IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON Plaintiff, v. KELAND R. GUINN Defendant.	No. 19-1-00434-31 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REGARDING SANCTIONS

This matter originally came before the Court on motion of the defense for CrR 8.3/4.7 sanctions against the prosecution for withholding numerous items of discovery. The original pretrial motion was later amended throughout the first week of trial because other missing discovery was uncovered every day during the first week of trial, and because the prosecution without notice sent physical evidence to be tested in the middle of trial resulting in the destruction or contamination of other fingerprint and DNA evidence. The Court having considered the pleadings, declarations, transcripts, discovery, exhibits, and oral argument of counsel, and being in all matters duly advised hereby makes the following Findings of Fact and Conclusions of Law.

I. OVERVIEW

I find the Prosecutor's Office did not contest that the numerous alleged discovery violations occurred; nor did it contest that the testing and potential destruction or contamination of evidence

occurred without notice to the defense.[1] In fact, I never ruled on the CrR8.3 dismissal because the Prosecutor of Snohomish County moved to dismiss this case in the "administration of justice" because of the discovery violations and/or destruction of evidence.[2]

The matter still remaining before this Court is a defense motion to impose additional educational sanctions against the individual prosecutor, DPA Michelle Rutherford, along with the rest of the Snohomish County Prosecutor's Office pursuant to CrR 4.7, CrR 8.3, or the inherent powers of the court.

The Prosecutor's response to this motion was to lump all the many different violations together and argue they were all not willful because the individual prosecutor, DPA Rutherford, was going through personal life problems.[3] Based on the DPA's personal problems, the Prosecutor's Office argued I could interpret the facts as showing every violation was not willful.[4]

I recognize that prosecutors and public defenders may be overworked, overwhelmed and operating in a stretched system often lacking the resources to handle every case in an ideal manner. They may all sometimes drop the ball, forget to send discovery, or not get around to it. They may miss deadlines for a variety of reasons, including simply just because they are human. Such human mistakes are not grounds for individual sanctions. Even if a prosecutor supplied no discovery in a case and truthfully indicated they just forgot about the case for no reason, I would not impose individual sanctions. Thus, in rendering this decision, I have carefully taken into account Deputy Rutherford's personal circumstances and, when the facts allow it, I have

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[1] *See* Declaration of Michelle Rutherford opposing sanctions, Docket No.51; Transcript of August 16, 2019 Sanctions Hearing, Docket No. 71.
[2] *See* Motion to Dismiss, Docket No.39; Order of Dismissal, Docket No. 40; Transcript of August 16, 2019, Docket No. 71.
[3] These included a scheduled vacation week, a medical absence of about one workweek, and a death in the family. *See* Declaration of Michelle Rutherford opposing sanctions, Docket No.51.
[4] *See* Declaration of Michelle Rutherford opposing sanctions, Docket No.51; Transcript of August 16, 2019 Sanctions Hearing, Docket No. 71.

assumed her actions were not done willfully due to her circumstances. I have carefully reread the transcripts and checked the facts to be sure DPA Rutherford is getting a fair decision.

While DPA Rutherford did experience personal problems that undoubtedly contributed to many of the discovery violations, trying to lump every violation together is over simplistic and glosses over the fact that the circumstances were different for each of the many discovery violations. This approach also ignores the fact that DPA Rutherford herself admitted that she willfully committed several of the later ongoing discovery violations that occurred right before or during trial. DPA Rutherford admitted she knew this discovery existed, admitted she had personal knowledge of or possession of the information, admitted she understood it was required to be disclosed, admitted she thought about what to do about disclosure, and admitted she made conscious and deliberate choices to not disclose this discovery timely or not disclose it at all.[5]

The Prosecutor's request that I find all violations were not willful when the violator has already bluntly admitted several violations were willful is not a request to interpret facts. It is a request to ignore facts and to make findings contrary to the truth.

This case was uniquely egregious. I have never granted a CrR8.3 dismissal based on discovery violations or on the destruction of evidence. Nor do I recall ever sanctioning any criminal attorney for a discovery violation. However, I have never seen any criminal case with discovery violations as serious and as numerous as in this case. I have never seen any case where a prosecutor knowingly directed the potential total destruction of evidence without notice to the defense, particularly where the defense had given explicit notice it wanted the evidence tested and believed the results would be exculpatory.[6] I could not find any reported Washington case

[5] *See* Section III, *infra.*

[6] This does not include the destruction of samples when only a portion of evidence is used up in the testing process, which happens routinely but is permissible because additional portions remain for defense testing.

where a prosecutor knowingly and secretly destroyed physical evidence. Except for this one case, I also am also unaware of the Snohomish County Prosecutor's Office ever having to move to dismiss a case due to discovery violations.

DPA Rutherford's acts interfered with the administration of justice. They resulted in a serious violent crime during which a human being was shot being decided based on her conduct rather than the merits of the charge. The argument that DPA Rutherford should not be sanctioned because the ultimate consequence of dismissal has occurred is a backwards argument. Her clients, society as a whole and the system of justice, suffered the ultimate consequence, not DPA Rutherford. The fact her misconduct was so extreme the charges had to be dismissed is a reason sanctions should be ordered, not a reason to not order them.

My sanctions decision is different for three different time periods: (1) the pretrial period from filing until about the day before trial call, (2) from the day before trial call through the first week of trial, i.e., after the defense served a Motion to Dismiss for discovery violations,[7] and (3) during the later post trial Sanctions Motion.

As to time period one, although numerous items of significant discovery were knowingly withheld for weeks or even months pretrial, I do not find by a preponderance of the evidence that those violations were willful. Given DPA Rutherford's life circumstances, these acts may have been negligent or inadvertent. In particular, a death in the family may result in an employee simply not coping. I have given DPA Rutherford every benefit of the doubt in assuming these numerous and substantial clear violations of mandatory discovery requirements were not willful.

I realize there was evidence suggesting the substantial pretrial withholding was not inadvertent. For example, some discovery was improperly withheld for weeks before any of

[7] Note, the one exception is the withholding of the proffer interview for which the sanctioned period starts a few days earlier as set forth Section III. 4, *infra.*

DPA Rutherford's life problems had even yet happened, so that period of withholding cannot be attributed to her life problems. There were also patterns to the pretrial nondisclosure suggesting it could be strategic. All the numerous different pieces of discovery impeaching the prosecution's main witness were withheld.[8] All discovery that revealed there were other eyewitnesses and other suspects to be investigated was withheld.[9] There also were motives to withhold the particular discovery that was withheld. If the defense did not know about significant impeachment evidence relating to the State's critical witness, it was more likely the defendant would plead guilty. Withholding impeachment and "other suspect" evidence also prevented the defense from being able to follow up and obtain witnesses to testify as to the impeachment facts and significant "other suspect" evidence. The prosecution's co-defendant witness also did not want the defendant to know whom she had identified as participating in the robbery until those other suspects were arrested because the witness feared the defendant would tell the other suspects and they would retaliate against her family.[10] All discovery relating to who she finally identified as the other robber participants was withheld.

Even though some of this pretrial withholding may have been deliberate, even though numerous different pieces of discovery were withheld, and even though the withholding lasted many weeks, I hereby deny sanctions on all of the pretrial discovery withholding until right before trial, due to DPA Rutherford's circumstances. This includes a lot of important new discovery dumped on the defense just a few days before trial.[11] This is a generous finding given the circumstances and given that the evidentiary standard on this motion is *not* that the court is to

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[8] *See* Section III. 4 and 5, *infra.*
[9] *See id.*
[10] The witness's attorney was negotiating hard with DPA Rutherford for protection for her client. *See* Section III. 2, *infra.*
[11] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing (all discovery disclosed pretrial, during trial, and post dismissal).

presume the facts in the light most favorable to the alleged discovery violator. The moving party has the burden of proof, but the court is to weigh the facts accurately.

I have not detailed all of these many pretrial discovery violations because it would lengthen this decision considerably. It should be remembered however, that there were numerous other separate pretrial discovery violations by DPA Rutherford involving other discovery not even mentioned herein, and this was going on throughout the life of the case. I have picked out a few of the later discovery violations to discuss herein. These are, however, only the tip of an iceberg of violations.

As to the second period, starting about the day before trial call when the defense filed a Motion to Dismiss based on the prosecutor withholding discovery, I find the seven violations set forth below in Section III, 2-8, *infra,* were willful and should be sanctioned as set forth in Section IV, *infra*. During trial, DPA Rutherford made numerous statements admitting these violations were deliberate and substantial evidence also corroborated that these acts were willful.

DPA Rutherford continued to deliberately withhold numerous significant pieces of discovery she was required by law to disclose, even after the defense filed a Motion to Dismiss complaining of late discovery the day before trial call and even after trial began.[12] Much of this missing discovery was completely hidden, that is, the defense was not aware the missing additional discovery existed. Because the defense was not advised as to the existence of this missing discovery, the defense did not even have enough information to make a motion to compel or to include the missing discovery in the Motion to Dismiss for prosecutorial withholding of discovery. Similarly, DPA Rutherford deliberately did not disclose a plan to do

[12] *See* Sections III. 2-6, *infra.*

midtrial testing of a firearm, giving the defense no opportunity to object to the resultant destruction or contamination of the fingerprint and DNA evidence caused by the testing.[13]

During a motion to add a new charge on the morning of trial call, at trial call, during a Motion to Dismiss for withholding discovery on the morning of trial, and for each of the first four days of trial, DPA Rutherford was still withholding more and more discovery that contained important never before disclosed information. This included, among other things, not disclosing oral threats, promises, and consideration DPA Rutherford made to the primary witness to induce her to testify.[14] It included withholding a written cooperation contract with the primary witness in which the witness agreed to testify against the defendant in return for a particular plea deal.[15] It included withholding a two-hour recorded interview of the prosecution's primary cooperating co-defendant witness that had occurred two months before trial in which the witness admitted she lied in her prior statement about who committed the robbery.[16] It included withholding the lead detective and State's managing witness's entire narrative police report spanning four months of ongoing investigation.[17] It included withholding police reports relating to another suspect and another gun seized in the case.[18]

In some instances, DPA Rutherford never actually volitionally came clean and disclosed this missing discovery on her own. She had no intent of ever disclosing some of these items. Instead these items of missing discovery were fortuitously discovered because questions arose from other new discovery dumped just prior to trial. Some of the examples outlined below

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[13] *See* Sections III. 7 and 8, *infra.*
[14] *See* Section III. 2, *infra.*
[15] *See* Section III. 3, *infra.*
[16] *See* Section III. 4, *infra.*
[17] *See* Section III. 5, *infra.*
[18] *See id.*

cannot be characterized as anything less than game playing with discovery in clear violation of CrR 4.7, the Omnibus Court Order, and case law.

DPA Rutherford admitted she had personal knowledge of the content or possession of each of these missing items of discovery.[19] She admitted she was aware that they each had not been disclosed. DPA Rutherford admitted she knew the missing pieces of discovery contained discoverable material. She admitted she thought about disclosure to the defense. DPA Rutherford also admitted she made conscious deliberate choices to not disclose these missing pieces of discovery timely or not to disclose some of them at all.[20]

DPA Rutherford also secretly concocted a plan to take a gun out of the WSP lab and wait to have the gun be test fired to determine operability in the middle of trial. Part of the plan was to do the testing without notice to the defense or court.[21] She did this knowing the testing could destroy or contaminate other fingerprint and DNA evidence on the gun that the defense believed was exculpatory evidence.[22] She later admitted she intended to spring the new witness testing testimony, new testing, and new physical evidence[23] on the defense in the middle of trial.[24] DPA Rutherford secretly directed acts knowing they could destroy or contaminate fingerprint and DNA evidence on the gun while argument on a defense motion was occurring in which the defense asserted it was prejudiced because this same fingerprint and DNA evidence had not been tested.[25] DPA Rutherford admitted she deliberated about whether to destroy the fingerprint and DNA evidence and made a conscious trial strategy decision to do so.[26]

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[19] *See* Sections III. 2-6, *infra.*
[20] *See id.*
[21] *See* Sections III. 7 and 8, *infra.*
[22] *See id.*
[23] The spent bullets from the firearm test fires.
[24] *See* Sections III. 7 and 8, *infra.*
[25] *See* Sections III. 7 and 8, *infra.*
[26] *See* Sections III. 7 and 8, *infra.*

DPA Rutherford withheld so many pieces of discovery pretrial and continued to withhold so many pieces of discovery during trial that I have not even attempted to discuss it all. I have limited my findings and discussion below to seven of the clearer and easier to explain representative examples.[27] However, it should be noted this is not all the discovery DPA Rutherford continued to withhold *during trial* and includes none of the discovery that was withheld pretrial and dumped on the defense right before trial. During the about week prior to trial call, DPA Rutherford sent 63 pages of new discovery and 3 new media CDs to the defense, including the star witness's 2.5 hour interview she delivered on the day of trial call.[28] Almost all of this contained facts never before disclosed to the defense but that the prosecutor or police had in their possession for months.[29] DPA Rutherford produced 249 pages of new discovery and 6 new media CDs after the trial began throughout what was scheduled to be the first five days of trial.[30] I am not addressing every violation because my decision on sanctions would just be too long and would not be any different if I found twice as many of the same types of violations.

The third period of time is the period during the briefing and arguing of the Sanctions Motion post trial. This case took an exponential turn for the worse when the remainder of the Sanctions Hearing was continued to a date two and a half months after trial.

DPA Rutherford submitted a sworn declaration for that hearing and provided oral information to her lawyers for the hearing containing both false and misleading material statements.[31] The Prosecutor's Office submitted a brief arguing some of the false facts from DPA

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[27] *See* Sections III. 2-8, *infra.*

[28] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates 278-341and media CDs 7,8,9.

[29] *See id.*.

[30] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates 342-518, separate Alfaro Discovery 1-74, and media CDs 10-15.

[31] *See* Section III. 1, *infra;* Declaration of Michelle Rutherford Opposing Sanctions, Docket No. 51; Transcript of August 16, 2019, Docket No. 71.

Rutherford's declaration.[32] At oral argument, the lawyer acting on DPA Rutherford's behalf also made misleading claims that he obtained from DPA Rutherford.[33] These false and misleading statements were not small details; they were facts that went to the heart of the sanctions issues. Despite the court attempting to get corrections on the record several times to remedy this, DPA Rutherford's lawyer would turn and ask DPA Rutherford for confirmation and continue to argue the misrepresentations based on what DPA Rutherford told him.[34]

Three weeks after the final hearing, DPA Rutherford submitted another declaration in which she recanted two false facts that were in her prior declaration.[35] The original false statements retracted were sworn declaration statements the court had specifically already pointed out as false and given explanation as to the facts proving they were false at the final hearing. This was embarrassingly like a child being told their story would be checked out and then coming skulking back later to tell a truer story. Notably, DPA Rutherford did not correct other misrepresentations she was not told the court had caught.

This post trial misconduct did not happen around the time period when DPA Rutherford was under the immediate stress of her prior personal problems. The post trial hearing was months later. To the extent the Prosecutor's Office has argued that everything that happened at trial should be attributed to those prior problems, the same cannot be said for these later misrepresentations.

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[32] *See* Section III.1, *infra.*
[33] *See* Section III. 1, *infra*
[34] *See* Section III. 1, *infra*
[35] *See* Section I. 1, *infra;* Supplemental Declaration of Michelle Rutherford; Docket No. 62.

A lawyer has duties to act with candor toward the court and to not make false statements in sworn declarations.[36] DPA Rutherford submitting facts or having her attorneys argue facts that were misleading or false violated these duties.

It was especially abhorrent that DPA Rutherford abused the trust and loyalty of two other unwitting attorneys in her office. It was clear DPA Rutherford did not fully apprise the other two lawyers of all the surrounding circumstances regarding some of her misrepresentations or that she had previously made inconsistent representations to the court at trial. She used their ignorance of the full facts to suck them into her unethical behavior.

Using other unwitting attorneys to proffer false and misleading information does not insulate DPA Rutherford from responsibility. The hubris to use one's boss to proffer false sworn declaration statements was alarming. This indicated that DPA Rutherford was confident no one in her office would question what she claimed or take the time and effort to really check her statements against the record. She was correct in that assumption.[37]

Making misrepresentations to a court is serious misconduct. In this case, the Snohomish County Prosecutor's Office actually proffered and argued some of DPA Rutherford's misrepresentations for her. This should not have happened. Prosecutors have a duty to tell the truth in court and uphold the law. The overarching purpose of the justice system is to find the truth and that purpose is subverted by the introduction of false facts. In a court of law, facts matter.

As to this third period discussed in Section III. 1, *infra,* I am specifically *not* making a sanction determination for the false and misleading statements. In addition to Section III. 1, *infra*, throughout this opinion I have described some of the other similar misrepresentations

[36] *See* RCW 9A.72; RPC 3.3.
[37] *See also* Transcript of August 16, 2019 at 49-50, Docket No. 71; Section III. 1, *infra.*

made during the Sanctions/CrR 8.3 Motion at the time of trial. I am also not making any sanctions determination as to those misrepresentations. I have made findings that statements were false or misleading as such findings were necessary for me to determine the other issues relating to sanctions for the discovery violations and destruction of evidence discussed in Sections III. 2-8, *infra*.

I do not find rolling this dishonesty misconduct into simple educational sanctions for discovery violations is wise at this point. DPA Rutherford's office appears to be in a total state of oblivion or denial about her dishonesty problem, to the point of even proffering DPA Rutherford's misrepresentations to a court including false statements in a sworn declaration. No sanction I impose for this would be effective if her office continues to back this kind of lack of candor. I am not finding there should be no consequences for this, only that my imposing any would not be effective. There are other agencies that can act as a reality check on this if that is still needed following this opinion. They are better suited to deal with such matters.

I have not written this very long decision to suggest this attorney's conduct in Sections III. 2-8, *infra*, deserves any consequences more than the minor education ordered in Section IV, *infra,* which is basic legal information that every prosecutor should know anyway. Nor am I suggesting this is the worst lawyer misconduct I have witnessed; I have seen far worse. The purpose of this decision is to connect the dots. The Snohomish County Prosecutor argued everything in this case was all just an innocent mistake. While I appreciate and respect the ownership that was taken for the mismanagement involved, not everything that happened in this case was an innocent mistake. Some of it was obviously willful misconduct. This decision is intended as a reality check. If someone in addition to me who is in DPA Rutherford's office does not tell her to knock this kind of behavior off, it will continue and get worse until she gets herself

in real trouble. No one did DPA Rutherford any favors by not calling out her deliberate misconduct after trial. When no one told her to stop, her unchecked behavior escalated at the final Sanctions Hearing and now she finds herself in worse trouble.[38]

The eight categories of willful misconduct discussed in detail herein are as follows:

1. **DPA Rutherford breached her ethical duty of candor to the court and made false statements in a sworn declaration.**

2. **DPA Rutherford never disclosed threats, promises and actual consideration she gave to the prosecution's primary witness to induce the witness's testimony.**

3. **DPA Rutherford withheld the co-defendant witness's written plea and cooperation agreements to testify against the defendant.**

4. **DPA Rutherford failed to disclose an interview of the primary witness containing *Brady* exculpatory evidence, *Brady* impeachment evidence, and the identities of three new eyewitness co-suspects.**

5. **DPA Rutherford never disclosed the existence or content of the Lead Detective's main narrative report.**

6. **DPA Rutherford withheld the main evidence she intended to use to prove a new firearm charge during a hearing on whether the defense had adequate notice to try that charge.**

7. **DPA Rutherford hid a plan to test evidence and offer new testing testimony until the middle of trial.**

8. **DPA Rutherford willfully destroyed material fingerprint and DNA evidence she knew the defense believed was exculpatory.**

[38] *See* Section III. 1, *infra.*

I find and conclude that these acts outlined in Sections III. 2-8, *infra*, each violated CrR 4.7, the Omnibus Court Order, and/or constitutional case law requirements. I further find and conclude that DPA Rutherford should be sanctioned for these to the extent they continued to occur during time period two, i.e., after the defense filed a motion complaining about late discovery and when trial had started.[39] DPA Rutherford admitted consciously continuing to willfully withhold this particular discovery, and she admitted making a conscious deliberated choice to direct an act she knew would contaminate or destroy evidence.

The evidence supporting these findings can be found in the court file, the admitted exhibits, the transcripts of the hearings that have been filed,[40] and the discovery.[41] As it was not contested that the discovery violations and destruction of evidence actually occurred, so I have not cited to the record for every single fact. I find the facts set forth herein are proven by the record.

II. FACTS

A separate factual addendum is being filed due to the length of the facts and to limit the file size. That is incorporated herein by reference.

III. WILLFUL MISCONDUCT

1. DPA RUTHERFORD BREACHED THE ETHICAL DUTY OF CANDOR TO THE COURT AND SUBMITTED FALSE STATEMENTS IN A SWORN DECLARATION.

[39] One exception is Section III. 4, *infra*, wherein the sanctioned period begins a few days earlier when DPA Rutherford realized the proffer interview recoding had never been sent to the defense..
[40] *See* Docket Nos. 65, 66, 67, 68, 69, 71.
[41] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing (all discovery disclosed pretrial, during trial, and post trial).

In response to this Sanctions Motion, the Snohomish County Prosecutor's Office filed a brief and argued facts that were false and misleading. A sworn declaration of DPA Rutherford was submitted to support the argument.[42] A Deputy from the Civil Division wrote the brief[43] and the Snohomish County Prosecutor, Adam Cornell, orally argued the motion.[44] The final Sanctions Hearing was continued to a date two and a half months after the trial CrR8.3/Sanctions Motion at the prosecution's request so the trial transcript could be obtained and read. Thus, the State's brief and DPA Rutherford's declaration supporting it for the final Sanctions Hearing were created and filed months after trial.[45]

As the final Sanctions Hearing happened two and a half months after trial, DPA Rutherford's life problems that were alleged to have caused her earlier discovery violations before trial[46] cannot excuse what happened in this later Sanction's Declaration or Sanctions Hearing.[47] DPA Rutherford had two months to draft her declaration. By that time, she was out of trial rotation, had two lawyers to assist her, and had the transcripts. Her declaration for the final Sanctions Hearing only contained a few pages of actual facts related to the case[48] and she had weeks to make sure her sworn facts in response to the Sanctions Motion were accurate. She also lived through the facts, so she had personal knowledge that allowed her to represent them accurately.

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[42] *See* Memorandum in Opposition to Sanctions, Docket No. 52; Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions, Docket No. 51.
[43] *See id.*
[44] *See* Transcript of August 16 Sanctions Hearing.
[45] *Compare* Memorandum in Opposition to Sanctions, Docket No. 52; Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions, Docket No. 51, *with*, Minute entries of June 3-7 Trial, Docket No. 28.
[46] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions, Docket No. 51 (DPA Rutherford indicated she had a one week vacation, a medical procedure that caused her to miss about one week of work, and a death in her family in the months before trial, specifically in March and April).
[47] By the time of the hearing on Sanctions, DPA Rutherford was months past the earlier life difficulties, had been transferred out of trials, had two lawyers to represent her, full access to the trial transcripts, and many weeks to prepare her Sanctions Declaration. *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions, Docket No. 51.
[48] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 4-7, Docket No. 51.

In her sworn declaration, DPA Rutherford made false and misleading statements. Although only four pages in the declaration directly addressed any actual facts relating directly to the alleged misconduct,[49] those pages contained three false statements and several other misleading claims as described below. These were not minor factual errors. They were misrepresentations that went to the heart of the only sanctions issue, i.e., whether DPA Rutherford's discovery and trial misconduct had been willful.

It was clear that some of these statements made to avoid sanctions were misrepresentations because DPA Rutherford made numerous prior statements at trial directly contrary to these new representations as detailed below. In determining the credibility of DPA Rutherford's later Sanctions Declaration, it was Rutherford v. Rutherford. In addition to DPA Rutherford's own prior clear statements to the contrary, there were also many other facts in the record as detailed below indicating some of the Sanctions Declaration statements were false or misleading.

Furthermore, more than a month after DPA Rutherford filed her Sanctions Declaration, DPA Rutherford filed a retraction of the two most blatant false fact statements in her sworn declaration.[50] These were two statements the court had specifically pointed out were inaccurate at the hearing.[51] This was embarrassingly like a child being caught fibbing and when told that their story will be checked, later skulking back and telling the true story. This occurred three weeks after the Sanctions Hearing was over and when briefing and oral argument was closed in the case. I had required the State to produce evidence on two issues unrelated to DPA Rutherford's recantations.[52] DPA Rutherford slipped these retractions into the other unrelated

[49]Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 4-7, Docket No. 51.
[50] *See* Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 3-4, Docket No. 62.
[51] *Compare* Transcript of August 16, 2019 AT 49-52, Docket No. 72, *with*, Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 4-7, Docket No. 51 (specifically paragraphs 23 and 25).
[52] *See* Order to Compel, Docket No. 61.

materials she was ordered to produce.[53] This gave the defense no ability to respond to what she did. I do not even know if the Civil Deputy Prosecutor who wrote the brief or the Snohomish County Prosecuting Attorney who argued the motion are aware that DPA Rutherford later recanted sworn facts they proffered to the court on her behalf. It is not clear if DPA Rutherford was attempting to accomplish a legally inadequate RCW 9A.72.060 retraction[54] or just doing a retraction because she knew these misrepresentations had been caught by the court and thought it would reduce her chances of sanctions. Notably, she did not retract her many other misrepresentations the court did not indicate it caught.

One of the false statements in DPA Rutherford's sworn declaration was a claim that she did not realize the gun the defendant had allegedly possessed had not been tested for operability until she was actually in trial.[55] DPA Rutherford's statements earlier at trial were very different. At trial she stated she realized the gun had not been tested for operability by no later than about the middle of the week before trial and definitely sometime before trial; she repeatedly and consistently stated she began planning for testing the gun before trial because she knew it had not been tested.[56] For the later final Sanctions Hearing, her changed statement about this in her declaration stated she had not realized the gun had not been operability tested until she was actually in the trial.[57] More than a month after she made the false declaration statement, DPA Rutherford filed an unsolicited third statement about this, a retraction stating she realized the gun

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[53] *See* Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 3-4, Docket No. 62.

[54] RCW 9A.72.060 provides "No person shall be convicted of perjury or false swearing if he or she retracts his or her false statement in the course of the same proceeding in which it was made, if in fact he or she does so *before it becomes manifest that the falsification is or will be exposed* and before the falsification substantially affects the proceeding (emphasis added).

[55] Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 4, Docket No. 62.

[56] *See* Transcript June 4, 2019 at 30-31, Docket No. 66; Transcript of June 5 at 41,47, 71-72 Docket No. 67.

[57] Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 4, Docket No. 62.

had not been tested for operability before trial when she was preparing for trial.[58] This retraction occurred only after the court pointed out this was a false statement during the Sanctions Motion.[59]

The Rutherford v. Rutherford v. Rutherford statements were as follows. At trial DPA Rutherford said, "... it was Wednesday of last week when we began discussing locating which crime lab we could find the gun at and bring it back for trial and have it tested."[60] The Court asked her, "If you made a decision to remove this evidence and test it last Wednesday, why didn't you advise the Defense or the Court of that on Wednesday, Thursday, Friday at trial call, Monday at trial?"[61] DPA Rutherford did not deny that occurred, but responded, "I have no reasoning or justification for that."[62] DPA Rutherford was planning the week before trial to find and get the gun to have it tested because she knew before trial it had not been tested for operability. Contrary to numerous trial statements, in her sworn Sanctions Declaration at paragraph 23, DPA Rutherford said, "During the scramble to prepare, *it was not until we were actually in trial* that I realized the firearm seized ... which formed the basis for Count II, UPF 2, [Unlawful Possession of a Firearm Second Degree] had not been tested for operability."[63] At the Sanctions Hearing the Court asked, "how do you reconcile this with what she said previously?"[64] A month after DPA Rutherford filed the false declaration statement, she filed a Supplemental Declaration retracting her prior declaration statement stating, "With regard to paragraph 23 of

[58] *See* Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 4, Docket No. 62.
[59] *See* Transcript of August 16, 2019 at 49, Docket No. 72.
[60] *See* Transcript of June 5 at 41, Docket No. 67.
[61] *See id.* at 47.
[62] *See id.*
[63] Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 6, Docket No. 51.
[64] *See* Transcript of August 16, 2019 at 49, Docket No. 72.

my prior declaration, it was not until I began preparation for trial, that I realized the gun had not been test fired."[65]

In addition to DPA Rutherford actually admitting her declaration statement was false by later recanting it, numerous facts in the record corroborated that DPA Rutherford knew the gun had not been operability tested before trial. DPA Rutherford and Lead Detective Fagen both indicated that they had discussed needing to find out which WSP lab the gun was at during the week before trial, so that if the case proceeded to trial, they would know where to go get it to do the test firing during the trial.[66] DPA Rutherford clearly stated these planning discussions happened before trial, she estimated the Wednesday before.[67] They also both indicated that at trial call DPA Rutherford gave Detective Fagen the directive to go ahead with the plan *they had previously discussed.*[68] As they had already determined what lab the gun was at by trial call, Detective Fagen also testified that before he came to court on first day of trial he directed another Sheriff's Deputy to go get the gun and test fire it.[69] Clearly DPA Rutherford knew the gun had not been test-fired for operability sometime before she was actually in trial because she described repeatedly and consistently throughout the trial proceedings how before trial she was making plans to have the test firing done.[70]

In order to understand why this false statement was critical to the sanctions issue of willfulness, it is necessary to understand the discovery violation involved. This is discussed in great detail with full citations to the record, which will not be repeated here, in Sections III .7 and III. 8, *infra.* In summary, the admitted facts as to this were as follows. DPA Rutherford

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[65]Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 4, Docket No. 62.
[66]*See* Transcript of June 5 at 41, 47, 71-72, Docket No 67.
[67] *See id.* at 41.
[68] *See* Transcript June 4, 2019 at 25, 30-31, Docket No. 66; Transcript of June 5, 22019 at 41, 47, 71-72.
[69] *See* Transcript June 4, 2019 at 135, Docket No. 66.
[70] *See* Transcript June 4, 2019 at 25, 30-31; Transcript of June 5, 2019 at 41, 47, 71-72, Docket No. 67. *See also* Section III. 7, *infra.*

formed a plan before trial to test the gun for operability after the trial started and not tell the defense or court about her plan until after the testing was done in the middle of trial. Her plan was to spring a testing witness, testing results and new physical evidence on the defense in the middle of trial. This is sandbagging. To make things worse, this gun was at the WSP crime lab for fingerprint and DNA testing and the defense had brought a motion complaining that the defense was prejudiced because the defense did not have the fingerprint and DNA test results for trial due to the prosecution negligently forgetting to send in the lab request. DPA Rutherford also knew from the police listening to jail phone calls that the defendant had been telling people his fingerprints and DNA would not being found on the gun, that is, that the test results would be exculpatory. DPA Rutherford's secret test-firing plan would result in the fingerprint and DNA evidence or the lack thereof that the defense wanted tested to instead be destroyed or contaminated without prior notice to the defense. The fact DPA Rutherford formed this plan was not in dispute, and she actually carried out this plan.[71]

DPA Rutherford's false declaration statement that she did not realize the gun had not been tested until she was actually in trial painted her gun testing plan in a false light more favorable to DPA Rutherford. The false statement was intended to obfuscate the fact she was sandbagging. If her false statement were true, that would mean DPA Rutherford would have both formed the testing plan and carried out the testing sometime during the first day of trial and fairly immediately informed the defense and court by the second day of trial. One of the reasons the gun-testing plan showed such bad faith was that DPA Rutherford had deliberately withheld her plan from the defense and court before trial during three court appearances.[72] One of these court

[71] *See* Sections III. 7 and 8, *infra*; Transcript June 4, 2019 at 13, 25-33, Docket No. 66; Transcript June 5, 2019 at 41, 47, 71-72, Docket No. 67
[72] *See id.*

appearances was a contested motion over whether the defense had been given adequate notice to add the firearm charge and whether the prosecution had probable cause for the charge.[73] Another one of these court appearances was a Motion to Dismiss on the morning of trial based on prosecutorial withholding of discovery and acts by the State that had delayed the fingerprint and DNA testing on the gun.[74] The fact DPA Rutherford withheld a plan to do midtrial testing on the gun during these particular motions showed bad faith. It also showed she deliberately intended to deny the defense any opportunity to ask for a continuance to meet new testing evidence by deliberately waiting to do the testing until the middle of trial.

If DPA Rutherford's false declaration statement had been true, she would not have been able to inform the defense or court she planned to test the gun during these other hearings because she would not have known she was going to do the testing before trial. However this statement was not true. That is clear because she retracted it after the Sanctions hearing[75] and because she said exactly the opposite during the trial sanctions hearing, i.e., that she discovered the gun had not been test fired and started making plans to test it sometime before trial.[76] The false statement made for the later Sanctions Hearing was made to prevent a bad faith finding that otherwise was inescapable from the record.

DPA Rutherford made another false statement in her declaration opposing sanctions; she said she did not realize testing the gun could destroy the fingerprint and DNA evidence on the gun.[77] In contrast, at trial DPA Rutherford stated repeatedly that she understood test firing the gun could destroy the fingerprint and DNA evidence on the gun.[78] In fact, she said the very

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[73] *See* Transcript of May 31, Docket No. 69; Section III. 7, *infra.*
[74] *See* Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019, Docket No. 65; Section III. 7, *infra.*
[75] *See* Supplemental Declaration of Michelle Rutherford, at 3-4, Docket No. 62.
[76] *See* Transcript of June 4, 2019 at 30-31, Docket No. 66; Transcript June 5, 2019 at 41, 47, 71-72, Docket No. 67.
[77] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at paragraph 25, Docket No. 51.
[78] *See* Transcript of June 4, 2019 at 4-6, 12, 28, Docket No. 66.

reason she waited to test fire the gun was because she knew it could destroy the fingerprint evidence,[79] and she explained in detail why she chose to let the fingerprint and DNA evidence go as part of her trial strategy.[80] Over a month after making this false declaration statement and after I specifically pointed out at the sanctions hearing that this was a false statement,[81] DPA Rutherford retracted this false statement.[82] The contradictory statements are set forth below.

At trial, when DPA Rutherford was asked why she waited so long to request the test fire, DPA Rutherford's first and repeated response was because she knew it could destroy the fingerprint and DNA evidence.[83] DPA Rutherford stated, "Your Honor, test firing the gun would disturb if there was DNA and fingerprint evidence or could disturb that evidence if it existed. So the idea would be to collect evidence before doing anything that could disturb it."[84] She also stated, "so until that [fingerprint and DNA] sampling would have been accomplished by the crime lab, we wouldn't have wanted to disturb the gun by test firing it."[85] The Court asked DPA Rutherford, "you didn't test fire it earlier because you wanted to have the crime lab take any fingerprints, DNA or blood off of it?" DPA Rutherford answered "yes."[86] DPA Rutherford also explained how she weighed preserving the fingerprint and DNA evidence against getting her operability test and being able to send the gun into the jury room to handle and decided since she couldn't get the fingerprint and DNA testing done before the current trial date she would let that evidence go in favor of getting the other things she wanted from the gun.[87]

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[79] *See id.*
[80] See Transcript June 4, 2019 at 35, Docket No. 66; Transcript June 5 at 43-44, Docket No. 67.
[81] *See* Transcript of August 16, 2019 at 51-51.
[82] *See* Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 4, Docket No. 62.
[83] *See* Transcript of June 4, 2019 at 4-6, 12, 28, Docket No. 66.
[84] Transcript of June 4, 2019 at 4-6, Docket No. 66.
[85] Transcript of June 4, 2019 at 5, Docket No. 66.
[86] Transcript of June 4, 2019 at 12, Docket No. 66.
[87] See Transcript June 4, 2019 at 35, Docket No. 66; Transcript June 5 at 43-44, Docket No. 67.

Contrary to her repeated trial statements, in her declaration opposing sanctions at paragraph 25, DPA Rutherford said, "Unfortunately, I neglected to recognize that by test firing the firearm, certain evidence would no longer available."[88]

Weeks after the post-trial Sanctions Hearing was over, DPA Rutherford revised this false statement in her Supplemental Declaration as follows, "Upon further review of my prior declaration in this matter, I was less than clear in a couple of areas. Regarding Paragraph 25 of my prior declaration, a better and more clear explanation of my thinking with regard to testing the firearm for operability was that I did not appreciate the implications of the fingerprint and DNA evidence being destroyed …."[89]

For this Sanctions Motion, there was a huge difference between not understanding the testing could destroy the evidence versus not understanding what the consequences of destroying the evidence would be. One of the worst allegations of bad faith by DPA Rutherford was that she knowingly destroyed evidence that the defense had indicated it wanted and believed was exculpatory.[90] In fact, DPA Rutherford's secret test firing of the gun occurred at the exact same time the parties were in trial arguing a defense Motion to Dismiss based, in part, on the defense allegation that it had been prejudiced because it would not have the fingerprint and DNA results for the current trial date.[91]

The false statement in DPA Rutherford's declaration that she did not realize the testing would destroy the evidence would also avoid a sanctions finding that she knowingly destroyed evidence in violation of a court order. In this case the Omnibus Court Order incorporating the

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[88]Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 6, Docket No. 51.
[89] Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions at 3-4, Docket No. 62.
[90] *See* Sections III. 7 and 8., that discuss this violation in greater detail.
[91] *See* Transcript June 3, 2019 at 18-22, 80-86, Docket No. 65; Motion to Dismiss, Docket No. 19; Transcript June 4, 2019 at 41; Exhibit 16, June 3-7 Hearing.

Defense Discovery Request specifically prohibited the destruction of any physical evidence without a prior court order.[92] If DPA Rutherford knew the testing would destroy evidence, she also knew she was violating the Omnibus Court Order.

DPA Rutherford also made another false statement in her declaration opposing sanctions by stating that the defense had never asked to interview *any* witness in the case.[93] The record reflects defense counsel made several attempts to interview the prosecution's star witness, Emma May, and that DPA Rutherford was well aware of that. This was the witness the State's case hinged upon.

During the trial, Emma May's attorney testified defense counsel had tried to set an interview with Emma May more than once and Emma May's attorney told DPA Rutherford about that. Emma May's attorney testified had received more than one email request by Guinn's defense counsel to interview State's witness Emma May.[94] She also testified she called DPA Rutherford on May 16 right after the one such a request and told DPA Rutherford that defendant Guinn's attorney was requesting to interview the State's primary witness Emma May and told DPA Rutherford that she needed to do something to progress plea negotiations forward with Emma May because of that.[95] Emma May's lawyer testified Guinn's defense counsel contacted her again to try and set up an interview of prosecution witness Emma May on May 28.[96] Emma May's lawyer testified she was in the thick of negotiations with the prosecution on Emma May's case on May 28 when she got the interview request.[97] She told DPA Rutherford's supervisor that

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[92] *See* Omnibus Court Order, Docket No. 15; Defense Request for Discovery, Docket No. 9.
[93] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 4, Docket No. 51.
[94] *See* Transcript of June 4, 2019 at 112-15, 120-21, Docket No. 66.
[95] *See* Transcript of June 4, 2019 at 112-15, Docket No. 66.
[96] *See id.* at 120-21.
[97] *See id.*

defendant Guinn's lawyer was contacting her to set an interview so there was some urgency in their negotiations.[98]

Defense counsel also represented he had made several efforts to interview the State's star witness Emma May, and emails were sent to DPA Rutherford telling her at the time that the defense was attempting but having trouble trying to interview the prosecution's primary witness, Emma May. These emails are in the record.[99] On May 21, defense counsel email DPA Rutherford and said, "I am having some trouble getting Ms. May interviewed. I'm still working on her attorney in that regard."[100] Defense counsel that same day asked DPA Rutherford for a copy of the CD recording of the proffer interview so her could have it to interview Emma May.[101] Defense counsel thereafter again emailed DPA Rutherford and again told her he was making multiple attempts to interview the primary prosecution witness. He said, "also frustrating is the fact that Ms. May's attorney has yet to respond to my emails seeking an interview."[102]

In her declaration for the later Sanctions Hearing DPA Rutherford stated, "defense counsel did not request a single interview of any law enforcement witness, civilian witness, or the victim in the case."[103] This inconsistency was not discussed at the final Sanctions Hearing,[104] and DPA Rutherford has never corrected this sworn misrepresentation.[105]

This misstatement was material to the Sanctions Motion because one of DPA Rutherford's main excuses for not disclosing large volumes of discovery she knew existed was that she thought the case would be continued because the defense had not requested to interview *any*

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[98] *See id.*
[99] Response to Motion to Dismiss at 5-6, Exhibit 9, Exhibit 10, Docket No. 35.
[100] Response to Motion to Dismiss at 5 and at Exhibit 9, Docket No. 35.
[101] *See id.*
[102] See id at 6 and Exhibit 10.
[103] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 4, Docket No. 51.
[104] *See* Transcript of August 16, 2019, Docket No. 72.
[105] *See also* Supplemental Declaration of Michelle Rutherford in Support of Opposition to Sanctions, Docket No. 62.

witness.[106] In fact, DPA Rutherford knew the defense tried on more than one occasion to interview the State's primary witness but was rebuffed because this co-defendant witness had not cut a deal to testify.[107]

This declaration statement that the defense had never tried to interview any witness was not only false, the context DPA Rutherford put it in in the declaration was misleading because of the information she omitted to disclose.[108] She omitted to explain that she and Guinn's defense counsel both knew the case would live or die on whether Emma May agreed to testify, because only Emma May could tie the defendant to the robbery.[109] Thus, the truth was that defense counsel made requests to interview the only witness that really mattered at that time.[110] Both DPA Rutherford and Guinn's defense counsel knew that despite four months to do so, DPA Rutherford had not been able to negotiate any agreement with Emma May to testify.[111] Thus, DPA Rutherford knew the defense had no reason to interview any other witness unless DPA Rutherford reached an agreement with Emma May to testify, because there was no State's case without Emma May. She left that out of the declaration.[112] DPA Rutherford also knew the defense had a good reason to not ask for a continuance even if no witnesses had been interviewed, because the State did not have the evidence to proceed. She left this out of her declaration.[113] These omissions gave the false impression DPA Rutherford had no reason to believe the defense would not ask to continue, when in fact she knew the defense had every reason to refuse a continuance.

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[106] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions, Docket No. 51.
[107] *See* Transcript of June 4, 2019 at 112-15, 120-21, Docket No. 66.
[108] *See* Declaration of Michelle Rutherford Opposing Sanctions at 4-5, Docket No. 51.
[109] *See* Transcript June 3, 2019 at 90-91; 158, Docket No. 65.
[110] *See* Transcript of June 4, 2019 at 112-15, 120-21, Docket No. 66.
[111] Emma May did not sign and enter an agreement to testify until May 30, 2019, one day before trial call. *See* Exhibit 18, June3-7 Hearing.
[112] *See* Declaration of Michelle Rutherford Opposing Sanctions at 4-5, Docket No. 51.
[113] *See* Declaration of Michelle Rutherford Opposing Sanctions at 4-5, Docket No. 51.

The three false statements in DPA Rutherford's sworn declaration opposing sanctions discussed above were not mere spin, these were direct statements of false facts. Two of them were later retracted and admitted to be false facts.[114]

In addition to stating these flat out false facts, DPA Rutherford's declaration to avoid sanctions also contained several other misrepresentations that are best described as misleading. They did not comport with the duty of candor to the court. Examples include the following:

- DPA Rutherford's statement in paragraph 26 that she "*neglected* to provide a copy of the completed plea agreement to defense counsel" was misleading because the word neglected gave the misimpression she just forget to do this or did not get around to it.[115] At trial she admitted she *deliberately chose* to not supply defense the copies of the plea agreement and agreement to testify she had in her possession.[116] She took the position she did not have to promptly disclose her copies because they did not have the original signatures and a handwritten change to the amount of community custody time.[117] She decided she did only had to disclose a direct copy of the original entered in court with the signatures if she had that. The plea agreement had an agreement to cooperate and testify against the defendant attached to it that was also not provided to defense although DPA Rutherford had a copy identical to what was entered in court.[118] She did not "neglect" to provide the agreements to the defense, she admitted at trial she deliberately chose not to provide the copies she had in her possession because her copies were not the copies with

[114] *See* Supplemental Declaration of Michelle Rutherford at 3-4, Docket No. 62.
[115] *See* Declaration of Michelle Rutherford Opposing Sanctions at 7 paragraph 26, Docket No. 51.
[116] *See* Section III. 3, *infra*; Transcript of June 3, 2019 at 48-60, docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.
[117] *See* Section III. 3, *infra*; Transcript of June 3, 2019 at 48-60, docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.
[118] *See id.;* Exhibit 18, June 3-7 Motion Hearing.

signatures.[119] This is discussed in fuller detail in Section III. 3, *infra,* with complete citations to the record.

