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 OPPOSITION TO PLAINTIFF'S MOTION TO QUASH**

Argument

In our Bench Memo Concerning June 8, 2022 Status Conference, filed June 3, 2022, we advised the Court concerning the subpoenas to be filed and the relevant legal framework for analyzing an anticipated motion to quash. Specifically, we discussed at length how the Court can and should evaluate defendant Gibson's claim that the riot statute is unconstitutional as applied to him—the so-called "*Robertson* Three" analysis. We would incorporate that memorandum herein by reference, and attach a copy of it for the Court's convenience as Exhibit A.

The State ignores that presentation entirely, and does not even deign to address the controlling Oregon Supreme Court case of *State v. Babson*, 355 Or. 383 (2014). In that case, the Supreme Court reversed a trial court's decision to quash subpoenas aimed at proving that "enforcement of the guideline was directed at suppressing defendants' expression". *Id.* at 404. There can be no principled distinction between that case and this one—the only distinction is the one that defendant Gibson contends drives this entire prosecution: the political viewpoint of the

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protestors subject to criminal charges. *See id.* at 386 (Babson and others "held an around the clock vigil on the steps of the state capitol building to protest the deployment of Oregon National Guard troops to Iraq and Afghanistan").

The State baldly asserts that the claim of selective prosecution is not a trial defense, but cites no authority whatsoever. The Oregon Constitution provides: "In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases." Or. Const., Art. I, § 16. This language clearly requires the jury to determine the underlying facts relevant to the *Robertson* Three/selective prosecution defense: was this carefully-timed and fraudulently-crafted riot charge (and the refusal to dismiss it) an attempt to suppress defendant Gibson's speech? Whether the Court or the jury (as in *People v. Gray*, 254 Cal. App.2d 256 (2d Dist. 1967)), also ignored by the State) addresses the question, the subpoenas are crafted to produce relevant evidence on it.

The State invokes *State v. Bray*, 363 Or. 226 (2018), which it says requires that subpoenaed material must have "potential use" at trial. The primary question presented in *Bray* involved the scope of the federal Stored Communications Act (SCA), and in particular the federal requirement that SCA orders may only be issued "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the [information sought is] relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). The dispute involved the attempts of a defendant charged with rape (he contended the interaction was consensual) to subpoena the victim's Google searches after the incident—evidence which the trial court viewed as potentially exculpatory.

In *Bray*, the Supreme Court would not fault the State for failing to exercise all available avenues to securing the information from Google under the SCA, but *reversed* defendant's conviction when the trial court declined to enforce a subpoena requiring the victim to produce her computer. The Supreme Court observed that ORS 136.567(1) provides a right of defendant to have subpoenas issued, including subpoenas *duces tecum*. *Id.* at 244.

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The Supreme Court's actual holding was that:

> "ORS 136.580 does not require that a party serving a subpoena duces tecum describe the evidence that it seeks and demonstrate its admissibility with that degree of certainty. Rather, as we will explain, when a party subpoenas a witness to produce material for cross-examination at trial, ORS 136.580 requires a court to order the production of the material unless it is clear that the material has 'no potential use' for that purpose."

Id. at 247-248. As the Court explained, "there is no reason to require a court to predict, with certainty, in advance of that witness's testimony, whether the subpoenaed material will in fact be relevant and admissible." *Id.* at 251. The material defendant Gibson seeks has clear potential use to the Court and/or jury to determine whether the riot statute is being constitutionally applied to him—and essentially no one else, despite a sea of violent rioters who happen to share many of the political views of Portland leadership.

The State also cites *State v. Davis*, 317 Or. App. 794 (2022), a case in which the defendant was filming the Portland City Council, was asked to turn off the bright light on his camera, refused to do so, refused to leave when an uproar arose and the Council determined to clear the entire chambers, and was charged with criminal trespass and other crimes. Defendant contended that the testimony of the Mayor and City Council members "could bolster his theory that G4S [the security company] and city council were biased against him and that the G4S security officer approached him not because of the light but because of the content of his speech." *Id*. at 796.

First, the case is of little precedential value because it does not address the controlling case of *State v. Babson*, 355 Or. 383 (2014). Second, the Court found that the theory that the Council's "dislike for defendant is what motivated the order to recess the meeting, which then caused G4S to order all participants to leave the chamber—was too speculative to lead to admissible evidence". *Davis*, 317 Or. App. at 794.

Here, by contrast, defendant Gibson has presented evidence that

- The elected officials of the City of Portland (and the City itself) 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.

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- 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.
- 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.

There is nothing speculative about defendant Gibson's argument that his prosecution was motivated by an unconstitutional animus, and that he has been denied equal protection of the law. Defendant Gibson is entitled to enforce the trial subpoenas to gather evidence this prosecution was "targeting his constitutionally protected activity". *Id.* at 804.

What the Court should find particularly significant about *Davis* is that there is no hint whatsoever in the decision that the question of unconstitutional motive—once transcending speculation—was entirely irrelevant at trial because it was not a "trial defense" as the State now claims. As we mentioned in the Bench Memo, this Court has repeatedly, in prior proceedings, made reference to the need to evaluate the constitutional questions at trial.

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With respect to the State's statutory argument, it again fails to take account of the important constitutional questions presented and also fails as a matter of simply reading the statute. The State complains that the subpoenas embrace material "not subject to discovery *under ORS 135.805 to 135.873*". (Motion at 1 n.1 (emphasis added; citing ORS 135.855(a)(1)). ORS 135.805 to 135.873 refer only to *pretrial* discovery. The cited statute does not purport to put any limitations on the scope of materials that may be the subject of a trial subpoena. That is an entirely separate statute, the one cited in *Bray*: ORS 136.580.

Whether or not the material must be produced as exculpatory under *Brady v. Maryland*, 373 U.S. 83 (1963), is beside the point; defendant Gibson is entitled to subpoena the evidence under ORS 136.580 and as a simple matter of due process of law and the protections of the Sixth Amendment. *E.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 1000 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.") Evidence that defendant Gibson was unconstitutionally singled out for criminal prosecution on account of his political beliefs—and indeed to halt his participation in upcoming demonstrations—clearly may influence the jury's determination of guilt.

Conclusion

For the foregoing reasons this Court should deny Plaintiff's motion to quash.

Dated this 27th day of June, 2022.

