IN THE CIRCUIT COURT FOR THE
TWENTY-SECOND JUDICIAL CIRCUIT
CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642
v.	)	
	)	
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S SECOND SUPPLEMENTAL
REPLY IN SUPPORT OF THE MOTION TO DISMISS

There can be no doubt that this is a most unusual case - a statute used in a fashion which no prosecutor had ever done before, a race to the grand jury to avoid even talking to the target's attorneys, the use of a private investigator- sidestepping any involvement by the St. Louis Metropolitan Police Department, the hiring of a "special" assistant Circuit Attorney not licensed in Missouri, a "victim" whose only request was to be left alone, all resulting in the indictment of a sitting Governor.

As details came out, this case only got stranger – the special prosecutor appeared to be violating Missouri law by his participation, the police department said the Circuit Attorney was not telling the truth when she said she had asked for its help, a video-taped interview of the key witness somehow is viewable for the first time months after the interview, the alleged victim has now said some of her memories may have been from dreams, and the private investigator not only had been found to have violated Alabama law and demoted by the FBI for misconduct, but he perjured himself in his deposition in response to almost every question he was asked, with the Circuit Attorney knowingly watching on.

Additionally, one of the early revelations which makes this case most unique is the admission by First Assistant Circuit Attorney Steele that the office indicted the case without having evidence to prove its case in court, and explained to the Court, "we did not have a significant amount of time to do any research and investigation into the case prior to the Grand Jury." February 28, 2018 transcript, page 3. Notwithstanding the statute of limitations had at least 30 more days, the indictment was presented to the grand jury on an unexplained expedited basis when the Circuit Attorney had less than sufficient evidence. Now with multiple weeks-worth of discovery, it has become self-evident how true Mr. Steele's revelation was.

Lack of evidence, questionable motives (whether for self-promotion or at the urging of political operatives), ignoring normal protocol, and possibly the fear of public embarrassment fueled the prosecution team's misguided efforts to try to win at all costs. And, there can be no doubt, the Circuit Attorney herself was driving this runaway train. She signed the indictment, she hired the special investigator, she presented to the grand jury, and she has attended both court proceedings and discovery depositions. All of this has resulted in gross misconduct on the part of multiple members of the prosecution team. Some of the misconduct is criminal in nature. All of it is unethical and against the rules that control our criminal justice system. None of it should be tolerated.

Furthermore, while the evidence is overwhelming of Ms. Gardner's participation in gross prosecutorial misconduct, she would have to assume just as much responsibility for Mr. Tisaby's conceded egregious misconduct even if he had done it all without her knowledge. It was the Circuit Attorney, and no one else, who decided to avoid using the St. Louis Metropolitan Police Department, thereby eliminating the routine production of reports. It was Ms. Gardner, and no one else, who publicly provided an explanation for not using the St. Louis Police which the

Department then publicly refuted. It was Ms. Gardner, and no one else, who on her own selected Mr. Tisaby's company. It was Ms. Gardner, and no one else, who signed the contract which called for only oral reports unless she specifically requested otherwise. It was indisputably Ms. Gardner who set up this investigation so that she could control the flow of discovery (Mr. Tisaby even testified that he rarely sent emails to Ms. Gardner, but mostly communicated with her in person). It was Ms. Gardner who selected an investigator who had a highly tarnished resume. And, it was Ms. Gardner who put herself in charge of supervising Mr. Tisaby.

The actions of Ms. Gardner, Mr. Tisaby and possibly others are outrageous. A video interview was hidden, and once found the Circuit Attorney and her First Assistant told the Court conflicting stories as to how the tape ever allegedly "malfunctioned." The investigator boldly and continually lied under oath, concealing his notes, concealing his draft reports, and lying as to how he conducts interviews and investigations. The lying and concealing of evidence was demonstrably motivated by the desire to hide exculpatory evidence. Large portions of at least one interview were never put in the report of interview, lines of information which even Mr. Steel agreed were exculpatory were removed from final reports. The Court was specifically told everything was turned over, when almost nothing had been turned over. And, modified witness statements were used to mold witness testimony. All of this involving a case the prosecution admits it indicted without sufficient evidence to convict.

As discussed below, the need for the most severe sanction is necessary because members of this prosecution team have been sanctioned before for delay in discovery production. The

previous sanction clearly did not have the needed impact of deterring such misconduct. This case shouts out for dismissal.[1]

I. Undeniable Lack of Evidence

What is indisputable at this point is that this case is almost entirely about the alleged taking of a photograph. However, there is no photograph. Not only has no photograph ever been produced in discovery, but Mr. Tisaby, the Circuit Attorney's private investigator, was asked in his deposition "But you have not seen any alleged picture? He responded. "No, I have not. ***I don't think anybody has***." In fact, he testified ***"I don't know whether one exists or not***." (emphasis added). No one has seen a photo, and no one knows whether one exists. Even KS testified that not only has she never seen a photograph, she never saw a camera or an iPhone which could have been used to take a picture (except perhaps in a dream).

