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IN THE SUPREME COURT OF THE STATE OF OREGON

Oct 28 2003

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

BRIEF OF AMICUS JURY SERVICE RESOURCE CENTER
IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REVIEW

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

Opinion Filed: December 11, 2002

Author of Opinion: Kistler, J.

Before: Edmonds, Presiding Judge, Delts, Chief Judge, vice Warren, S.J.

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10/20/03

NOTE: Amicus intends to file a Brief on the Merits if review is allowed.

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Amicus Brief in Support of Petition for Review

Amicus files this brief in support of Defendant-Relator's petition for this court to accept review of, and reverse, the Court of Appeals' opinion which affirmed Defendant-Appellant's convictions and the practice of holding criminal jury trials inside the Snake River Correction Institution (SRCI).

The Interest of Amicus in This Case

The interests of amicus have been set out in the Application. Briefly stated, amicus presents a position as to the correct rule of law while also advocating on behalf of prospective and empaneled jurors, and by extension, other members of the public who find themselves within the prison for purposes of attending trial. The interest of amicus is grounded in the public's interest in an open and presumptively safe courtroom. This interest has not yet been clearly articulated or zealously represented by either party to this case. Defendant-Appellant is concerned about his rights. The State is concerned about its rights. No one seems to be actively concerned about the public's rights or safety. This court should be.

This is the first "prison trial" case to make its way to the Oregon Supreme Court, and major public policy issues involved are involved. This Court's opportunity and responsibilities to review this practice are heightened by the lack of notice and due process provided to the general public to date about the practice.¹

¹ To the knowledge of amicus, the legislature has never officially condoned the practice of requiring jurors to work inside the state prison. Similarly, the executive branch office

The interest of amicus JSRC can be boiled down to one issue: the propriety of a Court summoning jurors to appear and perform criminal trial jury duty while guarded by State Correctional officers, and locked inside a state prison building that has a concertina razor wire perimeter. The arguments amicus makes can also apply equally well to the propriety of the State forcing non-jurors such as court staff, trial witnesses and trial attendees to enter a state prison – an inherently violent environment – as a condition of attending or working in a “public” state court.

**Amicus Requests That This Court Take Judicial Notice of Certain
Facts/Law**

Amicus asks this court to take judicial notice of certain facts, pursuant to ORS 40.065² and ORS 40.070³, and to take judicial notice of certain laws, pursuant to ORS 40.090.⁴ See also ORS 40.080.⁵ In particular:

of risk management has never announced its position on the practice, including whether or not the Court is an employer under the Oregon Safe Employment Act (see discussion further on).

² **ORS 40.065** Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

- (1) Generally known within the territorial jurisdiction of the trial court; or
- (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. [1981 c.892 §8]

³ **ORS 40.070** When mandatory or discretionary.

- (1) A court may take judicial notice, whether requested or not.

Amicus Curiae JSRC Brief in Support of Defendant-Appellant's Petition for Review

State v. Cavan, Petition for Review SC S50230

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- Generally known facts about the appearance of the official SRCI public "courthouse" and "courtroom." Amicus has attached copies of photographs of the state court facility (ATT 64-71).⁶ Licensed investigator Mr. Jesse Garcia took these photographs (ATT 63). Similar photographs were introduced at an omnibus hearing on the SRCI courtroom in 1999.⁷

(2) A court shall take judicial notice if requested by a party and supplied with the necessary information. [1981 c.892 §9]

⁴ **ORS 40.090** Kinds of law. Law judicially noticed is defined as:

(1) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

(2) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

(4) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.

(5) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

⁵ **40.080** Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

⁶ Amicus has provided the Court and each party with a set of color photographs, and then a set of black and white copies of the same photographs. The black and white photographs are easier to duplicate.

⁷ It is the understanding of amicus that some of these photographs, or very similar photographs, were introduced during the 1999 omnibus pre-trial hearings on the siting of the SRCI courtroom, which hearing took place several months after the State v. Jackson trial. See 6/22/1999, omnibus pre-trial hearing in State v. Tan Trahn, #98129313C; State v. Jenkins, #98089029C; State v. Cechmanek, #99029486C; State v. Flores, 98129313C;

- Generally known facts about other physical attributes of the state court facility at SRCI that are readily perceived by jurors, court officers, and other members of the public. These facts are contained in the attached transcripts of the voir dire sessions from State v. Jackson (2/1999) (ATT 86-108), State v. Cavan (6/2000) (ATT 2-62) and State v. Lewis (10/2000) (ATT 109-211), in which the court, trial counsel and summoned jurors refer to and describe these attributes.
- Generally known facts about SRCI, including public statements made by SRCI Superintendent Hill about the facility, as reported in the Argus Observer this year (ATT 212-219).
- Generally known facts about the 1999 omnibus hearings on the initial siting of the prison courtroom, as reported in the Argus Observer (ATT 220-223).