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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 **BENCH MEMO CONCERNING JUNE 8, 2022 STATUS CONFERENCE**

Among the issues worthy of discussion prior to trial is the question of how defendant Gibson may pursue his constitutional defenses at trial. As set forth below, this Court's ruling that defendant Gibson had not proved selective prosecution as a matter of law should not deprive him of his right to prove at trial that the Oregon riot statute, ORS 166.015, cannot constitutionally be applied to his conduct on May 1, 2019. This is a broader question than "selective prosecution." Unfortunately, the law in this area is not a model of clarity.

I. THIS COURT SHOULD PERMIT A SELECTIVE PROSECUTION DEFENSE AT TRIAL, AND PERMIT DEFENDANTS SUMMON WITNESSES CONCERNING THE ISSUE.

A. Procedural History

This Court has repeatedly pointed out that as a matter of Oregon criminal procedure, there is no evidentiary hearing available to defendant Gibson prior to trial. The Court denied a pretrial motion to dismiss this action for selective prosecution (and motion for reconsideration), primarily relying upon federal constitutional law, explaining that there is a "demanding" standard for pretrial

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dismissal of criminal charges on the basis of selective prosecution. (7/23/21 Order at 4.) The Court also denied discovery on the basis that the evidence presented did not meet a "correspondingly rigorous standard for discovery in aid of such a claim". (*Id.*) The Court's focus on was on "the State's motivation" for prosecution and "discriminatory intent". (*Id.* at 5.)

Ultimately, the Court determined that "the record [on the motion] does not establish that the charges against Defendants were filed selectively on unlawful bases". (*Id.* at 6 n.6.) We interpret the Court's order to hold that defendant Gibson failed to establish selective prosecution as a matter of law (*id*. at 6 n.6 ("the record does not establish that the charges against Defendants were filed selectively on unlawful bases")), and that the question of whether the riot statute may be constitutionally applied to his conduct under all of the circumstances of the case remains an issue for trial.

B. Relevant Law

While the Oregon riot statute has been upheld against a *facial* constitutional challenge, *State v. Chakerian*, 325 Or. 370 (1997), the question remains whether, *as applied* in this case, it is unconstitutional. The Court has repeatedly indicated that the fundamental question of whether the riot statute can constitutionally be applied to Gibson's conduct must abide trial for resolution.

The *Chakerian* Court pointed out that such an analysis could be conducted with respect to application of the riot statute, but was not presented by that case. As the Supreme Court explained,

> "There is a third level of scrutiny that goes beyond a facial attack on a statute. If the statute targets a harm, but does not refer to expression at all, then the statute still is analyzed to determine whether it violates Article I, section 8, as applied. That is the third level of the *Robertson* analysis. *City of Eugene v. Miller*, 318 Ore. at 488; *Plowman*, 314 Ore. at 164."

Chakerian, 325 Or. at 375 n.7. The case of *State v. Robertson*, 293 Ore. 402 (1982), characterized this third level or category as a defendant's argument "that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to article I, section 8." *Robertson*, 293 Ore. at 417.

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The Court is unfortunately left in a context where the law on "Robertson Category Three" challenges such as Gibson's is "largely undeveloped". *State v. Babson*, 355 Or. 383, 404 (2014). In *Babson,* protesters were charged with criminal trespass after violating a Legislative Administration Committee (LAC) guideline on protests at the Capitol. Their cases were tried to the court, which rejected selective enforcement/First Amendment defenses and found defendants guilty of second-degree criminal trespass.

The Supreme Court reversed and remanded based on defendants' argument that "testimony from the Legislative Administrator about any discussions that he had with LAC members about enforcement of the guideline, as well as testimony from the LAC co-chairs, could help prove that enforcement of the guideline was directed at suppressing defendants' expression." (*Id.* at 404.) That case is on all fours with this one.

The *Babson* Court declared that a law is invalid as applied to particular expression if "it did, in fact, reach privileged communication," and enforcement of the law against a particular defendant "impermissibly burden[ed] his [or her] right of free speech." *Babson*, 355 Or. at 406 (quoting *City of Eugene v. Miller*, 318 Ore 480, 490 (1994)). Defendant Gibson contends that applying the riot law to charge him criminally for a felony, where he has engaged in non-violent, expressive conduct and others have committed acts of violence, puts an impermissible burden on the right of free speech under the Oregon and United States Constitutions. He was entitled to appear at Cider Riot, make public comments, and live-stream the Antifa reaction. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592, 89 S. Ct. 1354, 1366 (1969)

Defendant Gibson has found no Oregon law specifying the burden of proof on his constitutional defenses to the charge of riot, but there is good reason to hold that it is only a preponderance of the evidence. Attached hereto (as Exhibit 1) is a California Court of Appeals case, *People v. Gray*, 254 Cal.App.2d 256 (2d Dist. 1967), which overturned a trial court that had

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put the selective prosecution case to the jury on the instruction that it should not convict "if you find by *clear and convincing proof* that the law in this case has been enforced in a discriminatory manner with the intent and purpose to deny equal protection of law to these defendants". (*Id.* at 263.) The Court of Appeals held that this "put too heavy a burden of proof on defendants" (*id.* at 270)—merely a preponderance of evidence was required (*id.* at 266).[1]

The Court noted the importance of the defense:

> ". . . the recognition of discriminatory enforcement of a penal law as a defense to a criminal action is one of the few means the individual citizen has to force public officials to do their job properly. Perhaps one of the unarticulated reasons why discriminatory enforcement is recognized as a defense to a criminal prosecution is pretty much the same as the basis for the rule excluding illegally obtained evidence. We refuse to admit such evidence because we know of no other way to force law enforcement agencies to obey the law."

Id. at 266. The *People v. Gray* Court did not decide "whether the defense of discriminatory enforcement is triable to the jury or the court". (*Id.* at 268 n.16.) As far as defendant Gibson can tell, Oregon has not articulated any clear rule on the question.

