MULTNOMAH COUNTY CIRCUIT COURT
IN AND FOR THE STATE OF WASHINGTON

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| STATE OF OREGON,<br>PLAINTIFF,<br><br>vs.<br><br>JOSEPH GIBSON,<br>DEFENDANT. | No. 19CR53042<br><br>JOSEPH GIBSON'S<br>MOTIONS IN LIMINE<br>**[SECOND SET]**<br><br>**[ORAL ARGUMENT REQUESTED]**<br>**[UTCR 4.050]** |

Comes now Joseph Gibson, by and through the Angus Lee Law Firm, and respectfully makes the below motions in limine (second set).

PRIOR MOTIONS AND RULINGS[1]

1. MOTION: Testimony that defendant Gibson or Patriot Prayer is "violent," "right wing," "extremist," "racist," "white supremacist," or similar terms. RULING RESERVED: The Court will require an OEC 104 hearing for any witness intending to describe the understood "background" of any defendant or the Patriot Prayer Group.

2. MOTION: Testimony that unknown individuals, allegedly associated with Patriot Prayer, planned for violence at Cider Riot on May 2, 2019, and contacted defendant Gibson. GRANTED IN PART, OTHERWISE RULING RESERVED: The Court will require an OEC 104 hearing for any witness anticipated to testify as to any plans for violence on May 2, 2019. No

[1] Provided here for reference.


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witness will testify regarding overhearing a conversation purportedly with Defendant Gibson on this topic.

3. MOTION: Testimony that the video recordings of the events at Cider Riot contain evidence of "violent or tumultuous" conduct by defendant Gibson. GRANTED IN PART: Witnesses may not use the terms of art "violent or tumultuous." Witnesses may not narrate a video when their only basis for their knowledge is the video itself.

MOTIONS

4. Motion to bar the State from playing the ***two Bridge Videos*** before the jury. *See* ER 402; ER 403; ER 802. Mr. Gibson and Mr. Schultz are not in those videos at all. Those videos show "Proud Boys" protesting and wearing distinct "Proud Boy" attire. Those videos are not relevant to prove what occurred later at Cider Riot, and are prejudicial in light of nationally televised indictments of the "Proud Boys," and are time wasting.

5. Motion to bar the State from playing ***portions of the Bridge Videos*** in which individuals in the video that are not being called as witnesses at trial make assertions of fact regarding what Joseph Gibson planned to do that day.[2] Regarding Motion 3 above, the court ruled "No witness will testify regarding overhearing a conversation purportedly with Defendant Gibson on this topic." The Bridge Videos contain segments where individuals not a party to this trial and not identified as witnesses for trial make fact assertions related to Mr. Gibson, and there is no evidence "sufficient to support of finding that the witness has personal knowledge of the matter" within the meaning of Rule 602. The statements are testimonial and prejudicial. *See* ER 402; ER 403; ER 802. Just as the court has already ruled that "No witness will testify regarding overhearing a conversation purportedly with Defendant Gibson on this topic," no such testimonial evidence

[2] This motion is moot if the preceding motion is granted.


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should be allowed through use of an irrelevant and prejudicial video of which Mr. Gibson is not even a part.

6. Motion to Bar the State of Oregon from introducing any portion of the ***any record of recording (audio, video, or other) that includes hearsay***. *See* ER 802.

7. Motion to bar the State of Oregon from introducing testimony from the complaining witness (or any other non-medical professional) that the complaining witness suffered a ***concussion or bone fracture***. No currently identified witness is qualified to offer such a medical opinion and any currently identified witness would therefore be relying entirely on hearsay. *See e.g., Carter v. City of Post Falls*, No. CIV 08-00488-EJL, 2009 U.S. Dist. LEXIS 67246, at *12 (D. Idaho July 31, 2009) ("there is no evidence other than inadmissible hearsay that any medical professionals ever thought he had suffered a concussion"). Such testimony would also be irrelevant to the case at bar, and unfairly prejudicial, as Ian Kramer is no longer a co-defendant in the trial.

8. Motion to bar the State of Oregon from introducing testimony, that calls for any witness to testify that any alleged victim was either ***harmed or offended*** by Mr. Gibson, Schultz, or Kramer. While a witness can testify to what he or she observed, a witness cannot speculate as to what offense another person may have taken or what pain a person may have experienced by any alleged touching. *See* ER 402; ER 403; ER 602; ER 802.

9. Motion to bar the State of Oregon from introducing testimony regarding ***statements made by other people to the police*** as any such statements are hearsay. A statement to a police officer will nearly always be considered testimonial. *See* ER 802; *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The discovery is replete with statements from individuals to the


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police. The State does not intend to call those individuals to testify at trial. Such out of court statements are hearsay and should be excluded.

10. Motion to bar the State of Oregon from introducing testimony which ***labels any individual as "the victim,"*** *"a victim,"* or *"the victims."* Such labels assume facts not in evidence since neither fault not guilt have been established in this case. Further, the only "victim" of a riot is the State, not any single individual.[3] Moreover, such labels lack relevance, are highly and unfairly prejudicial to the defendant, and if done by the court would be an impermissible comment on the evidence. *See* ER 402; ER 403.

