Hon. Benjamin Souede

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 ALTERANTIVE TO DISMISS THIS ACTION IN THE INTERESTS OF JUSTICE** Oral argument requested per UTCR 4.050

MOTION

Comes now Joseph Gibson, by and through D. Angus Lee, and James L. Buchal, and moves this Court to reconsider this Court's ruling on his motion to dismiss the State's claim that he violated the riot statute, ORS 166.015, because of unconstitutional selective prosecution, or in the alternative to allow discovery in support of that claim.

The motion was denied by Order of July 23, 2021 on the basis of two simple and eminently provable errors of fact. At the least, defendant made the requisite showing for pretrial discovery concerning selective prosecution.

In the alternative, the case should be dismissed pursuant to ORS 135.755 in the interests of justice.

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ARGUMENT

Introduction

We find ourselves in a time where many law and enforcement agencies, including by all appearances those of Multnomah County, Oregon and the City of Portland, have abandoned traditional notions concerning the preservation of public order and neutral application of criminal laws. In this case, obviously innocent defendants are prosecuted for riot, because they dared to appear in public to protest outside an Antifa gang headquarters, while the Multnomah County District Attorney's office and the Portland Police Bureau continue to allow Antifa rioters to run rampant in the City.

Procedural History

The case arises from a May 1, 2019 protest outside the premises of the Cider Riot bar, which until its closure served as a Portland headquarters for Antifa. The protest was videotaped by multiple participants from multiple angles and there is, in substance, no way to dispute what actually happened, making this an unusually appropriate case for judicial assessment of the facts. *Cf. Dinan v. Multnomah Cty.*, No. 3:12-cv-00615-PK, 2013 U.S. Dist. LEXIS 11088, at *24 (D. Or. Jan. 28, 2013) ("since the video recording captures Vetter's conduct, there can be little factual dispute concerning the amount of force Vetter applied").

The State has filed its exhibit list identifying the universe of videos in question,[1] and three judges have previously reviewed the footage, all of whom concluded, in one form or another, that defendant Gibson did not personally engage in any violent conduct. Judge Lavin so concluded in

[1] The Exhibit list is filed herewith for convenience as Exhibit 1 to the Supplemental Declaration of James L. Buchal in Support of Defendant Gibson's Motion to Reconsider Ruling. Two of these videos were previously filed in support of the motion to dismiss for selective prosecution as Exhibits 2 and 3 to the 4/21/21 Declaration of James L. Buchal. We are filing herewith the Supplemental Declaration of James L. Buchal to present the other five, and have put all seven on a thumb drive as Exhibit 4 thereto.

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the civil suit brought by Cider Riot (4/21/21 Buchal Decl. Ex. 1, at 4), Federal Judge Immergut so concluded in the federal suit defendant Gibson brought to enjoin the prosecution,[2] and this Court concluded in the very opinion reconsideration of which is sought:

> "Defendants are certainly correct that the video evidence reveals participants in the May 1, incident who engage in affirmatively violent physical behavior. *None of the evidence presented on this motion reveals Defendants engaging in such behavior.*"

(Supp. Buchal Decl. Ex. 5, at 5 n.3 (emphasis added).)

The Oregon Supreme Court has made it clear that in order to avoid severe constitutional problems, "such behavior" is an essential element of the crime:

> "It is clear under the statute that a person does not commit the crime of riot if he or she merely is part of a group and five other members of that group engage in tumultuous and violent conduct that intentionally or recklessly creates a grave risk of causing public alarm. *Under the statute, the state must prove that the person charged actually "engage[d] in violent and tumultuous conduct."*

State v. Chakerian, 325 Or. 370, 375 n.8 (1997) (emphasis added). The *Chakerian* case follows a long line of federal constitutional cases make it clear that the First Amendment protects those perceived to lead protests from liability when others commit acts of violence during political protests. A failure to provide such protection is a hallmark of totalitarian regimes aiming to cripple any political challenges.

Even more remarkable than the fact that defendant Gibson and others are prosecuted for riot absent any violent conduct is the established fact that in a City torn by continuing rioting involving violent attacks on police and property, *there are no other defendants prosecuted for riot.*

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[2] Specifically, she held:

> "Although Plaintiffs make compelling arguments that their conduct does not rise to the level of "tumultuous and violent" conduct under O.R.S. 166.015, they have not met their burden of showing that the charges against them are facially meritless such that this Court should invoke the narrow bad faith exception to *Younger* abstention."

