

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

STATE OF OREGON,

Plaintiff,

v.

JOSEPH OWAN GIBSON,

Defendant.

Case No. 19CR53042

**DEFENDANT'S MOTION TO
DISMISS FOR DISCOVERY
VIOLATIONS AND
MEMORANDUM IN SUPPORT
THEREOF**

Motion

Defendant Gibson moves to dismiss this case on the ground of discovery misconduct by the Multnomah County District Attorney's office, and to bring before the Court additional material supportive of the pending Motion for Reconsideration of the Motion to Dismiss for Selective Prosecution or, in the Alternative, in the Interests of Justice.

Argument

As set in Gibson's Motion for Dismissal on the Ground of Selective Prosecution, at every stage in these proceedings the State has evidenced a severe and unconstitutional level of prejudice against defendant Gibson frequently arising to outright misconduct:

- The State prosecuted Mr. Gibson for the express purpose of interfering with a large, politically-disfavored rally at the time;
- The State presented false testimony to this Court concerning Mr. Gibson's conduct;
- The State refused to present Mr. Gibson's testimony to the Grand Jury;

- The State then presented a case to the grand jury that was based on wholly inadmissible evidence (*e.g.*, a detective’s opinion that nonviolent, constitutionally protected speech was “violent and tumultuous conduct”)—a fact that may be easily verified by comparing the State’s concessions during the January 13th hearing to the grand jury transcript;
- The State prosecuted only “one side” of the May 1, 2019 incident, despite ample evidence of criminal conduct, victims, and identified potential defendants;
- The State then retroactively granted immunity from riot charges to politically-favored protestors, and misrepresented the Policy’s retroactive effect to the Court.

We now know that the State has also engaged in repeated misrepresentations to the Court concerning compliance with its discovery obligations. Beginning with the October 23, 2020 hearing (Declaration of D. Angus Lee, Ex. 2 filed herewith), continuing with the October 7, 2021 hearing (*see* Lee Decl. Ex. 3), the State has repeatedly told this Court that it has complied with all of its discovery obligations.

These obligations are vital, statutory and rise to constitutional dimensions ever since *Brady v. Maryland*, 373 U.S. 83 (1963). Under the statute, The State must produce:

“(g) Any material or information that tends to:

“(A) Exculpate the defendant;

“(B) Negate or mitigate the defendant’s guilt or punishment; or

“(C) Impeach a person the district attorney intends to call as a witness at the trial.

“(2)(a) The disclosure required by subsection (1)(g) of this section shall occur without delay after arraignment and prior to the entry of any guilty plea pursuant to an agreement with the state. If the existence of the material or information is not known at that time, *the disclosure shall be made upon discovery* without regard to whether the represented defendant has entered or agreed to enter a guilty plea.”

ORS 135.815(1)(g) & (2) (emphasis added). For a prosecutor to withhold *Brady* material is a striking indication of powerful motives of hostility against the defendant.

1 Notwithstanding the statute, Mr. Gibson specifically requested material concerning, among
2 other things, “entrapment,” back on August 28, 2019. (Lee Decl. Ex. 1.) No such materials were
3 produced, and the State repeatedly told this Court that it had met all discovery obligations. (*Id.*
4 ¶¶ 3-4 & Exs. 2-3.)

5 Earlier this month, counsel began to suspect that the State was withholding critical discovery
6 material, specifically some sort of cooperation agreement involving an informant (or even possible
7 agent provocateur) involved in the events of May 1, 2019. (*Id.* ¶ 5.) Accordingly, on January 24,
8 2022, counsel served a supplemental discovery demand seeking any such thing. (*Id.* Ex. 4.)

9 The next day, the State responded with an e-mail stating that the State assumes there would
10 be no objection “to any responsive documents being produced pursuant to a protective order” (*Id.*
11 Ex. 5), and providing a proposed protective order (*id.* Ex. 6). The proposed protective order states:
12 “The State will provide defense counsel with certain confidential material pertaining to information
13 provided to the Multnomah County District Attorney by the Multnomah County Sheriff on January
14 10, 2022.” (*Id.* at 1.) No argument was presented that this previously withheld material was
15 discoverable.

16 Defendant Gibson will not stipulate to the proposed stipulated protective order because
17 Defendant Gibson does not believe that the State first received the materials on January 10, 2022.
18 Defendant Gibson does not wish the Court to enter an order yet again memorializing presumptively
19 false representations from the State. We say presumptively false because the material is obviously
20 responsive to ORS 135.815(1)(g), and whatever else the State may be, we do not presume it is
21 incompetent and failed to conduct a reasonable search for responsive documents in the first place.
22 *Cf. State v. Wood*, 112 Or. App. 61, 66-67, 827 P.2d 924, 928 (1992) (“portions of CSD files
23 pertinent to an investigation are presumed to be in the prosecutor's possession or control”), *rev.*
24 *denied*, 313 Or. 354, 355 (1992).