11. Motion to bar the State of Oregon from introducing ***testimony*** by any witness that any defendant's conduct was "***reckless***" or that any defendant acted "recklessly." Such testimony calls for a legal conclusion, and is not helpful to a clear understanding of any witness's testimony or the determination of a fact in issue. *See* ER 402; ER 403; 602; *Guedon v. Rooney*, 160 Or. 621, 87 P.2d 209, 216 (1939) (holding it is for the jury to determine if the conduct of defendant was reckless, not the witness). Likewise, in *State v. King,* the defendant was convicted of reckless conduct and on appeal challenged, amongst other things, the officer's opinion testimony that King's conduct was "reckless." In reversing King's conviction, the Supreme Court noted "Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *State v. King*, 167 Wash. 2d 324, 331 (2009) (internal citations omitted). The Court further noted the particular prejudice with police testimony because it is an expression by the police officer that goes to the guilt of the defendant, holding "A law enforcement officer's opinion testimony may be especially prejudicial because the 'officer's testimony often

[3] An exception to this would be if the riotous conduct involved an assault or damage to the property of another. The State has conceded that Mr. Gibson and Schultz engaged in no assault and did not damage property.


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carries a special aura of reliability.'" *Id.* Any such testimony would invade the province of the jury. This sort of opinion testimony, especially from a police officer, clearly invades the province of the jury, is unfairly prejudicial and should be ruled inadmissible.

12. Motion to bar the State of Oregon from introducing ***testimony*** by any witness that any defendant's conduct was "***intentional***" or that any defendant acted "intentionally." *See* argument and authority above.

13. Motion to bar the State of Oregon from introducing ***testimony*** by any witness that any defendant's conduct created a "***grave risk of causing public alarm***." See argument and authority above.

14. Motion to bar the State of Oregon from introducing ***testimony*** by any witness that any defendant was "participating ***with*** five or more other persons." See authority and argument above regarding legal conclusion and speculation; see also *State v. Owen*, 369 Or 288, 310, 505 P3d 953 (2022); *State v. Prophet,* 318 Or App 330, 350, 507 P3d 735 (2022) ("all elements other than venue, statute of limitations, and the like, "necessarily require[ ] a culpable mental state" under ORS 161.095(2), regardless of whether the statute provides an explicit mental state"); *In re M.A.W.-S.*, 319 OR. App. 426, 507 P3d 1291 (2022) (following *Prophet*, and finding that "participating with five or more persons" "necessarily requires a culpable mental state"). Of note, Mr. Gibson and Schultz arrived at the Cider Riot themselves, separate from the larger group, and this Court has already held that the events "involved a free wheeling, chaotic scene with individual, independent actors engaged in widely varying individual, independent actions". Order, July 23, 2021, at 5.

15. Motion for ***election of facts prior*** to trial. Specifically, Mr. Gibson requests that this court order the State to elect the specific facts it is claiming were violent and tumultuous on


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the part of Mr. Gibson, Mr. Schultz, and Mr. Kramer, prior to making opening statements. This is the only way the defense will be able to prepare its opening statements with any meaningful notice and opportunity to craft a defense tailored to the specific allegations. A motion for election was best described in *State v. Hale,* 335 Or. 612, 75 P.3d 448 (2003), where the Supreme Court addressed situations in which an indictment was sufficient to withstand a demurrer because it followed the statutory language, but was insufficient for the purpose of notice for the defendant (such as here). In *Hale*, "where the record would support more than one incident of third-degree sexual abuse, the defendant was entitled to know the state's precise theory of the case and which facts and circumstances the state was relying on to support the aggravated murder counts." *Id*. at 621. The Court did not agree that requiring the trial court to sustain defendant's demurrer to the indictment was the only vehicle for ensuring that defendant obtain the information that he sought. *Id.* Rather, the defendant "had other avenues available to him for acquiring that information, ***such as later moving the court to require the state to elect a specific incident*** of third-degree sexual abuse, or requesting special jury instructions that clarify the matter." *Id.* (emphasis added). The State in this case has never provided a bill of particulars, despite the court ordering it to do so, making election of the specific act it alleges constituted violent and tumultuous conduct more necessary. In *State v. Antoine,* 269 Or.App. 66, 344 P.3d 69, *rev den,* 357 Or. 324, 354 P.3d 696 (2015), the Court of Appeals reaffirmed the principle that although an indictment usually suffices if it alleges the charged crime in the words of the statute an exception occurs when discovery would not aid the defendant in confirming which act the state could select in charging the defendant. *Id.* at 75. For example, in a gambling charge the information was insufficient where "'promotes gambling' was defined by a nonexclusive list of acts, [and] discovery was an insufficient substitute for a charging instrument that specified 'the acts allegedly

committed' by the defendant." *Id.* The *Antoine* court held that the state's charging method effectively allowed the state to adduce evidence of multiple acts "without defendant knowing which of the acts would be specified and argued to the jury for convictions." *Id.* at 76. "Such a charging process failed to provide defendant with proper notice of the charges before trial." *Id.* at 77. While the *Antoine* court affirmed, it did so because the defendant failed to pursue other procedural methods to procure adequate and timely notice of what specific act he was accused of committing (*such as filing a motion like the one at bar*). *Id.* at 78. The *Antoine* court made clear that the right to sufficient notice of what one is actually being accused is a right that comes in advance of trial.

