IN THE X COUNTY DISTRICT COURT X COUNTY COURTHOUSE

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| STATE OF WASHINGTON,  Plaintiff,  v.  JANE DOE  Defendant. | NO. 12345  MOTIONS TO DISMISS PURSUANT TO CrRLJ 8.3(b) AND DUE TO  SPOLIATION OF EVIDENCE |

# MOTION

COMES NOW the defendant, John Doe, through his attorney of record, Attorney X, and moves for dismissal of the charges on two separate grounds:

1. CrRLJ 8.3(b); and
2. Spoliation of Evidence.

These motions are based on CrRLJ 8.3(b) the Due Process Clauses of the State and Federal Constitutions, and the additional facts and authorities cited herein or offered at any hearing on the matter.

# DECLARATION OF COUNSEL

I, Attorney X, hereby declare and state as follows:

1. I am counsel for Jane Doe.
2. These Motions result from the loss of video footage of an alleged shoplifting incident and alleged misdemeanor assault. The incident is alleged to have taken place at the Safeway located at 90th Ave SE in Seattle, Washington. It is alleged that Ms. Doe shoplifted merchandise from Safeway but made a purchase at the same time. She was followed outside the store by Loss Prevention Officer Hunt (LPO) and within moments two officers from the Seattle Police Department arrived and approached Ms. Doe. At that point, the LPO grabbed Ms. Doe’s bags, pushed her to the ground, a struggle ensued and Ms. Doe was assaulted and tased and ultimately placed under arrest and transported to the X Police station. During the struggle, LPO Hunt claims Ms. Doe bit his hand. The booking photo of Ms. Doe shows her left eye to be swollen shut, a fresh cut on her forehead and a swollen lip. After Ms. Doe was released from custody, she was treated at Swedish hospital and received 6 stiches in her forehead. Medical Records are attached as Appendix A. Defense investigator David Snyder took additional photographs of Ms. Doe, attached as Appendix B.
3. There is no confession. No other witnesses are named in the discovery. The LPO did not receive medical attention and so no medical records will corroborate the LPO’s claim. A single, black and white photograph of the LPO’s hand was provided to the defense but a bite mark is not evident. During the LPO’s interview, the prosecutor suggested that a receipt, showing what Ms. Doe purchased at the store register, had been provided in discovery. It has not been provided. Nothing corroborates the LPO’s claim that Ms. Doe took items from Safeway that were not then paid for.
4. Ms. Doe has denied the allegations.
5. The presence of video surveillance cameras at this Safeway is pervasive. Those cameras are visible to the public. David Snyder, an investigator, canvassed the store shortly after this incident, to make note of how many video surveillance cameras there were and how they were configured. He took photos of each camera. Copies of those photographs are attached as Appendix C. Mr. Snyder is available to testify at any hearing on this Motion to Dismiss.
6. It is alleged that Ms. Doe selected items from Safeway shelves, put them in a reusable bag, and then left the store without paying for all of them. Therefore, it is relevant that there are multiple cameras mounted on the walls and ceilings at each of the four corners of the store. There are multiple cameras mounted on the ceiling at the east end of the store and throughout the store.
7. Large portions of this incident are alleged to have occurred just inside and just outside of store’s entrance/exit doorway.1 This includes the alleged assault. It is also

1 The Loss Prevention Officer acknowledged, during his recorded interview, that the alleged assault incident happened roughly ten feet outside the front door of the store, and thus, the

important, then, that there are cameras mounted on the *interior* walls immediately next to the entrances/exit doorways. There is at least one camera mounted on the *exterior* walls immediately next to the entrance/exit doorways.

