

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

STATE OF OREGON,

Plaintiff,

v.

JOSEPH OWAN GIBSON,

Defendant.

Cases No. 19CR53042 & 19CR53035

**REPLY IN SUPPORT OF MOTION OF
DEFENDANTS JOSEPH GIBSON AND
RUSSELL SCHULTZ
TO DISMISS FOR SELECTIVE
PROSECUTION**

STATE OF OREGON,

Plaintiff,

v.

RUSSELL SCHULTZ,

Defendant.

Summary of Argument

The State does not and cannot dispute the overarching legal principle that a “practical denial” of equal protection of law through selective criminal prosecution is forbidden. Nor does the State dispute that upon a clear showing of “discriminatory effect” and a prosecutorial decision “motivated by a discriminatory purpose,” dismissal is appropriate. Rather than offer any

1 evidentiary response whatsoever, the State files page after page of conclusory assertions that
2 defendants have not met their burden.

3 “Discriminatory effect” fairly leaps from the page. There are no other standalone
4 prosecutions for riot. The Antifa participants in the May 1, 2019, events at Cider Riot who actually
5 engaged in “tumultuous and violent conduct,” unlike movants, were not prosecuted, though known
6 to prosecutors. The Antifa and BLM participants in subsequent riots were also not prosecuted,
7 despite even more obvious and severe “tumultuous and violent conduct,” including attacks on
8 police officers. The capstone in proof of discriminatory effect was the August 11, 2020,
9 formalization of a previously informal policy against prosecution of Antifa rioters, retroactively
10 applied in favor of the Antifa, but declared inapplicable to defendants for reasons the State refuses
11 to explain.

12 The deference typically given to prosecutorial decisions is premised on the existence of
13 probable cause to believe the accused committed the crime charged, but here, *the State does not*
14 *even dispute that the probable cause affidavit it filed with this Court was a lie.* Claiming that a
15 defendant who did nothing more than stand around and observe a fight (the State’s justification for
16 prosecuting defendant Schultz), compels the inference of an alternative motive for prosecution.

17 That the State was “motivated by a discriminatory purpose”, requires resorting to
18 circumstantial evidence, but the circumstantial evidence here is clear. The timing of the
19 prosecutions, the dishonesty in prosecutorial conduct before this Court, misconduct before the grand
20 jury, the uniform and extreme hostility to defendants’ political (and even religious) viewpoints by
21 Portland elected officials, and all of the other blatantly unconstitutional actions taken by Portland
22 officials against those sharing the viewpoints of defendants, all constitute powerful circumstantial
23 evidence of unconstitutional bias.

24 This is not the typical selective prosecution case where the draft dodger or crack dealer is
25 unquestionably guilty, but wishes to avoid punishment because others are not punished; in this case,
26 defendants Gibson and Schultz have done nothing to merit felony punishment for riot. “To punish a

1 person because he has done what the law plainly allows him to do is a due process violation ‘of the
2 most basic sort.’” *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488 (1982).
3 Federal and state free speech guarantees plainly allowed defendant Gibson to stand in front of a *de*
4 *facto* Antifa headquarters and decry its existence, and plainly allowed defendant Schultz to stand
5 beside him. Under the Oregon Supreme Court’s decision in *State v. Chakerian*, these defendants
6 cannot be held liable for the riotous conduct of *others*—including all the Antifa members not
7 prosecuted. The State’s attempt to do so reeks of bad faith and vindictiveness.

8 **Argument**

9 **I. DEFENDANTS CLEARLY DEMONSTRATE DISCRIMINATORY EFFECT.**

10 The State baldly asserts that “[p]ersons with any political ideology that engage in riotous
11 behavior have been and are being prosecuted by the Multnomah County District Attorney’s office”.
12 (State Mem. 6.) The State does not deign to present one iota of evidence to this effect, and the non-
13 prosecution policy is to the contrary, stating that riotous conduct will not be prosecuted unless
14 accompanied by conduct so severe that it transcends interference with a police officer, disorderly
15 conduct, criminal trespass, escape II, and harassment. (*See* Buchal Decl. Ex. 17, at 2, filed 4/21/21.)

16 The State therefore quibbles with what constitute “similarly situated” defendants, arguing, in
17 substance, that political protestors in Portland cannot be compared to “virtually identical” owners of
18 wooden laundries in *Yick Wo v. Hopkins*. (State Mem. 8.) The State cannot and does not explain
19 why Antifa participants in the events of May 1, 2019, who threw things, pepper-sprayed and
20 physically attacked counter-demonstrators are not “similarly situated”. It is not just that there is “no
21 meaningful factual variance;” this is a compelling case because actually violent participants in the
22 *very same event* were not charged at all, while the nonviolent defendants face a felony charge.

23 Nor does the State explain why the subsequent political demonstrations in Portland do not
24 involve “similarly situated” defendants. The cases arose only a year later, and the sole factual
25 distinction of relevance is that these cases involve actual, egregious riotous conduct which goes
26 uncharged. These other examples cannot be distinguished on the basis that they occurred after

1 implementation of the non-prosecution policy. The State initially claimed that the non-prosecution
2 policy was “not retroactive,” and claimed it would not be applied to cases before August 10, 2020
3 (Buchal Decl. Ex. 19, at 4-5 (Kalbaugh testimony)), yet now admits that Mr. Lee’s analysis reaches
4 back to May 31, 2020 (State Mem. 12). As in the federal court, the State “fail[s] to provide any
5 justification for the non-prosecution policy [relating to Antifa rioters] or explain why it was not
6 evidence of Defendants’ bias against Plaintiffs.” (*Gibson v. Schmidt*, 3:20-CV-01580-IM, 2021 U.S.
7 Dist. LEXIS 36497, *31 (D. Or. Feb. 26, 2021).)

8 Attached hereto as Exhibit 1 is a copy of Mr. Lee’s Declaration with each and every case
9 arising before the policy issued highlighted in yellow. It is obvious from reading the descriptions in
10 these cases that there is no equal protection of law; there was merely an unconstitutional and
11 abusive exercise of power under which verbal conduct by anti-Antifa demonstrators is riot, and
12 violent physical mob attacks by Antifa demonstrators do not involve riot. *E.g.*, Lee Decl. ¶¶ 18f
13 (“striking and pushing officers”), 18h (“distributing weapons to the rioters”) & 18j (“hitting police
14 with items”).

15 In an attempt to avoid these obvious facts, the State adopts the remarkable strategy of
16 disputing that the political demonstrations that have plagued Portland before and after the non-
17 prosecution policy cannot be fairly categorized as involving “Antifa” participants, or more generally
18 participants motivated by the political ideologies defendants have actively opposed. Yet the State
19 makes no response to defendants’ request to take judicial notice of this obvious fact, and defendants
20 can, if necessary at an evidentiary hearing, bring expert testimony. The State’s position makes as
21 much sense as denying the federal judiciary any ability to infer anti-black animus because some
22 spectrum of varying racial characteristics is present in every defendant.