- DPA Rutherford's arguments in paragraphs 15 through 21 of her declaration that that she thought the defense would want to continue the case[120] were disingenuous and misleading by omission. What DPA Rutherford left out was that during the four months prior to trial she had never been able to secure Emma May as a witness and never tested the operability of the gun when she contacted the defense about the continuance.[121] Thus, at the time DPA Rutherford claimed she thought the case would be continued, the State had not been able to garner the evidence necessary to prove either charge and the defense knew that. Unless DPA Rutherford could obtain this missing evidence, it would have been close to malpractice for defense counsel to agree to continue the case. The state could not call Emma May as an uncooperative witness because it left her in District Court and therefore could not force her felony matter to be resolved before Guinn had to go to trial. The impression given by DPA Rutherford's declaration was that she had no reason to believe the defense would not want to continue the case. Her declaration misleadingly omitted the fact that defense counsel knew the prosecution had not yet been able to obtain the evidence to prove the case at the time she claimed she knew of no reason the defense would not continue.
- The statement that DPA Rutherford had a "latent sense" the defense did not want the gun tested because the defense had not requested independent testing[122] was misleading if not

[119] *See id.*
[120] *See* Declaration of Michelle Rutherford Opposing Sanctions at 4-5, Docket No. 51.
[121] Exhibit 18 June 3-7 Hearing (Emma May did not sign an agreement to testify until May 30, 2019, one day before trial call); Exhibit 1, August 16, 2019 Sanctions Hearing (all discovery showing that in that portion delivered pretrial there is no operability test results); Declaration re State's Discovery, Docket No. 45.
[122] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 6, Docket No. 51.

flat out false. This statement was used in the declaration with other misrepresentations to give the false impression DPA Rutherford might not have known the defense would not want the DNA and fingerprint evidence destroyed to excuse her deliberately destroying it.[123]

Giving an impression that DPA Rutherford might not know the defense wanted the fingerprint and DNA evidence was misleading because DPA Rutherford had absolute clear knowledge the defense wanted the fingerprint and DNA on the gun tested in this case, and she also knew the defense believed this evidence once tested would be exculpatory for the defense. The evidence proving this claim was false is laid out in greater detail in Section III. 8, *infra*, with full citations to the record. However, in summary, there were five ways DPA Rutherford knew for a fact the defense wanted this fingerprint and DNA evidence. (1) The police were listening to the defendant's jail phone calls and the defendant was telling people his fingerprints and DNA would not be found on the gun.[124] DPA Rutherford got the discovery stating this.[125] (2) For months defense counsel had been trying to get the fingerprint and DNA testing from the prosecutor and/or an update on when it would be complete. Such requests indicated he wanted the testing for trial.[126] Defense counsel sent emails in March, April, and May making such inquiries.[127] (3) When the defense found out that the State had failed to send the gun in

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[123] *See id.*

[124] *See* Exhibit 17, June 3-7, 2019 Motions Hearing; Exhibit 1 at Bates 281-289 specifically at 287-88, August 16, 2019 Sanctions Hearing (bates stamped discovery); Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019 at 18-19, Docket No. 65.

[125] *See* Exhibit 17, June 3-7, 2019 Motions Hearing; Exhibit 1 at Bates 281-289 specifically at 287-88, August 16, 2019 Sanctions Hearing (bates stamped discovery); Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019 at 18-19, Docket No. 65.

[126] *See* Transcript of June 3, 2019 at 18-22, Docket No. 65; Defense Motion to Dismiss, Docket No.19; Exhibits 2-5, June 3-7, 2019 Hearing.

[127] Exhibits 2-5, June 3-7, 2019 Hearing.

for DNA and fingerprint analysis contrary to what was represented in discovery, defense counsel told DPA Rutherford how upset he was about that.[128] (4) The defense filed a written CrR 8.3 Motion to Dismiss arguing the defense had been prejudiced by the prosecution misleading the defense into believing the gun had been sent in for fingerprint and DNA analysis at the very beginning of the case when the police had actually negligently forgot to send it in.[129] (5) On the morning of trial, during oral argument on the Motion to Dismiss, defense counsel argued the defense was prejudiced by having to choose between getting the DNA and fingerprint analysis or waiving speedy trial for longer than would have otherwise been necessary.[130] DPA Rutherford had explicit notice and actual knowledge the defense clearly wanted a fingerprint and DNA analysis done on the gun and believed it would produce exculpatory evidence.

DPA Rutherford's misleading declaration statement was, "I was...aware that the defense counsel had made no request at any time to have independent testing done on that firearm which likely influenced my latent sense that collecting the evidence at any time thereafter would be a needless exercise."[131] This was misleading because DPA Rutherford knew the defense would not need independent testing unless they felt the WSP Patrol results were wrong or their testing methods inadequate. In this case, DPA Rutherford knew the defense believed the WSP Lab tests would show the defendant's DNA and fingerprints were not on the gun and would not need to contest the WSP testing with other independent testing.

[128] *See* Transcript June 5, 2019 at 67, Docket No. 67.
[129] *See* Defense Motion to Dismiss, Docket No. 19.
[130] *See, e.g.,* Transcript of June 3, 2019 at 18-22, Docket No. 65; Amended Motion to Dismiss, Docket No. 29;
[131] *See* Declaration of Michelle Rutherford in Support of Briefing Opposing Sanctions at 6, Docket No. 51.

> The clear misleading implication intended to be given by this statement that DPA Rutherford had "a latent sense" the evidence would not be needed was that she had some reasonable belief the defense might not want the evidence. This deliberately gave a false impression by not disclosing the repeated and specific notice the defense gave DPA Rutherford that it wanted this specific evidence. The only reason I am including this statement in the misleading category rather than the false statement category is the use of the vague phrase "latent sense."

In addition to the false and misleading statements in the written declaration, during oral argument at the final Sanctions Hearing other oral misleading arguments were made by DPA Rutherford through her lawyer.[132] These oral misrepresentations were also inconsistent with what DPA Rutherford said at the motion during trial and/or contrary to other evidence in the record. The Prosecutor's Office made no attempt to reconcile Rutherford's claims at trial and the evidence in the record with the these later oral misrepresentations made during the Sanctions Hearing. In fact, they appeared to not even realize the inconsistencies existed.[133] Two examples of such misleading statements made at the last Sanctions Hearing are explained below.

The first example of a misleading oral claim made by DPA Rutherford through her attorney was the claim that DPA Rutherford believed defense counsel had received the CD recording of witness Emma May's proffer interview on the Friday morning of trial call.[134] The Prosecutor's Office used this misrepresentation to support its argument that DPA Rutherford did not act in

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[132] *See also* Transcript of August 16, 2019 at 19-22, 43-47Docket No. 72(misrepresentation DPA Rutherford believed defense counsel had the proffer agreement by the time of the Motion regarding adding the new charge and claim that DPA Rutherford did not mislead the defense and court by not disclosing the gun test fire the first day of trial when she said there would be no gun testing).

[133] *See id.*

[134] *See* Transcript of August 16, 2019 at 19-22, Docket No. 71.

bad faith by not disclosing evidence on the proffer recording that she intended to use to prove a new firearms charge during a motion hearing heard the morning of trial call.[135] The issues at the motion hearing the morning of trial call were whether the defense had adequate notice to be able to try a new charge of Unlawful Possession of a Firearm and whether there was probable cause to try the new charge. The defense's position was there was not probable cause to try the charge in the evidence it had in discovery and that the charge was being added too late.[136]

The motion to add the new charge occurred on the Friday morning of trial call on the 9:00am motion calendar.[137] During that hearing, DPA Rutherford knew she would be relying on different evidence to prove the new charge than the evidence that had previously been given to the defense in discovery.[138] During the hearing as to whether the defense had adequate notice to try the new charge, DPA Rutherford never disclosed that she would be relying on undisclosed evidence to prove the charge.[139] During the later Sanctions Hearing significant issues were raised as to whether DPA Rutherford acted in bad faith by not disclosing the evidence she intended to rely on to prove the charge during this motion where the issue was whether the defense had adequate notice to try the charge.[140] Some of the undisclosed firearm charge evidence was contained in an audio recording of witness Emma May's proffer interview conducted two months before trial.[141] This audio recording had never been given to the defense as of the time of

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[135] *See id.*
[136] *See* Transcript of May 31, 2019, Docket No. 69.
[137] *See* Transcript of May 31, 2019, Docket No. 69; Minute Entry for May 31. 2019, Docket No. 20.
[138] As to the defense not knowing about new gun testing, *see* Transcript of June 4, 2019 at 13, 25-33, Docket No.66; Transcript of June 5 at 41, 47, 71-72, Docket No. 67. As to the defense not knowing about the other new firearm charge evidence deriving out of the Emma May proffer interview that DPA Rutherford attended, *see* Section III. 4, *infra.*
[139] *See* Transcript of May 31, 2019, Docket No. 69.
[140] *See, e.g.,* Transcript of August 16, 2019 at 17-18, Docket No. 71.
[141] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing (Emma May Proffer Interview Recording).

the hearing to add the new charge.[142] Thus, whether or not DPA Rutherford believed the defense already *knew the information on the proffer recording* at the time of the motion to add the charge went directly to the issue of whether she acted in bad faith in not disclosing this information at the motion hearing.

The status of the original discovery on the Unlawful Possession of a Firearm charge was as follows. In the affidavit of probable cause and original discovery the State disclosed that Emma May had supplied a written statement to the prosecution through her attorney before defendant Guinn was charged.[143] Emma May who was present at the robbery with defendant Guinn said she knew Guinn had a gun during the robbery.[144] A gun was found under Emma May's mattress during the execution of a search warrant.[145] The defendant and Emma May did not live together.[146] There was no evidence in the original discovery that Emma May had ever actually been shown the seized gun and would be able to identify it was the one the defendant possessed.[147] There was also no evidence in the original discovery that the gun had ever been test fired to determine it was operable and met the necessary definition of a firearm for the Unlawful Possession of a Firearm charge.[148]

After the original discovery went out, the prosecution gained knowledge of four significant new pieces of evidence relating to the firearm charge that the prosecution never disclosed to the

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[142] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68 (citations indicating defense did not first get CD proffer until trial call the afternoon of Friday May 31).
[143] *See* Exhibit 10, June 3-7. 2019 Hearing (Emma May's first statement); Exhibit 1 at Bates 274-78, August 16, 2019 Sanctions Hearing (discovery).
[144] *See id.*
[145] Exhibit 1, August 16, 2019 Sanctions Hearing.
[146] *See* Exhibit 10, June 3-7. 2019 Hearing (Emma May's first statement); Exhibit 1 at Bates 274-78, August 16, 2019 Sanctions Hearing (discovery).
[147] *See id.*
[148] *See* Declaration re State's Discovery, Docket No 45; Exhibit 1 at Bates 1-340, August 16, 2019 Sanctions Hearing.

defense. (1) Emma May admitted during a proffer interview two months before trial that although she was with the defendant before, during and after the robbery, she never actually saw the defendant with a gun, she just assumed he had one.[149] This was undisclosed exculpatory *Brady* evidence. (2) During the proffer interview the police showed Emma May a photo of the gun found under her mattress and she identified it as the gun the defendant had around the time of the robbery.[150] This supplied some link between the gun the police had in their custody and the defendant that had been previously missing. (3) During the proffer interview, Emma May claimed the defendant told her he possessed a gun at the time of the robbery.[151] This was a confession statement that DPA Rutherford intended to use as her sole proof of the possession element. This alleged confession of the defendant had never been disclosed to the defense.[152] (4) A few days before trial call, DPA Rutherford and the lead detective formulated a plan to remove the gun from the WSP lab during trial and test fire it during trial to create proof to prove operability.[153] Part of this plan was to not disclose to the defense the planned testing until the testing was already completed in the middle of trial.[154] DPA Rutherford's plan was to spring a new testing witness, test results, and spent bullets on the defense in the middle of trial.[155] This would supply the missing proof to show the gun met the statutory definition of firearm necessary for this particular charge, to wit, a device capable of shooting a projectile via an explosive or gunpowder.[156] None of this evidence to prove the firearm charge was ever disclosed to the

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[149] *See* Exhibit 1, CD 7, August 16, 2019 Sanction Hearing (Emma May's Proffer Interview Recording).
[150] *See id.*
[151] *See id.*
[152] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68 (citations indicating defense did not first get CD proffer until trial call the afternoon of Friday May 31).
[153] *See* Transcript of June 5 at 41, 47, 71-72, Docket No. 67.
[154] *See* Transcript of June 4, 2019 at 13, 25-33, Docket No.66; Transcript of June 5 at 41, 47, 71-72, Docket No. 67.
[155] *See* Transcript of June 4, 2019 at 13, 25-33, Docket No.66; Transcript of June 5 at 41, 47, 71-72, Docket No. 67.
[156] *See* WPIC 133.02.02; 2.10.

defense before or during the motion to add the charge on the morning of trial call. Items one, two and three listed above were not found in any other pretrial discovery, but were on the CD recording of Emma May's proffer interview.[157] Thus, if the defense had known what was on the CD recording at the time of the motion, the defense would have known about some of the new firearms evidence.

The prosecution's failure to timely provided the defense any copy of the audio CD recording of the proffer interview or any summary of the contents is discussed at length in Section III. 4, *infra*, with full citations to the record, so those will not be repeated in full here. However, a brief summary of what happened is as follows. The 2.5-hour audio-recorded proffer interview of State's witness Emma May occurred on April 2, two months before trial. The defense was never advised the interview occurred or given any discovery about it. Nearly two months later DPA Rutherford told the defense an interview had occurred, but did not supply a copy of the interview recording or any information about the content. On Wednesday May 29, two days before trial call, DPA Rutherford asked the lead detective to hand deliver a CD copy of the audio recording to her so she could supply it to the defense. DPA Rutherford gave the CD to her staff to process it as discovery and then mail to the defense. The staff misdirected the CD into Emma May's discovery. Defense counsel was complaining all the week before trial that he did not have the CD. Although DPA Rutherford was telling the defense counsel it was on the way earlier in the week, she did not actually get a copy and give it to staff to mail until Wednesday.[158] The first time the defense finally got a copy of the CD recording was when the

[157] *See* Declaration Re State's Discovery, Docket No. 45; Exhibit 1, 1-340, CD 7, August 16, 2019 Hearing (all discovery).

[158] *See* Transcript June 3, 2019 100-105, 146-54, Docket No. 65; Transcript June 6, 2019 at 60-5, Docket No 68. It should be noted that initially at trial DPA Rutherford claimed she mailed the CD earlier in the week, like on Tuesday. However, when it was pointed out the lead detective's report had recorded he did not hand deliver the CD until Wednesday, she admitted she had not given her staff the CD to process and mail until Wednesday.

lead detective brought another copy to the Friday *afternoon* trial call and DPA Rutherford handed it to defense. So the defense did not in fact have any copy of the CD or recording before the motion to add the firearm on Friday morning. See Section III. 4, *infra*, for all citations to the record.

At the last Sanctions Hearing, the Prosecutor's Office argued DPA Rutherford did not act in bad faith in not disclosing the evidence she intended to use to prove the firearms charge because she believed that defense counsel's office had received a copy of the recording of Emma May's proffer interview the same Friday morning as the motion to add the charge, even if that was not in fact true.[159] At the Sanctions Hearing, the attorney arguing for DPA Rutherford said,

> I would just add I did have an opportunity to confer with Ms. Rutherford, and … she did add that--…and you will remember this. I believe the transcripts will bear this out…that *it was Ms. Rutherford's understanding that Mr. Aull had received the proffer that morning.* Remember, there was some confusion with regard to the proffer being sent, but then it was sent to Ms. May's attorney inadvertently by staff…So it wasn't – it should have been sent to Mr. Aull. So *Ms. Rutherford was under the impression that Mr. Aull had received that proffer that morning.* …So I think that's very important for the Court's consideration. Now I understand the reality of it is that it did not get provided, but it was, …for lack of a better term, it got lost in the mail….. In Ms. Rutherford's mind, Mr. Aull had received that proffer at the time that that motion was made in front of Judge Ellis.[160]

This claim that DPA Rutherford made through counsel was a misrepresentation made to try to excuse the fact DPA Rutherford failed to disclose to the Court and the defense during a motion as to whether the defense had adequate notice to try a new charge that she intended to use almost all previously undisclosed evidence to prove the charge.[161] DPA Rutherford's statement implied she believed during this motion that the defense was already *aware of the new evidence for the firearm charge* that was on the CD, so it was not bad faith to not disclose the new

[159] Transcript of August 16, 2019 Sanctions Hearing at 19-20, Docket No. 72.
[160] Transcript of August 16, 2019 Sanctions Hearing at 19-20, Docket No. 72.
[161] *See also* Transcript of August 16, 2019 at 17-22, Docket No. 71.

evidence. The record indicates this is not accurate and that DPA Rutherford knew the defense still did not know the pertinent new firearm evidence when the motion was made to add the firearm charge. Nevertheless, DPA Rutherford had her unwitting attorney argue this fact for her in the oral argument on the Sanctions Motion and her attorney even checked the fact with her on the record.[162] I presume she failed to make her attorney fully aware of all the facts and he just blindly believed whatever she told him.

No mention was made of the following five facts that prove the impression attempting to be made using this misleading statement was false. No attempt was made to reconcile these facts with DPA Rutherford's misleading statement. (1) Late Thursday afternoon the defense served a CrR 8.3 Motion to Dismiss on DPA Rutherford explicitly stating the defense had not received the proffer recording as of late Thursday and requesting a Motion to Dismiss based, in part, on not having the CD. The brief requested the motion be heard on emergency shortened time the next morning, Friday morning. (2) No one could reasonably assume with any certainty that the defense would have received the 2.5 hour CD recording mailed on Wednesday and listened to it prior to the Friday 9:00 am motion to add the charge. (3) If DPA Rutherford believed as her attorney stated, that the defense received the CD recording that Friday morning the motion to add the charge was heard, she knew for sure defense counsel did not know the content of the recording. If that had been true, defense counsel was in court arguing the motion when the CD arrived at this office and could not have possibly listened to the 2.5-hour recording before the motion on the 9:00 am calendar. (4) It was obvious from the argument made at the motion to add the charge that defense counsel was completely unaware the prosecution would be using previously undisclosed evidence to prove the firearm charge. No mention was made of any

[162] *See id.* at 19-20, 22.

newly disclosed evidence at all. (5) DPA Rutherford also did not disclose during the hearing her other anticipated new evidence for the firearm charge that was not on the proffer recording, to wit, her intent to test the gun and introduce new testing testimony in the middle of trial. If DPA Rutherford was really acting in good faith why didn't she disclose this other new evidence she intended to use to prove the charge? Each of these five reasons is discussed below.

First, the record shows that late Thursday afternoon, the day before the Friday motion to add the new charge, defense counsel served a motion on DPA Rutherford. This motion specifically complained that defense counsel still had not received any copy of the proffer recording as of that late Thursday afternoon.[163] It said, "recently provided discovery…shows that …. Ms. May … on April 2,… did a two-hour interview with detectives…that the defense, as of Thursday, still did not have in discovery."[164] This was a CrR 8.3 Motion to Dismiss based, in part, on the prosecution's failure to supply the CD recording of Emma May's proffer interview.[165] It is incredible for DPA Rutherford to now say she thought the defense had the recording at this hearing Friday morning, when defense counsel specifically notified her in writing in the brief served the evening before that he still did not have the recording. This is also incredible because DPA Rutherford knows the parties appeared the morning of trial call specifically to hear not just a motion about whether there was adequate notice to add the firearm charge, but also to hear a defense CrR 8.3 emergency Motion to Dismiss for failure to supply discovery, specifically because the defense did not have the recording or any summary of Emma May's interview.[166] The missing CD recording was really one of only two issues that formed the

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[163] *See* Motion to Dismiss at 1, 4, Docket 19 (Page one shows time of delivery of Prosecutor's Office. It should be noted that this line was removed from later versions of the Motion to Dismiss after the defense got the recording.)
[164] *Id.* at 4.
[165] *See* Motion to Dismiss, Docket 19.
[166] *See* Motion to Dismiss, Docket 19; Transcript of May 31, 2019, docket No. 69.

original Motion to Dismiss.[167] The Motion to Dismiss because the defense had not received the recording was not heard because the Motions Judge did not have time or would not hear the motion on shortened time; so it had to be continued until Monday.[168] I do not know what could have been clearer notice the defense did not have the CD recording than a written brief saying it did not have the recording and a Motion to Dismiss being made based on not having the recording just hours before the hearing.

Second, even if defense counsel had not sent DPA Rutherford a brief explicitly telling her he did not have the recording, the record reflects DPA Rutherford had no reasonable basis to assume the defense had already gotten the CD recording by Friday morning. Detective Fagen's police report and records indicated he did not bring DPA Rutherford the CD recording to mail to the defense until Wednesday, two days before the Friday morning hearing.[169] Although DPA Rutherford initially during the trial Sanctions Motion claimed the CD had been mailed earlier in the week, she later admitted that was not accurate when Detective Fagen's report was pointed out to her. She then admitted she did not ask Detective Fagen to bring her the CD until Wednesday and did not give the hardcopy CD to her staff to process as discovery and mail out until after that on Wednesday.[170]

It would be impossible to assume with any certainty that defense counsel could have received and have listened to the 2.5 hour audio interview by the Friday 9:00 a.m. hearing if DPA Rutherford did not even give it to her staff to process as discovery and mail out until sometime on Wednesday. Even DPA Rutherford admitted it takes a day or two for the defense

[167] *See* Motion to Dismiss, Docket 19.
[168] *See* Transcript of May 31, 2019, Docket No. 69.
[169] *See* Transcript June 3, 2019 100-105, 146-54, Docket No. 65; Transcript June 6, 2019 at 60-5, Docket No 68.
[170] *See id.*

to receive discovery.[171] This was a hardcopy CD hand delivered by the detective, not electronic discovery.[172] The only way defense counsel could have both received and listened to the CD recording before the Friday 9:00 am morning hearing was if he received it by mail the very next day after DPA Rutherford asked the detective bring it down and gave it to her staff for processing and mailing. It also would have to have been received well before the end of the day to have been listened to by Friday morning, due to the length of the recording.

Third, DPA Rutherford's attorney specifically represented orally at the final Sanctions Hearing that DPA Rutherford thought defense counsel got the CD recording the *Friday morning of the motion,* not the prior day.[173] DPA Rutherford's attorney checked this fact with her and re-verified the claim on the record.[174] He said, "it was Ms. Rutherford's understanding that Mr. Aull received the proffer that morning [referring to the Friday morning of the hearing].... So Ms. Rutherford was under the impression that Mr. Aull received the proffer that morning. ...So I think that's very important for the Court's consideration."[175] Presumably this specificity as to the timing of receipt on Friday morning was because the Thursday night brief made it clear the defense did not have the CD as of late Thursday. Given this was not electronic discovery, I do not know how anyone could know exactly when something mailed was received with such precision as to think Friday morning. Apart from that credibility issue, the bigger problem with this argument is defense counsel would not be able to have any idea what was on the 2.5-hour audio interview Friday morning if it was received by his office while he was in court Friday

[171] *See* Transcript June 3, 2019 100-105, 146-54, Docket No. 65; Transcript June 6, 2019 at 60-5, Docket No 68
[172] *See also id.*
[173] *See* Transcript of August 16, 2019 at 19-20, Docket No. 71.
[174] *See id.*
[175] Transcript of August 16, 2019 at 19, Docket No. 71.

morning. DPA Rutherford's lawyer seemed oblivious to the ramifications of a Friday morning receipt in terms of actual real notice.[176]

If DPA Rutherford's lawyer literally meant she believed defense counsel's office received the CD Friday morning, which he stated twice after conferring with Ms. Rutherford, this would not give her any basis to believe the defense had any knowledge of what was on the CD yet during the Friday morning motion. In fact, it would mean DPA Rutherford knew for sure the defense counsel did not know the information on the CD at the time of the Friday morning hearing. The Friday motion regarding whether the defense had adequate notice to add the charge was on the 9:00 am calendar. Even if defense counsel's office received it first thing in the morning Friday, defense counsel would have been in court by then and could not possibly have listened to the 2.5-hour audio recording before the motion which was heard before 10:30 am.[177] If DPA Rutherford really believed the CD was delivered to defense counsel's office Friday morning as her attorney stated, then she knew for a fact the defense did not yet know the pertinent new evidence related to the Unlawful Possession of a Firearm charge while he was in court that morning arguing whether there was adequate notice to allow the charge to be added. The Prosecuting Attorney's argument that DPA Rutherford thought defense counsel's office got the CD Friday morning, if it were true, proved the opposite of what he intended it to prove. It proved defense counsel could not possibly have known about the new firearm evidence on the CD recording by the time of the morning hearing on whether the defense had adequate notice of the charge.

Fourth, even if DPA Rutherford made an unrealistic assumption that a hardcopy CD could definitely be processed, mailed received and listened to in one day or even if she really thought

[176] *See* Transcript of August 16, 2019 at 19-20, Docket No. 71.
[177] *See also* Transcript of May 31, 2019, Docket No. 69; Minute Entry for May 31, 2019 Hearing, Docket No. 20.

defense counsel could somehow magically know what was on a CD arriving at his office while he was in court, it still would have been manifestly apparent her assumptions were wrong as soon as the notice motion began to be argued.[178] Had defense counsel received and had time to listen to the Emma May recording by the time of this hearing, he would have been making all kinds of additional arguments regarding lack of notice. Most notably, he would have noted he had just received all new evidence for the firearm possession charge within the last few hours. If defense counsel knew the previously undisclosed firearm evidence on the proffer recording on Friday morning, defense counsel would have just been notified of nearly all new evidence the State intended to use to prove the firearm charge. The defense would have just been notified the prosecution's prior inference a witness saw the defendant with a gun was not true.[179] It would have just learned the prosecution intended to use a never before disclosed alleged confession of the defendant as its sole proof of possession, which raised a corpus issue not previously in the case.[180] The defense would have for the first time just been notified of Emma May could really identify the gun the police had in police custody as being tied to the defendant as she was shown a picture of it during the proffer interview.[181] Defense counsel would have been raising all kinds of objections to adding the new charge if he had just received all newly disclosed evidence to prove the charge just hours before a motion to add the charge on the day of trial call. The most potent argument to support the defense's position it did not have adequate notice to add the new

[178] *See* Transcript of May 31, 2019, Docket No. 69.
[179] *Compare* Exhibit 10, June 3-7 Hearing (Emma May's first statement that she knew the defendant had a gun the night of the robbery), *with*, Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing (Emma May's second proffer statement in which she admits she never saw the defendant holding the gu, she just assumed he had one because he usually does).
[180] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing (Emma Mays Proffer Interview Recording), As Emma May and no other witness saw the defendant with the gun the only evidence to prove the defendant possessed the gun was the defendant's alleged confession. There was no crime unless the defendant possessed the gun because the Unlawful Possession charge was only a crime because the defendant possessed the gun because he was a convicted felon.
[181] *See id.*

charge would have been the fact all new and different evidence relating to the possession charge had just been received. Instead, there was no mention whatsoever of any new evidence relating to this charge received from the CD recording.[182] That is because the defense still did not have the CD recording.[183]

Furthermore, defense counsel also would not have still been trying to make the lack of probable cause argument that Friday morning if he was aware of the information on the CD recording, because the testimony on the CD recording supplied the missing probable cause.[184] The defense wanted to go forward with the lack of probable cause argument that morning, but it was continued due to lack of time on the calendar.[185]

It was crystal clear from what was actually happening during the motion to add the charge that defense counsel had no clue the prosecution would be using different undisclosed evidence to prove the charge.[186] It was absurd to imply DPA Rutherford believed the defense knew about the previously undisclosed firearm evidence on the CD recording at the time of this motion. It would have been manifestly obvious to DPA Rutherford that the defense had no knowledge of the undisclosed evidence from the fact there was no mention of the new evidence at all. Regardless of exactly when she thought the CD got to defense counsel's office, the important fact was DPA Rutherford knew due to her late delivery the defense counsel did not yet know what was on the CD recording, i.e., the new firearm charge evidence.

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[182] *See* Transcript of May 31, 2019, Docket No. 69.
[183] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68 (citations indicating defense did not firstget CD proffer until trial call the afternoon of Friday May 31).
[184] *See* Transcript of May 31, 2019, Docket No. 69. The testimony on the CD recording provided the missing link between the defendant and the gun the police had in their possession because on the recording witness Emma May identifies the gun the police have as being the one the defendant possessed the night of the robbery. *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.
[185] *See* Transcript of May 31, 2019, Docket No. 69.
[186] *See id.*

Fifth, if DPA Rutherford really had good intentions to disclose the new unlawful firearm possession evidence and just mistakenly thought the defense had that portion of the new evidence found on the CD recording, why didn't she disclose the other undisclosed evidence she planned to use to prove this charge? DPA Rutherford was planning to test fire the gun in the middle of trial and introduce a new testing witness, new test results and newly created spent bullet casings during trial.[187] This evidence would have supplied the missing necessary proof that the firearm met the statutory definition of firearm for this charge. DPA Rutherford also did not disclose this anticipated new and undisclosed evidence she intended to use to prove that charge at the time of the motion as to whether the defense had adequate notice to try the charge.[188]

DPA Rutherford knew the defense did not know she was intending to test the operability of the gun and introduce new gun testing testimony during trial.[189] If she was not withholding new evidence on the firearm charge in bad faith, why didn't she mention this other new evidence that was not on the proffer CD? No explanation has ever been supplied for withholding this other undisclosed firearm evidence during the notice motion. The fact DPA Rutherford also intentionally withheld the other undisclosed evidence she planned to use to prove the firearm possession charge during the motion to add the new charge and has provided no explanation for that withholding, suggests her failure to disclose the firearm evidence contained in the CD recording was not just by mistake.

Furthermore, regardless of what defense counsel knew or did not know from the CD recording, the Court hearing the motion had no idea DPA Rutherford was planning to use evidence either not yet disclosed or newly disclosed in the last few hours to prove the new

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[187] *See* Transcript of June 4, 2019 at 13, 25-33, Docket No.66; Transcript of June 5 at 41, 47, 71-72, Docket No. 67.
[188] *See* Transcript of May 31, 2019, Docket No. 69.
[189] *See* Transcript of June 4, 2019 at 13, 25-33, Docket No.66; Transcript of June 5 at 41, 47, 71-72, Docket No. 67.

charge she wanted to add the morning of trial call. At the motion DPA Rutherford knew that the Court was not apprised of these significant facts. DPA Rutherford's silence in these circumstances was misleading the court. Taking the position the defense had adequate notice of the charge during the motion without mentioning to the Court that the defense either just got or was just about to get all new evidence to prove the charge when she knew the Court did not know this was a form of misrepresentation by omission. DPA Rutherford prevailed at the notice hearing because the court only knew she told the defense previously she would add the charge; the court was not advised she had not disclosed the evidence she intended to use to prove the charge.[190]

This "I thought the defense had the CD excuse" was like a number of DPA Rutherford's other excuses throughout these hearings: a red herring. It was something that sounded good, but really just obscured the bigger misconduct issues. These were excuses that really did not excuse the misconduct. In this instance, whether the defense got the CD recording evidence at trial call or 24 hours before trial call was splitting hairs; the new evidence should have been disclosed to the Court under either of these circumstances. Under either of these circumstances the evidence was all being disclosed too late to try the charge. DPA Rutherford's misconduct was not disclosing this information to the Court and defense regardless of which late time the defense got the CD. The evidence disclosure was too late or way too late. So when the defense got the CD did not matter. What mattered is that it was not fair to proceed to trial on a case wher the defense was just getting all of the evidence the day of trial call. DPA Rutherford had a duty as a prosecutor to do what was just; not just do what would help her win. At a minimum, that would have been honestly disclosing the new evidence to the Court. The entire implication that this was

[190] *See* Transcript of May 31, 2019, Docket No. 69.

all ok because DPA Rutherford thought the defense got the proffer CD that morning of trial call was off base at its core.

DPA Rutherford's argument through her attorney during the later Sanctions Motion that she acted in good faith because she thought the defense had the proffer interview CD by the Friday morning of trial was a misleading argument. She knew the defense and the Court had no knowledge of the new evidence on the CD that she intended to use to prove the new firearm charge regardless of where the CD might be in the mailing process. She knew the failure to notify the defense and the Court of her newly disclosed major evidence during a motion as to whether the defense had adequate due process notice to try the charge showed actual bad faith. DPA Rutherford made this later misrepresentation through her attorney to try and excuse the bad faith finding that was otherwise inevitable from her deliberately withholding such pertinent information during this hearing.

The second example of a statement made at the later Sanctions Hearing that was inconsistent with DPA Rutherford's statements at trial was a representation that when DPA Rutherford said she would not be using the WSP laboratory testing she just meant the scientific fingerprint and DNA analysis, not gun operability testing.[191] This was argued to prove DPA Rutherford did not mislead the Court and defense the first day of trial by telling them she was not going to introduce any testing results on the gun requested from the WSP lab, without also disclosing she had an alternate plan to have the gun test fired in the middle of trial by the Snohomish County Sheriff's Office.

[191] *See* Transcript August 16, 2019 Sanctions Hearing at 45-47.

At the later Sanctions Hearing, through her attorney DPA Rutherford stated that when she said she would not be introducing the WSP lab gun testing she meant scientific testing. The statements made by the Snohomish County Prosecutor were as follows:

> Ms. Rutherford shared with me that there is a distinction to be made between test-firing a gun and scientific testing. And to Ms. Rutherford, scientific testing involves DNA and fingerprinting and other matters that wouldn't necessarily fall under the definition or the understanding of operability, which it would appear from Ms. Rutherford's representation to me, she's not thinking gun, scientific testing. Scientific testing to Ms. Rutherford, based on what she just told me, means fingerprinting, DNA, other sorts of things, not operability..... in Ms. Rutherford's mind, based on what she told me, ...she doesn't consider that to be scientific testing, and maybe it's a more narrow definition of scientific testing. ....And so I think that... Ms. Rutherford had a more narrow definition of scientific testing than maybe your honor does. So if your Honor is considering with regard to the question of willfulness, I think you have to consider my representations through Ms. Rutherford that she had a more narrow understanding of scientific testing. ...Ms. Rutherford wanted me to add that testing for operability is not a scientific thing. It's simply shooting...a gun...in Ms. Rutherford's mind that's not scientific testing."[192]

The argument made was DPA Rutherford had not misled the court by not disclosing she was going to do test firing on the gun in the middle of trial because she had only told the court she was not going to introduce the WSP tests at trial and those were a different kind of scientific testing in her mind.

DPA Rutherford clearly did not tell her attorney that she had made the exact opposite representation at trial. At trial, DPA Rutherford argued that in her mind the WSP lab tests were the same test as the test fire done during trial. At trial DPA Rutherford argued that she had not misled the court and the defense by not giving notice that she was going to do test firing on the gun in the middle of trial, because she had disclosed the WSP lab gun testing requests before

[192] Transcript August 16, 2019 Sanctions Hearing at 46-47.

trial. She explained that in her mind the gun test fire was the same thing as those WSP lab test requests.[193] DPA Rutherford made this representation more than once during trial.[194] She said,

> THE COURT: … Why did you not tell anybody that you had a plan to test fire the gun and bring that evidence in when we are already in the middle of trial?
>
> MS. RUTHERFORD: Your Honor, I understood that to be a part of the initial requests that were made to the crime lab. And whether the crime lab test fires it and retains the casings or Detective Fontenot does, **it's the same test**. It didn't appear to me to be any different than what we'd already disclosed was the intention with that piece of evidence.[195]

Detective Fontenot was the Sheriff's Deputy who did the test fire during trial.[196] The following similar exchange also occurred.

> COURT: …why did you not ask to have this test fired in days one through …
>
> MS. RUTHERFORD: Well, your Honor, that would have been done in the lab request that I thought had already been done…I thought that was already in progress.
>
> COURT: Is it your understanding that the Washington State Patrol crime lab does fire testing?
>
> MS. RUTHERFORD: Yes. Yes, they will fire weapons to get casings from them to match to crime scenes. That's what they do….
>
> COURT: When, if ever, have you sent in a request to have this test fired by the Washington State Patrol crime lab?
>
> MS. RUTHERFORD: That would have been the – it's the same May 20 request, your Honor. [referencing all the WSP gun lab requests for this gun]
>
> COURT: Does it have that in it?
>
> MS. RUTHERFORD: Yeah. Your Honor, it's part of the request that Detective Fagen made.

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[193] *See* Transcript June 4, 2019 at 14, 28, Docket No. 66; Transcript of June
[194] *See* Transcript June 4, 2019 at 28, Docket No. 66; Transcript of June 3, 2019 at 189-92, Docket No. 65.
[195] *See* Transcript June 4, 2019 at 28, Docket No. 66.
[196] *See* Exhibit 16, June 3-7, 2019 , Docket No. 65.

The argument at trial was that to do the lab ballistics testing that the WSP crime lab had been requested to do, the crime lab has to have someone shoot the gun to get the bullets for comparison. So, ballistics testing necessarily involves determining operability and accomplishes the same thing as a test fire.[197]

Apparently in Ms. Rutherford mind telling the Court and the defense you are going to do a certain group of WSP lab tests is notice you will be doing a test fire operability test, but telling them you will not be doing the same group of WSP lab tests is not notice you will not be doing a test fire operability test. At trial the WSP lab tests were the same as a test fire.[198] At the Sanctions Motion the WSP tests were not the same as a test fire.[199] This is inconsistent on its face.

Furthermore, at trial DPA Rutherford did not tell the Court she would not be introducing "scientific" testing. The phrase "scientific testing" was never used.[200] She said she would not be introducing the testing that had been requested from the WSP laboratory.[201] This occurred right after the Court asked her what the lab had been requested to do in relation to the gun.[202] DPA Rutherford stated that the lab had been requested to do "a firearms analysis to determine if that weapon was also used in other shootings with outstanding investigations as well..... It would be do we have bullets from a scene that match this gun? So it would include this and any other investigation."[203] So at the very same time DPA Rutherford told the Court and defense that she would not be using the requested WSP lab test results, she also explained that the WSP lab test

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[197] *See* Transcript June 4, 2019 at 28, Docket No. 66; Transcript of June 3, 2019 at 189-92, Docket No. 65.
[198] *See* Transcript June 4, 2019 at 28, Docket No. 66.
[199] *See* Transcript August 16, 2019 Sanctions Hearing at 45-47.
[200] *See* Transcript of June 3, 2019 at 78-84, Docket No. 65.
[201] *See* Transcript of June 3, 2019 at 84, Docket No. 65.
[202] *See* Transcript of June 3, 2019 at 78, Docket No. 65.
[203] *See* Transcript of June 3, 2019 at 81, Docket No. 65.

included the ballistics testing which involved test firing the gun.[204] This was the WSP lab testing that the next day in trial she explained in her mind was the **"same test"** as the operability test fire done by the Sheriff's office.[205]

The "I meant scientific testing" excuse, like DPA Rutherford's other excuses also missed the mark on actually excusing the true misconduct. The true misconduct in this case was not what she told the defense and the Court she would not do, but that she did not disclose what she was going to do. DPA Rutherford had an affirmative duty to disclose her new plan to do gun testing midtrial. DPA Rutherford violated her legal duties to promptly affirmatively disclose: (1) her intent to call a new witness,[206] (2) provide a summary of the witness's expected testimony,[207] (3) give notice of new physical evidence she intended to introduce at trial,[208] and (4) give notice of her intent to do destructive testing on physical evidence.[209] There outstanding Omnibus Court Order and the CrR 4.7, both required the disclosure of this information. As the discovery deadlines had all passed, pursuant to Cr 4.7(h)(2) and the Omnibus Court Order, DPA Rutherford was required to disclose each of these items promptly as soon as DPA Rutherford became aware of them.[210]

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[204] *See* Transcript of June 3, 2019 at 78-84, Docket No. 65.

[205] *See* CrR 4.7 (a); Omnibus Court Order, Docket No. 15; Defense request for Discovery, Docket No. 9. Defense Discovery request adopted by Court Order and CrR 4.7 both specifically required disclosure of the expected substance of witnesses' testimony.

[206] *See* CrR 4.7 (a); Omnibus Court Order, Docket No. 15; Defense request for Discovery, Docket No. 9. Defense Discovery request adopted by Court Order and CrR 4.7 both specifically required disclosure of the expected substance of witnesses' testimony.

[207] *See* Omnibus Court Order, Docket No. 15; Defense request for Discovery, Docket No. 9. The Omnibus Court Order ordered each side to comply with the other side's discovery demands. The Defense Discovery Request

[208] *See* Omnibus Court Order, Docket No. 15; Defense Request for Discovery at 2, Docket No. 9. The Defense Discovery Demand ordered to be followed in the Omnibus Court Order specifically required the State to give the defense notice of physical evidence or tangible objects intended to be used at trial.

[209] *See* Omnibus Court Order, Docket No. 15; Defense request for Discovery, Docket No. 9. The Defense Discovery Request adopted by the court order specifically required all evidence be preserved unless allowed otherwise by a court order.

[210] *See* Cr 4.7(h)(2) which imposes a continuing duty to disclose. CrR 4.7 provides that after discovery deadlines have passed if new material covered by the rules becomes known, counsel must promptly disclose to opposing counsel and, if trial has started, must also disclose to the court. The Court's Omnibus Order ordered each side to comply with the other side's discovery demands, thereby incorporating the Defense Request for Discovery. The

When the Court asked at the Sanctions hearing how it could not be willful misconduct for her to not disclose her intent to do new gun testing midtrial when the issue of gun testing was raised, it was not necessarily because what she said was misleading. Saying she was not going to use the WSP tests was actually accurate. It was because even when the issue of ballistics gun testing was raised, she remained silent about the new undisclosed gun testing she was planning to do.[211] It would be pretty hard to swallow she just forgot the secret testing she was doing when the issue of gun testing was being raised in court[212] and the detective sitting next to her was giving her periodic updates throughout the day as to how the secret gun testing plan was going.

DPA Rutherford failure to disclose this new gun-testing plan was misleading by omission. If an attorney does not disclose that which they have a clear duty to disclose, the other party has the right to assume it does not exist. As there was no disclosure of any new intended testing witness and no request to do destructive testing the defense and the Court had a right to assume no new gun testing would be introduced.

Even if DPA Rutherford had affirmatively stated she would not be introducing any scientific gun test results, that would not excuse her failure to promptly affirmatively disclose her new plan to test fire the gun mid trial. Her only excuse simply did not address the fact she violated CrR 4.7 and the Omnibus Court Order by failing to disclose her intent to call a different test fire witness, failing to provide a summary of that witness's testimony, failing to disclose her intent to offer new physical evidence, and her failing to request permission to destroy evidence.[213]

Defense Request for discovery specifically demanded compliance with the continuing duty to disclose set forth in CrR 4.7(h)(2). *See* Omnibus Court Order, Docket No. 15; Defense request for Discovery, Docket No. 9.

[211] *See also* Transcript of June 3, 2019 at 78-84, Docket No. 65.

[212] *See id.*

[213] *See* CrR 4.7(a) and (h); Omnibus Court Order, Docket No. 15; Defense request for Discovery, Docket No. 9.

The Snohomish County Prosecutor's Office throughout the final Sanctions Hearing specifically relied on DPA Rutherford's false and misleading statements in both its written briefing and during oral argument.[214] During oral argument, the Snohomish County Prosecutor repeatedly urged me to rely on DPA Rutherford's declaration.[215] He said "I will rely substantially on …the attached declaration."[216] When asked if deliberately choosing to not expedite late discovery wasn't willful as opposed to inadvertent or mistaken, Mr. Cornell stated, "I think I will refer you back to Ms. Rutherford's declaration."[217] When asked if he wanted to further address the willfulness issues, he stated, "Well, I think Ms. Rutherford did that in her declaration."[218] In the briefing, the Civil Deputy's arguments virtually parroted some of the misrepresentations in DPA Rutherford's declaration. For example, the Prosecutor's Office's brief argued the evidence did not show bad faith based on the following; "DPA Rutherford was also aware that defense counsel had made no request …to have independent testing done on that firearm, which likely influenced a latent sense that collecting the evidence at any time thereafter would be a needless exercise. But she neglected to recognize that by test firing the firearm certain evidence would no longer be available."[219] These are verbatim restatements of two of the false and misleading statements DPA Rutherford made in her declaration as discussed above.[220]

I made repeated efforts to encourage DPA Rutherford and the Snohomish County Prosecutor's Office to correct the misstatements, particularly the false facts sworn under penalty

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[214] *See* Transcript of August 16, 2019 at 19, 22, 41-42, 45-47, 65-66, Docket No. 71; Memorandum in Opposition to Sanctions at 4, Docket No. 52; Declaration of Michelle Rutherford Opposing Sanctions, Docket No. 51.
[215] *See, e.g.,* Transcript of August 16, 2019 at 22, 41, 46-47, 65-66, Docket No. 71.
[216] *See id.* at 22.
[217] *See id.* at 41.
[218] *See id.* at 65-66.
[219] *See* Memorandum in Opposition to Sanctions at 4, Docket No. 52.
[220] *Compare* Memorandum in Opposition to Sanctions at 4, Docket No. 52, *with*, Declaration of Michelle Rutherford Opposing Sanctions at 6, Docket No. 51.

of perjury.[221] DPA Rutherford and the Civil Deputy who wrote the brief were present at counsel table during the final sanctions hearing argument.[222] Throughout the hearing, Mr. Cornell would turn to DPA Rutherford to check the challenged facts.[223] She would assure him her misrepresentations were accurate, and he continued to assert her misrepresentations.[224] Despite false facts in the sworn declaration being specifically brought to the attention of DPA Rutherford on the record along with summaries of her previous contrary statements, DPA Rutherford did not retract or modify her sworn statements at that time.[225] Nor did her attorneys make any effort to retract or modify these inaccurate sworn statements or reconcile them with her prior statements.[226] When instead of revising misrepresentations, they doubled down on the accuracy of DPA Rutherford's misleading statements, I eventually gave up on trying to save DPA Rutherford from herself. I did indicate the facts would be checked against the record. I made special efforts to give DPA Rutherford every chance to correct this, because, in my opinion, it would never be worth it for any attorney to make false statements in a sworn declaration to avoid a few hours of requested educational discovery sanctions.