Gibson v. Schmidt, 522 F. Supp. 3d 804, 818 (D. Or. 2021).

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(*See generally* 4/21/21 Declaration of D. Angus Lee in Support of Defendants' Motion to Dismiss for Selective Prosecution.) It is obvious that that some factor other than objective implementation of the criminal laws is driving this prosecution, and defendant Gibson therefore moved for dismissal on the basis of an unconstitutional selective prosecution. Simply put, the District Attorney, *and more specifically the very Deputy leading this prosecution*, has repeatedly determined to insulate violent Antifa, Black Lives Matter and other rioters on the Left striking officers and throwing rocks at them from criminal charges (*e.g.,* 4/21/21 Lee Decl. ¶¶ 18(b), (c), (d) & (f)), while misusing official power to punish defendant Gibson and others who dared to stand against Antifa.

In the April 21, 2021, motion for dismissal for selective prosecution, defendant Gibson demonstrated that:

- The City of Portland was at all relevant times afflicted with what can only be described as a collective hatred of defendant Gibson, who was falsely vilified as a "white supremacist" and "violent, far-right extremist" by Portland media and political leaders.
- Multiple misuses of political power to make unconstitutional, context-based restrictions on speech against defendant's Gibson's point of view were documented.
- Despite multiple violent individuals being identified on the Antifa side of the May 1, 2019 event at Cider Riot as engaging in criminal conduct, including violent attacks on two journalists, no arrests were made or prosecutions commenced.
- The background and timing of defendant Gibson's arrest were directly calculated to chill his political speech and that of others perceived to be "alt-right".
- Utterly false and inflammatory statements were made to this Court by the State, *ex parte*, to secure an arrest warrant for Gibson.
- The grand jury was never provided any competent evidence of misconduct by Gibson, but with incompetent evidence based on a gross violation of ORS 132.320.
- The District Attorney's office is packed with prosecutors who are allies of the political opponents of defendant Gibson's.

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- On August 11, 2020, the District Attorney adopted a formal policy essentially forbidding any riot prosecutions unless the defendant involved was guilty of other crimes as well—not including such crimes as interference with a police officer, disorderly conduct, criminal trespass, escape III, and misdemeanor harassment, which the District Attorney also insulated from prosecution.

- In the Policy, the District Attorney carefully explained his motivation for eschewing riot prosecutions in a manner that plainly covers defendant Gibson's conduct as well.

- Careful analysis of the District Attorney's application of the riot statute confirms large numbers of highly-violent Left wing rioters as to whom no riot (or other charges) have been brought, including those who physically attack police officers without provocation.

In the Court's July 23, 2021, opinion denying the motion for selective prosecution, the Court provided no analysis of the vast bulk of the evidence submitted by defendant Gibson. The Court made two fundamental errors of fact with respect to the matters he did address.

First, with regard to the District Attorney's August 11, 2020 policy, the Court accepted the State's representation that the Policy was never intended to be retroactive:

> "Regarding the August 11, 2020, Policy promulgated by the Multnomah County District Attorney, *the State has taken the position that this Police was only ever intended to be forward looking.* Defendants were charged in these cases a year before the Policy was promulgated. The Court cannot infer from this record a discriminatory intent by the State not making the Policy retroactive."

(Supp. Buchal Decl. Ex. 5, at 5 n.3 (emphasis added).) As we shall demonstrate, the State's representation was blatantly false, as the Policy was always intended to be retroactive—just not retroactive for those sharing defendant Gibson's views, but only his opponents.

The Court's second error was in declining to assign any political motivations, sides or grouping to those present at the May 1, 2019 event. According to the Court, "[t]he general tumult of the incident renders futile any attempt to categorize the participants into two similarly situated camps distinguished solely by their expressed beliefs for purpose of evaluating a request for discovery based on selective prosecution." (Supp. Buchal Decl. Ex. 5, at 6.) As we shall

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demonstrate, this finding was contrary to the police reports, the OLCC report, and any reasonable view of the circumstances.

When defendant Gibson attempted to seek reconsideration by the Court, the Court pointed out that Supplemental Local Rule 5.045 provides that only the trial judge can reconsider prior rulings, and that the Court had checked the docket, but confirmed that that it was not assigned as trial judge. (Accordingly, the Court's order of October 7, 2021 did not address the motion for reconsideration.)

Defendant Gibson responded by seeking and obtaining appointment of a trial judge for the purpose of ruling on that motion, and other motions previously denied without prejudice in favor of leaving them to the trial judge.