1. It is alleged that Ms. Doe approached a register, but only paid for one of the items that she took from the store. Thus, it is important to note that there are 2 cameras mounted on the ceiling above each of the check-out lines.
2. Mr. Snyder counted approximately 26 cameras in all. Some of these cameras have attached screens, so that what the cameras see is also visible to the customers. Mr. Snyder took photographs of these screens. These screens demonstrate the high degree of detail that is picked up by the cameras. See Appendix A at 34, 36.
3. Mr. Snyder also interviewed the store general manager, John Smith, about the Safeway surveillance video system. Mr. Smith told him that the video surveillance cameras in his store are continuously recording. When there is a shoplifting incident, the loss prevention personnel decide on a case-by-case basis whether to retrieve and preserve video from any of the cameras that may have captured relevant portions of the incident. If a shoplifting incident escalates to the point where a loss prevention agent or a suspect is assaulted, this should typically trigger efforts to preserve the video.
4. Joe Hunt was the Loss Prevention Officer involved in this incident. Mr. Snyder interviewed Mr. Hunt on July 9, 2016. The interview was attended by a Mary Martin from the X County Prosecutor’s Office. The interview was recorded and a transcript has been provided to the prosecution.
5. Mr. Hunt’s credibility and testimony will be crucial to the State. Yet in his recorded interview, Mr. Hunt describes this incident in a number of ways that are inconsistent with his incident report. Mr. Hunt also describes actions or behaviors that are contrary to how he is trained to handle a shoplifting incident.2 Finally, Mr. Hunt was not even able to describe how the alleged bite happened. He said that at the time he put his hand up in Ms. Doe’s direction and “I must’ve turned my head ‘cause the next thing I knew I felt her teeth marks in my hand.” It was at that point that the SPD offices had to restrain her with their Taser. Hunt could not explain how Ms. Doe received injuries to her face.
6. But what happened during this incident is also in question because related video went missing after it was transferred to law enforcement. The video was requested by the

incident would have been captured on the video camera that is mounted on the wall right at that location. Much of law enforcement’s interaction with Ms. Doe’s and the LPO also occurred at that location.

2 Mr. Hunt signed a written document acknowledging receipt of a training manual. That training manual has been provided to the defense. The defense has provided this manual to the prosecution.

defense’s discovery demand. When the defense saw that video was not included in the discovery provided, they brought it to the prosecutor’s attention. But as of the time of the filing of this motion, it is not believed that the government has followed up on the missing evidence, much less found it. It has never been provided to the defense.

1. Mr. Hunt was asked about the video during the defense interview. Mr. Hunt explained that, when the officer was at the scene, they were all right in front of the camera mounted on the exterior wall of the Safeway entrance/exit. That camera would have been obvious to the officer.
2. More importantly, when the officer came to the scene, Mr. Hunt witnessed him ask the store manager for a copy of the video. In response, the store manager made a copy of the video footage for the officer. Mr. Hunt witnessed the manager give a copy of the video footage to the officer. The video was provided on a DVD.
3. Mr. Hunt also described his other actions associated with the case. Like a law enforcement officer, he made a decision about whether to stop Ms. Doe. Once she was stopped, he detained Ms. Doe. He filled out the Shoplift Report utilized by the X Police Department (XPD). He prepared a Narrative used by XPD and signed it under penalty of perjury, just as an officer typically would. He preserved evidence for the police. He did not follow up to obtain a copy of video footage, only because he claims he witnessed law enforcement ask for, and receive, the video.
4. Deputy Bungles was the officer who responded to this incident. Dep. Bungles participated in a recorded interview with the defense on July 15, 2016. A copy of the recorded interview, and the interview transcript, has been provided to the state. Dep. Bungles had a very limited memory of the incident, beyond what he had documented in his report. He remembered restraining and tasing Ms. Doe as a result of her being “uncooperative.” He could not explain how she received a cut on her forehead or how she received a black eye. He maintained that “she was kicking and being combative. She must have injured herself in the struggle.” He said that he may have asked for a video of the incident, but does not remember what was said in response. Having no independent memory, he could not say whether he received a video, other than to say that if he had, his practice would be to put it into evidence. Neither the presence nor the absence of video is referenced in any of his case reports.
5. Even before Mr. Hunt’s interview, the defense made its own efforts to verify whether video evidence existed. In addition to discovery requests, the defense obtained a *subpoena duces tecum* signed by this Court. After receiving the *subpoena duces tecum*, Safeway informed the defense that the videotape no longer existed. It would have to be obtained from the police.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

Attorney X Date and Place Signed

# THE IMPORTANCE OF VIDEO TAPE EVIDENCE

*Seattle v. Fettig* is a Division One case considering the utility of video footage in a similar situation. 10 Wn.App. 773, 519 P.2d 1002 (1974). The Court reversed the defendant’s conviction after the “negligent” destruction of video tapes which showed the defendant’s performance on field sobriety tests, explaining:

The crucial question then, is whether the video tape was “material evidence favorable to a defendant.”

The police officer witnesses were permitted to testify as to their observations regarding Fettig’s performance on the physical tests. The video tape was a record of that performance, either substantiating or rebutting the officer’s testimony. It was

therefore material to Fettig’s case since the testimony of the officers was the only evidence admitted against him, except the rebuttal presumption of intoxication evidenced by the .12 breathalyzer reading. *See Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965).

