IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, PLAINTIFF, vs. JOSEPH GIBSON, DEFENDANT.	No. 19CR53042 JOSEPH GIBSON'S MOTION FOR BILL OF PARTICULARS OR ELECTION **[ORAL ARGUMENT REQUESTED]** **[UTCR 4.050]**

MOTION AND INTRODUCTION

COMES NOW Joseph Gibson, by and through the Angus Lee Law Firm, PLLC, and moves the Multnomah County Circuit Court to order the State to either provide a bill of particulars or elect the specific act or acts it claims establish "tumultuous and violent *conduct*" (as opposed to speech) on the part of both Mr. Joey Gibson and Mr. Russell Schultz. Mr. Gibson requests 1 hour for oral argument.

A motion for a bill of particulars is ripe once an indictment has first been found sufficient on demurrer. *State v. Payne*, 298 Or. App. 411, 416-417 (2019).

Due to the unique freedom of expression questions presented in this case, it is not clear from the charging document, nor the discovery, what actual conduct is alleged to have occurred in violation of the law.

Pleadings filed from the State in this matter have repeatedly alleged Mr. Gibson and Mr. Schultz engaged in "taunting" Antifa (a subject of the protest). This only muddies the waters as Mr. Gibson and Mr. Russell, were engaged in a protest at the time of the taunts in question. A

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bill of particulars, or election by the State, will serve to provide sufficient notice of what is actually alleged so that Mr. Gibson can prepare a defense, and also serves to ensure that Mr. Gibson is only be prosecuted for conduct, and not protected speech.

FACTS

The State has charged Mr. Gibson and Mr. Schultz with Riot. ORS 166.015. Videos of the May 1st protest of Antifa and Cider Riot show the involvement of both Mr. Gibson and Mr. Schultz.[1] The video is completely devoid of any apparent act of "violence" or "tumultuous conduct" committed by Mr. Schultz personally. The video is also completely devoid of any apparent act of "violence" or "tumultuous conduct" committed by Mr. Gibson personally. It appears that the State is prosecuting him for speech and the predictably violent reaction to his speech by Antifa.

In Deputy Prosecutor Kalbaugh's AFFIDAVIT IN SUPPORT OF ARREST WARRANT FOR VIOLATION OF : ORS 166.015, he declared that in the video footage Mr. Gibson and Mr. Schultz can be seen "*taunting* and physically threatening members of the Antifa group in an effort clearly designed *to provoke* a physical altercation." Id., page 2, line 2. (emphasis added). The declaration does not provide any specific factual description of the asserted "taunting", "physically threatening", or 'provoking' conduct by Mr. Gibson or Mr. Schultz.

Mr. Kalbaugh further declared, that Mr. Gibson was "repeatedly *challenging* members of the Antifa group to fight him as he says 'do something' and *taunts* them from the sidewalk." Id., line 5. Again, the declaration does not provide a factual description of the alleged conduct other than stating that Mr. Gibson uttered the phrase "do something." There is no other description of any taunts in the declaration or in discovery.

[1]Available online here: https://youtu.be/HzId89utLys?t=1142

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Although Mr. Kalbaugh declared that Mr. Gibson "physically push[ed] Heather Clark," the State's pleadings failed to disclose to the court that the videos in discovery show clearly that prior to any physical contact between Mr. Gibson and Ms. Clark, Mr. Gibson was moving backwards and away from Ms. Clark with his hand up and arm outstretched while she aggressively and angrily charged at him throwing punches in Mr. Gibson's direction. Further, not one police report or witness statement provided in discovery asserts that Mr. Gibson pushed Ms. Clark.

At no point in the discovery does Detective Traynor conclude that Mr. Gibson "pushed" Ms. Clark. In fact the officer's report indicates Mr. Gibson was the opposite of violent.

> Ms. Clark was seen to clearly take exception to Coopers actions and moved forward towards Cooper. *A crowd [of Antifa] followed her but their actions appeared motivated by an effort to restrain Ms. Clark. Joey Gibson and Chris Ponte [are] also seen to re[s]train Ms. Clark whose anger was clearly aimed at Demi Cooper.*

Discovery BS 91 (emphasis added). This summary by Detective Traynor was not anomolistic. In a later recorded interview Detective Traynor stated "I think it's fair to say that Gibson was trying to hold her back." Interview or RW at 23:03.

Further, even Ms. Clark did not claim she was pushed by Mr. Gibson in her recorded interview with the police.

