

CIRCUIT COURT OF OREGON
FOR MULTNOMAH COUNTY

STATE OF OREGON,

Plaintiff,

No. 19-CR-53042

vs.

JOSEPH OWAN GIBSON

Defendant

MOTION TO QUASH

COMES NOW MIKE SCHMIDT, District Attorney for Multnomah County, by and through Deputy District Attorney Sean Hughey, and respectfully moves this court to quash Defendant's subpoenas *duces tecum* served on Deputy District Attorney Brad Kalbaugh, District Attorney Mike Schmidt, and retired District Attorney Rod Underhill. The subpoenas are attached hereto as **EXHIBITS A, B, and C**, respectively.

Defendant's subpoenas *duces tecum* encompass materials within the purview of ORS 135.855¹, and which are not otherwise subject to subpoena or discovery under *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Bray*, 363 Or 226 (2018), or *State v. Cartwright*, 336 Or 408 (2004).

POINTS AND AUTHORITIES

a. The documents sought have no potential use at trial.

Under *State v. Bray*, 363 Or 226 (2018), a subpoena *duces tecum* commanding the production of documents or testimony at trial need not be enforced unless the subpoenaed material has "potential use" at trial, specifically during cross-examination. *Id.* at 250 (citing *State v. Cartwright*, 336 Or 408, 419 (2004)). Here, the decision to charge certain defendants does not weigh on any material fact or element of the crime of riot. Defendant has sought relief (and received discovery) in a federal action, as well as having moved this

¹ (1) the following material and information shall not be subject to discovery under ORS 135.805 to 135.873: (a) Word product, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the attorneys, peace officers or their agents in connection with the investigation, prosecution or defense of a criminal action. ORS 135.855(1)(a).

1 court unsuccessfully for relief related to his claim of selective prosecution. The purported claim of selective
2 prosecution is not a trial defense.

3 **b. *Brady v. Maryland* does not compel production of these documents.**

4 Defendant also has no constitutional entitlement under *Brady v. Maryland* to documents he cannot
5 otherwise obtain pursuant to the subpoena statutes unless and until he can show that the documents sought are
6 both material and favorable to Defendant's case. *State v. West*, 250 Or App 196, 203 (2012); *State v. Guffey*,
7 291 Or App 729 (2018) (both citing *Brady v. Maryland*, 373 US 83, 87 (1996)). As the Court noted in *West*,
8 "*Brady* is not authority for a defendant obtaining evidence of unknown import to test whether it helps or hurts
9 his case." *Id.* at 204. As further explained by the Court in *Guffey*:

10 Oregon cases interpreting *Brady* have required defendant to make some
11 showing, beyond mere speculation, that the evidence he seeks will be
12 favorable to him and material to his guilt or innocence. . . . Materiality
"includes not only relevance; it also encompasses a requirement that the
state's failure to disclose the evidence be prejudicial.

13 *Id.*, 291 Or App at 735-36 (citing *State v. Spada*, 33 Or App 257, 259 (1978)). Here, any claim that
14 the records sought by Defendant are material and favorable is premised on speculation.

15 **c. *State v. Davis* supports quashing Defendant's subpoenas.**

16 Earlier this year the Oregon Court of Appeals decided *State v. Davis*, 317 Or App 794 (2022). The
17 defendant issued subpoenas for the mayor and certain city council members, contending that their testimony
18 could bolster his theory that the private security company providing security at City Hall and city council
19 were biased against him. *Davis*, 317 Or App at 796. In considering whether the trial court erred in quashing
20 the subpoenas, the court wrote:

21 A witness's duty to accommodate a defendant's right to compel the
22 production of evidence is constrained by relevance. Evidence is relevant so
23 long as the inference desired by the proponent is reasonable. While a
24 defendant has broad latitude to explore relevant avenues for cross-
examination, a nonspeculative showing of relevance is required to compel a
witness's appearance at trial. *Id.* at 801 (internal citations omitted).

25 Here, Defendant cannot make the requisite showing of relevance to compel an array of current and
26 former public officials to appear at trial or produce documents.

d. The District Attorney's office is the custodian of all records sought.

Although Defendant served a subpoena *duces tecum* on retired District Attorney Rod Underhill, Mr. Underhill is not in possession of any responsive records; all records would be in the custody of the Multnomah County District Attorney's Office. In addition to the arguments set forth above, the State moves the Court to quash the subpoena served on Mr. Underhill on the independent basis that he is not the custodian of the records sought.

CONCLUSION

Defendant's claim of selective prosecution is not a trial defense. No testimony, evidence, or argument related to decisions to prosecute would have any tendency to make a material fact (whether or not Defendant committed the elements of Riot), more or less likely. Therefore, the records sought in Defendant's subpoenas fail the relevance test articulated in *Davis* and should be quashed.

Dated this 22nd day of June, 2022.

Respectfully submitted,

Sean Hughey, OSB 152776
Deputy District Attorney

EXHIBIT A

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

6 STATE OF OREGON,

7 Plaintiff,

8 v.