23 The State also disputes disparate effect on the basis that defendants have not shown the
24 formal non-prosecution policy was applied to “any protestors charged with riot outside of the
25 George Floyd protest”. (State Mem. 6 (quoting *Gibson*, 2021 U.S. Dist. LEXIS 36497, at *8).)
26 Defendants’ case does not depend upon application of the policy to other particular cases;

1 defendants' case depends upon disparate treatment, which is clearly proven by the fact that no other
2 defendants with standalone charges of riot exist; that none of the Antifa defendants in the same
3 event were charged; and that a formalized pro-Antifa policy thereafter protected those engaging in
4 actual, serious, riotous conduct in events which, unlike the Cider Riot affair, required mass police
5 response.

6 The very creation of a policy for non-prosecution applicable only to rioters involved in
7 protests to advance one political viewpoint *is itself proof of discriminatory effect (and motive)*. The
8 Court can and should take judicial notice that it is a gross oversimplification to attribute hundreds of
9 nights of protests, including general calls for defunding police, abolishing ICE, etc., to relate
10 exclusively to "George Floyd." At an evidentiary hearing, after discovery, if a hearing is even
11 required, defendants can present expert testimony concerning the same "black bloc" at Cider Riot
12 that continues to operate with virtual impunity within the City today, and discovery can produce the
13 underlying detailed, case-by-case evidence concerning the similarly situated defendants to prove
14 beyond doubt their political alignment—as if participation in the riots at issue were not enough.
15 The evidence is all in the hands of the State.

16 **II. DEFENDANTS CLEARLY DEMONSTRATE DISCRIMINATORY MOTIVE.**

17 The State's invocation of *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), is
18 peculiar,¹ as the opinion contains language that might have been written for this case:

19 Nothing can corrode respect for a rule of law more than the knowledge
20 that the government looks beyond the law itself to arbitrary considerations, such
21 as race, religion, or control over the defendant's exercise of his constitutional
22 rights, as the basis for determining its applicability. *See Oyler v. Boles*, 368 U.S.
23 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962). Selective prosecution then can
24 become a weapon used to discipline political foe and the dissident, *see, e.g.,*
United States v. Falk, 479 F.2d 616 (7th Cir. 1973); *United States v. Steele*, 461
F.2d 1148 (9th Cir. 1972). The prosecutor's objective is then diverted from the
public interest to the punishment of those harboring beliefs with which the
administration in power may disagree. This case involves such allegations.

25 ¹ The State's quotation from *Joseph v. City of San Jose*, 19-CV-01294-LHK, 2020 WL 1031899,
26 *16 (N.D. Cal. Mar. 3, 2020) is clearly inapposite, as it deals with the showing required to avoid
federal abstention from interference with state court proceedings, not the showing required in state
court.

1 *Berrios*, 501 F.2d at 1209. Unlike defendants here, Mr. Berrios was unable to identify “a single
2 unprosecuted violation of § 504 on the part of others,” *id.* at 1212—here they are legion (*see*
3 *generally* Lee Decl.). Even without such evidence, the Second Circuit did not dispute the trial
4 judge’s decision to require the prosecution to produce evidence concerning its decision to prosecute,
5 accepting the affidavit of counsel outlining circumstantial evidence of unconstitutional motive as
6 sufficient to trigger such an inquiry. *Id.*

7 What is most remarkable about the State’s response is that no one dares step forward,
8 consistent with his or her obligation to avoid perjury, to offer any testimony or other *evidence*
9 refuting defendants’ claim of selective prosecution. (*Cf.* Buchal Decl. Ex. 19 (testimony in federal
10 case also offers no denial).) Instead, the State’s attack on motive focuses on the aspects of the
11 Buchal Declaration presenting general background information on the politics of Portland and the
12 general conduct by Portland leaders protective of Antifa (without controverting any of it), while
13 ignoring entirely the direct and repeated attacks upon defendant Gibson by the Mayor and others
14 within the City of Portland. The State also attacks the credibility of the Schultz Declaration, but
15 offers no evidence in response.

16 The State complains that the “flimsiness” of its charges is a “distraction” with “no bearing
17 on the present motion” (State Mem. 3), but the opposite is the case. As *Wayte v. United States*, 470
18 U.S. 598 (1985), explains, it is only “so long as the prosecutor has probable cause to believe that the
19 accused committed an offense defined by statute, that the decision whether or not to prosecute, and
20 what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Id.* at 607
21 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Here the State does not dispute that the
22 only fact remotely akin to “violent and tumultuous conduct” in the probable cause declaration
23 attributed to defendant Gibson—that he pushed the victim Heather Clark—was a lie, and that no
24 specific violent conduct was attributed to defendant Schultz at all. The State does not controvert
25 defendants’ demonstration that a review of the video evidence and police reports available to the
26 prosecution when charging defendants utterly refutes probable cause.

1 Defendants thus point to the federal court’s declaration that, without full discovery or an
2 evidentiary hearing, defendants had not yet proved the charges were filed “without reasonable
3 expectation of obtaining a valid conviction”. (State Mem. 7 (quoting *Gibson*, 2021 U.S. Dist.
4 LEXIS 36497, at *18).) But defendants are not required to make such a showing to make out a
5 claim for selective prosecution, and the federal court also declared, in contradictory fashion, that
6 defendants had “compelling arguments that their conduct does not rise to the level of ‘tumultuous
7 and violent’ conduct under O.R.S. 166.015.” *Id.* at *26. Ultimately, the federal decision addresses
8 only the question of federal abstention, with the decision to abstain reflecting its confidence that this
9 Court will make the correct decision under selective prosecution standards.

10 Beyond the lack of probable cause is a wealth of other circumstantial evidence of
11 unconstitutional motive, and indeed vindictiveness, which is alone sufficient to sustain a claim for
12 selective prosecution—after all, most selective prosecution cases involve defendants who do not
13 dispute that they broke the law, making probable cause irrelevant. This other evidence includes
14 substantial delay in charging defendants (at an incident then regarded as so insignificant that no
15 uniformed police appeared), the timing of charges to chill participation in a large right-wing rally,
16 and involvement of the highest political levels of Portland-based law enforcement in chilling
17 participation in such rallies. The State denies none of these circumstances.

18 Nor does it deny misuse of the grand jury procedure, with compound and improper
19 conclusory questions, an unwillingness to permit testimony by defendants, or the general political
20 climate within the District Attorney’s office. There is then the formalization of a policy to protect
21 rioters (other than defendants) from riot charges, and treatment so strikingly disparate as to virtually
22 shout the unconstitutional motive.