Alternatively, these facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Amicus also requests that this Court take judicial notice of the following law:

- The law as reflected in various public documents showing public actions taken by state officials to facilitate the holding of public trials inside the prison. ORS 40.090(2). Amicus has attached:
 - Chief Justice Order 99-030 dated 2/1/1999 (signed by Hon. Wallace Carson, Jr.) (ATT 72).
 - Chief Justice Order 98-007 dated 1/12/1998 (signed by Hon. Wallace Carson, Jr.) (ATT 73).
 - Proposal for Snake River Correctional Institution Trial Court Facility dated 10/21/1998 (signed by Hon. Frank Yraguen) (ATT 74-77).

State v. Mahon, 99029486C. See also Argus Observer articles (ATT 220-223) and Letter Opinion of Judge Luukinen, April 11, 2000, ruling on the omnibus motions, provided at ATT 80-85.

Photographer/investigator Garcia was a prospective juror in State v. Lewis. See ATT 115 L 12-24.

- Dept. of Corrections SRCI Request for LEDS (form) (ATT 78).⁸
- Dept. of Corrections SRCI SUP'T OFFICE Visitor Authorization Form containing the abbreviated "Inherent Risk/Hostage/No Duty to Rescue" Warning (ATT 79).⁹
- Letter Opinion of Hon. Charles Luukinen dated 4/11/2000 in State v. Jenkins, #98-08-9029C et al (ATT 80-85).
- Letter from Hon. Charles Luukinen dated 10/31/2000 to Ms. Pam Barton, Malheur County Courthouse in reference to State v. Cechmanek and State v. Mahon (ATT 224-225)

To the knowledge of amicus, this Court has never held a working session in the public courtroom at the state prison in Ontario, OR (SRCI), and may not be fully aware of the appearance and attributes of the prison facility's "state courtroom." Comprehending the appearance of this public facility – through pictures and public statements of persons familiar with the building and uttered during public proceedings -- will assist this Court and the parties in resolving the issues in this case. While many judges and some attorneys are familiar with the courthouses and courtrooms throughout the state, amicus will not presume that every attorney and judge involved in resolving this issue has actually been out to SRCI. It is in a very remote part of Eastern Oregon (near the Idaho border),

⁸ This is a government issued safety regulation akin to one adopted under the Oregon Safe Employment Act, and can be judicially noticed. Shahitout v. Emco Garbage Co., 298 Or 598 (1985), see also Hagan v. Gemstate Mfg., Inc., 148 Or App 192 (1997) (evidence of regulatory provision is relevant to establish whether adversary has met applicable standard of care).

⁹ Ibid.

approximately 20 minutes from the nearest town. An aerial photo of the prison is available on the State website for SRCI, at

<http://www.doc.state.or.us/institutions/inst.shtml?srci>.¹⁰

Allowing for visual documentation to supplement the record is not without precedent. In State v. Jackson, 178 Or App 233 (2001), the appellate court allowed the videotape of the prison trial to be introduced into the record, which then allowed the appellate court to see at least a portion of the working environment of the SRCI state courtroom.¹¹

It is important to understand that in the Jackson case, voir dire in its entirety was held at the Malheur County Courthouse in Vale (ATT 89 L 20-23; ATT 90 L 19-23). In the Cavan and Lewis cases, the last stages of jury selection, and what most attorneys recognize as "voir dire," took place *inside* the prison. (Cavan: ATT 4 L 7-8; ATT 15 L 15-24; ATT 31 L 23-25, ATT 32 L 1-3); Lewis: ATT 147 L 21-23; ATT 148, ATT 149, ATT 150 L 1-11). Thus, at least one premise of Defendant-Appellant's argument is incorrect (but this arguably strengthens his argument).¹²

¹⁰ Last viewed in 10/20/03.