As it relates to Mr. Schultz, the AFFIDAVIT IN SUPPORT OF ARREST WARRANT FOR VIOLATION OF : ORS 166.015, does not describe or identify a single specific violent or tumultuous act that can be identified. Nothing in discovery suggests he had any physical contact with any other individual.

In a later pleading, the State again asserted that Mr. Gibson and Mr. Schultz were "*verbally arguing* with approximately 50 members of individuals affiliated with 'Antifa.'" STATE'S MOTION TO CONSOLIDATE, September 23, 2019, page 2, line 3. The State also again asserted that they were "*verbally taunting* members of the 'Antifa' group in an effort clearly designed to

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provoke a fight." Id., line 20. Of note, the State again fails to give any description of how Mr. Gibson or Mr. Schultz are alleged to have taunted anyone and seems to attempt to hold Mr. Gibson and Mr. Schultz criminally liable for speech.

Finally, the State has asserted that after some Antifa member spit on Mr. Gibson he wiped the spit of on a nearby Antifa member and challenged that person to "'do something' about it." Id., page 3, line 1. While discourteous, this is not violent. And the video makes clear that Mr. Gibson at no point said "about it" or anything like that. The "about it" language subtly placed next to "do something" in the State's pleadings is simply a figment of executive branch imagination.

ARGUMENT

Is Mr. Gibson being prosecuted for taunting? The pleadings to date indicate so. Yet, taunting is not a crime, it is not violent, and it is not "conduct" under the Riot statute. Taunting is speech. Taunting is a form of protest. So why is taunting repeatedly referenced in the affidavit in support of arrest if the speech of Mr. Gibson and Mr. Schultz is not the underlying basis of the prosecution?

Is Mr. Gibson being prosecuted for holding his arm out while backing away from someone who is advancing on him and swinging her arms violently in his direction?[2] If so, the State should say so clearly so that Mr. Gibson can file a notice of self-defense and defend against that allegation.

Is the State prosecuting Mr. Gibson for wiping off spit that was spat upon him by Antifa? The video of this event shows no violence at all and the other participant in the exchange simply smiles. If this is the basis for the charge, the State should say so so that Mr. Gibson can address the insufficiency of evidence to establish that such conduct is "violent."

[2] Keeping in mind that even members of her own group felt the need to restrain her at that same time.

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And what on earth is Mr. Schultz alleged to have done?[3] He is hardly mentioned in the police reports and the video shows zero physical interaction between him and any other individual. If the State is prosecuting Mr. Schultz for "taunting" Antifa it should make this clear. Nothing in discovery or pleadings (aside from a baldly asserted legal conclusion) provides any evidence or indication of any conduct that could be described as violent or tumultuous by Mr. Schultz.

Neither the charging document, nor the discovery, answer the above questions, and as such Mr. Gibson has no way to fully prepare his defense without a bill of particulars or an election by the prosecution.

1. NEED FOR GREATER SPECIFICITY IN SPEECH RELATED CASES

> If the accusatory instrument charges a crime implicating the First Amendment to the United States Constitution or Article I, section 8, of the Oregon Constitution, ***greater specificity may be required***.

1 *Criminal Law* 8.51 (OSB Legal Pubs 2013) (emphasis added)[4]

As argued in Mr. Gibson's demurrer, the charging document is not definite or certain, and is unconstitutionally vague as applied, and is therefore unconstitutionally insufficient as applied to Mr. Gibson in this case, and serves to deprive Mr. Gibson of Due Process and his rights.[5]

2. BILL OF PARTICULARS.

In cases where a charging document does not fully inform the accused of the nature and cause of the accusation against him such that it enables him to prepare his defense and to avoid a subsequent prosecution for the same crime, the defendant has a right under the United States

[3] Keeping in mind that for charges of Riot against Mr. Gibson to stand, there must be evidence that 5 other separate individuals, participating *with* Mr. Gibson, engaged in violence.

[4] *Citing State v. McNamara*, 547 P.2d 598, 274 Or. 565 (Or., 1976) (Because a defendant would not know what actions were criminal and which were not, one could not take the risk of engaging protected expression for fear of prosecution, which could have a "chilling effect on freedom of expression render[ing] the verdict vulnerable to attack on constitutional grounds").