23 Proof of the discriminatory motive is circumstantial, but proof of motive is nearly always
24 circumstantial. It is because of this, and because the State is in ready possession of the facts
25 concerning its decision to initiate (and continue) this prosecution, that the burden shifts to the State
26 to defeat this motion, as in *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973)—yet another case

1 ignored by the State. Defendants believe they have demonstrated sufficient evidence for this Court
2 to find selective prosecution, and certainly enough for a prima facie case that shifts the burden to
3 the State to justify its decision. That the State does not lift a finger to do so is again alone sufficient
4 basis to grant dismissal.

5 **III. IF NOT ENOUGH FOR OUTRIGHT DISMISSAL ALREADY, DEFENDANTS**
6 **HAVE CLEARLY MADE THE CASE FOR THE DISCOVERY SOUGHT.**

7 In our opening brief, we demonstrated that defendants need only demonstrate a “colorable
8 basis,” even less than a prima facie case, in order to obtain discovery. That means no more than
9 “some evidence tending to show the essential elements of the claim”. *United States v. Heidecke*,
10 900 F.2d 1155, 1159 (7th Cir. 1990). While defendants believe that the right result is to dismiss the
11 case without further proceedings, insofar as the State has deigned to present no evidence
12 whatsoever, at the least defendants are entitled to the discovery sought.

13 **Conclusion**

14 The State has failed to identify any other protestors prosecuted at all on a standalone riot
15 charge, much less any other protestors prosecuted for verbal conduct of the sort engaged in by
16 defendants. It is obvious from defendant Kalbaugh’s own charging decisions, documented in detail
17 in the Lee Declaration, that he and the District Attorney are imposing an interpretation of ORS
18 166.015 for politically-favored defendants that ignores actual violence, at least so long as it is only
19 against police officers and property, while imposing a speech and content-based prohibition on
20 defendants which operates to criminalize verbal protest activity. This is a blatant violation of
21 defendants’ constitutional rights. Upholding the charging decisions here would replace the rule of
22 law in Oregon with the rubber stamping of the exercise of political power.

1 Dated this 2nd day of June, 2021.

2
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5 IN THE CIRCUIT COURT FOR THE STATE OF OREGON
6 FOR THE COUNTY OF MULTNOMAH
7

8 STATE OF OREGON,

9 Plaintiff,

10 v.

11 JOSEPH OWAN GIBSON,

12 Defendant.

Consolidated Case No. 19CR53042

**DECLARATION OF D. ANGUS LEE IN
SUPPORT OF DEFENDANTS' MOTION
TO DISMISS FOR SELECTIVE
PROSECUTION**

13
14 STATE OF OREGON,

15 Plaintiff,

16 v.

17 RUSSELL SCHULTZ,

18 Defendant.

Consolidated Case No. 19CR53035

1 I, D. ANGUS LEE, declare under the penalty of perjury that the following is true and
2 correct to the best of my knowledge. I am over the age of eighteen, and I am competent to testify
3 to the matters herein. I have personal knowledge of the matters stated herein, or as indicated, have
4 information concerning those matters.

5 **Facts Summarized from Discovery in the Federal Action.**

6 1. In the discovery provided by defendants there was an electronic file folder entitled
7 “GIBSON_MCDA_012531-029976.”

8 2. Inside that folder were 196 subfolders and a single document entitled
9 “GIBSON_MCDA_012531-029976.” The document was a seven-page spread sheet entitled “Riot
10 cases.”

11 3. The spread sheet purports to cover cases where a request for a riot charge was
12 received by the MCDA between the dates of 5/31/2020 to 9/28/2020. The sheet is organized by
13 “DA CASE NBR.”

14 4. The 196 subfolders were titled by a case number and the name of any suspects
15 associated with the case. The spread sheet case numbers correspond with the folder names.

16 5. For some subfolders there were multiple suspects for a single incident (case
17 number), so the folder would be titled with multiple names and then a case number followed by a
18 “-1” and then a “-2” or “-3”, and so on for each additional suspect.

19 6. Inside the subfolders was an MCDA “CRIMES Fact Sheet” for the defendant(s) and
20 associated police reports.

21 7. The “CRIMES Fact Sheet” for the MCDA provides a variety of information on
22 each case against each suspect, including the date the case was received, the status of the case,
23 internal case notes about the case disposition, a basis for that disposition, charges filed or not filed,
24 and in some cases a summary of the facts of the case.

25 8. The CRIMES sheet uses several phrases and codes, such as “RE/DM-DM.” Based
26 on my review of the CRIMES sheets, and my experience in both criminal prosecution and criminal
27 defense, I believe the code “RE/DM-DM” as used in CRIMES to indicate that a count was
28 dismissed.

9. The spread sheet also purports to give the status of each matter where a charge of riot was requested, by indicating that the matter was “ISSUED”, “PENDING REVIEW”, or “REJECTED”.

10. However, when the spreadsheet is cross referenced with the CRIMES sheets in the corresponding subfolders, it becomes clear that MCDA has listed cases as “issued” when the charge of riot was actually dismissed or not charged.

11. For example:

a. The MCDA sheet asserts that riot was issued in 2423049-1, but the corresponding CRIMES sheet says riot was not charged due to “insufficient evidence.”

b. The MCDA sheet asserts that riot was issued in 2423050-1 and 2423050-2, but the corresponding CRIMES sheet says “Unable to Indict Case: Factual Problem”, and these matters were “closed.” While MCDA’s crime sheet says there was a “factual problem,” the sheet also identifies a witness who “Witnessed [242305-1] assaulting security guard.” Another witness “witnessed [242305-2] assaulting victim.” DDA Brian Davidson wrote “Officers on patrol observe defs beating up security guard outside Ruth’s Chris Steak House. They are arrested.” However, on 8/4/20, DDA Davidson input “Case declined” into CRIMES.

c. The MCDA sheet asserts that riot was issued in 2423064-1, but the corresponding CRIMES sheet says riot was not charged. The CRIMES sheet says “Insufficient Evidence.”

d. The MCDA sheet asserts that riot was issued in 2423096-1, but as to riot, the corresponding CRIMES sheet says “Unable to Indict Case: Factual Problem.”

e. The MCDA sheet asserts that riot was issued in 2423118-1, but the corresponding CRIMES sheet indicates that the charges were later dismissed by DDA Kalbaugh, who CRIMES identifies as having entered “our office will not prosecute” into CRIMES for that case.

1 f. The MCDA sheet asserts that riot was issued in 2424477-1, but the
2 corresponding CRIMES sheet indicates that the charges were later dismissed because of a
3 “Factual Problem.”

4 g. The MCDA sheet asserts that riot was issued in 2424485-1, but the
5 corresponding CRIMES sheet indicates they were not able to indict on riot due to “Factual
6 Problem” with case. According to CRIMES:

7 “a riot was declared since the crowd was throwing mortars and fireworks
8 inside the federal courthouse as well as rocks and glass bottles at the police.
9 Victim officer was working in his capacity as a Portland Police officer on
10 scene. Police, including victim officer, arrested a person named [suspect 1] for
11 Disorderly Conduct from a crowd. [2424485-1], who was in the crowd, tried to
12 pull [suspect 1] away from the police. When the victim officer would not let go
13 of [suspect 1], [2424485-1] punched the victim in the right side of the face.”