DPA Rutherford took advantage of the loyalty and trust of the two attorneys from her office attempting to help her. She took advantage of the fact those lawyers did not understand the full context of her misleading statements and were oblivious that the claims she was having them repeat were misrepresentations.

I hereby find the Civil Deputy who wrote the brief and the Snohomish County Prosecutor who made the oral argument did not in fact realize they were proffering false and misleading

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[221] *See id.* at 19-22, 48-50, 51-54.
[222] *See* Minute Entry for August 16, 2019, Docket No. 60.
[223] *See, e.g.*, Transcript of August 16, 2019 Sanctions Hearing at 19-22, 41-47, Docket No. 71.
[224] *See id.*
[225] *See* Transcript of August 16, 2019 Sanctions Hearing at 48-54, Docket No. 71.
[226] *See id.*

statements. They simply trusted DPA Rutherford was telling them the truth and parroted what she told them. However, CR 11 places a duty on all lawyers to make an adequate investigation into the truth of the claims they make.[227] DPA Rutherford numerous inconsistent prior statements could be found throughout the transcripts.

I understand the instinct to support and show loyalty to one's employees and co-workers. That is a very admirable thing up to a point. However, the point beyond which this should not go for lawyers is proffering false sworn statements. Prosecutors in particular have a duty to uphold and enforce the law, not break it. Finding the truth is not possible if witnesses are permitted to make false sworn statements.

I hereby find that DPA Rutherford's fact statements in paragraph 23, paragraph 25, and paragraph 18 of her Sanctions Motion declaration were false statements of fact as explained above, and that she knew they were false when she made them. I further find the other misleading statements in the declaration and stated in court as outlined above were intentionally misleading. These were not slips of the pen; they were carefully crafted misrepresentations to avoid sanctions. DPA Rutherford was given specific clear notice and a last opportunity to timely correct them in court. Instead she left her attorneys to twist in the wind; she left them at risk of being accused of violating their ethical code of conduct by proffering her false statements.

This section has focused on the misrepresentations made during the final Sanctions Hearing. However, this lack of candor permeated the original motion at the time of trial as well. Other representative samples of that are found throughout this opinion. This section focuses on

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[227] CR 11 states that as to "every pleading, motion and legal memorandum ....The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact;* (2) is warranted by existing law or a good faith argument for an extension, modification or reversal of existing law...."

the misrepresentations for the later hearing in order to examine how DPA Rutherford's dishonesty problem was an ongoing pattern; these were not just mistakes that can be attributed to DPA Rutherford's life circumstances that existed at the earlier time of trial. I have not discussed every false and misleading statement made throughout all the hearings. I have discussed some of the others related to the other sanctions issues as necessary to make findings as to the other sanctions issues. Those are discussed in the sections herein that they relate to.

As to the statements I have found are false and misleading herein, I make no ruling as to sanctions. I am deliberately leaving this to be dealt with in some alternate way because this is not the most effective forum to address this. If there were a willingness to recognize the problem exists, DPA Rutherford's employer would be the best first option to deal with this by simply making it clear that dishonesty in court is not permitted.

2. DPA RUTHERFORD NEVER DISCLOSED THREATS, PROMISES AND CONSIDERATION SHE GAVE TO A WITNESS TO INDUCE THE WITNESS TO TESTIFY.

The State's entire case against defendant Guinn hinged on obtaining the testimony of co-defendant Emma May.[228] The victim was unable to identify the robbers and the video was too poor to make any identifications. The prosecution obtained two different sets of statements from Emma May by making separate threats and promises of consideration for each set of statements. These statements from Emma May were the sole evidence that connected defendant Guinn to the charged crimes and the first set of Emma May's statements was the only basis for probable cause to charge and arrest the defendant.[229]

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[228] *See* Affidavit of Probable Cause, Docket No. 2; Transcript of June 3, 2019 at 158, 192 Docket No. 65; Exhibit 1 to August 16, 2019 Sanctions Hearing (all discovery provided).
[229] *See id.*

DPA Rutherford never disclosed to the defense the fact she made an explicit verbal threat to Emma May to induce her first set of statements.[230] Shortly after Emma May was arrested for the robbery, DPA Rutherford made an explicit verbal threat to Ms. May, via Emma May's attorney.[231] The threat was that Emma May would receive no plea deal to any charge less than First Degree Robbery with a firearm enhancement unless she agreed to identify and testify against the co-defendants.[232] Shortly after this threat, Emma May provided her first set of written statements to DPA Rutherford through her lawyer.[233] She identified four other people who she allegedly committed the robbery with her. DPA Rutherford admitted she never disclosed her threat to the defense that was made before this first set of statements, and she admitted she never had any intent to disclose it.[234]

DPA Rutherford also never disclosed to the defense that after the first written set of statements were made she threatened to charge Emma May with Assault Second Degree as well as Robbery First Degree with a firearm enhancement in an effort to get her to agree to testify.[235] This was by chance discovered during trial when Emma May's attorney provided information including an email in which DPA Rutherford had demanded a plea deal to both robbery and assault.[236] Emma May's attorney testified she was able through negotiations to get the Assault Second Degree dropped and the robbery reduced to second degree in return for the Emma May

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[230] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67; Transcript of June 3, 2019 at 111-112, 192, Docket No. 65; transcript of June 4. 2019 at 57-58, Docket No. 66.
[231] *See id.*
[232] *See id.*
[233] *See also*, Transcript of June 5, 2019 at 78, Docket No. 67; Transcript of June 3, 2019 at 90, Docket No. 65; Transcript of June 4, 2019 at 93, Docket No. 66; Affidavit of Probable Cause at 4-5, Docket No. 2.
[234] *See* Transcript of June 3, 2019 at 26, Docket No. 65; Transcript of June 5, 2019 at 73-78, Docket No. 67.
[235] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67; Transcript of June 4, 2019 at 98, Docket No. 66; Exhibit 19 from June 3-7 Hearing.
[236] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67; Transcript of June 4, 2019 at 98, Docket No. 66; Exhibit 19 from June 3-6 Hearings.

signing the final agreement to testify against the defendant.[237] DPA Rutherford admitted she had never disclosed and never planned to disclose to the defense the fact she had threated to charge Emma May with Assault Second Degree and dropped that in exchange for the agreement to testify.[238]

DPA Rutherford also never disclosed to the defense consideration she provided to Emma May in the form of not charging her into Superior Court on Robbery First Degree. In anticipation of Emma May providing evidence for the prosecution, Emma May's attorney and DPA Rutherford reached an agreement to not charge Emma May into Superior Court within the time limits of the criminal rules and to hold her instead for months in District Court.[239] DPA Rutherford admitted this was done so that if they reached a deal, Emma May's record would not show she was ever charged with First Degree Robbery in Superior Court.[240] Emma May's attorney specifically negotiated with DPA Rutherford for this consideration because she believed it made Emma May's criminal history look less egregious.[241] It was undisputed that DPA Rutherford never disclosed this negotiated benefit was given to the primary witness. This information was also revealed by chance during trial when questions arose as to how Emma May was held in District Court for months.[242]

The defense also was not ever notified that Emma May's attorney specifically sought and received from the prosecution and police tacit assurances all the co-defendants would be arrested soon and that Emma May and her family would be protected from retaliation through assistance

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[237] *See also* transcript of June 4, 2019 at 98-124, Docket No. 66.
[238] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67.
[239] *See* Transcript of June 3, 2019 at 25-26, Docket No. 65; Transcript of June 5, 2019 at 74-76, Docket No. 67.
[240] *See id.*
[241] *See id.*
[242] *See id.*

from the Violent Offender Task Force.[243] Emma May's attorney testified this was a very important selling point to Emma May, and Emma May did not want to enter any deal to testify until her attorney heard such assurances.[244] Emma May's attorney testified that, "there was a huge concern because there's three individuals out of custody who…had some serious gang ties…part of my client's hesitation was she was fearful, and she was mostly fearful for her family."[245] Emma May's lawyer also testified she sought commitments to her client's protection before the proffer agreement, "so before …[Emma May] were to commit to anything…I want to know both from the detective and from the prosecutor what they might be able to do to protect her from those threats, or her family…."[246] "So in speaking with …[DPA Rutherford]…I got some standard assurances from the detective that, you know, the violent crimes task force, especially because some of them are gang related, would, you know, scoop them up or… watch their house…."[247]

After Emma May gave a second set of statements to the prosecution during a proffer interview, Emma May's attorney sought and obtained continued promises her client's safety would be protected;[248] it was undisputed that these promises were also not disclosed to the defense.[249] After the proffer agreement, Emma May's attorney was not satisfied with the police efforts at arresting the other suspects and sought out continued safety/protection assurances before her client was willing to enter the final agreement to testify.[250] Emma May's attorney

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[243] *See* Transcript of June 4, 2019 at 101, 104-05, Docket No. 66; Transcript of June 5, 2019 at 73-78, Docket No. 67.
[244] *See* Transcript of June 4, 2019 at 101, 104-05, 114-16, 119-123, Docket No. 66; Transcript of June 5, 2019 at 73-78, Docket No. 67; Transcript of June 6, 2019 at 66-67, Docket No. 68.
[245] Transcript of June 4, 2019 at 101, Docket No. 66.
[246] *Id.* at 104.
[247] *Id.* at 104-105.
[248] *See* Transcript of June 4, 2019 at 114-16, 119-123, Docket No. 66.
[249] *See also* Transcript of June 5, 2019 at 73-78, Docket No.67.
[250] *See* Transcript of June 4, 2019 at 114-16, 119-123, Docket No. 66.

testified, "my biggest complaint at that time was …what are they doing to get the other three people in custody….because, …I had made that a big selling point for my client for, you know, cooperating, that she wouldn't have to be in fear because they'd be in custody."[251] So Emma May's lawyer contacted DPA Rutherford in mid-May and said, "I don't know what your detectives are doing. I'm a little disturbed by that because, you know, these guys are still out there. At some point Mr. Guinn is going to know that …[Emma May] gave those names. And when he knows she gave those names and they're still out there, it's a risk to her family."[252] Emma May's lawyer testified DPA Rutherford responded to these concerns by email on May 21st as follows: " '[Detective] Fagen is going to get going on the follow ups. …. Hopefully we'll have movement this week or next in terms of sending VOTF,' the violent offender task force, 'to make arrests.'"[253]

To be absolutely sure this was a valid assurance that was being followed up on, Emma May's lawyer also contacted DPA Rutherford's supervisor on May 28th to make sure he also followed through and got assurances from the detectives. Emma May's lawyer testified, "So when I spoke to …[DPA Rutherford's supervisor] …the second thing I asked him to do, even though Ms. Rutherford had already told me on the 21st that was happening, was to follow up with the detectives and make sure that they are indeed doing what they need to be doing to apprehend the other people and he assured me he would do that."[254] Detective Fagen testified that DPA Rutherford's supervisor did do that. He testified DPA Rutherford's supervisor, "contacted me last week on her behalf asking me where I stood in the status of some of the stuff in regards to

[251] Transcript of June 4, 2019 at 116, Docket No. 66.
[252] *Id.* at 114-15.
[253] *Id.* at 119.
[254] *Id.* at 122, 128.

this case."[255] These assurances all occurred during the negotiations to have Emma May sign the agreement to testify against the defendant and the conversation with the supervisor happened on the very day the tentative agreement was reached.[256]

DPA Rutherford also admitted, Emma May's attorney "really wanted to see the other three individuals be arrested because of fear of retaliation and that would be something that was important to her for the purposes of a plea offer."[257] DPA Rutherford also indicated she kept putting off the plea offer hoping for arrests.[258]

I make no finding as to whether this was a binding and enforceable condition to Emma May's plea deal. However, it is clear specific oral promises were sought and tacit assurances were given specifically to convince Emma May to initially make her proffer statement and later to get her to sign the final agreement to testify.[259] Emma May's attorney testified they would not go forward with the agreement to testify against the defendant without getting these first on the day they reached the tentative agreement to testify.[260] It was undisputed that this consideration was never mentioned to defendant Guinn's attorney or disclosed in any discovery.[261]

DPA Rutherford was also aware Emma May claimed other people at the jail had threatened and tried to bribe her to influence her testimony in this case.[262] These alleged threats and

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[255] *Id.* at 155.
[256] *See* Transcript of June 4, 2019 at 114-16, 119-123, 132, Docket No. 66; Transcript of June 6, 2019 at 61, Docket No. 68.
[257] Transcript of June 6, 2019 at 66-67, Docket No. 68.
[258] *See id.* at 67.
[259] *See* Transcript of June 4, 2019 at 101, 104-05, 114-16, 119-123, 128, Docket No. 66.
[260] *See* Transcript of June 4, 2019 at 114-16, 119-123, 132, Docket No. 66.
[261] *See also* Transcript of June 5, 2019 at 73-78; Exhibit 1 to August 16, 2019 Sanctions Hearing (full bates stamped discovery).
[262] *See* Transcript of June 5, 2019 at 27-32, Docket No. 67 Transcript of June 3, 2019 at 192, 201, Docket No. 65; Transcript of June 4, 2019 at 128, Docket No. 66.Exhibit 1 to August 16, 2019 Sanctions Hearing (all discovery provided to defense).

promises specifically intended to influence Emma May's testimony were also never disclosed to the defense until trial call and as to some not until the middle of trial.[263]

DPA Rutherford's verbal threat to charge Robbery First Degree with a firearm enhancement, threat to charge Assault Second Degree, District Court extension consideration, and safety assurances were never disclosed to the defense and never mentioned in any discovery.[264] These threats and promises came out during trial only by chance when Emma May's attorney was called to testify about her deal and when DPA Rutherford was asked point blank questions about what conversations led up to Emma May's agreement.[265] Even when asked point blank in the middle of trial, DPA Rutherford had to be asked very directly a couple times before she disclosed the verbal threat to charge nothing less than Robbery First Degree.[266]

When the verbal threats/promises were inadvertently discovered midtrial, DPA Rutherford admitted she never had any intent to disclose this information to the defense.[267] It should be noted that the final written plea agreement to Robbery Second Degree and Rendering Criminal Assistance along with the written agreement to testify were also not disclosed by the beginning of trial. See Section III.4 *infra*. Even if those documents had been disclosed, they did not inform nor could it be inferred therefrom that at the time Emma May made her prior first statements there was an explicit threat that Emma May would be charged with nothing less than Robbery First Degree unless she testified against the defendant.[268] Nor were any of DPA Rutherford's other pretrial threats and consideration apparent from the later plea agreement.

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[263] *See id.*
[264] *See* Transcript of June 5, at 73-78, Docket No. 67; Exhibit 1 to August 16, 2019 Sanctions Hearing (all discovery).
[265] *See e.g.,* Transcript of June 3, 2019 at 110-12, Docket No. 65; Transcript of June 4, 2019 at 87-134, Docket No. 66 (testimony of Colleen St. Clair).
[266] *See* Transcript of June 3, 2019 at 110-12, Docket No. 65.
[267] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67.
[268] *See,* Section II. 4, *infra*; Exhibit 18 to June 3-7, 2019 Hearing (Emma May's plea and cooperation agreements). The fact such an explicit threat directly from the prosecutor was hanging over Emma May's head when she supplied

The failure by a prosecutor to disclose a threat or promise made to a witness who will be testifying at trial is a serious discovery violation that may result in reversal or dismissal.[269] In this case, it was a violation of the Omnibus Court Order, CrR 4.7, and state and federal case law.

This failure to disclose violated a specific provision of the Court's Omnibus Order because the defense made a specific discovery request for *all* threats and *all* consideration given to any prosecution witness.[270] The discovery demand is for "the following material within the *knowledge,* possession or control of the State..... a memorialization of *any implicit or explicit promises of benefit* which have been made by any government agent...to the witness, his or her family....*any actual or implied threats* of...prosecution...made to any witness...."[271] The court Omnibus Order required DPA Rutherford to disclose this information the defense had requested, including all threats and consideration by May 13.[272] DPA Rutherford never disclosed any of it pretrial.

This withholding also violated CrR4.7(a)(3), which requires threats and promises to be disclosed because they are considered *Brady*/impeachment evidence of the main prosecution witness,[273] and thus evidence known to the prosecution which tends to negate guilt. *See also* CrR 4.7(a)(3). CrR 4.7(a)(4) requires disclosure of such evidence even if the defense does not request

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her first statements was not apparent from her final plea paperwork or any discovery. For all the defense knew, the prosecution may have never been interested in charging Emma May with Robbery First since she was only an accomplice driver and claimed she did not know the robbery was going to happen. For all the defense knew, plea negotiations with Emma May were about whether to charge robbery at all or about the amount of recommended incarceration time for a lesser charge.

[269] *See also*, *Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015);*U.S. v. Blanco,* 392 F.3d 382 (2004); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).

[270] *See*, Omnibus Order, Docket No. 15; Request for Discovery, Section I.3 and I.4, at 2, Docket No. 9.

[271] *See id.* (emphasis added).

[272] *See id.*

[273] *See*, *Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).

the material and even if it is not in any written discovery but simply known by the prosecutor. *See* CrR 4.7(a)(3) and (4).

DPA Rutherford's failure to disclose threats and benefits given to her primary witness to induce testimony also violated constitutional due process requirements because according to federal and state case law even informal threats and promises are *Brady* impeachment evidence that must be disclosed.[274] Under the constitutional case law, disclosure is mandatory even if the threats or promises are tacit, not in writing, and predate other arguably superseding written agreements.[275]

DPA Rutherford violated the court rule, a court order and well established federal and state court precedent by failing to disclose threats, consideration and assurances she gave to the primary witness to induce the witness to testify.

At trial, DPA Rutherford did not claim this withholding was accidental, inadvertent or caused by her life events that impacted her other discovery disclosures. Factually those unfortunate events that happened could not have been the cause of her initial nondisclosure of the verbal threat to only charge First Degree Robbery because those life events did not even begin to happen until many weeks after the initial nondisclosure of that threat. DPA Rutherford's initial verbal threat to the witness occurred in the very beginning of February,[276] and her personal problems did not begin to occur until weeks later in mid to late March.[277] DPA Rutherford also never claimed she intended to disclose this information but that it just did not get it done due to her life circumstances.

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[274] *See, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *U.S. v. Blanco,* 392 F.3d 382 (2004); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).

[275] *See also id.*

[276] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67; Transcript of June 3, 2019 at 111-112, 192, Docket No. 65; transcript of June 4. 2019 at 57-58, Docket No. 66.

[277] *See* Declaration of Michelle Rutherford Opposing Sanctions, Docket No. 51.

At trial, DPA Rutherford instead took the position she never has to disclose threats or promises she makes to induce a witness's *pretrial statements* or threats or promises that precede and induce the final plea agreement.[278] Although there was an Omnibus Order requiring her to disclose all explicit and implicit threats and promises,[279] DPA Rutherford took the position all threats and promises are not discoverable.[280] She claimed all she had to disclose was the final *written* plea agreement no matter what threats were made to get it or what actual or tacit consideration may have been actually given preceding it.[281] DPA Rutherford stated she only had to disclose the sausage, "but not how the sausage was made."[282] This was a direct admission her failure to disclose the pretrial verbal threats and consideration she provided to her witness was a deliberate act, not accidental. She made a conscious decision to only disclose the final written sausage and not all the other threats and promises, not the "sausage making" leading up to the deal.[283](It should be noted DPA Rutherford also failed to timely disclose the final written agreement, which is discussed in the next section, *infra*).

The Prosecutor's Office cited no legal or case authority in support of DPA Rutherford's sausage analogy. This is not surprising as it is directly contrary to the Agreed Omnibus Court Order, CrR 4.7 and federal and state case law as explained in detail above.

DPA Rutherford violated the Omnibus Court Order because the defense discovery request that became the Omnibus Court Order explicitly required disclosure of ***all*** threats and ***all*** consideration given to any witness; this included implicit and implied threats and promises, not

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[278] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67.
[279] Omnibus Order, Docket No. 15; Defense Discovery Request, Docket No. 9. The Omnibus Order ordered each party to disclose to the other what was in their requests by May 13, 2019. The order was agreed meaning neither side objected to the requests by the other side.
[280] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67.
[281] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67.
[282] *Id.* at 75.
[283] *See* Transcript of June 5, 2019 at 73-78, Docket No. 67.

just final written deals to testify.[284] DPA Rutherford's refusal to disclose such threats or promises has also been held by the higher courts to be a violation of CrR 4.7.[285] DPA Rutherford's choice to not disclose was also contrary to well-established case law holding that even verbal threats and tacit assurances are considered *Brady* impeachment evidence that must be disclosed.[286] The case law requires all explicit and implicit inducements to a witness to be disclosed; not just some of the inducements or those inducements finally reduced to writing.[287] The failure to do so may be reversible error.[288]

The case law indicates that it is misconduct for prosecutors to not disclose all earlier threats and consideration to witnesses, even if they are just mere assurances, tacit agreements or not legally enforceable promises.[289] Disclosure is required because even informal unenforceable threats and promises may still influence the witness.[290] For example, in *State v. Soh*, 115 Wash. App. 290 (2003), the court found a prosecutor committed misconduct by not disclosing oral assurances of leniency regarding uncharged matters made to a testifying co-defendant on the side. It was not sufficient that the prosecutor disclosed the only enforceable written plea deal on the charged matter.[291] The Court said,

> The Sate is required to disclose exculpatory evidence, including impeachment evidence. Promises of leniency to witnesses may affect the witness' credibility and must be disclosed. Failure to disclose a promise of leniency may also violate the due process clause of the Fourteenth Amendment.....

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[284] *See* Omnibus Order, Docket No. 15; Request for Discovery, Section I.3 and I.4, at 2, Docket No. 9.
[285] *See State v. Vavra*, 33 Wash.App. 42 (1982)(case reversed because prosecution's failure to disclose deal made with witness about charges violated CrR 4.7). *S, State v. Dunivan*, 65 Wash.App.728 (1992)(reversed for failure to disclose deal to pay witness $50 for information because violated CrR 4.7).
[286] *See, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).
[287] *See, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003); *State v. Dunivin*, 65 Wash. App. 728 (1992).
[288] *See id.*
[289] *See also id.*
[290] *See also id.*
[291] *See State v. Soh,* 115 Wash. App. 290 (2003).

> The State maintains it had no duty of disclosure here, because the deputy prosecutor never reached a formal agreement with …[cooperating co-defendant] beyond the original promise of consideration at sentencing. We disagree. [Cooperating co-defendant]…was a key witness for the State; his motives in testifying could be affected by any promise of leniency. Whether the promise was memorialized by a specific written agreement is not determinative. Nor is the fact that a promise was made by a police officer rather than a prosecutor. Whether the deputy prosecutor believed she could enforce an agreement relating to charges …is irrelevant. The question is whether the offer of leniency may have any impeachment value. If so, it is exculpatory and must be disclosed. It is difficult to imagine an offer of leniency in exchange for testimony that would not have impeachment value. Further, here the prosecutor herself endorsed the detective's promise, which was made only because [defense counsel]… insisted upon further assurances before subjecting [cooperating co-defendant]…to an interview. The State's failure to disclose the promise constituted misconduct.

State v. Soh, supra at 294-95 (citations omitted). Similarly, in *State v. Dunivan*, 65 Wn. App. 728 (1992), the court ordered a new trial because the State failed to disclose the police had originally paid a witness $50 for the information. This was true even though there was no written agreement relating to later testifying at trial.

The federal appeals courts agree. In *Shelton v. Marshall*, 796 F.3d 1075 (2015), the Court reversed a murder conviction because the prosecution had disclosed the usual portions of the plea deal of a cooperating co-defendant, but had failed to disclose an unwritten precondition that the co-defendant would not get a psychiatric examination his attorney had been threatening to get.[292] Similarly, in *Benn v. Lambert*, 283 F.3d 1040 (2002), the Ninth Circuit reversed the Washington Supreme Court in a murder case, in part, because although the prosecution had disclosed the written plea deal and a deal for immunity from arrest during trial with a cooperating witness, it did not disclose the specific unwritten benefits the cooperating witness received during trial as part of the immunity from arrest.[293] This included seeing the witness did not get picked up on outstanding warrants when he was stopped on a traffic stop during trial, placing a due not charge

[292] *See Shelton v. Marshall*, 796 F.3d 1075 (2015).
[293] *See Benn v. Lambert*, 283 F.3d 1040 (2002).

hold on new burglary charges, and postponing the filing of a probation warrant until two weeks after trial. The court stated,

> We have explained the reason why information regarding prosecution-provided benefits constitutes *Brady* material.... 'Disclosure of an agreement to provide such benefits, as well as evidence of the benefits themselves, could have allowed the jury to reasonably conclude that [the witness]... had a motive other than altruism for testifying on behalf of the State. Such a finding could have substantially impeached [the witness's] ...credibility as a witness.' .... Here too, a jury could have reasonably concluded that [cooperating witness]... had 'a motive other than altruism.'
>
> The state contends that the information regarding benefits was cumulative and immaterial because the defense cross-examined [cooperating witness]...about his immunity from arrest during trial and about the reduced sentence he received in exchange for his testimony.....
>
> [A]s we pointed out...the state cannot satisfy its *Brady* obligation to disclose exculpatory and impeachment evidence 'by making some evidence available and asserting that the rest would be cumulative. Rather, the state is obligated to disclose all material information casting a shadow on a government witness's credibility.' Here the number and nature of the undisclosed benefits was such that they would have impeached [cooperating witness]... more effectively than the evidence that he was immune from arrest during the trial. The undisclosed benefits that [cooperating witness]... received added significantly to the benefits that were disclosed and certainly would have cast a shadow on [cooperating witness's] credibility. Thus, their suppression was material.[294]

In both cases, the courts reversed noting withholding any impeachment evidence was especially prejudicial in those cases because the prosecutions' cases rested heavily on the cooperating witnesses' testimony.[295] In this Guinn case, both sides agreed that the prosecution's case also rested on Emma May's testimony, the witness who received the undisclosed threats and promises.

Even the original landmark case on this issue, *Giglio v. United States*, 405 U.S. 150 (1972), involved a prior prosecution promise never reduced to writing. In *Giglio,* a first United States

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[294] *Benn v. Lambert, supra* at 1057-58 (citations omitted).
[295] *See Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002).

Attorney dealing with grand jury testimony made an unauthorized oral assurance to a cooperating witness that he would not be prosecuted. A subsequent U.S. Attorney made only vague assurances the prosecution would later consider the fact he testified. The final U.S. Attorney, who took over the case for trial, was not aware of any prior assurances. He made no promises to the witness that he would not be prosecuted before he testified and did not know of and did not disclose the prior assurances to the defense. The United States Supreme Court reversed the conviction stating, "*Brady v. Maryland*, ...held that suppression of material evidence justifies a new trial.... When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."[296] "Here the Government's case depended almost entirely on [cooperating witness's]... testimony...and evidence of ***any*** understanding or agreement ...would be relevant to his credibility and the jury was entitled to know of it."[297]

DPA Rutherford's argument relied on the legally and factually incorrect assumption that since the written agreement to *testify at trial* states there are no other promises, this somehow excuses providing notice of other threats or promises that induced other *pretrial statements,* or threats or promises *already carried out or completed* that led to the written agreement but did not need to be set forth in the written agreement because they were already completed. This is contrary to the case law as explained above.[298] It is also factually incorrect because a witness may actually be induced to give a pretrial statement by a pretrial threat even if it is not noted in a later plea deal. A witness may also actually be induced to sign an agreement to testify by benefits already received before trial or vague oral assurances even if those are not in the written

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[296] *Giglio* at 153-54 (citations omitted).
[297] *Giglio* at 154-55 (emphasis added).
[298] *See, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert,* 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).

agreement and technically not enforceable. The test is not whether the threats or promises were written or oral. The test is not whether the threats or promises were to obtain pretrial statements versus trial testimony. The test is not whether the treats or promises are enforceable or unenforceable. The test was whether they had any impeachment value.[299]

The threats, consideration, and assurances the prosecution gave to the co-defendant in this case had impeachment value because they actually factually induced her statements. The explicit threat to only file the highest charge of Robbery First Degree unless she testified against a co-defendant occurred directly before the disclose of Emma May's first set of statements to the prosecutor. The promise actually made good on to protect the witness's record and the assurances the witness's and her family's safety would be protected, were both benefits her attorney specifically negotiated for before Emma May would make her proffer statement and before she would sign the final agreement to testify. The threat to charge both First Degree Robbery and Second Degree Assault with a firearm enhancement that would carry a very high standard range likely induced the witness to cooperate. Both DPA Rutherford and Emma May's attorney stated these unwritten threats, completed consideration, and tacit assurances were important to convincing Emma May to testify.[300] These verbal threats and informal promises added to the inducement/consideration in the formal written plea deal. Thus, they were *Brady* impeachment evidence required to be disclosed by law, even if they were not articulated in the formal plea deal.[301]

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[299] *See State v. Soh,* 115 Wash. App. 290 (2003).
[300] *See* Transcript of June 4, 2019 at 101, 104-05, 114-16, 119-123, 128, Docket No. 66; Transcript of June 6, 2019 at 66-67, Docket No. 68.
[301] *See, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert,* 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).

The defense had a need to know about this impeachment evidence for several reasons. Not disclosing threats and promises made to the State's primary witness denied the defense an opportunity to make rational decisions about whether to go to trial, denied the defense an opportunity to ask informed questions while interviewing the witness, and denied the defense an opportunity to cross-examine the witness about these other pretrial threats and consideration during trial. The withholding of the explicit threat made before Emma May's first statement, also gave a misleading factual impression. It made it appear as if Emma May had no contact with the prosecution before her first statements and that she gave her first statements just out of an altruistic sense of civic duty to accurately report a crime. Indeed, if the defense had attacked Emma May's testimony with her plea deal as it inevitably would have, the fact DPA Rutherford never disclosed this threat left DPA Rutherford open to argue, Emma May free to testify, and a jury free to conclude that Emma May made the same statements incriminating the defendant before any influence was exerted or any deal was made with the prosecution. This is because the first statements were provided without a proffer agreement. The defense could not rebut that incorrect assumption by showing DPA Rutherford had in fact induced Emma May's first statements by explicitly threatening/promising that Emma May would be charged with the highest and most severe charges unless she testified against the defendant. The defense could not use this threat to rebut because the defense did not know it existed.

DPA Rutherford did not deny she intentionally withheld this information; instead DPA Rutherford's argued that even if she made very real threats, gave very real consideration, and made very real assurances to a State's witness to induce her to testify, she did not have to disclose any of that if she did not put it in the final written plea deal with the witness.[302] This was

[302] *See, e.g.,* Transcript of June 5, 2019 at 73-78, Docket No. 67.

not legally correct because the Court's Omnibus Order required the disclosure of all explicit or *implicit* threats and consideration to any witness.[303] CrR 4.7 requires disclosure of all exculpatory evidence and impeachment of a critical witness falls within that. It also was not correct because the case law requires all threats and promises inducing testimony to be disclosed, even if they are not in the formal written offer.[304]

DPA Rutherford's did not ever explicitly claim under oath that she did not know she had a duty to disclose all threats and promises she made to a witness; that claim is not in her sworn declaration.[305] Nor did the Prosecutor's Office proffer such a farfetched excuse in responding to the Motion for Sanctions. Nor would it be credible to suggest DPA Rutherford did not know she had to disclose explicit threats/promises and negotiated benefits she gives to her witnesses to testify. In fact, at oral argument, the Snohomish County Prosecutor could not believe I could be accurate when I told him DPA Rutherford had no intention of ever turning the oral threat to charge nothing less than Robbery First Degree.[306] DPA Rutherford has been a prosecutor for over five years,[307] and as such she is seasoned and knowledgeable about the law. Furthermore, even young and inexperienced prosecutors know that if they make threats, promises, and provide negotiated consideration to a witness that must be disclosed. This is basic law school level information. This requirement is stated on every standard discovery request that DPA Rutherford gets from the Public Defender's Office.[308] At this point DPA Rutherford has received hundreds of such requests demanding all express or implied threats and benefits given to any witness. It has been well established and well known for decades now that this is a form of *Brady*

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[303] *See,* Omnibus Order, Docket No. 15; Request for Discovery, Section I.3 and I.4, at 2, Docket No. 9.
[304] *See, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert,* 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).
[305] *See* Declaration of Michelle Rutherford Opposing Sanctions, Docket No. 51.
[306] *See* Transcript of August 16, 2019 at 63-64, Docket No. 71.
[307] *See* Declaration of Michelle Rutherford Opposing Sanctions, Docket No. 51.
[308] *See, e.g.,* Request for Discovery, Section I.3 and I.4, at 2,

impeachment information that must be disclosed.[309] DPA Rutherford knew she was supposed to disclose a direct threat and negotiated benefits and assurances she gave to her primary witness.

DPA Rutherford's "sausage" excuse epitomized how DPA Rutherford attempted to creatively interpret her way around the discovery rules throughout this case. She took the position if she could verbalize any excuse, blatant disregard of the discovery rules and Omnibus Court Order should be excused.

DPA Rutherford admitted her failure to disclose the threats, benefit and assurances she made to her witness was deliberate when she admitted she had affirmatively analyzed whether it needed to be disclosed, i.e., because she had decided she only needed to disclose the sausage, not the sausage making.[310] Her own sausage analogy about why she did not disclose the threats and consideration indicated a conscious thought process she went through in deciding not to disclose this information ever. She thought up an excuse to give if she got caught violating the discovery rule; she did not just forget the information or fail to get around to providing it due to her life circumstances.

I find DPA Rutherford's willfully hid explicit charging threats, bargained for consideration and requested assurances that she had made to the State's primary witness specifically to sell a deal to testify against the defendant. This withholding violated the explicit terms of the Omnibus Court Order, CrR 4.7, and the defendant's due process right to receive *Brady* impeachment evidence. DPA Rutherford should be sanctioned because she willfully violated the law.

3. DPA RUTHERFORD WITHHELD THE CO-DEFENDANT'S WRITTEN PLEA AND COOPERATION AGREEMENTS TO TESTIFY AGAINST THE DEFENDANT.

[309] *See also, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).
[310] *See* Transcript of June 5, 2019 at 73-78, Docket No 67.

Three days before trial call, DPA Rutherford and co-defendant Emma May's attorney reached a tentative plea agreement wherein Emma May would receive significant consideration for signing a written cooperation contract agreeing to testify against the other co-defendants, including Defendant Guinn.[311] A separate five-page written cooperation contract agreeing to testify was attached to the plea form.[312] Less than 24 hours before trial call, Emma May signed the agreement to testify against defendant Guinn and entered her plea.[313] The final agreement allowed her to plead to lesser charges with specific sentencing recommendations and specified conditions about testify against co-suspects in the five-page cooperation agreement.[314] This agreement was never turned over to the defense in pretrial discovery or even when trial began.[315]

The reason this cooperation agreement and plea did not enter until the day before trial call was because DPA Rutherford delayed in making any plea offer of any kind to Emma May for nearly four months[316] while Emma May was in jail and defendant Guinn was in jail with these charges pending. DPA Rutherford delayed making any offer even though it was clear the prosecution could not proceed at all against Guinn without the testimony of Emma May.[317] She delayed even though Emma May had indicated an interest in testifying before the case was even filed against Guinn by providing a written statement to the prosecution.[318] She delayed even though Emma May had signed a formal proffer agreement and provided a detailed recorded

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[311] Transcript of June 3, 2019 at 48-49, 161, Docket No. 65; Exhibit 18, June 3-7, 2019 Hearing.
[312] Exhibit 18, June 3-6, 2019 Hearing.
[313] *See* Transcript of June 3, 2019 at 49, 161, Docket No. 65.
[314] See id; Transcript of June 3, 2019 at 41, Docket No. 65.
[315] *See* Transcript of June 3, 2019 at 49, Docket No. 65; Transcript of June 4, 2019 at 72, 98, Docket No. 66
[316] *See* Transcript of June 4, 2019 at 49, 98, 114, Docket No. 66; Transcript of June 3, 2019 at 47, Docket No. 65.
[317] *See* Affidavit of Probable Cause, Docket No. 2; Transcript of June 3, 2019 at 158, Docket No. 65.
[318] *See id.* at 93.

statement to the police two months before trial.[319] DPA Rutherford never made any plea offer to Emma May until about 10 days before Defendant Guinn's trial call, on May 20 or 21.[320]

DPA Rutherford gained numerous significant tactical advantages by delaying entry of the plea and agreement to testify. The defense, despite efforts to do so, could not obtain an interview with Emma May because DPA Rutherford never formally listed May as a witness[321] and Emma May's attorney refused to respond to Guinn's attorney's requests to interview May, asserting her Fifth Amendment privilege.[322] This in turn prevented the defense from finding out that Emma May had been interviewed and significantly changed her story two months before trial. This including having changed who she identified were the three other robbers.[323] The defense knew nothing about that interview and the exculpatory evidence, impeachment evidence, and three new eyewitnesses to the crime revealed during the interview.[324]

DPA Rutherford's delay in offering a plea deal to a witness until right before trial resulted in the defense not being able to interview or prepare cross-examination of Emma May until the middle of trial. The inability to interview until midtrial in turn prevented the defense from finding out prior to trial that Emma May had provided new information that the defense would want to follow up on before trial had the defense known of the information before trial. Specifically, it prevented the defense from finding out about numerous impeachment facts regarding Emma May that the defense would have wanted to call witnesses to testify about had the defense known the impeachment facts before trial. For example, it prevented the defense from finding out before trial that Emma May originally lied in identifying three specific people

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[319] *See id.* at 98, 105-109.
[320] *See* Transcript of June 4, 2019 at 98, 114, Docket No. 66; Transcript of June 3, 2019 at 47, 98 Docket No. 65.
[321] *See* Transcript of June 4, 2019 at 112, Docket No. 66.
[322] *See* Transcript of June 4, 2019 at 112-113, Docket No. 66.
[323] *Compare* Exhibit 10 of June 3-7 Hearing (Emma May's first statement to police), *with*, Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing (All discovery, CD 7 is the recording of the interview of Emma May).
[324] *See* Section 7, *infra.*

as being involved in the robbery.[325] Had the defense known this before trial, it could have sought witnesses out to testify Emma May lied about their involvement. The delay also prevented the defense from finding out until midtrial that Emma May had identified three new eyewitnesses/suspects to the crime who had never been revealed to the defense before.[326] The prosecution knew about and had not disclosed these three new alleged eyewitnesses to the crime for two months before trial.[327] Unknown to the defense, the prosecution had been extensively investigating those new named witnesses for weeks to see if it could corroborate Emma May's second story, but the defense would not have an equal opportunity to investigate Emma May's new allegations/co-suspects.[328] Not being able to interview Emma May until trial also prevented the defense from learning there were details about the crime and co-suspects Emma May claimed that were not credible and hunting down the witnesses who could prove that.[329]

Furthermore, by delaying offering Emma May any plea deal and thereby delaying her from being interviewed before trial, DPA Rutherford gave Emma May and her attorney something they consistently indicated was important to them as part of any deal; more safety for Emma May and her family.[330] It delayed tipping off the out of custody co-suspects that Emma May had named them until a time closer to when those co-suspects may be apprehended. Protection from the other co-suspects was something Emma May and her attorney were specifically demanding as a condition to her agreement to testify.[331] Although the Prosecutor's Office wants to now paint this delay as caused by inadvertence, at trial DPA Rutherford admitted she delayed in any plea

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[325] *See* Section II.7 *infra.*
[326] *See id.*
[327] *See id.*
[328] *See* Section II.5 *infra.*
[329] *See* Section II.7 *infra.*
[330] *See* Transcript of June 4, 2019 at 101, 104, 105, 114-116, 119, 122, 123, Docket No. 66; Transcript of June 6, 2019 at 65-68, Docket No. 68.
[331] *See id.*

offers and negotiation with Emma May's attorney because Emma May did not want to do any plea deal unless they could get arrests of the other three suspects and they had not been able to accomplish that.[332]

Despite the fact DPA Rutherford gained multiple tactical advantages from delaying entry of the plea deal and cooperation agreement until less than 24 hours before trial call, and even though the witness had been cooperating since before the case was charged for four months, I am giving DPA Rutherford a generous benefit of the doubt as to this delay. DPA Rutherford had significant motives to deliberately delay listing this witness and getting her plea done and this was coordinated with the withholding of all the other written and recorded other discovery that would have otherwise provided the defense notice of Emma May's new proffer information via alternative sources.[333] Even though significant evidence indicated this delay may have been strategic, since it is also possible DPA Rutherford failed to make any plea offer to her necessary witness due to neglect, overwork, or her life circumstances, I am not sanctioning the delay in listing the witness and the pretrial withholding of multiple pieces of discovery that would have disclosed the witness's new interview testimony.

However, once a written cooperation agreement and plea deal were entered into with the witness the day before trial call, DPA Rutherford had legal duties to disclose this written *Brady* impeachment material to the defense immediately. DPA Rutherford did not supply the defense any copy of the written plea agreement, any copy of the cooperation agreement to testify against the defendant, or notify the defense by alternate means as to the specifics of these agreements other than the charges.[334] Even after trial began, DPA Rutherford continued to withhold these

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[332] *See* Transcript of June 6, 2019 at 65-68, Docket No. 68.
[333] *See* Section II. 7, *infra.*
[334] *See* Transcript of June 3, 2019 at 47-60, Docket No. 65; Transcript of June 4, 2019 at 72-74, Docket No. 66.

documents from the defense.[335] This withholding violated discovery duties that arose from the Omnibus Order, CrR 4.7, and well-established case law.

Pursuant to the Omnibus Order DPA Rutherford was required to disclose all threats and all promises given to a witness that the prosecution had knowledge of. The Omnibus Order directed the materials each side requested be disclosed by May 13.[336] The Defense Discovery Request demanded the "State provide...the following...within the *knowledge,* possession or control of the State... A memorialization of any implicit or explicit promises of benefit which have been made by any government agent...to the witness...[and] a record of any actual or implied threats of ...prosecution...made to any witness...."[337] The Omnibus Order further provided for a continuing duty to disclose by incorporating CrR 4.7(h)(2), which requires any party getting new discovery after disclosure deadlines have passed to "promptly" disclose it to the other party and to the court if trial has started.[338]

The agreements with the cooperating witness also had to be disclosed pursuant to CrR 4.7(a)(3) which dictates that " the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate the defendant's guilt...."[339] This is a codification of the *Brady* rule. *Brady* case law holds when a witness is critical to a prosecution's case to prove guilt, that witness's deals with the prosecution are *Brady* impeachment of that witness that negate guilt.[340] Washington case law also holds the

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[335] *See* Transcript of June 3, 2019 at 49, Docket No. 65; Transcript of June 4, 2019 at 72-74, Docket No. 66.
[336] *See* Omnibus Order, Docket No. 15.
[337] Defense Request for Discovery, Section I.3 &4, Docket No. 9.
[338] *See* Omnibus Order, Docket No. 15; Defense Request for Discovery at 4; CrR 4.7(h)(4).
[339] CrR 4.7 (a)(3).
[340] *See also, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *U.S. v. Blanco,* 392 F.3d 382 (2004); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).

failure to disclose deals with witnesses violates CrR 4.7.[341] As to the timing of disclosure, CrR 4.7(h)(2) imposes a continuing duty to disclose new discovery information "promptly."[342]

Federal and state case law also provide that the prosecution is required to disclose all deals with witnesses and the failure to do so may be reversible error.[343] As to timing, the material must be disclosed enough in advance of trial that the defense can make beneficial use of it to prepare for trial and to prepare to cross-examine the witness.[344] Waiting to disclose a witness's written plea deal to testify against a defendant until after the witness has been interviewed and after trial has started would not be timely. If a witness's testimony is critical to establishing the defendant's guilt, as was true in this Guinn case, the fact the defense did not have this information in time to effectively impeach the witness Emma May at trial, could have been grounds to later the reverse the case.[345] The court in *State v. Vavra*, 33 Wash.App. 142 (1982), explained why this is true:

> We must reverse the conviction. Such an understanding or agreement between the prosecutor and the only independent critical witness which linked defendant Vavra with the actual robbery should have been disclosed to defense counsel for the purpose of possible impeachment. The jurors may well have found that the leniency and favoritism shown to the critical ... witness whose testimony was required to link Vavra with the crime made him less believable, and thus it was error not to disclose the terms of this arrangement to defense counsel.

State v. Vavra, supra at 146 (reversing case for non disclosure of deal to have prosecutor not charge one crime and make a statement on behalf of cooperating witness in relation to another charge).