A reasonable probability that the suppressed video tape tended to rebut the police

testimony while corroborating the defendant is indicated by the defendant’s offer of proof. We therefore hold that the video tape was favorable within the meaning of *Brady v. Maryland, supra*.

The requirement of Brady that the suppressed evidence be material and favorable to the defendant is satisfied. The negligent destruction of the video tape therefore violated the due process clause of the Fourteenth Amendment.

*Seattle v. Fettig*, 10 Wn.App. at 775-76.

In this case, the video footage would have shown Ms. Doe entering the store. It would document whether she came into the store with anything in her bags. It would document whether those bags were bulky or hanging as though they were empty. It would document Ms. Doe’s demeanor at the time she entered the store – was she behaving furtively or suspiciously?

In this case, the video footage would have shown Ms. Doe in some of the aisles and walking around the store. It would have shown what Ms. Doe took off of store shelves and where Ms. Doe placed any merchandise removed from the shelves. It would have shown whether she was behaving furtively or suspiciously at that point.

Video footage would have shown her walking between the aisles and whether she rearranged any of the merchandise, to a different location on or about her person, as she walked around the store.

Video footage would have shown Ms. Doe as she went through the check out and paid for merchandise. It would have shown what was rung up by the cashier and the method of payment. It would have shown the distance between Ms. Doe and the LPO as she paid for her items and left the store. It would have shown Ms. Doe’s demeanor at that point, so that a jury could see whether it was suspicious. It would have shown precisely what happened as Ms. Doe left the store, was stopped by the LPO, was detained and assaulted by the LPO and the XPD officer and committed the alleged assault against the LPO. It would have shown how Ms. Doe behaved and how the LPO and the XPD officer behaved. It would have shown if the LPO’s hand ended up in Ms. Doe’s mouth as the LPO put his hand up and “turned his head away”. It would have shown whether what occurred was actually an assault. It was have shown the unprovoked assault and tasing of Ms. Dow and how she received the facial injuries and the black eye.

# ANALYSIS OF CrRLJ 8.3(b) MOTION

1. **CrRLJ 8.3(b) provides for dismissal when a defendant’s right to a fair trial is compromised.** CrRLJ 8.3(b) provides:

The court, in furtherance of justice, after notice and hearing, may dismiss the criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. The court shall set forth its reasons in a written order.

CrRLJ 8.3(b) is identical to CrR 8.3(b), which has been interpreted thusly by the Washington Supreme Court:

Dismissal under CrR 8.3(b) requires a showing of arbitrary action or governmental misconduct, but the governmental misconduct need not be of an evil or dishonest nature, simple mismanagement is enough.

*State v. Brooks*, 149 Wn.App. 373, 384, 203 P.3d 397 (2009), *citing State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). It also requires the defendant to show that such action prejudiced his right to a fair trial. *Brooks*, 149 Wn.App. at 384. The trial court’s decision to dismiss pursuant to CrRLJ 8.3(b) will not be overturned unless there has been an abuse of discretion. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

1. **A defendant’s right to a fair trial is violated when the government fails to turn over discovery materials which are reasonably likely to be helpful in raising a reasonable doubt as to any element of the crime, establishing a defense, or mitigating punishment**. The right to a fair trial necessarily encompasses the right to the production of material, impeaching or exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992). This requirement derives from the government’s dual role as sovereign and a party in criminal cases. A prosecutor’s obligation is not to win all cases that she handles, but to act

impartially to see “that justice shall be done.” *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed.1314 (1935), *quoted in Strickler v. Greene*, 527 U.S. 263, 281, 199 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). A just, fair trial can only be ensured when the government gives the defense all material, exculpatory or impeaching information it possesses. *Strickler*, 527 U.S. at 282.

The test for materiality under *Brady* … has often been phrased by the Supreme Court only in post-trial form: evidence is material if its suppression would undermine confidence in the outcome of the trial. *U.S. v. Bagley*, 473 U.S. 667, 678 (9th Cir.

19995). Because of the difficulty of applying *Bagley* in the discovery phase and misapplication of the test by the Court of Appeals, the Supreme Court clarified four aspects of materiality in *Kyles v. Whitley*, 514 U.S. 419 438 (1994). First, the dispositive question is whether the defendant would receive a fair trial in the absence of the evidence, not whether the missing evidence would more likely than not result in a different verdict. A showing of materiality does not require demonstration by a preponderance that the disclosure of the evidence would ultimately result in a defendant’s acquittal. *Kyles*, 514 U.S. at 434. Second, *Bagley*, does not present a sufficiency of the evidence test. A defendant need not demonstrate that there would be reasonable doubt once the suppressed evidence is brought to light. *Id*. at 435.

