

**FILED**

JAN 12 2009

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERKIN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SPOKANE COUNTY

STATE OF WASHINGTON,


Plaintiff,

NO. 08-1-02444-1

vs.

TYLER W. GASSMAN,

Defendant.

DEFENDANT'S MOTION TO  
DISMISS FOR PROSECUTORIAL  
MISCONDUCTTO: CLERK OF THE COURT  
AND TO: PROSECUTING ATTORNEY**I MOTION**COMES NOW the Defendant, Tyler W. Gassman, through undersigned counsel and moves  
this Court to dismiss this case for prosecutorial misconduct.**II BASIS**This Motion is based upon the file, records, the Declaration of Counsel filed herewith, CrR  
8.3 and *State v. Martinez*, 121 Wash.App. 221 (2004).DATED: 1-12-09  
David Partovi, WSBA 30611  
Attorney for Defendant

MOTION TO DISMISS

- 1

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SPOKANE COUNTY CLERK**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR SPOKANE COUNTY****STATE OF WASHINGTON,****Plaintiff,****NO. 08-1-02444-1****vs.****TYLER W. GASSMAN,****Defendant.****DECLARATION OF COUNSEL  
DETAILING PROSECUTORIAL  
MISCONDUCT**

1. I am the attorney of record in the above-captioned case. Most or all of the allegations contained herein can be verified from personal knowledge by one or more of the attorneys which will appear before this Court Monday January 12, 2009 at 11:00 a.m.
2. The misconduct which forms the basis for the Defendant's motion to dismiss is extensive, spanning many cases, many months, many defendants and many victims. As such, it may be difficult to summarize succinctly but it is crucial for this Court to understand in ruling on the Defendant's motion and for background should the misconduct be allowed to continue.
3. In February of 2008 a horrific home invasion was perpetrated on Christopher Selfridge and his girlfriend, Yvonne Denham while two small children slept in an adjacent room. Two of the three invaders were armed with firearms, one of which scarred Mr. Selfridge's forehead when he was hit with the barrel.
4. Two days after the armed home invasion, Detective Marske had been provided with two suspect names by the victims. He took photo montages of Statler and Bewick to the victims and added a montage of Tyler Gassman because Gassman had been a co-defendant of Statler's some six or seven years prior. Victim Selfridge identified Statler and Bewick, but not Gassman. Victim Denham did not identify Statler or Bewick, but told Detective Marske that Gassman "looked like" one of the burglars. Det. Marske drafted an affidavit of probable cause, attached hereto as Exhibit A, in support of charging Statler, Bewick and Gassman with the home invasion. No further action was taken on the case for months.

- 1 5. As the early Spring of 2008 turned into the Summer of 2008, Matthew Dunham was  
2 identified as a suspect in a different home invasion along with his brother, Larry Dunham and  
3 their good friend, Nicholas Smith. All were adults except for Dunham who was old enough  
4 to be automatically declined as a juvenile.
- 5 6. After he and his friends and family were identified as suspects in one case, Matthew Dunham  
6 came forward through his defense attorney and wanted to talk to prosecutors in exchange for  
7 lenience. Rather than his friends and family, he identified the defendants now before the  
8 Court as having conducted multiple home invasions along with him over the Spring of 2008.  
9 In exchange for his testimony, the sole evidence against most of these defendants, Dunham  
10 was not declined as a juvenile and was given an exceptional reduction in his juvenile  
11 sentence. The Plea Agreement is attached hereto as Exhibit B.
- 12 7. At Gassman's first appearance on only the Selfridge home invasion, his attorney, Bevan  
13 Maxey, argued that "looking like" a home invader was insufficient probable cause to  
14 proceed. Chief Criminal Judge Leveque agreed and indicated to the State that he was  
15 inclined to dismiss. The State asked for one additional day for the assigned prosecutor to  
16 answer to the Court. The request was granted but rather than appear the next day, the  
17 assigned prosecutor dismissed the case without prejudice in a motion and certificate to the  
18 court, under oath, stating the probable cause affidavit did not support the charge at that time  
19 and that additional investigation would be done before the case was re-filed. That motion  
20 and certificate is attached hereto as Exhibit C.
- 21 8. Before Gassman could be released on the dismissed case, the State filed the two home  
22 invasions alleged against Gassman by Dunham. No independent evidence links Gassman to  
23 these home invasions and three alibi witnesses will vouch for his whereabouts on those dates.
- 24 9. Then, rather than doing any additional investigation on the Selfridge case as promised, the  
25 State simply had Det. Marske re-write the probable cause affidavit to remove the phrase,  
26 "looked like" and alleged that Victim Denham had actually identified Gassman as one of the  
home invaders. That second probable cause affidavit is attached hereto as Exhibit D. In the  
course of re-charging Gassman, the State actually raised his bond.
10. Two weeks before trial, the assigned prosecutor directed Eugene Cruz to take the Selfridge  
home invasion to trial.
11. Less than one week before trial in that Selfridge home invasion, counsel learned that the  
State had not spoken to Denham since the initial photo lineup. They did not talk to her  
between the dismissal and re-filing of the charge. Counsel for the State, Det. Marske, three  
defense counsel and an investigator were present.
12. Counsel's motion to dismiss for lack of probable cause and misconduct was denied on the  
day of trial and the case proceeded, but not before Gassman's other two cases were continued  
30 days for good cause so that case could go to trial. On day two, with a jury empanelled,  
counsel for the State spoke with the deputy who initially responded to the call. He learned  
that the deputy had been called by Selfridge the day after the home invasion, was given the  
suspect names of Statler and Bewick and that Selfridge could not identify either. The next  
day, with Marske, he did. The reporting deputy apparently authored a report to this effect,  
but no defense counsel has ever seen it.

