concluded that the trial court did not make findings of extraordinary circumstances that would have justified its exercise of discretion to hold the trial at the prison. *Id.* at 109-10.

In *People v. England*, 83 Cal App 4th 772, 100 Cal Rptr 2d 63 (Cal App 3 Dist) (2000), a California Court of Appeal held that a trial held on prison grounds was "public" within the meaning of the state and federal constitutional provisions. In that case, the courtroom was not within the actual confines of the prison, and was accessible to the press and to the general public. *England*, 83 Cal App 4th at 778. Despite the fact that it might have been more difficult for the public to attend – given that some people would be dissuaded from attending a proceeding on prison grounds and some would resent having to identify themselves to prison officials to gain access to the grounds – the Court of Appeal held that there was "no general exclusion of the public from the trial, and the security measures imposed – requiring attendees to identify themselves to gain access to prison grounds – were minimal and unintrusive." *England*, 83 Cal App at 779.[16] Likewise, in this case, the fact that the public had to

---

[16] The court also stated:

> That some people might not want to go to a courtroom located on prison grounds is irrelevant to determining whether a trial was public. Other individuals might not want to go downtown to an urban courtroom, while others might not want to drive long distances in rural areas to attend a courtroom located in another town. These individual predilections do not make what is otherwise a public trial any less public. Nor does the fact that individuals have to identify themselves before entering prison grounds unlawfully curtail defendant's right to a public trial. Far more stringent security procedures have been permitted in other cases.

83 Cal App 4th at 779.

appear at the prison, rather than the courthouse, to view the trial, was a minimal condition that did not operate to deny the public's access to the trial.

In this case, the court ensured that the public was able to both view and hear the proceeding from an area adjacent to the courtroom. Any member of the public who wanted to observe the trial could do so from that viewing area. The trial in this case was "public."

2. To the extent that the location constituted a "restriction" on public access, it was justified in this case.

The right to a public trial is not absolute, and must be balanced against other interests. *Blake*, 53 Or App at 911; *Gannett Co. v. DePasquale*, 443 US 368, 383, 99 S Ct 2898, 61 L Ed 2d 608 (1979). To the extent that the location at SRCI and the existence of a window between the spectators and the trial participants constituted a limitation on that right, those limitations were justified in this case.

As stated above in response to defendant's due-process claim, the state had a legitimate interest in ensuring the safety of the proceedings and the presence of the defendant. Rather than repeat the facts that supported the trial court's security concerns, the state relies on the arguments made in the previous section. The court's concerns justified the minimal restriction that the SRCI location and the administrative and security requirements may have had on the access of the public to the proceeding.

In sum, the record supports the trial court's findings of fact regarding the gravity of the state's security concerns in this case, and the trial court's choice of holding the trial in the courtroom at SRCI was reasonable. The Court of Appeals

correctly affirmed the judgment based on its conclusion that the trial site did not violate defendant's constitutional rights to an impartial jury, to due process, and to a public trial.

CONCLUSION

This court should affirm the decision of the Court of Appeals.

Respectfully submitted,

HARDY MYERS
Attorney General
MARY H. WILLIAMS
Solicitor General

JENNIFER S. LLOYD
Assistant Solicitor General

Attorneys for Plaintiff-Respondent
State of Oregon

JSL:kak/APP66627

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on April 29, 2004.

I further certify that I directed the Brief on the Merits to be served upon Peter A. Ozanne and Peter Gartlan, attorneys for appellant, S. Rose Jade, attorney for Jury Service Resource Center, on April 29, 2004, by mailing two copies, with postage prepaid, in an envelope addressed to:

Peter A. Ozanne
Executive Director
Office of Public Defense Services
Peter Gartlan
Deputy Public Defender
1320 Capitol Street NE, Suite 200
Salem, Oregon 97303-6469

S. Rose Jade #95310
Attorney at Law
1676 N. Coast Hwy 2nd Floor
Newport, Oregon 97365

Attorney for Amicus Curiae, Jury Service Resource Center

JENNIFER S. LLOYD
Assistant Solicitor General

Attorney for Plaintiff-Respondent

JSL:kak/APP66627