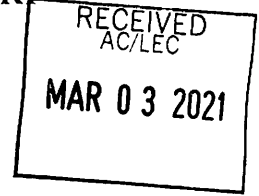


IN THE SUPREME COURT OF THE STATE OF MISSOURI
EN BANC



IN RE:)
)
KIMBERLY M. GARDNER) Case No.: DHP-21-005
)
MBE# 56780) OCDC File No.: 18-1095-XI
)
Respondent.)

INFORMATION

COMES NOW the Chief Disciplinary Counsel, pursuant to Missouri Supreme Court Rule 5, and states and alleges as follows:

Introduction

1. Informant is the Chief Disciplinary Counsel appointed by this Court pursuant to Rule 5.06.
2. Informant has determined, pursuant to Rule 5.11, that probable cause exists to believe that Respondent is guilty of professional misconduct.
3. Respondent is a duly licensed attorney admitted to practice in and before all courts of this State and is a member of the Bar of the State of Missouri. Respondent's Missouri Bar number is 56780 and she has been licensed to practice law in Missouri since September 29, 2004.
4. During all times relevant to the allegations set forth herein Respondent was the Circuit Attorney for the City of St. Louis and engaged in the practice of law at 1114 Market Street St. Louis, Missouri 63101.
5. Respondent's license is currently in good standing.

6. Respondent has no previous disciplinary history.
7. Identification Legend for Relevant Documents Referenced Herein:
 - A. “Gardner’s 1/24/18 Handwritten Notes”: Respondent took six pages of handwritten notes during her interview with K.S. (alleged victim) at a hotel in Illinois on January 24, 2018.
 - B. “Gardner’s 1/28/18 Bullet Points”: A six-page document of single-spaced, type-written bullet points, including approximately one hundred forty-one separate bullet points of information created on or about January 28, 2018 allegedly quoting or summarizing oral statements made by K.S. to Respondent during her interview at the hotel in Illinois on January 24, 2018.
 - C. “Gardner’s 1/28/18 email to Tisaby”: On January 28, 2018, Respondent sent an email to her private investigator, William Tisaby, with the attached “Gardner’s 1/28/18 Bullet Points”.
 - D. “Tisaby’s Annotated Version of Gardner’s 1/28/2018 Bullet Points”: During Tisaby’s interview of K.S. on January 29, 2018, Tisaby made handwritten notes atop a double-spaced copy of “Gardner’s 1/28/18 Bullet Points”.

D. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”: During Tisaby’s interview of J.W. (a friend and confidante of K.S.) on January 30, 2018, Tisaby made handwritten notes.

E. “Tisaby’s 3/13/18 email to Gardner”: On March 13, 2018, from his private email account, Tisaby sent an email to Respondent, at her private email account, attaching “Tisaby’s Draft Interview Narrative Confidential of K.S.” and “Tisaby’s Draft J.W. Interview”.

F. “Tisaby’s Draft Interview Narrative Confidential of K.S.”: This draft report attached to “Tisaby’s 3/13/18 email to Gardner” was allegedly based on Tisaby’s January 29, 2018 interview of K.S.

G. “Tisaby’s Draft J.W. Interview”: This draft report attached to “Tisaby’s 3/13/18 email to Gardner” was allegedly based on Tisaby’s January 30, 2018 interview of J.W.

H. “Tisaby’s Final Interview Narrative Confidential of K.S.”: This final report, produced to the defense at the time of Tisaby’s deposition, was allegedly based on Tisaby’s January 29, 2018 interview of K.S.

I. “Tisaby’s Final J.W. Interview”: This final report, produced to the defense at the time of Tisaby’s deposition,

was allegedly based on Tisaby's January 30, 2018 interview of J.W.

Factual Allegations

8. On January 11, 2018, Respondent announced a formal criminal investigation into the alleged actions of (now former) Missouri Governor Eric Greitens that occurred nearly three years earlier. The allegations concerned Greitens' extramarital conduct with K.S.

9. Respondent used a private investigator, William Don Tisaby ("Tisaby"), of Enterra, LLC, in lieu of the Metropolitan St. Louis City Police Department or any other public agency.

10. On January 17 and 18, 2018, Respondent met with Tisaby in Baton Rouge, LA to discuss the Greitens investigation. Tisaby spent hours reviewing background materials Respondent provided.

11. On January 18, 2018, the Circuit Attorney's Office (CAO), by and through Respondent, contractually engaged Enterra, LLC, by and through Tisaby, to provide consulting advice to the CAO and to conduct an "independent investigation into potential criminal (and civil) liability of the Governor under guidance of the CAO." Further, the contract provided that, "all communications between or among Enterra personnel and CAO personnel shall be regarded as privileged in all respects, shall constitute attorney work product, and shall be kept in strictest confidence."

12. On January 24, 2018, Respondent, with advanced preparation from Tisaby, but without Tisaby present, interviewed K.S. at a hotel in Illinois. Respondent took six

pages of handwritten notes during the interview (i.e. "Gardner's 1/24/18 Handwritten Notes").

13. On or about January 28, 2018, Respondent authored a six-page document consisting of single-spaced, type-written bullet points, including approximately one hundred forty-one separate bullet points of information, with significant additional information not contained in "Gardner's 1/24/18 Handwritten Notes", allegedly quoting or summarizing statements made by K.S. to Respondent on January 24, 2018 (i.e. "Gardner's 1/28/2018 Bullet Points").

14. On January 28, 2018, Respondent emailed "Gardner's 1/28/2018 Bullet Points" to Tisaby stating: "Please find enclosed work product and draft of notes." (i.e. "Gardner's 1/28/18 email to Tisaby").

15. On January 29, 2018, Tisaby conducted an interview of K.S.. Respondent sat next to Tisaby during the interview. Respondent used a video camera to record the interview, however, she initially contended that it did not work.

16. During that interview, Tisaby asked K.S. approximately one hundred-fifty questions.

17. During that interview, Tisaby took handwritten notes atop a double-spaced copy of "Gardner's 1/28/2018 Bullet Points" (i.e. "Tisaby's Annotated Version of Gardner's 1/28/18 Bullet Points").

18. On January 30, 2018, Tisaby, alone, interviewed J.W., a friend of K.S. with whom K.S. confided. Tisaby took handwritten notes of the J.W. interview (i.e. "Tisaby's 1/30/18 Handwritten Notes of J.W.").

19. On February 22, 2018, the Grand Jury of the City of St. Louis indicted Greitens on one count on Invasion of Privacy-1st Degree (Class D Felony) RSMo 565.252 (taking and transmitting a photograph of a person who was partially nude): State of Missouri v. Eric Greitens, Cause No. 1822-CR00642 (Witnesses listed: K.S., P.S.[husband of K.S.], J.W.; Circuit Court Twenty-Second Judicial Circuit (St. Louis City)).

20. On February 23, 2018, Attorneys Edward L. Dowd, James F. Bennett, James G. Martin, Michelle Nassar, and John F. Garvey entered their appearances for Greitens (Defendant).

21. On February 23, 2018, Defendant propounded to the State a Request for Discovery, including:

A. “The names and last known addresses of all persons whom the State intends to call as witnesses at any hearing or trial, together with *their written or recorded statements and existing memoranda reporting or summarizing part or all of their oral statements.*” (emphasis included).

B. “Any material or information, within the possession of control of the state, which *tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment*” (emphasis included), and

C. “All favorable evidence, including all impeachment information that is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

22. On February 27, 2018, Defendant propounded a Supplemental Request for Discovery, including: “Any and all memoranda, notes, rough notes, e-mails or other communications by, from or to Enterra, LLC or any of its employees regarding any witness interviewed or spoken to regarding this case.”

23. On February 28, 2018, Judge Rex Burlison, the judge assigned to the case, held a hearing regarding the trial date in the matter. In open court, Respondent stated:

“We’re doing our due diligence. We already talked about the independent investigation. We still have reports that need to be done and turned over.”

(9:16-18)

24. In the same hearing, regarding the timing of discovery disclosures, Judge Burlison said:

“This case affects the course of business of the State of Missouri. And I don’t think there’s any case that affects all the residents of the State of Missouri more than this does.”

(10:20-23)

25. On or about March 3, 2018, Lead Attorney, Robert Steele and Respondent Kimberly Gardner entered their appearances for the State.

26. On March 3, 2018, in a discussion about the State's discovery compliance and *Brady*¹ obligations, Assistant Circuit Attorney Rachel Smith sent an email to Respondent, stating as follows:

“We must turn over anything currently in our possession asap. We’ve already done this? Couple of things come to mind: Who has the list of what reports, evidence or documents we possess? May I see it? If one does not yet exist because we’ve been under a crunch, it makes sense to do it now. May I help make one? This will be essential to protecting the CAO against allegations of Brady violations after we convict Greitens. It can be a document log that we keep and update on the secure laptop. We also need an evidence inventory or listing -who has been packaging all original documents obtained by the investigators or our local team? It may not be done yet. Again it is something we can

¹“Under *Brady v. Maryland*, 373, U.S. 83 (1963), due process is violated when the prosecutor suppresses evidence that is favorable to the defendant and material to either guilt or punishment.” *State v. Salter*, 250 S.W.3d 705, 714 (Mo. banc 2008). Evidence that tends to impeach a government witness is considered *Brady* material. *Taylor v. State*, 262 S.W.2d 231, 240 (Mo. banc 2008) citing *Strickler v. Green*, 527 U.S. 263, 281-82 (1999).