¹¹ See colloquy during voir dire in State v. Jackson, ATT 103 L 12-18. "In addition, for appellate purposes we are making an interactive video of these particular proceedings. So in essence, anyone hereafter, including appellate court or anyone else, will actually be able to view what the public had access to and I guess make a determination as to whether we are in fact meeting the constitutional requirement for public access."

¹² In his Petition for review, Defendant-Appellant argues that:

Merely because the jury in this case was impaneled at a remote location prior to transportation to the prison for trial does not shield the jury from the bias inherent in the practice nor circumvent the protections of Article I, section 11.

To clarify, as reflected in the voir dire transcript, Defendant-Appellant's final voir dire pool assembled at SRCI and voir dire then took place (not at "a remote location..."). This was a change of procedure from the protocol followed in the State v. Jackson case, and may have been in direct response to criticism over impaneling the jury in one location and moving it to another without statutory authority (a bait and switch tactic). It appears that orientation of Defendant's jury pool took place at the Vale County Courthouse, many weeks prior to the trial, and went unrecorded (Cavan: ATT 15 L 22-25). Thus, the initial reaction of the *entire* group of summoned jurors to the prospect of having to perform jury duty at SRCI is not of record. The record in this case only reflects the attendance of a *portion* of the summoned jurors, and only a *portion* of their reaction to the situation. The record reflects that portion of juror response that was volunteered during voir dire and which was audible and transcribable by the court reporter. Much of the voir dire session is reported as either "no audible response" or "inaudible response." (*No Audible Response*: see Cavan, ATT 10 L 13, ATT 11 L 2, 7, 11; ATT 13 L 23; ATT 16 L 14; ATT 19 L 1, 18; ATT 30 L 3; ATT 31 L 22; ATT 32 L 3, 8, 13, 15; ATT 35 L 3; ATT 37 L 3, 6, 20; ATT 39 L 25; ATT 49 L 4, 24). (*Inaudible Response*: see Cavan ATT 23 L 18, ATT 28 L 7, ATT 33 L 14; ATT 34 L 8-9; ATT 40 L 7; ATT 43 L 24; ATT 44 L 14; ATT 46 L 19; ATT 50 L 4).

At any rate, amicus agrees with Defendant-Appellant that "a jury that relies on the corrections staff for its safety and security is biased...[and] the prison setting biases a typical lay jury in favor of the state." Amicus agrees, especially in any case (such as the case at bar) where the victim and/or State's witnesses are co-workers of the Corrections staff who are guarding the jurors and court.

What also becomes apparent from reviewing the three voir dire transcripts, is how so few of the jurors who do ultimately appear at the SRCI courtroom voice *any* comment about their location. From the biological sketches provided during voir dire, it appears that many of these prospective jurors actually work at the prison, or have friends or family who work at the prison. Their testimony could support the inference that such persons are clearly acclimated to the inherently violent environment, or possibly fear economic or social fall-out if they criticize the prison in any way. Such inferences buttress the Defendant's argument about the lack of juror impartiality, and would support holding *all* Malheur County trials at the "neutral" County Courthouse in Vale.

The voir dire transcripts attached to this Brief reflect facts about the physical environment of the public prison courthouse and courtroom. Prospective jurors were questioned or volunteered answers regarding:

- The concertina/razor wire around the prison perimeter and other fences (Cavan: ATT 17 L 11-25; Jackson ATT 93 L 23-25; Lewis ATT 144 L 23-25, ATT 145 L 1-2). The Razor wire and concrete wall and fences are shown in photos ATT 64-67.
- Signs advising jurors and other members of the public to lock their cars and to not bring "contraband" into the prison; the restrictive meaning of "contraband" (tobacco, prescription medicine, loose change) for purposes of entering a prison courtroom (Cavan ATT 19 L 6-20; Lewis ATT 145 L 2-10). Photos are at ATT 65, 57.
- The abbreviated "Inherent Risk/Hostage/no duty to rescue" warning (see SRCI text within ATT 79). In Cavan, a prospective juror explained that he had been given notice of this rule during his training as a volunteer (not anything to do with jury duty, ATT 21 L 23-25; ATT 22 L 1-19), but there is no other evidence that the jurors as a group were given notice about this rule prior to their entering the prison. The Jackson jurors were read the hostage warning after they were locked inside the prison, and about to partake in a jury view. (Jackson ATT 104 L 21-22 through ATT 108).
- Juror apprehensiveness at being inside a prison (Cavan ATT 45 L 20-25, ATT 46 L 1-9; Lewis ATT 145 L 20-25; ATT 146 L 1-3).