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[341] *See State v. Dunivan,* 65 Wash.App. 728 (1992); *State v. Vavra*, 33 Wash.App. 142 (1982).
[342] CrR 4.7(h)(2).
[343] *See also, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003); *State v. Dunivan,* 65 Wash.App. 728 (1992); *State v. Vavra*, 33 Wash.App. 142 (1982).
[344] *See generally, id.*
[345] *See also, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *U.S. v. Blanco,* 392 F.3d 382 (2004); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Vavra*, 33 Wash.App. 142 (1982).

Although DPA Rutherford told the defense a couple days before trial that Emma May was pleading to Robbery Second Degree and Rendering Criminal Assistance and would be added as a witness, no other specifics of the plea deal were revealed.[346] DPA Rutherford also did not give the defense a copy of the witness' plea agreement or written agreement to cooperate and testify against Defendant Guinn.[347] Even when the CrR 8.3 Motion to Dismiss for failure to supply discovery was filed on the afternoon of Thursday May 30, the day before trial call and after Emma May entered her plea, DPA Rutherford did not give the defense the written cooperation agreement to testify or written plea agreement.[348] DPA Rutherford set a defense interview of Emma May for Friday after trial call and that got continued until Monday the first day of trial. Prior to the both times set to interview witness Emma May, DPA Rutherford still did not supply the defense the written cooperation and plea agreements that had already then been entered.[349] DPA Rutherford planned to have the defense conduct the interview without this impeachment discovery.[350] Trial started Monday June 3, and the first motion heard was a CrR 8.3 Motion to Dismiss for ongoing discovery violations by DPA Rutherford. Even then, DPA Rutherford did not provide the defense a copy of this missing discovery, i.e., a copy of Emma May's written cooperation agreement to testify and plea deal.[351]

Even in the middle of trial, DPA Rutherford continued to withhold the written agreement to testify that she had entered into with her star witness.[352] When the issue arose of the defense not having Emma May's plea paperwork, DPA Rutherford repeatedly made the carefully worded

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[346] *See* Transcript of June 3, 2019 at 50-51, Docket No. 65; Transcript of June 4, 2019 at 72-73, Docket No. 66.
[347] *See* Transcript of June 3, 2019 at 47-49, 53, 193 Docket No. 65; Transcript of June 4, 2019 at 72-74, Docket No. 66.
[348] *See* Transcript of June 3, 2019 at 47-49, 53, 193 Docket No. 65; Transcript of June 4, 2019 at 72, Docket No. 66.
[349] *See* Transcript of June 3, 2019 at 47-49, 53, 193 Docket No. 65; Transcript of June 4, 2019 at 72, Docket No. 66.
[350] *See* Transcript of June 3, 2019 at 53, Docket No. 65.
[351] *See* Transcript of June 3, 2019 at 47-60, Docket No. 65; Transcript of June 4, 2019 at 72-74, Docket No. 66.
[352] *See* Transcript of June 3, 2019 at 49, 51-53, 59-60, Docket No. 65 Transcript of June 4, 2019 at 72-74, Docket No. 66.

response that she had orally informed Guinn's defense counsel *of the charges* Emma May had pleaded guilty to.[353] DPA Rutherford insinuated that was sufficient discovery of the plea deal and that this obviated the necessity for her to immediately turn over the written agreements.[354] However, disclosure of the charges pleaded to did not disclose Emma May's standard ranges, what the sentencing recommendations would be, or what charges the prosecution agreed not to charge. More importantly, it did not disclose the existence or terms of the five-page written agreement to cooperate and testify.

DPA Rutherford did not claim she ever told defense counsel before trial she was waiting on anything to get the documents. Nor was there any claim she told defense counsel she would eventually, at some future unknown time, provide the written agreements. However, in the middle of trial when the defense demanded this, DPA Rutherford claimed she could not turn over the written documents because she had no copies of the documents and therefore had to wait for the documents to appear on Odyssey.[355]

Even in the middle of trial and during a Motion to Dismiss for failure to provide discovery, DPA Rutherford would not turn over a copy of the written plea agreement and the written agreement to testify attached to it or anything memorializing the specifics of those agreements.[356] Upon questioning as to how she could not have a copy of the plea paperwork or plea agreement drafted by her office, it turned out DPA Rutherford had unsigned copies of the paperwork in her computer sitting on counsel table and in her office.[357] DPA Rutherford claimed those were not discovery she had to turn over because they were unsigned copies that did not show the

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[353] *See, e.g.,* Transcript of June 3, 2019 at 50-51, Docket No. 65; Transcript of June 4, 2019 at 73, Docket No. 66.
[354] *See* Transcript of June 3, 2019 at 50-51, Docket No. 65.
[355] *See id.* at 50-54, 57; Transcript of June 4, 2019 at 74-75, Docket No. 66.
[356] *See* Transcript of June 3, 2019 at 49, Docket No. 65; Transcript of June 4, 2019 at 73-74, Docket No. 66.
[357] *See* Transcript of June 3, 2019 at 50-60, Docket No. 65.

signatures and because one handwritten change to community custody had been made on the plea agreement.[358] I told DPA Rutherford she was required to turn over any written agreements she had with the testifying witness right then and there because we were in the middle of trial and the witness was scheduled to testify soon.[359]

DPA Rutherford's initial claim she could not provide the defense any discovery as to the written plea and cooperation agreements in the middle of trial because she did not have copies was disingenuous.[360] DPA Rutherford admitted her office prepared the plea paperwork and she had a copy of it in their computer systems.[361] She admitted she prepared the written cooperation agreement to testify and had a copy of that in her own computer sitting in the courtroom with her.[362] I told DPA Rutherford she needed to send those copies into the courtroom for the defense forthwith which she was able to do within a minute or so.[363] DPA Rutherford's only reason for not giving the defense the copies of the written impeachment documents she had in her possession was that there had been handwritten "*changes*" (plural) to the plea paperwork and the copies did not have the signatures on them.[364]

DPA Rutherford continued to suggest that it was sufficient that the defense had been told what charges Emma May pleaded to and suggested no additional information needed to be turned over to the defense until the documents someday appeared in the court Odyssey system/court file.[365] As the plea had been entered the day before trial, as of the first day of trial these documents still could not be accessed through the Odyssey system and it was then

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[358] *See* Transcript of June 3, 2019 at 50-51, Docket No. 65.
[359] *See* Transcript of June 3, 2019 at 56-59, Docket No. 65.
[360] *See also,* Transcript of June 3, 2019 at 47-60, Docket No. 65; Transcript of June 4, 2019 at 73-75, Docket No. 66.
[361] *See id.*
[362] *See id.*
[363] *See also* Transcript of June 3, 2019 at 56-59, Docket No. 65.
[364] *See* Transcript of June 3, 2019 at 50-52, Docket No. 65.
[365] *See also* Transcript of June 3, 2019 at 41-60, 50-51Docket No. 65.

unknown when they might become accessible.[366] Deputy Rutherford admitted she had checked the morning of trial and knew the documents were not available through Odyssey yet.[367] I also checked this on Odyssey during the argument and the documents were not yet available there. As Emma May was scheduled to be interviewed by the defense at about the time this discussion occurred in court, 10:30 am the first day of trial, this meant DPA Rutherford's withholding would have resulted in the defense having to interview Emma May without access to Emma May's written plea and cooperation agreements.

DPA Rutherford's "no copies" excuse for not providing the defense any discovery containing the written agreements she had with the main witness to testify was not a legitimate excuse. It was not a valid excuse factually because she had at least three ways could have provided the information promptly as required by CrR 4.7 and the court order.

First of all, DPA Rutherford could have just put a cover sheet on the unsigned copies she had explaining that the originals were signed and had the one handwritten correction to the number of community supervision months. Contrary to DPA Rutherford's insinuation that there were many handwritten changes to the plea paperwork, there actually was only one change to the plea paperwork correcting the amount of community custody/supervision to the amount required by statute.[368] There were no handwritten changes to the cooperation agreement at all,[369] so no reason it could not have turned over to the defense several days before trial on May 29 when DPA Rutherford had drafted and reached the tentative agreement with Emma May.[370] DPA Rutherford admitted she had always had possession, control and immediate access to the

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[366] *See* Transcript of June 3, 2019 at 49, Docket No. 65.
[367] *See id.*
[368] *Compare* Transcript of June 3, 2019 at 52, Docket No. 65 (DPA Rutherford claimed she couldn't send her copy because there had been too many changes to the agreement in court when it was entered), *with,* Exhibit 18, June 3-7, 2019 Hearings (Emma May's Plea and Cooperation Agreements as entered in court).
[369] *See* Transcript of June 3, 2019 at 59-60, Docket No. 65.
[370] *See* Transcript of June 3, 2019 at 56-57 Docket No. 65.

unsigned copies of the written agreements as was obvious by her almost instantaneously turning them over from her computer in the courtroom during trial .[371]

Second, DPA Rutherford could have supplied the defense copies of Emma May's written signed agreements because she was personally present at Emma May's plea and could have just Xeroxed a copy of them in the courtroom.[372] DPA Rutherford admitted she knew there was a copy machine in that courtroom.[373] She also could have had her staff come get the signed agreements from the courtroom and Xerox them once they were signed and changes made. The Prosecutor's Office's main offices are in the courthouse and the plea calendars are long enough to accomplish this and still return the document by the end of the calendar. DPA Rutherford knew she was entering a cooperation agreement to have this co-defendant testify at a trial set for trial call the very next day. She knew this witness was scheduled to be interviewed by the defense the next day and was scheduled to testify at a trial starting the next business day after that. She knew a written agreement she had with a witness providing consideration in return for an agreement to testify against the defendant had to be turned over. She never claimed she did not know this requirement or that she did not need to do it, she claimed only that she did not have adequate copies. If DPA Rutherford thought only a signed copy could go to Guinn's defense attorney, she or her staff could have just simply made a copy of the signed document.

Third, even if DPA Rutherford did not have a copy of the agreement she felt was adequate, she could have simply memorialized all the terms in writing and sent them to the defense. She did not do that.[374] Even without a written copy, she had a duty to immediately disclose her *personal knowledge* of the agreement, and she knew everything about it because she negotiated

[371] *See* Transcript of June 3, 2019 at 50-60, Docket No. 65.
[372] Transcript of June 4, 2019 at 73-74, Docket No. 66.
[373] Transcript of June 4, 2019 at 74, Docket No. 66.
[374] *See* Transcript of June 3, 2019 at 50-51, Docket No. 65; Transcript of June 4, 2019 at 73, Docket No. 66.

it, was a party to the agreement, and created the written documents. The Omnibus Order, CrR 4.7(a)(3) and case law clearly required DPA Rutherford to disclose this particular *Brady* impeachment information within her *knowledge* even if she did not have written copies.[375] A prosecutor cannot withhold impeachment material that consists of deals with witnesses to testify that she has personal knowledge about just because she does not have a written document memorializing the information she knows.[376] Whether DPA Rutherford did or did not have a sufficient copy was a red herring, because a she had a duty to disclose this information she had actual knowledge of even if she had no copies of the written documents.[377]

If DPA Rutherford had disclosed the written plea agreement and attached agreement to testify when she claimed she planned to disclose it, the defense would not have had this impeachment information before Emma May's interview and may not have had it before Emma May testified. The agreement to testify could not be accessed on Odyssey until the second day of trial.[378] When the State's case rests on the credibility of one witness, the failure of the State to disclose threats and promises to the witness so that the defense can use that impeachment is grounds for a new trial.[379] If disclosure had gone according to DPA Rutherford's plan and the interview and/or testimony of Emma May had proceeded without the defense having her plea and cooperation agreements or a detailed summary of them, any conviction would have later been in jeopardy of being reversed due to this misconduct.[380]

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[375] *See also*, Omnibus Order, Docket 15, Defense Request for Discovery, Docket No. 9; CrR 4.7(a)(3); *Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).
[376] *See also id.*
[377] *See id.*
[378] *See also* Transcript of June 3, 2019 at 49, Docket No. 65; Transcript of June 4, 2019 at 73-74, Docket No. 66.
[379] *See also, Giglio v. United States*, 405 U.S. 150 (1972); *Shelton v. Marshall,* 796 F.3d 1075 (2015); *Benn v. Lambert*, 283 F.3d 1040 (2002); *State v. Soh,* 115 Wash. App. 290 (2003).
[380] *See also id.*

However, for purposes of this Sanctions Motion, the real import of DPA Rutherford's concocted excuse that she was waiting for Odyssey is that it proves she understood she had an obligation to provide this information and needed an excuse for not providing it timely. It also proves she did not just accidentally or inadvertently forget to send this witness's deal to testify immediately to defense; she instead made a deliberate thought out choice to delay providing the information until it came up on Odyssey.[381] It proves DPA Rutherford made a conscious and willful decision to delay sending this impeachment information to a time it may be less useful or no longer be useful at all to the defense.

DPA Rutherford withheld these documents even though she was easily able to provide written copies before the scheduled witness' interview and trial testimony if she wanted to do so. During trial DPA Rutherford admitted this:

> THE COURT: And you've had ...[the cooperation agreement and plea agreement] for the last three days, and you haven't turned it over to the defense?
>
> MS. RUTHERFORD. That's correct.[382]
>
> . . . . . .
>
> THE COURT: ...did [defense counsel]... have a copy of it when you wanted him to interview...[Emma May] on the afternoon of trial? ....
>
> MS. RUTHERFORD: He did not, Your Honor, but I could have -- **I could have easily provided that** just.
>
> THE COURT: ...you could have, but did you?
>
> MS. RUTHERFORD: I did not. ..**if it was requested, I certainly could have – I could have done it**....[383]

[381] *See* Transcript of June 3, 2019 at 49-60, Docket No. 65; Transcript of June 4, 2019 at 74-75, Docket No. 66.
[382] *See id.* at 60.
[383] *Id.* at 53.

The defense had requested this. There was an Omnibus Order in place incorporating the Defense Request for Production when this occurred.[384] In that the defense specifically requested disclosure of all threats, promises and agreements made to or with prosecution witnesses.[385] This is the standard Defense Request for Discovery filed by the Snohomish County Public Defender's Office in all of their cases and DPA Rutherford would have received hundreds of these over the five years she has been a prosecutor. She knew the defense had requested all plea deals with witnesses, and by her own ultimate admission in this case if the defense requested it (the defense did), she "could have easily provided it."[386]

The Prosecutor's Office pointed to DPA Rutherford's personal problems before trial and asked me infer that must have been the cause for every problem in this case; that is not supported by the record in this instance. Deputy Rutherford did not claim at the time of trial, nor has she sworn under oath in her declaration that her general overwork or personal problems caused her to simply forget about or neglect to send the plea paperwork and written cooperation agreement to testify. Nor has she ever claimed she did not know she had to disclose a written deal she had with a witness to testify.

Instead the record clearly shows the opposite. It shows DPA Rutherford admitted at trial that she knew she was required to disclose a witness' agreement to testify for consideration and deliberately made a choice to not disclose the information she was easily able to supply even after trial began.[387] She *chose* to wait until the documents came up on Odyssey at some future unknown date rather than supply the defense with the copies she had on her computer or give the

[384] *See* Omnibus Order, Docket 15.
[385] *See* Defense Request for Production, Docket 9.
[386] *See* Transcript of June 3, 2019 at 53-54, 60 Docket No. 65.
[387] *See* Transcript of June 3, 2019 at 50-54, Docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.

defense a memorialization of specifically what was in the documents.[388] This was a willful deliberate choice made ***as to the timing*** of this disclosure; it was a strategic choice during trial to slow walk rather than promptly produce mandatory impeachment discovery.

DPA Rutherford should be sanctioned because she did not comply with her legal requirements to "promptly" disclose the specifics of the plea and cooperation agreements or produce copies of the written agreements. She chose to withhold this information even though there was a discovery demand and court order requiring her to supply it, even after a Motion to Dismiss was brought for failing to provide discovery, and even in the middle of trial. She admitted she had personal knowledge of this impeachment information.[389] She admitted she had copies of the written agreements.[390] She admitted she knew a cooperation agreement with a witness had to be disclosed; that is why she had a plan to disclose it albeit slowly rather than promptly.[391] She admitted she did not just forget to do this, in fact she had checked the status of the document in Odyssey the day of trial.[392] She admitted she created a conscious plan to wait to disclose this rather than disclosing it immediately.[393] She *decided*, i.e., made a willful choice, to wait until the documents became publically available on Odyssey.[394] She admitted that even when she checked Odyssey and learned the information had not become available on Odyssey, she decided to stick with her alleged plan.[395] She admitted she consciously chose to stick with her plan even when it became clear her deliberate plan to slow disclose rather than promptly disclose would result in the defense not getting the impeachment information until after the

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[388] *See id.*
[389] *See also* Transcript of June 3, 2019 at 48-60, Docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.
[390] *See also* Transcript of June 3, 2019 at 48-60, Docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.
[391] *See also* Transcript of June 3, 2019 at 48-60, Docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.
[392] *See* Transcript of June 3, 2019 at 49-54, Docket No. 65.
[393] *See* Transcript of June 3, 2019 at 48-60, Docket No. 65; Transcript of June 4, 2019 at 72-75, Docket No. 66.
[394] *See* Transcript of June 3, 2019 at 50-54, Docket No. 65; Transcript of June 4, 2019 at 74-75, Docket No. 66.
[395] *See* Transcript of June 3, 2019 at 50-60, Docket No. 65; Transcript of June 4, 2019 at 74-75, Docket No. 66.

witness was scheduled to be interviewed by the defense.[396] She stuck with her plan even when it was clear any further delay would hamper the defense's ability to use this information to prepare cross-examination of the witness because we were in the middle of trial.

DPA Rutherford should be sanctioned because according to DPA Rutherford's own statements, during trial, she willfully withheld written agreements she had with a witness to testify rather than promptly disclosing the agreements in her knowledge and possession.

4. DPA RUTHERFORD HID AN INTERVIEW OF THE PRIMARY WITNESS CONTAINING THE IDENTITY OF EYEWITNESSES AND *BRADY* EVIDENCE.

DPA Rutherford and co-defendant witness Emma May entered into a written proffer agreement two months prior to trial.[397] The agreement provided Emma May would submit to a police interview where she would proffer her testimony regarding this crime so the prosecution could determine if her testimony had value and potentially offer her a plea deal in exchange for an agreement to testify against defendant Guinn.[398] The written proffer agreement provided consideration to Emma May from the State in that it agreed that Emma May's proffer statements could not be used later against her.[399]

The proffer interview occurred on April 2, 2019, two months before trial, and it was audio recorded for 2.5 hours.[400] DPA Rutherford, the lead detective, another detective, Emma May and

[396] *See* Transcript of June 3, 2019 at 53, Docket No. 65.
[397] *See* Transcript of June 3, 2019 at 6, 36, Docket No. 65; Transcript of June 4, 2019 at 988, Docket No. 66.
[398] *See* Transcript of June 3, 2019 at 36, Docket No. 65; Exhibit 1, June 3-7 Hearings.
[399] See Transcript of June 3, 2019 at 36, Docket No. 65; Exhibit 1, June 3-7 Hearings.
[400] *See* Transcript of June 3, 2019 at 7, Docket No. 65 (2.5 hours);Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).

Emma May's attorney were present.[401] The defense was not advised this interview occurred and received no discovery about it.[402]

During the interview, Emma May provided extensive new details and significantly changed her prior story.[403] Through her attorney, Emma May had given a prior written statement to the prosecution that had been used as the basis to arrest and charge defendant Guinn.[404] The nature of this new information in the proffer interview was such that it was subject to mandatory disclosure requirements because it contained clear *Brady* impeachment evidence, *Brady* exculpatory information, and the identity of three never before disclosed eye witnesses to the crime.[405] It was also a statement of the prosecution's primary witness containing never before disclosed details regarding the crime.[406]

During the proffer interview, Emma May disclosed substantial *Brady* impeachment information. Most significantly, she changed her prior story by identifying three of the robbers as being different persons with different names than the three persons she previously had identified as her co-robbers.[407] This inconsistent statement was a *Brady* bombshell; the fact the witness said three people did the robbery in one statement and changed her story and said three different

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[401] *See* Transcript of June 3, 2019 at 88, Docket No. 65 Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[402] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-150, 153, 157, 204, Docket No. 65; Transcript of June 4, 2019 at 43, Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).
[403] *See* Transcript of June 3, 2019 at 10-11, Docket No. 65; Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[404] See Affidavit of Probable Cause, Docket No. 2; Exhibit 10 of June 3-7 Hearing.
[405] *See* Transcript of June 4, 2019 at 50, Docket No. 66 three eyewitness); Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[406] *See* Transcript of June 4, 2019 at 50, Docket No. 66 three eyewitness); Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[407] *See* Transcript of June 3, 2019 at 10-11, 41-43, 21; Docket No. 65; *See* Transcript of June 4, 2019 at 50, Docket No. 66; Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).

people did the story in the next statement was potent impeachment evidence.[408] It proved the witness lied in her identification of the robbers in at least one statement and substantially weakened the prosecution's case because the only evidence connecting the defendant Guinn to the robbery was the testimony of this witness. As a result of this interview, even the prosecutor and police believed that Emma May likely lied in her first statement as to the identity of some of the co-suspects.[409]

Emma May also made other statements showing a lack of candor by trying to claim she was just an innocent witness and did not know a robbery was going to occur.[410] This was not credible, so the police pressed her on this during the proffer interview. By the end of the interview, she began to admit she really did know there was going to be a robbery and that her prior denial was not truthful.[411] This was *Brady* impeachment evidence.

Emma May also made numerous other statements regarding the crime and aftermath that the defense later claimed could be impeached with other evidence if the defense had time to gather the impeachment witnesses and evidence. For example, Emma May claimed phone calls made before and during the robbery from her phone to the other robbers were made by Guinn who was borrowing her phone because he had no working phone.[412] The defense indicated they believed they could obtain a witness or proof the defendant had a working phone to impeach Emma May.[413](Emma May was the one who set up the drug buy where the robbery occurred.) Emma May also claimed she had been talking to people in the jail and they had been trying to

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[408] *See id.*
[409] *See also* Transcript of June 3, 2019 at 43, 45 Docket No. 65; Transcript of June 4, 2019 at 53-54, 143-44, Docket No. 66.
[410] *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[411] *See id.*
[412] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing (all discovery).
[413] *See* Transcript of June , 2019 at 13-14, Docket No. 68.

influence her testimony and the defense believed they could show her testimony was influenced or could show through jail records some of these claims were lies.[414]

During the proffer interview, Emma May also provided new exculpatory *Brady* evidence related to the Unlawful Possession of a Firearm charge, to wit, she stated she was in a position to see if the defendant possessed a gun and she never saw him with a gun during the charged period.[415] She stated she had never actually seen the defendant possessing a gun the night of the robbery, even though she had been with defendant Guinn before and after the robbery, had drove him to and from the robbery, sat next to him in the car, and had watched the robbery.[416] This was different than the impression given by her first statement that was in the discovery given to the defense; the prior discovery made it appear she had personal knowledge of the defendant possessing a firearm the night of the robbery.[417] At the proffer interview she clarified she just assumed the defendant possessed a firearm during the charged period, but did not actually ever see that.[418]

During the proffer interview, Emma May also provided much more detailed information about the robbery than was provided in her prior statement.[419] This included incriminating details against the defendant and much more information about the planning and aftermath of the crime.

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[414] *See* Transcript of June 3, 2019 at 9-11, 22, Docket No. 65.
[415] *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[416] *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[417] *See* Affidavit of Probable Cause, Docket No. 2; Exhibit 1 of June 3-7 Hearing (Emma Mays first written statement-attorney notes).
[418] *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[419] *Compare* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery), *with,* Affidavit of Probable Cause, Docket No. 2; Exhibit 1 of June 3-7 Hearing (Emma Mays first written statement-attorney notes).

During the proffer interview, Emma May also named three different alleged eyewitness co-suspects to the robbery that had never been known or disclosed before.[420] She provided detailed descriptions and information about how to locate these newly identified alleged robbers.[421]

During the proffer interview, Emma May also alleged the defendant made a statement to her that was essentially a confession to the charge of Unlawful Possession of a Firearm.[422] She said the defendant told her he possessed a gun at the time of the robbery. DPA Rutherford later admitted following this interview she planned to use this never before disclosed statement of the defendant as her sole proof the defendant possessed the gun, because no one ever saw the defendant in possession of the gun.[423] However, DPA Rutherford never disclosed this defendant's statement she intended to use to prove an element of the charge to the defense before trial call.[424]

No one asked Emma May during the tape recorded portion of the proffer interview why she named three different people as her co-robbers in this interview as opposed to the persons she named in her prior first written statement.[425] No one sought any clarification while the recording was on, even though a main purpose of the proffer interview was to determine if Emma May could/would identify the other robbers and whether her identifications were correct. However, after the tape recorder was turned off, but while everyone was still present, Emma

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[420] *See* Transcript of June 4, 2019 at 50, Docket No. 66; Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing. Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.
[421] *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing.
[422] *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[423] *See id.*
[424] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).
[425] *See* Transcript of June 4, 2019 at 45, 55-52, 142-43, Docket No. 66; Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).

May's attorney explained in Emma May's presence that Emma May had lied about the identities of the other robbers in her prior statement because she feared retaliation.[426] The tape recorder was not turned back on to document this.[427] This was thus not disclosed in the proffer recording and was never disclosed in any pretrial discovery provided to the defense.[428] This undisclosed exchange only came out in the middle of the trial Motion to Dismiss.[429]

DPA Rutherford did not disclose the *existence* of the April 2 proffer interview or the written proffer agreement until about ten days before the May 31 trial call. At that time, she disclosed an interview had occurred, but she did not give the defense a copy of the recording of the proffer interview.[430] Even though it was only ten days until trial, she also did not disclose any information about the content of the proffer interview.[431] This included not informing the defense that Emma May lied in her prior statement about who the co-suspects were and was naming three new co-suspects, not revealing there was new *Brady* exculpatory evidence, not revealing the interview contained *Brady* impeachment evidence, and not disclosing the alleged confession of the defendant.[432]

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[426] *See* Transcript of June 4, 2019 at 53-54, 111, 143-44, Docket No. 66; *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[427] *See id.*
[428] *See id.*
[429] *See also* Transcript of June 4, 2019 at 53-54, 111, 143-44, Docket No. 66; *See* Exhibit 1 CD 7 of August 16, 2019 Sanctions Hearing (all discovery).
[430] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-150, 153, 157, 204, Docket No. 65; Transcript of June 4, 2019 at 43, Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).
[431] *See id.*
[432] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).

Even if the case had slipped off DPA Rutherford's radar for awhile, she became very much aware this proffer interview information was missing from discovery by no later than May 16, when Emma May's attorney called and reminded her. She was in fact reminded it had not been disclosed again and again starting no later than eighteen days prior to trial.

On about May 16, eighteen days before trial, Emma May's lawyer contacted DPA Rutherford and advised her Defendant Guinn's lawyer was trying to interview Emma May and that Guinn's lawyer clearly was not aware of the proffer interview.[433] In response, DPA Rutherford did not remedy this by notifying the defense attorney a proffer interview had occurred or sending discovery regarding the proffer content.

On May 20, two weeks before the June 3 trial date, DPA Rutherford reviewed her file to see what needed to be done and again saw the defense had never been informed the proffer interview occurred, never been sent any discovery about the proffer interview, never been sent a copy of the written proffer agreement, and never sent a copy of the recording of the proffer interview. In response to learning this, she advised the defense on about May 21 that an interview with witness May had occurred and she sent a copy of the proffer agreement, but not the proffer recording. The defense received the written proffer agreement sometime between May 24 and May 28.[434] DPA Rutherford also advised the defense she was going to add Emma May as a witness a couple of days before trial, but she did not actually do that until trial call.[435] She requested the lead detective send her a CD copy of the proffer interview to give the defense on about May 21 and the detective immediately sent her one on the same day.[436] She did not disclose a summary of the

[433] *See* Transcript of June 4, 2019 at 114-15, 132, Docket No. 66.
[434] *See* Transcript of June 3, 2019 at 89, Docket No. 65.
[435] *See id.* at 3, 158.
[436] *See* Transcript of June 6, 2019 at 114-15, Docket No. 68.

content of her expected witness's changed testimony or any information about the content of the proffer interview to the defense.[437]

During the week before trial call, the withholding of all discovery regarding the content of the proffer interview continued. Once defense counsel became aware a proffer interview had been done weeks before, he started asking DPA Rutherford for discovery about the proffer interview and the recording of the interview, indicating he needed to see that right away before interviewing Emma May.[438] There was an outstanding Omnibus Court Order that required this discovery to be disclosed by no later than May 13, but DPA Rutherford still did not comply with the order. All week the week before trial defense counsel was asking DPA Rutherford where the recording of the proffer interview was and DPA Rutherford was telling the defense it was coming.[439]Defense counsel believed it had been sent early in the week based on being told it was coming.[440] On Tuesday May 28, DPA Rutherford finally reached a tentative agreement with Emma May's attorney to have Emma May testify, something that no one was certain would occur.[441] The day after she reached the agreement with Emma May's counsel and two days before trial call, on Wednesday May 29, DPA Rutherford made her first attempt ever to send Emma May's proffer recording CD to the defense.[442] Two days before trial call, DPA

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[437] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).

[438] *See* Transcript of June 6, 2019 at 64-65, Docket No. 68; Transcript of June 3, 2019 at 100-105, 146-54 Docket No. 65.

[439] *See* Transcript of June 6, 2019 at 64-65, Docket No. 68; Transcript of June 3, 2019 at 100-105, 146-54 Docket No. 65.

[440] *See id.*

[441] *See* Transcript of June 3, 2019 at 48-49, 158, 161, Docket No. 65; Exhibit 18, June 3-7, 2019 Hearing.

[442] *See* Transcript of June 6, 2019 at 60-65, Docket No. 68. (DPA Rutherford initially claimed she got the proffer recording from Detective Fagen on Tuesday and sent it then, but later after his police reports and records showed differently, DPA Rutherford admitted that the detective did not hand deliver the CD to her and she did not first give it to staff to send until Wednesday May 29).

Rutherford finally went to send the defense the CD copy of the recording, but she could not find the copy of the interview recording the lead detective sent to her or it had not arrived.[443] DPA Rutherford asked the lead detective to then bring her new copies of the CD and the detective burned copies and hand delivered copies to DPA Rutherford that day.[444] DPA Rutherford did not advise the defense counsel he could pick the recording up to get it more quickly. Despite DPA Rutherford telling defense counsel the CD recording was on its way earlier in the week, she never revised that and never informed defense counsel she had not even given the recording to staff to mail until Wednesday. Instead, two days before trial call DPA Rutherford just gave the CD to her discovery department to process and then mail the hardcopy CD to defense.[445] Although both Emma May's lawyer and Defendant Guinn's lawyer needed a copy of this CD as discovery, DPA Rutherford later said she only gave one CD to her staff who misdirected it into the discovery packet being prepared that day for State's witness Emma May rather than sending it to defendant Guinn's counsel.[446] It is unknown whether this misdirection claim is accurate or not, because Friday evening after trial call Guinn's defense counsel got the proffer recording. So it appears the Prosecutor's Office staff did send it out and that it just took two days to get there via regular discovery processing and mailing, which would not be unusual.[447] This may also have been the original copy Detective Fagen sent coming through finally

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[443] *See* Transcript of June 6, 2019 at 63-65, Docket No. 68; Transcript of June 3, 2019 at 100-105, 146-54 Docket No. 65(DPA Rutherford initially claimed she got the proffer recording from Detective Fagen on Tuesday and sent it then, but later after his police reports and records showed differently, DPA Rutherford admitted that the detective did not hand deliver the CD to her and she did not first give it to staff to send until Wednesday May 29).
[444] *See* Transcript of June 6, 2019 at 64, Docket No. 68; Transcript of June 3, 2019 at 100-105, 146-54, Docket No. 65(DPA Rutherford initially claimed she got the proffer recording from Detective Fagen on Tuesday and sent it then, but later after his police reports and records showed differently, DPA Rutherford admitted that the detective did not hand deliver the CD to her and she did not first give it to staff to send until Wednesday May 29).
[445] *See* Transcript of June 6, 2019 at 60-65, Docket No. 68. Transcript of June 3, 2019 at 100-105, 146-54, Docket No. 65(DPA Rutherford initially claimed she got the proffer recording from Detective Fagen on Tuesday and sent it then, but later after his police reports and records showed differently, DPA Rutherford admitted that the detective did not hand deliver the CD to her and she did not first give it to staff to send until Wednesday May 29).
[446] *See id.*
[447] *See* Transcript of June 3, 2019 at 149-51, Docket No. 65.

As DPA Rutherford kept telling Guinn's defense counsel all week that the CD was on the way and that he should have it,[448] when it did not arrive by the Thursday afternoon of trial call, defense counsel filed a CrR 8.3 Motion for discovery withholding.[449] The 8.3 Motion to Dismiss was based on all the late and missing discovery, including the missing CD recording of Emma May's proffer interview.[450] The written motion specifically stated defense counsel still did not have the proffer interview recording as of Thursday.[451] This motion was served on the prosecutor Thursday afternoon and it included a request to be heard on emergency shortened time the next morning, the Friday morning of trial call, in part, because of the urgent need to get discovery immediately.[452] In response to this motion, DPA Rutherford still did not provide the CD recording or disclose any summary of the content of the interview.[453] The parties appeared Friday morning to hear the Motion to Dismiss based, in part, on the still undisclosed content/recording of Emma May's proffer interview.[454] DPA Rutherford still did not provide it.[455] Due to calendar overcrowding that motion was continued to Monday.

At trial call, the Friday afternoon of May 31, DPA Rutherford told the defense counsel to have his staff stop turning his office upside down looking for the CD because it had not ever

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[448] *See* Transcript of June 6, 2019 at 64, Docket No. 68; Transcript of June 3, 2019 at 146-47, Docket No. 65.
[449] *See* Motion to Dismiss, Docket No. 19.
[450] *See id.*
[451] *See id.*
[452] *See id.* (copy received stamp on front page).
[453] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).
[454] *See* Minute Entry of May 31, 2019, Docket 20.
[455] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).

been sent by her office.[456] She had the lead detective bring another copy of the CD recording,[457] and for the first time, DPA Rutherford turned over the content of Emma May's April 2 proffer interview by handing the CD to the defense.[458] DPA Rutherford handed defense counsel the 2.5 hour long audio recording at the end of trial call, and DPA Rutherford had set up a defense interview of Emma May to occur right after trial call.[459] This made it impossible for the defense to listen to the proffer interview before the scheduled witness interview, which interview was scheduled for the last two business hours remaining before trial. Defense counsel declined to do the defense interview before he could listen to the proffer interview recording, so DPA Rutherford reset the interview of Emma May for Monday, the first morning of trial.

By withholding the existence and content of a major State witness' interview, DPA Rutherford violated CrR 4.7, the Court Omnibus Order, and case law. In fact, due to the content of the interview, the withholding violated these rules in many different ways.

DPA Rutherford violated CrR 4.7 in at least three distinct ways. (1) She violated CrR 4.7(a)(3) which requires the prosecuting attorney to "disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge with tends to negate defendant's guilt...."[460] DPA Rutherford was at the interview and had personal knowledge of Emma May's exculpatory testimony that she was with the defendant all night and drove him to the robbery but never saw him with a gun. As DPA Rutherford was present for the interview, she also knew Emma May lied about who committed the robbery. This significant impeachment evidence relating to the only witness who could place the defendant at the robbery is exculpatory

[456] *See* Transcript of June 6, 2019 at 64-65, Docket No. 68; Transcript of June 3, 2019 at 8-9, Docket No. 65.
[457] *See* Transcript of June 4, 2019 at 150, Docket No. 66. *See* Transcript of June 3, 2019 at 148, Docket No. 65.
[458] *See* Transcript of June 3, 2019 at 8-9, 87, 100, 148, Docket No. 65; *See* Transcript of June 4, 2019 at 43, Docket No. 66.
[459] *See* Transcript of June 4, 2019 at 123, Docket No. 66; Transcript of June 3, 2019 at 8-9, 148, 204, Docket No. 65.
[460] CrR 4.7(a)(3)

impeachment negating guilt required to be disclosed pursuant to CrR 4.7(3). (2) DPA Rutherford also violated CrR 4.7 (a)(1)(ii) which requires the prosecutor to disclose "the substance of any oral statements made by the defendant."[461] DPA Rutherford knew Emma May claimed the defendant told her had a gun and DPR Rutherford intended to use the defendant's alleged statement to prove the possession element of the firearm possession charge because it was the only evidence she had to prove that.[462] (3) DPA Rutherford also violated Cr 4.7(a)(1)(i) by not disclosing "the substance of any oral statements of … witnesses" as required by that rule.[463]

DPA Rutherford had a CrR 4.7 duty to disclose all this information by omnibus because she had actual knowledge of it, regardless of whether or not she had yet received it in a written document or oral recording. CrR 4.7(3) required disclosure of the exculpatory information within the prosecutor's **knowledge**. CrR 4.7(a)(4) required disclosure of all materials listed in section (a) that are "information within the **knowledge**, possession or control of members of the prosecuting attorney's staff." CrR 4.7(a)(4). This knowledge section applying to subsection (a), applies to both the requirement to list witnesses and the substance of their testimony and to the requirement to disclose the statements made by the defendant. See CrR 4.7(a)(1)(i) and (ii); CrR 4.7(a)(3) and (4). As DPA Rutherford had personal knowledge of the substance of Emma May's new testimony and the defendant's oral statement, she had to disclose her actual knowledge by omnibus. DPA Rutherford was required to disclose this information she had actual knowledge of by no later than the date set at omnibus, even if she did not have a copy of the recording or a police report containing the information. She had personal knowledge of all of the content of Emma May's proffer interview by April 2 because she was at the interview taking notes.[464] She

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[461] CrR 4.7 (a)(1)(ii).
[462] *See* Exhibit 1, August 16, 2019 Sanctions Hearing (discovery).
[463] Cr 4.7(a)(1)(i).
[464] *See* Exhibit 1, CD 7, August 16, Sanctions Motion (all discovery).

had this knowledge for a month before Omnibus. She was in continuous ongoing violation of CrR 4.7 every day after the mandatory Omnibus disclosure date.

The Prosecutor's Office's focus on when she got material like the proffer recording is misplaced, because DPA Rutherford had actual knowledge of the content of all the proffer discovery she withheld. If DPA Rutherford was not going to bother to timely get the CD recording or the police report summarizing the content of the interview, then she was instead required by CrR 4.7 to memorialize what she had actual knowledge of and send it to the defense. Not having the CD recording in her possession did not negate these CrR 4.7 duties of disclosure when she had actual knowledge. The very reason the rule requires prosecutors to disclose what they have knowledge of and requires them to seek out information the police have is so that they do not do exactly what DPA Rutherford did in this case: obtain actual knowledge of the information themselves and then never ask for the written discovery and use that as an excuse for nondisclosure.[465] DPA Rutherford did this throughout this case. She would obtain the information directly orally from the police or witness and then not ask for the discovery and claim she had no obligation to turn the information over because it was not in a document in her possession.[466] CrR 4.7 specifically prohibits this tactic by requiring disclosure of all information within the prosecutor's actual knowledge as to the items identified in several subsections of the rule.[467]

By withholding the proffer information, DPA Rutherford also violated the Court's Omnibus Order in several ways. The Agreed Omnibus Order agreed and ordered each side to provide to the other the materials they had requested by May 13.[468] The defense discovery

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[466] *See* Sections III. 3, 4, 5, 7.

[467] *See* CrR 4.7(a)(1),(3) and (4).

[468] *See* Omnibus Order, Docket No. 15.

demand was thus incorporated into the order and it requested at least five distinct items that the prosecution had ***knowledge*** of contained in the proffer interview that DPA Rutherford failed to disclose. (1) DPA Rutherford failed to disclose the material requested in Discovery Request Section I.1., to wit, "the substance of any and all oral statements of [witnesses]...and the names, addresses, and telephone numbers of all persons present when ...[the witness'] statements were made."[469] DPA Rutherford knew the substance of Emma May's oral statements during the interview because she was present for the interview.[470] She also knew, but failed to disclose, the identities of the two detectives and Emma May's attorney who were present when Emma May gave the proffer statement. (2) DPA Rutherford also failed to disclose the material requested in Section I.3, to wit, "memorialization of any implicit or explicit promises of benefit which have been made by any government agent ...to the witness..."[471] DPA Rutherford had a copy of the proffer agreement that contained a promise to not use the proffered statements against Emma May. DPA Rutherford failed to disclose this for many weeks.[472] (3) DPA Rutherford failed to disclose the material requested in Discovery Request Section I.5, to wit, all known occasions on which the witness has made false statements in connection with this or any other case, as well as any conduct or statements by the witness that reflect a lack of candor...."[473] DPA Rutherford was personally present when Emma May changed her story as to the identity of the robbers. Both DPA Rutherford and Detective Fagen later admitted they believed Emma May likely lied in her first statement when they heard the second proffer statement.[474] DPA Rutherford also knew Emma May's attempt to claim she did not know the robbery was going to occur were statements

[469] *See* Defense Discovery Demand, Docket No. 9
[470] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.
[471] *See id.*
[472] *See* Transcript of June 3, 2019 at 89, Docket No. 88-89.
[473] *See id.*
[474] *See also* Transcript of June 3, 2019 at 43, 45 Docket No. 65; Transcript of June 4, 2019 at 53-54, 143-44, Docket No. 66.

reflecting a lack of candor that she partially recanted during the proffer interview because DPA Rutherford was at the interview. (4) DPA Rutherford failed to disclose the material required to be disclosed in Section III.1, to wit, "the substance of all oral statements made by the defendant...."[475] During the proffer interview Emma May disclosed to DPA Rutherford a confession statement allegedly made by the defendant.[476] DPA Rutherford later admitted she was intending to use this statement to prove an element of one charge. (5) DPA Rutherford failed to disclose the material required by Section III.1, to wit, "the substance of all oral statements made by ... codefendants, and the names, addresses, and telephone numbers of all persons present when such statements were made."[477] DPA Rutherford was present for the proffer statements by co-defendant Emma May, had personal knowledge of the substance of co-defendant May's statements, and knew who was present when the proffer statements were made.[478] Yet she failed to disclose the substance of this co-defendant's proffer statements and the names of the witnesses to the statement.

The Omnibus Order also required DPA Rutherford to disclose this information regardless of whether or not she had it in a written report or on a recording, because she had actual knowledge of it. The defense discovery demand adopted by the Omnibus Order[479] required DPA Rutherford to disclose any of the listed information "within the **knowledge**, possession or control of the State"[480] by a specific date about three weeks before trial, May 13.[481] DPA Rutherford had personal knowledge of all the Emma May's proffer interview information by April 2, but

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[475] *See id.*
[476] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.
[477] *See id.*
[478] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.
[479] *See* Omnibus Order, Docket No. 15.
[480] *See* Defense Discovery Request, Docket No. 9.
[481] *See* Omnibus Order, Docket No. 15; Defense Discovery Request, Docket No. 9.

violated the Omnibus Court Order by not disclosing any of it by the deadline in the Omnibus Order of May 13. Every day thereafter, her violation of the Omnibus Order was ongoing.

DPA Rutherford's failure to timely disclose the proffer interview information also violated constitutional case law requirements because of the content of the interview. The proffer interview contained each of the following types of evidence required to be timely turned over by the case law: *Brady* exculpatory evidence,[482] *Brady* impeachment evidence,[483] the names of three never before identified eyewitnesses to the crimes, and almost all the evidence the prosecution intended to use to convict the defendant of the crimes.[484] DPA Rutherford's withholding of the 2.5 hour recorded interview of her primary witness until the day before trial is almost identical to what the court found to be misconduct mandating dismissal in *State v. Brooks*, 149 Wash.App. 373 (2009). In *Brooks, supra*, the State did not provide the defense a witness' sixty-page initial interview statement containing inconsistent statements until the day before trial. The court dismissed the case asking, "how defense counsel would be able to effectively interview ...[the witness] without his initial statement. Specifically it asked how defense counsel could cross-examine ...[the witness] if counsel received a 60 or 70 page statement the day before trial."[485] The court held prejudice may arise from the State's failure to provide timely discovery because it may force a defendant to choose between his speedy trial rights and his right to counsel who has had the opportunity to adequately prepare.[486]

DPA Rutherford and the Prosecutor's Office have incorrectly focused solely on when DPA Rutherford came into possession of the police report summarizing the proffer interview and the

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[482] *See Kyles v. Whitley*, 514 U.S. 419 (1995)(capital murder reversed for failure to disclose exculpatory evidence).
[483] *See U.S. v. Kohring,* 637 F.3d 895 (2011); *U.S. v. Brummel-Alvarez*, 991 F.2d 1452 (1992); *State v. Stenson*, 174 Wash.2d 474 (2012); *State v. McDonald*, 122 Wash. App. 804 (2004).
[484] *See State v. Brooks*, 149 Wash.App. 373 (2009).
[485] *See State v. Brooks*, 149 Wash.App. 373, 382-83 (2009).
[486] *See id.*

CD recording of the interview. The proffer interview content was not information gathered by the police alone that DPA Rutherford would only know about when she got the police report. She was at the proffer interview and heard the entire statement.[487] DPA Rutherford violated her legal duties not only by not timely obtaining and providing a copy of the proffer interview, but also by not promptly disclosing her knowledge of the existence and content of the interview. CrR 4.7(a)(4), the Omnibus Order, and the constitutional case law, all indicate the prosecutor's discovery obligations as to this kind of evidence apply to "information within the **knowledge**, possession or control of members of the prosecuting attorney's staff."[488] DPA Rutherford had no legal right to delay disclosure of her knowledge simply because she delayed requesting the CD recording. If memorializing her knowledge was too much trouble, she could have just timely gotten a copy of the tape recording from the police and provided that to the defense timely. When asked why she had not just told the defense important facts like a proffer interview occurred and the witness changed her story about the robbers identities, DPA Rutherford repeatedly said she decided to let the discovery speak for itself when it arrived rather than tell the defense. This is not an option she gets to decide after the discovery deadlines have passed. Everything discoverable she knew from the proffer interview at that point had to be memorialized and turned over.