The ethical obligations under *Brady* are encompassed by Missouri Rule 4-3.8(d): “The prosecutor in a criminal case shall: make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

keep and update on the secure laptop. Just looking to make sure we do not misspeak right now. A misstatement on discovery right now will hurt us a lot with BURLISON so I'm trying to avoid me doing that at all costs. I don't want to say the wrong thing."

27. On March 3, 2018, in her email response to Rachel Smith's email, Respondent stated:

"Can you call me. We turned over what we had last time. They pushed to rush this trial date."

28. At no time did Respondent reveal to Smith the existence of "Gardner's 1/28/18 Bullet Points" or "Tisaby's Annotated Version of Gardner's 1/28/18 Bullet Points".

29. At the March 6, 2018 court hearing regarding the scheduling order, the following colloquy occurred:

(Mr. Steele): It seems to be we have fully complied with the rules of discovery. We recognize our duty to disclose - - an ongoing duty to disclose. * * * I don't know if we necessarily need ink on it because it will be produced when we get it pursuant to our ongoing duty to disclose.

(9:17-10:1)

(Mr. Steele): And in terms of the discovery they haven't seen, we've given them the discovery we had. I believe at the last proceeding we had, * * *.

(10:13-15)

(Mr. Garvey): Judge, what we're asking for is, we don't have police reports. We don't have police involved. We have a private investigation company that entered into a contract. In that contract, it states that Ms. Gardner shall determine whether or not they write a report. The problem with that is when they go out and interview someone and they inform them of the contents of the interview and they're told not to write a report, that's a Brady violation. All statements are discoverable of these witnesses, especially when they're not police officers. If this is a normal case, which it isn't, I know, and if the police were out interviewing witnesses, they would be turning over their reports to the circuit attorney and the defendants would get them. They would not be told not to do a report. So we're asking for, a couple things, as far as discovery being turned over. We understand there are notes of interviews, we haven't received them yet. They have not been turned over yet. We ask that they be turned over, and

any other notes from interviews with witnesses be turned over.

(14:8-15:4)

(Ms. Smith): Judge, I think it is very clear the State will absolutely turn over anything that is Brady, whether or not it's in a report, and it will be put into writing and in a report. If it's at all Brady or falls under the rules.

(15:15-19)

(The Court): Right. This in on the record. So I think on the record is that everything's been turned over except the witnesses, addresses and transcript.

(Mr. Steele): That's correct.

(Ms. Gardner): Yes.

(18:20-24)

(The Court): ...but all I'm saying is that I am working on the – my assumption that everybody's going to follow the law, and if it comes that other things happen then we'll deal with that accordingly. But at this point I am assuming everybody's going to follow the law and follow the rules and follow

Brady, and if there's evidence out there that hereafter comes to bear, we'll take it up then.

(Mr. Garvey): We know that they have notes that they haven't turned over to us yet. Now on that, we'll get them within 48 hours, is that what the ruling of the Court is?

(The Court): What I would say is that in your subpoena duces tecum, that the identification of what you think - - what the defense thinks they haven't got needs to be specific.

(Mr. Garvey): Okay.

(The Court): And then if that does or doesn't pan out 48 hours later when the deposition's taken, then we'll-- I'm sure I'll hear from one side or the other.

(Mr. Garvey): Okay, thank you.

(The Court): Fair enough?

(Ms. Smith): Yes, sir.

(20:22-21:18)

30. Respondent's confirmation that "everything's been turned over except the witnesses, addresses and transcript" was false, in that the following documents had not produced:

A. "Gardner's 1/28/18 Bullet Points";

B. "Gardner's 1/28/18 email to Tisaby";

C. “Tisaby’s Annotated Version of Gardner’s 1/28/18 Bullet Points”;

D. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”.

31. On or about March 7, 2018, Smith advised Respondent by email and during a meeting that any notes taken by the prosecutors during a witness interview would not be considered work product and must be produced to the defense.

32. On March 7, 2018, N. Scott Rosenblum entered his appearance for the defendant.

33. On March 8, 2018, Robert Dierker entered his appearance for the State.

34. On March 8, 2018, the Court entered a Joint Proposed Scheduling Plan, which specifically required:

“The Circuit Attorney’s Office will produce all available discovery materials by March 5, 2018. The duty to provide all relevant discovery is ongoing. Any new documents or other discoverable materials obtained after March 5, 2018 will be produced within 48 hours of its receipt by the Circuit Attorney’s Office.”

35. Despite the advice of Smith and the requirement under the Joint Proposed Scheduling Plan entered by the Court on March 8, 2018, Respondent did not produce:

A. “Gardner’s 1/28/18 Bullet Points”;

B. “Gardner’s 1/28/18 email to Tisaby”;

C. “Tisaby’s Annotated Version of Gardner’s 1/28/18 Bullet Points”

D. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”.

36. On March 6, 2018, the defense filed Defendant Eric Greitens’ Motion to Compel Disclosure of Impeachment Evidence.

37. On or about March 12, 2018, in the State’s Response to Defendant Eric Greitens’ Motion to Compel Disclosure of Impeachment Evidence, the State declared: “In fact, the State possesses no information relative to K.S. not disclosed, ‘that may be used to impeach a government witness.’ ”

38. On or about March 12, 2018, the State filed its Response to Defendant Eric Greitens’ Supplemental Request for Discovery. The State argued that it will disclose any and all material produced by Enterra, LLC that is in form similar to material produced by the St. Louis Metropolitan Police Department and that would be discoverable under Rule 25 of the Missouri Rules of Criminal Procedure. The State argued that Rule 25.10(A) protects attorney work product and the work product of an attorney’s investigative staff from the disclosure requirements of Rule 25.

39. On March 13, 2018, Tisaby sent an email to Respondent’s unofficial AOL email, stating: “Kim/Tony [Circuit Attorney Anthony Box], please see the attached. Please advise of any additional changes. If they are ok, let me know as well.” Signed: “William Don Tisaby”. (i.e. “Tisaby’s 3/13/18 Email to Gardner”). Attached were:

A. “Tisaby’s Draft Interview Narrative Confidential of K.S.” and

B. “Tisaby’s Draft J.W. Interview.”

40. On March 14, 2018, Defendant filed his Notice of Videotaped Deposition of William Don Tisaby, with Exhibit A, which listed 12 categories of documents to be produced at the time of the deposition. The first five were as follows:

1. All reports, communications, emails, text messages, notes, recordings, and/or other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting statements of any individuals interviewed regarding this matter.
2. Reports, communications, emails, text messages, notes, recordings, and/or other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting any and all investigative steps regarding this matter, including but not limited to any and all interviews attempted or conducted, evidence sought or obtained, searches sought or conducted, subpoenas issued, background searches conducted, and forensic or scientific analyses performed.
3. Any books, papers, documents, photographs, objects, documents, records, recordings, photographs, communications, or other evidence sought or obtained by any current or former employee of Enterra, LLC or any other

investigator in this matter, and any notes, logs, or documentation reflecting any such evidence.

4. Any and all memoranda, notes, rough notes, e-mails or other communications by any current or former employee of Enterra, LLC regarding any witness interviewed or spoken to regarding this case.

5. Any and all e-mails or other communications between any current or former employee of Enterra, LLC and Maurice Foxworth.

41. On March 14, 2018, the State filed a Motion to Quash and for Protective Order Regarding Defendant's Notice of Videotaped Deposition of William Don Tisaby arguing, in part, that Defendant was improperly seeking Enterra's work product, which "would implicate, for example, an email by an Enterra investigator containing trial preparation documents which reference the statement of an interviewed individual." "In the alternative, however, the State requested an *in camera* review of materials as to which the work product privilege applies, with a privilege log to be supplied."

42. At the court hearing on March 15, 2018, the court told the State on the record to "turn over all nonprivileged (documents), make a privilege log, turn over what's on the privilege log to me for an *in camera*, and then we'll have a quick hearing and that burden will be on the State to assert – to support its position of privilege. That's – you're correct, that's the way it's going to be handled."

(17:9-14)

43. On March 15, 2018, the Court entered its written order, stating: “As to items 1-5 (of Exhibit A attached to Defendant’s Notice of Videotaped Deposition of William Don Tisaby), Circuit Attorney will turn over all materials that it is obligated to provide. Court orders Circuit Attorney to provide a privilege log and all withheld materials for *in camera* inspection by 9:00 a.m., March 16, 2018.”

44. On March 15, 2018, the State produced to the defense “Mr. Tisaby Report” (1 flash drive), containing Tisaby’s final reports:

- A. “Tisaby’s Final Investigative Narrative Confidential of KS” and
- B. “Tisaby’s Final JW Interview”.

45. On March 16, 2018, the State produced a privilege log. However, the following documents were neither listed in the privilege log nor produced to the defense:

- A. “Gardner’s 1/28/18 Bullet Points”;
- B. “Gardner’s 1/28/18 email to Tisaby”;
- C. “Tisaby’s Annotated Version of Gardner’s 1/28/18 Bullet Points”;
- D. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”;
- E. “Tisaby’s 3/13/18 email to Gardner”;
- F. “Tisaby’s Draft Interview Narrative Confidential of K.S.” and
- G. “Tisaby’s Draft J.W. Interview”.