Whether tried to the jury or the court, there is additional evidence to be presented concerning the constitutional issues in this case. The question whether this prosecution has impermissibly burdened Gibson's free speech rights under the Oregon and United States Constitutions depends upon a wide range of facts that overlaps with the selective prosecution inquiry.[2] Gibson contends that the riot statute cannot constitutionally be applied to someone standing on a sidewalk interacting with others through Constitutionally-protected speech merely because a riot develops; that the decision to apply the statute to him, while not to his violent

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[1] The Court noted that defendants also had the option of proceeding by motion if they "established discriminatory enforcement *as a matter of law* . . .". (*Id*. at 268.) Again, we understand the Court's July 23, 2021 decision to reflect the Court's conclusion that defendants had not established selective enforcement as a matter of law.

[2] Other courts have complained of the analytical difficulties in this context. *See, e.g., Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011) ("courts must undoubtedly make doctrinal space for challenges to the content-discriminatory enforcement of content-neutral rules, [but] it is not clear into which precise category of constitutional claims such challenges fit").

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opponents, denies equal protection of laws; and that the decision was in fact taken by reason of his extraordinarily unpopular exercise of First Amendment rights in the City of Portland. Defendant Gibson believes that testimony from those involved in the decision to prosecute him (and not the Antifa participants) shortly in advance of another large, planned protest, as well as testimony from those involved in the decision not to apply the "no standalone riot prosecutions policy" to him, will establish that the State's application of ORS 166.015 to the circumstances of May 1, 2019, is violative of his state and federal constitutional rights.

C. Proposed Procedure at Status Conference

Defendant Gibson has determined to amend his witness list (and has served an amended list on the State), including additional witnesses relevant for the constitutional defenses, and one other issue that remains generally under seal. Defendant Gibson has prepared five associated trial subpoenas *duces tecum* (attached hereto as Exhibits 2-6) that would provide important evidence concerning the "Robinson Category Three" claim. The five witnesses to be subpoenaed are:

1. Brad Kalbaugh, the person at the DA's office most involved in the prosecution of defendant Gibson. Defendant will question Mr. Kalbaugh on issues that include:

- The timing of the criminal information in relation to the exercise of Gibson's First Amendment rights at a forthcoming anti-Antifa demonstration;
- The treatment of other riot cases and the role of expressive conduct in the charging decisions;
- The source and motive for false statements in the information supplied to the Court in connection with the initiation of the prosecution;
- The motive for invoking the grand jury procedure and presenting wholly inadmissible evidence to the grand jury; and,
- Contacts with higher levels officials in connection with the initiation of (and refusal to dismiss) these prosecutions concerning Gibson.

2. Officer Christopher Traynor, the police officer most involved in the investigation of the events at Cider Riot on May 1, 2019, the prosecution of defendant Gibson, and the non-

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prosecution of other participants in the events at Cider Riot on May 1, 2019. He will be questioned on issues that include:

- Directions concerning the timing and initiation of prosecution.
- The motive for false statements to the grand jury, and potentially to Mr. Kalbaugh, concerning Gibson's conduct; and,
- The reasons for failing to arrest or charge other May 1st participants, particularly the one making violent attacks on Gibson and specifically identified to the police.

3. Former District Attorney Rod Underhill, who supervised Mr. Kalbaugh at the time this case was initiated. He will be questioned on issues that include:

- The timing of the criminal information in relation to the exercise of Gibson's First Amendment rights at a forthcoming anti-Antifa demonstration;
- The decision not to pursue charges against violent Antifa members on May 1st and other occasions and the role of expressive conduct in those decisions; and,
- Discussions with Portland political leaders concerning a perceived need to prosecute right-wing demonstrators and/or defendant Gibson.

4. Current District Attorney Mike Schmidt, who met with Mr. Kalbaugh but refused to dismiss this case by application of the non-riot-prosecution policy. He will be questioned on issues that include:

- The discussions with Mr. Kalbaugh concerning the scope of retroactive application of the non-riot-prosecution Policy, and motives for not applying the Policy to dismiss these prosecutions; and,
- The role of expressive conduct in the Policy and in riot charging decisions.

5. Mayor Ted Wheeler, who repeatedly expressed animosity toward defendant Gibson, saying he was not welcome in Portland, and served at all relevant times as Commissioner of Police, and took an active role in responding to protests in the City. He will be questioned on issues including:

- The timing of the criminal information in relation to the exercise of Gibson's First Amendment rights at a forthcoming anti-Antifa demonstration;
- The decision not to pursue charges against violent Antifa members on May 1st and other occasions and the role of expressive conduct in those decisions; and,

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- Discussions with Portland political leaders concerning a perceived need to prosecute right-wing demonstrators and/or Gibson.

In the *Babson* case, "defendants subpoenaed the legislator co-chairs of the LAC, but the state filed a motion to quash those subpoenas." (*Id.* at 415.) The Court granted the motion to quash, but reconsidered the issue during trial, adhering to the initial ruling. The Supreme Court concluded that the trial court erred by granting the motion to quash. (*Id.* at 432.) So too would it be error here to deny defendant Gibson the right to put on his constitutional defenses at trial.

Defendants have not yet served the subpoenas, as a courtesy to the State, to avoid inconvenience for its officials (and one former official). The State may wish to accept service of the subpoenas at the June 8th conference, and based on the course of events to date, to make an oral motion to quash on June 8th. The Court can then rule on the questions presented most efficiently, as they will materially affect the conduct and duration of the trial. Upon notice from the State that it will not accept the subpoenas, defendant Gibson will go ahead and serve them, and further pretrial proceedings may then be required in connection with the State's anticipated motion to quash.

Conclusion

It should be an interesting status conference.

Dated: June 3, 2022.

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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 June 3, 2022, I caused the following document to be served:

BENCH MEMO CONCERNING JUNE 8, 2022 STATUS CONFERENCE

in the following manner on the parties listed below:

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1200 SW 1st Ave., Ste 5200	( )	(BY FAX)
Multnomah County Central Courthouse	( )	(BY HAND)
Portland, OR, 97204-3201	(X)	(E-Service, UTCR 21.100)
E-mail: brad.kalbaugh@mcda.us		

/s/ Carole Caldwell

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People v. Gray

Court of Appeal of California, Second Appellate District, Division Five

September 11, 1967

Crim. No. 13513

Reporter
254 Cal. App. 2d 256 *; 63 Cal. Rptr. 211 **; 1967 Cal. App. LEXIS 1390 ***

THE PEOPLE, Plaintiff and Respondent, v. FLEMING DANIEL GRAY, JR., et al., Defendants and Appellants

Subsequent History: [*1]** Respondent's Petition for a Hearing by the Supreme Court was Denied November 8, 1967.