- The doors locking behind them and their inability to get out of the courtroom or building without "permission" from the guards (Cavan ATT 18 L 14-25; Jackson ATT 93 L 25, ATT 94 L 20-21; ATT 95 L 5-13; Lewis ATT 144 L 23-24, ATT 152 L 1-19; ATT 181 L 19-25, ATT 182 L 1-19) (various "handle-less" doors that jurors must pass through on the way to the interior courtroom). Photos are at ATT 68-71.
- The presence of inmates and guards working outside the prison (Cavan ATT 16 L 15-25; ATT 17 L 1-5).
- Having to restrict their attire (Lewis, ATT 148 L 12-18).
- Not understanding the justification for having the trial inside the prison (Lewis, ATT 150 L 14-20).
- A lack of understanding about the risks of being present in the prison, from a legal point of view (Lewis, ATT 150 L 18-25, ATT 151 L 1-9).
- Having to provide personal identification (fill out LEADS forms) and undergo background checks by the prison officials (Jackson ATT 92 L 11-25, ATT 93 L 1-12, ATT 99 L 20-25; Lewis, ATT 149 L 8-24).
- The presence of Correctional officer "guards" inside the courtroom guarding the defendant and the jurors (Lewis, ATT 143 L 15-23, ATT 144 L 16-23, ATT 182 L 21-25); whose co-workers were victims or state witnesses (Cavan, ATT 6 L 1-7, L 20-25; ATT 7 L 1-2).
- Prospective jurors recognized that the location affected how they "saw" the inmate/defendant. (Cavan ATT 24 L 13-15).

Granting the request to take judicial notice of these public facts will further the interests of justice by allowing the court to more fully consider relevant public policy arguments.

Summary of Facts

Defendant-Appellant-Petitioner was prosecuted inside SRCI for a crime he committed while residing at SRCI, the largest state prison in Oregon. Petitioner was tried and convicted by a jury that had been summoned to serve in the "courtroom" located at Petitioner's place of residence, inside the barbed-wire perimeter of the heavily guarded Snake River Correctional Institution. Defendant contends that holding the jury trial in a correctional facility violated his rights to an impartial jury, a public trial, and due process.

It is a matter of public record that the circuit court's authority to "hold court" inside the prison was grounded in CJO 99-030, an Order signed by Chief Justice Carson in his administrative capacity on 2/1/1999 (ATT 72), which Order supplemented CJO 98-007 dated 1/12/1998 (ATT 73). There were no public hearings held on the decision to site a "public courtroom" at the prison.¹³ Hon. Judge Yraguen signed a letter proposal for the prison courtroom and met with DOC officials about it on 10/21/1998 (ATT 74-77).¹⁴ After the Jackson trial, the

¹³ Testimony of Malheur Co. Circuit Ct. Judge the Hon. Frank Yraguen, on direct examination by Attorney Diane Rader, 6/22/1999, omnibus pre-trial hearing in State v. Tan Trinh, #98129313C; State v. Jenkins, #98089029C; State v. Cechmanek, #99029486C; State v. Flores, 98129313C; State v. Mahon, 99029486C.

¹⁴ Testimony of Malheur Co. Circuit Ct. Judge the Hon. Frank Yraguen, on direct examination by Attorney Diane Rader, 6/22/1999, omnibus pre-trial hearing in State v.

Hon. Judge Luukinen set forth additional conditions that must be met before the Court could hold a jury trial inside SRCI. (ATT 80-85), many of which remain unresolved. ATT 224-225.

This is one of three cases to date in which a defendant has been tried inside the state's largest prison. State v. James Donald Jackson, 178 Or App 233 (2001) (conviction reversed, defendant denied right to public trial; the State chose not to appeal the reversal); State v. Cavan, 185 Or App 367 (2002) (conviction upheld; case at bar); State v. Lewis, 185 Or App 378 (2002) (conviction upheld; the Defendant chose not to appeal the decision further).

This prison environment is formally recognized by the State as dangerous. As stated in Oregon Administrative Rule 291-016-0030(7) "*Physical welfare cannot be guaranteed since there is an inherent risk for violence in a prison environment.*" It is a well known State policy that the State does not "recognize hostages" inside the prison (ATT 79) and this translates into a "no duty to rescue" jurors -- or anyone else -- who happen to be working or otherwise present within this prison if a riot or other emergency occurs.