[5] See the First Amendment to the United States Constitution and Art. I, sec. 8 of the Oregon Constitution. ORS 135.610, ORS 135.630(4) & (6), and *State v. McKenzie*, 307 Or 554, 560, 771 P2d 264 (1989).

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Constitution, Oregon case law, and case law in neighboring jurisdictions, to additional notice by way of a bill of particulars. *State v. Payne*, Or. App. 411 (2019); Fed. R. Crim. P. 7(f) ("The court may direct the government to file a bill of particulars"); 12 Wash. Prac., Criminal Practice & Procedure § 1901 (3d ed.) (*citing Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), *rehearing denied* 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed.2d 129 (1974); *State v. Peerson*, 62 Wn.App. 755, 816 P.2d 43 (1991), *review denied* 118 Wn.2d 1012, 824 P.2d 491 (1992) (the purpose of the bill of particulars is to give the defendant sufficient notice of the charge so that he can competently defend against it; this notice requirement stems from the defendant's due process right under the United State Constitution).

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation …." Article 1, § 11 of the Oregon State Constitution, provides: "[i]n all criminal prosecutions the accused shall have the right … to demand the nature and cause of the accusation against him …." Oregon's Constitution mirrors the language of Article 1, § 22 of the Washington State Constitution.

Case law applying Washington's parallel constitutional provision holds that a bill of particulars is called for if the particulars of a specific case require such to adequately inform the accused.

> Even where an accusation is legally sufficient, the defendant may be entitled to a bill of particulars if he needs additional information as to the crime charged. ***A defendant is ordinarily entitled*** to the specific date and time of the offense, its location, the name of the complainant and victim, and ***the means by which the defendant allegedly committed the offense, if such information is necessary for the defense***. This serves to minimize surprise and assists a defendant in his preparation for trial, particularly when the charge is stated in general terms.

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12 Wash. Prac., Criminal Practice & Procedure § 1903 (3d ed.) (emphasis added) (*citing State v. Maurer*, 34 Wn.App. 573, 663 P.2d 152 (1983); *State v. Newman*, 63 Wn.App. 841, 822 P.2d 308 (1992), *review denied* 119 Wn.2d 1002, 832 P.2d 487 (1992) (if an information is vague as to matters other than the elements of the crime, the defendant may request a bill of particulars to correct the defect).

"Oregon has no formal criminal procedure code, and hence there is no direct procedural equivalent to ORCP 21 D [(a civil motion to make more definite and certain)] in criminal practice. The closest conceptual equivalent would be a motion for a bill of particulars." *State v. Payne*, 298 Or. App. 411, 416-417 (2019) (*citing State v. Darlene House & James House*, 260 Or 138, 142-43, 489 P2d 381 (1971) (explaining that the purpose of such a motion is "to provide the defendant with further information respecting [a] charge [against him] so as to enable him to prepare his defense and avoid prejudicial surprise at trial").

A motion for a bill of particulars is ripe once an indictment has first been found sufficient on demurrer. *Id.*

"[T]he tests to be applied in determining whether an indictment is sufficient for the purposes of a demurrer and whether a defendant in a criminal case is entitled to a bill of particulars are entirely different and are based upon entirely different considerations." *Darlene House & James House*, at 142.

> Of more importance is the fact that the purpose of a bill of particulars is not to inform the defendant of the charge against him (as is the test to be applied in determining the sufficiency of an indictment on demurrer). Instead, its purpose is to provide the defendant with further information respecting that charge so as to enable him to prepare his defense and avoid prejudicial surprise at the trial.

Darlene House James House, 260 Or. 138, 142-43 (Or. 1971)

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Consider, *State v. Davis*, 1 Or. App. 285, 287 (Or. Ct. App. 1969), in which the mother of a 20 month old child was charged with murder for "failing and refusing to secure and provide [her child] with the care, guidance and protection necessary for his physical, mental and emotional well-being." There the Court of Appeals held:

> The indictment against defendant in no way descends to particulars. It does not state what omissions the state would attempt to prove as a proximate cause of the child's death. Defendant could be held accountable for every act or omission since the birth of the child which the jury might find came within the open-ended charge. *It provides defendant with little help in making her defense without speculation and guesswork and little, if any, guidance for the trial court in determining what matters were or were not embraced by the charge*.

State v. Davis, 1 Or. App. 285, 289 (Or. Ct. App. 1969) (emphasis added) (cited affirmatively by *State v. House*, 5 Or. App. 519, 523-24 (Or. Ct. App. 1971)).