14 h. The MCDA sheet asserts that riot was issued in 2424511-1, but the
15 corresponding CRIMES sheet indicates that all charges were dismissed by DDA Kalbaugh.
16 The CRIMES sheet also says “Officer Le recognized the protesters in this group as ‘Antifa.’”
17 Kalbaugh wrote “I am declining to issue charges.”

18 i. The MCDA sheet asserts that riot was issued in 2424513-1, but the
19 corresponding CRIMES sheet indicates that riot was “RE/DM-DM.” According to CRIMES
20 Facts:

21 “[2424513-1] is protecting protestors on July 4th, 2020 by holding a shield and
22 preventing officers from engaging and stopping the protestors who are shooting
23 mortars and using lasers against the police. When officers move in to arrest
24 [2424513-1] she fights with them...”

25 j. The MCDA sheet asserts that riot was issued in 2426892-1, but the
26 corresponding CRIMES sheet indicates that the riot charge was actually “RE/DM-DM.”
27 The CRIMES sheet also shows that MCDA concluded there was “Insufficient Evidence” for
28 charges of even disorderly conduct. At the same time, the CRIMES sheet entry describes
the facts as follows:

“Officer Green observed a group of around 8 protestors standing a short
distance from him with about 6 of the people holding shields facing the

1 officers and not following orders to disperse, rather continuing to face and
2 move towards officers. That Officer Green and others approached the group
3 and attempted to intervene when one of the group, a male holding a wooden
4 shield, later identified as [2426892-1], pulled his shield back, then lifted the
5 shield up with both his hands and threw it at Officer Green who was about 2
6 feet away from him. The bottom of the shield hit Officer Green in the face and
7 he stumbled backwards.”

8 k. The MCDA sheet asserts that riot was issued in 2426980-1, but the
9 corresponding CRIMES sheet indicates that all charges were “RE/DM-DM” by DDA
10 Kalbaugh and the case was closed.

11 l. The MCDA sheet asserts that riot was issued in 2427620-1, but the
12 corresponding CRIMES sheet indicates that riot was not charged.

13 m. The MCDA sheet asserts that riot was issued in 2423065-1 and 2423065-2,
14 but the corresponding CRIMES sheets indicate that riot was not charged. CRIMES says
15 “Insufficient Evidence” for riot on 2423065-1 but “PENDREV” for 2423065-2.

16 n. The MCDA sheet asserts that riot was issued in 2423066-1 and 2423066-2,
17 but the corresponding CRIMES sheets indicate that riot was not charged. CRIMES says
18 “Insufficient Evidence” for riot on 2423066-1 and 2423066-2.

19 o. The MCDA sheet asserts that riot was issued in 2423069-1 and 2423069-
20 2, but the corresponding CRIMES sheets indicate that riot was not charged. CRIMES
21 says “Insufficient Evidence” for riot on 2423069-1 and 2423069-2.

22 12. In total, there appear to be 19 suspects who were referred to MCDA for riot charges
23 where the MCDA “Riot Cases” sheet indicates charges issued but riot was actually not issued, not
24 indicted, or later dismissed.

25 13. In total, according to the CRIMES sheets and the MCDA spreadsheet, there were
26 208 individual referrals to MCDA for riot charges.

27 14. Of those, the MCDA sheet lists 69 as having been issued, but a review of the
28 associated CRIMES sheets shows that only 50 are actually facing riot charges.

15. Accordingly, there appear to be 158 individuals (of the 208) referred to MCDA for riot charges who are not facing a charge of riot.

16. Of the 50 individuals actually charged with riot, the associated CRIMES sheets show that each and every one of those individuals was charged with not only riot, but also charged with some additional crime or crimes.

17. Stated another way, of all the crimes sheets provided by MCDA, it appears that there is not a single person charged with a stand-alone riot charge as is the case with Mr. Gibson and Mr. Schultz.

18. A review of CRIMES sheets and associated officers' reports for the cases where riot was not charged is telling.

a. According to CRIMES, MCDA did not file charges in 2426893-1. A CRIMES sheet entry states:

“there clearly was a riot... When you went to arrest [2426893-1], [2426893-1] made a fist and tried to punch you... But the question will be does it rise to an attempted assault, BRD?”

b. According to CRIMES, DDA Kalbaugh declined to file riot charges in 2427009-1, for the given reason of “Insufficient Evidence” even though his CRIMES entry notes that the officer

“arrested [2427009-1] whom he had observed standing in the middle of the road with four other people as part of a “shield wall” during a mass protest that had turned violent.” But according to the officer’s report the officer “observed several individuals holding shields as items were being thrown over their heads towards officers” and “[the officer] know[s] based on [his] training and experience shields to be used offensively towards officers. The individuals holding shields were standing in the roadway facing officers as we moved closer.”

c. According to CRIMES, DDA Kalbaugh declined to file any charges in 2427010-1, for the given reason of “Insufficient Evidence.” Kalbaugh’s own CRIMES entry reads as follows:

“On 9/5/20, law enforcement officers were attempting to arrest individuals in conjunction with criminal activities at a mass protest. OSP trooper Jacob Fough observed an individual, later identified as [2427010-1], “pull on” an

1 officer that was attempting to arrest a third party... I am unable to issue
2 referred charges. Based on the facts as I understand them, the only violent
3 and/or tumultuous activity in which [2427010-1] is alleged to have engaged in
4 or otherwise participate in would be the action described as pulling on an
5 officer who was attempting to arrest a third party.”

6 d. According to CRIMES, DDA Kalbaugh declined to file any charges in
7 2427011-1, including Riot, for “Insufficient Evidence.” Kalbaugh’s CRIMES entry reads as
8 follows:

9 “On 9/5/20, OSP Trooper Koenig arrested Defendant whom he had observed
10 standing in the middle of the road with four other people as part of a “shield wall”
11 during a mass protest that had turned violent.”

12 e. According to CRIMES, DDA Kalbaugh declined to file any charges in
13 2423807-1. According to the associated officer’s report,
14 “the Field Arrest team arrived on scene, they recognized [2423807-1] from earlier
15 in the night for throwing rock(s) at their vehicle”.

16 f. According to CRIMES, DDA Kalbaugh declined to file any charges in
17 2424197-1. A CRIMES entry describes the facts as follows:

18 “The protest was declared an unlawful assembly and multiple sound truck
19 announcements were made instructing protestors to leave the area. The crowd
20 engaged in active aggression against the police, throwing objects and covering
21 officers in paint... [2424197-1] was taken into custody, but kicked her legs out
22 as one officer tried to control her arms. [2424197-1] yelled “fuck you” and
23 flailed her legs, actively resisting arrest, striking and pushing officers.”

