MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1822-CR00642
	)	Div. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

SUPPLEMENTAL MEMORANDUM IN RESPONSE TO DEFENSE DISCOVERY ISSUES

The Court granted the parties leave to file additional memoranda regarding the discovery issues and sanctions demands in this cause. This Memorandum is intended to address two issues: (1) sanctions for discovery violations, and (2) defendant's motion for an order requiring disclosure of all exculpatory information in the State's possession (including, presumably, information of which the State has knowledge or over which the State can obtain control).

1. Dismissal of a prosecution is not warranted as a sanction for discovery violations except in the most extraordinary circumstances, where prejudice can be shown, which is not the case here.

The defense continues to attempt to try this case via pretrial or discovery motions in the hope of obtaining what amounts to a directed verdict. Unfortunately, discovery lapses by the State have played into defendant's hands, but a careful review of the record leads to only one conclusion: there is no basis on which the Court can dismiss this prosecution due to discovery lapses by the State, **since the defense has not even attempted to offer support for the proposition**

that the Circuit Attorney was somehow complicit in Mr. Tisaby's representations, and they have wholly failed to show any meaningful prejudice. In this case, sanctions are clearly inappropriate.

Defense counsel eloquently and masterfully portray discovery violations in a way that turns every ripple in the discovery pond into a tsunami of "exculpatory" evidence. The best way to refute defense counsel's hyperbole is to soberly compare the actual record with defense counsel's characterization of that record. To that end, the State submits the complete transcripts of the recording ("the tape") made during the January 29 interview of the victim (Exhibit A), the grand jury testimony of the victim (Exhibit B), and the grand jury testimony of the witness J.W. (Exhibit C).[1] As can be seen by even the most superficial examination of these records, the victim has been wholly consistent in the core of her testimony, and the belated disclosure of some inconsistent statements on other issues hardly establishes that the defendant cannot prepare for and get a fair trial.[2] The defendant's incantations of "Prejudice!" do not make it so.

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[1] The House Committee Report is public information and reports further testimony of the victim verbatim. One hopes that the defense will not accuse the State of failing to disclose material to which the defense has equal access. Cf. *State v. Salter,* 250 S.W.3d 705 (Mo.banc 2008). The victim has also been deposed in a painstaking manner for more than 8 hours. The State is not filing those additional items, but there is nothing in them to support the defense argument regarding prejudice.

[2] With regard to one alleged "core *Brady*" statement, the State directs the Court's attention to Exhibit B, Tr. 5, 37-38, 69-71, regarding K.S.'s testimony about her concept of defendant's feelings toward her, and invites comparison to the evidence of a statement on the same topic to J.W. as cited by the defense.

Furthermore, it is inferable that Defendant lobs these charges to distract from a damaging recently published House Report. Alleging misconduct in this case is a useful avenue for distracting from the current political milieu. This hypothesis is borne out by the fact that in the three business days following the release of the House Report, Defendant has multiple filings of serious misconduct against the Circuit Attorney. Defendant has submitted these filings despite having no proof - whatsoever - of misconduct on the part of the Circuit Attorney. The Court cannot allow Defendant to drag this Court into the political thicket.

The essential elements of a *Brady* violation are nondisclosure of evidence favorable to the defense, i.e., exculpatory or impeaching evidence; suppression of the evidence by the State, either willfully or inadvertently; and *prejudice*. In assessing claims of *Brady* violations, there must be a fact-specific inquiry as to whether undisclosed material was *in fact* material enough to undermine confidence in a trial's outcome. See *Turner v. United States*, 137 S.Ct. 1885 (2017). Thus, the focus of the prejudice inquiry must be the effect of nondisclosure on the *trial*, not on discovery depositions, legislative investigations, or public relations.

Here, the State's belated disclosure of "the tape" and Tisaby notes can have no conceivable effect on the fairness of the trial. With regard to the victim's statements, the Tisaby notes are largely irrelevant, because the actual recorded statement of the victim is known to the defense. Any disadvantage that accrued to the defense in deposing the victim can be remedied by a further deposition of the

victim. Likewise, any disadvantage from the belated disclosure of the Tisaby notes regarding J.W. can be remedied by deposing J.W. on the topic.

The defense cites two cases, one a federal district court, for the proposition that discovery violations can support dismissal of a prosecution. Neither is in point. In *State ex rel. Jackson County Pros. Atty. v. Prokes,* 363 S.W.3d 71 (Mo.App.W.D. 2011)(*en banc*), the prosecutor had violated discovery rules and orders repeatedly and egregiously over a ten-year period, during which the defendant had been tried and found guilty, but the conviction had been set aside due to *Brady* and other serious discovery violations. After remand, the prosecutor willfully violated specific discovery orders and, at a show cause hearing, proffered disingenuous explanations and excuses. The trial court did not dismiss, but excluded all of the State's evidence, finding that the prosecutor's course of conduct prejudiced the defendant by depriving him of his right to a fair trial. *Prokes* simply does not support dismissal in this case. Indeed, *Prokes* did not actually approve dismissal, albeit the sanction of striking all of the State's evidence had that effect. In any event, *Prokes*, where the prosecutor remedied discovery lapses promptly and fully, in advance of trial, and should not be found to have acted in bad faith.