Here, the information is generic statutory language that is unfitting for a case with a fact pattern complexly woven into protected first amendment speech and expression. Mr. Gibson and Mr. Schultz had a right to be at the location they were at, and to protest Antifa and Cider Riot. The State's pleadings and discovery to date shed no light on what Mr. Gibson and Mr. Schultz are actually being prosecuted for and indicate that it is actually for "taunting" (AKA protesting) Antifa, or worse, for the predictably violent reaction of Antifa to speech that Antifa finds offensive.

A bill of particulars form the State, which specifically identifies what "conduct" on the part of Mr. Gibson and Mr. Schultz is alleged to have been "violent or tumultuous" will resolve this notice and due process issue, and will go a long way to ensuring that prosecution is not the result of protected expression.

3. ELECTION OF FACTS.

> In Oregon, we do not have a statute expressly authorizing such a motion. However, our case law has described situations in which an indictment is sufficient to withstand a demurrer but still may fail to give a defendant adequate notice of the

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> precise charges against him. In those instances, Oregon common law has created the "motion for election" that gives a defendant more information as to the basis for the charges against him.

Payne, at 417.

A motion for election was best described in *State v. Hale,* 335 Or. 612, 75 P.3d 448 (2003), where the Supreme Court addressed situations in which an indictment was sufficient to withstand a demurrer because it followed the statutory language, but was insufficient for the purpose of notice for the defendant.

The trial court denied the demurrer. *Id.,* at 619. The Supreme Court held that the issue of the sufficiency of the indictment was timely raised by the demurrer, but that the defendant was not entitled to require the state to make the indictment more definite and certain, and that the trial court's failure to grant the demurrer was not error. *Id.,* at 620-21. The court agreed with the defendant that "where the record would support more than one incident of third-degree sexual abuse, the defendant was ***entitled to know the state's precise theory of the case and which facts and circumstances the state was relying*** on to support the aggravated murder counts." *Id*., at 621 (emphasis added).

The Court did not agree that requiring the trial court to sustain defendant's demurrer to the indictment was the proper (or only) vehicle for ensuring that defendant obtain the information that he sought. *State v. Hale*, 335 Or. 612, 621 (Or. 2003). Rather, the defendant "had other avenues available to him for acquiring that information, ***such as later moving the court to require the state to elect a specific incident*** of third-degree sexual abuse, or requesting special jury instructions that clarify the matter." *Id.* (emphasis added).

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Mr. Gibson in this case is asking this court to do exactly that, by ordering the State to provide a bill of particulars or make election the specific act it alleges constituted violent and tumultuous conduct by Mr. Gibson and Mr. Russell.

Later, in *State v. Antoine,* 269 Or.App. 66, 344 P.3d 69, *rev den,* 357 Or. 324, 354 P.3d 696 (2015), the Court of Appeals reaffirmed the principle that although an indictment usually suffices if it alleges the charged crime in the words of the statute defining the offense, ***there are exceptions to that rule***. *Id.* at 75 (*citing State v. Cooper*, 78 Or App 237, 240, 715 P2d 504 (1986). Such an exception occurs when discovery would not aid the defendant in confirming which act the state could select in charging the defendant. *Id.* For example, in a gambling charge the information was insufficient where "'promotes gambling' was defined by a nonexclusive list of acts, [and] discovery was an insufficient substitute for a charging instrument that specified 'the acts allegedly committed' by the defendant." *Id*.

In *Antoine*, the Court of Appeals held that the defendant was correct that his case fell within the exception, and that the state's charging method effectively allowed the state to adduce evidence of multiple acts "without defendant knowing which of the acts would be specified and argued to the jury for convictions." *Id.* at 76. "Such a charging process failed to provide defendant with proper notice of the charges before trial." *Id.* at 77.

While the court affirmed in *Antoine,* it did so because when the trial court overruled the defendant's demurrer the defendant failed to pursue other procedural methods to procure adequate and timely notice of what specific act he was accused of committing (*such as filing a motion like the one at bar*). *Id.* at 78.

The court made clear that the right to sufficient notice of what one is actually being accused is a right that comes in advance of trial.

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> [D]efendant could have moved to discover the state's election of the specific criminal acts that the state would prosecute at trial, ***in time for defendant to tailor his defense to those specific incidents.*** Defendant did file a demurrer before trial but did not later move for the state's election of the specific criminal acts that it would prosecute at trial.