DPA Rutherford unfairly blamed the Sheriff's Office and the Snohomish County Prosecutor's Office staff for the fact a copy of the proffer CD recording never got to the defense until trial call.[489] She claimed the CD got lost or misdirected in the mail twice.[490] The real reason this didn't get to the defense on time is because DPA Rutherford delayed in requesting the CD

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[487] *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.
[488] *See* CrR 4.7(a)(4); Omnibus Order, Docket No. 15; Defense Discovery Request, Docket No. 9.
[489] *See* Transcript of June 3, 2019 at 102-04, Docket No. 65.
[490] *See* Transcript of June 3, 2019 at 103, 148, Docket No. 65.

recording from the police and did not give it to her staff to mail until two days before trial call.[491] The CD was available for the asking any time after April 2. DPA Rutherford simply did not first ask for it until about May 21, and she did not give it to staff to actually mail to the defense until May 29, two days before trial call.[492] (Note, DPA Rutherford initially claimed the CD was sent on Tuesday but revised that after shown Detective Fagen's records showing he did not bring it to her to send until Wednesday May 29.)

DPA Rutherford gave one CD to her staff and they misdirected the CD and sent it to Emma May's attorney as discovery for Emma May.[493] While Emma May's attorney did properly get one CD recording of her proffer interview,[494] defendant Guinn's attorney also got a copy of the proffer recording through the Snohomish County Prosecutor's Office's normal discovery channels.[495] He got this Friday afternoon after trial call, two days after DPA Rutherford gave it to her staff to send to him.[496] This would be a normal delivery time for something mailed and even DPA Rutherford stated discovery took "a day or two" to go through normal channels.[497] It simply does not appear to be true that the Prosecutor's Office staff made any error that significantly contributed to any delay. Or if they did it was immediately rectified. Furthermore, even if the staff did misdirect the CD that would not have been the cause of the defense getting the CD recording late. If the staff sent it correctly on Wednesday, it likely still would have got there on Friday and the defense got it by Friday afternoon via the hand delivery at trial call and

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[491] *See* Transcript of June 3, 2019 at 101-105, 147-48,Docket No. 65; Transcript of June 4 at 150, Docket No. 66; Transcript of June 6, 2019 at 63,-65, Docket No. 68 (Note, DPA Rutherford initially claimed the CD was sent on Tuesday but revised that after shown Detective Fagen's records showing he did not bring it to her to send until Wednesday May 29).
[492] *See id.*
[493] *See* Transcript of June 3, 2019 at 103, 148, Docket No. 65; transcript of June 6, 2019 at 133, Docket No. 66.
[494] *See* Transcript of June 3, 2019 at 133, Docket No 65.
[495] *See* Transcript of June 3, 2019 at 149-50, Docket No. 65; Transcript of June 6, 2019 at 25, Docket No 68.
[496] *See id.*
[497] *See* Transcript of June 6, 2019 at 61, Docket No. 68.

via mail anyway despite any misdirection.[498] Any misdirection by staff added zero time to the delay. DPA Rutherford waited almost two months to get the recording and did not give it to staff to mail until two days before trial call, and then she blamed the late delivery of the recording on her staff who actually got it to the defense within two days. (This was a hard copy CD that DPA Rutherford gave her staff to mail.)

The Sheriff's Office was also unfairly blamed. Detective Fagen provided copies of the CD to DPA Rutherford three times; each set was sent or delivered the day she requested it.[499] Twice the Sheriff's Office actually hand delivered copies of the CD to DPA Rutherford on the same day she requested them.[500] The record reflects that Detective Fagen brought DPA Rutherford CD *copies*, more than one copy, on May 29.[501] That means if she gave one to staff as claimed, DPA Rutherford had at least one other copy of this interview recording in her actual possession.

DPA Rutherford did not send this CD at the beginning of the week of trial as the defense was led to believe.[502] It was not on its way then. She did not obtain it from the detective or give it to staff to mail until Wednesday for a case with trial call on Friday.[503] The lost in the mail excuse was a smoke screen to hide the real reason the CD did not get to the defense until the day of trial: DPA Rutherford did not request the detective to send it to her until 10 days before trial and did not give it to her staff to mail until two days before trial call, the day after she got a tentative plea deal with Emma May to testify.[504]

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[498] *See also,* Transcript of June 3, 2019 at 8, 11, 87, 146-150, 204 Docket No. 65; Transcript of June 6, 2019 at 25, 58-59 Docket No 68.
[499] *See* Transcript June 3, 2019 at 87, 101, 105, 147-48, Docket No. 65; Transcript June 4, 2019 at 150, Docket No. 66; Transcript of June 6, 2019 at 63-65, Docket No 68.
[500] *See id.*
[501] *See id.*
[502] *See* Transcript of June 6, 2019 at 64-65, Docket No. 68.
[503] *See* Transcript of June 3, 2019 at 146-48, Docket No. 65; Transcript of June 6, 2019 at 64, Docket No. 68.
[504] *See* Transcript of June 3, 2019 at 146-48, Docket No. 65; Transcript of June 6, 2019 at 63-5, Docket No. 68.

I am giving DPA Rutherford the benefit of the doubt that she just dropped the ball on all proffer interview discovery from the time of the interview on April 2, until she reviewed her file a month and a half later on about May 20 and realized none of the proffer information was ever disclosed. This is generous under the circumstances as numerous pieces of discovery had to all be simultaneously withheld for many weeks for the defense to be kept totally in the dark as to the fact such an interview occurred. This included withholding the written proffer agreement, the main police report summarizing the interview, any police report of the other officer at the interview, and the recording of the interview.

At the proffer interview, the prosecution's star witness dropped multiple *Brady* bombshells that would have immediately put any prosecutor on notice the information needed to be disclosed immediately. Some of these new facts included the fact Emma May's identification of three robbers in her first statement were lies, the identification of three new co-suspect eyewitnesses, an admission by the State's only alleged witness to have seen the defendant possessing a gun that she never actually saw the defendant with the gun, and an alleged incriminating confession statement by the defendant.[505] These exculpatory and impeaching facts and other impeachment evidence contained in the interview significantly impacted the strength of the State's case. The defense needed to know them to prepare for trial and to make an informed determination as to whether to even go to trial as opposed to pleading guilty.

DPA Rutherford knew this information for weeks and sent a lot of other discovery, but every single piece of discovery regarding this interview was withheld.[506] She also had

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[505] *See* Exhibit 1, compare bates 1-341 (discovery delivered pretrial with CD 7(Emma May's proffer interview recording), August 16, 2019 Sanctions Hearing; Transcript June 3, 2019 at 10-11, 151, 205, Docket No. 65; Transcript June 4, 2019 at 43, 50, 53-54, 142-148, Docket No. 66, Transcript June 6, 2019 at 58-59, Docket No. 68.

[506] *See e.g.,* Section III. 5, *infra* (police report withheld of detective at proffer interview); Transcript of June 3, 2019 at 88-89, 109 Docket No. 65(written proffer agreement in DPA Rutherford's possession withheld until May 28, two days before trial call);

communications with Defendant Guinn's lawyer and appeared for court hearings but did not ever mention any of the clear *Brady* information in this interview or even that the interview had occurred.[507] Given DPA Rutherford's events going on in her life, I am assuming for this Sanctions Motion that this was all just a mistake and not sanctioning the acts of withholding this information for the first seven weeks DPA Rutherford withheld it.

However, given the facts, it is clear that after DPA Rutherford's May 20, 2019 review of her file, DPA Rutherford's continued refusal to disclose the information from the major witness's proffer interview was knowing and willful. Five facts prove this. (1) DPA Rutherford admitted she did it deliberately because she wasn't sure she wanted to disclose Emma May's testimony if she wasn't going to testify. (2) After her May 20th review of her file, DPA Rutherford admitted she realized this discovery was missing and still did not disclose it. (3) After May 20, a lot of other discovery was disclosed, but each and every piece of discovery containing the proffer interview information was in coordination withheld. (4) DPA Rutherford requested the police give her the hard discovery containing the content of the proffer interview one day after she cut a deal with Emma May to testify. (5) No explanation has ever been provided as to why DPA Rutherford did not at least tell defense counsel the *Brady* bombshell interview information after she was reminded on May 15 and May 20 that the defense did not have any of the proffer information. These five facts are each discussed below.

[507] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).

First, most telling is the fact DPA Rutherford actually admitted she was consciously withholding Emma May's proffer information.[508] During argument, DPA Rutherford stated before Emma May agreed to testify (on May 30) she had not made a decision whether or not she would go ahead and disclose the proffer information if Emma May did not agree to testify.[509] This statement indicated DPA Rutherford was purposely actually waiting to decide whether or not to turn over the Emma May's information until after it was determined for sure whether or not Emma May was going to testify.[510] DPA Rutherford's idea seemed to be that if Emma May was not going to testify, then the fact she had identified certain people as her co-robbers to the police did not have to be turned over to the defendant who might tell the co-robbers. While this is laudable, it is only legal up until the discovery deadline. DPA Rutherford did not have the legal authority on her own to decide to not turn over the discovery to the defense to protect the witness. If that was necessary, she had to seek a protective order from the court with notice to the defense and such an order still would have allowed the defense counsel to get the information necessary to comply with due process, although with protective conditions. See CrR4.7(h)(4). This is explained in the footnote below.[511] Apart from showing again DPA Rutherford was again

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[511] DPA Rutherford had reasons for not wanting to turn the proffer information over to the defense because it showed who Emma May had identified as the robbers. The robbery participants were allegedly violent gang members and Emma May was negotiating to get protection for her family from them as they remained out of custody. However, if protection is needed the lawyer does not get to just choose to violate the law, a court order, and the court rule and not timely turn over discovery. The proper procedure is to get a CrR 4.7 protection order.

While protecting a witness and her family are laudable motives, the law does not permit State attorneys to secretly make their own decisions to withhold discoverable information past discovery deadlines to protect witnesses. This interview contained significant exculpatory and impeachment evidence required to be disclosed by deadlines pursuant CrR 4.7, the Omnibus Court Order, and *Brady v. Maryland, supra,* and its progeny. The exculpatory information had to be disclosed by the deadlines so the defense would have a fair chance to prepare in case the witness did testify and the case did go to trial.

If DPA Rutherford felt protection was necessary, she could seek a protective order. CrR 4.7(a) indicates the prosecutor must disclose the information required by the rule, "[e]xcept as otherwise provided by protective orders...." CrR 4.7(h)(4) entitled "Protective Orders," provides that, "upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as appropriate, *provided that*

unlawfully withholding discovery, for the purpose of this sanctions motion, the key significance of this statement by DPA Rutherford is her admission that she was "deciding" whether or not she was going to disclose the proffer information.[512] She was willfully withholding it, biding her time until she "decided" whether or not she was ever going to disclose it. Deciding is a deliberative willful process.

The second fact indicating DPA Rutherford's withholding was willful is that DPA Rutherford also admitted she reviewed her file on about May 21 and realized then the proffer recording was missing from discovery.[513] To the extent that the Prosecutor's Office is now implying that DPA Rutherford just got distracted and forgot to send the proffer information earlier, even if that is true for the first month and a half, she realized that mistake by May 21 and knew she needed to turn this information over immediately because the discovery deadlines had passed. She admitted it had come to her attention the proffer recording had not been sent by May 21.[514]

The third fact indicating the withholding was willful is the content of discovery items DPA Rutherford did disclose and the content of discovery items she did not disclose after her May 21

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all material or information to which a party is entitled shall be disclosed in time to permit the party's counsel to make beneficial use thereof." CrR 4.7(h)(4)(emphasis added).

DPA Rutherford does not get to just decide whether or when to disclose discoverable information as her disturbing remark indicated she was doing. If she felt protection was necessary she had to get that through a court order. In this case a protective order could have provided that the defense counsel not provide the names of the other identified suspects to the defendant, but still given all the other information, including other *Brady* material in the interview to the defense attorney. Not even a court is permitted pursuant to the protection order rule to allow withholding of discoverable material for so long that defense counsel cannot make beneficial use of it. That is because that would deny due process. Certainly withholding all the information until trial call is not disclosure in time to be of beneficial use, especially where the information contains other suspect information, and *Brady* impeachment that the defense would have to obtain witnesses to testify about. It was the court's prerogative, not DPA Rutherford's prerogative to decide when and how the proffer information had to be disclosed if it was going to be protected. *See* CrR 4.7(h)(4).

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[513] *See* Transcript June 3, 2019 at 153-54, Docket No. 65 Transcript June 6, 2019 at 63-64.

[514] *See id.*

review of her file. She disclosed the discovery that did not contain the proffer content,[515] she did not disclose any of the discovery containing the proffer content.[516] In the normal course of discovery, the existence and content of the proffer interview would have gotten to the defense through any one of the following several channels: (1) listing Emma May as a witness and giving a summary of her expected testimony; (2) the lead detective's narrative report summarizing the interview, (3) a report of the other detective present during the interview, (4) a copy of the recording of the interview, or (5) a defense interview of Emma May (which the defense could not get because the State had not listed her as a witness or made any offer). Five separate regular discovery channels all had to be stymied in a coordinated manner for the defense to not get this information. DPA Rutherford was not just not coping and sending no discovery after May 20. She sent all kinds of other new discovery after her May 20 review, including things like the defendant's arrest report, phone downloads and data reports, other police reports and lab requests.[517] She got all this discovery from the lead detective and sent it in discovery, but did not ask for or send that lead detective's main narrative report containing the proffer information or the proffer recording.[518] Any review of the file would have made it clear the proffer information was the most critical discovery then to go out. This selective withholding was very telling.

The fourth fact, and just as revealing, was the timing of the eventual disclosure of the proffer information. On May 29th, the day after DPA Rutherford cut a deal with Emma May's

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[515] *See* Exhibit 1, Bates 1-340, August 16, 2019 Sanctions Hearing; Declaration re State's Discovery, Docket No. 45.
[516] *See* Section III. 5, *infra* (police report with summary of proffer interview not disclosed); Transcript of June 3, 2019 at 88-89, 109 Docket No. 65(written proffer agreement in DPA Rutherford's possession not disclosed until May 28, two days before trial call); Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (numerous citations indicating proffer recording not disclosed).
[517] *See* Exhibit 1 at bates 278-341 and CDs 7-9, August 16, 2019 Sanctions Hearing; Declaration re State's Discovery, Docket No. 45.
[518] *See* Section III. 5 *infra* (discussing the failure to disclose the lead detective's report even after trial started).

attorney to have her testify, DPA Rutherford requested the lead detective send her his report summarizing the proffer interview and bring her a CD recording of the proffer interview.[519] The first time DPA Rutherford ever asked the lead detective to provide his narrative report spanning investigation from January 2019 through May of 2019, was two days before trial and immediately after she cut the deal with Emma May.[520] DPA Rutherford has never provided any explanation for requesting all the other police reports and all the other discovery from Detective Fagen on May 20-21, but not requesting Lead Detective Fagen's own report that contained a summary of the proffer interview. Nor has she ever explained why she did not request a copy of the CD sooner when it didn't come after May 20. DPA Rutherford was suddenly able to get the proffer recording and the police summary of the recording to the defense within 48 hours of Emma May signing her deal to testify, but had not been able to get it to the defense any time during the two months prior. The timing of the disclosure is consistent with DPA Rutherford's statement discussed in reason one above, that she was withholding discovery to wait and see if Emma May agreed to testify.

The fifth fact indicating this withholding was willful is that DPA Rutherford has never explained why she did not just disclose her own actual knowledge of the interview when she became acutely aware this critical discovery was missing a few weeks before trial. The discovery rule, court order and case law required her to disclose what she knew and she did not even do that. She had numerous interactions with defense counsel during this period and never even mentioned the interview or any of the *Brady* highlights from the interview.[521] Someone acting in

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[519] *See* Section III. 5 (discussing failure to request lead detective's report until May 29); Transcript of June 3, 2019 at 147-48, Docket No. 65; Transcript June 6, 2019 at 63-65, Docket No. 68;(indicating DPA Rutherford asked the detective to hand deliver the proffer CD to her May 29 to send the defense); Transcript of June 3, 2019 at 48-49, 161, Docket No. 65 (indicating tentative deal cut with Emma May's attorney May 28).

[520] *See* Section III. 5, *infra.*

[521] *See, e.g.,* Transcript June 3, 2019 at 157, Docket No. 65.

good faith might have at least mentioned the big new nuggets, like the witness lied in her first interview about the identities of three co-suspects, the witness cannot testify she saw any gun in the defendant's hand, but the witness will testify the defendant confessed to her.

These five facts fit into a coherent picture. DPA Rutherford and Emma May were in negotiations to protect Emma May from being endangered by the defendant telling the new co-defendants she had identified them.[522] DPA Rutherford didn't turn this new identification over to the defense and hadn't decided if she even would turn it over if no deal was cut for Emma May to testify.[523] Why endanger her unless necessary? All discovery disclosing the content of Emma May's proffer continued to be withheld then while all the other discovery was getting sent. The day after a tentative plea agreement was reached with Emma May, DPA Rutherford asked the detective to send her the recording with the content of Emma May's proffer. The first time any content from Emma May's proffer was disclosed to the defense was at trial call, one day after she entered her deal to testify and DPA Rutherford had scheduled the defense interview for immediately following trial call. This was the last possible moments before trial. The truth is just as DPA Rutherford slipped and said during trial, she was withholding the proffer discovery to wait and see if Emma May agreed to testify before she "decided" whether to turn the proffer content over at all.[524] This was deliberate willful withholding.

DPA Rutherford violated CrR 4.7, the Court Omnibus Order, and the constitutional case law by withholding the content of the primary witness's proffer interview until the case was called for trial.[525] This included withholding *Brady* impeachment information, *Brady* exculpatory

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[522] *See* Section III. 2, *supra;* Transcript Jun 4, 2019 at 101, 104-5, 114-16, 119-23, Docket No. 66; Transcript June 5, 2019 at 73-78, docket No. 67; Transcript June 6, 2019 at 66-7, Docket No. 68.

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[525] *See* Transcript of June 3, 2019 at 8, 11, 87, 100, 103, 146-151, 153, 157, 204-05, Docket No. 65; Transcript of June 4, 2019 at 43, 50, 53-54, 142-48 Docket No. 66; Transcript of June 6, 2019 at 58-59, Docket No. 68; Motion to Dismiss at 4, Docket No. 19 (all citations indicating the first the defense got the proffer recording and any

information, an alleged confession of the defendant, the identities of three never before disclosed alleged eyewitnesses and the detailed testimony describing the crimes that the State intended to rely on to convict the defendant.[526] DPA Rutherford should be sanctioned from the time she admitted it came back to her attention the proffer information had not been disclosed on May 20, through the time she turned it over on May 31. She admitted she withheld this deliberately and all the other surrounding facts corroborate it was done willfully.

5. DPA RUTHERFORD NEVER DISCLOSED THE EXISTENCE OR CONTENT OF THE LEAD DETECTIVE'S MAIN NARRATIVE POLICE REPORT.

Unbeknownst to the defense before and during trial, the lead detective in this case had a long detailed narrative report full of months of significant investigation that was never provided in discovery.[527] DPA Rutherford hid the existence of this report and never voluntarily surrendered it in discovery to the defense before or even during trial.[528]

DPA Rutherford never asked the lead detective to send her the narrative report until two days before trial call, even though DPA Rutherford was aware that the narrative report existed and there had been significant ongoing investigation by the lead detective throughout the four months leading up to trial.[529] The initial discovery provided soon after charging had only contained a SuperForm summary from that lead detective that was used to supply basic probable cause to arrest.[530] The lead detective had continued investigation revealing new information throughout the pretrial period thereafter and would add to his existing report each time he

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information of the content was at trial call on May 31). *See also* Transcript of June 3, 2019 at 88-89, Docket No. 65 (DPA Rutherford informed defense counsel a proffer interview had occurred the week before trial, but did not disclose any content at that time).

[526] *See id*; Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing (proffer recording CD).

[527] *See* Transcript of June 5, 2019 at 34-38, Docket No. 67; Transcript of June 3, 2019 at 91-92, 97,Docket No. 65.

[528] *See id.*

[529] *See* Transcript of June 5, 2019 at 35-36, Docket No. 67; Transcript of June 3, 2019 at 97, Docket No. 65.

[530] *See* Transcript of June 3, 2019 at 118-119, Docket No. 65; Exhibits 12 and 13, June 3-7, 2019 Hearings.

conducted new investigation.[531] The lead detective disclosed his new investigation and new information orally to DPA Rutherford on an ongoing basis.[532] She was also aware of it because she read a long draft search warrant affidavit in which the detective stored and documented his new information. DPA Rutherford could have asked the lead detective to send his report to be disclosed as discovery at any time, but she did not do so.

Even if DPA Rutherford negligently lost track of the case for a while, according to her own statements, it came back on her radar and she noticed there was missing discovery long before two days before trial call.[533] DPA Rutherford admitted she did a review of her case file about thirteen days before trial on May 20, and at that time she asked the lead detective to send her the other missing items of discovery including other police reports. This large volume of other discovery was all turned over to the defense during the last week prior to trial.[534] No explanation has been provided as to why DPA Rutherford did not ask the lead detective to send his own main narrative report thirteen days before trial when she asked him to send everything else.

When DPA Rutherford did request the lead detective's main report the Wednesday two days before trial call, the lead detective expeditiously delivered it to her. Due to the narrative being 33 pages long, it took the Sheriff's Office two days to have a supervisor review and approve the report.[535] On the afternoon of Friday trial call, the lead detective sent the report electronically to DPA Rutherford's office via the usual SharePoint method.[536] This is an

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[531] *See* Transcript of June 3, 2019 at 96- 97, Docket No. 65.
[532] *See* Transcript June 4, 2019 at 39, Docket No. 66. See also Transcript of June 3, 2019 at 94-95, 135, Docket No. 65.
[533] *See* Transcript of June 5, 2019 at 35-36, Docket No. 67. Transcript of June 3, 2019 at 97, Docket No. 65.
[534] *See* Declaration re State's Discovery, Docket No. 45; Exhibit 1, August 16, 2019 Sanctions Hearing (all discovery).
[535] *See* Transcript of June 5, 2019 at 35-36, 39, Docket No. 67; Transcript of June 6. 2019 at 31, docket No. 68; Transcript of June 3, 2019 at 97, Docket No. 65.
[536] *See* Transcript of June 3, 2019 at 96, 98, Docket No. 65; Transcript of June 6, 2019 at 31, Docket No. 68.

electronic instant method of transmission.[537] By the Friday afternoon of trial call, the lead detective's narrative police report was in the actual possession of the Snohomish County Prosecutor's Office in its SharePoint system ready to be downloaded.[538]

DPA Rutherford admitted she realized the main narrative police report was missing no later than two days before trial call.[539] She also admitted that despite having many opportunities thereafter to tell the defense about the *existence* of the missing report, she chose not to do that.[540] After learning the lead detective's report was missing, DPA Rutherford did not reveal even the existence of this missing report during a motion hearing Friday morning, at trial call Friday afternoon, in motion and trial briefs she prepared over the weekend, or when trial began.[541]

DPA Rutherford failed to disclose the lead detective's narrative report was missing from discovery even in the face of a Motion to Dismiss for withholding other discovery. The defense filed a CrR 8.3 Motion to Dismiss based on late disclosure of other discovery one day before trial call.[542] The defense Motion to Dismiss for withholding discovery certainly put DPA Rutherford on notice she needed to disclose all other missing discovery immediately, including this police report.[543] The Motion to Dismiss was scheduled on shortened time for the next day on the Friday morning motions calendar. Another motion was heard on this case on Friday, but due to calendar overcrowding the Motion to Dismiss was deferred to the Monday trial. Even though the parties had come to court, in part, to argue whether the case should be dismissed for late discovery on Friday morning, DPA Rutherford still did not disclose the lead detective's narrative report existed and that it was missing from discovery.

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[537] *See* Transcript of June 3, 2019 at 114, Docket No. 65.
[538] *See* Transcript June 3, 2019 at 92-94, 97, 114, 212-13; Transcript June 5, 2019 at 39 Docket 67.
[539] *See* Transcript of June 5, 2019 at 34-38, Docket No. 67; Transcript of June 3, 2019 at 94-95, Docket No. 65.
[540] *See* Transcript of June 6, 2019 at 35-38, Docket No. 68; Transcript of June 3, 2019 at 92, Docket No. 65.
[541] *See* Transcript of June 6, 2019 at 35-38, Docket No. 68; Transcript of June 3, 2019 at 92, Docket No. 65.
[542] *See* Motion to Dismiss, Docket No. 19.
[543] *See also* Transcript of June 5, 2019 at 35-38, Docket No. 67; Transcript of June 3, 2019 at 95, 97, Docket No. 65.

DPA Rutherford thereafter wrote a responsive brief to the CrR 8.3 Motion and still did not disclose the existence of the lead detective's main report and that it was missing from discovery. While writing a responsive brief denying prosecutorial misconduct for withholding other discovery, DPA Rutherford was secretly withholding the lead detective's entire narrative report and several other major pieces of discovery. DPA Rutherford responded to the Motion to Dismiss as if the defense had all the discovery, arguing the discovery failures in this case were not as bad as cases cited by the defense.[544] By omission, she misrepresented to the court that the discovery withholding misconduct was less than what she really knew it to be.

At trial call, DPA Rutherford had another opportunity to disclose to the defense the lead detective's extensive police report was missing from discovery or produce the report; she again failed to do so.[545] The lead detective actually appeared at trial call and hand delivered other discovery to DPA Rutherford. DPA did not ask the Detective to simply bring her a copy of his report then[546] or to hand deliver it as soon as it was completed.[547] They both work in the courthouse. Although the report was in the possession of the Snohomish County Prosecutor's Office by about 3:30 Friday afternoon in an electric format that could be easily and quickly downloaded and turned over to the defense, DPA Rutherford did not disclose it.

On the following Monday, the first issue addressed at trial was the Amended 8.3 Motion to Dismiss based, in part, on failures to timely disclose discovery. DPA Rutherford continued to not disclose the existence or content of the missing lead detective's narrative report.[548] The lead detective appeared in court with DPA Rutherford as the prosecution's managing witness.[549] DPA

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[544] *See* Amended Response to Motion to Dismiss, Docket No. 35.
[545] *See* Transcript of June 5, 2019 at 36, Docket No. 67; Transcript of June 3, 2019 at 92, Docket No. 65.
[546] *See* Transcript of June 6, 2019 at 32-33, Docket No. 68.
[547] *See id;* Transcript of June 5, 2019 at 36, Docket No. 67; Transcript of June 3, 2019 at 92, Docket No. 65.
[548] *See id.* Transcript of June 5, 2019 at 36-37, Docket No. 67; Transcript of June 6, 2019 at 33, Docket No. 68; Transcript of June 3, 2019 at 1-92, Docket No. 65.
[549] *See generally,* Transcript of June 3, 2019 at 99, Docket No. 65.

Rutherford knew his report was complete and had been sent to the Prosecutor's Office by SharePoint because the detective told her this, but still DPA Rutherford withheld the report and even the fact a missing narrative police report existed.[550]

At no time before or during trial did DPA Rutherford ever come forth of her own volition and disclose even the existence of this missing main police report.[551] She only disclosed its existence when literally forced to do so based on direct questions from the court related to other late discovery.[552] This missing report was only discovered by luck when the court inquired how the defense could really be surprised about Emma May's proffer interview since the proffer interview would be in the lead detective's report.[553] I asked DPA Rutherford if this information was in the police reports several times and DPA Rutherford deflected or ignored the question initially.[554] Only when the Court flat out demanded to know if notice of the witness interview was in the police report did DPA Rutherford finally fess up that the defense had never been given the lead detective's narrative report.[555]

DPA Rutherford was then asked when she was planning to disclose the lead detective's report was missing from discovery and she indicated she had no intent to tell the defense or the court it existed and was missing. Her plan was to simply have her staff eventually download and process the report in the normal course and mail it to defense counsel sometime in the middle of trial.[556] She stated that she did not plan to advise the court or defense counsel of the *existence* of the lead detective's missing main narrative report in the middle of trial because she had decided

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[550] *See* Transcript of June 5, 2019 at 36-39, Docket No. 67. See Transcript of June 6, 2019 at 33, Docket No. 68; Transcript of June 3, 2019 at 1-92, Docket No. 65.
[551] *See* Transcript of June 5, 2019 at 34-39, Docket No. 67. See Transcript of June 6, 2019 at 33, Docket No. 68.
[552] *See* Transcript of June 5, 2019 at 38-39; Transcript of June 3, 2019 at 90-92, Docket No. 65.
[553] *See* Transcript of June 3, 2019 at 88-92, Docket No. 65.
[554] *See id.*
[555] *See id.*
[556] *See* Transcript of June 5, 2019 at 38-39, Docket No. 67; Transcript of June 3, 2019 at 96, 98, Docket No. 65.

eventual receipt of the report by mail to the defense would be adequate notification of its existence.[557] DPA Rutherford further admitted she had actually checked that first morning of trial and found the Prosecutor's Discovery Unit had not yet even downloaded and logged in the report via SharePoint, even though it had been in the SharePoint system since Friday. In short, after it was discovered this report had been withheld, DPA Rutherford stated she had no idea if or when the defense would get the report during trial.[558] A later declaration from the Prosecutor's Office staff indicated the item would have been in the computer system, but just had not yet been downloaded and placed in discovery by the staff.[559] DPA Rutherford knew this because the lead detective told her he had sent it via SharePoint's instantaneous delivery three days prior on Friday[560] and SharePoint is the usual method DPA Rutherford uses to receive police reports.[561]

Even after she got caught withholding this in the middle of trial, Deputy Rutherford was resistant to supplying the report. When I suggested she needed to immediately provide the police report to the defense so we could get on with trial, DPA Rutherford indicated the report was not really in her possession, but she would have her staff do the regular processing and mailing if and when the report ever came through to SharePoint.[562] She admitted she had no idea when the report might be mailed in the regular course.[563] She claimed the defense usually got things in a couple of days. A couple of days from that point would have been the third or fourth day of trial of an estimated four-five day long trial. I pointed out to DPA Rutherford that we were in trial and the author of the report was sitting next to her and she could just get the report from him

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[557] *See, e.g.,* June 3, 2019 at 209, Docket No. 65.
[558] *See* Transcript of June 3, 2019 at 92-94, 96, 98, Docket No. 65.
[559] *See* Declaration of Tricia Stemler, Docket No. 63.
[560] *See also* Transcript June 3, 2019 at 92-94, 97, 114, 212-13; Transcript June 5, 2019 at 39 Docket 67.
[561] *See* Transcript June 3, 2019 at 98, Docket No. 65. *See also* Declaration of Tricia Stemler, Docket No. 63 (SharePoint is the was the Prosecutor's Office receives law enforcement reports).
[562] *See* Transcript of June 3, 2019 at 92, 96, 98-99, Docket No. 65.
[563] *See* June 5, 2019 at 38-39, Docket No. 67; Transcript June 6, 2019 at 43, Docket No. 68.

immediately.[564] It should be noted Detective Fagan's office is on the fourth floor of the courthouse and these proceedings were on the fifth floor of the courthouse. Detective Fagan could have gone to his office and printed a copy of his report and given it to counsel in a matter of minutes. In fact, when DPA Rutherford refused to do anything to get the report to the defense other than by regular processing and mailing, Detective Fagen indicated he had his report on his phone and could email into the courtroom.[565] I directed him to email it to DPA Rutherford and for her to email it to the law clerk to print it and provide copies to the parties.[566] This was accomplished in the courtroom in about five minutes.

DPA Rutherford never came clean of her own accord, never just voluntarily disclosed the existence of the report, and never voluntarily turned the report over to the defense. The fact it existed had to be pried out of her and she had to be directed to provide it by the court in the middle of trial.[567] It was only by chance that its existence was discovered at all.

DPA Rutherford did not claim she did not realize this discovery was missing or had forgot this was missing; to the contrary she admitted she realized it was missing after Wednesday, May 29.[568] She had just asked the deputy to send her the report a couple of days before trial on May 29.[569] She admitted she remembered and realized this lead detective's narrative report had never

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[564] *See* Transcript of June 3, 2019 at 99, Docket No. 65.
[565] *See id.*
[566] *See id.* It should be noted that later in response to the Motion for Sanctions, DPA Rutherford's submitted a discovery affidavit indicating she provided the defense this police report during trial. This is somewhat misleading. What really happened is DPA Rutherford would not do anything to obtain the report of her own volition, so the court directed the officer to send it to DPA Rutherford's computer in the courtroom by email from his cell phone and DPA Rutherford to electronically send it to the law clerk who printed it for the parties and provided it to the parties in the courtroom.
[567] *See also* Transcript of June 3, 2019 at 88-92, 99, Docket No. 65.
[568] *See also* Transcript of June 5, 2019 at 35-40, Docket No. 67; Transcript of June 3, 2019 at 95, Docket No. 65.
[569] *See also* Transcript of June 5, 2019 at 35-36, Docket No. 67; Transcript of June 3, 2019 at 97, Docket No. 65.

been disclosed when she began arguing against the Motion to Dismiss on the first day of trial.[570] She stated she had no justification for not disclosing it then.[571]

While DPA Rutherford's initial failure to request the report for months before trial may have been due to inadvertent mistake, she admitted once she realized it was missing she made a deliberate choice to not disclose the existence of the missing report to the defense, and she made a choice to do nothing to expedite its delivery.[572] When asked why she did not disclose at least the *existence* of the lead detective's report at motions, trial call, in her briefing, during the Motion to Dismiss, or when trial began she had no explanation and indicated she could not justify that.[573] She knew the report existed and was not in discovery by Wednesday and chose to not disclose the existence of the missing report thereafter.[574] She knew the report was in the computer systems at her office by Friday afternoon, but she just did not download it or ask staff to do that, and she did not give it to the defense for Monday trial.[575] The week before this, DPA Rutherford had expedited a different police report in this case by immediate direct email,[576] and she could have done the same with this report to supply it promptly as required by CrR 4.7(h)(2).[577] She chose to not expedite receiving this report by having it sent by email like the other report because she generally prefers to not use email for discovery.[578]

DPA Rutherford's knew her plan to have this missing police report slow walked through the regular discovery processing and mailing would not supply it to the defense promptly as required

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[570] *See* Transcript of June 5, 2019 at 35-40, Docket No. 67; Transcript of June 3, 2019 at 97, Docket No. 65.
[571] *See* Transcript of June 5, 2019 at 35-40, Docket No. 67.
[572] *See* Transcript of June 6, 2019 at 32-33, Docket No. 68. See Transcript of June 3, 2019 at 92, 96, 98-9, Docket No. 65.
[573] *See* Transcript of June 5, 2019 at 35-40, Docket No. 67; Transcript of June 6, 2019, at 33, Docket No. 68.
[574] *See also* Transcript of June 3, 2019 at 92, 95, Docket No. 65.
[575] *See also* Transcript of June 3, 2019 at 92-94, 96, 97-9, Docket No. 65.
[576] *See* Transcript of June 6, 2019 at 19, Docket No. 68.
[577] *See* Transcript of June 3, 2019 at 99, Docket No. 65.
[578] *See* Transcript of June 6, 2019 at 32-33, Docket No. 68; See Transcript of June 3, 2019 at 92, 96, 98-9, Docket No. 65.

by CrR 4.7(h)(2) and the Omnibus Order. She knew it would result in the defense never knowing the report existed until several days into trial. She knew it would result in the defense not seeing the report in time to use it to prepare for trial. In fact, it may not have arrived until after trial was completely over.

According to a later prosecution staff member's declaration, this police report was not received by the defense through normal discovery mailing channels until six days after Detective Fagen sent it to the Prosecutor's Office, that is on Thursday, June 6, the fourth day of scheduled trial. That delivery date was after a rush was placed on it.[579] The later declaration from the Prosecutor's staff detailed the process when discovery is received via SharePoint and why there may be a time delay of several days before the discovery actually is received by the defense in the mail.[580] As many pieces of discovery may be coming in at once, it may be a long time before an item is downloaded by staff. Notice is then sent to the prosecutor to review it once it is downloaded. It then is processed by staff and eventually mailed to defense. After the police report was already turned over in the courtroom to all parties, for some unknown reason DPA Rutherford asked the discovery department to continue processing it for regular delivery, but to put a rush on sending it.[581] It is of note, that DPA Rutherford did not put a rush on this discovery until after she got caught withholding it.[582] Presumably without the rush this second copy may have gotten to the defense even later. Even with the rush, DPA Rutherford's plan for disclosure did not get this police report to the defense until the evening after the fourth day of what was supposed to be trial.[583] Had disclosure and delivery gone as DPA Rutherford planned, the

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[579] *See* Declaration of Tricia Stemler, Docket No. 35.
[580] *See id.*
[581] *See id.*
[582] *See id.*
[583] *See id.*

defense may not have gotten the lead detective's main narrative report until after the detective would have likely testified in this four day trial.

DPA Rutherford knew the kind of delay that might occur by using her chosen method of delivery because she has been a prosecutor for five years, and she indicated the normal way her discovery comes from the police is through SharePoint.[584] DPA Rutherford knew this discovery that was not yet even showing as having been downloaded from the SharePoint system as of the first day of trial if left to the normal process may not get to the defense via mail for days. She knew this because this is the system generally to obtain police discovery.

DPA Rutherford or the police caused the problem of the lead detective's report not being disclosed by the discovery deadlines by not requesting or sending the report earlier. DPA Rutherford then refused to do anything to deal with the problem she had created.[585] By not choosing any one of numerous quicker ways to get the material to the defense and not even telling the defense the report existed, DPA Rutherford assured the defense would not get the report until well into the trial. By choosing to let the receipt of the discovery be the notice of its existence rather than actually disclosing its existence, she prevented the defense from even having an opportunity to object to her slow method of delivery. The defense could not make a motion to compel this discovery because DPA Rutherford did not tell the defense it existed.[586]

DPA Rutherford's failure to obtain and disclose the lead detective's police report in a timely manner violated CrR 4.7, the Omnibus Court Order, and case law.

DPA Rutherford violated CrR 4.7(a)(1)(i) and (d) by not disclosing the existence or content of the lead detective's police report. Detective Fagen was a listed witness and this was a written

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[584] *See* Transcript of June 3, 2019 at 98, Docket No. 65.
[585] *See* Transcript June 6, 2019 at 32-33, Docket No. 68; Transcript of June 3, 2019 at 92, 94, 98, Docket No. 65.
[586] *See also* Transcript of June 6, 2019 at 33, Docket No. 68; Transcript of June 3, 2019 at 90-92, Docket No. 65.

statement by him. CrR 4.7(a)(1)(i) requires disclosure of written statements by witnesses by no later than omnibus.[587] DPA Rutherford violated this because CrR 4.7(d) required DPA Rutherford to use due diligence to obtain the police report from the officer as all police reports were requested by the defense.[588] CrR 4.7(d) provides, "Material held by others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant." Contrary to DPA Rutherford's insinuations, she cannot just sit back and do nothing and just send whatever happens to be sent her way. DPA Rutherford knew her lead detective's narrative report existed for months. She had a duty to request it in time to be produced for omnibus but made no request until two days before trial call. Her failure to request the lead detective's report for the four months leading up to trial was a clear violation of CrR 4.7(d) because the defense had requested police reports.

Apart from initially violating CrR 4.7(a) and (d) by never requesting the lead detective's report before omnibus, DPA Rutherford thereafter also violated CrR 4.7(h)(2) by not complying with her continuing duty to disclose. CrR 4.7(h)(2) provides that if a party *discovers* or receives additional material or information subject to disclosure after the time for disclosure has passed, "the party shall *promptly* notify the other party or their counsel of the *existence* of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified."CrR 4.7(h)(2)(emphasis added). DPA Rutherford admitted she was aware this report was missing by no later than the Wednesday before trial when she requested the

[587] *See* Omnibus Order, Docket No. 15 (requiring disclosure by May 13); Defense Demand for Discovery, Docket No. 9 (requiring disclosure of witnesses written statements); Transcript of June 3, 2019 at 90-92, Docket No. 65 (DPA Rutherford admits defense still doesn't have statement midway through first day of trial).
[588] *See* Defense Request for Discovery, Docket No. 9.

lead detective to send it to her. Her failure to promptly notify the other party of the *existence* of this additional material was a violation of the obligation to make continuing disclosure pursuant to CrR 4.7(h)(2). DPA Rutherford's obligation to promptly notify defense of the *existence* of the missing discovery did not require her to have the report in hand. One she knew it was missing she had to report that fact promptly. She instead failed to disclose it through three court hearings and admitted she had no intent to disclose existence at all.

She also failed to promptly supply the report when her office received it. The lead detective sent his narrative report via instantaneous electronic SharePoint delivery to DPA Rutherford's office the Friday afternoon of trial call.[589] It was actually sitting in the computer system of the Prosecutor's Office by Friday afternoon. DPA Rutherford was aware the report was sent via SharePoint because the lead detective told her. In blatant disregard of CrR 4.7(h)(2), she did not "promptly" notify the defense of a missing police report and did not have her office download the report and supply it to defense counsel.

The Omnibus Court Order incorporating the Defense Discovery Request mirrored the above requirements of CrR 4.7.[590] All of DPA Rutherford's violations of CrR 4.7 described above also violated the court order. The Omnibus Court Order required the production of the written statement of the lead detective as a listed witness,[591] required the prosecution to obtain the police report from the police,[592] and imposed a continuing duty to disclose the existence of any new evidence promptly.[593]

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[589] *See* Omnibus Court Order, Docket No. 15; Defense discovery Request, Docket No. 9 (The Omnibus Order ordered each party to disclose what had been requested by the other and thus incorporated the Defense and Prosecution Discovery Requests.)
[590] *See id.*
[591] *See id.*
[592] *See id.*
[593] *See id.*

Washington case law also finds the failure to provide a lead detective's narrative case report until the middle of trial may violate the defendant's right to a fair trial because disclosing significant information that late interferes with the constitutional right to have adequately prepared counsel. *See e.g., State v. Brooks*, 149 Wash. App. 373. In *State v. Brooks, supra,* the State's case was dismissed for discovery failures similar to those in this Guinn case, including a failure to provide the lead detective's report until trial. The Brooks court found such discovery violations to be misconduct stating,

> "Dumping the amount of information into the lap of the defense attorneys subsequent to the omnibus hearing and on the day of trial when it was not newly created or discovered and which had been available for weeks is simply unfair and unacceptable."…. The State cannot by its own unexcused conduct force a defendant to choose between his speedy trial rights and his right to effective counsel who has had the opportunity to adequately prepare a material part of his defense.
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> The Sate failed to deliver [the] Deputy['s]… report and he was the lead detective on the case. It seems unlikely that this report could be immaterial in any circumstance and it was certainly material as to how defense counsel would have interviewed the investigator at trial. The delayed and missing discovery prevented defense counsel from preparing for trial in a timely fashion.

See State v. Brooks, supra at 387 (citations omitted).

Furthermore, in this case, the prosecution had a separate constitutional obligation to disclose much of the information in the report because it was *Brady* information. The underlying notion behind the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), is that "society wins not only when the guilty are convicted, but when criminal trials are fair."[594] Thus, the United States Supreme Court has held the government has an affirmative duty to disclose all information favorable to the accused that is exculpatory or is impeaching of a witness

[594] *See Brady v. Maryland*, 373 U.S. 83, 87(1963); *In re Stenson*, 174 Wash.2d 474, 486 (2012).

whose credibility is determinative of guilt.[595] The duty to disclose *Brady* material applies whether or not the material has been requested by the defense.[596] Individual prosecutors also have "a duty to learn of any favorable evidence known to the others acting on the government's behalf ...including the police."[597] In determining whether the failure to disclose *Brady* information is so prejudicial as to warrant later reversal because it violates due process, the withheld evidence will be considered collectively, not item by item.[598]

This detective's narrative report contained numerous different pieces of *Brady* impeaching and exculpatory information. Several of these new pieces of information are detailed below. The *Brady* impeachment material related to Emma May, whose credibility would determine the defendant's guilt as she supplied the only evidence connecting the defendant to the crime. DPA Rutherford had actual knowledge of this favorable impeachment and exculpatory information in the report, so she had an affirmative duty to disclose that information even if she did not have the report. She also had an obligation to obtain the *Brady* material from the police and disclose it. DPA Rutherford committed misconduct by failing to disclose exculpatory and impeaching *Brady* information that was favorable for the accused.[599]

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[595] *See U.S. v. Bagley*, 473 U.S. 667 (1985); Giglio v. U.S., 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Kohring*, 637 F.3d 895, 902 (2011)(reversed because government failed to disclose the witness had tried to solicit perjury and make other witnesses unavailable); *U.S. v. Brumel-Alvarez*, 991 F.2d 1452 (1992)(conviction reversed when government failed to disclose witness had previously lied); *In re Stenson*, 174 Wash.2d 474 (2012)(capital murder reversed because State failed to disclose gunshot residue testing was done by expert other than the one who testified); *State v. McDonald,* 122 Wash.App. 804 (2004)(reversed because State failed to disclose information that could have impeached victim)

[596] *See U.S. v. Agurs*, 427 U.S. 97, 107 (1976); *In re Stenson*, 174 Wash.2d 474, 486 (2012).