The lack of a photograph was known from the beginning. But, on a hope and a prayer, the Circuit Attorney decided to nevertheless indict the Governor. This ill-advised step is at the root of the misconduct which followed. As Mr. Steele announced in Court at the very beginning (with Ms. Gardner sitting right next to him), the State indicted the case without sufficient evidence to obtain a conviction. Clearly, the bold move of indicting the sitting Governor without the key piece of evidence created a drive to win at all costs, but, an approach contrary to how any prosecutor should deal with any case.

Because no one has ever seen a photograph, no one has ever been able to testify what the alleged photo showed. Could it have been of the floor, of the ceiling, of KS's feet? The State must

[1] While we have attempted to be thorough in this pleading, we also incorporate the facts and arguments set out in the three other pleadings we have filed on this issue. See Defendant's Motion to Compel Immediate Production of all Exculpatory Information, Defendant's Reply in Support of His Motion for Sanctions, and Defendant's Supplemental Brief in Support of Motion for Sanctions.

prove beyond a reasonable doubt that it was a photograph of KS at least partially nude. However, the proof of an image of full or partial nudity was non-existent at the time of the indictment, and is non-existent today.

Moreover, for the State to win at trial, it must have more than just a picture. The indictment specifically alleges that there was a subsequent transmission of the picture to make it accessible to a computer. The State loses if it cannot produce a photograph. It likewise loses even if it had a photograph if it cannot prove a transmission. Yet, the Circuit Attorney's Office has also admitted in court that there is "no explicit evidence" of transmission of any photo. In her deposition, KS even testified she had no knowledge of a transmission. Proof of a transmission was non-existent at the time of the indictment, and is non-existent today.

Not only must the Circuit Attorney produce a photo and evidence of a transmission, but it also must establish lack of consent. As to the element of consent, the CAO has at best one witness who could testify about the consent to have a photograph taken – KS. However, with all due respect for KS, her story has enough holes in it that neither this Court nor any jury could rely on any of her testimony. But, many of these holes were not all readily apparent to the defense when this case first began because as the Court has already seen, significant and improper steps were taken to conceal evidence from the defense. This condemnable behavior grew out of the obvious concern that the prosecution shot before it took aim and now did not know how to extricate themselves from their initial blunder.

The lack of evidence is not only important to understanding the motive for the Circuit Attorney and her specially hired investigator to lie and hide evidence, but it is also important in assessing the prejudice and harm caused by their misconduct. Were this a case where there existed substantial evidence of a crime, the Court might be able to rationalize that the misconduct

was harmless. But here, where there is literally no evidence of several of the essential elements of the charged offense, each concealment and each lie takes on added importance.

II. The Evidence of Political Motivation

When a prosecutor is motivated by anything other than seeking justice, the chances of a bad result are almost always guaranteed. Here there are two undisputed pieces of evidence which strongly suggest the Circuit Attorney has brought this case at least in part because of political motives. First, the use of a statute in a way never before utilized for a matter which most certainly involves private and personal conduct raises real questions of politicizing. Second, Ms. Gardner specifically asked for a trial date of the Monday before the next General Election. It is almost impossible to believe that was mere coincidence. Then, we learned only from the testimony of P.S. before the House committee that someone is funding him for his efforts in getting this story out to the public. It is impossible to believe that does not have a political angle.

III. The Misconduct has Been On-going Even Before the Indictment

As has been fully set forth to the Court before, Ms. Gardner and Mr. Steele had grand jurors directly question them as to their concerns that there was no proof that a picture was taken. During this grand jury session, Mr. Steele provided the grand jury three different explanations of the applicable law. All three were blatantly incorrect. See, Defendant's Motion to Dismiss Based on False and Misleading Instructions to the Grand Jury. The lack of evidence in combination with such wrong illegal instruction given to the grand jury, means this case was from the start tainted. Timely and full and complete discovery under such circumstances was imperative – particularly given the defendant was the sitting Governor. But, as discussed below, discovery was anything but timely or full or complete.

IV. The Misconduct is Egregious, Continual, Prejudicial and Sanctionable

A. The Most Recent Damning Evidence – The J.W. Interview

As has come to be expected at this stage of the case, new evidence of the lies and concealment arise almost daily. This week, on Tuesday, J. W. was deposed. As the Court may recall, notes related to Mr. Tisaby's interview of J.W. were first claimed to not exist. At his deposition, Mr. Tisaby confirmed -- under oath -- that he had no detailed notes of the interview, that the summary included all information provided by J.W., and that he did not have drafts of the witness statement. Even after multiple defense motions and a hearing in-chambers where the Court addressed the seriousness of the allegations of lies and concealment of evidence, no Tisaby notes regarding J. W. were turned over on Thursday, Friday or Saturday. Only after the defense sent an e-mail threatening to go to Court did the Circuit Attorney turn over on Sunday, ten pages of never-before-disclosed Tisaby notes and draft reports.