ARGUMENT

The Court Should Grant Defendant-Appellant's Petition for Review, Require Full Briefing, and Then Decide the Merits of This Case. Because Important Public Policy Issues Concerning the Safety of Jurors, Court Staff, Attorneys, and Other Members of the Public are at Issue, and the Parties Cannot Be Relied Upon to Zealously Advocate for the Public's Interest in Safe Courtrooms, the Court Should Encourage and Accept Briefs From Amicus Curiae.

Tan Trinh, #98129313C; State v. Jenkins, #98089029C; State v. Cechmanek, #99029486C; State v. Flores, 98129313C; State v. Mahon, 99029486C.

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The public has a right to be heard on the propriety of the state holding criminal jury trials inside prisons. This right is grounded in Oregon Constitution Article I section 8,¹⁵ section 10,¹⁶ and section 20¹⁷; the legislative policy found at ORS 1.040¹⁸, and in the federal constitution, by way of the 1st¹⁹ and 14th Amendments.²⁰ The three branches of state government, and the county

¹⁵ Oregon Constitution **Article I section 8** states:

Freedom of speech and press. No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]

¹⁶ Oregon Constitution **Article I section 10** states:

Administration of justice. No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

¹⁷ Oregon Constitution **Article I section 20** provides in relevant part:

Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

¹⁸ **ORS 1.040** Sittings of court to be public. The sittings of every court of justice are public[.]

¹⁹ The **1st Amendment** to the U.S. Constitution provides in relevant part:

Freedom of speech and press, right to petition. Congress shall make no law *** abridging the freedom of speech, or of the press; or the right of the people *** to petition the Government for a redress of grievances.

²⁰ The **14th Amendment** to the U.S. Constitution provides in relevant part:

governments spend enormous resources on making traditional public courthouses safe for employees, litigants, witnesses and other attendees and users. At the same time, the State spends tremendous resources on making state prisons secure, and in smoothing public relations between prison operators, prison employees and local communities (see e.g. ATT 212-219).

This case presents important public policy issues, including whether the holding of criminal jury trials inside the SRCI state prison is a compatible use with the primary purpose of state prisons: the imprisonment of felons for the protection of the public.²¹ SRCI houses approximately 3000 male felons, and has all the earmarks of a quasi-military camp set within a small rural eastern Oregon community.²² Violence by inmates is regularly reported in the paper.

Privileges and immunities; due process; equal protection. *** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

²¹ As stated on the ODOC website:

[t]he ultimate goal of the Oregon Accountability Model [of the Oregon Department of Corrections] is to improve public safety[.]

(ODOC website http://www.doc.state.or.us/oam/welcome_oam.shtml last visited 10/16/03).

²² As reported in the Argus Observer, 5/05/2003:

SRCI is the largest prison in Oregon, housing 3,000 beds and sprawling over 538 acres. "This is a very large prison," [SRCI Superintendent Jean Hill] said. "I think we tend to underestimate the size of this prison." Hill said a prison is very much like a community within a community with its own police force, jail mail service, food warehouse, internal courts, physical plant, schools, infirmary, church

ATT 216-217. It is a matter of public record that SRCI has been susceptible to fostering additional hostilities, particularly towards women.²³ It is a matter of state rule and law that prisons are inherently dangerous and not considered "public" venues. Adderly v. Florida, 385 US 39 (1966). The Dept. of Corrections OAR 291-016-0030(7) states that *"Physical welfare cannot be guaranteed since there is an inherent risk for violence in a prison environment."* Allowing the Court of Appeals decision in this case to stand, without insisting on careful review and hearing argument, would be irresponsible and will likely invite disaster.

The court not only summons prospective jurors to court, but it also requires court staff and officers to be present, and pays them all to be there. Under the Oregon Safe Employer Act (ORS Chap. 654) "no employer...shall cause to be constructed or maintained any place of employment that is unsafe or detrimental to health." Oregon Administrative Rule 291-016-0030(7) plainly states that *"Physical welfare cannot be guaranteed since there is an inherent risk for violence in a prison environment."* Whether the court is an employer for

services, community volunteers, visitors facility and laundry center. "We couldn't do what we are doing without the services we receive from local agencies," Hill said, noting the important relationship SRCI maintains with Treasure Valley Community College, the Malheur County Sheriff's Office, the Ontario Police Department and Holy Rosary Medical Center.