46. The “Tisaby’s Final Investigative Narrative Confidential of K.S.” was different than “Tisaby’s Draft Interview Narrative Confidential of K.S.” in the following respects:

A. Deleted from the final version was the sentence: “KS stated that she looked at EG and he looked sheepishly back at her and did not say anything as she was blow drying her hair.”

B. Deleted from the final version was the sentence: “She stated that she was torn by this, that she did not know what to think, kept thinking she did not want to cheat on her husband, and thought that the situation was really weird. K.S. stated that she was dressed in Aveda t shirt and black pants. She stated that she was really nervous and shaken.”

47. “Tisaby’s Final J.W. Interview” was different than “Tisaby’s Draft J.W. Interview” in the following respects:

A. Deleted from final version was the sentence: “KS thought that EG cared about her.”

B. Deleted from the final version was the sentence: [JW related that she and KS had engaged in several conversations about her marital situation] “and that a marriage counselor was involved.”

C. Deleted from the final version was the sentence: “JW stated that she was also concerned that P.S. would do something detrimental to Greitens.”

48. On March 18, 2018, Dierker sent an email to Smith (cc: Gardner and Steele) stating: “Jim Martin plans to raise an issue about “notes” that he thinks is created by the privilege log. I’m not sure what he’s thinking. I am assuming any notes of witness interviews by Tisaby have been turned over as part of his report or are in the privilege log materials. I can cover Martin’s issue tomorrow morning, but please correct me if there are notes we have not turned over to the defense or the Court.”

49. Smith, in her email reply to Dierker (cc: Gardner and Steele) stated: “I’m sorry Judge [Dierker]. I don’t know. I’ve not seen any of the privilege log, the notes or anything we gave the judge [Burlison] on Friday.”

50. Respondent did not reveal to Dierker or Smith the existence of:

A. “Gardner’s 1/28/2018 Bullet Points”;

B. “Tisaby’s Annotated Version of Gardner’s 1/28/18 Bullet Points”;

C. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”;

D. “Tisaby’s Draft Interview Narrative Confidential of K.S.;

and

E. “Tisaby’s Draft J.W. Interview”.

51. At the court hearing on March 19, 2018 regarding the privilege log, with Respondent present, the following colloquy occurred:

(Mr. Martin): Your Honor, Mr. Dierker asserted that only

Mr. Tisaby would know whether he took notes. Ms. Gardner

is here and apparently participated in the interview. I would assume she would know whether Mr. Tisaby took notes. We're supposed to depose him today. And they were specifically subpoenaed, they were supposed to be turned over 48 hours.

(The Court): Chief, you want to speak to Ms. Gardner to make sure.

(Discussion off the record.)

(Mr. Dierker): There are no other notes.

(6:3-13)

52. Dierker consulted with Respondent off the record before he spoke.

53. The statement "there are no other notes" was false in that Respondent knew of the existence of the following notes that were neither produced nor listed as privileged:

A. "Gardner's 1/28/18 Bullet Points"

B. "Tisaby's Annotated Version of Gardner's 1/28/18 Bullet Points";

C. "Tisaby's 1/30/18 Handwritten Notes of J.W.";

D. "Tisaby's Draft Interview Narrative Confidential of K.S.";

E. "Tisaby's Draft J.W. Interview".

54. On March 19, 2018, following the court hearing, Jim Martin of the Greitens defense team took the sworn video deposition of Tisaby. Respondent was present and

defended the deposition. Tisaby made the following false statements under oath, shown in **bold**, which Respondent knew were false:

A. Tisaby falsely testified he did not receive any documents or information from Respondent prior to his interview of K.S.:

Q [W]ere 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.**

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.**

(51:22-52:10)

Q And did she [Gardner] tell you what [K.S.] said to her?

A **No, sir...I specifically did not want to hear what she told the Circuit Attorney. I wanted to hear it for myself because I as conducting an-an independent review as requested by the Circuit Attorney.**

(62:10-17)

Respondent knew the above answers were false because on January 17 and 18, 2018, Respondent was in Baton Rouge, LA with Tisaby, who spent hours reviewing background materials Respondent provided. In addition, Respondent emailed Tisaby "Gardner's 1/28/18 Bullet Points" prior to his interview of K.S.

B. Tisaby falsely testified he did not ask K.S. any substantive questions during his interview of K.S.:

Q And you never asked the key witness whether she had seen a photograph?

A No, sir....

Q But, Mr. Tisaby, wasn't she responding to your questions?

A Mr. Martin, let me say this again. I told her to tell her story to me, and I just sat there and listened to her story.

Q Okay. So your testimony is that you didn't ask her any questions about the events that you were investigating, you simply let her talk?

A I simply let her talk.

Q And you asked no questions?

A No questions other than, again, like I said, her – the normal stuff like who she was.

Q That's the preamble stuff?

A The preamble stuff, yes, sir.

Q Okay. But so almost all of this [report] is simply her talking without any questions being asked?

A Yes, sir.

(172:8-173:24)

Q And you are confident that you didn't ask questions?

A I'm confident.

(174:2-4)

Q Because you didn't ask any questions?

A No, sir.

Q No, sir meaning yes, I did not ask any questions?

A I did not ask any questions.

(189:21-25)

Q You didn't ask?

A I didn't ask.

Q Because you didn't ask any questions?

A No, sir.

(199:17-20)

Q She didn't say she didn't want to do that?

A Didn't ask her.

Q Because you didn't ask her any questions?

A No, sir.

(205:10-13)

Respondent knew the above answers were false because she sat next to Tisaby during the interview and witnessed Tisaby asking K.S. over one hundred-fifty questions.

C. Tisaby falsely testified he did not take any notes during his interview of K.S.

Q No. I'm talking about the pen to paper notes you took when you interviewed [K.S.] and [J.W.]?

A **Okay, Mr. Martin, I have no handwritten notes for the interview itself...**

(109:12-16)

Q And at that interview [of K.S.] you did not type out anything while she was talking, and you did not write down anything while she was talking?

A **I wrote out the preamble - - the predicate of what we discussed saying why we were there and who she was, whatever, which is a preamble thing, and then I also made a note that just - - just a handwritten note on the bottom date 1/29/2018.**

Q So you just listened and then when the interview was over tried to remember everything she said and put it down in paper?

A **Yes, sir. Best as I can recall, yes sir.**

Q So as a former FBI agent you sat through a multiple hour interview asking a woman detailed questions about her activities that are the focus of your investigation, and you took no notes and took - - typed no contemporaneous information down and just sat there and listened?

A **Until she left.**

Q You did - - you wrote - - you put nothing to paper until she left except the preamble?

A **Thank you. That's - - that's what I did and when she left, I started.**

Q Okay. And you have the preamble written in paper you believe in your hotel room?

A **It may be or it may be at home.**

(112:24-113:24)

Q Okay. But you were not taking any notes?

A **No, sir.**

(130:17-18)

Q And you did not document what she [K.S.] said during those two hours in any fashion whatsoever?

A No, sir.

(131:21-23)

Respondent knew the above answers were false because she was with Tisaby watching him make handwritten notes atop a double-spaced copy of "Gardner's 1/28/18 Bullet Points" during the interview (i.e. "Tisaby's Annotated Version of Gardner's 1/28/2018 Bullet Points").

D. Tisaby falsely testified that he did not communicate with Respondent during the lunch break of his deposition:

Q Now, you were gone for over two hours.

A I was.

Q Did you spend some of that time talking to Ms. Gardner?

A I did not.

Q You spent - -

A Not at all.

(128:8-14)

Respondent knew the above answers were false because Respondent and Tisaby had engaged in seven telephone conversations for a total of approximately 34 minutes during the two-hour lunch break.

E. Tisaby's falsely testified that "Tisaby's Final Investigative Narrative Confidential of K.S." produced to the defense on March 15, 2018 contained everything communicated to him directly by K.S. and all quotes were verbatim repetitions of what she told him:

Q Is this everything that she [K.S.] said to you?

A **Yes, sir.**

Q There's nothing that you left out?

A **No, sir.**

Q How much of this report is verbatim?

A **Verbatim what I have in quotes. Like look on the first page. Things that I definitely know is verbatim [K.S.] [from Greitens] - - [K.S.], great to see you. I left a book for you. Some time it's difficult getting an appointment. Do you have another way I can contact you?" Those were her exact quotes.**

Q Any time there's quotation marks that's an exact quote?

A **Yes, sir.**

Q Okay. And would you agree that you have multiple quotes contained in this report?

A **Yes, sir.**

Q And your testimony is because this might be shown to a jury. You understand that?

A **Understand.**

Q Okay. Your testimony under oath is that you remembered each of those exact quotes.

A **Yes, sir.**

(159:24-160:23)

Q Well, why are you so confident of that?

A **Because I listen to what she had to say, and I - - and I guarantee that that's what she told me.**

Q You guarantee it?

A **I'm confident, sir. I am confident.**

(135:17-21)

Respondent knew the above answers were false because the majority of "Tisaby's Final Investigative Narrative Confidential of K.S.", including the quotes, was copied verbatim from "Gardner's 1/28/18 Bullet Points". Furthermore, Respondent was present for Tisaby's interview of K.S. and knew that quotes in "Tisaby's Final Investigative Narrative Confidential of K.S." were not made by K.S. to Tisaby.