[597] *In re Stenson*, 174 Wash.2d 474, 486 (2012) quoting *Strickler v. Greene*, 527 U.S. 263 (1999).

[598] See *U.S. v. Kohring*, 637 F.3d 895, 902 (2011); *In re Stenson*, 174 Wash.2d 474, 487 (2012).

[599] *See also U.S. v. Bagley*, 473 U.S. 667 (1985); Giglio v. U.S., 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Kohring*, 637 F.3d 895, 902 (2011)(reversed because government failed to disclose the witness had tried to solicit perjury and make other witnesses unavailable); *U.S. v. Brumel-Alvarez*, 991 F.2d 1452 (1992)(conviction reversed when government failed to disclose witness had previously lied); *In re Stenson*, 174 Wash.2d 474 (2012)(capital murder reversed because State failed to disclose gunshot residue testing was done by expert other than the one who testified); *State v. McDonald,* 122 Wash.App. 804 (2004)(reversed because State failed to disclose information that could have impeached victim)

Withholding the lead detective's narrative report was not just a technical violation; given the nature of the new information in the report it was a substantive prejudicial violation. DPA Rutherford admitted the lead detective was going to be a significant witness.[600] The report covered the lead detective's ongoing and substantial investigation over the four months prior to trial.[601] The large volume of new impeachment and other suspect information in the missing report would not be useful to the defense unless the defense was aware of the information before trial.[602] Defense counsel Aull detailed numerous new items of significant information contained in the narrative report that were not in the prior discovery, and he explained their significance to the defense case and the need to have the information in advance for it to be useful at trial.[603]

Both sides agreed and/or a comparison of the lead detective's narrative report to the discovery[604] received up until trial showed that some of the new previously undisclosed information included the following:

- Emma May's attorney affirmatively stated Emma May lied in her first statement to the police about the identity of three of the robbers after the tape was turned off during the proffer interview.[605] This was *Brady* impeachment information. The reference to this is oblique in the lead detective's report, but it is the only mention of this in any discovery. The detective later testified this direct admission to lying was stated during the proffer interview when the tape was turned off in Emma May's presence. The fact the State's only witness who tied the defendant to the crime admitted she outright lied to the police about who committed the crime was major impeachment evidence. As the police and prosecutor never asked Emma May during the taped interview why her stories differed as to the robbers' identities, there was an inference, but not direct admission she had lied from the fact she named different co-suspects. The new evidence in the police report was that Emma May's speaking agent attorney said Emma May lied to the police in Emma May's presence. Without this evidence it would have been possible for Emma May to claim her prior statement was a mistake, she gave nicknames for the same people, or other excuses. This also debunked a prosecution theory DPA Rutherford repeatedly tried to sell that Emma May identified the same people in both stories, but they were just

[600] Transcript of June 6 2019 at 31, Docket No. 68.
[601] *See* Exhibit 9, June 3-7 Hearing (Lead Detective's 33 page narrative report).
[602] *See also* Transcript of June 3, 2019 at 125-127, 135-36, 142-45, 164-200, Docket No. 65.
[603] *See also* Transcript of June 3, 2019 at 125-127, 135-36, 142-45, 164-200, Docket No. 65.
[604] *See* Exhibit 1, August 16, 2019 Hearing of Motion for Sanctions (all the discovery pretrial and post trial).
[605] *See* Transcript of June 3, 2019 at 126-28, 189, Docket No. 65.

nicknames in the first story. Without this information from the report that Emma May made up the first names, Emma May and DPA Rutherford would have been free to sell the false nickname theory to the jury rather than have to admit Emma May lied.

- The police had developed a theory to try and explain one of the different names of the robbers between Emma May's first and second stories. She first named the shooter as A.D. and later named the shooter as Damon Wilson. The police speculated that maybe A.D. was Damon Ali Wilson's first and middle initials reversed.[606] However, Emma May never corroborated this, nor was there any reference in police data banks showing Damon Wilson went by A.D. This appeared to be a totally speculative theory the prosecution wanted to throw out to explain away Emma May's major lie as to the robbers' identities in her first statement. This new police report not only revealed this theory, but also debunked this theory by disclosing Emma May's attorney in Emma May's presence disclosed Emma May made up the first set of names. Throughout argument in this case, DPA Rutherford argued this false nickname theory although Emma May never claimed the first group of names she gave were nicknames for the second group of named individuals and this missing police report showed DPA Rutherford's theory was wrong.

- The police believed in February or March that they had identified and knew who one of the robbers was that Emma May had listed in her first statements. They thought they had positively identified one of the robbers as being one Gerald Wallace via phone contacts in Emma May's phone.[607] This police confirmation of one of the named robbers in the first set of Emma May statements put in question which set of named robbers might be the real ones and whether the police techniques of corroborating Emma May's identifications were very accurate. Emma May in her second statement did not identify Geraud or anyone with any similar name as having done the robbery. This was evidence to impeach the police or Emma May's changing stories.

- Damon Wilson, the person Emma May identified as the shooter in her second story was, according to the police, associated with the TRG gang. This was inconsistent with Emma May's claim Damon Wilson was associated with the Crypts. This was more detail to add to already existing problems with Emma May's overall unlikely claim that the robbers were both Crypts and Bloods, gangs that don't hang out together.[608] This was evidence to impeach Emma May.

- Emma May was claiming that while in jail people had tried to influence her testimony by making both threats and bribes to her. The defense indicated that in addition to the apparent impeachment value of showing someone had tried to influence the witness about her testimony which could have been criminals other than the defendant, if the defense had been given this information before trial it may have been able to prove Emma May made these claims up. However, that would require investigation to obtain Emma May's

[606] *See* Transcript of June 3, 2019 at 172, Docket No. 65.
[607] *See* Transcript of June 3, 2019 at 178-79, Docket No. 65.
[608] *See* Transcript of June 3, 2019 at 172-73, Docket No. 65.

records, Emma May's jail phone calls, determine the lack of reports by Emma May, and other investigation.[609] This was evidence that impeached Emma May.

- The police had in evidence the defendant's phone seized at the time of the defendant's arrest about a week after the crime in February. At the time the police seized the phone, another identified witness present at the scene indicated the phone belonged to that witness, but the defendant had been borrowing the phone for the last month, i.e., at the time of the crime. Defense counsel had never been advised in prior discovery that the police had seized a phone alleged to be the defendant's. Had the defense known, the defense could have used call data on the phone to establish where the defendant was and whom he was talking to on the night of the robbery. Furthermore, the fact the defendant had a working phone at the time of the robbery was inconsistent with and impeached Emma May's claim that calls on her phone right around the time of the robbery were not made by herself, but by the defendant who was borrowing her phone because he did not have a working phone. Emma May had tried to paint herself as not knowing a robbery was going to occur. Attributing phone calls on her own phone associated with other robbers to the defendant would help her do that.[610] This was evidence that impeached Emma May.

- Throughout the months of investigation the police had been doing ongoing investigation of the phone numbers found in the phones of Emma May and the victim. The narrative report contained all new information about that.[611] This included three phone calls that had been identified coming out or into Emma May's phone around the time of the robbery and one that was connected to a phone number connected to Damon Wilson, the person Emma May alleged was the shooter in her second story. This information had never before been disclosed to the defense leaving the defense unable to do any of its own investigation of the phone calls. [612]

- The police had obtained a phone number from Emma May's mother allegedly connected to the defendant that had never been disclosed in any other discovery and that didn't' match the defendant's phone in evidence or Emma May's phone.[613] This impeached Emma May's claim the defendant had no working phone and borrowed her phone.

- The report contained new evidence indicating the defendant had tried to get someone to delete something from a snap chat account. Emma May apparently set up the drug buy where the robbery occurred by snap chat.[614] This was evidence against the accused that the defense could not be prepared to meet at trial unless it knew about the evidence.

- About a week after the robbery the police had arrested one Sebastian Alfaro with a 380 gun and a backpack with a large amount of marijuana in it. A backpack with a large

[609] *See* Transcript of June 3, 2019 at 192, 200-01, 207-08, Docket No. 65
[610] *See* Transcript of June 3, 2019 at 169-72, 185-87, Docket No. 65.
[611] *See* Transcript of June 3, 2019 at 135-36, Docket No. 65.
[612] *See* Transcript of June 3, 2019 at 172, Docket No. 65.
[613] *See* Transcript of June 3, 2019 at 164-67, Docket No. 65.
[614] *See* Transcript of June 3, 2019 at 181-82, Docket No. 65.

amount of marijuana is what was stolen in this robbery and had never been found by the police despite having served a search warrant on both Emma May's car and home.[615] Based on connections between Sebastian Alfaro and persons involved in this case, the lead detective in this case believed this 380 gun found on Alfaro may have been the gun used by the shooter in this case. Thus the police had sent this other gun to the WSP Crime Lab to check for fingerprints, DNA, and ballistics. The lead detective had been aware of all this since February, the beginning of the case. Prior to this police report being disclosed in the middle of trial, the defense had received no information about this other suspect. The only prior reference of any kind in discovery was a lab request sent to the defense two day before trial call showing the police had another gun. There was no explanation where the gun came from or why the prosecution believed it may be related to this case. The defense alleged it would have investigated this other suspect information to try to present it to the jury if it had been provided the information before trial.[616]

- The arrest history of Sebastian Alfaro showed he was connected to Damon Wilson. They were also both connected to a criminal named Alcaraz.[617] Emma May had called one of the robbers Taz. This was other suspect evidence.

- Throughout the investigation, the police had made ongoing efforts to confirm the identities of the other persons Emma May had identified as being the robbers. With the exception of Damon Wilson, they were unable to match the other new names and descriptions she gave with any real person. This was impeachment information against Emma May.

- This lead detective narrative report indicated the proffer interview occurred on April 2 and summarized the content of that interview. Thus, if this police report had been released anytime during the pretrial period, it would have cured one of the other major discovery violations in this case, the nondisclosure of the proffer interview and recording. This proffer interview summary contained additional exculpatory and impeaching facts as outlined in another section in this opinion discussing the proffer interview. *See* Section III. 4, *supra.*

The lead detective's narrative report that was not disclosed until the middle of trial contained never before disclosed significant *Brady* evidence to impeach Emma May, and it also contained other suspect information. Despite this, when DPA Rutherford was first caught hiding the report she claimed she had not thought it important to disclose this report because she didn't

[615] *See* Transcript of June 3, 2019 at 168-69, 182-83, Docket No. 65.
[616] *See* Transcript of June 3, 2019 at 135-36, 168-69, 175-76, 193-94, 200, Docket No. 65; Transcript of June 6, 2019 at 8-11, 21-23 Docket No. 68.
[617] *See* Transcript of June 3, 2019 at 174, 178, Docket No. 65.

think it would add much.[618] Thus, the defense had to go through item by item to identify each new piece of evidence, at which time DPA Rutherford either agreed or did not dispute these items were new information and that the State had known the information for months.[619]

DPA Rutherford's plan to have the lead detective's main report processed and mailed in the middle of trial would have resulted in the defense not having the significant impeachment information in this report when the defense interviewed or cross-examined Emma May. It also foreclosed the defense's ability to investigate and present other suspect and impeachment evidence.

The response of the Prosecutor's Office to the Sanctions Motion focused on the initial potentially inadvertent or negligent delay in requesting and getting the lead detective's narrative for four months pretrial. It completely ignored DPA Rutherford's actions in continuing to withhold the fact of the existence of a missing report after she realized the report was missing. It ignored the failure to disclose the report even after it was received by the Snohomish County Prosecutor's Office. It also ignored DPA Rutherford's explicit admissions that the later *continuing* nondisclosure of this report was done deliberately per a conscious plan/choice to just let the report go through the normal eventual slow delivery channels.[620]

I am not imposing any sanction for the fact DPA Rutherford failed to request and disclose her lead detective's narrative report for four months, even though she admitted she knew there was a report, even though she admitted the detective kept her fully informed he was conducting significant ongoing investigation, even though she admitted she had read an ongoing affidavit for search warrant showing the new investigative information that would be in the narrative report,

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[618] *See* Transcript June 3, 2019 at 141-42, 210, Docket No. 65.
[619] *See also* Transcript of June 3, 2019 at 126-128, 164-189, 193-208, Docket No. 65.
[620] *See* Transcript of June 3, 2019 at 92, 98, Docket No. 65.

and even though she admitted she did a review of the case discovery to see what was missing around May 20 and asked for the other missing discovery to be supplied by this same detective. The initial failure to disclose, even though it lasted for months, could have been due to DPA Rutherford assuming the police sent her everything and the matter just mistakenly falling through the cracks. I find no sanction should be imposed for that nondisclosure, giving DPA Rutherford the benefit of the doubt that this may have been simple negligence or mistake due to her life circumstances.

However, I find DPA Rutherford should be sanctioned for her continuing nondisclosure after she realized the report was missing from discovery. In particular, she is hereby sanctioned for deliberately not thereafter disclosing promptly to the defense and court the existence of the missing report and for deliberately not immediately turning it over to the defense once the police actually delivered it to her office via SharePoint.

Once DPA Rutherford realized two days before trial call that the lead detective's narrative report had never been disclosed, her continuing failure to disclose even the fact this outstanding discovery existed was a deliberate conscious choice that she has provided no justification for.[621] DPA Rutherford understood this was discovery that had to be disclosed; that is why she admitted she requested the detective send her the report right away. Within about two days of requesting the missing report she was briefing and arguing against a CrR8.3 Motion to Dismiss based on allegations she committed mismanagement by withholding other discovery. This put her on notice she needed to disclose this missing discovery if she wasn't already aware.

This withholding was egregious because DPA Rutherford was actually withholding the existence of missing discovery during a motion against her for withholding other discovery. One

[621] *See* Transcript of June 6, 2019 at 33, Docket No 68.

of the main appellate cases I read for that CrR 8.3 Motion to Dismiss was a case upholding a CrR8.3 dismissal based, in part, on the prosecution waiting until right before trial to disclose the lead detective's police report.[622] During the Motion to Dismiss for withholding discovery DPA Rutherford argued the case should not be dismissed because the discovery violations were not as bad as the violations in the cases cited by the defense,[623] but she omitted to advise the court that there were still many other pieces of discovery she was withholding that the defense knew nothing about, including the lead detective's entire narrative report.[624]

As trial began, DPA Rutherford still did not tell the defense there was a major police report missing,[625] and she knew the fact the defense did not know this was prejudicial to the defense. The defense could not move to compel the missing report or move to have it produced expeditiously if the defense did not know the report even existed. The fact the prosecution had not disclosed the lead detective's report would also have been an extremely potent additional fact for the defense to add to its many other ground to dismiss for prosecutorial mismanagement of discovery. The defense could not add this withholding to its Motion to Dismiss because DPA Rutherford withheld the fact she was withholding another item. There was *Brady* information, other suspect information and potential witnesses the defense would want to follow up on contained in the report.[626] However, to do that follow up the defense would have to continue the case. By not disclosing even the existence of the missing report before trial began, the defense would not know it might need a continuance to follow up on the undisclosed information. Even if the defense got the report by the end of trial, it would be then too late to ask for a continuance

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[622] *See State v. Brooks*, 149 Wash. App. 373.
[623] *See* Response to Motion to Dismiss, Docket No. 30. *See generally* Transcript of June 3, 2010, docket No. 65 (no disclosure during beginning of argument on motion).
[624] *See id.*
[625] *See* Transcript of June 5, 2019 at 35-40, Docket No. 67; Transcript of June 3, 2019 at 1-92, Docket No. 65 (first disclosure of missing police report is at page 92 in response to direct questions from the court).
[626] *See* Exhibit 9, June 3-7 Hearing (Lead Detective's Narrative Report).

to follow up on the new leads in the report. Failure to produce the report also hampered the defense's preparation of cross-examination of the lead detective who was considered a significant witness in this case.[627] DPA Rutherford would have been aware of all these forms of prejudice to the defense that flowed from not disclosing the main police report.

DPA Rutherford did not claim her failure to reveal the existence of this missing discovery was an accident; she admitted it was a deliberate choice.[628] When asked when she was going to advise the defense of the existence of this missing report, her response was that she thought about it and just decided to let the delivery of the report at some unknown future time be disclosure of its existence.[629] When asked why she did that, she indicated she had decided to no longer talk with defense counsel Aull but communicate with him only by writing.[630] This of course did not explain why she just didn't email defense counsel or send him a short discovery memo telling him there was a missing report. Her explanation was defense counsel would know it existed when defense counsel got it, and that would be good enough disclosure of its existence.[631] Deliberately choosing to send the lead detective's report by snail mail so the defense would not receive it until several days into trial was not a valid excuse for violating a court order and a court rule that imposed a continuing duty to *promptly* disclose the *existence* of other discovery after the discovery deadline has passed. See CrR 4.7(h)(2).

DPA Rutherford said she *decided* to let receipt of the report several days into trial be the notification the report existed. This is an explanation of a deliberate choice. This was a decision; it was not an accident. DPA Rutherford was not claiming she just forgot this, as it would be hard

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[627] *See* Transcript of June 6, 2019 at 31, Docket No. 68.
[628] *See also* Transcript of June 6, 2019 at 33, Docket No. 68; Transcript of June 3, 2019 at 92, 98, 99, 140-41, 206-07, Docket No. 65; Transcript June 5, 2019 at 35-38, Docket No. 66.
[629] *See* Transcript June 3, 2019 at 209, Docket No. 65.
[630] *See* Transcript June 3, 2019 at 140, Docket No. 65.
[631] *See, e.g.,* June 3, 2019 at 209, Docket No. 65.

to claim you accidently forgot to mention the major missing discovery during a motion about whether there was enough discovery missing that the case needed to be dismissed. It would also be hard to claim you forgot this when you just requested it from the detective within the last few days.

Even now, DPA Rutherford has provided no valid explanation at all as to why she did not even tell the court and the defense about the missing police report. All she had to do was open her mouth and state it *existed* and was missing during motions, at trial call, in her briefing or during the first day of trial. She did not need the police report in hand to fulfill her duty to disclose the existence of the missing discovery promptly. Instead she *decided* even though the trial was in progress to just let eventual receipt by defense counsel at some unknown future date of delivery by slow mail be notice of the existence of the discovery. This was a clear admission this act was willful. DPA Rutherford herself eventually admitted there was no justification for this.[632]

DPA Rutherford not only violated her duty to promptly disclose the *existence* of the missing discovery, but also failed to turn over the additional discovery *promptly* to the defense and the court in the middle of trial, in violation of CrR 4.7 and the Omnibus Order. DPA Rutherford admitted she did nothing to expedite the delivery of this report to the defense after her office received it on Friday, on the weekend, or during trial.[633] She deliberately chose a slow method of mailing this report that would take days rather than just handing a copy to the defense in court immediately.[634] She admitted that using this method she had no idea when or if the discovery would be delivered because it was not yet even showing in the SharePoint system as

[632] *See* Transcript of June 3, 2019 at 141, 206, 209-13, Docket No. 65; Transcript of June 4, 2019 at 39, Docket No. 66; Transcript of June 5, 2019 at 39-40, 63-64; Docket No. 67; Transcript of June 6 at 33, Docket No. 68.
[633] *See* Transcript of June 6, 2019 at 32-33, Docket No. 68.
[634] *See* Transcript of June 3, 2019 at 92, 98-99, Docket No. 65.

being downloaded as of the first day of trial.[635] DPA Rutherford also admitted she had actually checked to see the progress of delivery through SharePoint on the first day of trial, and even though there was no progress in it showing up downloaded she still deliberately chose to continue with her original delivery plan, i.e., just wait for the report to go through the regular discovery processing and be mailed someday to defense.[636] By the first day of trial, at best DPA Rutherford had no idea when the discovery might get to the defense using her chosen method, as she admitted. At worst, she probably knew full well based on her years of experience it would take several days to go the usual route. Because it was the middle of trial, DPA Rutherford no longer had the option to choose the regular slow method of delivery; she was legally required at that point to immediately advise the court and the defense of the existence of the report and promptly hand it over to the defense. See CrR 4.7(h)(2).

There were easy simple ways to get this report to the defense promptly as required rather than the slow walk DPA Rutherford *chose*. When she was requesting the report really late, two days before trial, DPA Rutherford could have simply asked the detective to walk a copy of the report to her when it was ready. The detective's office and her office are both in the courthouse and the same detective walked copies of other discovery in this case to DPA Rutherford on both May 28th and May 31st at her request.[637] It would be disingenuous to claim she just didn't know or think to have the detective do this when she was having him do it for other discovery at the very same time. As the detective was in court with her at trial call and every day all day during trial, she could have simply asked him to bring a copy of the report to court and hand it to defense counsel. The detective's office is in the courthouse. The record in this case, indicated

[635] *See* Transcript of June 3, 2019 at 92, 98-99, Docket No. 65.
[636] *See id.*
[637] *See* Transcript of June 5, 2019 at 39, Docket No. 67.

Detective Fagan was very accommodating in doing what DPA Rutherford asked immediately, including similar requests to immediately hand deliver other discovery to her.[638] In fact, in the end, as DPA Rutherford was continuing to refuse to immediately turn the police report over during trial, Detective Fagen whipped out his phone and immediately sent it by email in the matter of one minute and we had it printed in the courtroom a few minutes later.[639] DPA Rutherford could have simply asked the detective to email it to her directly on Friday after it was completed as she had done with another report in this case the week before.[640] Another way this could have been accomplished promptly was Deputy Rutherford could have simply alerted her staff it had been sent to SharePoint and asked them Friday afternoon or Monday morning to immediately download it and print her a copy to bring to trial the first day. Knowing this discovery was seriously late, DPA Rutherford had many quick and easy ways to get it to the defense immediately as required under the discovery rule and Court Order. She admitted she simply just chose to do it the slow way.

Parties are free to send their discovery any way they choose under normal circumstances, so long as it gets there timely in compliance with the rules. However, a party cannot create a need to expedite discovery by its own inactions and then chose to send discovery in a manner that the party knows will cause the discovery to be disclosed in violation of CrR4.7, a court order, and due process. DPA Rutherford's failure to turn this report over after it was in the possession of her office and when the author of the report was sitting next to her and could have easily immediately supplied it was game playing by DPA Rutherford.

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[638] *See* Transcript June 4, 2019 at 150, docket No. 66; Transcript June 5, 2019 at 39, Docket No. 67.
[639] *See* Transcript of June 3, 2019 at 99-100, Docket No. 65.
[640] *See id.*

The brief of the Prosecutor's Office's in response to the Motion for Sanctions emphasized that DPA Rutherford had no duty to disclose items not in her possession, citing CrR4.7.[641] At trial DPA Rutherford also indicated she could do nothing because the report was not in her possession, but the possession of staff of her office.[642] This argument is legally incorrect or inapplicable to these particular circumstances for four reasons.

First, the court is not sanctioning DPA Rutherford for the period she did not have the report; the sanction is for the period she had the report. Detective Fagen submitted a credible sworn declaration he sent this report by SharePoint's instantaneous method the afternoon of trial call,[643] and the Prosecutor Office's staff submitted a sworn affidavit it was received by SharePoint.[644] During the relevant time period being sanctioned, this report was within the actual possession and control of the Snohomish County Prosecutor's Office, which is legally in the possession of DPA Rutherford. DPA Rutherford also knew Detective Fagen had sent it Friday by the instantaneous SharePoint method of delivery and thus knew that it was in her office's possession even if was not in her hands. Detective Fagen was with her at all court hearings to tell her the status of his report. Yet she continued to not have someone simply download it and continued to not disclose its existence in her briefing and argument thereafter. Once DPA Rutherford had the lead detective's report in her office's possession, she was required to produce it pursuant to CrR4.7(1). Once she was aware of its existence, which was certainly no later than when she

[641] *See* Memorandum in Opposition to Additional Sanctions, Docket No. 52.
[642] *See* Transcript of June 3, 2019 at 91-92, 113, Docket No. 65; Transcript of June 4, 2019 at 150, Docket No. 66; Transcript of June 5, 2019 at 39, Docket No. 67.
[643] *See* Declaration of Eric Fagen, Docket No. 64.
[644] *See* Declaration of Tricia Stemler, Docket No. 63.

requested it, she had a duty to disclose its existence pursuant to CrR 4.7(h)(2).[645] She did not produce or disclose it at all ever.[646]

The second reason the Prosecutor's Office's argument is wrong is because DPA Rutherford had a legal duty to disclose certain information in the police report she had actual *knowledge* of, even if she did not have the report in hand. This especially included all the *Brady*/impeachment information and other suspect potentially exculpatory information. CrR 4.7(a)(3) states, " the prosecuting attorney *shall* disclose to defendant's counsel *any* material or information *within the prosecuting attorney's knowledge* which tends to negate the defendant's guilt...."[647] The Agreed Omnibus Order and the *Brady* case law also required the same, that is, they require the prosecutor to disclose any *Brady*/impeachment information within her *actual knowledge*.[648] There was substantial *Brady*/impeachment information in the report that DPA Rutherford had actual knowledge of, even before she got the report. She admitted the detective had told her everything and kept her fully advised of all the ongoing investigation. She admitted she read his undisclosed draft affidavit for search warrant where the detective testified he was storing all his investigative information.[649] She knew everything in the summary of the proffer interview because she was at the interview. DPA Rutherford stated she had no need for the report for her own purposes because she was aware of everything.[650] DPA Rutherford had a duty to turn over all her *knowledge* regarding *Brady* impeachment material in the report, even if she did not yet have possession of the written report containing it. Memorializing that knowledge and

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[645] *See* CrR 4.7(h)(2); Omnibus Order, Docket No. 15; Defense Discovery Request at 4, Docket No. 9 (incorporating the continuing duty to disclose of CrR 4.7(h)(2).
[646] *See also* Transcript of June 6, 2019 at 33, Docket No. 68; *See* Transcript of June 3, 2019 at 92, Docket No. 65.
[647] CrR 4.7(a)(3).
[648] *See* Omnibus Order, Docket No. 15; Defense Discovery Request, Docket No. 9.
[649] *See* Transcript of June 3, 2019 at 94-95, 99, Docket No. 65.
[650] *See* Transcript June 3, 2019 at 94-95, 135, Docket No. 65; Transcript June 4, 2019 at 39, Docket No. 66.

sending it to the defense was a legally required hassle once the discovery deadlines passed, unless she produced the report instead.

Third, apart from CrR 4.7, there was a specific broad Agreed Omnibus Order that separately also mandated production. The Omnibus Order required DPA Rutherford to obtain this written statement of the lead detective witness from the police and then disclose it. The Agreed Omnibus Order required the parties to comply with each other's discovery requests.[651] The defense discovery request specifically, "demands that the State provide … the following information within the knowledge control or possession of the State, its agents …, ***or law enforcement agencies, or which by the exercise of due diligence might become known to them.***"[652] One of the listed items mandated to be provided was the police reports.[653] This missing police report was within the control of law enforcement agencies and DPA Rutherford by the exercise of due diligence could have easily gotten a copy of it. DPA Rutherford had a copy in her actual possession by the time this case began. DPA Rutherford violated the court order mandating her to get possession and then give possession to the defense.

Fourth, the fact DPA Rutherford did not have the report in her hand, also does not excuse her violation of the requirement of CrR 4.7(h)(2) that she immediately during trial advise both the court and the defense of the *existence* of missing discovery. The "Continuing Duty to Disclose" section of CrR 4.7(h)(2) states, that after discovery deadlines pass "If …a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the *existence* of such additional material, and if the additional material or information is discovered during trial, the court shall also be

[651] *See* Omnibus Order, Docket No. 15.
[652] Defense Discovery Request, Docket No. 9.
[653] *See id.*

notified."[654] The very purpose of this rule is to allow the court and opposing counsel to know something is missing so that they can be sure the material can be obtained expeditiously. Even if we assumed DPA Rutherford did not have the report in her possession because it was in her office rather than her hand, she had discovered its existence and she had a duty to promptly disclose its existence. She admitted she realized the report was missing no later than the Wednesday before trial, yet she never disclosed it in briefing or during the three court appearances thereafter.[655] Not even during trial did she ever disclose it until forced to do so.

When it was discovered, she admitted she had no intent of promptly disclosing its existence to the defense or the court during trial. She planned to just silently mail it and have the first disclosure of its existence be the receipt in the mail four days later. This violated CrR 4.7(h)(2), and the Court Omnibus Order incorporating the Defense Request for Discovery which incorporated CrR4.7(h)(2) requiring prompt disclosure of the existence of the missing material.[656]

The initial three-to-four month delay in requesting the lead detective's main narrative report may have been just a mistake. However, after it came back to DPA Rutherford attention the lead detective's narrative report had never been disclosed at least five days before trial, her continued nondisclosure of the existence of this missing discovery combined with the slow chosen method of delivery were willful choices that violated the prompt disclosure requirements of CrR4.7, the Omnibus Court Order and constitutional case law. These acts should be sanctioned.

6. DPA RUTHERFORD WITHHELD THE MAIN EVIDENCE SHE INTENDED TO USE TO PROVE A NEW FIREARM CHARGE DURING A HEARING ON WHETHER THE DEFENSE HAD ADEQUATE NOTICE TO TRY THE CHARGE.

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[654] CrR 4.7(h)(2).
[655] *See* Transcript of June 5, 2019 at 35-40, Docket No. 67; See Transcript of June 3, 2019 at 95, Docket No. 65.
[656] *See* Omnibus Order, docket No. 15; Defense discovery Request at 4, Docket No. 9.

During a contested motion as to whether the defense had received adequate notice to allow the State to file the new Unlawful Possession of a Firearm charge, DPA Rutherford hid the fact she still had not disclosed the main evidence she intended to use to prove the charge. On the morning of Friday trial call day, DPA Rutherford sought to file an additional charge of Unlawful Possession of a Firearm.[657] The defense argued lack of notice because the State was adding a charge the day of trial call, and the defense also asserted there were not facts in the current discovery sufficient to support probable cause for the new charge.[658] DPA Rutherford position was the defense had previously been told the charge would be added.[659]

Normally adding a charge late is fine if prior notice has been given that the charge will be added. However, this is under the assumption that the State's evidence to prove the new charge has been in discovery all along so those facts are not a surprise to the defense.

While it was true DPA Rutherford had given notice the charge would be added,[660] unbeknownst to the defense or the court, the prosecution had never revealed to the defense in discovery the main evidence it intended to use to prove the charge. Although it was highly pertinent to whether or not the defense had adequate notice to try the charge, DPA Rutherford did not reveal she was planning to disclose her main evidence to support this charge later at trial call and in the middle of trial.[661] The defense did not know even know this evidence existed.

The Friday Criminal Motions judge did not have time to consider the lack of probable cause argument and deferred that to trial, but ruled there was notice that the charge would be filed because on the Omnibus Order the State indicated the charge would be filed if the defendant did

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not plead guilty.[662] No issue was raised as to whether the defense had been provided adequate discovery on the charge, because the defense was unaware it was missing any discovery for this charge.[663] By hiding the fact she had all new evidence yet undisclosed on this charge, DPA Rutherford circumvented the defense from using the late disclosure of evidence to prevent the late addition of the charge.

As the motion was being heard as to whether the prosecution had supplied sufficient notice to file the new charge, DPA Rutherford hid the fact she intended to spring all new evidence on the defense after the motion. This included three never before disclosed key pieces of evidence.

First, DPA Rutherford failed to disclose exculpatory *Brady* evidence relating to the Unlawful Possession of a Firearm: witness Emma May who had been with the defendant throughout the time he allegedly possessed the gun never saw him holding any gun.[664] The original discovery and affidavit of probable cause had implied prosecution witness Emma May would testify the Defendant possessed a gun during the charged time. DPA Rutherford had attended an interview of this witness after the affidavit of probable cause was filed but two months before trial. During that interview, witness Emma May stated something different than what was suggested in the affidavit of probable cause. Emma May admitted she had never actually seen the defendant holding a gun on the night in question; the witness admitted she had just assumed the defendant possessed a gun because he often possessed a gun. Witness Emma May was with the defendant throughout the night of the robbery, drove the robbers to and from the robbery, sat next to the defendant in the car, and she watched the robbery. The fact she never saw the defendant holding a gun that night was significant exculpatory evidence as to the charge

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of Unlawful Possession of a Firearm. Although DPA Rutherford was personally aware of this exculpatory evidence two months before trial, she still had never disclosed that to the defense as of the morning of trial call. When the defense objected to adding the firearm possession charge at that time, she still did not disclose it.[665]

DPA Rutherford had a legal duty to inform the defense of the exculpatory fact that an eyewitness in a position to see, never saw the defendant possessing a gun during the charged time the prosecution alleged the defendant possessed the gun. DPA Rutherford violated CrR4.7, the Court Omnibus Order, and constitutional case law by withholding this information.

DPA Rutherford violated CrR4.7(a)(3) that states that by the time of omnibus, "the prosecuting attorney **shall** disclose to defendant's counsel any material or information within the prosecuting attorney's **knowledge** which tends to negate defendant's guilt..."(emphasis added). DPA Rutherford violated CrR 4.7(a)(3) because she had personal knowledge of the exculpatory information before omnibus because she attended the interview of Emma May.

DPA Rutherford also violated the Omnibus Court Order by not turning over exculpatory evidence. The Agreed Omnibus Order ordered the parties to disclose the information requested by a set date about three weeks before trial. This included the defense request that the "State provide ... the following material and information within the **knowledge**, possession or control of the State .... XII. EXCULPATORY EVIDENCE: 1. ...any and all information or material which may tend to exculpate the defendant or negate the defendant's guilt ... including any statements by informed witnesses...." DPA Rutherford violated the court order because she had personal knowledge of this exculpatory evidence by the date she was ordered to disclose it, and she did not disclose it.

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Well-established federal and state constitutional case law also places a duty on the prosecution to disclose any *Brady* exculpatory evidence it is aware of.[666] Due process requires this exculpatory evidence be provided sufficiently in advance of trial so the defense can use it effectively for trial.[667] DPA Rutherford violated this duty because she was at the interview where Emma May disclosed the exculpatory information and did not disclose it before trial call.

DPA Rutherford had to disclose this exculpatory evidence whether or not she had it in any police report or on any tape recording in her possession because she had actual knowledge of the exculpatory information.[668] DPA Rutherford clearly violated CrR4.7, a Court Order, and constitutional case law by not disclosing exculpatory *Brady* information long before the morning of trial call when a hearing was occurring as to whether the defense had adequate notice of the evidence on this charge to proceed to trial.

The second critical piece of evidence relating to the Unlawful Firearm Possession charge that DPA Rutherford continued to hide during the motion to add the charge was an alleged statement/confession by the defendant.[669] During the interview of Emma May that DPA Rutherford attended two months before trial, Emma May claimed the defendant had told her he possessed a gun on the night in question. DPA Rutherford later admitted she planned to use this undisclosed confession of the defendant to prove the possession element for the firearm charge. In fact, since Emma May never saw the gun, this alleged statement by the defendant was the only evidence DPA Rutherford had to prove the possession element. Even though DPA Rutherford became aware of the defendant's alleged statement two months before trial, she did not disclose it to the defense. Although DPA Rutherford planned to prove the possession element of the crime

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solely using an alleged confession by the defendant, she had never disclosed this alleged statement to the defense as of the morning of trial call. She continued to withhold her *only* evidence of possession, an alleged confession of the defendant, during the hearing on whether the defense had adequate notice to try the firearm possession charge.[670]

DPA Rutherford violated CrR 4.7, the Court's Omnibus Order, and case law requirements by not disclosing an alleged statement of the defendant she intended to use as her sole evidence to prove the element of the crime at trial.

In every case, the prosecution is required by CrR 4.7(a)(1)(ii) and (4) to provide to the defense any written or recorded statements, and **the substance of any oral statements** made by the defendant that the prosecutor has **knowledge** of by no later than omnibus. DPA Rutherford had personal knowledge of the defendant's alleged statement because she was present during the interview when Emma May disclosed it more than a month before omnibus.[671] The substance of the defendant's oral statement was in her knowledge, so even though the defendant's alleged statement was not in writing or she did not have it in a police report, DPA Rutherford was still required by the rule to disclose the substance of any statement of the defendant by omnibus. See CrR 4.7(a)(1)(ii) and (4). While subsection (a)(1) of CrR4.7(a) does say to disclose the material within the prosecution's control, subsection (a)(4) clarifies that as to all subsections of CrR 4.7(a), possession or control applies to information within a prosecutor's knowledge. The rule states subsection (a) of CrR4.7 applies to "material and information within the **knowledge**, possession or control" of the prosecution.

DPA Rutherford also had a duty to disclose the defendant's alleged statement pursuant to a court order. The Agreed Omnibus Order ordered the parties to produce the items each had

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requested by a date certain about three weeks before trial.[672] The defense discovery request explicitly sought disclosure of any statement of the defendant the State intended to rely on at trial. It demanded, "the following … information within the **knowledge**, possession or control of the State.... III. DEFENDANT'S STATEMENTS… 1. All written or recorded statements and the substance of all oral statements made by the defendant …and the names, addresses, and telephone numbers of any persons present when such statements were made."[673] DPA Rutherford had personal knowledge of the alleged statement and later admitted this was what she intended to rely on to prove possession at trial. She violated the court order by not disclosing the defendant's statement and the name of the witness who allegedly heard it by the discovery deadline of May 13. She continued to violate the court order by withholding her only evidence of firearm possession on the morning of trial call during a hearing where the issue was whether the defense had adequate notice to defend the firearm possession charge.[674]

The third critical piece of information that DPA Rutherford hid during the hearing on whether the defense had adequate notice regarding this charge was the fact DPA Rutherford was intending to create new testing evidence and call a new testing witness relating to this new charge in the middle of trial.[675] DPA Rutherford secretly planned to have the police test the gun for operability in the middle of trial. She also planned to spring the test results, the new spent bullets and new witness testing testimony on the defense in the middle of trial. The facts surrounding this with citations to the record are discussed at length in Section III. 7, *infra*. The statutory definition of firearm for this charge is a device capable of shooting a projectile via an

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explosive such as gunpowder.[676] DPA Rutherford was planning to gather the evidence to prove this element of the crime, i.e., that the gun was operable, in the middle of trial by having the gun test fired in the middle of trial. DPA Rutherford never disclosed her plan to conduct and disclose firearm testing in the middle of trial before or during argument on whether the defense had adequate notice to proceed to trial on the firearm charge.[677] She hid this plan from the court and the defense during this motion and even during the entire first day of trial.[678]

DPA Rutherford violated CrR 4.7, the Court Omnibus Order, and constitutional due process by withholding her intent to have a new witness testify about new physical evidence testing and introduce new bullet evidence in the middle of trial.

DPA Rutherford's failure to disclose an intended testing witness, the substance of the witness's testimony and intended test results violated CrR 4.7.[679] CrR 4.7(a)(1)(i) requires the prosecution to produce by omnibus any witnesses it **intends** to call along with the substance of their testimony. CrR 4.7(a)(1)(iv) requires the prosecution to disclose by omnibus any reports including physical examinations, tests, experiments, or comparisons.

DPA Rutherford's midtrial attempt to add a new testing witness, testing report, and spent bullets also violated the Omnibus Court Order. The Omnibus Court Order ordered the prosecution to comply with the defense requests by May 13.[680] This included a defense demand that the "State provide the following … information within the **knowledge**, possession or control

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678 *See* Section III. 7, *infra.*

679 *See also Salgado-Mendoza*, 189 Wash.2d. 420 (2017) (was governmental misconduct and a violation of the requirement of CrR 4.7(a)(1) for the prosecution to not designate which of three possible toxicologists it would call at trial by the day before trial); *State v. Dailey,* 93 Wash.2d 454 (1980) (prosecution's dismissing the charges against the co-defendant two days before trial and listing new witnesses one day before trial violated CrR 4.7(a)(1) and was prosecutorial misconduct justifying dismissal); *State v. Stephans*, 47 Wash.App. 600 (1987); *State v. Dailey*, 93 Wash.App. 454 (1980).

680 *See* Omnibus Court Order, Docket No. 15.

of the State, its agents...or law enforcement agencies:.... the names ... of all persons the State **intends** to call as witnesses..." and substance of any witness' testimony, "any test results...in connection with the case," and "any tangible objects which the Prosecuting Attorney intends to use...." [681]

Furthermore, DPA Rutherford's attempt to add a testing witness, test results and new physical evidence in the middle of trial interfered with the defendant's rights established by case law to have adequate notice of the evidence against him in order to prepare for trial.[682] This was especially true because this evidence disclosed in the middle of trial was the only evidence to prove an actual element of the charge of Unlawful Possession of a Firearm. The defense had a right to have sufficient notice of testing to be able to get independent testing, to interview the witness, and prepare cross-examination.[683] It had a due process right to have sufficient notice so as to be able to factor this evidence into decisions about trial strategy, whether to plead guilty, or whether to continue the trial.

DPA Rutherford hid her intent to conduct testing during trial, hid her intent to call the testing witness, hid her intent to submit test results, and hid her intent to submit bullets produced from the testing.[684] She failed to disclose this even on the morning of trial call during a motion on the precise issue of whether the defense had adequate notice to meet this new firearm charge.[685] She also continued to withhold this during the first day of trial during a motion to dismiss based on withholding other discovery.

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[681] *See* Omnibus Court Order, Docket No. 15; Defense Discovery Request, Docket No. 9.
[682] *See also See State v. Sherman*, 59 Wash.App. 763 (1990) (motion to add handwriting expert right before trial held to deny right to effective counsel); *State v. Stephans*, 47 Wash.App. 600 (1987).
[683] *See also State v. Ruelas*, 7 Wash.App. 887 (2019)(court did not error in excluding defense witness proposed to testify defendant had medical necessity for marijuana because the witness was not disclosed until the second day of trial forclosing the prosecution's ability to get a counter witness);
[684] *See* Section III. 7, *infra.*
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It is important to note that for each of these three pieces of withheld information, the prosecutor's duty was to disclose the information she had **knowledge** of by a specific time. The duty was not just to disclose the information she knew if or when it also became memorialized in a police report or on a CD recording. DPA Rutherford throughout these proceedings focused on when she got written materials in hand. This is really irrelevant because she had actual personal knowledge of the information. As to the exculpatory evidence no witness saw the defendant possessing a gun, the alleged defendant's confession he had a gun during the robbery, and the State's intent to call a testing witness and submit new physical evidence, DPA Rutherford had duties pursuant to CrR 4.7, the court order, and case law to disclose this information she had actual **knowledge** of once the discovery deadlines passed. In particular, a prosecutor cannot withhold exculpatory evidence she has actual knowledge of because the police never memorialize it in a report and send it to her.

Even if DPA Rutherford's nondisclosure of the main unlawful firearm evidence was an inadvertent mistake due to her unfortunate life circumstance during the many weeks leading up to trial call, she later admitted that by the morning of trial call she had discovered this and was fully aware her main evidence she intended to use to prove the unlawful firearm possession charge still needed to be disclosed. Her admissions showing her clear awareness that this discovery was still missing and her deliberated choices to continue to withhold showing this was willful are discussed in other sections of this opinion with full citations to the record and will not be repeated here. Her knowing willful withholding of Emma May's proffer testimony containing both the exculpatory firearm information that no one saw the defendant with the gun and the defendant's confession statement is discussed in Section III. 4, *supra.* Her knowing and willful

withholding of her intent to test the gun and introduce a gun testing witness during trial is discussed in Section III. 7, *infra.*

This misconduct was later exacerbated when, in response to the last hearing on the Motion for Sanctions, DPA Rutherford made a misleadingly statement to try and cover up what she did. She claimed through counsel at the Sanctions Motion that she did not disclose the Emma May firearm evidence during the motion regarding adding that charge because she believed the defense had already received the CD recording containing Emma May's statements.[686] The record indicates this claim is not accurate and that DPA Rutherford knew the defense still did not have the Emma May recording the morning of trial call. Nevertheless, DPA Rutherford had her unwitting attorney argue this fact for her in the oral argument on the Sanction Motion.[687] I presume she failed to make her attorney fully aware of the facts set forth below and he just blindly believed whatever she told him.

