

MULTNOMAH COUNTY CIRCUIT COURT  
IN AND FOR THE STATE OF OREGON

STATE OF OREGON,

PLAINTIFF,

vs.

JOSEPH GIBSON,

DEFENDANTS.

No. 19CR53042

JOSEPH GIBSON'S MOTION TO SEVER

**[ORAL ARGUMENT REQUESTED]**

**[UTCRC 4.050]**

MOTION

Comes now Mr. Joseph Gibson, the defendant, by and through the Angus Lee Law Firm, and respectfully moves the Court to sever his case from the cases against Ian Kramer (19CR54815), Matthew Cooper (19CF53038), Mackenzie Lewis (19CR53040), and Christopher Ponte (19CR53033), for a separate trial on grounds that the co-defendants allegedly made statements implicating themselves and Mr. Gibson.

This motion is made pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and ORS 136.060.

FACTS

***The Bridge Group***

On the day in question several of the co-defendants were engaged in a protest while standing on or around a local Portland Bridge.<sup>1</sup> There is extensive video in discovery of these co-

<sup>1</sup> Video "YouTube Rewound News 4."  
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Joseph Gibson  
Wednesday, January 8, 2020

1 defendants on the bridge (“Bridge Group”). Also present on the bridge were members of the  
2 “Proud Boys.” Notably, Mr. Gibson and Mr. Schultz were not among those on or near the bridge  
3 and where not part of the Bridge Group.

4 The Bridge Group include Ian Kramer, Matthew Cooper, Mackenzie Lewis, and  
5 Christopher Ponte. The Bridge Group co-defendants where recorded, and observed by witness,  
6 for a lengthy period. During their time on the bridge they made various statements that the State  
7 will certainly introduce at trial. Mr. Gibson and Mr. Schultz where not there, but were implicated  
8 by the statements of the Bridge Group.

9 At approximately of the bridge video there is a discussion between co-defendants about  
10 moving to the next location (Cider Riot).<sup>2</sup> When the camera pointed to the ground a voice is heard  
11 saying “I know you can kick ass.” Next Mr. Lewis stated that Mr. Gibson as attempting to get a  
12 group together to go to Cider Riot.

13 Next, video<sup>3</sup> shows the Bridge Group walking from the bridge to Cider Riot (the location  
14 of the alleged riot). Mr. Gibson and Mr. Schultz where still not with the Bridge Group during their  
15 walk. As they approached Cider Riot, The Bridge Group discussed text messages with Mr. Gibson  
16 and one of the group said that “Joey said that he’d be the second wave.”<sup>4</sup> The individual making  
17 the recording then attributed that statement to co-defendant Lewis. According to Officer Jerry  
18 Cioeta he heard one of the individuals in the co-defendant group say that he was on the phone with  
19 Joey Gibson as the group was in route to Cider Riot.

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<sup>2</sup> Id., at 25:30.

<sup>3</sup> Video “YouTube RewoundNews 1.”

<sup>4</sup> Id., at 3:40.

1 The Bridge Group then talked about checking the wind at Cider Riot so that when they use  
2 pepper spray they don't spray themselves.<sup>5</sup>

3 Ian Kramer then asked another participant "are you going to fight in heavyweight?"  
4 Kramer then stated "... and the cops aren't gonna do shit."<sup>6</sup> Another participant mentioned a "pre-  
5 fight indicator" and Ian Kramer stated that he was the one with the weapons.<sup>7</sup>

6 The next video in this group of videos in discovery<sup>8</sup> shows the Bridge Group continue their  
7 walk from the bridge to Cider Riot and discussed their plan. Even before the Bridge Group has  
8 reached Cider Riot, Ian Kramer is seen brandishing a fully extended asp in one hand and bear spray  
9 in the other.<sup>9</sup> As they approach Cider Riot, co-defendant Matthew Cooper screams "where the  
10 F\*\*\* is Luiz. Bring his A\*\* over here."<sup>10 11</sup>

11 Later, Mr. Gibson and Russel Schultz arrived a block down from Cider Riot where the  
12 Bridge Group was also standing.<sup>12</sup> After briefly greeting each other Mr. Gibson simply left and  
13 walked down the block to Cider Riot. There was no direction or request from Mr. Gibson to the  
14 Bridge Group.

### 15 *The Ian Kramer Postings*

16 Finally, the State will certainly seek to introduce Facebook postings of Ian Kramer that  
17 were provided in discovery, in an effort to establish a hostile and hateful motive on behalf of Mr.

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<sup>5</sup> Id., at 7:30.

<sup>6</sup> Id., at 10:15.

<sup>7</sup> Id., at 10:45.

<sup>8</sup> Video "YouTube RewoundNews 2."

<sup>9</sup> Id., at 12:39.

<sup>10</sup> Id., at 11:00.

<sup>11</sup> Luiz is believed by many to be an Antifa member or leader.