See article attached at ATT 214-215.

²³ See ATT 212-213 documenting the sexual harassment/gender discrimination lawsuit filed by 20 SRCI employees. The settlement was mediated by the Equal Employment Opportunity Commission.

purposes of the Oregon Safe Employer Act (ORS chap 654),²⁴ and thus subject to ORS 654.015 is a question of first impression, which this Court may invite amicus or other interested parties to address.²⁵

In order to provide the constitutionally mandated public access to criminal trials, normal levels of prison security must be altered and relaxed on the days that trials are held. Those who would normally be screened and refused as security risks, instead must be allowed inside. Any lessening of "courthouse" perimeter security makes the interior prison courtroom even more dangerous. Inmates and prison staff may become endangered. Jurors and others summoned to work inside prison courtrooms are forced to work in highly dangerous settings and apparently stripped of tort remedies afforded to jurors and others who work

²⁴ **ORS 654.015** Unsafe or unhealthy place of employment prohibited. No employer or owner shall construct or cause to be constructed or maintained any place of employment that is unsafe or detrimental to health.

²⁵ **ORS 654.005** Definitions [for the Oregon Safe Employment Act]:

(4) "Employee" means any individual, including a minor whether lawfully or unlawfully employed, who engages to furnish services for a remuneration, financial or otherwise, subject to the direction and control of an employer, and includes salaried, elected and appointed officials of the state, state agencies, counties, cities, school districts and other public corporations, or any individual who is provided with workers' compensation coverage as a subject worker pursuant to ORS chapter 656, whether by operation of law or by election.

(5) "Employer" means any person who has one or more employees, or any sole proprietor or member of a partnership who elects workers' compensation coverage as a subject worker pursuant to ORS 656.128.

in normal county courthouses. This situation obviously triggers equal protection and due process concerns for persons beyond "the State" and "defendant."

The Defendants in these three cases have been focused on the prejudice to their defense by the State holding the trial inside the prison. The State has sought —and continues to seek — to justify the practice for its own reasons (typically asserting that the Defendant poses a flight risk). In all of these cases, the Court sided with the State (again for its own reasons). No party has zealously advocated on behalf of the public's interest in safe working environments at trial. Yet jurors — just like court staff, witnesses, attorneys and attendees — are members of the public and intimately affected by court siting decisions.

Although jurors (and court staff, witnesses, et al) theoretically have "rights," third parties are not generally allowed to intervene at the trial level in criminal cases. A person summoned or subpoenaed to appear does have a right to move to quash the summons/subpoena. The U.S. Supreme Court has recognized that jurors have rights but have been historically reluctant to litigate their rights (for financial and other reasons). And, when they do attempt to do so, they are unlikely to be successful. See discussion in Powers v. Ohio, 499 US 400, 111 S Ct 1364 (1991). Although that Court has granted to trial litigants third party standing to raise the rights of prospective jurors, no litigant has a "duty" to do so, and of those who are interested, few know how to do so effectively. For instance, in the three cases to date, no SRCI litigant has made a complete record regarding juror orientation, jurors' reactions to the prospect of working inside SRCI, or sought to conduct a poll on the public's attitude toward the practice of

requiring their friends and loved ones to perform jury duty inside the prison. Arguably, neither criminal defense attorneys nor prosecutors are particularly well suited to doing so: they – like the trial courts – have other agendas, and those agendas have associated interests that may conflict with the public's interest. For instance, a particular defendant may *want* to have his jury trial inside the prison, simply to avoid being transported "out" if being transported out results in him losing his cell, his cell-mate, or any on-going opportunity for services that depend on his unbroken attendance at the prison. A particular defense attorney may not wish to 'rock the boat,' by objecting to the prison venue, if doing so might result in his losing future revenue (loss of court appointments to represent inmates) or risk harm to another client appearing before the same judge. A particular prosecutor may waive the anxiety and safety issues in order to "look tough," or gain a psychological advantage. In addition, particular court staff (judges, attorneys, and even prospective jurors) may have become so acclimated to the prison setting, that they have lost sight of the stress and danger that others unaccustomed to the setting may feel, *and which risk the law insists is very real*. Others may simply feel that the speculative financial savings (theoretically realized by not having to arrange and provide for transport to the County Courthouse in Vale) is reason enough.