F. Tisaby falsely testified that he did not consult with or retain any experts regarding the Greiten's investigation prior to his deposition to acquire a photograph at issue in that matter

Q So your testimony is you're unaware of anybody that has made any effort to locate any alleged photograph?

A **Not that I know of.**

(66:20-23)

Q But you actually testified that Enterra doesn't have the capability of searching for any photograph?

A **I didn't say that.**

Q What did you say?

A **I said that - - I said subpoena power. I'm going to have subpoena power, but technically I got to - - I'll just - - I may try to find out if somebody technically can look for it for us without having subpoena power. I mean, through normal - - through normal channels.**

Q You haven't done that at this -

A **I haven't done that at this point. That was probably a final step. Haven't done yet, sir.**

Q Are you planning on doing it?

A **I anticipate doing it.**

Q When?

A **Get done with this. My next steps. My next - - my following steps. My next step is to take a look at that, too.**

There's other things we want to take a look at to close that out and that be one of the things that we may do.

Q What else?

A **Talk to somebody technically how we may go about trying to get this - -**

Q Get what?

A **You said the photo. You asked me I was trying to get the photo.**

Q I just asked you if you had looked for it.

A **No, not yet.**

Q Did Ms. Gardner ask you to look for it?

A **No, sir.**

(69:2-70:15)

Q And so tell me exactly what are the steps you're planning on doing to determine whether, one, there was a photograph and, two, whether that photograph was transmitted?

A **Consult with an expert.**

Q And – and that's – that's the step you plan on doing?

A **My next step.**

(73:10-17)

Respondent knew that the above answers were false, because three weeks prior to the deposition of Tisaby, Tisaby contacted Vestige Limited, a digital forensic investigative company, and asked them for help in obtaining the alleged photograph at issue in the Greiten's case. Thereafter, Respondent, Tisaby and Circuit Attorney Anthony (Tony) Box all communicated with Vestige by telephone multiple times prior to Tisaby's deposition. Vestige advised about the difficulties in obtaining the alleged photograph.

G. Tisaby falsely testified he had no drafts of "Tisaby's Final Investigative Narrative Confidential of K.S." and "Tisaby's Final J.W. Interview"

Q And you – and – and it's your testimony under oath that you went to your laptop and you looked for earlier drafts, and you could not find earlier drafts of the interview report of [K.S.] or [J.W.]?

A Yes, sir.

(128:2-7)

Q You only had one draft?

A One draft and I worked on that one draft.

Q So each time you just modified that same document?

A Yes, sir.

Q You're a 100 percent positive then?

A I'm a 100 percent positive.

(143:8-14)

Respondent knew the above answers were false because she received from Tisaby on March 13, 2018 an email with “Tisaby’s Draft Interview Narrative Confidential of K.S.” and “Tisaby’s Draft J.W. Interview”.

55. Despite knowing that the above testimony (Paragraph 54 herein) from Tisaby was false, Respondent took no reasonable remedial measures to correct Tisaby’s testimony.

56. Following Martin’s examination of Tisaby, Respondent offered and eliciting additional false testimony from Tisaby, shown in **bold**:

A. Tisaby falsely testified that he did not receive any document or information from Respondent prior to his interview of K.S.:

QUESTIONS BY MS. GARDNER:

Q Did you look at any notes before you had this interview?

A **Never.**

(314:23-25)

Respondent knew that the above answer was false because on January 17 and 18, 2018, Respondent was in Baton Rouge, LA with Tisaby, who spent hours reviewing background materials Respondent provided. In addition, Respondent emailed Tisaby “Gardner’s 1/28/18 Bullet Points” prior to his interview of K.S.

B. Tisaby falsely testified that “Tisaby’s Final Investigative Narrative Confidential of K.S.” produced to the defense on March 15, 2018 contained everything communicated to him directly by K.S. and all quotes were verbatim repetitions of what she told him:

QUESTIONS BY MS. GARDNER:

Q So just to clarify some of the stuff was talked about, all the notes you have have been incorporated in your final report, is that correct?

A Yes, sir - - yes, ma’am.

(292:16-19)

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

A Yes.

(293:15-17)

Q And when you met with Ms. 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.

Q Do you recall any notes that I took?

A No.

(295:11-15)

* * *

Q Did you look at any notes before you had this interview?

A Never.

Q And to the best of your knowledge, the notes that you had taken [of K.S. interview] are incorporated in the report that you turned over?

A Yes, Ms. Gardner. Yes.

(314:23-315:4)

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

A Accurate summary what she told me.

(341:16-19)

Respondent knew the above answers were false because the majority of "Tisaby's Final Investigative Narrative Confidential of K.S." was taken verbatim from "Gardner's 1/28/18 Bullet Points," which she emailed to Tisaby prior to his interview of K.S.

C. Tisaby falsely testified that "Tisaby's Final J.W. Interview" produced to the defense on March 15, 2018 contained everything communicated to him directly by J.W.:

QUESTIONS BY MS. GARDNER:

Q And did you interview J.W.?

A I did.

Q And whatever notes you took are incorporated in that report that you turned over?

A **Completely.**

(315:5-9)

Q To the best of your recollection, is this a true and accurate statement of what J.W. stated to you?

A **Yes, it is, Ms. Gardner.**

(341:16-19)

Respondent knew the above answers were false because on March 13, 2018 she received an email with "Tisaby's Draft J.W. Interview" which contained statements allegedly made by J.W. which were then deleted from "Tisaby's Final J.W. Interview" produced to the defense.

D. Tisaby falsely testified that he did not consult with or retain any experts regarding the Greiten's investigation prior to his deposition to acquire a photograph at issue in that matter:

QUESTIONS BY MS. GARDNER:

Q To the best of your recollection, when speaking with the Circuit Attorney on this investigation, were you supposed to do any follow up on a photo?

A **No, I was not.**

(315:22-316:1)

Respondent knew that the above answer was false, because three weeks prior to the deposition of Tisaby, Tisaby contacted Vestige Limited, a digital forensic investigative company, and asked them for help in obtaining the alleged photograph at issue in the Greiten's case. Thereafter, Respondent, Tisaby and Circuit Attorney Anthony (Tony) Box all communicated with Vestige by telephone multiple times prior to Tisaby's deposition. Vestige advised about the difficulties in obtaining the alleged photograph.

57. On March 20, 2018, the defense counsel filed a Witness Endorsement of William Don Tisaby.

58. On April 4, 2018, defense counsel filed a Motion to Compel Production of Subpoenaed Records and Notice of Second Deposition of Tisaby.

59. On April 8, 2018, Defendant filed a Motion to Compel Immediate Production of all Exculpatory Information (including videotape or equipment used to record Tisaby's interview of K.S.).

60. On April 11, 2018, at 8:00 a.m., Dierker emailed Respondent a draft Memorandum in Opposition to Motion to Compel and Re-Depose Tisaby, with the following suggested language:

“Leaving aside defense counsel's loose rhetoric about perjury, the State submits that the defense has presented nothing that warrants further action by this Court. Mr. Tisaby was questioned and cross-examined repeatedly about notes of interviews and drafts of reports. A fair reading of the

deposition indicates that Mr. Tisaby took no handwritten notes, except for very brief notes regarding interview dates and names, and that he simply began drafting his report from memory, combining drafts as he went along. The defense apparently was discomfited when Mr. Tisaby recalled some information that had not been set out in his reports – information that is far from exculpatory and paints the circumstances of defendant’s crime in even worse light. Regardless, the testimony is clear that there are no drafts or notes to be had.”

61. On April 11, 2018 at 11:30 a.m., Dierker emailed Respondent asking if they are good to file the last draft of the Memorandum in Opposition to Motion to Compel and Re-Depose Tisaby,. At 12:00 p.m., Respondent replied: “No not yet.”

62. On April 11, 2018 via courier at 6:00 p.m., the CAO provided to the defense:

A. The working video of Tisaby’s interview of K.S. revealing that Respondent was sitting next to Tisaby during the interview as Tisaby asked over one hundred-fifty questions and took hand-written notes atop a slightly-modified version of “Gardner’s 1/28/18 Bullet Points” regarding the following topics:

1. Events occurring on the date and at the location the alleged crime took place;
2. K.S.'s clothing at the time of the alleged crime;
3. Information regarding the elements of invasion of privacy;
4. Information regarding the defendant's exact words;
5. K.S.'s state of mind was and how she felt regarding a sex act that occurred;
6. Defendant's state of mind was at the time of the alleged crime; and
7. The names of potential witnesses who later testified before the Grand Jury in the invasion of privacy case.

B. Tisaby's 11 pages of handwritten notes of his 1/29/18 interview of K.S., which were written atop "Gardner's 1/28/18 Bullet Points" (i.e. "Tisaby's Annotated Version of Gardner's 1/28/18 Bullet Points"), but excluding the last forty-five bullet points from "Gardner's 1/28/2018 Bullet Points".