Prior History: APPEAL from a judgment (orders granting probation) of the Municipal Court of Los Angeles Judicial District. Joan Dempsey Klein, Judge.

Prosecution for violating a municipal code relating to handbill posting upon a building.

Disposition: Reversed. Judgment of conviction reversed.

Counsel: David A. Binder and Meyer S. Levitt for Defendants and Appellants.

A. L. Wirin, Fred Okrand and Laurence R. Sperber as Amici Curiae on behalf of Defendants and Appellants.

Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Richard G. Kolostian and Irwin S. Evans, Deputy City Attorneys, for Plaintiff and Respondent.

Judges: Kaus, P. J. Stephens, J., and McCoy, J. pro tem., * concurred.

Opinion by: KAUS

Opinion

[*257] [212]** This appeal involves certain problems that arise when a defendant to a ***criminal*** charge claims that the prosecution against him is the result of discriminatory **[*258]** enforcement of the law and therefore a denial of equal protection. (*Yick Wo* v. *Hopkins*, 118 U.S. 356 [30 L.Ed. 220, 6 S.Ct. 1064].)

[*2]** Both defendants were convicted of violating section 38.03 of the Los Angeles Municipal Code which reads as follows: "No person shall paint, mark or write on or post or otherwise affix or attach any handbill or sign to or upon any building, wall or part thereof, or upon any private property without the consent of the owner, agent or occupant thereof." Proceedings were suspended and each defendant was placed on summary probation for one year on certain conditions. The appeal is from the orders granting probation.

There is no question that defendants committed the acts proscribed by the ordinance. In fact each defendant took the stand and so testified. [1] The only reason given below and asserted here why defendants should not be convicted is that in ***prosecuting*** them under the ordinance the People enforced it "with an evil eye and an unequal hand . . ." (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 [30 L.Ed. 220, 227, 6 S.Ct. 1064].)

[*3]** In support of this contention defendants introduced substantial evidence. The issue was tried to the jury concurrently with the basic issue of guilt and the court instructed the jury on the nature of the defense. It also allocated and defined the burden of proof. By finding defendants guilty the jury impliedly found that the defense had not been established by the quantum of evidence required by the court's instructions.

The Facts -- People's Case

On the night of June 26, 1966 at about 2 a.m. Officer Reynolds observed defendants Gray and Coleman in the process of posting a sign on a board fence.

The sign consisted of three capital B's arranged vertically one above the other. The first two were followed by three hyphens and a comma, the last by three hyphens and an exclamation point. The entire message was in quotes. One of

* Assigned by the Chairman of the Judicial Council.

[1] This was quite helpful to the prosecution, since the evidence against the defendant Coleman was on the weak side.

the defendants said that they were working on a political campaign and that the sign stood for "Bring, Back, Brown!" [2] **[*259]** The defendants also said that they had no permission from anyone to put up the sign.

[*4]** Reynolds placed defendants in his black and white police car and proceeded to a call box about two blocks away. After he had run a record check on defendants, which was negative, he got in touch with the supervisor at his station and reported. He was told to release defendants. He took them back to the scene -- 11th and Sentous, a little way southwest of central **[**213]** Los Angeles -- deposited them and left. No superior had ever instructed him to single out violators of section 28.03 who put up signs bearing the "B---, B---, B---!" legend. In fact he had never been given any specific instructions about how to enforce that particular section of the Municipal Code.

Later Officer Reynolds reported the incident to his supervisor in writing.

Mr. Northrop, the owner of the property in question, testified that he never gave defendants permission to post that particular sign. He did not complain to the police about the "B---, B---, B---!" sign, but a Sergeant Holtz got in touch with him and asked him whether he had given permission to defendants. There was a good deal of fairly inconclusive testimony from Northrop concerning his conversation with the police which either may **[***5]** or may not suggest to a trier of facts that the police would not have ***prosecuted*** if Northrop had not objected to the signs, once they were up, in spite of the lack of a prior permission. In connection with this testimony Northrop made the following statement to which defendants attach some importance: "He didn't tell me definitely 'We are going to ***prosecute***' but that I was -- *something was up* and I would hear about it or I wouldn't hear about it." (Italics added.)

Facts -- Defendants' Case

Preliminarily we should say defendants' case was a marvel of meticulous and sensitive preparation, geared precisely to the constitutional issues involved. We mention this fact not to pat anyone on the back, but as proof which supports our ultimate conclusion that to put as heavy a burden of proof on defendants as the trial court did in this case, nullifies the availability of the doctrine of *Yick Wo* v. *Hopkins*, *supra*, as a defense.

First defendants showed many photographs of signs of every nature posted in random locations throughout the City of Los Angeles in connection with the 1966 primary elections. **[*260]** Then they produced testimony from the owners of the properties involved **[***6]** to the effect that they had never given permission for the signs in question to be posted and that the police had never been in touch with them concerning these signs. Typically the cross-examination of these owners showed that they did not know who put up the signs.

Ellsworth R. Dressman, a professional billposter since 1932, was called by defendants, but just exactly whom his testimony favored is anybody's guess. Construing his many equivocations most strongly in favor of the People it amounts to this: In 1966 he had been "stopped" five or six times by the police while posting signs. On each occasion he gave the police his card. Nothing further happened. On each of those occasions he had had permission from the owners in question to put up the signs. [3] **[***7]** He also testified that many times when officers observed him in the act of posting signs on private property, nothing happened. [4]

[214]** Benjamin Hite, our registrar of voters, testified to the fact of the 1966 election, the number of candidates and so forth.

Judicial notice was taken that between January 1 and July 31, 1966 the dockets of the Municipal Court of Los Angeles Judicial District showed only two prosecutions for violations of section 28.03 out of about 25,000 nontraffic misdemeanor complaints. One was the subject litigation, the other charge was against one Carolyn Perkins Sweezy and one Clayborne Carson. Miss **[***8]** Sweezy, who later testified, was also caught in the act of putting up "B---, B---, B---!" signs.

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[2] At the time the incumbent Governor Brown had been nominated at the June primary as the Democratic candidate for Governor in the November election. It is noted that the number of hyphens does not match this explanation, nor another one subsequently given.