Clearly, forcing the public to rely on criminal trial litigants to protect and vindicate their public interests is fundamentally unfair, and therefore not in the interests of justice, or judicial expediency. The record regarding the public's reaction and concern is not being made. As revealed in the three voir dire

transcripts, each group of prospective jurors/empaneled jurors who appeared at SRCI for jury duty were informed at least two weeks prior to voir dire that they were going to be serving at the prison. (e.g., Cavan, ATT 15 L 22-25). They had at least two weeks to get used to the idea of the Court ordering them into the prison. Many of their responses on voir dire were "inaudible" or silent. (e.g. Cavan ATT 15 L 12-13). The record does not reveal how many *other* prospective jurors were actually summoned, and who then balked, refused, got sick, asked to be deferred or otherwise abstained from prison jury duty.²⁶ The prospective jurors

²⁶ For instance, in State v. Jackson, it is a matter of public record that the trial judge went through two panels of prospective jurors before finding a group that would "go along" with working at the prison.

Well, I gave the general orientation, and I indicated that we would having the trial I did indicate to the jurors that I wanted them to be uh watchful of what occurred, uh what their concerns might be, things that – that they felt should be addressed in a different manner. I also talked during general orientation, to two jury panels before the jury panel that actually tried the case here, to get their impressions as to what – what their reaction was – to uh pursuing trials in this sort of setting.

Testimony of Malheur Co. Circuit Ct. Judge the Hon. Frank Yraguen, on direct examination by Attorney Diane Rader, 6/22/1999, omnibus pre-trial hearing in State v. Tan Trahn, #98129313C; State v. Jenkins, #98089029C; State v. Cechmanek, #99029486C; State v. Flores, 98129313C; State v. Mahon, 99029486C.

Judge Yraguen explained during voir dire in Jackson that:

THE COURT: You might be interested too, I have asked them [jurors] to go along with me on this trial and then give me their candid reactions after they've actually seen.

MR. ROCK (for defendant): The jurors that serve on the case?

THE COURT: I did that during general instructions.

present for voir dire were willing to acknowledge certain things, but did not give audible responses when asked to describe how it made them feel. (e.g., Cavan, ATT 18 L 1). To complicate matters, the jurors were asked these sensitive questions while locked inside the prison, guarded by correctional officers, and in front of the judge who had ordered them to work inside the prison, facts which they were reminded of by the State (Cavan ATT 31 L 1-2). There was tension between the Defense Attorney and the Judge. (Cavan ATT 26 L 2-25; ATT 27 L 1-4). This was obviously not the most neutral or productive setting for ferreting out juror unease over the prison setting.

Importantly, the record does not reflect whether the jurors and their families were ever given notice of OAR 291-016-0030(7) *Physical welfare cannot be guaranteed since there is an inherent risk for violence in a prison environment*, or whether jurors and their families had the "no duty to rescue" rule explained to them in detail.

THE COURT: ***I told the jurors that in coming into the visitors center they would not be put in amongst the general population in any way[.]

State v. Jackson, see ATT 95 L 24-25, ATT 96 L 1-3; ATT 105 L 7-8.

In State v. Lewis, held 10/16/00, voir dire revealed the same arrangement: prospective jurors were informed off the record weeks before the trial that they might have to work out at the prison (Lewis ATT 147 L 20-25; ATT 148-151). The record is thus incomplete with regards to the actual notice received by the prospective jurors, how it was responded to, and how many summoned jurors failed or refused to report to jury duty out at SRCI.

Amicus Curiae JSRC Brief in Support of Defendant-Appellant's Petition for Review

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Conclusion

The public policy issues presented in this case are hugely important. Over a hundred years ago, this Court ruled that neither the defendant nor the state could waive a public right. Ex parte Tice, 32 Or 179, 49 P 1038 (1897). The public right at issue here, is the right to have criminal jury trial proceedings take place in public locations that are safe, and under conditions consistent with the law as reflected in administrative rules, statutes, and constitutional provisions. Granting Defendant-Appellant-Petition for review, and allowing amicus to appear, will serve the interests of justice and the public's interest.

DATED: 10/20/03

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 20, 2003, I served the foregoing **Brief by Amicus Jury Service Resource Center in Support of Defendant-Appellant's Petition for Review** pertaining to State v. Cavan, Supreme Court SC 50230 on the parties by mailing 2 true copies of same to those shown below at the address given:

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