C. Respondent's handwritten notes of Tisaby's interview of K.S. on January 29, 2018.

63. On April 12, 2018, at the court hearing, defense counsel argued the Respondent concealed evidence, allowed Tisaby to give false statements under oath, suborned perjury, and prejudiced the defense, and asked the court for sanctions, including dismissal of the indictment. The judge had the following questions:

THE COURT: All right. From the State, at this point, all I want to hear is about the chain of this video projector and videotape. I want to know how it was first determined that it was malfunctioned, when it was determined that it no longer malfunctioned.

I'm not going to hear anything from the State at this time - - we're going to recess from the State and have a discussion in chambers with regard to the severe allegations of criminal perjury and a dishonest prosecutor. Those are some very, very severe allegations that I feel incumbent to make a record to make sure anything that's put on the record at this point from the State has been - - that the State has had the opportunity to consider those allegations.

But I do want to hear from the State, whoever has the most information, what the process was on this projector, when it was asked for, when the request was responded to that it was

inoperable and there wasn't any tape, when it was that it was determined that the tape was operable, and when it was actually disclosed to the defendant. Who best can address that?

MS. GARDNER: Me, your Honor. Your Honor, the tape was basically set up in the hotel room. When we were under the impression that it was recording, we thought it worked. No one touched the tape. No one did anything until after the interview was over.

THE COURT: Whose recorder was it?

MS. GARDNER: It was the circuit attorney's recorder, your Honor.

THE COURT: Recorder that the circuit attorney routinely uses?

MS. GARDNER: Well, I don't know because we just got a tape, one of our recordings that we have in our investigation unit. So I don't know if that's the one we use normally because I don't record normally.

THE COURT: Who was in charge of the recording?

MS. GARDNER: It was set up by myself, and we put a - - we did all the setup. Mr. Tisaby, we checked the tape at the time.

(27:21-29:9)

* * *

THE COURT: We're going to stop at this point. We're going to need to make a record in chambers.

(30:24-25)

64. In a confidential proceeding in chambers, the following colloquy occurred:

THE COURT: We're in chambers, Cause 1822-CR00642, State of Missouri versus Eric Greitens.

The Court has recessed the hearing that was being conducted in open court. Mr. Pedersen's here from the legal staff, I believe most everyone knows him.

With the allegations that have been made in open court and with the preliminary documents and argument in support of those allegations, I feel it's incumbent upon me, before the State put anything further on the record, to advise Ms. Gardner and that any further reference is going to be under oath and that, Ms. Gardner, unfortunately, I need to advise you that you have the right to have an attorney, to consider the advice of an attorney.

The allegations that I'm referring to is that in documents and argument it seems that you were in the room when the basis of the defendant's allegations of subornation of perjury were made, and I don't take that as true. What I'm taking that as

it's a severe enough allegation that I felt it was incumbent upon me to recess and make sure that there was a record before anything further was said and that's what I'm doing right now. Do you understand that?

MS. GARNER: Yes, I do.

THE COURT: Mr. Steele, there's also been allegations of perjury by Mr. Tisaby. I'm not sure, and Mr. Pedersen's going to have to help me, I'm not sure what my authority is at this point as far as investigation of that allegation, whether your office will need to conduct that investigation or make sure that that investigation is handled with regard to the criminal perjury that has been alleged.

So I don't need an answer on that at this point, but that is another basis of this recess is that there's been a prima facie showing here there may have been criminal perjury and who investigates that needs to be determined. Okay?

MR. STEELE: Yes, your honor.

THE COURT: So, frankly, I don't know where to go from here as far as when to reopen this hearing. Do you have any requests? I felt that, I don't know - - didn't know the extent of, Ms. Gardner, your office's knowledge of what was going to be presented today, but I felt that you're entitled to - - I felt

it may have been somewhat - - the extent of the allegations may have been somewhat of a surprise, and I felt that it would be fair that you had time to respond to it and time to respond to it based on the admonition that I've put in the record.

So I'll take a suggestion from your office as to when we complete this - - the rest of this hearing.

MR. DIERKER: Could we have a few minutes to huddle, your Honor?

THE COURT: Sure.

(Discussion off the record.)

THE COURT: We're back on the record. Chief, were you - -

MR. DIERKER: I think it's our request, your Honor, that we go back out in open court on the record, and Mr. Steele and Ms. Gardner would like to address the Court.

THE COURT: Very well. Okay.

(Proceedings in chambers concluded.)

(2:3-4:11)

65. Back in the courtroom, with Respondent present, Steele conceded to the Court that "Tisaby's Annotated Version of Gardner's 1/28/18 Bullet Points" contained *Brady* impeachment evidence regarding the defense theory that K.S. and Greitens had an ongoing, consensual relationship:

MR. STEELE: There's also some allegations of information that they did not have prior to, I guess, the committee. That it would have somehow changed something. The deposition of K.S., the Court granted a lot of latitude, there were a number of questions asked, in the defense's opinion, would have possibly brought some evidence.

A lot of that got into issues such as her physical reaction or sexual reaction to certain activity. Some of these activities months away from the incident. The incident in March 21st. Some of the actions that they're talking about like the FaceTime. That she FaceTimed him.

This is four or five months later. This has nothing to do with the allegations that transpired on March 21st. The fact that she FaceTimed him three or four months later has nothing to do with that.

They can argue to a jury that she somehow means that four months earlier, even though she said there was not consensual, it may have been. It's somehow relevant. The issue is what happened on March 21st of 2015 in that basement. Whether she FaceTimed him four months later - -

THE COURT: You don't think that has anything to do with whether or not the March 21st incident was consensual, the fact there was Facebooking three or four months later?

MR. STEELE: I think they can present that to a jury and the jury can make that decision.

THE COURT: Do you think that's relevant?

MR. STEELE: I think it's relevant, yes.

THE COURT: That's the point, Mr. Steele.

MR. STEELE: And this is the point your Honor. They had that information last week. Because she was deposed on that. So to say that they did not.

THE COURT: The point's compounded by Brady, and it seems that your argument is that the State decides before it turns anything over what's relevant. Is that how you read Brady?

MR. STEELE: No, your Honor.

(36:14-38:1)

66. Mr. Martin then argued about the exculpatory nature of the notes having been concealed from the defendant:

MR. MARTIN:

His testimony under oath that he took no notes, that he never takes notes, when Ms. Gardner was sitting there as she has now represented in the Court. She was sitting right next to him. And he was - - you can see in the video, you can see in the pictures he's writing the notes out.

And she allowed him to testify he never took any notes.

(41:23-42:5)

[K.S.] lied in this video, and every time she lies in this video that goes to her credibility. Every time she leaves something out, that goes to her credibility. And when Mr. Steele says that's not exculpatory, as a former public defender for 20 years, I guarantee he would have found it exculpatory if he was sitting at our table.

She said, one of the - - the second meeting they had just a few weeks later in the salon, she described as a little bit of kissing.

In her deposition she described it as way more than that.

She's telling different stories, that goes to her credibility.

The FaceTime incident. The FaceTime incident. This entire case is about was a photograph taken, if it was taken was it consensual. And if it was consensual, was it of somebody partially naked.

She lied in her interview of January 29 about that FaceTime incident. She made it sound as if it was innocuous, and she cut it off. When we got her to admit in the deposition that she was partially naked, and what that says is that she was willing to have photographs of herself partially naked being sent over the Internet to our client.

That's huge. And she didn't tell the truth about that in this January taped interview that we just got last night.

(42:22-43:20)

One of the most incredible things that, in all candor, we think destroys this woman's credibility, and again, I'm going to say on the record, real victims deserve every protection in the world. This isn't a victim. She's a consenting person to everything that went on.

(44:20-24)

But she made testimony in her deposition that there was explicit sexual activity going on, totally voluntary. Her inability to tell the same story, totally contrary to what Mr. Steele is saying that she's telling the same story every time, is hugely exculpatory.

(45:13-17)

And Ms. Gardner sat there right there, right next to him, as she even testified in the interview of January 29th, and she sat there right next to him in the deposition. And even went so far as to ask the question, as both Mr. Rosenblum and I have quoted to you, you turned over all the notes? Yes.

When she knew he had 11 pages of other notes, and when she knew that she had other notes of her own that didn't get turned over until last night.

There are huge problems. It is gross prosecutorial misconduct, and goes to the heart of this case. And we are asking this Court to dismiss this case as a sanction against the circuit attorney for gross prosecutorial misconduct.

(46:8-21)

67. Mr. Dierker then inaccurately stated that the type-written bullet points were the work of Tisaby, and that Respondent had turned over everything that needed to be produced:

MR. DIERKER: Your Honor, I'd like to make just a couple of observations. Accusations of perjury are serious, but we both know that the crime of perjury is a rather intricate

offense, and I think that this whole situation has developed because Ms. Gardner has done her duty.

She did disclose the materials because she kept after Mr. Tisaby, and she kept after the issue of getting this video to get produced. So she has turned over the materials. The notes that are referred to have handwritten notes and bullet point, typewritten, and those were prepared by Mr. Tisaby. Ms. Gardner had turned over her handwritten notes previously.