Then during the Tuesday deposition of J.W., she disclosed that back on February 19, 2018, before the indictment, Mr. Tisaby had e-mailed her and her attorney the typed draft of his report of interview of J.W. Almost a full month before the draft report was provided to the defense, it was provided to J.W. Yet, as the Court will recall, the defense had been promised weeks ago that we had everything, including the following representation:

1. February 28, 2018 transcript, page 9, Ms. Gardner told the Court she needed a November trial date because "[w]e still have reports that need to be done and turned over."

2. March 6, 2018 transcript, page 15, Ms. Smith, with Ms. Gardner sitting next to her, stated "Statements of witnesses will absolutely be reduced to writing and turned over to the defense."

3. Ms. Smith also said, "we will make sure if there are any things that are not contained in the report, and I candidly can't imagine anything that would fall into that that hasn't been

turned over, but should there be anything, it's turned over in advance of the deposition and then they have an opportunity to question about it."

4. Still, on March 6, the Court specifically asked whether all discovery except grand jury transcripts had been turned over, and both Mr. Steele and Ms. Gardner said yes.

5. Subsequently, on March 15, 2018, the Court held a hearing to address the State's motion to quash the Tisaby subpoena duces tecum. Mr. Dierker (who is not a part of the problem) stated that Rule 25.03 called for "written statements, notes, memoranda, reflecting statements of endorsed witnesses." March 15, 2018 transcript, page 9-10. Notwithstanding all these statements in court, and as the Court now knows, the defense did not receive close to everything that Rule 25.03 requires to be disclosed.

The failure to provide the draft report of the Tisaby J.W. interview until April 15, when it was being distributed to others as early as February 19 is not merely just another instance of indisputable evidence showing Tisaby lied under oath. Rather, if back in February, Tisaby was sharing his draft interview report outside the Circuit Attorney's Office, it is unfathomable to believe that the Circuit Attorney did not know of the draft's existence until April 15. This brand new revelation is another concrete demonstration of Ms. Gardner's full participation in the lying and concealing of evidence.

So, why was the draft report not turned over until Ms. Gardner realized she was going to have another difficult day in court? Because this draft report was being ever so slightly modified to eliminate exculpatory evidence. That eliminated exculpatory evidence included:

1. Mr. Tisaby wrote down in his notes that K.S. and P.S. were seeing a marriage counselor. Mr. Tisaby omitted this from his final report, perhaps because it did not fit the

narrative advanced by P.S. of the cause of his divorce from K.S. or because it could lead to discovery by the defense of materials in the counselor's possession.

2. Mr. Tisaby wrote down in his notes that J.W. -- who knew P.S. well -- was "concerned that PS would do something detrimental to Greitens." Mr. Tisaby omitted this from his report, perhaps because it is inconsistent with P.S.'s testimony that he was not motivated by dislike for the defendant in releasing his tapes. This statement is of obvious import for the deposition of P.S., but the Circuit Attorney did not disclose it.

But, the most significant evidence is:

3. Mr. Tisaby wrote in his notes that J.W. (who spoke to K.S. about the March 21, 2015, encounter shortly after it took place) "felt K.S. thought he cared about her." This information is exculpatory and material anyway it is diced. It would have been a focus of the deposition of K.S. Indeed, J.W. talked directly to K.S. about the events of March 21, 2015, shortly after that date. K.S. described the events to her in some detail. J.W. reported to Tisaby that K.S. was nervous because she was married, and not because of anything that the defendant did that was unlawful in some way. Based on what K.S. said and K.S.'s demeanor and voice, J.W. concluded that "K.S. thought he cared about her." A person would never act like another person "cared about" them if that person had victimized them in some way. Moreover, the statement directly contradicts the quote K.S. made to the House committee, "I was a thing to him." The statement is core Brady material and it was intentionally omitted from the final report.

If there is any dispute that such information is significant and exculpatory, one needs only look at what else the defense was able to obtain from J.W. in her Tuesday deposition.

1) J.W. testified that Mr. Greitens rubbing of K.S.'s leg in the salon was part of the "flirtation" going on in the salon. (not some unwelcomed advance). J.W. Deposition Transcript at 9.

2) J.W. testified that K.S. told her very shortly after March 21 that she "felt like she was special." (contradicting any image of K.S. as a victim). Id. at 12.

3) J. W. testified that "everything that K.S. told [her] in 2015 and [her] observations of her demeanor, [she] believed that this was an affair between two consenting adults that happened to be married." (it was fully consensual). Id. at 14.

