

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 RECONSIDER RULING  
DENYING MOTION ON SELECTIVE  
PROSECUTION, OR IN THE  
ALTERNATIVE, FOR DISMISSAL  
PURSUANT TO ORS 135.755**

**(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 reconsider the court's ruling on the motion to dismiss for selective prosecution, or in the alternative, for dismissal pursuant to ORS 135.755.

**ARGUMENT**

This court's denial of the selective prosecution motion was based on the court's mistaken belief that the non-prosecution policy was only "forward-looking" and not applied retroactively.

Regarding the August 11, 2020, Policy promulgated by the Multnomah County District Attorney, the State has taken the position that this Policy was only ever

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TO ORS 135.755

NO. 19CR53042

Tuesday, September 7, 2021

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1 **intended to be forward-looking....** The Court cannot infer from this record a  
2 discriminatory intent **by the State not making the Policy retroactive.**  
3

4 Order Denying Motion to Dismiss for Joseph Gibson & Russell Schultz Selective Prosecution,  
5 n 3, July 3, 2021 (emphasis added).

6 But the simple and undeniable reality is that once the non-prosecution policy was put into  
7 place it was immediately applied *retroactively* (backward looking) to all previously charged riot  
8 cases, with the exception of this single matter. This fact could have easily been missed by the  
9 court, considering the voluminous record before the court in this matter. But this fact was  
10 documented in an email exchange with Deputy Prosecutor Kalbaugh. *See* Declaration of James  
11 L. Buchal in Support of Defendants' Motion to Dismiss for Selective Prosecution, Ex. 18,  
12 p. 381-388. A copy the relevant email exchange is attached as Exhibit A to this motion to  
13 reconsider.

14 In an email to Kalbaugh on August 14, 2021, defense counsel inquired specifically if the  
15 policy would be applied retroactively to those who were already facing charges in cases arising  
16 out of protest events.

17 I don't see anything in the policy regarding retroactivity, **or not**. So I am a bit  
18 confused. However, it does say that the policy will apply to "all referred cases  
19 arising from the current protests." **So, just so I understand, it does apply to**  
20 **cases from the protests that began around the end of May of 2020 through**  
21 **current**, but does not apply back further to Mr. Gibson's case?

22 Ex. A (emphasis added). Kalbaugh confirmed that the policy was being applied retroactively to  
23 the other active cases that had been charged, responding unequivocally, "That's my  
24 understanding." *Id.*

1 In fact, as the record makes clear, *and as the State will not deny*, when the policy was  
2 enacted, it was applied retroactively to ALL active riot cases arising out of a protest... except the  
3 cases at bar here. The State cannot produce evidence of a single riot case that did not receive the  
4 benefit of retroactive application except the cases at bar. Stated another way, the policy was  
5 applied retroactively to the benefit of those protesting with, or as part of, Antifa, but not to those  
6 who protested against Antifa.

7 Even if the Court finds it inappropriate to commence a discovery-based investigation into  
8 the motives of prosecutors, it is clear beyond doubt that the State has no evidence that can  
9 constitutionally support a conviction for violation of ORS 166.015 in this case. ORS 135.755  
10 provides that “the court may, either of its own motion or upon the application of the district  
11 attorney, and in furtherance of justice, order the proceedings to be dismissed. The reasons for  
12 the dismissal shall be set forth in the order, which shall be entered in the register.”

13 As the Court of Appeals has explained, the “decision to dismiss all or part of an  
14 accusatory instrument generally involves consideration of the defendant's substantive and  
15 procedural rights in the case and the public's interest in having the law enforced.” *State v.*  
16 *Stough*, 148 Or. App. 353, 356, 939 P.2d 652, 653 (1997). The District Attorney’s own policy  
17 establishes that there is little public interest in having riot charges enforced in the political  
18 context as “prosecution of cases relating solely to protest activities, most of which have weak  
19 nexus to further criminality and which are unlikely to be deterred by prosecution, draws away  
20 from crucially needed resources”. (4/21/21 Buchal Decl. Ex. 17, at 1.) Here, the State has also  
21 run roughshod over Mr. Gibson’s substantive and procedural rights though all of the procedural  
22 machinations reviewed in the motion to dismiss for selective prosecution, and it is clear beyond

1 doubt they are prosecuting a man innocent of the crime of riot only because their misuse of the  
2 grand jury process took away his right to a preliminary hearing.