(46:23-47:10)

68. Respondent, who was present at that court hearing:

A. Failed to correct Dierker's false and inaccurate statement, which she knew was false, by disclosing to the Court that she, not Tisaby, was the author of "Gardner's 1/28/18 Bullet Points" atop which Tisaby made hand-written notes (i.e. "Annotated Gardner's 1/28/18 Bullet Points");

B. Failed to correct Dierker's false and inaccurate statement, which she knew was false, by disclosing to the Court, that the original "Gardner's 1/28/18 Bullet Points" and particularly, the last forty-five bullet points of "Gardner's 1/28/18 Bullet Points" had not been produced to the defense; and

C. Failed to correct Dierker's false and inaccurate statement, which she knew was false, by disclosing to the Court, that "Tisaby's Draft Interview Narrative Confidential of K.S." had not been produced to the defense.

D. Failed to correct the previous statement in the March 12, 2018 State's Response to Defendant Eric Greiten's Motion to Compel Disclosure of Impeachment Evidence, that: "In fact, the State possesses no information relative to K.S. not disclosed, 'that may be used to impeach a government witness.' ", despite Steele's concession that evidence of a consensual relationship between K.S. and the defendant was impeachment evidence, when Respondent knew that she had not produced the original "Gardner's 1/28/18 Bullet Points" (inclusive of the last forty-five bullet points) and "Tisaby's Draft Interview Narrative Confidential of K.S.", both of which she knew contained impeachment evidence based on Steele's concession in open court that evidence of a consensual relationship is *Brady*.

69. Later on April 12, 2018, in the State's Memorandum in Opposition of Motion to Compel and for Sanctions, Respondent falsely stated that:

On April 10, after viewing the video in full for the first time, the Circuit Attorney realized that Mr. Tisaby's deposition testimony was incorrect. She proceeded to follow up with Mr. Tisaby and succeeded in obtaining notes which had not been observed by the Circuit Attorney at the time. These 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), Handwritten notes were added to these typewritten bullet points by Mr.

Tisaby, but the Circuit Attorney was not aware of those notes until she viewed the video. The typescript bullet points were the work of Mr. Tisaby, not the Circuit Attorney.

There is simply no additional discovery to be had concerning the victim's testimony.

70. The following statement by Respondent statement in the Memorandum in Opposition of Motion to Compel and for Sanctions was false: "On April 10, after viewing the video in full for the first time, the Circuit Attorney realized that Mr. Tisaby's deposition testimony was incorrect. She proceeded to follow up with Mr. Tisaby and succeeded in obtaining notes which had not been observed by the Circuit Attorney at the time". The statement was false because the video clearly showed Respondent sitting next to Tisaby and watching him take notes during his interview of K.S.

71. The following statement by Respondent statement in the Memorandum in Opposition of Motion to Compel and for Sanctions was false: "The typescript bullet points were the work of Mr. Tisaby, not the Circuit Attorney". The statement was false because, in reality, Respondent authored the typescript bullet points (i.e. "Gardner's 1/28/18 Bullet Points").

72. The following statement by Respondent statement in the Memorandum in Opposition of Motion to Compel and for Sanctions was false: "There is simply no additional discovery to be had concerning the victim's testimony". The statement was false because, in reality, Respondent never produced the following:

- A. “Gardner’s 1/28/18 Bullet Points” in its original form (inclusive of the last forty-five bullets):
- B. “Gardner’s 1/28/18 email to Tisaby”;
- C. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”;
- D. “Tisaby’s Draft Interview Narrative Confidential of K.S.”;
- E. “Tisaby’s 3/13/18 email to Gardner”.

73. At the court hearing on April 16, 2018, the defense revealed to the Court that the State had just then produced to the defense “Tisaby’s 1/30/18 Handwritten Notes of J.W.” and “Tisaby’s Draft J.W. Interview”, which Tisaby, under oath, had denied existed. Both of those revealed an allegedly exculpatory statement made by J.W. (“K.S. thought that E.G. cared about her”), but the statement was not included in “Tisaby’s Final J.W. Interview” produced to the defense prior to Tisaby’s deposition.

74. Respondent never produced to the defense or the court “Tisaby’s 3/13/18 email to Gardner” (with draft attachments) stating: “Kim/Tony, please see the attached. Please advise of any additional changes. If they are ok, let me know as well.” Signed: “William Don Tisaby”. In addition, Respondent failed to explain who made changes to the final reports produced to the defense and why.

75. As an additional sanction for prosecutorial misconduct alleged based only on information known by defense counsel at the time, defense counsel asked that K.S. and J.W. be excluded from testifying at trial:

(MR. MARTIN): Every one of the witnesses Mr. Tisaby has touched is now tainted. At a minimum, and that would

impact the case anyhow, these witnesses should be excluded from testifying because his false reports, his twisting of what people said has impacted their mindset as to what their story is.

There appears to be a concerted effort to get them to have a certain story. And they have - - once you testify under oath to a certain story, every witness tries to stick to it so they're not accused of perjury also. So what Mr. Tisaby has done with J.W. and with K.S. is he has, in fact, impacted their testimony, tainted it, and that impact us and that prejudices us.

(28:17-29:3)

THE COURT: All right. So as to the motion to dismiss. I'm going to give you until noon on Wednesday for any other filings. We've had a number of those over the weekend, and I'm going to make a ruling in open court Thursday morning on the motion to dismiss.

(29:17-21)

76. On April 18, 2018, in the State's Supplemental Memorandum in Response to Defense Discovery Issues, Respondent again falsely stated that: "All known notes of

interviews with the victim have been provided,” when in reality, Respondent had not produced:

A. “Gardner’s 1/28/18 Bullet Points” (inclusive of the last forty-five bullet points) and

B. “Tisaby’s Draft Interview Narrative Confidential of K.S.”

77. On April 19, 2018, in open court, the judge, after considering Defendant’s Motion to Compel and for Sanctions, Defendant’s Motion to Produce Exculpatory Information, State’s Memorandum in Opposition to Compel and for Sanctions, Defendant’s Second Supplemental Reply in Support of Motion to Dismiss, and State’s Supplemental Memorandum in Response to Defendant’s Discovery Issues, made the following ruling:

“Ms. Gardner has, as the elected circuit attorney for the City of St. Louis, represents the People of the City of St. Louis. She has a duty to be impartial. She has a duty to ensure that all defendants are accorded procedural justice.

Missouri Supreme Court has promulgated Rule 25 to further ensure that a criminal procedure goes forward with procedural justice. Rule 25 orders that certain documents be turned over without request.

Rule 25 is also supplemented by U.S. and Missouri court rulings, specifically regarding Brady material.

Material that may be considered exculpatory or in favor of the defendant must be turned over if it is in possession of the State.

These rules are not mere rules of etiquette. They must be complied and they're not discretionary. Clearly in this case the State has committed sanctionable discovery violations of the Rules of Criminal Procedure. It's troubling to the Court that the State, in its filings this week, state that sanctions are clearly inappropriate at page 2, and the defendant's motion is frivolous at page 9.

However, the sanctions that the Court must consider are wide ranging. From the striking of pleadings to the order of retaking depositions, to monetary assessments of costs or fines against entities or individuals.

The Court, in considering sanctions, must look at aspects of the conduct. And, generally, the Court would look at the reasons for nondisclosure. The prejudice to the opposing party. The feasibility of curing any prejudice in any other related circumstances.

In considering the sanctions, the most extreme is the striking of the State's pleadings, or striking of the State's evidence, striking of the State's witnesses, or dismissing of the case.

That type of sanction is only available where there is fundamental unfairness that a defendant has suffered that is irreparable and not feasible of curing with any lesser sanction. Although the conduct that has been seen in the discovery of this case is not to be condoned, is serious, it is, however, in the Court's opinion capable of being cured.

Therefore, the Court, in considering sanctions, will not dismiss the case. The Court will order lesser sanctions, that being that the parties, or that the defendant will be allowed to retake depositions.

The Court will, based on its finding that the State did, in fact, violate the rules of criminal discovery, will consider costs and monetary sanctions at or near the time the case has been completed.

With regard to the conduct that's been alleged in the courtroom. There are other venues and authorities that have jurisdiction. We're not going to try what at the end of the day Mr. Tisaby's conduct equals in this case. We're not going to try at the end of the day what the State's conduct equals in this case. The Court's only going to weigh the effect of that conduct as it relates to the defendant's right to a fair trial.

At this point, the Court believes that the tilting of the playing field that has occurred by the conduct of the State is curable. However, as this case proceeds in the next three or four weeks, if further conduct is brought to the Court's attention, this motion will be reconsidered.

If during the trial irreparable harm surfaces due to the conduct, the Court will re again consider the defendant's request.

If the lesser sanctions that have been ordered here today do not cure the unfair tilt of this playing field, the Court will again consider the sanction of dismissal.”

(24:13-27:7)

78. On April 23, 2018, the Court heard arguments related to the production of Tisaby for his second deposition. Respondent again falsely stated in open court that all notes regarding K.S. had been turned over to the defense:

MS. GARDNER: Your Honor, Mr. Tisaby only interviewed K.S. one time, and that is on the videotape. The notes when I had a previous interview of K.S. was turned over to the defense, as well as the notes on the second interview, so what they have is what we have, your Honor, and it was turned over immediately.

So they have everything that we have, as well as a videotape that they can look at and all the questions that Mr. Tisaby asked, anything else they have on that tape is available to the defense. We turned that over.

MR. MARTIN: I think Ms. Gardner is forgetting the fact that she has been sanctioned and you have found that their conduct was sanctionable. So the idea that we got everything and everything was done properly is just absurd.