Argument

I. THIS COURT SHOULD RECONSIDER ITS ACCEPTANCE OF THE STATE'S FALSE REPRESENTATION THAT THE NO RIOT PROSECUTION POLICY WAS NEVER INTENDED TO BE RETROACTIVE.

This Court apparently overlooked Exhibit 18 to the Declaration of James L. Buchal filed April 21, 2021, which demonstrated that defense counsel had inquired specifically and in writing whether if the policy would be applied retroactively to those who were already facing charges in cases arising out of protest events:

> "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?"

(4/21/21 Buchal Decl. Ex. 18, at 78.) The State confirmed that the policy was being applied retroactively to the other active cases that had been charged by responding unequivocally: *"That's my understanding." Id.* at 6-7 (emphasis added).

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Indeed, *the District Attorney had publicly stated at the time that the Policy was intended to be retroactive*—at least to go backwards in time far enough to protect all of the protestors of whose message the District Attorney approved, but had rioted long before the August 11, 2020 Policy issuance date. On August 12, 2020, the Washington Post published an article in which it was reported that the District Attorney "said *the new policy will be retroactive for hundreds of people who have been arrested in protests following Floyd's killing in late May*." (Supp. Buchal Decl. Ex. 6 (emphasis added); *see also id.* Ex. 7 (article e-mailed within the District Attorney's office the next day).) In short—and this lack of honesty is all too typical of those allied with Antifa[3]—the District Attorney has one story for a supportive press and an opposite story for this Court.

The Policy had to be retroactive to cover the protestors whose message the District Attorney wanted to support—unlike defendant Gibson's—and *there was no factual dispute that it was applied retroactively for each and every riot case arising out of a protest*—except Gibson's. There was only the State's lame and blatantly false assertion, accepted by the Court, that the Policy was never intended to be retroactive. Every wrongdoer denies a wrongful motive; it is the job of the courts to evaluate the circumstantial evidence supporting the denial, which here utterly refutes a claim that the Policy was not intended to be retroactive.

As set forth in the motion for a change of venue, the entire political leadership of the City of Portland, was unanimous in both issuing false statements concerning defendant Gibson, and making it clear that any attempt by him to exercise his First Amendment rights was at the least unwelcome. *See, e.g.*, 2/21/20 Amended Buchal Decl. Ex 23 (press report that Mayor attempting

[3] *See, e.g.*, 4/21/21 Buchal Decl. Ex. 15, at 1 ("New DA in Portland admits he is 'old buddies' with an antifa militant").

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to get federal government to revoke permit for a rally organized by defendant Gibson in Portland). The unconstitutional motive in these circumstances—felony prosecutions for peaceful anti-Antifa protestors, and a free pass for violent Antifa rioters based on a formal, content-based policy to protect them—fairly leaps from the record, once it is understood that the Policy was intended to be retroactive and was retroactive—just not for protestors whose First-Amendment-protected message was opposed by the District Attorney.

II. THIS COURT SHOULD RECONSIDER THE IDEA THAT NO INFERENCES AS TO PROSECUTORIAL MOTIVES CAN BE DRAWN FROM THE FACT THAT ONLY THOSE ASSOCIATED WITH ONE SIDE OF THE CIDER RIOT PROTEST WERE ARRESTED AND CHARGED.

Defendant Gibson demonstrated the Portland Police officer assigned to investigate the events concluded: "The case will proceed with five victims. The five victims are Heather Clark, Andy Ngo, Crystal Pritchett, Margaret Maxey, and Noah Bucchi. The only identified suspect at this time is Ian Alexander Kramer . . .". (4/21/21 Buchal Decl. Ex. 5, at 7.) Review of the police reports confirmed that two of these had personal injuries from the Antifa side, one had a car damaged by a rock thrown from the Antifa side, and two had personal injuries from the anti-Antifa side.

None had injuries caused by defendant Gibson, who was known to the officer but not identified in the police reports as a suspect—the natural inference being that the unconstitutional decisions to punish Gibson arose later. Consistent with his pariah status, Gibson himself was also not identified as a victim by the Portland Police, though the OLCC investigator easily concluded that he was the subject of multiple attacks. (*See id.* Ex. 12, at 11; *see also* id at ¶¶ 36-39.)