<sup>12</sup> Id., at 16:45.

1 Ian Kramer (and also to prejudice the  
2 jury against Mr. Gibson and others).  
3 Mr. Kramer's Facebook posts will be  
4 highly prejudicial against Mr. Gibson  
5 as any jury would respond negatively  
6 to them. See posting to right.

7 One post by Mr. Kramer reads  
8 "remember to curb your Antifa" and  
9 displays an image of someone being  
10 beaten.<sup>13</sup> In this case, Mr. Kramer is  
11 accused of beating someone affiliated  
12 with Antifa with his baton.

13 Mr. Kramer also appears to  
14 have posted a similar image of a  
15 beating along with the post "Antifa got  
16 so sleepy he took a nap during a riot."<sup>14</sup>



<sup>13</sup> Discovery Bates 63.

<sup>14</sup> Id., at 64.

1 In other posts that State will likely seek to introduce, Mr. Kramer posted about killing the  
2 “enemy” in 2020 and burning a rainbow flag.<sup>15</sup>



3 LAW

4 Mr. Gibson moves this court to sever this matter (1) because the number of defendants and  
5 the complexity of the evidence as to several defendants is such that the trier of fact probably will  
6 be unable to distinguish the evidence and apply the law intelligently as to the charges against Mr.  
7 Gibson; and (2) because evidence not admissible against Mr. Gibson will certainly be considered  
8 against Mr. Gibson.

9 Other times, such as when the confession directly implicates the defendant,  
10 severance is necessary. *Cruz v. New York*, 481 US 186, 107 S Ct 1714, 95 L Ed 2d  
11 162 (1987); *Bruton v. United States*, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476  
12 (1968); *State v. Lavadores*, 230 Or App 163, 214 P3d 86 (2009) (admission of  
13 nontestifying codefendant’s redacted statements violated defendant’s right to  
14 confrontation because the redactions, which used terms like “we all,” “others,” and  
15 “they,” along with the use of proper names and nicknames for the other individuals  
16 except defendant, alerted jury to the fact that defendant’s name had been deleted);  
17 *State v. Enis*, 212 Or App 240, 158 P3d 510 (2007) (admission of nontestifying  
18 codefendant’s redacted testimony to police violated defendant’s right of

<sup>15</sup> Id., at 61.

1 confrontation in joint trial for felony murder because codefendant's statement not  
2 only made jury aware of the existence of other participants but, on its face, allowed  
3 jury to infer exactly who the participants were).

4 1 *Criminal Law* 8.7-2 (OSB Legal Pubs 2013).

5 Among the factors which should be considered are: (1) the speed of the administration of  
6 criminal justice, including the conservation of judicial time; (2) whether the number of defendants  
7 or the complexity of the evidence as to several defendants is such that the trier of fact probably  
8 will be unable to distinguish the evidence and apply the law intelligently as to the charges against  
9 each defendant; (3) whether evidence not admissible against all defendants probably will be  
10 considered against a defendant notwithstanding cautionary instructions; and (4) whether there are  
11 antagonistic defenses.<sup>16</sup>

12 Here the State seeks to try six defendants at the same time. They seek to use The Bridge  
13 Group evidence against Mr. Gibson and Mr. Schultz to paint them in the same light as Ian Kramer.

14 While the State may think this is efficient, it is anything but. A six co-defendant trial means  
15 six opening statements from the defense in a single case and six possible objections to every  
16 question from six different perspectives. Such complexity could make for great difficulty for the  
17 court, but more importantly the jury. Limiting instructions on the admissibility of statements  
18 against The Bridge Group defendants, where there are countless videos makes the problem worse.

19 The Bridge Group video and discussions in the lead up to the Cider Riot protest (if  
20 admitted) would paint Mr. Gibson and Mr. Schultz in an entirely different and false light and

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<sup>16</sup> Mutually antagonistic defenses may support a motion for severance. The prejudice that occurs from the joinder of two antagonistic defenses is the potential of guilt being ascertained solely by reason of the conflict between the two defenses. Although Mr. Gibson does not raise this issue at this time, Mr. Kramer certainly may wish to, as Mr. Kramer is claiming self-defense, but in video provided in discovery Mr. Gibson verbally reprimanded Mr. Kramer for his actions and said that what Mr. Kramer did was not right.



1 ensure they will not have a fair trial. Instead they will be judge for in the context of The Bridge  
2 Group statements and plans of which Mr. Gibson and Mr. Schultz were not a part.

3 The statements by Ian Kramer on Facebook and his actions as seen in video are so shocking  
4 to the average person that it would be impossible for a jury not to hold the actions of Mr. Kramer  
5 against anyone forced to set next to him as a defendant at trial. Mr. Kramer's statements about  
6 'curbing' Antifa are so abrasive that there is a near certainty that the jury would view all co-  
7 defendants in a negative light simply for being involved in the same event as Mr. Kramer.