24 g. According to CRIMES, Kalbaugh declined to file charges in 2424353-1,
25 because there was “Insufficient Evidence.” According to CRIMES, on 7/1/20, Kalbaugh
26 wrote to the officer as follows:

27 “Based on the reports as I understand them, the defendant was protesting with
28 a number of other protesters at an incident that escalated into a riot. In your
report you describe people engaging in violent acts with multiple other people
clearly satisfying the definition of riot. Nothing in your report mentions
whether this particular defendant was engaging in the violent acts you
describe. Mere proximity to people rioting does not satisfy the legal
requirement of “engaging in tumultuous and violent conduct” beyond a
reasonable doubt. See for example State ex rel Juve Dept of Wash County v.
Saechao, 167 Or 227 (2000). Nor does the fact that you found extra goggles

1 and a jacket in her backpack cure the problem. Certainly, one reason someone
2 may have a different jacket in his or her backpack could be to disguise
3 themselves after committing a crime. But that conclusion does require a
4 stacking of inferences which is not allowed under Oregon law. Had your report
5 detailed an instance in which you or another officer actually saw this defendant
6 (who by your description was cooperative) throw a projectile at an officer or
7 something of that sort, I would be able to go forward with charges. Or even if
8 she had incriminated herself when interviewed by the detective. But these
9 facts, as I understand them, are insufficient to prove this case beyond a
10 reasonable doubt.”

11 h. According to CRIMES, DDA Kalbaugh has not filed charges on 2423192-1.

12 According to the associated officer’s report,

13 “[2423192-1] was stopped as the driver of the suspect vehicle for participating in
14 riot by distributing weapons to the rioters. Since the vehicle had previously
15 eluded police officers, responding officers had attempted to box in her car. As
16 officers went to make contact with her, [2423192-1] responded by ramming
17 police cars until she was able to flee in her car almost hitting officers in the
18 process.”

19 i. According to CRIMES, MCDA did not file any charges in 2427625-1.

20 CRIMES also states that the case was “staffed w/ Kalbaugh.” According to the officer’s
21 report:

22 “violent actors in the crowd threw projectiles at us including fireworks and
23 mortars. We disengaged with the crowd around 2209[.] Around 2218 hours,
24 violent actors lit the awning attached to the precinct on fire. Around 2219
25 hours, the sound truck declared the assembly a riot and gave more arrest and
26 use of force warnings... Around 2230 hours, we had a Molotov cocktail
27 thrown at us. One Officer was caught on fire. Through out the night we had
28 multiple Molotov cocktails thrown at us along with fireworks and other hard
objects... I saw a male dressed in all black with a gas mask and a backpack,
later identified as [2427625-1] running with the group... Officer Wheeler and I
were able to place [2427625-1] into flex cuffs... I inventoried [2427625-1]’s
person and found a lighter, small can of pepper spray, and a firework in his
front right pants pocket. Fireworks had been thrown at us all night long...
Based on my prior experience, I know fireworks have the potential to cause
injury.”

j. According to CRIMES, DDA Kalbaugh did not file any charges in 2424372-1.

The officer’s report notes,

1 "Many of the individuals within the group were armed with various weapons
2 to include shields, metal poles, sticks, pepper spray, fireworks, rocks, water
3 bottles, and laser pointers among other items. As we were attempting to
4 disperse the group many of the group was engaged in physical resistance. The
5 crowd was pushing police, hitting police with items, and using shields push
6 back at police. [2424372-1] was armed with a shield and numerous water
7 bottles. [2424372-1] was actively engaged in physical resistance as he was
8 resisting other officers attempt to place him into custody. In addition,
9 [2424372-1] pushed me to the ground when I moved in to assist the other
10 officers."

11 k. According to CRIMES, DDA Kalbaugh did not file any charges in 2426885-1.

12 The associated officer's report says:

13 "I observed multiple items including rocks, bottles, paint balloons and metal
14 canisters being thrown toward me and my squad. During the course of the
15 event I was hit by a rock in the shin and a paint balloon exploded on my
16 shoulder... [2426885-1] was wearing a protective helmet, lab goggles, and had
17 a gas mask clipped onto his pants. I told [2426885-1] something to the effect
18 of "get out of the street." I heard [2426885-1] yell "I am going to kill your
19 families." [2426885-1] then looked at me and yelled "I am going to kill your
20 kids." [2426885-1] had an aggressive stance and seemed to be actively
21 pursuing me while making death threats against my family."

22 l. According to CRIMES, DDA Kalbaugh did not file any charges in 2425926-1.

23 The CRIMES entry attributed to Kalbaugh on 8/13/20 says:

24 "On 8/13/20, shortly after midnight, numerous law enforcement officers were
25 dealing with a mass protest outside of the Federal Courthouse and the
26 Multnomah County Justice Center in downtown Portland. PPB Officer Dustin
27 Barth observed an individual, later identified as [2425926-1], in a physical
confrontation with several unidentified officers... Officer Barth observed
[2425926-1] hit one of the officers in the head and kick at one or more
additional officers..."

28 m. According to CRIMES, MCDA did not file charges in 2426882-1. According
to the associated officer report, the officer "saw [2426882-1] was carrying a round shield,
which protesters often use as weapons against officers." A CRIMES sheet entry states:

"...to PPB Ofc. Amelia Flohr: First of all, thank you for how you wrote your
report to include some background information. Here, on 9/5/20 you arrested
suspect [2426882-1] for Riot and IPO. There were people in the crowd who
were throwing rocks at OSP, and a Molotov cocktail hit a protester, lighting
them on fire. The PPB sound truck clearly informed people to disperse. This

1 suspect was arrested after 2 hours of announcements to leave the area. She was
2 not observed throwing anything, and she also did not have on her person
3 anything that was connected to the weapons being thrown.”

4 n. According to CRIMES, MCDA did not file charges in 2426914-1. A
5 CRIMES sheet entry states:

6 “This is my decline memo to PPB... I know that extraordinary resources are
7 expended by PPB in responding to these riots, and that PPB is trying to keep
8 everyone, and property, safe. You arrested suspect [2426914-1] 9/6/2020 after
9 several hours of announcements by PPB sound truck. She did not disperse, and
10 was in thick of people who were throwing items toward the police... As far as
11 the rioting charge...She did have two fireworks on her person. But she
12 explained that she just found them and just picked them up because she did not
13 want kids finding them.”

14 o. According to CRIMES, no charges have been filed in 2423482-1 where,
15 “the Portland Police Bureau sound truck give the announcement that an unlawful
16 assembly was being declared and... Officer Sanders and Lieutenant Schoening
17 observed Defendant remain in the area, and throw a large glass bottle hard at the
18 line of police officers.”

19 p. According to CRIMES no charges have been filed in 2423809-1, where the
20 defendant “swing his fists” and “hit [a police officer] in the face.”