[3] The ordinance in question uses the word "consent" and not permission. All parties, throughout the trial, considered the two words to be synonymous. Analysis of Mr. Dressman's testimony reveals that his idea of what was consent or permission was very broad indeed. Thus he figured that if at one time in the past he gave a particular owner a pass to an event such as the Date Festival or a picture show, thereby obtaining consent at that particular time, the consent was valid until revoked. He also testified that, on occasion, he would keep the consent alive by sending the owners new passes.

[4] "The Witness: Well, all I want to say is that a lot of times an officer will stop you if he catches you around the building because he doesn't know if you are taking plywood or you're taking cement or something, and he is protecting the other people's property. And when he sees you with a truck there, why, he thinks you are taking something. So naturally he stops you. But usually if an officer sees you right in the act and we have our long-handled brush and we're throwing up paper, he just goes on by and they don't bother you. Now, this happens hundreds of times where they never stop you."

Various representatives of printing companies testified to the number of political posters which they printed in connection **[*261]** with the 1966 election campaign. Naturally the figure, though never precisely established, was extremely high.

Roger Murdock, deputy chief of police in charge of the patrol bureau, was called by defendants. He testified as follows: Of a total of slightly over fifteen thousand officers employed by the Los Angeles Police Department, 56 percent were assigned to patrol duty. The greatest concentration of officers on duty is during the hours of darkness. Section 28.03 "is a very irritating section. It is very hard to find perpetrators and we get many complaints about it, usually during election time." He was not familiar with a single case where the complaining owner was able to identify the violator. There was no departmental policy with regard to persons who put up "B---, B---, B---!" signs, nor has he ever given any of his officers instructions in this particular area [*sic*] as to whom to arrest or whom not to arrest.

In response to a question **[***9]** by the court, [5] the witness replied: "The Witness: We try to engage in selective enforcement, and it's probably best illustrated by traffic. In other words, by an analysis of traffic accidents we determine the cause of accidents and the location and the time of day when they occur and deploy more heavily in those districts at those times and places for that particular situation. And it would apply generally to all types of offenses. In relation to the particular offense involved, we normally do not deploy for it because it's all over town and it happens so rarely that we hope that if there are any arrests and prosecutions that they would be done on the basis of observations on routine patrol." The witness further explained that in some cases "selective enforcement" depends on a judgment concerning the seriousness of the offense. [6] Other factors which are taken into consideration are the number of complaints, the frequency of the crime and, of course, available personnel. In many areas "selective enforcement" means giving the officer or patrol **[*262]** some latitude. [7] Generally, however, the term "selective enforcement" means "the amount of enforcement effort which is applied **[***10]** in that particular direction.

Defendant Gray testified that he was a member of a political organization which called itself the Non-violent Action **[***11]** committee, "NVAC" for short. In January 1966 NVAC conceived a political program "to try to get the citizens of the State of California interested in what we considered here the important social reform issues . . . **[**215]** and to get them to be aware of these issues so that we would only vote for the politicians that took a strong stand . . ." On June 28, 1966 -- two days after the incident in question -- NVAC held a press conference at which it was explained that the "B---, B---, B---!" posters were part of a campaign in connection with which NVAC was also putting up posters reading "Boycott, Baby, Boycott." [8]

Gray was notified about two or three weeks after June 26 that he would be ***prosecuted***.

Defendant Coleman took the stand just to tell the jury that he did not claim that he had not participated in the activities of the defendant Gray.

Carolyn Sweezy, a student at U.C.L.A. testified **[***12]** as follows: On June 26, 1966 she and one Carson were stopped by a Sergeant Gunn at 53d and Avalon while in the act of putting up "B---, B---, B---!" signs. A ***criminal*** charge was pending against her. On other occasions she had also been stopped by members of the Los Angeles Police Department while putting up "B---, B---, B---!" signs. No prosecutions ensued after these other incidents. [9]

The Instructions

The trial court instructed the jury with respect to the only defense asserted. Among other things the jury was informed that if it found "that the law which defendants are accused of violating has not been uniformly enforced and that defendants have been intentionally and arbitrarily singled out for prosecution, the defendants are entitled to an acquittal. . . ." The jury was, however, also instructed as follows: **[*263]** "You are instructed that the fact that others might also have

[5] "The Court: Let me ask you this, Chief Murdock: Do you have any policy in the Police Department relative to the enforcement of misdemeanors wherein -- recognizing that officers cannot ***prosecute*** the misdemeanors not committed in their presence, do you have any policy with respect to deploying officers for the handling of certain misdemeanor complaints as contrasted with others, sir?"

[6] "The Witness: Well, we try to take first things first. We think that an organized crap game, for example, put on where it's professionally promoted, and so forth, is a greater police problem than a penny-ante poker game in somebody's kitchen. And so we spend more effort to suppress that type of situation."

[7] Sometimes when a person gets stopped for a traffic violation, they get a ticket; and other times they get a warning. And they are given some latitude in that . . . ."

[8] The slides in evidence show several such "Boycott, Baby, Boycott" posters. There is no evidence when they were put up.

[9] There is no evidence concerning the reason for such ***failure to prosecute***.

violated the statute in question and have **[***13]** not been arrested or ***prosecuted*** therefor should not influence your consideration of the facts in the instant case unless you find by *clear and convincing proof* that the law in this case has been enforced in a discriminatory manner with the intent and purpose to deny equal protection of the law to these defendants. However, discriminatory law enforcement will not be presumed. And before it can be established, proof thereof must be judicially made. The burden of proving discrimination is upon the defendants. Mere laxity in enforcement is not a denial of equal protection of law." (Italics added.)

Contentions

On appeal defendants make the following contentions:

1. That they had no burden of persuasion of any kind respecting the defense of discriminatory enforcement. As soon as they established a prima facie case, the prosecution had the burden of negativing the defense by evidence having the usual persuasive force, that is to say "beyond a reasonable doubt."

2. That even if defendants had the burden of persuasion, it was not to persuade the jury "by clear and convincing proof" but only by a preponderance of the evidence.

3. That this court is not bound by any of the facts **[***14]** found by the jury below, but should conduct an independent review of the evidence and that such independent review will establish the defense of discriminatory enforcement.

The People rebut these contentions and claim in addition that there is no such thing as a "defense" of discriminatory enforcement assertable in a ***criminal*** prosecution.

Of necessity we first deal with the People's last mentioned contention.