The record shows that **late Thursday afternoon, the day before the Friday motion to add the new charge, defense counsel served a brief on DPA Rutherford. This brief specifically complained that defense counsel still had not received any copy of the recording as of late Thursday afternoon.**[688] This brief was a CrR 8.3 Motion to Dismiss based, in part, on the prosecution's failure to supply the CD recording of Emma May's proffer interview.[689] It is incredible for DPA Rutherford to now say she thought the defense had the recording at this hearing, when defense counsel specifically notified her in writing in the brief served the evening before that he still did not have the recording. This is also incredible because DPA Rutherford knows the parties appeared the morning of trial call specifically to hear not just the motion about

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whether there was adequate notice to add the firearm charge, but also to hear a defense CrR 8.3 emergency Motion to Dismiss for failure to supply discovery, specifically that the defense did not have the recording or any summary of Emma May's interview.[690] The missing CD recording was really one of only two issues that formed the original Motion to Dismiss.[691] The parties appeared the morning of trial call for a Motion to Dismiss the case, in part, because the CD recording had never been received by the defense.[692] This motion was not heard only because the Motions Judge did not have time or would not hear the motion on shortened time.[693] It was clear defense counsel still wanted to go forward with the motion because it was deferred to be heard on Monday.[694]

Furthermore, even if defense counsel had not sent DPA Rutherford a brief explicitly telling her he did not have the recording, the record reflects DPA Rutherford had no reasonable basis to assume the defense had already gotten the CD recording by Friday morning. Detective Fagen checked his records, and indicated he did not bring DPA Rutherford the CD recording to send to the defense until Wednesday, two days before the Friday morning hearing.[695] DPA Rutherford later admitted she did not give the hardcopy CD to her staff to process as discovery and mail out until Wednesday.[696] It would be unreasonable to presume defense counsel could have received and have listened to the 2.5 hour audio interview by the Friday 9:00 a.m. hearing if DPA Rutherford did not even give it to her staff to process and mail until Wednesday. The prosecutor's staff submitted a declaration indicating that with processing and mailing of

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discovery it takes at least a couple of days for defense to receive discovery.[697] Even DPA Rutherford admitted it takes a day or two for defense to receive discovery.[698] This was a hardcopy CD, not electronic discovery.[699] The only way defense counsel could have both received and listened to the CD recording before the Friday 9:00 am morning hearing was if he received it by mail the very next day after DPA Rutherford received it and well before the end of the day.

Furthermore, DPA Rutherford's attorney specifically represented orally at the final Sanctions Hearing that DPA Rutherford thought defense counsel got the CD recording the *Friday morning of the motion,* not the prior day.[700] DPA Rutherford's attorney checked this fact with her and re-verified the claim on the record.[701] Defense counsel would not be able to have any idea what was on the 2.5 hour audio interview if it was received by his office while he was in court Friday morning. DPA Rutherford's lawyer seemed oblivious to the ramifications of a Friday morning receipt in terms of actual notice. Even if it were true that DPA Rutherford believed defense counsel's office received the CD Friday morning, this would not give her any basis to believe the defense had any knowledge of what was on the CD yet. In fact, it would mean she knew for sure the defense counsel did not know the information on the CD at the time of the Friday hearing. The Friday motion regarding whether the defense had adequate notice to add the charge was on the 9:00 am calendar. Even if the defense counsel's office received it first thing in the morning Friday, defense counsel would have been in court by then and could not possibly have listened to the 2.5-hour audio recording before the motion which was heard before

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10:30 am.[702] If DPA Rutherford thought the CD was not delivered to defense counsel's office until Friday morning as her attorney argued, then she knew the defense did not yet know the pertinent facts related to the Unlawful Possession of a Firearm charge while he was in court at that morning arguing whether there was adequate notice to allow the charge to be added. DPA Rutherford's attorney's argument that she thought defense counsel's office got the CD Friday morning, even if it were true, proved the opposite of what he intended it to prove.

Moreover, even if DPA Rutherford made an unrealistic assumption that a hardcopy CD would definitely be processed, mailed and received in one day or even if she really thought defense counsel would somehow magically know what was on a CD arriving at his office while he was in court, it still would have been manifestly apparent her assumption was wrong as soon as the notice motion began to be argued. Had defense counsel received and listened to the Emma May recording by the time of the hearing, he would have been making all kinds of additional arguments regarding lack of notice. Most notably, he would have noted he had just received all new evidence for the firearm possession charge within the last few hours. If defense counsel knew the evidence on the recording of Emma May's interview by Friday morning, defense counsel would have just been notified of all new evidence the prosecution intended to use as its sole proof of possession, a previously undisclosed alleged confession statement of the defendant. Defense counsel would have been raising all kinds of objections to adding the new charge if he knew DPA Rutherford had been withholding exculpatory evidence for two months, to wit, that no one ever saw the defendant possessing a gun. A potent argument to support the defense's position it did not have adequate notice to add the new charge would have been the fact all new and different evidence relating to the possession charge had just been received on the Emma

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May recording. Instead, there was no mention whatsoever of any new evidence relating to this charge received from the CD recording.[703] That is because the defense still did not have the CD recording or certainly had not yet had any opportunity to listen to it, and, thus, the defense did not yet know the new firearm evidence existed. Defense counsel also would not have been trying to make the lack of probable cause argument that morning if he was aware of the information on the CD recording because the testimony on the CD recording supplied the missing probable cause.[704] In short, it was clear from what was actually happening during the motion to add the charge that defense counsel had not received or had any opportunity to listen to the CD recording of Emma May's interview and had no idea it contained all new evidence for the Unlawful Firearm Possession charge. This would have been manifestly obvious to DPA Rutherford at the time.

Furthermore, if DPA Rutherford really had good intentions to disclose the new unlawful firearm possession evidence and just mistakenly thought the defense had the CD recording, why didn't she disclose or discuss the other new evidence she planned to use to prove this charge during the hearing? Where was any discussion of how or why the charge could still be added despite all the new evidence? There was no mention of this.[705]

DPA Rutherford knew the defense did not know she was intending to test the operability of the gun and introduce new gun testing testimony during trial. If she was not withholding new evidence on the firearm charge in bad faith, why didn't she mention the other new evidence she planned to introduce on the charge?[706] No explanation has ever been supplied for withholding

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704 The testimony on the CD recording provided the missing link between the defendant and the gun the police had because on the recording witness Emma May identifies the gun the police have as being the one the defendant possessed the night of the robbery. *See* Exhibit 1, CD 7, August 16, 2019 Sanctions Hearing.

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this new evidence during the notice motion. The fact DPA Rutherford also withheld the other new undisclosed evidence she planned to used to prove the firearm possession charge during the notice hearing, suggests she was just deliberately withholding all the new evidence so the defense could not use it to prevent the charge from being added.

DPA Rutherford's claim during the later Sanctions Motion that she thought the defense had the proffer interview CD by the Friday morning of trial was a misleading statement to the court. She knew the defense had no knowledge of the new evidence she intended to use to prove the new firearm charge. She knew the failure to notify the defense of her new evidence during a motion as to whether the defense had adequate notice to try the charge showed actual bad faith. This is why DPA Rutherford made this misleading statement to the court through her attorney.[707]

DPA Rutherford's continued nondisclosure of the primary evidence she intended to use to prove the Unlawful Firearm Possession charge during a motion where the issue was whether the defense had adequate notice to proceed on that new charge was egregious misconduct. This not only violated a court rule, a court order, and the Constitution; it was also another separate misrepresentation to the other Judge that heard that motion. It was a misrepresentation by omission. DPA Rutherford argued to that other Judge that the defense had adequate notice while omitting the fact she still had not disclosed to the defense the main evidence she planned to use to prove the charge.[708] She knew that the court and the defense did not know this other evidence even existed. While the defense may have had notice the State would add the charge, unbeknownst to the defense and the court, the defense did not yet have notice of the evidence that would be used to support the charge. By not even telling the defense new evidence existed,

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DPA Rutherford's withholding denied the defense any opportunity to make a motion objecting to adding the charge on the basis all new evidence would be used at trial.

Even accepting DPA Rutherford's excuse that her failure to disclose the new firearm charge evidence for weeks pretrial was an innocent mistake due to a convergence of unfortunate life events, once she admittedly became aware of her mistakes before this hearing, her continued withholding of the main evidence to support the added charge during a motion about whether notice was adequate was knowing and willful. DPA Rutherford knowingly withheld the primary evidence for this charge on the day of trial call during a motion claiming the prosecution was not giving proper notice of the charge and after the defense had filed a Motion to Dismiss for withholding discovery. The nature of the motions and just the fact it was the day of trial call put DPA Rutherford on notice she needed to forthwith disclose this discovery. She admitted she was aware of and planned to use this evidence. Yet even in the face of these motions, she still did not disclose the existence of the new evidence relevant to the new charge. This should be sanctioned because it was willful withholding in bad faith.

7. DPA RUTHERFORD HID A PLAN TO TEST THE GUN AND OFFER NEW GUN TESTING TESTIMONY UNTIL THE MIDDLE OF TRIAL.

There were two late firearm-testing requests in this case for the same gun. I am not imposing a sanction for the long delay in making the first request to the WSP Lab or the misleading information given to the defense about that. I am giving DPA Rutherford the benefit of the doubt that was simple negligence. However, I am finding DPA Rutherford willfully withheld a second secret request to the Snohomish County Sheriff's Office to test fire the gun in the middle of trial. I find that deliberate withholding was done for strategic advantage and should be sanctioned.

The first delayed testing request to the WSP occurred as follows. A few days after the alleged robbery, the police seized a gun they believed Defendant Guinn possessed during the charged crimes.[709] In the initial police reports, the police said they were sending the gun to the WSP lab for fingerprint, DNA and ballistics testing.[710] Although the police said in discovery they were sending the gun into the WSP Lab for testing in early February, unbeknownst to the defense the police actually never got around to doing that at that time.[711] On May 9, 2019, about 24 days before trial the lead detective sent a WSP lab technician a description of what testing he wanted done on the evidence in this case, including the fingerprint, DNA and test firing/ballistics testing on the gun.[712] There was no evidence to believe this gun was shot at the crime scene, and the police believed it had not been shot, so the WSP ballistics-testing request for this case was really to just test fire the gun and produce bullets showing it was operable and then do a general search to see if the ballistics match other unsolved crimes on file.[713] About thirteen days before trial, on May 20 or 21, DPA Rutherford reviewed her file and finding no lab requests, she contacted the lead detective and asked him to send the gun to the WSP for fingerprint, DNA and firearm testing.[714] The detective did that ten days before trial call on about May 21, 2019, nearly four months after this gun was seized.[715]

Defense counsel was not informed that contrary to what had been indicated in the police report the gun was never sent in for testing. Defense counsel asserted and DPA Rutherford admitted, that defense counsel had checked with DPA Rutherford several times during the

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[709] *See* Transcript of June 3, 2019 at 80, 82, Docket No. 65; Transcript of June 4, 2019 at 4, Docket No. 66. This gun was found under Emma May's mattress during a search warrant execution.
[710] *See* Transcript of June 3, 2019 at 86-87, Docket No. 65
[711] *See* Transcript of June 3, 2019 at 80-1, 82, 85-87, Docket No. 65; Transcript of June 5, 2019 at 41-42, Docket No. 67.
[712] *See* Exhibit 17, June 3-7 Hearing.
[713] *See* Transcript of June 3, 2019 at 80-81, Docket No. 65; Transcript of June 4, 2019 at 6, 11, Docket No. 66.
[714] *See* Transcript of June 3, 2019 at 86, Docket No. 65; Transcript of June 5, 2019 at 41-42, Docket No. 67.
[715] *See* Transcript of June 3, 2019 at 18-19, Docket No. 65; Transcript of June 4, 2019 at 12, Docket No. 66.

pendency of the case regarding the status of the gun testing.[716] This included emailing DPA Rutherford in March, April and May and asking when the fingerprint and DNA gun test results were expected.[717] Defense counsel could never get a direct answer from DPA Rutherford who would respond vaguely that additional discovery would be forthcoming.[718] Defense counsel took this to mean DPA Rutherford had actually checked the status of the forensics testing and it was in progress. DPA Rutherford admitted that she never actually checked on the status of the gun testing when defense counsel asked, and thus, she did not know the gun had actually never been sent.[719] So, to the extent her vague answers could be interpreted as the request was outstanding and expected in the future, her answers were arguably misleading. DPA Rutherford discovered the gun request was not sent by no later than May 20th and then requested the detective to send it in.[720] Defense counsel sent another email asking when the gun testing was expected to DPA Rutherford the next day on May 21.[721] In response, DPA Rutherford did not tell defense counsel the gun had never been sent for testing, even though she had discovered the error by then. Instead, she just said she did not know the testing timeline, but that it looked to be farther away than trial.[722] On about May 24, about one week before trial call, the defense received discovery including a lab test request for the gun and noticed on the corner of the request that it had only been sent three days before. The first notice the defense got that the gun had not been sent in for testing was during the week before trial call. On May 28th defense counsel sent an email to DPA

[716] *See* Transcript of June 3, 2019 at 18-19, Docket No. 65: Transcript of June 5, 2019 at 49-50, Docket No. 67.
[717] *See* Transcript of June 3, 2019 at 18-19, Docket No. 65; Exhibits 2-5 of June 3, 2019 Hearing.
[718] *See* Transcript of June 3, 2019 at 18-19, Docket No. 65; Exhibits 2-5 of June 3, 2019 Hearing.
[719] *See* Transcript of June 3, 2019 at 85-86, Docket No. 65.
[720] *See* Transcript of June 3, 2019 at 18-19, Docket No. 65; Transcript of June 5, 2019 at 41-42, Docket No. 67.
[721] Amended Response to Motion to Dismiss at 5, Docket No. 32.
[722] *Id.*

Rutherford expressing "extreme displeasure" that the gun fingerprint and DNA testing had not been sent for testing months before.[723]

The defense filed a CrR 8.3 Motion to Dismiss a couple days after it learned the testing had not been timely requested as it was represented it would occur in the police reports.[724] Defense counsel asserted he was led astray by the prosecution regarding the status of this forensics testing on the gun to its detriment.[725] This first CrR 8.3 Motion was filed Thursday May 30, the day before trial call. The brief and later oral argument alleged the defense had relied on the misrepresentation that testing was pending for four months and now would have to waive speedy trial again and wait an extra four months to get the testing or be prejudiced by having to go forward without the fingerprint and DNA tests.[726] The very next day after the defense filed its motion to dismiss for lack of fingerprint and DNA testing, DPA Rutherford directed Lead Detective Fagen to have the gun removed from the lab and tested for operability that would destroy the fingerprint and DNA evidence on the gun.[727]

I am not imposing sanctions for the original gun testing alleged misrepresentations and mismanagement because it is possible that DPA Rutherford's original failure to notice the gun testing request was not sent was simple neglect or oversight due to her stressful life circumstances. It is possible she just blew off the defense request for a status update on the testing and never checked. This includes imposing no sanctions for not discovering or disclosing for months there were no lab requests to test the gun, failing to check with the detective regarding the status of the gun testing even when the defense requested it be checked, failing to

[723] Transcript of June 5, 2019 at 67, Docket No. 67.
[724] *See* Motion to Dismiss, Docket No. 19.
[725] *See* Transcript of June 3, 2019 at 18-19, Docket No. 65.
[726] *See* Transcript of June 3, 2019 at 18-20, Docket No. 65; Motion to Dismiss, docket No. 19.
[727] *See* Transcript of June 5, 2019 at 41-42, 67 Docket No. 67; Section III. 8, *infra.*

tell the defense she was not actually checking to see the status of the gun testing, and providing responses to the defense that could be interpreted as she was checking with the lab and believed additional information would be coming. It also includes deliberately omitting from her May 21 email that the lab requests had never been sent, even though she knew that by that time, and it includes instead deliberately leaving the misimpression the lab was just slow. Although some of these acts violated discovery requirements and were misleading, giving due regard to DPA Rutherford's personal circumstances, I am not imposing sanctions for them.

The second late secret gun-testing request by DPA Rutherford to the Snohomish County Sheriff's Office is a different story. According to DPA Rutherford, when she found out she would not get the gun ballistics/test firing results from the WSP Lab before trial, she formed an alternate plan to have the Sheriff's Office remove the gun from the WSP and test fire the gun to establish its operability.[728] She also formed an intent to add new witness testimony about the new gun testing, introduce the new testing results and offer new fired bullets at trial as exhibits.[729] Significantly, part of this plan was to wait until the trial started to do the testing and not tell the defense about the plan to do midtrial testing until the testing was complete.[730]

According to DPA Rutherford, she began discussing this plan with Lead Detective Fagen a few days before Friday trial call, on about Wednesday May 29.[731] At that time, she asked Detective Fagen to figure out which WSP lab the gun was located at so if the case went to trial they would know where to go get the gun so they could test fire it *during the trial.*[732] DPA Rutherford repeatedly stated these planning discussions occurred before trial call on Friday, her

[728] *See* Transcript of June 5, 2019 at 41, 47, 71-72, Docket No. 67; Transcript of June 4, 2019 at 13, 25-31, Docket No. 66.
[729] *See id* at 47.
[730] *See* Transcript of June 4, 2019 at 32-33, Docket No. 66.
[731] *See* Transcript of June 5, 2019 at 41, 47, 71-72, Docket No. 67.
[732] *Id.*

best estimate was Wednesday before trial call.[733] Lead Detective Fagen came to Friday trial call. Once trial was confirmed, DPA Rutherford then gave the formal directive to Detective Fagan to go forward with their previously discussed plan to remove the gun from the WSP Lab and have the Snohomish County Sheriff's Office test fire it the following week during trial.[734]

DPA Rutherford hid her plans to do testing on the gun, call a witness to testify about the testing, and introduce bullets at trial until the middle of trial.[735] Although she began steps to carry out the plan on about the Wednesday before trial, she did not disclose this plan to the defense on Wednesday or Thursday.[736] She did not disclose her intent to create new evidence on the firearm charge when she appeared Friday morning and argued a contested motion on the issue of whether the defense had adequate notice to be able to try the firearm possession charge.[737] She did not disclose her testing plan at Friday trial call or any other time thereafter on the Friday.[738] She did not disclose it over the weekend to defense counsel, even though they were apparently in email communication.[739] DPA Rutherford also did not disclose her plan to disclose new evidence in the middle of trial in a brief she wrote that weekend responding to a defense CrR 8.3 Motion to Dismiss that alleged the defense was being prejudiced by late discovery disclosures.[740] DPA Rutherford did not disclose her plan during the morning of the first day of trial while she was arguing against the defense Motion to Dismiss based specifically on the allegation the defense

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[733] *See id.*
[734] *See id.*
[735] *See* Transcript of June 5, 2019 at 41, 47, 51, 71-72, Docket No. 67; Transcript of June 4, 2019 at 25-33, Docket No. 66.
[736] *Id.*
[737] *See* Transcript of May 32. 2019, Docket No. 69; Transcript of June 5, 2019 at 41, 47, 51, 71-72, Docket No. 67; Transcript of June 4, 2019 at 25-33, Docket No. 66.
[738] *See* Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67; Transcript of June 4, 2019 at 25-33 Docket No. 66.
[739] *See id.*
[740] *See* Response to Defense Motion to Dismiss Pursuant to CrR 8.3; Docket No.32; Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67; Transcript of June 4, 2019 at 25-33, Docket No. 66.

was being prejudiced by the prosecution's disclosing discovery late.[741] Nor did she disclose it anytime during the first day of trial even though the defense argued that day it was prejudiced by not getting the DNA and fingerprint test results,[742] and she knew her undisclosed plan to test fire the gun would contaminate or destroy the fingerprint and DNA the defense wanted tested.[743]

The gun was secretly test fired in the middle of the first day of trial without any prior notice to the court or the defense.[744] Sometime before trial started Monday morning, Detective Fagan directed another Sheriff's Deputy to remove the gun from the WSP and test fire it.[745] Deputy Fagan sat in court with DPA Rutherford all day during the first day of trial. That morning, DPA Rutherford argued in response to the CrR 8.3 Motion that the government's mismanagement in sending the gun late to the WSP for testing was not prejudicial to the defense, because she would not be using the gun testing at trial because it would not be completed at trial.[746] This would have included the request to the WSP to fire the gun and supply the bullets.[747] At lunch the first day of trial, Detective Fagan confirmed with the other deputy that they were on track with the plan to have the gun removed and tested during trial as scheduled.[748] At about 1:10 p.m. on the first day of trial, the other deputy removed the gun from the Washington State Patrol Lab, test fired the gun to determine its operability, and retained the spent bullets/casings for trial evidence.[749] After normal court hours the first night of trial, DPA Rutherford sent the defense new discovery

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[741] *See* Transcript of June 3, 2019 entire transcript and specifically 18-19, Docket No. 65; Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67.
[742] *See* Transcript of June 3, 2019 entire transcript and specifically 18-19, Docket No. 65; Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67; Transcript of June 4, 2019 at 25-33 Docket No. 66.
[743] *See* citations in Section III.8, *infra;* Transcript of June 4, 2019 at 4-6, 12, 28, 24-26, 35, 141, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[744] *See* Exhibit 16 to the June 3-6, 2019 Hearings; Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67; Transcript of June 4, 2019 at 3, Docket No. 66.
[745] *See* Transcript of June 4, 2019 at 135, Docket No. 66.
[746] *See* Transcript of June 3, 2019 at 80-81, Docket No. 65.
[747] *See* Transcript of June 3, 2019 at 80-81, Docket No. 65.
[748] *See* Transcript of June 4, 2019 at 139, Docket No. 66.
[749] *See* Exhibit 16 to the June 3-6, 2019 Hearings; Transcript of June 4, 2019 at 141, Docket No. 66.

identifying a new witness to testify regarding the new gun testing and the new gun testing results.[750] This was the first notice given to the defense.[751] Defense counsel notified the court on the second day of trial that DPA Rutherford had just disclosed new discovery indicating she intend to introduce a testing witness, testing results, and new physical evidence (bullets).[752]

I find DPA Rutherford secretly formed a plan the week before trial to have the gun tested fired in the middle of trial. She admitted this.[753] I further find she deliberately chose to not disclose her plan to do this testing, call a testing witness and introduce bullets until after the testing was done in the middle of trial. She admitted this.[754] I further find from these admission that her failure to disclose this until the middle of trial was a willful and deliberate violation of the discovery rules. The evidence supporting these findings is set forth below.

Even if DPA Rutherford's prior failures to realize, disclose, and remedy the lack of timely lab testing requests were just neglectful, once she formed her new plan, she had a new legal duty to immediately disclose the new testing request and her new intent to call a testing witness. DPA Rutherford willfully violated discovery duties by intentionally choosing to withhold the intended new testing witness and testing evidence. The withholding of this new discovery spanned three court hearings, a written round of briefing, and oral arguments all addressing the very issue of whether the prosecution's ongoing late disclosure of discovery prejudiced the defense. During these motions about late discovery DPA Rutherford omitted the fact she was planning to disclose more late discovery in the middle of trial.

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[750] *See* Transcript of June 5, 2019 at 40, Docket No. 67; Transcript of June 4, 2019 at 63, Docket No. 66.
[751] *See* Transcript of June 5, 2019 at 40, Docket No. 67.
[752] *See* Transcript of June 4, 2019 at 1-13, Docket No. 66; Exhibit 16 of June 3-7 Hearing.
[753] *See* Transcript of June 5, 2019 at 41, Docket No. 67.
[754] *See* Transcript of June 4, 2019 at 25-33 Docket No. 66. Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 68; Transcript June 5, 2019 at 40-41, 47, 51, 71-72, Docket No. 67.

To defeat the Monday morning Motion to Dismiss for not timely making the first gun testing request to the Washington State Patrol, DPA Rutherford argued that late disclosure of the late attempt at testing did not matter because the testing would not be completed for trial. She indicated she would not be using the gun testing because the results would not be back in time for trial.[755] This included the request that WSP do ballistics testing that DPA Rutherford described as including test firing the gun and comparing the bullets to the bullets in this case and other cases generally.[756] When indicating she would not be introducing the WSP gun testing, DPA Rutherford did not mention that she had a secret alternate plan to have the same test fire done on the gun by a different agency in the middle of trial.[757] She did not mention she planned to introduce those test results and a new witness to testify about them in the middle of trial.[758] Unbeknownst to this Court or the defense, at the very moment DPA Rutherford was informing us she would not be trying to admit results from her late gun testing request, she was planning to have the gun tested by an alternate agency and planning to try to introduce even later requested gun testing results.[759] At the very moment DPA Rutherford said she would not try and admit the gun test results, at her direction a Sheriff's Deputy was about to go to the WSP lab and remove the gun to conduct alternate test firing she was going to try to admit.[760]

DPA Rutherford had duties pursuant to CrR 4.7, the Court's Omnibus Order, and the United States Constitution to give the defense and court prompt notice that she was intending to

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[755] *See* Transcript of June 3, 2019 at 84, Docket No. 65.
[756] *See id.*
[757] *Compare* Transcript of June 3, 2019 at 83-84 *with* Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 66; Transcript June 5, 2019 at 40-41, 47, 71-72, Docket No. 67; Exhibit 16, June 3-7 Hearing.
[758] *See* Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67; Transcript of June 4, 2019 at 25-33 Docket No. 66.
[759] *Compare* Transcript of June 3, 2019 at 83-84*with* Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 66; Transcript June 5, 2019 at 40-41, 47, 71-72, Docket No. 67; Exhibit 16, June 3-7 Hearing.
[760] *See* Exhibit 16 to the June 3-6, 2019 Hearings (showing gun testing done on June 3, 2019; Transcript of June 3, 2019 at 81-82 (DPA Rutherford telling the court all the testing will not be back for trial).

test evidence, introduce new witness testimony, introduce new testing results, and introduce new physical evidence in the middle of trial (the spent bullets).

DPA Rutherford violated the CrR 4.7(h)(2) ongoing duty to disclose by not disclosing this promptly once she was aware of it. CrR 4.7(a)(1) states the prosecuting attorney *shall* disclose to the defense by omnibus the names and addresses of persons whom the prosecuting attorney ***intends*** to call as witnesses along with their statements or the substance of their testimony. CrR 4.7(a)(1) also requires the prosecutor to disclose to the defense by omnibus "reports or statements … including results of … tests, experiments or comparisons." Cr 4.7(a)(4) requires the witness and testing information to be disclosed if it is within the knowledge of the prosecutor, regardless of whether the prosecutor has any written document memorializing the knowledge. CrR 4.7(h)(2) further imposes a "*continuing duty to disclose*." It states after normal discovery deadlines, " If …. a party discovers additional material or information that is subject to disclosure, the party shall ***promptly*** notify the other party or their counsel of the ***existence*** of such additional material, and ***if the additional material or information is discovered during trial, the court shall also be notified.***"CrR 4.7(h)(2) (emphasis added). By trial call, DPA Rutherford intended to call a testing witness and knew the subject of the testimony was tests or experiments. This was information specifically required to be promptly disclosed by CrR 4.7(a)(1) since it was within her knowledge. As the discovery deadlines had passed, DPA Rutherford had an ongoing duty to disclose all this promptly pursuant to CrR 4.7(h)(2). Once trial started she also had a duty to disclose it to the court promptly per CrR 4.7(h)(2). Even if her new testing request was not in writing, DPA Rutherford had a CrR 4.7(h)(2) duty to immediately disclose the *existence* of the new testing request, the *intent* to call a testing witness, and the subject of the witnesses anticipated testimony. See CrR 4.7(a)(1) and (h)(2).

Washington courts have held the failure to comply with the requirement to timely disclose witnesses as required by CrR 4.7(a)(1) is prosecutorial misconduct. In *State v. Salgado-Mendoza*, 189 Wash.2d. 420 (2017), the Washington Supreme Court held it was governmental misconduct and a violation of the requirement of CrR 4.7(a)(1) that the prosecution list witnesses by omnibus for the prosecution to not designate which of three possible toxicologists it would call at trial by the day before trial. DPA Rutherford's conduct in this case was even more egregious than the prosecution's in *Salgado-Mendoza, supra.* At least in *Salgado-Mendoza, supra*, the defense was advised a toxicologist would be called and given the names of the three possible witnesses, one of which would be called. DPA Rutherford did not disclose she was going to call any gun testing witness until the second day of trial and had not disclosed any named person to be testifying to such information before the middle of trial. In *State v. Dailey,* 93 Wash.2d 454 (1980), the court likewise found the fact the prosecution dismissed the charges against the co-defendant two days before trial and then listed the new witnesses one day before trial in violation of CrR 4.7(a)(1) was prosecutorial misconduct justifying dismissal.

DPA Rutherford's secret gun testing plan also violated the Omnibus Court Order that had ordered the parties to each disclose to the other what was in their discovery demands.[761] The Defense Discovery Request demanded, "the following material or information within the *knowledge,* possession or control of the State...the names of all witnesses" along with a summary of the substance of their testimony and "any test results...made in connection with this case...Any...tangible objects which the Prosecuting Attorney *intends* to use at any...trial or which are in any way related to this prosecution."[762] Pursuant to the Court's Omnibus Order, DPA Rutherford was required to disclose this specific information by May 13, or thereafter,

[761] *See* Omnibus Court Order, Docket No. 15; Defense Discovery Request at 1-2, Docket No. 9.
[762] *See* Defense Discovery Request at 1-2, Sections I.1, II.2, IV.1, Docket No. 9.

pursuant to a continuing duty to disclose incorporated into the Omnibus Order she was required to disclose it immediately when she became aware of it.[763] DPA Rutherford did not disclose this promptly to the court or defense counsel when trial began. Although she did not have the report, she knew a new request for testing had been made, knew she was intending to call a new witness, knew the substance of the witness' testimony, and knew she was intending to introduce new tangible objects as exhibits. She violated the Omnibus Court Order by not disclosing this.

DPA Rutherford not disclosing her testing plan also violated the Omnibus Court Order because the testing could destroy the fingerprint and DNA evidence on the gun, so this was an act of failing to preserve evidence. The Defense Request for Discovery, incorporated into the Omnibus Order, required the prosecution to "preserve all physical evidence relating to the alleged offense, ...until final disposition of this cause or until further order of this Court."[764] Destroying evidence without prior court approval (which would necessitate notice to the defense) violated this specific court order. Section III. 8, *infra,* discusses at length the fact DPA Rutherford knew the gun test firing would contaminate the fingerprint and DNA testing and she admitted knowing that repeatedly during trial. DPA Rutherford's withholding her plan to do destructive testing on the gun until it was already done was a flagrant violation of this portion of the Omnibus Court Order requiring all physical evidence to be preserved.

DPA Rutherford's failure to provide the gun-testing witness and test results before trial also violated constitutional case law.[765] It violated the due process right to receive sufficient

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[763] *See* Omnibus Court Order, Docket No. 15; Defense Discovery Request at 4, Docket No. 9 (incorporates the continuing duty to disclose from CrR 4.7(h)(2)).
[764] *See* Omnibus Order, Docket No. 15; Defense Request for Discovery at 4, Docket No. 9.
[765] *See State v. Sherman*, 59 Wash.App. 763 (1990) (motion to add handwriting expert right before trial held to deny right to effective counsel); *State v. Ruelas*, 7 Wash.App. 887 (2019)(court did not error in excluding defense witness proposed to testify defendant had medical necessity for marijuana because the witness was not disclosed until the second day of trial forclosing the prosecution's ability to get a counter witness); *State v. Stephans*, 47 Wash.App 600 (1987)(case dismissed for government misconduct including failure to disclose witnesses timely).

notice of evidence before trial to allow the defense a meaningful chance to respond and prepare for such evidence at trial. Motions to add last minute new testing evidence and testing witnesses also "compromise … defense counsel's ability to adequately prepare for trial—a denial of the right to counsel." *See State v. Sherman*, 59 Wash.App. 763 (1990) (motion to add handwriting expert right before trial held to deny right to effective counsel).[766] The Washington State Court of Appeals explained in *State v. Stephans*, 47 Wash. App. 600, 604 (1987) that, "[t]he defendant cannot prepare a defense without knowing what the State's case will be, and cannot know that without at least being formally advised as to the State's witnesses."[767]

In this case, DPA Rutherford deliberately chose to test the evidence and disclose that testing and the new witness testing testimony in the middle of trial, even though she had many other less prejudicial options. She could have tested it any time in the four months before trial. She could have tested it anytime after she discovered she needed the testing which was Wednesday when she started discussing removing it from the WSP. Even at that late date she had five days before trial when she could have had the test firing done and disclosed before trial. The police were able to accomplish the test fire in one afternoon the next working day after DPA Rutherford requested it be done. Instead DPA Rutherford deliberately chose to wait until the middle of trial to have the testing done. Even late testing and disclosure right before trial would have been better than testing and disclosure in the middle of trial. It would have at least allowed the defense to seek a continuance to meet the new evidence.

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[766] *See also State v. Ruelas*, 7 Wash.App. 887 (2019)(court did not error in excluding defense witness proposed to testify defendant had medical necessity for marijuana because the witness was not disclosed until the second day of trial forclosing the prosecution's ability to get a counter witness); *State v. Stephans*, 47 Wash.App 600 (1987)(case dismissed for government misconduct including failure to disclose witnesses timely).

[767] *State v. Stephans*, 47 Wash.App 600, 604. (1987)

DPA Rutherford also could have at least notified the defense of her intent to test evidence and introduce new evidence in the middle of trial by no later than the Wednesday before trial when she formed the plan. This would have given the defense a chance to object or seek a continuance if the evidence was to be allowed. By secretly waiting until the middle of trial to test physical evidence, DPA Rutherford denied the defense a fair opportunity to conduct independent testing, interview the testing expert, prepare cross-examination, or even ask for a continuance to meet the new evidence.

Defendants have a due process right to know what the evidence is against them so they can prepare for trial and make rational decisions about whether to request a continuance, plead guilty or proceed to trial. Although DPA Rutherford formed this plan about five days before trial, by keeping it secret thereafter until the middle of trial she denied the defendant his right to due process notice and his right to receive adequate assistance of counsel.[768]

The Snohomish County Prosecutor's Office argued that DPA Rutherford secretly testing evidence in the middle of trial and withholding the fact she was doing that should not be sanctioned because it was not willful; DPA Rutherford's own admissions at trial were inconsistent with this claim. DPA Rutherford never claimed she intended to disclose her new request for testing or new intent to call a witness promptly when she formed her plan. To the contrary, she admitted she made a deliberate choice or thought out plan to wait to do the test until trial started and to wait to disclose the testing until after it was completed.[769] She said she decided to wait until the testing was complete before she would disclose it because she wanted to

[768] *See, e.g., State v. Sherman*, 59 Wash.App. 763 (1990) (motion to add handwriting expert to testify morning of trial denied defendant the right to effective assistance of counsel).
[769] *See also* Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 66; Transcript June 5, 2019 at 40-41, 47, 71-72, Docket No. 67.

make sure she got the test before disclosing it.[770] She indicated she decided to make sure she was able to have the test in hand before she would tell anyone about it.[771] This was essentially arguing that she could choose to delay disclosure of testing to mid trial by choosing to do the testing mid trial. There was really no question this test fire could be accomplished as the government had full control of the gun and the ability to have any officer test it at any time. This excuse was not compelling factually. However, even if it were real, it was not a valid excuse for not disclosing something in violation of a court rule, court order and case law. More importantly, this "excuse" evidenced a conscious deliberative process or choice to delay disclosure until mid trial until after the test was done. That is a willful act. This was not inadvertent.

DPA Rutherford also knew this was wrong. She later admitted she knew she could not just test evidence and keep it secret.[772] She also admitted she had never before done destructive testing of evidence without the defense being notified and having a chance to have a defense expert involved.[773] She supplied no explanation as to any good faith thought process she had to reconcile a secret plan to test evidence and disclose a new witness during trial with the Omnibus Court Order and CrR 4.7. Neither she nor her attorneys supplied any mistaken good faith rationale DPA Rutherford had as to how this was legal.

At trial DPA Rutherford did claim the defense had good enough notice the gun operability testing would occur because she sent the defense the request to have the WSP Lab do test firing/ballistics testing about a week before trial call and it was the "same test" as the operability test done by the Sheriff's Office[774] The problems with this argument are twofold. One, the

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[770] *See Id.*
[771] *See id.*
[772] *See* Transcript of June 6, 2019 at 38, Docket No. 68.
[773] *See* Transcript of June 5, 2019 at 50-51, Docket No. 67.
[774] Transcript of June 4, 2019 at 28, Docket No. 66.

defense needs to not only be notified testing is planned, but also needs to know what the test results are before trial. The defense was never given any test results before trial. Two, the defense was notified by DPA Rutherford before and during trial that the WSP gun testing would not be done and there would be no attempt to introduce it at trial.[775] The request for testing by the WSP could not be notice testing would occur after she said she would not be going forward with or using that testing.

Several weeks later, in response to the Motion for Sanctions, the Prosecutor's Office made a completely inconsistent argument that DPA Rutherford had not really misled the defense and the Court on the first day of trial when she said she wouldn't be using gun testing at trial, because the WSP tests and Sheriff's Office tests were different kinds of testing, she just meant she wouldn't be using WSP scientific testing.[776]

In short, the prosecutors took the inconsistent positions at two hearings that (1) notice WSP gun testing will occur was adequate notice that other agency gun test firing would occur because they are the same testing, and (2) notice WSP gun testing will not occur is not notice other agency testing will not occur, because they are different testing.

This kind of hairsplitting to excuse violations of the discovery requirements was typical of how DPA Rutherford operated regarding discovery obligations. She argued since she only told the court she wasn't introducing the WSP gun test firing, she did nothing misleading by not telling the court and defense she would be trying to introduce other alternate testing.[777] This ignored her absolute legal duty to disclose the information pursuant to CrR 4.7, the Omnibus

[775] *See* Transcript of June 3, 2019 at 80-84, Docket No. 65.
[776] *See* Transcript of August 16, 2019 at 45-47, Docket No. 71.
[777] *See id.*

Court Order and the case law. It also ignored the fact that in the context of these particular facts the omission of information was misleading.

Telling the court and defense she would not be going forward with her only gun testing requests in discovery (the WSP test requests) did give a misleading impression no gun operability testing would be sought to be introduced because the WSP Lab test request and the Sheriff's Office tests were really the same as to the operability testing.[778] The WSP lab request did request firearm testing, i.e., that the gun be shot and bullets produced and this was not to do any scientific ballistics matching for this case.[779] No bullet matching was requested from the WSP crime lab for this gun for this case because the police did not believe this gun was ever shot at the scene of the crime.[780] The only bullet matching was to be a NIBENS check against the general database of open crimes.[781] However, to do that NIBENS check would require the gun to be test fired and bullets created to do the check, which also simultaneously accomplishes testing for operability. Thus, at trial DPA Rutherford directly asserted and affirmatively argued both agencies would do the same operability testing.[782] Thus, DPA Rutherford's representation that the WSP gun test results would not be back in time for trial included the request to have the WSP test fire and return the bullets. This is the same kind of testing DPA Rutherford did plan to do with another agency, the Snohomish County Sheriff's Office, but she did not disclose this plan for alternate testing.

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[778] *See* Transcript of June 4, 2019 at 28, Docket No. 66.
[779] *See* Transcript of June 4, 2019 at 6, 17-19, 28, Docket No. 66; Transcript of June 5, 2019 at 80-81, Transcript of June 3, 2019 at 80-81, Docket No. 65; Exhibit 1 at 281-289 of August 16, 2019 Hearing (Bates stamped Discovery showing Detective Fagen's description of what testing was requested on the gun at pg. 288 he requested the gun be tested against all crimes, i.e. a NIBENS request.)
[780] *See id.*
[781] *See id.*
[782] Transcript of June 4, 2019 at 28, Docket No. 66.

Furthermore, DPA Rutherford's failure to disclose she was planning to do testing on the gun the first day of trial was misleading whether or not the WSP and Sheriff's Office gun testing were the same. It was misleading because midtrial DPA Rutherford had a mandatory duty to immediately disclose all gun testing witnesses she was planning to introduce of any kind. The failure to disclose she was going to do gun testing of any kind in the middle of trial when gun testing was brought up would give the misleading impression there would be no testing. This is particularly true as to testing that would destroy other evidence. Silence in these circumstances would mean no testing was occurring because there was an affirmative legal duty to not be silent if there was an intent to do testing. The issue is not what gun testing DPA Rutherford told the court and defense she would not use, but the fact she did not disclose what gun testing she was intending to use. The omission was misleading.

DPA Rutherford's deliberate withholding of her intent to do gun testing was a withholding of short duration, but the timing of it was crucial. This timing provided tactical advantage for DPA Rutherford while prejudicing the defense in at least three ways.

First, DPA Rutherford's new alternate testing was timed in a way that prejudiced the defense because it was a plan to add otherwise missing proof of an element of a crime during the middle of trial.[783] The charge of Unlawful Possession of a Firearm was added on the morning of trial call and the defendant was arraigned the morning of trial.[784] That crime has a specific definition of firearm that includes a requirement the firearm be capable of shooting a projectile by an explosive.[785] This is not the same definition of firearm as for the robbery charge. When trial started, the prosecution had never provided any discovery or evidence showing the gun the

[783] *See also* Plaintiff's Proposed Instructions, Docket No. 23 (WPIC 1.33.02.02 and 2.10).
[784] *See* Transcript of May 31, 2019, Docket No. 69; Transcript of June 3, 2019; Docket No. 65.
[785] *See* Plaintiff's Proposed Instructions, Docket No. 23 (WPIC 1.33.02.02 and 2.10).

defendant allegedly possessed was operable.[786] Nor had the prosecution listed any witness to testify to that fact. Relying on discovery, the defense was proceeding to trial knowing it had a defense to the firearm charge that the prosecution could not prove beyond a reasonable doubt the gun met this statutory definition of an operable firearm. The defense may well have chosen to proceed to trial and not requested a continuance relying on the fact the prosecution had no evidence to prove this element of the crime at that time but could get such evidence later if the case was continued. If the defense had been informed of the request for mid-trial testing before the trial began, the defense could have objected to late testing, asked for a continuance to develop other possible defenses to that charge, or sought a plea deal on that charge. The defense had a right to know before trial began what evidence the State would present on gun operability that formed a necessary part of proving an element of the charge. When DPA Rutherford disclosed the new testing on the second day of trial she admitted on the record she understood she was creating a new piece of evidence to prove an element she otherwise could not prove, in the middle of trial.[787] DPA Rutherford's planned withholding of the gun operability testing until trial allowed her to sandbag the defense into thinking they had a defense to the charge and then to defeat the planned defense by introducing surprise evidence in the middle of trial.

Second, DPA Rutherford's plan to wait to disclose the fact firearm testing would be done in the middle of trial deprived the defense of the opportunity to use this additional late discovery as additional proof to support the defense CrR 8.3 Motion to Dismiss for prosecutorial mismanagement. The prosecution had this gun for months and DPA Rutherford admitted she could have requested the Sheriff's Office to conduct firearm testing at any time.[788] Waiting until

[786] *See* Exhibit 1 to August 16, 2019 Hearing (All the discovery); Declaration regarding Case Discovery, Docket No. 45 (indicating the dates discovery was sent and received).
[787] *See* Transcript of June 4, 2019 at 12-13, Docket No. 66.
[788] *Id.* at 13.

the middle of trial to do the firearm testing and to disclose a new testing witness was significant additional evidence of prosecutorial mismanagement to support the defense's Motion to Dismiss. This Motion was filed the Thursday before trial and was to be heard the first day of trial.[789] The defense could not raise that potent additional showing of mismanagement pursuant to DPA Rutherford's planned disclosure timing as she did not plan to disclose the new testing until after the time it was believed the defense Motion to Dismiss would be over.

Third, DPA Rutherford's choice to wait to disclose her plan to do new testing until after the testing was already done was also prejudicial because it denied the defense any opportunity to object to the testing and preserve the fingerprint and DNA evidence on the gun. Knowing the defense would object to the destructive testing, DPA Rutherford just did the testing without telling the defense. This denied the defense its right to object and take acts to preserve that other evidence. The destruction of evidence was only possible because DPA Rutherford deliberately withheld her intent to test the gun and call a gun testing witness until after the testing was done in the middle of trial. DPA Rutherford's improper destruction of this evidence is discussed in detail in Section III. 8, *infra*.

In addition to the timing of the disclosure of new testing being particularly prejudicial to the defense, DPA Rutherford's actions were especially aggravated by the context in which they occurred and her lack of candor in trying to excuse them.

Withholding discovery that she was intending to call a new witness about new testing was particularly aggravated because it literally occurred during a CrR 8.3 Motion to Dismiss for prosecutorial mismanagement that was based on a similar late disclosure of discovery.[790] This

[789] *See* Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019, Docket No. 65.
[790] *See* Transcript of June 3, 2019, Docket No. 65 (Motion to Dismiss Argument); Exhibit 16, June 3-6, 2019 Hearings (gun test fire report showing the testing occurred on the afternoon of June 3, 2019).

Motion to Dismiss included defense complaints about another prior late request to test the same gun.[791] DPA Rutherford was withholding this new gun-testing discovery while responding to a Motion to Dismiss alleging she committed a similar wrong act on a prior occasion.[792] That is, she was withholding her new gun-testing request while defending a Motion to Dismiss for withholding the prior late gun-testing request.[793] It is ridiculous to argue DPA Rutherford had no idea she was doing something wrong when at the moment she was doing it, she was in court being accused of doing the same wrong thing on another occasion. During oral argument on this Motion to Dismiss, every time it was discovered DPA Rutherford was still withholding other discovery on the first day of trial, she was repeatedly reminded that as trial had started she needed to disclose all discovery now. Still she sat moot and did not disclose her intent to do new testing the entire first day of trial. Continuing to hide discovery during a Motion to Dismiss based on failure to disclose discovery is beyond the pale. It is strong evidence the continued hiding was willful.