3 “ORS 135.755 allows only pretrial dismissals—a judge cannot dismiss a criminal case  
4 pursuant to ORS 135.755 after the jury has returned a verdict.” *Criminal Law* § 12.5-2 (OSB  
5 Legal Pubs. 2013) (citing *State ex rel. Penn v. Norblad*, 323 Or 464, 471, 918 P2d 426 (1996)).  
6 The interests of justice require that the remedy for the State’s extraordinary conduct here be  
7 provided prior to trial.

### 8 CONCLUSION

9 The court’s ruling acknowledged that its “analysis would be very different” if the facts  
10 were different in this regard. Here, the facts were very different than the court understood them  
11 to be. But the record is clear, when the policy was promulgated, it was applied retroactively to  
12 all of those on one side of the political divide, and none of those on the other. As the facts  
13 underlying the analysis are very different than the court believed, the analysis should be very  
14 different. Mr. Gibson asks this court to reconsider, or dismiss on its own motion in the interests  
15 of justice.

16 DATED this Tuesday, September 7, 2021.

17 s/ D. Angus Lee

18 D. Angus Lee, WSBA# 36473 (*pro hac vice*)

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/s/ James L. Buchal

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D. Angus Lee <angus@angusleelaw.com>

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## Cider Riot Trials will not be dismissed

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**KALBAUGH Brad** <Brad.KALBAUGH@mcdca.us>

Fri, Aug 14, 2020 at 3:43 PM

To: "D. Angus Lee" <angus@angusleelaw.com>

Cc: James Buchal <jbuchal@mbllp.com>, David Peters <davepeters1@yahoo.com>, Aubrey Hoffman <aubrey@aubreyhoffmanlaw.com>, "kdoyleatty@aol.com" <kdoyleatty@aol.com>, HUGHEY Sean <sean.hughey@mcdca.us>

That's my understanding.

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**From:** D. Angus Lee <angus@angusleelaw.com>

**Sent:** Friday, August 14, 2020 3:31 PM

**To:** KALBAUGH Brad <Brad.KALBAUGH@mcdca.us>

**Cc:** James Buchal <jbuchal@mbllp.com>; David Peters <davepeters1@yahoo.com>; Aubrey Hoffman <aubrey@aubreyhoffmanlaw.com>; kdoyleatty@aol.com; HUGHEY Sean <sean.hughey@mcdca.us>

**Subject:** Re: Cider Riot Trials will not be dismissed

Brad:

Thank you. I don't see anything in the policy regarding retroactivity, or not. So I am a bit confused.

However, it does say that the policy will apply to "all referred cases arising from the current protests." So, just so I understand, it does apply to cases from the protests that began around the end of May of 2020 through current, but does not apply back further to Mr. Gibson's case?

Thanks for any clarification.

Angus

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On Aug 14, 2020, at 3:21 PM, KALBAUGH Brad <[Brad.KALBAUGH@mcds.us](mailto:Brad.KALBAUGH@mcds.us)> wrote:

<FINAL- Protest Policy - August 11, 2020.pdf>

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**CERTIFICATE OF SERVICE**

I, Carole 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.

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

**DEFENDANT JOSEPH GIBSON'S MOTION TO RECONSIDER RULING DENYING MOTION ON SELECTIVE PROSECUTION, OR IN THE ALTERNATIVE, FOR DISMISSAL PURSUANT TO ORS 135.755**

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s/ Carole Caldwell