> [D]efendant could have moved to discover the state's election of the specific criminal acts that the state would prosecute at trial, ***in time for defendant to tailor his defense to those specific incidents.*** Defendant did file a demurrer before trial but did not later move for the state's election of the specific criminal acts that it would prosecute at trial.

*Id.* at 79 (footnote omitted) (emphasis added).

> [E]lucidation of the state's precise theory ***at trial*** does not cure the problem of a lack of pre-trial notice, given that ***such notice is essential to pre-trial investigation, trial preparation, and litigation of evidentiary issues***. Thus, we do not view *Hale* as impeding a defendant from filing a motion for the state's election ***early in the case***.

*Id.* at 77 n.8 (emphasis added).

16. Motion to bar the State of Oregon from introducing testimony, or making argument, that any defendant's language or ***words constituted*** "violent" or "tumultuous" "conduct." Such a motion would not normally be needed, as words are self-evidently not violence. However, the State has taken the position that words, and other expressive conduct such as wagging a finger, amount to tumultuous conduct. Such testimony or argument would not be grounded in fact, relevance, or reason, and would be a violation of the 1st Amendment to the United States Constitution.

17. Motion to bar the State of Oregon from introducing testimony, or making argument that, any defendant's language or words incited others to "violent" or "tumultuous" "conduct." Same reasoning as above.

18. Motion to bar the State of Oregon from introducing testimony, or making argument that, any defendant holds, or has expressed, "extreme" political views. *See* ER 402; ER 403; U.S. Const. Amend. 1 (freedom of speech).

19. Motion to bar the State of Oregon from introducing testimony, or making argument that, Mr. Gibson is the "leader" of any group. *See* ER 402; ER 403; U.S. Const. Amend. 1 (freedom of association and speech).

20. Motion to bar the State of Oregon from introducing testimony, or making argument that, any of the defendants were taunting, or proving a fight. See authority above. Further, taunting and provocation is speech, not conduct. Likewise, one man's "taunting" is another man's truth saying. It is not for a witness to speculate that a defendant was taunting. Rather a witness can state what he or she observed. Here, all the speech is on video (the best evidence), so even witness testimony of what was said during the protest is of little use to a jury. The jury can draw what conclusions it wishes from the video, but taunting at a protest is not a crime, it is in fact protected political activity. Taunting is also not an element of any crime charged. It is irrelevant if a defendant was "taunting".

21. Motion to bar the State of Oregon from introducing testimony from Det. Traynor speculating as to a methodology or plan of any defendant. Det. Traynor has no basis to offer such speculation or opinion testimony. *See* ER 402; ER 403; ER 602.

22. Motion to bar the State of Oregon from introducing Joseph Gibson's ***booking photo***. *See* ER 402; ER 403.


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23. Motion to bar the State from introducing ***911 or dispatch recordings without proper foundation*** by the 911 caller, the actual 911 dispatcher, or a records custodian. *See* ER 402; ER 403; ER 802.

24. Motion to bar the State of Oregon from introducing testimony, comment, or argument regarding any ***prior bad act by, or arrests, or convictions of*** Joseph Gibson. *See* ER 402; ER 403; ER 404.

25. Motion to instruct the State of Oregon's counsel to advise all witnesses not to mention, refer to, or attempt to convey to the jury in any manner, either directly or indirectly, any of the ***facts mentioned in this motion***, without first obtaining permission of the Court outside the presence and hearing of the jury.

26. Motion to instruct the State of Oregon's counsel to advise all witnesses not to mention, refer to, or attempt to convey to the jury in any manner, either directly or indirectly, ***the fact that this motion has been filed***.

27. Motion to instruct the State of Oregon's counsel to warn and caution each of State of Oregon's witnesses to ***strictly follow the Court's rulings*** on these motions.

28. Motion to bar the State of Oregon from introducing testimony or ***argument regarding pretrial motions***, hearings, arguments, or court rulings.

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## CONCLUSION

Joseph Gibson respectfully requests that this Court enter the above motions in limine.

DATED this Tuesday, June 21, 22.

*/s/ D. Angus Lee*
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## CERTIFICATE OF SERVICE

I, D. Angus Lee, 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, June 21, 2022, I caused this document to be served in the following manner on the parties listed below:

| | | |
|---|---|---|
| Brad Kalbaugh | ( ) | (BY FIRST CLASS US MAIL) |
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