4) J. W. testified that she viewed both participants as having chosen to participate in the affair. Id. at 15.

5) J. W. testified that K.S. never indicated that she resisted or opposed being taped to the exercise rings or that it was against her will. Id. at 15-16.

6) J.W. testified that based on what K.S. told her in 2015 she "had no reason to believe Mr. Greitens had ever physically assaulted K.S. in the sense of hitting or slapping." (refuting claims of a slap). Id. at 18-19.

7) J. W. testified that based on what K.S. told her in 2015, the reason for any discomfort or nervousness by K.S. during the affair "came from the fact they were both married." Id. at 20-21.

The Court might at first assume that the ability to obtain all these exculpatory statements would suggest that the lies told and evidence relating to J.W. concealed by Tisaby and Ms. Gardner did not prejudice the defense. But such should not be assumed. First, given the total lack of credibility of Mr. Tisaby (as admitted to by the CAO), there is no way to know what other exculpatory evidence never made it even into Mr. Tisaby's notes. The removed information was

clearly Brady. Ms. Gardner was required to turn it over whether it made it into a report or not. The failure to do so demonstrates that there can be no ability to rely on all exculpatory information being produced. That is prejudicial.

Obviously, it is also prejudicial that the defense did not have this information when it deposed K.S. Instead, K.S. became locked in and committed to testimony without the benefit of complete cross-examination.

It is undisputed that Tisaby lied about the existence of these notes and draft reports. In fact, at the hearing on April 16, Mr. Dierker admitted Mr. Tisaby was a liar. But, it is also undisputed that Ms. Gardner attended the deposition where Mr. Tisaby lied under oath about 1) whether he took any notes, 2) whether he asked any questions, 3) whether he prepared any drafts, and 4) whether he included everything that J.W. said in his report of interview. The Circuit Attorney has never disputed that Tisaby made all these false statements.

So, how do these lies relate to the conspiratorial nature of the overall lying and concealment of evidence? Because exculpatory information was removed from the report of interview provided to the defense, to avoid exposure of that lie, they also had to conceal, and therefore lie about, the existence of notes and the existence of draft reports because they contained the deleted exculpatory information.

The Circuit Attorney may argue that the known facts related to the J.W. interview do not indisputably show that she knew Tisaby was lying about the notes, the drafts, the questioning and the removal of information. However, the direct and circumstantial evidence is overwhelming. First, it simply is illogical that Mr. Tisaby would include the exculpatory information both in his notes and in his draft report and then on his own remove it from the version provided to the defense. Second, it is highly improbable that Mr. Tisaby would have

provided the draft report to J.W. in February and Ms. Gardner did not learn of the draft report until mid-April. Third, not only is the same pattern of lies seen regarding K.S.'s interview by Mr. Tisaby, but, as discussed below, we know indisputably as to the same set of lies, and others, Ms. Gardner absolutely knew of them and permitted them without correction.

B. The K.S. Interview Lies

Having seen the video interview, it is indisputable that Ms. Gardner knew Mr. Tisaby was lying under oath when he said he did not ask any questions—Ms. Gardner can be seen telling him questions to ask. It is likewise indisputable that Ms. Gardner was sitting right next to Mr. Tisaby when he wrote 11 pages of notes - including stopping K.S. to repeat what he took as exact quotes and stopping her to help him with the spelling of names – and did not observe the note taking. As set out in earlier pleadings, no one disputes that Mr. Tisaby lied multiple times about the notes. Ms. Gardner had to know he was lying.

1. Gardner Knew Tisaby Lied About What Information He Got From Gardner

Ms. Gardner herself presented the best evidence that she had to know Mr. Tisaby was lying about his interviews and the reports of interview. On April 12, 2018, in her memorandum in opposition to defendant's motion to compel and for sanctions, the Circuit Attorney admitted in the memorandum filed in this Court that she gave Tisaby a "briefing … based on a prior oral interview of the victim." Opposition, p. 2. She also admitted that this briefing resulted in the six pages of typed up notes onto which Mr. Tisaby wrote his interview notes.

> Those notes consisted in part of bullet points prepared by Mr. Tisaby from a briefing by the Circuit Attorney (based on a prior oral interview of the victim by the Circuit Attorney).

Opposition, page 2. Thus, the Circuit Attorney admitted that she briefed Mr. Tisaby about her January 24 interview before the January 29 video interview of K.S.

However, Mr. Tisaby blatantly lied, again under oath, about this briefing. And Mr. Tisaby lied for a reason: he claimed that he did not want information from the Circuit Attorney before the interview because he wanted to do an "independent" investigation of K.S.'s allegation that was not tainted by information from the Circuit Attorney. Thus, Mr. Tisaby had a point to this lie, which was to suggest that the investigation was not tainted by politics. The Circuit Attorney went along with this lie, presumably for the same reason.