THE COURT: All right. Ms. Gardner, the Court's going to order that Mr. Tisaby, your lead investigator, be available for deposition Thursday. And we'll take under consideration any further relief if he doesn't produce himself for deposition.

(33:4-23)

But in reality, Respondent never produced to the defense:

A. "Gardner's 1/28/18 Bullet Points" (inclusive of last forty-five bullet points): and

B. "Tisaby's Draft Interview Narrative Confidential of K.S.".

79. In Respondent's presence, Steele then stated to the court that the defense had all of the documents in the possession of the State:

MR. STEELE: The investigator with our office, Mr. Box. The chief investigator, he's the head of all investigations in our office. Mr. Tisaby is not lead investigator on this case.

He's not involved in this case. He is not endorsed by the State. Any information they have from him they've already got. They've got everything we've got.

(34:7-13)

80. Respondent knew Steele's statement: "They've got everything we've got.", was false and failed to correct the record by disclosing the CAO never produced to the defense:

- A. "Gardner's 1/28/18 Bullet Points" in its original form (inclusive of the last forty-five bullets);
- B. "Gardner's 1/28/18 email to Tisaby";
- C. "Tisaby's Draft Interview Narrative Confidential of K.S.";
- D. "Tisaby's 3/13/18 email to Gardner".

81. On April 26, 2018, the defense took the second deposition of Mr. Tisaby, who was represented by attorney, Jermaine Wooten. Mr. Tisaby invoked his fifth amendment right not to answer any substantive questions asked. The deposition was terminated.

82. On May 10, 2018, in proceedings in chambers, the judge allowed the defense to endorse Respondent as a witness at trial:

ROSENBLUM: In effect, Ms. Gardner has made herself a case agent. She did not insulate herself in a way that is normally done by prosecuting attorneys. There's a reason why most - - almost every prosecuting attorney would not

have put themselves, or herself in a position that Ms. Gardner put herself in.

She has injected herself in this case every step of the way. She brought the investigator in who turned out to be a disaster. He now has taken the Fifth. So the last person standing that has essentially the same information as Tisaby is Ms. Gardner, and she effectively acted as a case agent.

(5:23-6:9)

* * *

THE COURT: At this point, I'm going to allow the endorsement. When it gets to the part of actually the defense attempting to call Ms. Gardner, then we're going to have a hearing, and I would suggest that we get that pretty well briefed right now. What I'm hearing is an endorsement before the defense case.

(7:2-7)

83. On May 14, 2018, the State filed a Nolle Prosequi of State of Missouri vs. Eric Greitens (Cause No. 1822-CR00642). The judge discharged the defendant from his bond and closed the case.

84. On July 2, 2018, an ethics complaint against Respondent was submitted to the OCDC regarding Respondent's conduct in State of Missouri vs. Eric Greitens (Cause No. 1822-CR00642).

85. On November 15, 2018, Respondent submitted her response to the ethics complaint.

86. In her November 15, 2018 response to the ethics complaint, Respondent made the following false statements to the OCDC:

A. Respondent reaffirmed that Tisaby created “Gardner’s 1/28/18 Bullet Points”,

when, in reality, Respondent created “Gardner’s 1/28/18 Bullet Points” and emailed them the same day to Tisaby;

B. Respondent stated that: “I promptly corrected the record in regard to Tisaby,”

when, in reality, Respondent never disclosed that she created “Gardner’s 1/28/18 Bullet Points” and emailed them to Tisaby nor corrected the false deposition answers Tisaby gave, including those she elicited with her own questions; and

C. Respondent stated that: “The pretrial order regarding supplementing discovery was followed,”

when, in reality, Respondent never supplemented discovery production with the following documents:

1. “Gardner’s 1/28/2018 Bullet Points”

(inclusive of the last forty-five bullet points of information);

2. “Gardner’s 1/28/18 email to Tisaby”

attaching “Gardner’s 1/28/18 Bullet Points”;

3. “Tisaby’s Draft Interview Narrative

Confidential of K.S.”

4. “Tisaby’s 3/13/18 email to Gardner”.

Respondent’s Concealment and Misrepresentations as to the Source of Evidence

87. Respondent violated Rules 4-3.3(a)(1), 4-3.4(a) and 4-8.4(c) when she falsely stated on March 6, 2018 in open court that “everything’s been turned over except the witnesses, addresses and transcript,” when she knew that the following documents had not been produced to the defense:

A. “Gardner’s 1/28/18 Bullet Points”

B. “Gardner’s 1/28/18 email to Tisaby attaching “Gardner’s 1/28/18 Bullet Points”;

C. “Tisaby’s Annotated Version of Gardner’s 1/28/18 Bullet Points”.

88. Respondent violated Rule 4-3.3(a), Rule 4-5.1(b), Rule 4-5.1(c)(1), Rule 4-8.4(a) and Rule 4-8.4(c) by failing to correct the false statement made in the State’s March 12, 2018, State’s Response to Defendant Eric Greiten’s Motion to Compel Disclosure of Impeachment Evidence (i.e. “In fact, the State possesses no information relative to K.S. not disclosed, ‘that may be used to impeach a government witness.’ ”), after Lead Attorney, Steele conceded in open court on April 12, 2018 that evidence of a consensual relationship between K.S. and the defendant was in fact impeachment evidence of K.S., a government witness. Impeachment evidence Respondent possessed but never produced to the defense includes:

A. "Gardner's 1/28/2018 Bullet Points" (inclusive of the last forty-five bullet points of information); and

B. "Tisaby's Draft Interview Narrative Confidential of K.S.".

89. Respondent violated Rule 4-3.4(a), (c) and (d) and Rule 4-8.4(c) by violating the court Order of March 15, 2018 and Rule 25 of the Criminal Rules of Procedure by failing to timely produce or list as privileged for an *in camera* review the following documents:

A. "Gardner's 1/28/18 Bullet Points";

B. "Gardner's 1/28/18 email to Tisaby attaching "Gardner's 1/28/18 Bullet Points";

C. "Tisaby's Annotated Version of Gardner's 1/28/18 Bullet Points";

D. "Tisaby's Draft Interview Narrative Confidential of K.S." and "Tisaby's Draft J.W. Interview";

E. "Tisaby's 3/13/18 email to Gardner"

90. Respondent violated Rule 4-3.3(a)(1), 4-3.4(a) and (c), Rule 4-4.1(a) and (b), Rule 4-5.1(c)(1) and Rule 4-8.4(a) and (c) when she provided false information to Dierker who then falsely stated to Judge Burlison on March 19, 2018 that no notes regarding witnesses existed ("no other notes") when Respondent knew of the existence of:

A. "Gardner's 1/28/18 Bullet Points"

- B. “Tisaby’s Annotated Version of Gardner’s 1/28/18 Bullet Points”;
- C. “Tisaby’s Draft Interview Narrative Confidential of K.S.”;
- D. “Tisaby’s Draft J.W. Interview”.

91. Respondent violated Rule 4-3.3(a)(3), 4-3.3(b) and 4-8.4(c) regarding Tisaby’s deposition of March 19, 2018 by failing to take reasonable remedial measures when she knew Tisaby was giving false answers to questions regarding the following topics as fully described in Paragraph 54 herein:

- A. Tisaby falsely testified he did not receive any documents or information from Respondent prior to his interview of K.S.
- B. Tisaby falsely testified he did not ask K.S. any substantive questions during his interview of K.S.
- C. Tisaby falsely testified he did not take any notes during his January 28, 2018 interview of K.S.
- D. Tisaby falsely testified he did not communicate with Respondent over the lunch break during his deposition.
- E. Tisaby falsely testified that “Tisaby’s Final Investigative Narrative Confidential” of K.S.” produced to the defense on March 15, 2018 contained everything communicated to him directly by K.S. and all quotes were verbatim repetitions of what K.S. told him.

F. Tisaby falsely testified he did not consult with or retain any experts regarding the Greitens investigation prior to his deposition to acquire a photograph at issue in the matter.

G. Tisaby falsely testified he had no drafts of "Tisaby's Final Investigative Narrative Confidential of K.S." or "Tisaby's Final J.W. Interview".

92. Respondent violated Rule 4-3.3(a) and (b), 4-5.3(c) and 4-8.4(c) when she offered and elicited false testimony when questioning Tisaby during his deposition on March 19, 2018 regarding the following topics as fully described in Paragraph 56 above:

A. Tisaby falsely testified that he did not receive any documents or information from Respondent prior to his interview of K.S.

B. Tisaby falsely testified that "Tisaby's Final Investigative Narrative Confidential of K.S." produced to the defense on March 15, 2018 contained everything communicated to him directly by K.S. and all quotes were verbatim repetitions of what she told him.

C. Tisaby falsely testified that "Tisaby's Final J.W. Interview" produced to the defense on March 15, 2018 contained everything communicated to him directly by J.W.

D. Tisaby falsely testified that he did not consult with or retain any experts regarding the Greiten's investigation prior to his deposition to acquire a photograph at issue in that matter.