9 JOSEPH OWAN GIBSON

10 Defendant.

Case No. 19CR53042

11 **SUBPOENA DUCES TECUM**

12 To: BRAD KALBAUGH, OFFICE OF THE MULTNOMAH COUNTY DISTRICT
13 ATTORNEY, 1200 SW 1st Ave., Ste. 5200, Multnomah County Central Courthouse,
Portland, OR, 97204-3201.

14 YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County
15 of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 15, 2022, at 9:00 a.m. as a
16 witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of
17 defendant Gibson.

18 YOU ARE TO BRING WITH YOU any and all documents constituting:

- 19 (a) Communications with any other public employee or official concerning
20 the initiation of criminal charges against defendant Gibson, including both
21 the determination to issue a criminal information, and the determination to
22 put the case before a grand jury;
- 23 (b) Communications with Officer Christopher Traynor concerning his
24 investigation of the events at Cider Riot on May 1, 2019;
- 25 (c) Discussion or reference to the political content of defendant Gibson's
26 activities or "Patriot Prayer" activities within the City of Portland; and,
- 27 (d) Communications with any other public official concerning the lack of
28 charges against those occupying the premises, including outdoor patio, of
the Cider Riot Bar) on May 1, 2019 (generally referred to as Antifa).

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Dated this 6th day of June, 2022.

s/James L. Buchal
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
P.O. Box 97286
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939
E-mail: jbuchal@mbllp.com
Attorney for Defendant

Witness Fees: \$10.00

EXHIBIT B

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

7 STATE OF OREGON,

Case No. 19CR53042

8 Plaintiff,

SUBPOENA DUCES TECUM

9 v.

10 JOSEPH OWAN GIBSON

11 Defendant.
12

13 To: MIKE SCHMIDT, MULTNOMAH COUNTY DISTRICT ATTORNEY:

14 YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County
15 of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 15, 2022, at 9:00 a.m. as a
16 witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of
17 defendant Gibson.

18 YOU ARE TO BRING WITH YOU any and all documents constituting

- 19 (a) Communications between you or any representative of your office and (ii) any
20 representative of the Office of the Mayor and/or Police Bureau which relate to defendant
21 Gibson or "Patriot Prayer";
22 (b) Documents referring to any decisions not to charge (or prosecute) those occupying the
23 premises (including outdoor patio) of the Cider Riot bar on May 1, 2019 (generally
24 referred to as Antifa);
25 (c) Documents referring or relating to the decision not to give defendant Gibson the benefit
26 of the Policy you adopted in August 2020 generally ruling out riot prosecutions of this
27 type; and,
28 (d) Any documents generated by you which refer to defendant Gibson or "Patriot Prayer".

SUBPOENA DUCES TECUM
Case No 19CR53042

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939

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Dated this 8th day of June 2022.

s/James L. Buchal
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939
E-mail: jbuchal@mbllp.com
Attorney for Defendant

Witness Fees: \$10.00

EXHIBIT C

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

5 STATE OF OREGON,

Case No. 19CR53042

6 Plaintiff,

SUBPOENA DUCES TECUM

7 v.

8 JOSEPH OWAN GIBSON

9 Defendant.
10

11 To: RODNEY DALE UNDERHILL
12 10101 NW Engleman Street, Portland, OR 97229-7527

13 YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County
14 of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 15, 2022, at 9:00 a.m. as a
15 witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of
16 defendant Gibson.

17 YOU ARE TO BRING WITH YOU any and all documents constituting:

- 18 (a) Communications with any other public employee or official concerning
19 the initiation of criminal charges against defendant Gibson, including both
20 the determination to issue a criminal information, and the determination to
21 put the case before a grand jury;
- 22 (b) Discussion or reference to the political content of defendant Gibson's
23 activities or "Patriot Prayer" activities within the City of Portland; and
- 24 (c) Communications with any other public official concerning the lack of
25 charges against those occupying the premises, including outdoor patio, of
26 the Cider Riot Bar) on May 1, 2019 (generally referred to as Antifa).

27 For purposes of this subpoena, you may limit the search to documents generated or received
28 between May 1, 2019 and September 30, 2019.

SUBPOENA DUCES TECUM
Case No 19CR53042

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
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Portland, OR 97286
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Dated this 6th day of June, 2022.

s/James L. Buchal
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
Fax: 503-573-1939
E-mail: jbuchal@mbllp.com
Attorney for Defendant

Witness Fees: \$10.00
Mileage: \$5.00

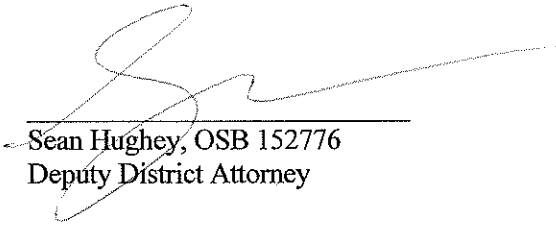
Total: \$15.00

CERTIFICATE OF SERVICE

I hereby certify that on June 22nd, 2022, I served the foregoing **MOTION TO QUASH** on the parties below via email:

James Buchal, attorney for defendant.
Via email
jbuchal@mbllp.com

Angus Lee, attorney for defendant.
Via email
angus@angusleelaw.com



Sean Hughey, OSB 152776
Deputy District Attorney