21 q. According to CRIMES no charges have been filed in 2424227-1.
22 According to the associated officer’s report the suspect “was actively shoving against
23 officers and refusing to get out of the street.”

24 r. According to CRIMES no charges have been filed in 2426409-1. The
25 associated officer’s report reads as follows:

26 “I encountered [2426409-1] at that time...It was a chaotic scene. The conduct
27 of the crowd (vandalism, shouting vulgar slogans, fighting with police,
28 throwing projectiles, etc.) was enough to constitute tumultuous and violent
conduct, which could recklessly create a grave risk of causing public alarm...
[2426409-1] and another, unknown, female came rushing northbound toward
the crowd's confrontation with police. [2426409-1] and her associate entered
the lanes of traffic and formed a “human chain” to pull one would-be custody
from a single officer's grasp. [2426409-1] was in the back and the other
individual had her hands on the person being arrested.”

s. According to CRIMES no charges have been filed in 2426865-1. The officer's report paints a vivid picture:

"In the first interaction police had with rioters on this night molotov cocktails, numerous mortar style fireworks, balloons filled with paint, buckets filled with paint, ball bearing type objects, rocks, and bottles were thrown at police. A riot was almost immediately declared at 2117 hours due to this incredibly unsafe and rapidly evolving chaotic environment. I personally was hit with numerous paint balloons on this night and my uniform was covered in paint and ruined. I was also hit with extremely hot pieces of mortar fireworks which were thrown right next to me and exploded next to me. This was the most violent and most dangerous night that I have yet experienced during this campaign of riots. This crowd was out of control and incredibly dangerous towards police and any other innocent people in the area... This crowd had thrown buckets of paint, and balloons filled with paint at us, numerous fireworks, and ball bearing type objects...I ran towards the crowd and picked out one male wearing a black backpack, black hat, a mask, and all black clothing. This male was later identified as [2426865-1]...I performed a takedown on him... I unzipped [2426865-1]'s backpack and sure enough discovered a container of paint which had opened and leaked in his backpack... The inside of [2426865-1]'s backpack was covered in white paint."

t. According to CRIMES, MCDA declined to file any charges in 2424362-1.

The officer's report reads:

"There was a large crowd of over a hundred demonstrators which had been blocking the streets on N Lombard St for several hours at this point in time. I was made aware members of the crowd were verbalizing intent for violence, throwing various objects at police officers, arming themselves with sticks and shields, and demonstrating other violent behaviors.... During this assistive action I was able to observe a male, later identified as [2424362-1], who seemed to be actively trying to fight Ofc. PAVON [] and Ofc. HAASE [] to prevent himself from being taken into custody."

u. According to CRIMES, MCDA declined to file any charges in 2424364-1.

A CRIMES entry on 7/30 says:

I have received the supplemental report written by Detective Michaels. I am declining to issue charges because I do not believe the state could prove riot, IPO, or disorderly conduct beyond a reasonable doubt. The riot statute states a "person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm." In this case it sounds like a riot was occurring, but there is no evidence that this

1 defendant was participating in that riot. Mere presence is not enough to be
2 found guilty of riot.

3 v. According to CRIMES, MCDA declined to file any charges in 2424365-1.

4 A CRIMES entry states:

5 I have received and reviewed Officer Giles report and I am declining to issue
6 charges because I do not think the state would overcome a motion for
7 judgment of acquittal on the charges of riot and IPO. The riot statute states "a
8 person commits the crime of riot if while participating with five or more other
9 persons the person engages in tumultuous and violent conduct and thereby
10 intentionally or recklessly creates a grave risk of causing public alarm."
11 Although a riot may have been occurring there is no evidence that this
12 defendant was engaging in the type of behavior required by the elements of the
13 riot statute.

14 w. According to CRIMES, MCDA declined to file any charges in 2424367-1.

15 A CRIMES entry states as follows:

16 "The protest became violent, with protestors throwing rocks, balloons filled
17 with paint and urine, and water bottles at the police officers. In addition,
18 protestors were shining green lasers into the eyes of police officers, which can
19 cause vision damage, and lighting items on fire... Ramic reports that he
20 observed [2424367-1] in the middle of the street at Lombard and Kerby. The
21 Sound truck made multiple warnings that this was an unlawful assembly, but
22 [2424367-1] did not leave and stood his ground as officers advanced. Ramic
23 reports that he arrested [2424367-1] ... and that [2424367-1] had 3 water
24 bottles in his pockets."

25 x. According to CRIMES, MCDA declined to file any charges in 2424994-1.

26 According to CRIMES the DDA wrote to the officer,

27 "In your report you stated that [2424994-1] threw a water bottle at police officers
28 while yelling 'fuck you pigs.' Although this would certainly be viewed at
29 'tumultuous and violent conduct' I believe the state would not be able to prove
30 that this act created a 'grave risk of causing public harm.'"

31 y. According to CRIMES, MCDA declined to file any charges in 2425029-1.

32 A CRIMES entry says the officer

33 "saw unknown Ofc documenting demonstration. [2425029-1] advanced on Ofc
34 and kicked/stomped feet at Ofc's legs multiple times. [officer] Duarte and another
35 Ofc intervened. [2425029-1] then punched pushed at them."

1 z. According to CRIMES, MCDA declined to file any charges in 2425622-1.

2 The associated officer's report says:

3 "I witnessed both [2425622-1] and her friend use [skateboards] as a weapon to
4 push back towards officers. I witnessed two officers move out of way after
5 they tried to jab officers with the skateboards.... I again saw [2425622-1] in
6 the middle of the street. [2425622-1] tried to antagonize officers and tried to
7 provoke other protesters to incite violence. [2425622-1] yelled that we
8 deserved to get shot or killed and wanted more projectiles tossed at us... We
9 pushed them northbound on N Denver from Lombard and again I encountered
10 [2425622-1] in the middle of the street armed with her skateboard. It was clear
11 that [2425622-1] used it as both a shield and weapon. She gestured her
12 skateboard like she was going to use it to attack us."

13 aa. According to CRIMES, MCDA declined to file charges in 2425629-1,

14 including Riot. The associated officer's report says,

15 "[2425629-1] was intentionally attempting to hit and injure officers moving the
16 unlawful crowd. [2425629-1] threw a projectile and ran back with rest of the
17 unlawful crowd... [2425629-1] fought, kicked, punched and attempted to bite ...
18 [2425629-1] "kicked his leg forward, and kicked [an officer] in the chest..."