1 As this court is aware, the prosecution violates a defendant's due process rights by failing to
2 turn over potentially exculpatory evidence *Brady v. Maryland*, 373 U.S. 83 (1963), and *Brady* rule
3 applies to impeachment evidence, *United States v. Bagley*, 473 U.S. 667 (1985).

4 The prosecutor bears the primary responsibility of identifying and turning over *Brady*
5 evidence. The prosecutor's obligation to turn over all exculpatory evidence extends to evidence that
6 is in the possession of the police, *including information that the police have not disclosed to the*
7 *prosecutor. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to
8 learn of any favorable evidence known to the others acting on the government's behalf in the case,
9 including the police").

10 In the State's favor it may be said that no one doubts that police investigators
11 sometimes fail to inform a prosecutor of all they know. But neither is there any
12 serious doubt that "procedures and regulations can be established to carry [the
13 prosecutor's] burden and to insure communication of all relevant information on each
14 case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154,
15 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972). *Since, then, the prosecutor has the means to*
discharge the government's Brady responsibility if he will, any argument for
excusing a prosecutor from disclosing what he does not happen to know about boils
down to a plea to substitute the police for the prosecutor, and even for the courts
themselves, as the final arbiters of the government's obligation to ensure fair trials.

16 *Id.* at 438 (emphasis added).

17 Here, at least one person involved in this case had a written cooperation agreement with
18 Multnomah County. There is no excuse for the Multnomah County District Attorney's Office
19 failing (or refusing) to disclose a written cooperation agreement with the County.

20 Further, even if the State received the "material" on January 10th, the State is still guilty of
21 serious discovery misconduct. The State appeared before this Court and the parties on January 13th
22 and said nothing of it. If one credits the assertions of the State—and by now that should be a
23 questionable course of action—the State sat on the material *for more than two weeks* and was
24 obviously not going to release it *ever* unless and until it was specifically demanded again. The
25 statute, of course, requires that "the disclosure shall be made *upon discovery*". ORS 135.815(1)(g)
26 (emphasis added).

1 This is yet another example of conduct that proves the entire prosecution is contaminated
2 with an inalterable and unconstitutional bias against defendant Gibson which has caused the State to
3 abandon all notions of fair play and due process of law. The stink arising from this case is now
4 worse. Defendant Gibson understands that the State's discovery misconduct may not alone be
5 grounds for dismissal of the case, insofar as the prejudice from withholding the material can still be
6 overcome by its prompt production. *Cf. Wood*, 112 Or. App. at 67.

7 As a matter of Oregon law, the discovery misconduct by the State can, however, constitute
8 grounds to dismiss the case. 1 Criminal Law, § 14.2-9(e) (OSB Legal Pubs 2013) ("If the state
9 refuses to comply with a pretrial order to provide discovery, the court may order the charges against
10 the defendant dismissed"); *see also State v. Martinez*, 97 Or. App. 170, 172 (Or. Ct. App. 1989)
11 (dismissal upheld). Here it was only by happenstance that a serious constitutional violation (as well
12 as violation of ORS 135.815) came to light despite the Multnomah County District Attorney
13 office's repeated assertions to this Court that it had provided all discovery.

14 Here, the State's conduct is yet another example of a continuing train of severe abuses by
15 the state that merit dismissal in the interests of justice. Dismissal in the interests of justice under
16 ORS 135.755 "generally involves consideration of the defendant's substantive and procedural rights
17 in the case and the public's interest in having the law enforced. *State v. Stough*, 148 Or. App. 353,
18 356, 939 P.2d 652, 653 (1997). Here the State has run roughshod over Defendant Gibson's
19 substantive and procedural rights from the beginning, and the District Attorney's formal policy is
20 that it is *not* in the interests of justice to engage in riot prosecutions for protest situations, absent
21 violations of other criminal laws not present here. There is no public interest in continuing this
22 prosecution, and to do so would expand the opprobrium of the Multnomah County District
23 Attorney's office to this Court.

1 **Conclusion**

2 For the foregoing reasons, and the reasons previously articulated in pending motions, this
3 Court should dismiss the case against Defendant Gibson.

4 Dated this 31st day of January, 2022.

5 *s/ James L. Buchal*

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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 January 31, 2022, I caused the following document to be served:

**DEFENDANT’S MOTION TO DISMISS FOR DISCOVERY VIOLATIONS AND
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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@mcda.us		

/s/ Carole Caldwell