Every law enforcement representative investigating the events at Cider Riot easily determined that two groups were involved:

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> "Both groups were engaged in verbal arguing. Occasionally I would see a physical confrontation. It was obvious to me both groups were making the choice to be there, and be confrontational. At any time the Patriot Prayer group could have walked away, and the Antifa group could have gone into the business."

(*E.g.*, 4/21/21 Buchal Decl. Ex. 5, at 17; Ex. 12, at 2 ("two groups confronting each other"). In the context of two well-defined groups confronting each other, the notion that those blatantly violating the criminal laws on Antifa side at the same time and in the same place cannot be deemed to be "similarly situated" (Supp. Buchal Decl. Ex. 5, at 5) is unfathomable.

Anyone watching the videos can see on the side, the Antifa side, uniformly masked and organized, occupying the premises of Cider Riot as defendant Gibson and others walk about in front of them. To say that "[t]he actors at the May 1 incident acted so particularly individually that they could only be evaluated on their individual behavior" (*id.* at 6) is to ignore the overall context of the confrontation.

It is not just that no one on the Antifa side was charged for rioting on May 1st; it is that they continue to have a free pass to riot in Portland, while the full force of the law enforcement establishment is being brought to bring felony charges against those who dared publicly to confront them and draw attention to this rising evil. This prosecution should shock the conscience of the Court.

III. IN THE ALTERNATIVE, IF THE MOTION TO RECONSIDER IS DENIED, THIS COURT SHOULD DISMISS THE PROSECUTION IN THE INTERESTS OF JUSTICE.

ORS 135.755 provides:

> "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order the proceedings to be dismissed. The reasons for the dismissal shall be set forth in the order, which shall be entered in the register."

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The District Attorney's Policy applicable to all riot prosecutions in the City other than this one explains the interests of justice in this context. According to the District Attorney,

> "We recognize that we will undermine public safety, not promote it, if we leverage the force of our criminal justice system against peaceful protestors who are demanding to be heard . . . the prosecution of cases relating solely to protest activities, most of which have weak nexus to further criminality and which are unlikely to be deterred by prosecution, draws away from crucially needed resources. As stewards of public resources, we must devote our efforts to prosecuting crimes that allow us to protect our most vulnerable victims to have the greatest impact on providing a safer community for everyone in Multnomah County."

By this standard, there is obviously not reason to continue this prosecution. This is a case relating solely to a protest activity, which has nothing to do with vulnerable victims in Multnomah County.

Defendant Gibson engaged in nothing more than constitutionally protected speech. He threw nothing, sprayed no one, and by admission of the State's lead attorney, assaulted no one (4/21/21 Buchal Decl. Ex. 14, at 56). As both the police and the OLCC found, those engaged at Cider Riot on May 1, 2019 were making a voluntary decision to participate and were free to leave at any time. (*Id*. Ex. 5, at 15 ("It was clear to me [observing officer] that the people directly involved in the disturbance were there by choice and were free to leave or go inside Cider Riot"); *id* Ex. 12, at 2 ("the people directly involved in the disturbance were there by choice and were free to leave at any time"). We are filing herewith a motion to present the grand jury transcript to the Court, and a motion *in limine* which will demonstrate, in conjunction with that transcript, that it was only by wholesale violation of the legal requirement that competent evidence be submitted to the grand jury (ORS 132.320) that the State managed to procure an indictment at all, presumably knowing that no case could be sustained in any probable cause hearing on the information it initially issued.

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The State's abuse has now continued for two years, causing defendant Gibson to incur enormous costs. The only apparent reason that it continues in shocking contradiction to the interests of justice—and the foregoing conceptions of the interests of justice articulated by the District Attorney—is to make an example of defendant Gibson for collateral political purposes.

This case stinks of prosecutorial bias and unconstitutional conduct. This Court should not permit itself to become part to the State's unconstitutional attack on defendant Gibson's First Amendment rights, and by exercising its power to dismiss in the interests of justice can avoid such a result.

Conclusion

For the foregoing reasons, the case should be dismissed. In the alternative, the Court should find that defendant Gibson has demonstrated sufficient evidence to secure pretrial discovery on the selective prosecution to permit further factual development of the claims.

DATED: November 24, 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 November 24, 2021, I caused the following document to be served:

DEFENDANT JOSEPH GIBSON'S MOTION TO RECONSIDER RULING DENYING MOTION ON SELECTIVE PROSECUTION, OR IN THE ALTERANTIVE TO DISMISS THIS ACTION IN THE INTERESTS OF JUSTICE

in the following manner on the parties listed below:

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