93. Respondent violated Rule 4-3.3(a), 3.4(a) and (c), Rule 4-5.1(c)(1) and Rule 4-8.4(a) and (c) when on April 12, 2018 she failed to correct, assisted, ratified, and misrepresented by her conduct the false and inaccurate statement by Dierker to the court that the typewritten bullet points were created by Tisaby: "The notes that are referred to have handwritten notes and bullet point, typewritten, and those were prepared by Mr. Tisaby," when in reality, Respondent knew that she created the typewritten bullet points (i.e. "Gardner's 1/28/18 Bullet Points").

94. Respondent violated Rule 4-3.3(a), Rule 4-5.1(c)(1), Rule 4-8.4(a) and Rule 4-8.4(c) by remaining silent on April 23, 2018, when Dierker stated in open court that the typewritten notes (i.e., "Gardner's 1/28/18 Bullet Points") were authored by Tisaby, when in fact, Respondent knew that she authored the typewritten notes.

95. Respondent violated Rule 4-3.3(a), Rule 4-3.4(a) and Rule 4-8.4(c) when she falsely stated in the April 12, 2018 Memorandum in Opposition to Motion to Compel and for Sanctions that: "On April 10, after viewing the video in full for the first time, the Circuit Attorney realized that Mr. Tisaby's deposition testimony was incorrect. She proceeded to follow up with Mr. Tisaby and succeeded in obtaining notes which had not been observed by the Circuit Attorney at the time." was false, as the video showed Respondent sitting next to and watching Tisaby taking notes during his interview of K.S.

96. Respondent violated Rule 4-3.3(a), Rule 4-3.4(a) and Rule 8.4(c) when she falsely stated in the April 12, 2018 Memorandum in Opposition to Motion to Compel and for Sanctions that: “The typescript bullet points were the work of Mr. Tisaby, not the Circuit Attorney”, when in reality, Respondent had authored the typescript bullet points (i.e. “Gardner’s 1/28/18 Bullet Points”) and emailed them to Tisaby the day before he interviewed K.S.

97. Respondent violated Rule 4-3.3(a), Rule 4-3.4(a) and Rule 4-8.4(c) when she falsely stated in the April 12, 2018 Memorandum in Opposition to Motion to Compel and for Sanctions that: “That there is simply no additional discovery to be had concerning the victim’s testimony,” when in reality, Respondent possessed but never produced to the defense:

- A. “Gardner’s 1/28/18 Bullet Points” in its original form (inclusive of the last forty-five bullets);
- B. “Gardner’s 1/28/18 email to Tisaby”;
- C. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”;
- D. “Tisaby’s Draft Interview Narrative Confidential of K.S.”;
- E. “Tisaby’s 3/13/18 email to Gardner”.

98. Respondent violated Rule 4-3.3(a), Rule 4-3.4(a) and Rule 4-8.4(c) in the State’s Supplemental Memorandum in Response to Defense Discovery Issues on April 18, 2018, when she falsely stated that: “All known notes of interviews with the victim have been provided,” when in fact, she knew she never produced the following notes to defendant:

A. “Gardner’s 1/28/18 Bullet Points” (inclusive of last forty-five bullet points) and

B. “Tisaby’s Draft Interview Narrative Confidential of K.S.”

99. Respondent violated Rule 4-3.3(a) and 4-8.4(c) when on April 23, 2018, she falsely said in open court: “The notes when I had a previous interview of K.S. was turned over to the defense, as well as the notes on the second interview, so what they have is what we have, your Honor, and it was turned over immediately. So they have everything that we have,” when in reality, Respondent knew of and never produced to the defense the following:

A. “Gardner’s 1/28/18 Bullet Points” in its original form (inclusive of the last forty-five bullets):

B. “Gardner’s 1/28/18 email to Tisaby”;

C. “Tisaby’s 1/30/18 Handwritten Notes of J.W.”;

D. “Tisaby’s Draft Interview Narrative Confidential of K.S.”;

E. “Tisaby’s 3/13/18 email to Gardner”.

100. Respondent violated Rule 4-3.3(a), Rule 4-5.1(c)(1) and Rule 4-8.4(a) and (c) by remaining silent on April 23, 2018, when Steele said in open court that: “Any information they have from him they’ve already got. They’ve got everything we’ve got,” when in reality she knew of the existence of the following notes not produced to the defense:

A. “Gardner’s 1/28/18 Bullet Points” in its original form (inclusive of the last forty-five bullets):

- B. “Gardner’s 1/28/18 email to Tisaby”;
- C. “Tisaby’s Draft Interview Narrative Confidential of K.S.”;
- D. “Tisaby’s 3/13/18 email to Gardner”.

Responsibilities to Subordinates

101. Respondent violated Rule 4-5.1(b), Rule 4-8.4(a) and (c) by misrepresenting and concealing facts from her subordinates, Smith and Dierker, regarding the State’s obligation to identify the existence of notes of interviews of witnesses:

A. On March 3, 2018, Respondent falsely told Dierker and Smith in an email: “We turned over everything we had last time,” but in reality, Respondent concealed from Dierker and Smith the existence of:

- 1. “Gardner’s 1/28/2018 Bullet Points”;
- 2. “Gardner’s 1/28/18 email to Tisaby” attaching “Gardner’s 1/28/18 Bullet Points”.

B. On March 18, 2018 in a staff email, Dierker stated: “Jim Martin plans to raise an issue about “notes” that he thinks is created by the privilege log. I’m not sure what he’s thinking. I am assuming any notes of witness interviews by Tisaby have been turned over as part of his report or are in the privilege log materials. I can cover Martin’s issue tomorrow morning, but please correct me if there are notes we have not turned over to the defense or the Court.”

Yet, Respondent failed to reveal to Dierker and Smith the existence of:

1. "Gardner's 1/28/2018 Bullet Points" (inclusive of the last forty-five bullet points); and
2. "Tisaby's Draft Interview Narrative Confidential of K.S."

Special Responsibilities of a Prosecutor

102. Respondent violated Rule 4-3.8(d) and 4-8.4(c) when she failed to disclose to the defense the following information known to her that tended to negate the guilt of the defendant or mitigate the offense:

- A. "Gardner's 1/28/18 Bullet Points" (inclusive of the last forty-five bullet points);
- B. "Gardner's 1/28/18 email to Tisaby" attaching "Gardner's 1/28/18 Bullet Points";
- C. Information as to why Respondent created "Gardner's 1/28/18 Bullet Points" and sent them to Tisaby;
- D. "Tisaby's 3/13/18 email to Gardner";
- E. "Tisaby's Draft Interview Narrative Confidential of K.S.";
- F. Information as to who made the deletions of information from Tisaby's final reports produced to the defense and why.

Conduct Prejudicial to the Administration of Justice

103. Respondent's misconduct charged in paragraphs 87-100 violated Rule 4-8.4(d) by prejudicing the administration of justice, to wit:

- A. Misrepresenting to and concealing facts from the court and the defense as to the existence and authorship of "Gardner's

1/28/18 Bullet Points” (inclusive of the last forty-five bullet points of information);

B. Allowing her assistant prosecutors to make false statements to the court as to the existence and authorship of “Gardner’s 1/28/18 Bullet Points”;

C. Violating defendant’s constitutional rights by failing to disclose that she created and emailed “Gardner’s 1/28/18 Bullet Points” to Tisaby prior to his interview of K.S.;

D. Violating the defendant’s constitutional rights by allowing Tisaby to misrepresent facts under oath during his deposition and failing to take reasonable remedial measures;

E. Violating defendant’s constitutional rights by concealing discoverable and exculpatory evidence contained in prior drafts of Tisaby’s final reports and failing to explain how or why changes were made;

F. Violating the rules of criminal procedure and court orders by concealing discoverable and exculpatory evidence; and

G. Jeopardizing the successful prosecution of the defendant because of her misconduct.

Misrepresentations to the OCDC

104. Respondent violated Rule 4-8.1(a) by knowingly making false statements to the OCDC in connection with the investigation of the above captioned matter in the following respects:

A. Respondent reaffirmed her false statement that Tisaby created "Gardner's 1/28/18 Bullet Points",

when, in reality, Respondent knew that she created "Gardner's 1/28/18 Bullet Points" and emailed them to Tisaby prior to his interview of K.S.;

B. Respondent falsely stated that: "I promptly corrected the record in regard to Tisaby,"

when, in reality, Respondent knew that she failed to disclose that she created "Gardner's 1/28/18 Bullet Points" and emailed them to Tisaby; and she failed to correct the false deposition answers Tisaby gave, including those she elicited with her own questions; and

C. Respondent falsely stated that: "The pretrial order regarding supplementing discovery was followed,"

when, in reality, Respondent knew she never supplemented discovery production with the following documents:

1. "Gardner's 1/28/2018 Bullet Points" (inclusive of the last forty-five bullet points of information);
2. "Gardner's 1/28/18 email to Tisaby" attaching "Gardner's 1/28/18 Bullet Points";
3. "Tisaby's 3/13/18 email to Gardner" and

4. “Tisaby’s Draft Interview Narrative Confidential of K.S.”


WHEREFORE, Informant prays that a decision be issued finding Respondent guilty of professional misconduct as alleged in this Information and that Respondent be disciplined in accordance with Rule 5 and that costs be assessed against Respondent.

Respectfully submitted this 1st day of March, 2021.

Designation of Counsel for Informant

The Chief Disciplinary Counsel has designated the following as counsel of record for Informant:

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