Third, once the requirements of *Bagley* are met, a reviewing court should not conduct a harmless-error review. *Id*. Fourth, whether nondisclosure amounts to constitutional error on review is judged by the cumulative effect of all suppressed evidence. *Id*. at 436.

In sum, *Brady* and *Kyles* require the government to turn over all requested discovery materials which are reasonably likely to be helpful in raising a reasonable doubt as to any element of the crime, establishing a defense, or mitigating punishment.

In this case, the value of this evidence was readily apparent to any reasonable officer investigating the case. An eyewitness verifies that the evidence was sought by and provided to Dep. Bungles. The evidence was lost after it was in the government’s possession. The State made no efforts to follow up and obtain the video. The defense has been unable to obtain the video through other means. On the whole, the government’s handling of this case has resulted in the loss of crucial evidence that would corroborate Ms. Doe’s claim in a case that is otherwise a “he said/she said.” It is appropriate to dismiss this case under CrRLJ 8.3(b) due to mismanagement that prejudices Ms. Doe’s right to a fair trial.

# ANALYSIS OF SPOLIATION MOTION

The due process protections afforded to a defendant require the State to disclose

evidence when it is material to the issue of guilt or innocence. *See Brady v. Maryland*, 373

U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 96 S.Ct.

2392, 49 L.Ed.2d 342 (1976); *State v. Judge*, 100 Wn.2d 706, 675 P.2d 219 (1984). In

*Judge*, the Washington Supreme Court explained:

The State is “required to preserve all potentially material and favorable evidence.” This rule, however has not be interpreted to require police or other investigators to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case. **The police are required only to preserve that which comes into their possession either as a tangible object or a sense impression, if it is reasonably apparent the object or sense impression potentially constitute material evidence.**

(Emphasis added.) *State v. Judge*, 100 Wn.2d at 216-17.

Washington has also adopted the “Youngblood standard” to assess the state’s obligation to preserve exculpatory evidence. *See State v. Wittenbarger*, 124 Wn.2d 467, 481, 880 P.2d 517, 524 (1994) (adopting the standard from *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). This test makes the good or bad faith of the government irrelevant when the government fails to preserve material exculpatory evidence.

The charges should be dismissed without requiring a showing of bad faith if:

1. The exculpatory value of the evidence was apparent before it was destroyed; and
2. It was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

*Wittenbarger*, 124 Wn.2d at 475.

Under the Due Process Clause as interpreted in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the good or bad faith of the State is also irrelevant when the State fails to disclose to the defense materially useful evidence. *Youngblood,* 488 U.S. at 57, 109 S.Ct. at 337. In *City of Seattle v. Duncan*, the Court also explained the first part of the test in this way: was there a “reasonable possibility that the missing evidence would have affected the defendant’s ability to present a defense.” *City of Seattle v. Duncan*, 44 Wn. App.

735, 739-40, 723 P.2d 1156 (1986). Accordingly, this is not the same as proving that the evidence would result in an acquittal.

In this case, the officer was required to preserve the video that was brought to his attention and given to him. At the time the officer was given the video, he knew that Ms. Doe was not admitting guilt. He had been told about the incident and thus presumably knew that he was not taking statements or noting the presence of other witnesses. He would have known that the photograph was inconclusive (at best) and that there was no receipt showing what Ms. Doe did and did not purchase. He knew that the store had video cameras. The officer treated this case casually and the prosecution has not followed up on the defense requests that the video be obtained before it was destroyed. This video was crucial evidence and comparable evidence cannot now be obtained. Dismissal is appropriate.

# CONCLUSION

This case is a “he said/she said” without corroboration of the prosecution’s allegations. The video footage was crucial evidence material to Ms. Doe’s defense. The value of the footage would have been readily apparent to law enforcement and the government. The state’s primary witness – one that the need to have believed in order to prove their case – verifies that the video footage was requested by the police, and then downloaded and provided by DVD. When the defense did not receive footage in discovery, it immediately followed up with the state and made its own efforts to obtain the evidence. To the defense’s knowledge, the state has made no effort to obtain the missing evidence, and it is now unavailable from the store. This case involves mismanagement prejudicial to Ms. Doe’s right to a fair trial. As a result, this case should be dismissed pursuant to CrRLJ 8.3(b). This case should also be dismissed due to spoliation, under the test created in *Arizona v. Youngblood*.

DATED THIS 7th Day of August, 2016.

By Attorney X