8 Finally, statements by Bridge Group co-defendants are not admissible against Mr. Gibson.  
9 The State has clearly joined Mr. Gibson to the Bridge Group cases in hopes that it can use  
10 statements of co-defendants to evidence some pre-planned military style attack intended to result in  
11 a "huge fight" with a Mr. Gibson being the "second wave." Such statements by the Bridge Group  
12 are clearly not admissible against Mr. Gibson and call for severance.

13 1. Bruton

14 Under *Bruton*, one's "right to cross-examination secured by the Confrontation Clause of  
15 the Sixth Amendment" is violated if the jury is presented with a nontestifying co-defendant's  
16 inculpatory statements that also implicates a second defendant but which is not admissible against  
17 the second defendant.<sup>17</sup> As the *Bruton* Court stated:

18 [T]here are some contexts in which the risk that the jury will not, or cannot, follow  
19 instructions is so great, and the consequences of failure so vital to the defendant,  
20 that the practical and human limitations of the jury system cannot be ignored . . .  
21 Such a context is presented here, where the powerfully incriminating extrajudicial  
22 statements of a co-defendant, who stands accused side-by-side with the defendant,  
23 are deliberately spread before the jury in a joint trial. Not only are the incriminations

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<sup>17</sup> The Supreme Court's decision in *Crawford* does not alter the *Bruton* doctrine. Indeed, *Crawford* cited *Bruton* as an example of a case that was consistent with the Framers' original understanding of the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 57, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

1 devastating to the defendant, but their credibility is inevitably suspect, a fact  
2 recognized when accomplices do take the stand and the jury is instructed to weigh  
3 their testimony carefully given the recognized motivation to shift blame onto  
4 others. The unreliability of such evidence is intolerably compounded when the  
5 alleged accomplice, as here, does not testify and cannot be tested by cross-  
6 examination. It was against such threats to a fair trial that the Confrontation Clause  
7 was directed.  
8

9 *Bruton*, 391 U.S. at 135–36 (footnotes omitted).

10 Thus, if the prosecution insists on introducing such a statement against a non-testifying co-  
11 defendant for its truth, then the other co-defendant is generally entitled to a severance of his trial  
12 from that co-defendant.

13 *Bruton* is a bit easier conceptualize when applied to a hypothetical case, such as the  
14 following (which is the typical scenario in which *Bruton* issues arise).<sup>18</sup> Assume, the State has  
15 charged D1 and D2 with crimes arising out of a single incident, and the two defendants are to be  
16 tried together. D1 has made an out-of-court statement that tends to incriminate both D1 and D2.  
17 The statement is, of course, admissible against D1 on the theory that it is an admission by party-  
18 opponent. But an admission by one party is not admissible against a co-party. Thus, by trying the  
19 cases together, the State is actually seeking another way to introduce D1's statement against D2 by  
20 finding an exception to the hearsay rule other than the exception for admissions by party-opponent.  
21 If that is the case, the *Bruton* rule applies and the cases should be severed.

22 Even though the underlying concern in *Bruton* is the jury's inability to properly consider  
23 the evidence, some courts have concluded that the *Bruton* issue is so serious that it also applies to

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<sup>18</sup> Karl B. Tegland, 5C Wash. Prac., Evidence Law and Practice § 1300.29 (6th ed.)



1 bench trials because judges, like juries in these circumstances, are unlikely to be able to properly  
2 evaluate and disregard evidence not admissible against a particular defendant.<sup>19</sup>

3 Here, the State charged Mr. Kramer. Then, after obtaining Bridge Group video it charged  
4 Mr. Schultz and Mr. Gibson. It is clear that the State intends to smear Mr. Gibson and Mr. Schultz  
5 with the Bridge Group videos and discussions that Mr. Gibson and Mr. Schultz were not a part of.  
6 Severance is called for.

7 CONCLUSION

8 Mr. Gibson respectfully moves the Court for a separate trial on grounds that the Bridge  
9 Group co-defendants are alleged to have made statements implicating Mr. Gibson in the alleged  
10 crime and that the statements of Mr. Kramer as so prejudicial to Mr. Gibson that they should not  
11 be admissible against him.

12 Respectfully submitted this Wednesday, January 8, 2020.

/s/ D. Angus Lee

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<sup>19</sup> See, e.g., *U.S. v. Longee*, 603 F.2d 1342, 1345 (9th Cir. 1979) (“The fact that the defendants were tried to the court rather than to a jury does not eliminate the [*Bruton*] error. The disregard of incriminating evidence as against only one defendant in a joint trial has been termed ‘a mental gymnastic which is beyond, not only (the jury's) powers, but [anybody elses].’”).

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. The above fact section in the above brief is based on my review and understanding of the discovery I have received at this point.

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 Wednesday, January 8, 2020.

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 Wednesday, January 8, 2020, 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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*/s/ D. Angus Lee*