19 bb. According to CRIMES, MCDA has not filed charges in 2425735-1. The
20 CRIMES fact summary states:

21 "The demonstration had been declared an unlawful assembly. Officer Dyk saw
22 people throwing frozen eggs, among other things, at police officers. RRT
23 Officer Le recognized [2425735-1] and saw him standing behind a wall of
24 shields throwing frozen eggs. Officer Le saw [2425735-1] throw at least 20
25 eggs at officers. Officer Le captured [2425735-1] throwing eggs on his bureau
26 phone. Officer Le told Det Fields one of the eggs hit his patrol car and
27 shattered, which is how he knew it was frozen. RRT Officer Brunelle saw a
28 male, later identified as [2425735-1], throwing at least 4 eggs at officers.
 Officer Brunelle reported the eggs were frozen and one struck him....
 [2425735-1] said he would be back the next night to fight them again."

 cc. According to CRIMES, MCDA did not file charges in 2426019-1. The
CRIMES entry notes there was "Insufficient Evidence" for the charge of riot. The MCDA
entry on 8/17/20 is telling:

 "This is my 8/17/20 memo to PPB Ofc. Bryan Anderson 52713: While you
had PC to arrest [2426019-1] for some of the referred charges from 8/16/20
event of some protestors attacking East Precinct and other police assets, I do
not believe that we would be prevail BRD on any of them... That said, I want

1 to emphasize to you that I absolutely know that what occurred on 8/16/20
2 outside of East Precinct was in fact a riot, that certain members of the crowd in
3 fact committed chargeable crimes such as attempted APSO and felony criminal
4 mischief. But I cannot prove that THIS suspect engaged in anything other than
5 being present in a crowd of people that did not obey a lawful order to disperse.
6 There were clearly other bad actors in the crowd. I recognize that him being
7 outfitted with a plywood shield and goggles puts him in the group that was on
8 the front line aggressively confronting the police, and also provided cover to
9 those in the crowd that were launching projectiles that broke car glass and
10 dented the metal of multiple police cars. (Aid and Abet, while viable, requires
11 that we prove that was the specific intent, and we do not have any evidence
12 here that the shield was being used for anything other than personal
13 protection.) There is no observation of HIM doing anything that could be
14 reasonably described as engaging in tumultuous and violent conduct. (Again, I
15 realize that there were some crowd members, if not many, if not most, who
16 were clearly engaging in that conduct.) So we cannot prove riot.... I realize it
17 is extremely frustrating and daunting to put your safety at risk when engaging
18 with a crowd intent on causing harm to you, who openly and brazenly chant
19 "every city, every town, burn the precinct to the ground," and "Only good cop
20 is a dead cop."

21 dd. According to CRIMES, MCDA did not file charges in 2426025-1. The
22 CRIMES facts summary states:

23 "The Portland Police Bureau declared the demonstration an unlawful riot...
24 Officer Ianos saw a male, later identified as [2426025-1], standing with a
25 shield and push the shield into an officer's face... [2426025-1] initially ran to
26 the East, but then turned around and came back toward officers yelling, "Let's
27 go," "You fucking pussy," "I'm going to jail you mother fuckers," "I'll fucking
28 kill you all." [2426025-1] then took his shirt off of his neck and charged at
officers who were in the process of arresting a female. A bystander grabbed
[2426025-1]'s shirt to hold him back. [2426025-1] took the shirt off and
continued toward the officers with his fists balled up."

ee. According to CRIMES, MCDA did not file charges in 2426060-1, including
Riot. The CRIMES entry says:

"The demonstration had been declared a riot and demonstrators were ordered
to leave the area. Officer Middleton received orders to begin moving a group
of 20-30 people away from the building. As he walked toward the group, he
heard a person, later identified as [2426060-1], yell out, "Fuck you, asshole."
Officer Middleton turned toward [2426060-1], who was approximately four
feet away, and saw him finishing a throwing motion. He then felt something
hard hit him in the face mask that he suspected was a rock about the size of his
fist."

1 ff. According to CRIMES, MCDA did not file charges in 2426124-1. The
2 CRIMES entry says,

3 “Portland Police Detective Baer was also on duty as a member of RRT and
4 saw the officers engaging [2426124-1]. It looked to her like they were trying to
5 push him east and get his shield away from him. Detective Baer looked away,
6 then looked back and saw [2426124-1] swinging his shield at officers hitting
them in the helmet and chest.”

7 gg. According to CRIMES, MCDA did not file charges in 2426261-1, including
8 Riot. The CRIMES entry says

9 “Officer Bieker saw [2426261-1] spinning around wildly swinging his elbows
10 around with clinched fists... [2426261-1] closed the distance and began pushing
and throwing fists at Officer Bieker. A few made contact with Officer Bieker.”

11 hh. According to CRIMES, MCDA did not file charges in 2426284-1. The
12 CRIMES fact summary states:

13 “Officer Ianos' use of force report reflects that as Officer Ianos observed
14 [2426284-1] punch Officer Hancock in the face, he ran towards [2426284-1]
yelling at [2426284-1] to get off. That Officer Ianos then observed [2426284-1]
15 continue to hold Officer Hancock's vest with one hand and cock his other arm
back in a fist.”

16 ii. According to CRIMES, MCDA did not file charges in 2426288-1. The
17 CRIMES entry states:

18 “[2426288-1] grabbed onto Officer Scott’s vest and tried to pull Officer Scott off
19 of the person that he was trying to arrest. Officer Hancock then grabbed the back
20 of [2426288-1] and pulled her off of Officer Scott. After pulling [2426288-1] off
of Officer Scott, Officer Hancock released [2426288-1] and [2426288-1] then
21 punched Officer Hancock in the face.”

22 jj. According to CRIMES, MCDA did not file charges in 2426349-1.
23 According to the associated report:

24 “[2426349-1] was facing officers across the street and yelling for
25 approximately thirty minutes while officers secured the area and transferred
custodies. [2426349-1] was yelling inflammatory statements which appeared to
26 be intended to incite the crowd, including (para-phrased): “Why don't you put
down your badge and meet me down the street and we can handle this,
27 bitches.” “How do you spell Nazi? P-P-B.”... I observed [2426349-1] yelling

1 and attempting to incite the crowd (members of which continued to throw
2 projectiles, shine lasers and barricade the street) rather than disperse as
3 instructed. [2426349-1]'s behavior was tumultuous and threatening and his
position on the roadway was also obstructing vehicular traffic."

4 kk. According to CRIMES, MCDA did not file charges in 2426354-1,
5 including Riot. According to the associated officer's report:

6 "[2426354-1] had a object in his hand and attempted to strike me with it. The
7 crowd was very hostile, members of the crowd had shields and had made various
8 threats to officers and were a resisting officers who were trying to take people into
custody."

9 ll. According to CRIMES, MCDA did not file charges in 2426551-1. The
10 associated officer's report says,

11 "I contacted one rioter, later identified as [2426551-1], in the parking lot and
12 grabbed him by the backpack... Two large rocks were located in [2426551-1]'s
13 back left pocket that were large enough to cause injury... Rocks have been used
regularly during the last 92 days as projectiles thrown at officers and have caused
significant injury."