- 1 13. With the Selfridge home invasion dismissed, this time with prejudice, the elements of  
2 malicious prosecution had been met: a prosecution instituted without probable cause and with  
3 reckless disregard for the rights of the Defendant resulting in a favorable outcome at trial.  
4 The remaining cases being weak for the State, counsel for Gassman approached the State  
5 with a release-dismiss agreement. If the State dismissed against Gassman, Gassman would  
6 release the State from civil liability for malicious prosecution. Rather than considering the  
7 offer, the State filed a grievance with the Washington State Bar Association. With minimal  
8 research, it is clear that such agreements are legal and ethical. *See Town of Newton v.*  
9 *Rumery*, 480 U.S. 386 (1987), *Musso-Escude v. Edwards*, 101 Wash.App. 560 (2000), *State*  
10 *v. Moen*, 150 Wn.2d 221 (2003) and *Lassiter v. City of Bremerton*, not published in F.Supp  
11 (WD Wash. 2007) Westlaw Citation 709030 ("simultaneous negotiations (of civil and  
12 criminal cases) are lawful and attorneys who engage in them are acting ethically when so  
13 engaged."). This was about the time counsel for Mr. Gassman began to realize that some  
14 motivation other than the facts and the law was moving these prosecutions.
- 15 14. As counsel all prepared for trial on the Dunham allegations, an email chain circulated  
16 between all attorneys initiated by Anna Nordvedt on behalf of Larson requesting interviews  
17 with witness Shawn Fowler. At first the State seemed interested in the attorneys' schedules  
18 but no meeting took place until 24 hours after it was ordered by the trial judge.
- 19 15. At the Fowler interview it was learned that attorney Senit Lutgen's partner, James Kirkham,  
20 had briefly represented Fowler on an unrelated matter.
- 21 16. On day two or three of the previous trial, the State served a subpoena on Deputy Public  
22 Defender Matthew Harget for the sole purpose of showing chain of custody of a video which  
23 was relevant to that case and which was in his possession before being given to the State.
- 24 17. The State sought to remove Senit Lutgen on a conflict of interest based on Kirkham's brief  
25 representation of the witness, Fowler. The State also sought to remove attorney Anna  
26 Nordvedt and the entire Spokane County Public Defender's Office on a conflict of interest  
based on the chain of custody testimony of Matthew Harget, a lawyer in that office.
- 18 18. When asked why Harget had not been on a witness list, a pre-trial report, contacted,  
19 interviewed or served a subpoena before day two or three of the trial, the State told Judge  
20 Leveque that it had not considered it would have to show chain of custody or lay foundation  
21 until Mr. Lutgen's motion in limine to exclude the video. For the Court's information, the  
22 video was a handheld video recording of a closed circuit camera being played on a monitor  
23 with the wrong date stamp and a counter that tended to show it had been manipulated.
- 24 19. Ultimately, Lutgen was allowed to withdraw, but Fowler waived the conflict as to Nordvedt.  
25 That all happened on Thursday, January 8, 2009 while 50-55 jurors sat and waited. The  
26 Court scheduled them to return on Monday, January 12, 2009 at 9 a.m. Mr. Gassman was  
prepared with cross examination, evidentiary challenges and three alibi witnesses some of  
whom were scheduled to miss work or school to testify. The case now before the Court was  
"trailing."
20. On Friday, January 9, 2009, counsel were summoned before Chief Criminal Judge Ellen  
Clark at 1:30 p.m. to discuss good cause to continue the case now before this Court. Rather  
than addressing good cause, we learned that the case scheduled to proceed Monday had been  
dismissed *ex parte* by the State and no notice whatsoever had been given to any defense

counsel. When asked on the record whether the case had been dismissed, counsel for the State indicated that the case had been "handled" and that the State was ready to proceed to trial on the case now before this Court. The State refused to say that the case had been dismissed and refused to say if it had been with or without prejudice. Mr. Gassman's counsel filed a Notice of Objection to a dismissal without prejudice because that case as well as the above-captioned case were both well into the speedy trial "buffer" if not beyond.

21. In the case which was apparently dismissed, or at least "handled" last week, the State had evidence that the crimes charged occurred and one witness who would allege they were committed by the named defendants. Assuming that a reasonable person would believe that witness, the State could have put on a prima facie case. On Sunday, January 11, 2009, counsel for Mr. Gassman spoke with Nona Fowler and Danny Neil, two of the victims in that case. Neither of them had been consulted or notified that the case had been either dismissed or "handled."


22. The Defendant has not had an opportunity to calculate his speedy trial because by the time he had notice that this case was scheduled for Monday, these files had been picked up to be brought into Court. Mr. Gassman believes that his speedy trial rights have been violated by the State's misconduct prosecuting cases without probable cause and dismissing cases with prima facie evidence. No legitimate reason stands out to have dismissed the case before Leveque other than to "sandbag" counsel on the case now before this Court.

23. In addition to the delay Mr. Gassman has already suffered, he is likely to suffer additional delay because of the jury pool currently convened, 55 of them have heard of his other case so they will be impermissibly prejudiced by the idea that he has two cases back to back. Moreover, those jurors who have not heard of his prior cases will be prejudiced once they learn that other jurors have. The State's intentional gamesmanship has not only cost Mr. Gassman his prospective jury panel, but has tainted the entire pool currently convened.

24. Based on the recent past, these violations are predicted to continue. Instead of allowing that, Mr. Gassman requests that this Court dismiss pursuant to its inherent authority to do justice and CrR 8.3.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: 1-12-09

  
David Partovi, WSBA 30611  
Attorney for Defendant