Specifically, Mr. Tisaby testified under oath that the Circuit Attorney "did not" tell him what the witness had said in the earlier interview between K.S. and the Circuit Attorney. Tisaby Dep., 62:10-12. Mr. Tisaby testified, under oath, that he "specifically did not want to hear what she told the Circuit Attorney." Id. at 62:13-14. He was asked:

> Q. "... were you provided any information as regarding what [K.S.] told Ms. Gardner in her interview?
>
> A. Mr. Martin, no, sir, because I wanted to independently get my own take of the thing. I did not ask the Circuit Attorney what her take was. I did not ask for any notes or anything else. I just -- I just wanted to have an opportunity to talk to -- talk to [K.S.] and just let her tell her side of the story." Id. at 51:22-52:5.

Then, this testimony was given:

> Q. "Okay. My question wasn't what you asked for. My question was were you provided any information from the interview that Ms. Gardner conducted of K.S.?
>
> A. No, sir, period." Id. at 52:6-10.

Ms. Gardner knew this testimony was false because she in fact briefed him on the earlier interview. Yet, she did nothing to correct the false testimony. Likewise, she knew he asked questions in the interview, but she did not stop Mr. Tisaby from saying he asked no questions. She knew he took notes, but she did nothing to stop Mr. Tisaby from lying about the notes. In fact, she proactively encouraged him to lie:

Q: "And when you met with [K.S.] who was present?

A: Her attorney and yourself, Ms. Gardner.

Q: **And at that meeting, was there any notes that you took?**

A: **No."** Tisaby Dep., 295:8-13.

The Circuit Attorney chose to bring forth even more false testimony:

Q: **"Was every handwritten note that you talked about turned over --**

A: **Yes."** Tisaby Dep., 293:15-17

The Court should also consider that not only did Ms. Gardner observe Mr. Tisaby taking notes in the video, but even if she were blind, she would know such a claim as told by Tisaby was preposterous.[2] Not only did he testify, with her sitting there, that he took no notes at either interview (unbelievable from a former FBI agent to begin with), but she sat there and heard him testify that he never in his career took notes.

Q: "Your testimony is that every time you have ever done an interview, you just listen and only at the end of the interview do you write down the substance of what the witness said?

A: Yes, sir. Yes, sir. My whole career. My whole career.

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[2] His words also showed he was taking notes.

> Mr. Tisaby: Hold on a second [K.S.]. His exact words were what? I need to get his exact words.
>
> K.S.: Oh.
>
> Mr. Tisaby: You said?
>
> K.S. Yeah.
>
> Mr. Tisaby: What you just told me. I mean I need to get it down pat. I don't want to paraphrase that. Tr. of K.S. Video Interview, 11:23-12:5.

Q: You don't take notes while the witness is talking?

A: I sit and -- I sit and -- I sit and take in everything that they say, Mr. Martin.

Q: You take it into your brain?

A: Yes, sir.

Q: But you don't write it down?

A: I don't write it down." Id. at 115: 6-19.

No rational person could believe a former FBI agent went his whole career and never created any interview notes. If Ms. Gardner now wants to claim she believed that testimony, then she will be lying directly to the Court.

And again, why would Mr. Tisaby and Ms. Gardner conspire to lie and conceal regarding the interview of K.S.? Because disclosure of the video tape and the Tisaby notes, would provide exculpatory information. There would be no other reason for the multitude of lies told, suborned and permitted.

2. K.S. Interview Had Omitted Exculpatory Information

Indisputably, there were significant and exculpatory facts left out of the Tisaby report. First, K.S. said on the tape that in 2018, she went to her friends who she had told everything to back in 2015 and that they did not remember being told about any alleged slap. Mr. Tisaby asked her "Did you relate that – did you relate that he slapped you?" and K.S. responded by stating, "So neither one of them remember that." Similarly, KS said in the video that she was "turned on," "curious" and that she "d[idn]'t even know" how she was feeling during the events of March 21, but somehow those statements are left out of the memorandum.

Further, another collection of information K.S. provided in her video interview that Mr. Tisaby completely left out of his report of interview was the near 20 minutes he asked questions

about P.S. During that segment, having heard what K.S. was saying about P.S., Mr. Tisaby himself asked "[d]id you beg him not to release this stuff (inaudible)and this what he been hanging over your head threatening you from day one?". . . Imean, in your own words you just felt that he just continued to harass you with that story, the threats -- of going public. Very much have you scared?"

Not only was none of that portion of the interview included in the report of interview, but the presentation of P.S. to the grand jury, attended by both Ms. Gardner and Mr. Steele, made P.S. appear to be only trying to be compassionate with K.S. This contrast, not known until the video appeared, proves the prosecution presented known false testimony when it allowed P.S. to testify.