Although Rule 25.18 does not expressly authorize dismissal of a charge as a sanction for discovery violations, there is no question that the trial court has broad discretion to remedy such violations by the State. However, the remedy should be tailored to the harm. There is a wide range of sanctions short of dismissal than can be deployed

in proper cases: continuances, adverse inferences, sanctions against counsel personally, exclusion of evidence. To warrant the more extreme sanction of exclusion of evidence (not to mention dismissal), there must be some showing that the discovery violation materially hindered or thwarted defendant's trial preparation or resulted in fundamental unfairness. See *State v. Wolfe,* 13 S.W.3d 248 (Mo.banc 2000); *State v. Goodwin,* 43 S.W.3d 805 (Mo.banc 2001). No such prejudice has been shown, nor can it be.

Notably, the Supreme Court of the United States and other federal courts have made it plain that even constitutional violations prior to trial do not warrant dismissal of an indictment absent a showing of prejudice, i.e., infringement of the right to a fair trial. See, e.g., *United States v. Morrison,* 449 U.S. 361 (1981); see also *United States v. DeCoteau,* 186 F.3d 1008 (8th Cir. 1999)(dismissal for discovery violation was error absent showing of prejudice).

Defense hyperbole to the contrary notwithstanding, there is no showing prejudice here to warrant dismissal or even striking witnesses or testimony. As discussed above, the belatedly disclosed information is at best marginally impeaching. While the victim's credibility is a key issue, the State's late disclosures simply do not impair the defendant's ability to prepare for and try this case.

Whether the victim has given inconsistent statements is a matter of evidence. Prior inconsistent statements are substantive evidence in Missouri, so long as the declarant is available for cross-examination regarding them. §490.074, RSMo. The credibility of any witness's testimony, including the credibility of prior inconsistent

statements, is for the jury. E.g., *State v. Lyons,* 951 S.W.2d 584, 594 (Mo.banc 1997)(prior version of statute). Inconsistent statements of a testifying victim do not preclude a conviction, and sometimes prior inconsistent statements can *alone* suffice to support a conviction. *State v. Porter,* 439 S.W.3d 208 (Mo.banc 2014)(applying §491.075, RSMo); *State v. Lewis,* 431 S.W.3d 7 (Mo.App.E.D. 2014). Thus, the fact that the victim has allegedly testified inconsistently does not mean that, as a matter of law, the charge has no merit, and defendant's incessant ululations about the "huge" impact of the victim's purportedly inconsistent statements do not suffice to show trial prejudice—the only prejudice that warrants judicial sanction in the form of dismissal.

Moreover, while Defense Counsel hurls these alleged serious ethical lapses by the Circuit Attorney they completely ignore their own disqualifying misconduct. Dowd Bennett LLP and all lawyers associated with the firm are conflicted from working on this case due to their representation of the Defendant qua State in the Confide matter. Despite operating under this clear disqualifying conflict of interest, Defense Counsel nonetheless accuses the Circuit Attorney of ethical violations. Defense Counsel seems to be under the impression that ethical rules do not apply to them. The Court cannot allow this flagrant affront to basic notions of professional responsibility to go unchecked. The only real ethical violation in this case is Defense Counsel's continued representation of Defendant and no amount of claimed ethical violations by the Circuit Attorney's office can distract from this issue.

2. No further orders are required to compel production of exculpatory or impeaching information.

Defendant's motion to compel disclosure of exculpatory or impeaching information is an exercise in futility, as such an order would merely require the State to do what already has been done and what the State is obliged to do before, during and even after trial.

All known notes of interviews with the victim have been provided. All known prior recorded statements of the victim have been provided. The State represents that there are no known oral statements of the victim not reduced to writing that constitute exculpatory or impeaching evidence.

The Court has previously commented on the central paradox in *Brady* jurisprudence: who decides what is exculpatory or impeaching in the first instance? There is no realistic alternative to placing that burden on the prosecutor. The prosecutor must err on the side of disclosure, but, short of direct judicial oversight of the prosecutor's investigatory file, it is fair to presume that a prosecutor acts in good faith and in accordance with the law.

In the instant case, the defense no doubt would argue that the Circuit Attorney is not entitled to the usual presumption of probity. That argument is without merit. Although there have been mis-steps, as delineated above, the Circuit Attorney in fact disclosed what needs to be disclosed. The Circuit Attorney has herself rectified the errors and misstatements of her investigator, enduring painful and unwarranted accusations by the defense in the process. Apart from the unfortunate complications created by the investigator, the defense can

point to no other lapse on the part of the State in disclosing exculpatory or impeaching information within its knowledge or control.

The Court need not enter an order requiring the Circuit Attorney to obey Rule 25.03(A)(9), as the Circuit Attorney has and will obey that rule and the parallel constitutional command.