(1) There is no particular need to review the somewhat inconsistent positions which have been taken by California appellate tribunals with respect to the availability of discriminatory enforcement of a penal law as a defense to a ***criminal*** action. The **[**216]** inconsistency was noted by the compiler of the annotation in 4 American Law Reports, third series, page 404, pages 416-417 "Penal Law -- Discriminatory Enforcement." We are quite satisfied that *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U.S. 582, pages 588-589 [6 L.Ed.2d 551, 556-557, 81 S.Ct. 1135] disposes of all arguments, persuasive or otherwise, to the contrary. *Two Guys* was an action against McGinley, the District Attorney of Lehigh **[*264]** County, Pennsylvania, seeking an injunction against **[***15]** the enforcement of a Sunday closing law. Among other things it was claimed that McGinley had discriminated against plaintiff in enforcing the law. Certain ***criminal*** prosecutions under the law against plaintiff's employees were pending. While the case was before a three-judge court a new district attorney for Lehigh County took office. The three-judge court denied the injunction. Affirming, the Supreme Court said: "First, appellant contends that McGinley discriminated against it in enforcing the laws. Recognizing that a mootness problem exists because Lehigh County now has a new District Attorney, appellant contends that there are still pending prosecutions against its employees initiated as the result of the alleged discriminatory action. *Since appellant's employees may defend against any such proceeding that is actually* ***prosecuted*** *on the ground of unconstitutional discrimination*, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers at that time." (Italics added.)

If we felt disposed to apply very strict standards of "how to read a case" to the emphasized portion of the opinion, we could perhaps come to the conclusion that it **[***16]** is not a direct holding on the point we are considering. Frankly, coming as it does from the highest court and being the very basis for an affirmance, it is good enough for us. [10]

Before proceeding to defendants' contentions it seems appropriate to note the following: the question of whether or not the defense of discriminatory enforcement is properly triable to the jury is not before us. The parties simply proceeded to try it to the jury. The propriety of that course is therefore not involved on this appeal. Much can be said for either course of action. (See discussion in 4 A.L.R.3d 404, pp. 412-414; 61 Colum.L.Rev. 1103, pp. 1131-1133.) [11]

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[10] For the pros and cons of permitting discriminatory enforcement of a penal statute to be raised as a defense to a ***criminal*** prosecution, see the authorities cited in 61 Columbia Law Review page 1103, *The Right to Nondiscriminatory Enforcement of State Penal Laws*.

[11] The appellate department of the superior court, from whose decision this matter is before us on certification, decided the point and, following *People* v. *Utica Daw's Drug Co.*, 16 App.Div.2d 12 [225 N.Y.S.2d 128, 4 A.L.R.3d 393], held that the matter should be tried to the court. As indicated in the text we feel the problem is not properly presented by the appeal; however as a matter of academic interest this much may be stated: one of the advantages of trying the matter to the court on a motion to dismiss, as suggested by the appellate department, is that the People, if unsuccessful, have a right to appeal from the dismissal. This is undoubtedly true where the trial takes place in an inferior court. (Pen. Code, § 1466.) It would not be true if the charge is a felony and the dismissal is by a superior court. (Pen. Code, § 1238; *People* v. *Valenti*, 49 Cal.2d 199, 204-208 [136 P.2d 633].) For what it is worth, the highest court of the

[*17] [*265]** Who Has the Burden of Persuasion?

(2) Defendants argue that the burden of persuasion rested with the People once they had introduced substantial evidence of discriminatory enforcement. Whether or not that was so when this case was tried in 1966 is immaterial. For reasons explained later there must be a retrial. The **[**217]** Evidence Code went into effect on January 1, 1967. Under the provisions of that code certain presumptions affect the burden of proof, that is to say "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, §§ 115, 605, 606.) Among those presumptions which the Legislature has designated as affecting the burden of proof is the presumption that "official duty has been regularly performed." (Evid. Code, § 664.) Since the defense of discriminatory enforcement is a claim that official duty has not been regularly performed, the presumption is obviously applicable and its effect is "to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606.)

Quantum of Proof Required

(3) The trial **[***18]** court apparently felt persuaded by *People* v. *Utica Daw's Drug Co.*, 16 App.Div.2d 12 [225 N.Y.S.2d 128, 4 A.L.R.3d 393] and instructed the jury that defendant had to establish discriminatory enforcement "by clear and convincing proof." This instruction was emphasized by the prosecutor in his closing argument. We think it was error. First, however persuasive an authority *People* v. *Utica Daw's Drug Co., supra*, may be, the case does not really say that the burden rests on defendant to prove discriminatory enforcement "by clear and convincing proof." At one point the court says that the burden is on the defendant "by a clear preponderance of the proof." On its face this is not quite the same as "clear and convincing proof." In two other places of the opinion the court refers to the "heavy burden" which rests on the defendant. These statements, however, are equally reconcilable with a meaning that, whatever may be the proper **[*266]** quantum, the defense is a very difficult one to establish. Certainly the instant case so demonstrates.

Although no case which we have read says so in so many words, the recognition of discriminatory enforcement of a penal law as a defense **[***19]** to a ***criminal*** action is one of the few means the individual citizen has to force public officials to do their job properly. Perhaps one of the unarticulated reasons why discriminatory enforcement is recognized as a defense to a ***criminal*** prosecution is pretty much the same as the basis for the rule excluding illegally obtained evidence. We refuse to admit such evidence because we know of no other way to force law enforcement agencies to obey the law. (*Mapp* v. *Ohio*, 367 U.S. 643, 651 [6 L.Ed.2d 1081, 1087-1088, 81 S.Ct. 1684, 84 A.L.R.2d 933]; *People* v. *Cahan*, 44 Cal.2d 434, 445 [282 P.2d 905, 50 A.L.R.2d 513].) It must be presumed that legislatures intend that the laws they pass be impartially applied. The availability of discriminatory enforcement as a defense thus serves a good purpose: it acts as a constant reminder to the executive that the will of the people, expressed through the legislative branch, should be obeyed.