3. The Tisaby Interview Report Contained False Information

In addition to omitting exculpatory information on the tape, the interview memorandum includes incendiary statements that were never said by K.S. in the video. The tape shows the investigator added words and concepts that are not in the tape itself. In short, it was not K.S. who used loaded terms like "traumatized" or "violated" but rather it was the investigator who put words in the memorandum that just were never said in the taped interview. Mr. Tisaby even places words in quotes in his summary that K.S. just does not say anywhere on the tape regarding, for example, what K.S. was thinking at work on the day in question. Yet he falsely testified under oath that if he used quotation marks, they were the exact words of K.S. at the interview. Tisaby Dep., 160: 12-23. In short, several of the worst allegations in the interview report are not in the tape at all, but those words now manage to make their way into the description of events being advanced by the prosecutors and were elicited at the grand jury.

Despite this, the Circuit Attorney proceeded to obtain the following false testimony that is not close to being true:

Q: "Mr. Tisaby?

A: Yes.

Q: To the best of your recollection, is this report a true, accurate summary of what was stated by [K.S.]?

A: Accurate summary what she told me." Tisaby Dep., 341:10-15.

Ms. Gardner could not possibly have been unaware of Tisaby's falsity when claiming he tried to make his two reports near verbatim and include everything the witness told him. Mr. Tisaby's final report of interview for K.S. includes a multitude of cut and paste sentences not from his notes, but from the typed notes which were the product Ms. Gardner's briefing him about the January 24 interview which he did not attend. If she ever read his report, she would have had to know that much of his report was never said in the video interview.

One specific example makes this clear. During Tisaby's deposition, the Circuit Attorney elicited false testimony on the subject of consent. She asked Mr. Tisaby "[d]id she consent to oral sex at that period [referring to March 21] to the best of your knowledge? Tisaby responded that K.S. said "he place his d*** in her mouth." While such a statement may sound non-consensual, the tape shows that neither the term or phrase were used at all. In fact, in the video, K.S. merely stated he "takes himself out." Then Tisaby adds the word "penis.' But, nowhere is the D-word. Moreover, K.S. never said he placed anything in her mouth.

Ms. Gardner attended the video interview. She knew "he placed his d*** in my mouth" was never said. Yet, she solicited that testimony, and when Mr. Martin asked Mr. Tisaby if he had just made up K.S.'s use of the D-word, Mr. Tisaby said that he did not and that they were "her exact words" and "I remember her saying that." Tisaby Dep., 309:3, 319:15, 321:10-11, and Ms. Gardner did nothing to correct the perjured testimony. No such words were used, as the tape reveals. But, Ms. Gardner actively participated in that lie.

C. Lies About the Functioning of the Video

Someone is not telling the Court the truth about the reason the video allegedly malfunctioned. Mr. Steele and Ms. Gardner told the Court two completely different explanations as to the alleged malfunctioning.

At the April 12 hearing, Ms. Gardner said;

"It would go on and cut off. It kept doing that."

On the other hand, Mr. Steele said:

"In terms of what is meant by malfunctioning, you see movement but there is no audio [for the first 15 minutes]. . . . But in terms of what is meant by the tape not working properly or malfunctioning, that's what it is, there's no audio."

Ms. Gardner and Mr. Steele could not have both been telling you the truth. Because the defense knows now there is in fact a few minutes where the audio does not work, it appears Ms. Gardner was not truthful about the "malfunction." But in reality, neither was Mr. Steele, because he then went on to tell the Court that "[a]nd so that information was given to them and they had that opportunity." Such a claim that the defense was told there was missing audio is completely fabricated. Certainly, the Court knows if the defense would have been told the audio was missing, we would still have insisted on being given a copy.

Of course, further misconduct is reflected in the fact that Ms. Gardner admitted in court that she had a functioning tape on Monday, two days before the House committee issued its report. The tape however was conveniently turned over only on Wednesday after the House committee had in fact issued its report. Another piece of evidence of both politics and prejudice.

D. Additional Concealment of Exculpatory Evidence –The Dream

One of the important facts the Circuit Attorney failed to turn over to defense counsel relates directly to whether a photograph was ever taken – the core issue in this case. Late in her deposition, referring to an iPhone, K.S. testified, "I feel like I saw it after it happened." However, she admitted, "I don't know if it's because I'm ***remembering it through a dream***." (emphasis added). The obvious significance that K.S. may have memories of some of the facts of this case, including key facts such as whether there was even any type of equipment which could have taken a photograph, does not need to be belabored. Such a revelation casts serious doubt upon the credibility of her story. Yet, K.S. also testified that she had previously told either Ms. Gardner or Mr. Steele that she may have memories through a dream. She said she told them of a vision or a dream. This undeniably exculpatory information was not previously provided to defense counsel even though the Circuit Attorney's Office had promised "anything potentially exculpatory . . . we will absolutely turn it over within 48 hours of getting it." 3-6-18 Transcript, p. 15-16.