Finally, the State emphasizes that the accusations of perjury and subornation of perjury are wholly unwarranted and unfounded. Even Mr. Tisaby's misstatements do not fall within the ambit of the statute. Still less can the Circuit Attorney be accused of suborning perjury. Even if the Court finds fault with the speed with which the Circuit Attorney reacted in this unusual and unexpected situation, there is no doubt that the Circuit Attorney conformed to the law and her oath in pursuing additional discoverable and potentially exculpatory information, so as to seasonably supplement and correct prior disclosures.

3. **Defense Counsel's continued allegations of misconduct are inappropriate and are simply an attempt at distracting the court, and the public, from the true issues at play.**

The reason for these frivolous claims is obvious. Last week the Missouri House Special Committee on Oversight issued a report severely negative towards Defendant. See, e.g., John Eligon, NEW YORK TIMES, Sex Claims Against Gov. Eric Greitens of Missouri Vividly Detailed in Report, (April 11, 2018), https://www.nytimes.com/2018/04/11/us/missouri-greitens-house-impeachment-inquiry.html. However, that report is completely separate from the Circuit Attorney's criminal investigation into Defendant.

However, to distract from the negative press attention generated by this report, Defendant has pursued a public relations strategy of indiscriminately hurling alleged ethical violations against the Circuit Attorney. In fact, in the three business days since that report was issued, Defendant has filed multiple claims of misconduct against the Circuit Attorney.

The simple fact is that Defendant is attempting to use this proceeding as a political tool to fight back against a damaging political situation he finds himself in. The Court should not allow itself to be drawn into Defendant's high-stakes political drama. Defendant is free to defend himself from the wholly separate House Report, but Defendant cannot be allowed to sully this proceeding in this way. As evidenced above, Defendant has provided no proof that the Circuit Attorney's was complicit in Mr. Tisaby's misconduct; yet knowing that hurling these claims of suborning perjury against the Circuit Attorney will distract from his separate political issues, Defendant is recklessly attacking the Circuit Attorney.

This cannot be allowed. Defendant's personal political issues must be kept separate from this proceeding. Defendant cannot be allowed to hurl unsubstantiated claims willy-nilly whenever the political winds point in that directions. This Court is an impartial body and must remain that way. Granting Defendant's Motion would inject this Court into the political arena – a space this Court must avoid entering. Accordingly, the Court should order Defendant to refrain from filing frivolous motions, like this one, which are

clearly intended to serve Defendant's personal political goals rather than this litigation.

4. The continued involvement of conflicted attorneys is the true ethical problem in this case.

On March 23, 2018, the State filed a Motion to Disqualify Defense Counsel James Bennett and Dowd Bennett LLP. The Motion was predicated on the disturbing conflict of interest which had been reported in the press the prior week. This conflict of interest was based on Defense Counsel inappropriately representing both the State and Defendant in a proceeding against the State. Although there was no need to demonstrate that the two matters were related, the State nevertheless showed at length the interrelatedness of the two matters. To summarize: Confide may be at issue in both proceedings, and while representing the State in the Confide matter, Defense Counsel may have learned information which would help Defendant in his current proceedings against the State.

Despite this disqualifying conflict of interest, Dowd Bennett LLP, James G. Martin, James F. Bennett, Edward L. Dowd, and Michelle Nasser (collectively "Dowd Bennett) have continued their representation of Defendant. Although this conflict raises serious issues with the information they already have, these attorneys continue to collect more information from the Circuit Attorney's office. This increases the risk that past inappropriately gathered information will be combined with the new information in improper ways that could permanently prejudice Defendant.

Dowd Bennett claims to be so worried about Defendant being prejudiced yet wholly ignores the most prejudicial current matter - their own involvement in the case. Instead of erecting a firewall, or withdrawing from the case, Dowd Bennett has continued this troubling representation in the face of the clear conflict of interest. Instead, Dowd Bennett has attempted to distract from their own ethical troubles, and Defendant's political troubles, by repeatedly accusing the Circuit Attorney of misconduct despite having little basis for these claims.

The State asks that until the Court issues a ruling on this matter, to avoid further prejudicing Defendant, the Court should issue a temporary order restricting Dowd Bennett LLP, James G. Martin, James F. Bennett, Edward L. Dowd, and Michelle Nasser from continuing their representation of Defendant. The State also asks leave for the Circuit Attorney's office to conduct an examination of James G. Martin, James F. Bennett, Edward L. Dowd, and Michelle Nasser to determine the extent of their knowledge from their representation of the State which can have bearing on this case.

WHEREFORE, the State respectfully urges the Court to deny the motions to compel disclosure of exculpatory evidence and for sanctions and for the additional temporary relief above set forth.

Respectfully submitted,
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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 18 day of April 2018.

/s/Robert Steele

MISSOURI CIRCUIT COURT
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MOTION FOR LEAVE TO FILE OUT OF TIME

The State respectfully requests leave to file the accompanying Supplemental Memorandum in Response to Defense Discovery Issues, out of time, owing to difficulties in preparation. Counsel for the State have not reviewed defendant's last filing and are not seeking to secure any advantage by filing approximately 45 minutes late.

Respectfully submitted,
KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

/s/Kimberly M. Gardner
/s/Robert Steele 42418

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SO ORDERED:
Div. 16

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 18 day of April 2018.

/s/Robert Steele