To rule that a defendant must carry the heavy burden of proof imposed by the trial court's instructions, is to hold that equal protection may be denied if the denial cannot be clearly and convincingly proved. We doubt that the Fourteenth **[***20]** Amendment sanctions so cynical a posture. [12]

Relative convenience in gathering the facts pertaining to a particular defense frequently is decisive in allocating the burden of proof. There is no reason why this consideration should not also affect the quantum of evidence required to sustain that burden. Evidence of discriminatory enforcement usually lies buried in the consciences and files of the law enforcement agencies involved and must be ferreted out by the defendant. Indeed, the case at bar involved a relatively easy presentation of the defense since possible violations of **[**218]** section 28.03 were literally plastered all over town. In the average case, however, the imposition of a burden heavier **[***21]** than proof by a preponderance of the evidence might mean the nullification of the defense as a practical matter.

There is nothing, we think, to the notion that the lesser burden will stimulate specious assertions of discriminatory **[*267]** enforcement. One would have to posit defendants willing to assert the defense if faced with the necessity of proving it by preponderance of the evidence, but deterred from doing so by a requirement of clear and convincing proof. Such reticence would be quite surprising.

Independent Review of the Evidence

(4) Defendants finally argue that we ought to disregard the fact finding process that took place below and undertake an independent review of the evidence. A corollary to that

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State of New York apparently does not agree with the Appellate Division of the Supreme Court which decided *People* v. *Utica Daw's Drug Co., supra*. (See *People* v. *Walker*, 14 N.Y.2d 901 [200 N.E.2d 779].

[12] It is of interest that the Evidence Code specifically provides that two presumptions affecting the burden of proof -- legitimacy (§ 661) and beneficial ownership (§ 662) -- can be rebutted only by clear and convincing proof. No such provision appears in section 664 (official duty regularly performed.)

proposition is the argument that such independent review will lead to the conclusion that defendants have been the victims of discriminatory enforcement and that we should order the prosecution to be dismissed.

This suggestion raises a host of problems. To be sure the Supreme Court of the United States has often exercised an independent review over the state fact finding process and our own Supreme Court has followed suit on occasion (*Zeitlin* v. *Arnebergh*, 59 **[***22]** Cal.2d 901, 908-911 [31 Cal.Rptr. 800, 383 P.2d 152, 10 A.L.R.3d 707]). Just exactly what the Supreme Court of the United States does when it exercises this power is a matter of some dispute. [13] There appears to be some disagreement on the high court itself. [14] Even in the coerced confession cases where the doctrine of an independent review is most frequently enunciated, certain portions of the trial fact finding process are accepted. [15]

[*23]** We see no reason to venture into this no-man's land at this time. Certainly before an appellate court should undertake to **[*268]** delineate and then exercise so extraordinary a power, the case should come to it after a trial in which the issue was considered by the appropriate trial court finder of fact under proper standards. Such was not the case here. [16] This does not mean, of course, that if defendants have established discriminatory enforcement *as a matter* **[**219]** *of law*, they are not entitled to a dismissal.

[*24]** **(5a)** We have set forth the facts at some length, because we think they demonstrate that a finding that there has been no discriminatory enforcement is supported by the record. To be sure in 1966 section 28.03 was not enforced against anyone but defendants and another couple who had done precisely what defendants had done. Many, many violations of the section had taken place during that year. There is even some evidence which suggests that some violators of the section were observed by the police in the act of violation and not even questioned. Yet one of those violators -- Miss Sweezy -- was on several occasions posting the very signs against which the discriminatory enforcement was allegedly directed. Just what motivated the police not to investigate other apparent violations we do not know, but the fact that several of them involved the same sign that defendants put up, makes the conclusion of purposeful discrimination less than compelling.

(6) "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in **[***25]** it an element of intentional or purposeful discrimination." (*Snowden* v. *Hughes*, 321 U.S. 1, 8 [88 L.Ed. 497, 503, 64 S.Ct. 397]. [17]

Defendants recognize all this, but argue that the statistical method employed by the Supreme Court of the United States **[*269]** in a series of jury discrimination cases establishes the defense nevertheless.

The Supreme Court's statistical approach in these jury discrimination cases was recently thoroughly analyzed. (Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338.) While we do not pretend to understand the mathematical formulae employed by the author of this analysis, this **[***26]** much appears certain: the jury discrimination cases involve a

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[13] See the extensive and subtle analysis of the problem in the comment *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 Stanford Law Review, page 328.

[14] See *Culombe* v. *Connecticut*, 367 U.S. 568 where, at page 603 [6 L.Ed.2d 1037, 1058, 81 S.Ct. 1860], Justice Frankfurter starts to explain the process, an explanation which the Chief Justice, in a concurring opinion, characterizes as a "lengthy and abstract dissertation" on a question not presented by the record or necessary to a disposition of the case.

[15] "In a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court. Determination of what happened requires assessments of the relative credibility of witnesses whose stories, in cases involving claims of coercion, are frequently, if indeed not almost invariably, contradictory. That ascertainment belongs to the trier of facts before whom those witnesses actually appear, subject to whatever corrective powers a State's appellate processes afford.

"This means that all testimonial conflict is settled by the judgment of the state courts. . . ." (*Culombe* v. *Connecticut, supra*, p. 603 [6 L.Ed.2d p. 1058].)

[16] It should be noted that the problem of an independent appellate review of the evidence is entirely different from the other matter we do not decide, namely, whether the defense of discriminatory enforcement is triable to the jury or the court. The preliminary questions of fact which govern the admissibility of a confession must be tried and decided primarily by the trial court rather than the jury (*Sims* v. *Georgia*, 385 U.S. 538, 544 [17 L.Ed2d 593, 598, 87 S.Ct. 639]; *Jackson* v. *Denno*, 378 U.S. 368 [12 L.Ed.2d 908, 84 S.Ct. 1774, 1 A.L.R.3d 1205]) yet it is precisely in that area that the Supreme Court has most often exercised its power of independent review.

[17] *Snowden* v. *Hughes, supra*, also contains the statement that ". . . there must be a showing of 'clear and intentional discrimination.'" Nothing said in this opinion concerning the burden of proof is to the contrary. What must be shown is one thing, the persuasive force of the evidence by which it is shown, is another.

comparison between the number of Negroes who, in the past, have been selected for jury duty with the number of Negroes eligible for such duty. [18] A comparison of the large number of eligibles to the small number chosen leads to the conclusion that there has been discrimination.