14 mm. According to CRIMES, MCDA did not file charges in 2426687-1,
15 including Riot. According to the CRIMES sheet, MCDA determined that there was
16 "insufficient evidence of a riot." But according to the officer's report,

17 "At the mayor's residence; on scene the protesters had started a fire in the
18 middle of the road, were breaking widows to businesses and were throwing
19 objects at officers... The protests were declared unlawful, and ultimately
20 declared a riot with multiple announcements given to vacate the streets and
21 disperse... I observed a male later identified as [2426687-1] who was
22 screaming at officers, and went up to one of the RRT officers, slightly bumped/
23 stopped with his chest close to the chest of the officer, and began yelling at the
officer. As the line of officers including myself began moving forward after
the crowd was instructed to move W/B onto NW Flanders, [2426687-1] began
focusing his attention on me and began yelling: "you stand there like a
monkey," along with other profanities."

24 nn. According to CRIMES, MCDA did not file charges in 2426869-1. A CRIMES
25 sheet entry reads as follows:

26 "Here, while some unidentified rioters were throwing dangerous objects
27 toward police, including molotov cocktails, rocks, and fireworks. I cannot
connect [2426869-1] to any of that violent behavior... He did have spray paint.

1 He also was using a flashlight on strobe, probably to distract the police from
2 legitimate law enforcement actions, or to provide cover for incoming
projectiles. But I cannot prove either of those BRD.”

3 oo. According to CRIMES, MCDA did not file charges in 2426870-1.

4 According to the CRIMES sheet,

5 “OSP officers reported that members of the large group of protesters (400-500
6 people, by your estimate) began throwing projectiles at the officers, including
7 rocks. You responded to the area to assist OSP, and you observed a Molotov
8 cocktail land and burst into flames near the line of OSP officers. At 2115 hours
9 a riot was declared and the crowd was instructed to disperse. As you moved to
10 disperse the crowd, you were hit by projectiles, including fireworks, paint, and
11 rocks. While attempting to disperse a crowd at SE 108th and Stark, you
observed [2426870-1] walking backwards in the street, wearing a helmet and
face mask, and appeared to be using his body to blocking view of the large
crowd of people behind him, some of whom were throwing objects at police...
Sims reports that [2426870-1] had a laser pointer in his possession”.

12 pp. According to CRIMES, MCDA did not file any charges in 2427616-1. A
13 CRIMES entry states “the reports I receive did not [contain] sufficient information to
14 prove the referred charge.” However, the officer’s report reads as follows:

15 “[suspect 1] and [2427616-1] had been arrested together and were believed to
16 be involved in a Molotov cocktail that had been thrown at PPB Officers.
17 Detective Wollstein told me ATF and FBI agents informed him that they
18 witnessed [suspect 1] lighting PPB Central Precinct on fire on the North side
19 of the building where there was plywood covering a window. The agents also
20 told Detective Wollstein they saw him light the awning on fire on the East side
21 of the precinct. The agents maintained visual of [suspect 1] as he walked into
the park on the west side of central precinct. [suspect 1] then lit a Molotov
cocktail and threw the bottle towards a line of officers but the device failed to
ignite. The agents continued watching [suspect 1] and [2427616-1] as they
were leaving the area and were arrested by Officer Townley.”

22 qq. According to CRIMES, MCDA did not file any charges in 2427735-1. A
23 CRIMES entry describes the facts as follows:

24 “Officer Livingston was on the west curb line and saw a female, later
25 identified as [2427735-1], standing in front of her on the sidewalk. [2427735-
26 1] was standing in a crowd that had been throwing projectiles at the officers
27 including fireworks, bottles, and rocks. [2427735-1] told Officer Livingston
she would not let the officers “take one of us,” saying she would take them
back. Officer Livingston saw officers taking a person into custody and saw

1 [2427735-1] step out into the road toward them. Officer Livingston told
2 [2427735-1] to get back on the sidewalk. She did not. Officer Livingston told
3 her to get back on the sidewalk two more times. [2427735-1] refused. Officer
4 Livingston used her baton and attempted to push [2427735-1] back onto the
5 sidewalk. [2427735-1] pushed the baton back at Officer Livingston, then
6 pushed Officer Livingston back by her vest. Portland Police Officers Terrett
7 and Green stepped in and tried to take [2427735-1] into custody. ... Officer
8 Livingston searched [2427735-1] and found that she was wearing a protective
9 vest under her sweatshirt and had three large rocks in her back left pocket.
10 Portland Police Detective Burkeen received [2427735-1]'s property and found
11 that she had body armor, a gas mask, rocks, and a mortar firework. Detective
12 Burkeen spoke to [2427735-1] who said she... did not remember whether she
13 punched an officer but said she did put up a fight.”

14 19. In the discovery in the federal case, the District Attorney released a trial exhibit they



(031163) Joey rooted in christ.jpg
IPFG image - 41 KR

intended to use against Gibson as “Joey rooted in Christ.jpg.”:

20. The photo was provided as “(031163) Joey rooted in christ.jpg” in a folder entitled “GIBSON_MCDA_029977-032683.” In that folder were other jpegs and videos clearly prepared for presentation at trial against Gibson and Schultz. In that same folder was a photo of Russell Schultz titled “(032246) Schultz rooted in Christ.jpg.” These photos of Gibson and Schultz, both called attention to their Christian faith and appear to have no legitimate prosecution purpose.

Grand Jury Proceedings Herein

21. I have reviewed a transcript of the grand jury hearing for the underlying state criminal matter.

22. According to the transcript of the grand jury testimony, I see no testimony providing a description of any activity by Russell Schultz, with the exception of a single question to Detective Traynor by Kalbaugh, where Kalbaugh asked the detective if when he went through the video of the event he recognized Joseph Gibson, Matthew Cooper, Russell Schultz, Ian Kramer, Mackenzie Lewis, and Chris Ponte and that when reviewing the video, did he have any doubt that those people were engaging in acts that Detective Traynor would describe as violent and tumultuous. To that question, the detective answered that he had no doubt.

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. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 21st day of April, 2021

/s/ *D. Angus Lee*

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CERTIFICATE OF SERVICE

I, Carole A. Caldwell, 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, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal LLP and my business address is P.O. Box 86620, Portland, Oregon 97286..

On June 2, 2021, I caused the following document to be served:
REPLY IN SUPPORT OF MOTION OF DEFENDANTS JOSEPH GIBSON AND RUSSELL SCHULTZ TO DISMISS FOR SELECTIVE PROSECUTION
in the following manner on the parties listed below:

Brad Kalbaugh	()	(BY FIRST CLASS US MAIL)
Multnomah County District Attorney's Office	(X)	(BY E-MAIL)
600 Multnomah County Courthouse	()	(BY FAX)
1021 SW 4th Ave	()	(BY HAND)
Portland OR 97204	(X)	(E-Service, UTCR 21.100)
E-mail: brad.kalbaugh@mcdca.us		

/s/ Carole Caldwell