

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

STATE OF OREGON,

PLAINTIFF,

vs.

JOSEPH GIBSON,

DEFENDANT.

No. 19CR53042

**DEFENDANT JOSEPH GIBSON'S
MOTION TO DISMISS UNDER
ROBERTSON CATEGORY THREE**

(Oral argument requested per UTCR 4.050)

MOTION

Comes now Joseph Gibson, by and through D. Angus Lee, and James Buchal, and moves this court to dismiss under category three of *State v. Robertson*, 293 Or. 402 (1982), as clarified and explained in *State v. Babson*, 326 P.3d 559, 573-77 (2014). The Robertson case divided criminal statutes into (1) those directly aimed at the subject of communication; (2) those aimed at “forbidden effects” with proscribed means including expressive conduct; and (3) those focused only on forbidden effects” (*id.* at 566; ORS 166.015), focusing on “tumultuous and violent conduct [which] . . . thereby intentionally or recklessly creates a grave risk of causing public alarm,” falls into category (3).

A person charged with violating a category (3) statute “can bring a constitutional challenge under Article I, section 8, by arguing that the statute “could not constitutionally be

1 applied to his [or her] particular words or other expression.”” *Babson*, 326 P.3d at 573. “When a
2 law is challenged ‘as applied’ under the third *Robertson* category, the question is whether the law
3 was applied so that it did, in fact, reach privileged communication.” *Eugene v. Miller*, 318 Or.
4 480, 490 (Or. 1994); *cited affirmatively by Babson*, at 574. As there is no evidence of violent or
5 tumultuous conduct by Mr. Gibson personally, it is clear that he is being prosecuted for protected
6 expression and the matter must be dismissed.

7 **FACTS**

8 “Defendants are each charged with one count of ‘Riot,’ which arises out of an incident
9 that occurred on May 1, 2019 (“May 1 Incident”), when people spouting **opposing political**
10 **views** engaged vigorously with one another outside of a Portland bar.” Order Denying Motion to
11 Dismiss for Joseph Gibson & Russell Schultz Selective Prosecution, p. 2, July 3, 2021 (emphasis
12 added).

13 The evidentiary record in this case reveals the May 1 Incident to be a free-
14 wheeling, chaotic scene with individual, independent actors engaged in widely
15 varying individual, independent actions.... The May 1 Incident is marked by
16 people with **opposing views engaging loudly with one another** and at times
17 engaged in physical violence and/or physical touching; **the range of individual**
18 **actions is wide.**

19 *Id.* at 5-6 (emphasis added). “The actors at the May 1 Incident acted so particularly individually
20 that they could only be evaluated on their individual behavior.” *Id.* at 6.

21 The video evidence reveals some participants in the incident engaged in violent physical
22 behavior, but “**None of the evidence presented on this motion reveals Defendants engaging**
23

in such behavior.” *Id.* at n. 4 (emphasis added).¹

There is no evidence in the record, or in discovery yet to be submitted to the court, of any violent or tumultuous act by Mr. Gibson. (Declaration of D. Angus Lee in Support of Motion to Compel Discovery, filed herewith.) The State has conceded previously that Mr. Gibson never assaulted anyone and there is no allegation that Mr. Gibson damaged any property. The State has yet to identify for this court any violent or tumultuous act by Mr. Gibson. At the October 23, 2020 hearing Deputy District Attorney Kalbaugh made clear this case is about speech, not actions, telling the court:

“...there's been a lot of discussion from Mr. Buchal about riotous conduct. That's not a term of art. Under Oregon, when you look at the riot statute and you look at the case law that explains what it means to have tumultuous and violent conduct, we have *State v. Hicks* [120 Or. App. 345 (1993)]. And *State v. Hicks* goes **into the idea that the language is designed to imply terrorist mob behavior involving ominous threats of personal injury and property damage.**”

(Buchal Decl. Ex. 4, at 37 (emphasis added).)

ARGUMENT

Here, the State has charged Mr. Gibson with Riot. ORS 166.015. The Oregon Supreme Court wrote plainly in *State v. Chakerian* that “[u]nder the statute, the state must prove that the person charged actually ‘engage[d] in violent and tumultuous conduct.’” 325 Ore. 370, 375 n 8 (1997). But there is no evidence Mr. Gibson ‘engage[d] in violent and tumultuous conduct.’

¹ The federal court concluded that defendants Gibson and Schultz made “*compelling arguments that their conduct does not rise to the level of ‘tumultuous and violent’ conduct under O.R.S. 166.015.*” *Gibson v. Schmidt*, No. 3:20-cv-01580-IM, 2021 U.S. Dist. LEXIS 36497, at *26 (D. Or. Feb. 26, 2021) (emphasis added).

1 This leaves only the possibility that he is being prosecuted for his expression, not his
2 physical conduct. This is precisely why the State has produced no evidence, and cannot identify
3 any exhibit, which shows violent or tumultuous conduct by Mr. Gibson.

4 This is why Deputy District Attorney has specifically argued that this case is about verbal
5 “threats” rather than any violent physical conduct. Thus Mr. Gibson’s expression is what is
6 being prosecuted here, not his conduct. The State’s continuing delay in producing its long-
7 promised Exhibit List may be motivated, in part, by a desire to avoid making it even clearer that
8 no evidence of violent physical conduct by Mr. Gibson exists.

9 Article I, § 8 of the Oregon Constitution is a “very broad prohibition” on restraints on
10 expression, and its “sweeping terms” extend to the kind of protest defendants engaged in here
11 and even to “the kinds of expression that a majority of citizens in many communities would
12 dislike.” *State v. Ciancanelli*, 339 Ore 282, 293 (2005). Nothing that Mr. Gibson said during the
13 May 1 incident constitutes a constitutionally “proscribable threat,” that is, “a communication that
14 instills in the addressee a fear of imminent and serious personal violence *from the speaker*, is
15 unequivocal, and is objectively likely to be followed by unlawful acts. *State v. Rangel*, 328 Or.
16 294, 303, 977 P.2d 379, 384 (1999) (emphasis added). In short, the State may not
17 constitutionally apply ORS 166.015 to what Mr. Gibson said and did at the May 1 incident.

18 CONCLUSION

19 Mr. Gibson is not being prosecuted for his conduct, but for his speech. “As applied” to
20 Mr. Gibson, for his expression, the prosecution is unconstitutional and should be dismissed under
21 *Robertson and Babson*.
22

1 DATED this Tuesday, September 7, 2021.

2 s/ D. Angus Lee

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2
3 **CERTIFICATE OF SERVICE**
4

5 I, Carole Caldwell, hereby declare under penalty of perjury under the laws of the State of
6 Oregon that the following facts are true and correct:
7

8 I am a citizen of the United States, over the age of 18 years.
9

10 On Tuesday, September 7, 2021, I caused this document to be served in the following
11 manner on the parties listed below:
12

13 **DEFENDANT JOSEPH GIBSON'S MOTION TO DISMISS UNDER ROBERTSON**
14 **CATEGORY THREE**
15

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