(5b) A case such as the one at bar is quite different. The evidence does not really establish the number of violations known to the police. To be sure they knew **[***27]** of many violations from citizens' complaints, but did not know who had committed them. There is also some evidence that they observed apparent violations by others which they did not investigate by ascertaining from the owner of the property involved whether he had given consent. But, as we have already noted, that argument cuts both ways because some of those apparent violations involved the posting of "B---, B---, B---!" signs. The necessary mathematical basis for comparison which we find in the jury discrimination cases is therefore nonexistent here and any rules which defendants would derive from those cases and apply here are not pertinent.

The evidence is just as easily explainable as an instance of selective enforcement as it is in terms of discriminatory enforcement. " **[**220]** Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. **[*270]** Therefore grounds supporting **[***28]** a finding of a denial of equal protection were not alleged." (*Oyler* v. *Boles*, 368 U.S. 448, p. 456 [7 L.Ed.2d 446, 453, 82 S.Ct. 501].)

The orders are reversed for the sole reason that the court's instructions put too heavy a burden of proof on defendants.

End of Document

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[18] "A basic legal principle in the jury discrimination cases is that the selection of an improbably small number of Negroes is evidence of discrimination. This principle, which links a finding of discrimination to a determination of probabilities, opens the door to the use of statistical analysis in these cases. The mathematical methods described here have been used to calculate the probabilities which the law has established as relevant for determining the existence of discrimination." (80 Harv. L.Rev. 338, p. 374.)

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 **SUBPOENA *DUCES TECUM***

To: MIKE SCHMIDT, MULTNOMAH DISTRICT ATTORNEY:

YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 12, as a witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of defendant Gibson.

YOU ARE TO BRING WITH YOU any and all documents constituting

(a) Communications between you or any representative of your office and (ii) any representative of the Office of the Mayor and/or Police Bureau which relate to defendant Gibson or "Patriot Prayer";

(b) Documents referring to any decisions not to charge (or prosecute) those occupying the premises (including outdoor patio) of the Cider Riot bar on May 1, 2019 (generally referred to as Antifa);

(c) Documents referring or relating to the decision not to give defendant Gibson the benefit of the Policy you adopted in August 2020 generally ruling out riot prosecutions of this type; and,

(d) Any documents generated by you which refer to defendant Gibson or "Patriot Prayer".

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

Dated this ____th 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

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 **SUBPOENA *DUCES TECUM***

To: RODNEY DALE UNDERHILL

YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 12, 2022, as a witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of defendant Gibson.

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

(a) Communications with any other public employee or official concerning the initiation of criminal charges against defendant Gibson, including both the determination to issue a criminal information, and the determination to put the case before a grand jury;

(b) Discussion or reference to the political content of defendant Gibson's activities or "Patriot Prayer" activities within the City of Portland; and

(c) Communications with any other public official concerning the lack of charges against those occupying the premises, including outdoor patio, of the Cider Riot Bar) on May 1, 2019 (generally referred to as Antifa).

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

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

Dated this ____th day of June, 2022.

s/James L. Buchal
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
3425 SE Yamhill Street, Suite 100
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E-mail: jbuchal@mbllp.com
Attorney for Defendant

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 **SUBPOENA *DUCES TECUM***

To: TED WHEELER, MAYOR AND POLICE COMMISSIONER:

YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 12, 2022, as a witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of defendant Gibson.

YOU ARE TO BRING WITH YOU any and all documents constituting

(a) Communications between and among (i) you or any representative of your office and (ii) any representative of the Office of the Multnomah County District Attorney and/or Police Police Bureau which relate to defendant Gibson or "Patriot Prayer,"

(b) Documents referring to any decisions not to charge (or prosecute) those occupying the premises (including outdoor patio) of the Cider Riot bar on May 1, 2019 (generally referred to as Antifa); and

(c) Any documents generated by you which refer to defendant Gibson or "Patriot Prayer".

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

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

Dated this ____th day of June 2022.

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

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 **SUBPOENA *DUCES TECUM***

To: CHRISTOPHER TRAYNOR, PORTLAND POLICE BUREAU

YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 12, 2022, as a witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of defendant Gibson.

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

(a) Communications with any other public employee or official concerning the initiation of criminal charges against defendant Gibson;

(b) Communications with any representative of the Multnomah County District Attorney's Office concerning investigation of the events at Cider Riot on May 1, 2019;

(c) Discussion or reference to the political content of defendant Gibson's activities or "Patriot Prayer" activities within the City of Portland; and

(d) Communications with any other public official concerning the lack of charges against those occupying the premises, including outdoor patio, of the Cider Riot Bar) on May 1, 2019 (generally referred to as Antifa).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
P.O. Box 86620
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For purposes of this subpoena, you may limit the search to documents generated or received between May 1, 2019 and September 30, 2019.

Dated this ____th day of June, 2022.

s/James L. Buchal
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
P.O. Box 86620
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Attorney for Defendant

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 **SUBPOENA *DUCES TECUM***

To: BRAD KALBAUGH, OFFICE OF THE MULTNOMAH COUNTY DISTRICT ATTORNEY

YOU ARE HEREBY COMMANDED TO APPEAR before the Circuit Court for the County of Multnomah, 1200 SW 1st Avenue, Portland, OR 97204, on July 12, 2022, as a witness in a criminal action prosecuted by the State of Oregon against Joseph Gibson on behalf of defendant Gibson.

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

(a) Communications with any other public employee or official concerning the initiation of criminal charges against defendant Gibson, including both the determination to issue a criminal information, and the determination to put the case before a grand jury;

(b) Communications with Officer Christopher Traynor concerning his investigation of the events at Cider Riot on May 1, 2019;

(c) Discussion or reference to the political content of defendant Gibson's activities or "Patriot Prayer" activities within the City of Portland; and,

(d) Communications with any other public official concerning the lack of charges against those occupying the premises, including outdoor patio, of the Cider Riot Bar) on May 1, 2019 (generally referred to as Antifa).

James L. Buchal, (OSB No. 921618)
MURPHY & BUCHAL LLP
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For purposes of this subpoena, you may limit the search to documents generated or received between May 1, 2019 and September 30, 2019.

Dated this ____th day of June, 2022.

s/James L. Buchal
James L. Buchal, OSB No. 921618
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Attorney for Defendant

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 June 27, 2022, I caused the following document to be served:

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO QUASH

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

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