E. Prejudice is Present

The prosecution (i) appears to have used interview memoranda authored by Mr. Tisaby to guide witnesses' testimony in the grand jury; (ii) allowed key depositions to proceed without disclosure of this evidence; (iii) sought and obtained a court order limiting public statements by the defense; and (iv) waited until after the House Report was published on Wednesday to provide this tape and notes.

The prejudice from this delay is massive. The delay meant that the notes, drafts and tapes were provided <u>after</u> the House Report was completed and published – an event that may well have ruined any ability by the defendant to obtain a fair trial. The prejudice of a tainted jury pool was compounded even more when late last week the Circuit Attorney violated the Court's order

and gave a copy of the video to a third party (and then somehow miraculously, the House committee simultaneously subpoenas the video from that third party).

The delay meant that the tape was provided after the K.S. deposition. The delay meant that the tape was provided after two days of P.S.'s deposition. And the production of the tapes and notes firmly establishes that the prosecution has violated multiple rights of the defendant, including (1) the right to not have a lead investigator provide false testimony under oath; (2) the right to be provided a recorded statement from the most important witness in the case before her deposition; and (3) the right to not have the prosecution put on perjured testimony in depositions.

It is no answer for the prosecution to assert that the defense now has the tape. The false interview memoranda had already been used to inject false ideas to the public and to witnesses. The House Report is out and made its findings without any cross examination or the rules of court. However, the House did not have the benefit of even learning of this tape before they issued the report, a fact that might have affect the pre-trial publicity associated with this matter. It is galling to have the Circuit Attorney obtain a gag order limiting the right of the defense to respond to allegations while another branch of the state releases untested testimony and findings in the most public manner possible.

Moreover, every time a witness is under oath the witness becomes more committed to the testimony given. The inability to use the tape at the first deposition of K.S. has caused irreparable harm to the defendant because her testimony could not be tested using the tape. The tape could have been used to demonstrate that K.S. just did not previously say what the prosecution contends. Likewise, J.W. testified that she reviewed her Tisaby report of interview before her grand jury appearance. She thereby had her testimony molded to fit what Mr. Tisaby decided she had said in her earlier interview.

This misconduct is egregious. It also appears to have been motivated by several strategic concerns of the Circuit Attorney. For instance, the notes needed to be withheld and the tape concealed so that Mr. Tisaby could claim that he conducted an "independent" review free of any information from the politically-elected Circuit Attorney. Similarly, the notes and tape needed to be withheld to avoid an inference that the investigator asked questions to lead the witness to favored terms. In fact, what appears to have happened is that the Circuit Attorney wanted to avoid any inference that K.S.'s Grand Jury testimony was affected by her interview on January 24, 2018, or by the interview on January 29, 2018. But it was, and the motive for Mr. Tisaby's lies is clear. He testified as to exactly why he wanted to say that he did not ask questions; why he did not take notes; and why he did not talk to the Circuit Attorney. This testimony was false, but it does explain the motives for the false testimony.

A clear example can be shown regarding whether K.S. witnessed the notes taken by Mr. Tisaby. K.S. is a witness who claims to recall all the details of conversations from three years ago. As seen in the tape, he was sitting across a small table from Mr. Tisaby as he took detailed notes. Mr. Tisaby stopped her talking so he could take down precisely what K.S. was saying. Yet when asked at her deposition, "[a]nd I want you to try to remember whether or not as you were talking if he was contemporaneously writing notes to capture your version of what you were saying," the witness K.S. testified, "I really don't remember." A reasonable inference is that she was prepared on this subject by the Circuit Attorney to deny recall of these notes, since it was a major topic of the earlier deposition of Mr. Tisaby. The Court can decide if the testimony is credible. But in any event, three years after the events in question there is grave concern as to what this witness actually remembers versus what she now says.

There is a reason why Rule 25 requires all recorded witness statements and summaries of those statements to be turned over immediately and without court order. Here, the defense spent weeks preparing the defense without the aid of valuable evidence. As expected, the missing video tape revealed that key themes and specific testimony used in the grand jury did not come from the witness herself but rather were added or prompted by the investigator. The tape establishes that K.S. told her friends "everything" back in 2015 and that these friends did not remember any statement by K.S. of any slapping or violence. The tape will materially assist the defense refute any claim of a lack of consent. All of this is of obvious significance, which is why witness statements must be produced under Missouri law and Brady.