Id. at 79 (footnote omitted) (emphasis added).

> [E]lucidation of the state's precise theory ***at trial*** does not cure the problem of a lack of pre-trial notice, given that ***such notice is essential to pre-trial investigation, trial preparation, and litigation of evidentiary issues***. Thus, we do not view *Hale* as impeding a defendant from filing a motion for the state's election early in the case.

Id., at 77 n.8 (emphasis added).

Mr. Gibson requests that this court order the State to so elect the specific facts it is claiming were violent on the part of Mr. Gibson and Mr. Schultz.

CONCLUSION

Without greater specificity it is impossible to know what action by Mr. Gibson and Mr. Schultz are alleged to have personally committed in violation of the law as Mr. Schultz and Mr. Gibson were in a public forum engaging in protected expression at the time of the alleged offense. Such lack of notice inhibits the ability to prepare a defense and engage in pretrial litigation of evidentiary issues in this matter.

Joseph Gibson moves the Multnomah County Circuit Court for an order directing the government to provide a bill of particulars and/or elect the specific act it claims were violent and tumultuous by Mr. Gibson and Mr. Schultz.

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Respectfully submitted this Friday, October 25, 2019.

/s/ D. Angus Lee
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DECLARATION OF COUNSEL

I, D. Angus Lee, declare under the penalty of perjury that the following is true and correct to the best of my knowledge. I am over the age of eighteen, and I am competent to testify to the matters herein. I have personal knowledge of the matters stated herein, or as indicated, have information concerning those matters. I am the attorney of record for Joseph Gibson, in the above captioned matter.

1. I have reviewed all discovery made available to me thus far in this matter.

2. Based on that review, I do not see evidence of any act that I believe is, or could reasonably be interpreted as, tumultuous and violent that is committed by Mr. Gibson.

3. Based on that review, I do not see evidence of any act that I believe is, or could reasonably be interpreted as, tumultuous and violent that is committed by Mr. Schultz.

4. I do not know with sufficient certainty to mount a defense what particular act or acts on the part of Mr. Gibson or Mr. Schultz the State refers to in the charging instrument.

5. What is clear from the discovery is that Mr. Gibson and Mr. Schultz were in a public location exercising their rights of free expression when they were assaulted by patrons of Cider Riot.

6. Mr. Gibson was spat upon and pepper sprayed repeatedly.

7. The videos in discovery appear to show that prior to any physical contact between Mr. Gibson and Ms. Clark, Mr. Gibson was moving backwards and away from Ms. Clark with his hand up and arm outstretched while because she was aggressively and angrily charging and throwing punches in his direction.

8. It does not appear that any police report or witness statement provided in discovery asserts that Mr. Gibson pushed Ms. Clark or any other person.

9. In Ms. Clark's interview with Detective Traynor, it does not appear that she asserts she was pushed by Mr. Gibson.

10. It appears that at no point in the discovery does Detective Traynor conclude that Mr. Gibson pushed Ms. Clark.

11. His report appears to indicate Mr. Gibson was the opposite of violent:

> Ms. Clark was seen to clearly take exception to Coopers actions and moved forward towards Cooper. A crowd [of Antifa] followed her but their actions appeared motivated by an effort to restrain Ms. Clark. Joey Gibson and Chris Ponte [are] also seen to re[s]train Ms. Clark whose anger was clearly aimed at Demi Cooper.

12. In one recorded interview Detective Traynor admitted that he thinks it is fair to say that Mr. Gibson was trying to hold her back.

13. Video evidence shows Mr. Gibson say "do something," but the alleged "about it" language asserted in pleading by the State does not appear to exist in any video evidence or other discovery.

14. Based on the discovery and the indictment, it is impossible to tell which facts are referred to in the indictment, and it is impossible to determine what the Grand Jury considered in returning this indictment. Defendant is unable to prepare for his defense, because he does not know what facts are alleged to constitute the crime in question.

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I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Signed at Vancouver, Washington, this Friday, October 25, 2019.

S// D. Angus Lee

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CERTIFICATE OF SERVICE

I, D. Angus Lee, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years.

On Friday, October 25, 2019, I caused this document to be served in the following manner on the parties listed below:

Brad Kalbaugh	( )	(BY FIRST CLASS US MAIL)
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600 Multnomah County Courthouse	( )	(BY FAX)
1021 SW 4th Ave	( )	(BY HAND)
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