F. Dismissal is the Necessary Sanction

The lead prosecutor, the elected official, has suborned perjury in order to conceal her efforts to hide evidence favorable to the defense. The lead investigator, hand selected by the lead prosecutor, has so blatantly lied under oath that it has become impossible to believe anything he has said and even the prosecution has called him a liar. The manipulations by the prosecution team have been used to mold witness testimony to fit its own desire of what they wish the evidence showed. To cover up all of this, the prosecution team has misled the Court on multiple occasions. All of this has been highly prejudicial. Severe sanctions are necessary to protect the rule of law and the citizens of St. Louis from a runaway prosecutor.

But worse yet, this is not the first time members of the prosecution team have faced sanctions. In State v. Nathan, No. 1022-CR01659, then Judge Dierker sanctioned Robert Steele, then attorney for the defendant. Though denied, Mr. Steele also sought sanctions against the State. His claimed misconduct, in part the same as here, failure to disclose favorable evidence. In fact, he specifically states that "[i]ndividual prosecutors have a duty to learn of any favorable

evidence known to others acting on the government's behalf." With this the defense agrees completely. Ms. Gardner knew Mr. Tisaby was lying. She had a duty to look beyond the lies to find the evidence which was being hidden. Sadly, it appears the core reason she did not do so is because she was a participant in both the lying and the concealing of evidence.

G. Requested Relief

This motion presents grave Brady issues as well as serious issues regarding perjury. If not for the tape being discovered by people in the office who told the Circuit Attorney to turn it over, none of this would have been discovered. It is impossible to know what else has happened in this case that is not proper. The defense was even given a false interview memorandum that both left out important exculpatory information and added false negative information. The Circuit Attorney berated the defense for even asking for more tapes or notes, asserting that all of them were turned over. If this can happen in this case, it may be happening to other defendants in this courthouse. The Brady violations have created undeniable prejudice to the defendant, with disclosure coming after the House Report; after K.S.'s deposition; and after the first portion of P.S.'s deposition.

It is unfair to deny critical evidence to the defense in this or any other case. It is unfair to create false evidence (both the interview summary and deposition testimony) that omits favorable information for the defense. It is unfair to add negative information to the interview summary that was never said on the tape. The delay in coming clean further allowed the jury pool to be irretrievably tainted with a report that contained findings not subject to cross examination about the evidence. It is highly suspicious that the tape was released only after the gag order was obtained and after the House Report was released. The Court can take judicial notice of the impact of the House Report on this case and the ability of the defendant to obtain a

fair trial. While the state asked for a gag order, the committee made its allegations known in the most public way possible.

Dismissal with prejudice is the proper sanction for perjury and these Brady violations. No witness who was exposed to Mr. Tisaby or the Circuit Attorney should be permitted to testify because of the clear unlawful conduct. Rule 25.03 states that without court order, the prosecution is to provide "the names … of person whom the state intends to call as witnesses … at the trial together with their written or records statements" as well as all summaries of their statements. This rule was violated without question. There has been an obvious violation of due process as well. See State ex rel Jackson County Prosecuting Attorney v. Prokes, 363 S.W.3d 71 (Mo. App. 2011) ("The broad rights of discovery afforded criminal defendants by our Rule 25 have constitutional underpinning rooted in due process").

In Prokes, the Court of Appeals held that the sanctions imposed by the Court are reviewed for an abuse of discretion. The Court relied on Rule 25.18 to uphold the striking of all the state's evidence. That rule provides: "**If at any time during the course of the proceeding** it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule, **the court may … enter such other order as it deems just under the circumstances.** Willful violation by counsel of an applicable discovery rule … may subject counsel to appropriate sanctions by the court." Id. (emphasis added). Here, the violation of the law is clear and, like in Prokes and because the misconduct relates to the key witness in the entire case, the only reasonable remedy is to exclude "all of the State's evidence in this case." Prokes, 363 S.W.3d at 75. In Prokes, the dismissal sanction was given five months before trial -- here we are less than a month out of trial. Like in Prokes, this case involves "fabricating,

misrepresenting and withholding evidence." Id. at 78. Mr. Tisaby and the Circuit Attorney have tainted this whole case and violated the rules.

United States v. Ramming, 915 F. Supp. 854 (S.D. Texas 1996), presented similar troubling Brady and Giglio violations. There, the court dismissed the case because of the clear prosecutorial misconduct. After chronicling the various violations, the court said

> the government's contentions of equal access, neutral evidence, that the defendants were aware of the information possessed by the Grand Jury, that the testimony was merely impeachment, and that they acted in good faith, is incredible. **Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path**.

Id. at 868 (emphasis added). Those words ring equally true here.

The motion for sanctions should be granted and the case should be dismissed

Dated: April 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed via the Court's electronic filing system and was also sent via email to the St. Louis City Circuit Attorney's Office this 18th day of April, 2018.

/s/ James G. Martin