DPA Rutherford's misconduct was also aggravated by her disingenuously claiming when she finally disclosed this that the reason she did not disclose it earlier was because it did not occur to her there would be an issue with midtrial testing of evidence.[794] She blithely commented she saw no problem directing that evidence testing be delayed until the middle of trial and not disclosing an intended new testing witness and testing expert until the middle of trial.[795] Deputy Rutherford has been a prosecutor for five years.[796] When I asked her if she had ever deliberately

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[791] *See id.*
[792] *See also* Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 66; Transcript June 5, 2019 at 40-41, 47, 71-72, Docket No. 67; Motion to Dismiss, Docket No. 19.
[793] *See id.*
[794] Transcript of June 4, 2019 at 29-30, Docket No. 66.
[795] *See id.* at 29-30.
[796] *See* Declaration of Michelle Rutherford Opposing Sanctions at 1, Docket No. 51

requested evidence be tested in the middle of trial before, she said no.[797] When I asked her if she had ever heard of any other prosecutor doing that, she said no.[798] I do not find credible DPA Rutherford's claim that she had no idea at all there was any issue with intentionally delaying the testing of physical evidence and disclosing a testing witness until the middle of trial. It is farfetched to believe an experienced prosecutor doesn't have even a clue this might raise objections. Two days later when asked during the hearing if she really thought she could just test evidence in secret, she said no.[799] DPA Rutherford had a clue testing evidence, listing a new testing witness, and producing new physical evidence in the middle of trial could be a problem; her initial pretense to the contrary was disingenuous.

DPA Rutherford also exacerbated her misconduct by making a later sworn misrepresentation to the court about the gun testing in an effort to avoid sanctions. At the time of the Sanctions Motion DPA Rutherford claimed she did not know the gun had not been tested for firearm operability until she was actually in trial.[800] This changed story would be helpful in defending against sanctions because it would mean she never really withheld the plan to test the firearm, but instead just formed and did it all at once during trial. DPA Rutherford's sworn declaration for the later Sanctions Motion said, "it was not until we were ***actually in trial*** that I realized the firearm seized from co-defendant Emma May's residence, which formed the basis for Count II, UPF2, had not been tested for operability." (Emphasis added).[801]

Contrary to this statement for the Sanctions Motion, at the earlier trial DPA Rutherford stated that she started to form the plan to do the midtrial test firing on the gun to determine

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[797] Transcript of June 4, 2019 at 29-30, Docket No. 66.
[798] *Id.*
[799] *See* Transcript of June 6, 2019 at 38, Docket No. 68.
[800] Declaration of Michelle Rutherford Opposing Sanctions at 6; Docket No. 51.
[801] Declaration of Michelle Rutherford Opposing Sanctions at 6; Docket No. 51.

operability before trial, which meant she knew the gun had not been tested for operability before trial.[802] At trial DPA Rutherford repeatedly and consistently explained how she asked Detective Fagen to find out which WSP lab the gun was at before trial call, so if the case was going to trial they would be ready to know where to go get the gun to test it according to their discussed plan.[803] She said,

> THE COURT: And when did you ask Detective Fagen to take this – see if he can take this out of evidence and go test fire it? I'm asking what you did in the last two to three working days.
>
> MS. RUTHERFORD: ...I think it was Wednesday of last week when we began discussing locating which crime lab we could find that gun at and bring it back for trial and have it tested. It could have been, for example, in Olympia or in Marysville, two options, and so we needed to track it down and determine if we could bring it back. That's when we began having that discussion.[804]
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> . . . . . .
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> THE COURT: if you made a decision to remove this evidence and test it last Wednesday, why didn't you advise the Defense or the Court of that on Wednesday, Thursday, Friday at trial call, Monday at trial?
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> MS. RUTHERFORD: I have no reasoning or justification for that.[805]
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> . . . . . .
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> MS. RUTHERFORD: The question was – my recollection was that I asked after the gun on Wednesday. I couldn't find any evidence that that's actually when that happened. All the communications that I have appear to be from Friday. But I think that I initially on Wednesday – if that's the right day – asked Detective Fagan to find out where the gun was in case the case did get sent out to trial on Friday, and then on Friday we had knowledge of which crime lab it would be at and I asked him to go retrieve that at that time.
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> THE COURT: ...by Friday he'd already done checking to see where it was at your request?
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> MS. RUTHERFORD: I believe so. I don't know how much earlier than that I made the request to find out where the gun was. I thought – my recollection was

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[802] *See* Transcript of June 5, 2019 at 41, Docket No. 67.
[803] *See* Transcript of June 5, 2019 at 41, 47, 71-72, Docket No. 67.
[804] *See* Transcript of June 5, 2019 at 41, Docket No. 67.
[805] See Transcript of June 5, 2019 at 47, Docket No. 67.

> Wednesday, but that conversation would have had to have been over the phone. So I don't actually know.
>
> THE COURT: Some time before Friday?
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> MS. RUTHERFORD: It could have been early in the day of Friday, ***but some time before trial call.*** My recollection you Honor, is it was Wednesday, but I can't say for sure.[806]

Whether it was Wednesday or Friday of the week before trial, the prior record is clear that DPA Rutherford knew the gun had not been tested for operability before trial. She asked Detective Fagen to get the information sometime before Friday trial call to be able to find the gun. She directed Detective Fagen to go forward with their previously discussed plan to get the gun and test fire it on the Friday afternoon of trial call, before trial.[807] Both Detective Fagen and DPA Rutherford agreed that by the Friday afternoon of trial call she had already directed Detective Fagen to initiate or go forward with this plan to test fire the gun the following week during trial.[808] Detective Fagen checked his records to confirm that he was given the directive to follow through with the plan on Friday.[809] In fact, Detective Fagen gave another detective the direction to get the gun and test it before Detective Fagen came to the first day of trial on Monday morning.[810] DPA Rutherford also submitted jury instructions before trial started containing the operability element/definition for the firearm.[811] DPA Rutherford clearly realized the gun had not been tested for operability before she was actually in trial as she discussed a plan

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[806] *See* Transcript of June 5, 2019 at 71-72, Docket No. 67.
[807] *See* Transcript of June 4. 2019 at 25, 30-31, Docket No. 66; Transcript of June 5, 2019 at 41, 47, 71-72, Docket No. 67.
[808] *See id.*
[809] *See* Transcript of June 4. 2019 at 30-31, Docket No. 66.
[810] *See* Transcript of June 4, 2019 at 135, Docket No. 66.
[811] *See* Plaintiff's Proposed Instructions, Docket No. 23.

to correct that before trial call and directed Detective Fagen before trial call to get information to be ready to go forward with the plan to test the gun for operability.[812]

DPA Rutherford's declaration claim she was not aware the firearm was not tested for operability until she was "already in trial"[813] was a sworn misrepresentation of fact. We now know for sure it was a false statement because three weeks after I pointed out during the Sanctions Motion this sworn statement was false, DPA Rutherford filed a supplemental declaration recanting this false statement.[814] The recantation was an admission her prior sworn statement was incorrect and DPA Rutherford became aware the gun had not been tested for operability before trial during trial.[815]

DPA Rutherford carefully changed her story about the timing of when she realized the gun had not been tested for operability for the Sanctions Motion. She did this to avoid sanctions for withholding this testing plan during three court hearings.[816] If she did not know the gun had not been tested until right before she tested it, her withholding would have been shorter and not spanned the time of prior hearings. Withholding her intent to test the gun was particularly egregious during two of these hearings given the nature of the hearings. One of the hearings was specifically about whether the defense had adequate notice of the new Unlawful Firearm Possession charge so that it could be added right before trial.[817] Not telling the court that she planned to create new evidence for the new firearm charge that she still had not disclosed was an

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[812] *See* Transcript of June 4, 2019 at 30-31, Docket No. 66; Transcript of June 5, 2019 at 41, 47, 71-72, Docket No. 67.
[813] Declaration of Michelle Rutherford Opposing Sanctions at 6; Docket No. 51.
[814] *See* Supplemental Declaration of Michelle Rutherford in Opposition to Sanctions at 4, Docket No. 62.
[815] *Id.*
[816] (1) The Friday motion hearing having to do with whether the defense had adequate notice to try the firearm charge *See* Transcript of May 31, 2019; (2) Friday trial call; and (3) Monday Motion to Dismiss for withholding and mismanaging discovery. *See* Transcript of June 3, 2019, Docket No. 65.
[817] *See* Transcript of May 31, 2019, Docket No. 69.

omission in bad faith given the nature of the hearing.[818] Another motion heard was whether the case should be dismissed for prosecutorial misconduct or mismanagement for withholding discovery.[819] It was particularly nefarious that she was withholding discovery while arguing a motion against her for withholding discovery.

DPA Rutherford tried to change the facts about when she created the secret plan to test the gun because serious questions were raised during the trial Sanctions Hearing as to whether she had acted in bad faith by not disclosing her intent to do new gun testing during three court hearings. No explanation has been given for the complete inconsistency between her trial and her later Sanctions Hearing stories. Nor has any explanation been given for the complete inconsistency between her later Sanctions Hearing story and her retracting declaration. This was a misrepresentation made under oath to the court and only recanted after she was caught telling the falsehood.[820]

DPA Rutherford violated CrR 4.7, the Omnibus Court Order, and due process by hiding the discoverable facts that she had made a new request for testing, intended to call a new firearm testing witness, intended to introduce new firearm testing, and intended to introduce new physical evidence at trial. She hid this during a motion on the issue of whether the defense had adequate notice to meet the firearm charge, during trial call, while briefing a motion on whether the case should be dismissed because the prosecution was withholding evidence, during a motion on whether the case should be dismissed because of another late request to test the same firearm, and during trial.

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[818] *See id.*
[819] *See* Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019, Docket No. 65.
[820] *See* Declaration of Michelle Rutherford in Opposition to Sanctions at 6, Docket No. 51 (declaration with misrepresentation); Transcript of August 16, 2019 at 48-50. Docket No.71(Court indicates statement in declaration is inconsistent with prior representations); Supplemental Declaration of Michelle Rutherford in Opposition to Sanctions at 4, Docket No. 62.

She admitted she had knowledge she was going to try and introduce this new evidence in the middle of trial.[821] She admitted she deliberately chose to not disclose it promptly.[822] She admitted she deliberated about when to disclose this and made a conscious decision to wait until after the testing was done to disclose the testing.[823] She then made misleading statements to the court to try to avoid sanctions for this misconduct. The willful withholding of a plan to test evidence, introduce a new testing witness, and introduce new physical evidence in the middle of trial should be sanctioned.[824]

8. DPA RUTHERFORD WILLFULLY DESTROYED MATERIAL FINGERPRINT AND DNA EVIDENCE.

DPA Rutherford and the Prosecutor's Office admitted she directed the Sheriff's Office to take actions that resulted in the destruction and/or contamination of potential DNA and fingerprint evidence.[825] She directed that the Sheriff's Office remove the gun the defendant allegedly possessed from the WSP Lab and test fire the gun.[826] The gun was at the WSP Lab for fingerprint, DNA, and ballistics testing.[827] DPA Rutherford and the Prosecutor's Office conceded test firing the gun could contaminate or destroy fingerprint and DNA evidence on the gun.[828]

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[821] *See also* June 5, 2019 at 47, Docket No. 67.
[822] *See also* Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 66; Transcript June 5, 2019 at 40-41, 47, 71-72, Docket No. 67.
[823] *See id.*
[824] *See also* Transcript June 6, 2019 at 24-26, 30-33, 134, Docket 66; Transcript June 5, 2019 at 40-41, 47, 71-72, Docket No. 67.
[825] *See* Transcript of June 4, 2019 at 4-6, 12, 28, 24-26, 35, 141, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[826] *See* Transcript of June 4, 2019 at 24-26, 141, Docket No. 66.
[827] *See* Transcript of June 5, 2019 at 41, 43, Docket No. 67; Exhibit 16, June 3-6, 2019 Hearing; Transcript of June 3, 2019 at 80-81.
[828] *See* Transcript of June 4, 2019 at 4-6, 12, 28, 24-26, 35, 141, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.

At trial, DPA Rutherford clearly and repeatedly admitted she knew at the time she directed the test firing that the testing could destroy or contaminate the fingerprint and DNA evidence.[829] *DPA Rutherford directly admitted the very reason she had not requested test firing earlier was because she knew it could destroy the fingerprint and DNA evidence.*[830] In fact, when asked why she waited so long to request the test fire, DPA Rutherford's first and repeated response was because she knew it could destroy the fingerprint and DNA evidence.[831] DPA Rutherford stated, "Your Honor, test firing the gun would disturb if there was DNA and fingerprint evidence or could disturb that evidence if it existed. So the idea would be to collect evidence before doing anything that could disturb it."[832] She also stated, "so until that [fingerprint and DNA] sampling would have been accomplished by the crime lab, we wouldn't have wanted to disturb the gun by test firing it."[833] The Court asked DPA Rutherford, "you didn't test fire it earlier because you wanted to have the crime lab take any fingerprints, DNA or blood off of it?" DPA Rutherford answered "yes."[834]

In addition to admitting she knew the testing would destroy the other evidence, DPA Rutherford repeatedly described how she made a deliberate choice to do this. DPA Rutherford explained she weighed the options of destroying the evidence versus getting the other test fire evidence, and she decided since she could not get the fingerprint and DNA evidence in time for the current trial date, that it would be better for her case to let the fingerprint and DNA evidence go in favor of getting the test fire evidence in time for trial.[835] She stated, "So, your Honor, for that particular gun the primary objective would have been to obtain DNA and fingerprints from

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[829] *See* Transcript of June 4, 2019 at 4-6, 12, 28, Docket No. 66.
[830] *See* Transcript of June 4, 2019 at 4-6, 12, 28, Docket No. 66.
[831] *See* Transcript of June 4, 2019 at 4-6, 12, 28, Docket No. 66.
[832] Transcript of June 4, 2019 at 4-6, Docket No. 66.
[833] Transcript of June 4, 2019 at 5, Docket No. 66.
[834] Transcript of June 4, 2019 at 12, Docket No. 66.
[835] *See* Transcript of June 4, 2019 at 4, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.

that gun. And so based on the fact that the case is going to trial now, we had to basically abandon that request..."[836] DPA Rutherford also explained that she decided she was going to send the gun to the jury to handle in the jury deliberation room, and since she knew that would destroy the fingerprint and DNA on the gun anyway, it did not matter that the test firing of the gun would also destroy the fingerprint and DNA on the gun.[837] She stated she chose to test fire the gun since sending the gun to the jury room would result in people handling it and "make any DNA or fingerprints unusable on the gun anyway."[838] This deliberate thought process of weighing one kind of evidence against the other showed DPA Rutherford very much appreciated the test firing could destroy the other evidence. By her own words she made a deliberated choice to let that fingerprint and DNA evidence be destroyed as a strategy decision because she felt it would overall be better for her immediate case.[839]

In addition to DPA Rutherford's own crystal clear admissions, other evidence proved DPA Rutherford knew she was destroying evidence and choosing to do so. About a week before DPA Rutherford directed the gun test fire, the lead detective working closely with DPA Rutherford on the testing issues made email inquiries to the WSP Lab.[840] The inquiries made to the crime lab were whether there was any way fingerprint and DNA evidence could be lifted off a gun and preserved for later testing so test firing/ballistics testing could be done before the fingerprint and DNA testing.[841] Inherent in this inquiry was a clear understanding that test firing can destroy and contaminate fingerprints and DNA; that is why they needed to be lifted to be preserved before the test firing. The very purpose of this inquiry was to find a way to avoid such evidence

[836] *See* Transcript of June 4, 2019 at 4, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[837] Transcript of June 4, 2019 at 35, Docket No. 66.
[838] *Id.* at 35.
[839] *See* Transcript of June 4, 2019 at 4, 12, 35, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[840] *See* Exhibit 17, June 3-7, 2019 Hearing.
[841] *See id.*

destruction. This request was made in regards to testing another gun in this case.[842] However, the important fact is that this inquiry shows before DPA Rutherford requested the defendant's alleged gun be tested, she was specifically aware that test firing a gun could destroy fingerprint and DNA evidence on the gun.

In direct contradiction of DPA Rutherford's clear admissions at trial, DPA Rutherford and the Prosecutor's Office claimed in response to this Sanctions Motion that she did not appreciate she was destroying evidence when she directed it be destroyed.[843] This later claim was simply not true as shown by the prior record of statements by DPA Rutherford quoted above. These prior statements were made the day she destroyed the evidence or within two days thereafter and clearly show her state of mind and knowledge at that time. This changed story was more than just spin; it was a deliberate misrepresentation to a court. The prosecution's brief submitted by a prosecutor from the Civil Division states, DPA Rutherford "neglected to recognize that by test firing the firearm, certain evidence would no longer be available."[844] DPA Rutherford in a sworn declaration stated, "I neglected to recognize that by test firing the firearm, certain evidence would no longer [be][sic] available."[845]

There is no way to reconcile the statements in DPA Rutherford's response to sanctions with her trial statements; they are completely inconsistent. I do not believe the Civil Deputy who wrote this brief realized or was warned by DPA Rutherford that DPA Rutherford had already told the Court something very different trial. The very first thing DPA Rutherford said at trial when she was asked why she delayed testing the gun until the middle of trial was that she

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[842] *See id.*
[843] *See* Declaration of Michelle Rutherford Opposing Sanctions at 6, Docket Sub No. 51; State's Memorandum in Opposition to Defendant's Request that Additional Sanctions be Imposed at 4, Docket No. 52.
[844] State's Memorandum in Opposition to Defendant's Request that Additional Sanctions be Imposed at 4, Docket No. 52.
[845] *See* Declaration of Michelle Rutherford Opposing Sanctions at 6, Docket Sub No. 51; State's Memorandum in Opposition to Defendant's Request that Additional Sanctions be Imposed at 4, Docket No. 52.

believed the testing would destroy the DNA and fingerprint evidence.[846] I presume the Civil Deputy also did not realize DPA Rutherford had described how she figured since she planned to have the jury handle the gun and that would destroy the fingerprint and DNA evidence anyway, it did not matter if the test firing also destroyed the evidence.[847] I assume the Civil Deputy did not realize how DPA Rutherford had explained how since she could not get the fingerprint and DNA tests for the current trial date, but could get the operability test for the current trial date, she decided to get what she could and let the fingerprint and DNA evidence go.[848] I also assume the Civil Deputy would not have placed this claim in her brief if she realized there were emails showing DPA Rutherford and the lead detective were checking with the crime lab to find ways to remove and preserve fingerprints and DNA on a gun to do test firing first right before DPA Rutherford directed this test firing.[849]

The record showed Deputy Rutherford was very cognizant that the test firing she directed could destroy the fingerprint and DNA evidence on the gun. She may not have fully appreciated her case could be dismissed for doing it, but it was a misrepresentation for the Civil Deputy to claim in her brief and for DPA Rutherford to swear under oath in her declaration that she did not recognize she was destroying or contaminating evidence.

DPA Rutherford later admitted this Sanction's Declaration statement was false by recanting this false statement.[850] At the Sanctions hearing the court pointed out this declaration statement was not true.[851] Three weeks later, after all argument and briefing were done, DPA Rutherford

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[846] *See* Transcript of June 4, 2019 at 4-6, 12, 28, 24-26, 35, 141, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[847] *See* Transcript of June 4, 2019 at 4-5, 35, Docket No. 66.
[848] *See* Transcript of June 4, 2019 at 4, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[849] *See* Exhibit 17, June 3-7, 2019 Hearing.
[850] Supplemental Declaration of Michelle Rutherford in Support of the State's Briefing to the Court Opposing Sanctions at 4, Docket No. 62.
[851] *See* Transcript of August 16, 2019 at 51-54; Docket No. 72.

sent in a new declaration admitting her prior affidavit claim that she did not know the test firing could destroy or contaminate the fingerprint and DNA evidence had been inaccurate.[852]

DPA Rutherford also knew that any fingerprint and DNA evidence she was contaminating was material evidence and potentially exculpatory evidence that the defense particularly wanted. This was the gun the prosecution claimed the defendant possessed for the charge of Unlawful Possession of a Firearm.[853] If the defendant's DNA and fingerprints were not on the gun, that absence would be exculpatory evidence given Emma May claimed the defendant carried the gun all the time. DPA Rutherford admitted if the defendant's fingerprints were not found on the gun that arguably could be *Brady* evidence.[854] If the fingerprints of one of many other suspects identified in this case were found on the gun, that would tend to negate Emma May's story the defendant was involved in the robbery and carried this gun. Exculpatory evidence is not 100% proof the defendant is innocent; it is favorable evidence that tends to negate guilt. Even DPA Rutherford admitted that if someone else's fingerprints were found on the gun that may be *Brady* material she would be required to disclose.[855]

Fingerprint and DNA evidence on the gun were particularly material given the facts in this case for two reasons. (1) The prosecution had no witness who actually saw the defendant possessing any gun on the date charged.[856] (2) There were problems with the prosecution's evidence in terms of proving any gun in evidence was the same gun the witness said the

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[852] Supplemental Declaration of Michelle Rutherford in Support of the State's Briefing to the Court Opposing Sanctions at 4, Docket No. 62.
[853] *See* Transcript of June 4, 2019 at 8-11, Docket No. 66.
[854] *See* Transcript of June 4, 2019 at 34, Docket No. 66.
[855] *See* Transcript of June 4, 2019 at 8, Docket No. 66.
[856] Ms. May admitted she did not actually see the defendant with a gun on the date alleged, but she claimed the defendant told her he had a gun. *See,* CD Recording of Witness Emma May's April 2, 2019 Proffer Interview, Exhibit 1 at CD 7, August 16, 2019 Hearing (all discovery).

defendant possessed.[857] Under these circumstances, any additional fingerprint or DNA evidence on the gun could have tipped the scales on the Unlawful Possession of a Firearm charge one way or the other.

In addressing this destruction of evidence, the Prosecutor's Office made another misleading argument for DPA Rutherford that was contrary to the facts in this case; they argued that DPA Rutherford had a "latent sense" the defense did not think the fingerprints and DNA were important or material because the defense had never asked to independently test the gun.[858] The Prosecutor's Office's Brief said, "DPA Rutherford was also aware that the defense counsel had made no request at any time to have independent testing done on that firearm, which influenced a latent sense that collection of the [DNA and fingerprint] evidence ... would be a needless exercise."[859] DPA Rutherford swore to the same thing in her declaration opposing sanctions. She said, "I was also aware the defense had made no request at any time to have independent testing done on that firearm, which likely influenced my latent sense that collecting the evidence at any time thereafter would be a needless exercise."[860] While I appreciate the other prosecutors arguing this were innocently parroting DPA Rutherford, for DPA Rutherford to

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[857] Emma May told the authorities the defendant carried any gun only on his person or in the car *See* Transcript of June 4, 2019 at 8-9, Docket No. 66. The gun in evidence was found under Emma May's mattress and not on the defendant or in a car. *See* Transcript of June 4, 2019 at 8-9, Docket No. 66; Transcript of June 6, 2019 at 5, Docket No. 69. Emma May could not explain how a gun got under her mattress. The police showed Emma May a picture of the gun found under her mattress and she said it was the one the defendant possessed on the night in question. *See,* CD Recording of Witness Emma May's April 2, 2019 Proffer Interview, Exhibit 1 at CD 7, August 16, 2019 Hearing (all discovery). However, this testimony would not have been admissible since she never actually saw the gun the defendant possessed that night, so she had no foundation to say it was the one possessed. Furthermore, the picture she was shown of the gun was just a photo of a ubiquitous gun with no distinguishing characteristics from which Emma May could actually distinguish it as one the defendant possessed as opposed to thousands of others that look the same.

[858] *See* Declaration of Michelle Rutherford Opposing Sanctions at 6, Docket Sub No. 51; State's Memorandum in Opposition to Defendant's Request that Additional Sanctions be Imposed at 4, Docket No. 52.

[859] State's Memorandum in Opposition to Defendant's Request that Additional Sanctions be Imposed at 4, Docket No. 52.

[860] *See* Declaration of Michelle Rutherford Opposing Sanctions at 6, Docket No. 51; State's Memorandum in Opposition to Defendant's Request that Additional Sanctions be Imposed at 4, Docket No. 52.

imply she had a "latent sense" the defense was not interested in this fingerprint and DNA evidence was absurd in light of what had gone in the case.

At the time DPA Rutherford directed the destruction of the evidence, the defense had repeatedly told DPA Rutherford it wanted this fingerprint and DNA evidence tested and that the defense would be prejudiced without it. The defense attorney had been contacting DPA Rutherford about the status of the fingerprint and DNA testing on this gun by email every month, because he wanted the results for trial.[861] This included contacting DPA Rutherford in March, April, and May to get firearm testing status information.[862] On about May 21, the defense attorney contacted DPA Rutherford by email and specifically asked if the gun DNA fingerprint testing could be back for trial.[863] When the defense found out it was not going to get the fingerprint or DNA testing on May 28th because the State forgot to send in the test request, defense counsel was frustrated and advised DPA Rutherford of that by email on Tuesday May 28th.[864]

In addition to defense counsel's repeated inquiries as to the fingerprint and DNA evidence, DPA Rutherford knew the defendant believed the DNA and fingerprint test results from the gun would be exculpatory.[865] The police found this out through listening to the defendant's jail phone calls.[866] The lead detective noted this in his request for laboratory analysis sent to the WSP to test the gun that the defendant was telling people the DNA and fingerprint analysis would come back

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[861] *See* Transcript of June 5, 2019 at 49-50, Docket No. 67; Exhibit 2-5 to June 3-7, 2019 Hearing; Motion to Dismiss at 1-2, Docket No. 19.
[862] *See id.*
[863] *See* State's Response to Motion to Dismiss at Exhibit 9, Docket No. 30.
[864] *See* Transcript of June 5, 2019 at 67, Docket No. 67; Transcript of June 3, 2019 at 18-19, Docket No. 65; State's Response to Motion to Dismiss at Exhibit 10, Docket No. 30.
[865] *See* Exhibit 17, June 3-7, 2019 Motions Hearing; Exhibit 1 at Bates 281-289 specifically at 287-88, August 16, 2019 Sanctions Hearing (bates stamped discovery); Declaration re Discovery, Docket No. 45.
[866] *See id.*

favorable to him.[867] The detective's request stated, "While Guinn declined to speak to us, his jail calls indicated he has denied being in possession of this firearm."[868] This information was sent to DPA Rutherford as part of discovery.[869] Presumably the defendant might have a pretty good idea whether there was or was not any chance of his fingerprints and DNA being on a gun. It was clear to DPA Rutherford that the defense believed the test results for fingerprints and DNA would be exculpatory evidence for the defendant. She knew this before she destroyed the evidence.[870]

DPA Rutherford also knew the defense believed the fingerprint and DNA testing would be helpful to the defense because the defense filed a Motion to Dismiss specifically claiming the defense was prejudiced by the delay in requesting the gun fingerprint and DNA tests.[871] This Motion to Dismiss was served on DPA Rutherford's office on Thursday May 30,[872] the day before she directed the deputy to go forward with the plan to do the destructive testing.[873] This Motion also informed DPA Rutherford the defense was upset about the firearm not being sent in for the fingerprint and DNA testing earlier.[874] The Motion to Dismiss asked the case be dismissed because the defense had been mislead to believe the firearm had been sent in for the fingerprints and DNA testing months earlier when it had not been sent.[875] I do not know what could have put DPA Rutherford on more direct notice the defense wanted this evidence and would object to destruction of the DNA and fingerprint evidence than a Motion To Dismiss

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[867] *See id.*
[868] *See id.*
[869] *See id.*
[870] *See id.*
[871] *See* Motion to Dismiss, Docket No. 19.
[872] *See* Motion to Dismiss, Docket No. 19.
[873] *See* Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019 at 18-19, Docket No. 65._
[874] *See* Motion to Dismiss, Docket No. 19.
[875] *See id.*

based on the prosecution mismanaging the case by not sending the firearm in for DNA and fingerprint testing.

During the oral argument on the Motion to Dismiss, the defense argued it was prejudiced by the police delay in sending the fingerprint and DNA evidence on the gun in for testing.[876] The motion argued DPA Rutherford had prejudiced the defense by stringing them along to believe the testing request had been made.[877] The defense motion claimed the failure to have the fingerprint and DNA tested timely was mismanagement by the State so prejudicial the case had to be dismissed.[878] The defense argued it was caught between having to waive speedy trial again (trial had already been continued) or wait an additional four months more to get the testing results than it would have had to wait if the test requests had been sent in when the State said it was sending them in.[879]

This Motion to Dismiss was filed and served on DPA Rutherford exactly one day before DPA Rutherford gave the direction the police to do the destructive testing.[880] This motion was being argued in court on the first day of trial right before the evidence was actually being secretly destroyed at DPA Rutherford's direction.[881] Despite clear written and oral notice the defense wanted the DNA and fingerprint test evidence and believed it would be exculpatory, DPA Rutherford went secretly forward and destroyed the evidence with no notice to the defense.[882]

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[876] *See* Transcript of June 3, 2019 at 18-21, Docket No. 65; Amended Motion to Dismiss, Docket No. 29.
[877] *See id.*
[878] *See id.*
[879] *See id.*
[880] *Compare* Motion to Dismiss at 1, Docket No. 19 (the stamps on the filed copy show the motion was served on the Prosecutor's Office and filed in the court file the Thursday before trial call, May 30), *to*, Transcript of June 4, 2019 at 30-32, Docket No. 66 (DPA Rutherford stated she gave the final order to go get the gun and test it the Friday afternoon of trial call).
[881] *See* Transcript of June 3, 2019 at 18-20, 80-86; Docket No. 65; Amended Motion to Dismiss, Docket No. 29.
[882] *See also* Transcript of June 4, 2019 at 25-26, 32-33, Docket No. 66.

The statement now by the Prosecutor's Office that at the time this evidence was being destroyed DPA Rutherford had some "latent sense" the defense was not interested in the fingerprint and DNA testing is intended to give the very misleading impression DPA Rutherford might not have known the defense would have a problem with the destruction of this evidence. This was misleading because at the very moment the evidence was being destroyed, DPA Rutherford was in the middle of a motion where the defense was claiming it was prejudiced by not having this very same fingerprint and DNA evidence timely tested.[883] It was misleading because prior to the evidence destruction the defense straight out gave DPA Rutherford written notice in a brief that it wanted this exact evidence and was prejudiced without it.[884] It is misleading because in its motion the defense explained it had relied on the State's representation it would do testing.[885] It was misleading because for months defense counsel had been trying to get the fingerprint and DNA testing from the prosecutor and/or an update on when it would be complete.[886] Most significantly, it was misleading because DPA Rutherford specifically knew the defense believed testing the DNA and fingerprints would produce exculpatory evidence for the defense.[887]

DPA Rutherford knew the defense would object to the destruction of the gun fingerprint and DNA evidence if the defense were notified that destructive testing was going to occur. DPA absolutely positively knew the defense wanted the fingerprint and DNA tests results from the gun. DPA Rutherford's claim for the last Sanctions Hearing that she likely had a "latent sense"

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[883] *See* Transcript of June 3, 2019 at 18-20, 80-86; Docket No. 65; Amended Motion to Dismiss, Docket No. 29;
[884] *See* Defense Motion to Dismiss, Docket No.19.
[885] *See* Transcript of June 3, 2019 at 18-22, Docket No. 65; Defense Motion to Dismiss, Docket No.19.
[886] *See* Transcript of June 3, 2019 at 18-22, Docket No. 65; Defense Motion to Dismiss, Docket No.19.
[887] *See* Exhibit 17, June 3-7, 2019 Motions Hearing; Exhibit 1 at Bates 281-289 specifically at 287-88, August 16, 2019 Sanctions Hearing (bates stamped discovery); Motion to Dismiss, Docket No. 19; Transcript of June 3, 2019 at 18-19, Docket No. 65.

the defense did not want the DNA and fingerprint evidence was disingenuous. The argument mislead the other prosecutors who were making the argument on her behalf because she told them the defense had not asked for testing without telling them the full story. In light of what was going on in the case, the insinuation by DPA Rutherford that she thought the defense might not mind her destroying the evidence was absurd.

DPA Rutherford is a prosecutor with five years of experience; she knows not to destroy evidence. During the hearing, I asked her what she understood to be her duty to preserve physical evidence and she responded, "generally speaking, to preserve evidence."[888] When asked what her prior understanding was as to whether she could just choose to destroy evidence, she admitted in all other instances when she has had destructive testing done on evidence, it was done with notice to the defense so they could have an expert present.[889] The head of her office, Snohomish County Prosecutor Adam Cornell, indicated he believed the attorneys in his office know they are supposed to preserve evidence.[890]

Furthermore, in every case DPA Rutherford has with the Public Defender's Office they file a standard demand to preserve all evidence and that is adopted into the Omnibus Order.[891] In this case, the Omnibus Court Order, that incorporated the standard Defense Discovery Request, specifically ordered all physical evidence to be preserved.[892] DPA Rutherford had a court order to not destroy evidence and a specific written defense request to preserve evidence.[893] A latent sense the defense might not mind would never be sufficient to violate the court order or the discovery demand.

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[888] *See* Transcript of June 5, 2019 at 50, Docket No. 67.
[889] *See id.* at 50-51.
[890] *See* Transcript of August 16, 2019 Sanctions Hearing at 56-57, Docket No. 72.
[891] *See, e.g.,* Defense Discovery Demand at 4, Docket No. 9; Omnibus Order, Docket No. 15.
[892] *See* Omnibus Court Order, Docket No 15; Defense Request for Discovery at 4, Docket No. 9.
[893] *See id.*

Furthermore, given the facts in this case, it would not have been reasonable for DPA Rutherford to conclude anything from the mere fact the defense had not asked for independent testing. In the very beginning of the case, about four months before trial, the defense had been told in discovery that the police were sending this gun for fingerprint and DNA testing.[894] Thus, while the case was pending, the evidence was believed to not yet be back from the State lab and not yet available for defense testing. The defense repeatedly tried to find out from DPA Rutherford when the evidence would be back[895] and she blew the defense off. The defense also had no reason to get other testing unless it disagreed with the State's testing results or had some reason to believe the WSP Laboratory testing procedures were inadequate. The defense believed accurate testing would be helpful for the defense and show defendant's DNA and fingerprints were not on the gun.[896] Defense counsel also kept contacting DPA Rutherford to get the WSP test results and find out when the evidence would be back indicating he was interested in getting the fingerprint and DNA test results for trial.[897]

DPA Rutherford was aware the defense thought this was material *exculpatory* evidence before she directed the police to take acts that would destroy or contaminate the evidence. DPA Rutherford knew the police had found out the defendant was claiming to others that his fingerprints would not be found on the gun; the police knew this from listening to jail calls.[898] The defendant bragging his fingerprints and DNA would not be on the gun and Defense counsel repeatedly making email efforts to try and get updates on the status of the gun testing made it

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[894] *See, e.g.,* Exhibit 1 at 129, August 16, 2019 Sanctions Hearing (bates stamped discovery).
[895] *See* Transcript of June 5, 2019 at 49-50, Docket No. 67, Exhibits 2-5, June 3-7, 2019 Hearing.
[896] See Exhibits 2-5, June 3-7, 2019 Motion Hearing; Transcript of June 5, 2019 at 49-50, Docket No. 67; Exhibit 17, June 3-7, 2019 Motions Hearing; Exhibit 1 at Bates 281-289 specifically at 287-88, August 16, 2019 Sanctions Hearing (bates stamped discovery).
[897] *See id.*
[898] *See* Exhibit 17, June 3-7, 2019 Motions Hearing; Exhibit 1 at Bates 281-289 specifically at 287-88, August 16, 2019 Sanctions Hearing (bates stamped discovery); Declaration re Discovery, Docket No. 45.

clear to DPA Rutherford this could be favorable *Brady* evidence for the defense. The Motion to Dismiss indicated the defense believed the DNA and fingerprint evidence was important to the defense and noted the delay was forcing the defense to choose between a speedy trial and having all the evidence it wanted.[899] When the defense counsel found out the gun had never been sent in for the lab testing, he sent an email to DPA Rutherford on the Tuesday before trial expressing his frustration that the gun fingerprints and DNA had not been tested.[900] This was a clear clue to DPA Rutherford the defense thought the results could be exculpatory. The very next day, the Wednesday before trial, DPA Rutherford started discussing with Detective Fagen locating the gun to do the destructive operational testing.[901]

It showed particular bad faith for DPA Rutherford to secretly destroy this DNA and fingerprint evidence at the very time she was in the middle of a motion wherein the defense was arguing it was prejudiced by the mismanagement in not getting this same evidence tested and when she knew the defendant claimed this evidence was exculpatory. The Motion to Dismiss based, in part, on the defense not being able to timely get the gun fingerprint and DNA testing began at 9:00 am and went throughout the first day of trial.[902] At DPA Rutherford's prior direction, at about 1:00 pm that afternoon a detective drove to the WSP, removed the gun, and tested it without taking any known actions to preserve any fingerprint or DNA evidence on the gun.[903] DPA Rutherford literally had the evidence destroyed while the defense was arguing in court that the state had mismanaged the case by not testing this exact same evidence. Despite being in a motion where the defense indicated it was prejudiced by not getting this evidence,

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[899] *See* Transcript of June 3, 2019 at 18-22, Docket No. 65; Defense Motion to Dismiss, Docket No.19.
[900] *See* Transcript of June 5, 2019 at 67, Docket No. 67; State's Response to Defense Motion to Dismiss at attached Exhibit 9, Docket No. 30.
[901] *See* at Transcript of June 5, 2019 at 41, 71-72 Docket No. 67.
[902] *See* Transcript of June 3, 2019 at 18-22, 80-86, Docket No. 65
[903] *See* transcript of June 4, 2019 at 140-41, Docket No. 66; Exhibit 16, June 3-7, 2019 Hearings.

DPA Rutherford deliberately chose to destroy the evidence without giving the defense any notice or chance to object.[904] It was bad faith to do this secretly. DPA Rutherford hid the fact she was going to destroy this evidence she knew the defendant claimed was exculpatory until it was already destroyed because she knew full well the defense would object.

DPA Rutherford had a common law legal duty to preserve this evidence and she violated that duty. All parties have a general duty to preserve anything that may be evidence for potential litigation.[905] The intentional destruction of evidence is spoliation. If spoliation occurs, the fact finders at trial may be instructed that they should assume the destroyed evidence would have been unfavorable to the party who spoiled it.[906]

DPA Rutherford also had a constitutional duty in a criminal case to not destroy such evidence pursuant to the United States Supreme Court *Youngblood* decision[907] and multiple other appellate cases.[908] It is a violation of a defendant's due process right to a fair trial to knowingly and deliberately in bad faith destroy material evidence that is *potentially* useful.[909] There are two different standards. If evidence is material and exculpatory it is a violation of due process to destroy it without regard to whether the destruction was negligent or intentional. If evidence is only "potentially useful" it is a violation of due process only if the destruction is done in bad faith, i.e., deliberately by someone who knew the material was potential useful evidence at the time of the destruction.[910] "Potentially useful" evidence is defined by case law as "evidentiary

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[904] *See also* Transcript of June 5, 2019 at 40-41, 47, 51, Docket No. 67; Transcript of June 4, 2019 at 25-33 Docket No. 66.
[905] *See, Pier 67, Inc. v. King County,* 89 Wash.2d 379 (1977); *Marsall v. PacWest Inc.;* 94 Wash.App. 372 (1999); *Henderson v. Tyrell,* 80 Wash. App. 592 (1996).
[906] *See id.*
[907] *See Arizona v. Youngblood,* 488 U.S. 55 (1988).
[908] *See, e.g., State v. Copeland,* 130 Wash.2d 244 (1996); *State v. Wittenbarger,* 124 Wash.2d 467 (1994); *State v. Afeworki,* 189 Wash.App. 327 (2015); *State v. Groth,* 163 Wash App. 548 (2011); *State v. Burden,* 104 Wash. App. 507 (2001).
[909] *See id.*
[910] *See id.*

material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[911]

In this case DPA Rutherford knew she was destroying material evidence in the case, knew the other party wanted this particular evidence tested, knew the other party claimed the evidence would be exculpatory once tested, knew the other party had specifically requested the preservation of all evidence in writing, knew a Court Omnibus Order had entered requiring the preservation of all evidence, and knew if the testing was negative as to the defendant or positive to someone else it would be evidence useful to the defense. Because DPA Rutherford knew this was evidence that could be potentially useful and exculpatory, and she intentionally directed the destruction of it anyway, the standard for a due process violation was whether the evidence destroyed was "potentially useful."

The evidence was potentially useful. The Unlawful Possession of a Firearm charge alleged possession by the defendant of this gun. The police found the gun soon after the crime where the defendant allegedly hid it right after the crime, under a mattress. Emma May claimed the defendant kept the gun on him all the time and said he had it on him at the time of the robbery.[912] Fingerprint and DNA testing of this gun was "potentially useful evidence." Pursuant to *Youngblood,* DPA Rutherford denied the defendant his due process right to a fair trial by intentionally destroying "potentially useful" evidence.[913]

It should also be noted, that because there was a specific request to preserve evidence in this case, there may also have been a due process violation even if DPA Rutherford had not acted intentionally. In *State v. Boyd*, 29 Wash.App. 584 (1981), the court held that when a specific

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[911] *See State v. Afeworki*, 189 Wash. App. 327 at 356 (2015) *quoting, State v. Groth, supra* and *Arizona v. Youngblood, supra.*
[912] *See* Exhibit 1 at CD 7, August 16, 2019 Sanctions Hearing.
[913] *See also Arizona v. Youngblood, supra.*

request is made to preserve evidence, due process is denied if there is a "reasonable *possibility*" the evidence was favorable and material to the defense without regard to whether the destruction was negligent or intentional.[914]

While the above cases analyze whether a case should be dismissed after destruction, they all emphasize that before destruction, "the State's duty is to disclose and preserve all *potentially* material and favorable evidence."[915] They all also note the government's failure to preserve evidence in violation of the due process clause "requires dismissal of the charges against the defendant."[916]

DPA Rutherford had an even clearer duty to preserve this evidence pursuant to the Omnibus Court order. The Omnibus Order ordered the parties to comply with each other's discovery requests.[917] The Defense Request for Discovery stated, "PRESERVATION: You are requested to preserve evidence relating to the alleged offense ... until final disposition of this case or until further order of the Court."[918] The Omnibus Order required DPA Rutherford to preserve *all* evidence in the case without regard to whether it was exculpatory or useful. This court order also required her to seek an order of the court if she wished to destroy evidence before final disposition of the case.[919] DPA Rutherford violated the clear terms of the court order by knowingly destroying evidence and by not seeking court permission before doing so.

This illegal destruction of evidence was not necessary. Advance notice was supposed to occur before any destruction of evidence pursuant to the Omnibus Order.[920] Had DPA

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[914] *State v. Boyd*, 29 Wash.App. 584 (1981). *See also State v. James*, 26 Wash.App. 522 (1980).
[915] *See id.* at 590 (emphasis added).
[916] *See State v. Copeland,* 130 Wash.2d 244, 279 (1996). *See also State v. Wittenbarger*, 124 Wash.2d 467 (1994); *State v. Afeworki,* 189 Wash.App. 327 (2015); *State v. Groth*, 163 Wash.App. 548 (2011); *State v. Burden,* 104 Wash.App. 507 (2001).
[917] *See* Omnibus Order, Docket No. 15.
[918] Defense Request for Discovery at 4, Docket No. 9.
[919] *See,* Omnibus Order, Docket No. 15; Defense Request for Discovery at 4, Docket No. 9.
[920] *See id.*

Rutherford followed the court order and established law and given notice of her intent to destroy, this case may not have had to be dismissed. By secretly destroy or contaminating this evidence without giving the defense advance notice, DPA Rutherford prevented the defense from having any chance to object. Had she not hid what she was doing, the defense could have objected and options could have been explored to prevent this. For example, the detective found out from the crime lab before this evidence was destroyed that DNA and fingerprint evidence could be lifted for later testing.[921] By using this procedure the prosecution would have been able to preserve the evidence and still get the test-fire evidence for trial. There has been no explanation why DPA Rutherford and the detective determined this option was available and actually requested it for another gun in this case, but did not use this option to avoid destroying the evidence on this gun. Even if that preservation method required a short continuance, the defense may have preferred it to destruction. The defense was prevented from exercising that option. The prosecution also could have sought a stipulation as to operability of the gun. Faced with other options of a continuance or destruction of the potentially exculpatory evidence, the defense may have preferred a stipulation. The prosecution also could have moved for a continuance within the remaining 30-day speedy trial time to allow the DNA and fingerprint evidence to be lifted and preserved or tested. The court also could have provided the defense funding to lift and preserve the fingerprint and DNA evidence immediately or to immediately do independent fingerprint and DNA testing during a continuance within speedy trial. DPA Rutherford also could have just dismissed the late added Unlawful Possession of Firearm charge, as operability of the firearm was not a necessary element for the main robbery charge. DPA Rutherford had many options

[921] *See also* Exhibit 17 to June 3-7, 2019 Hearing.

other than secretly destroying clearly material and potentially exculpatory evidence in violation of a court order.

DPA Rutherford's violation of the common law duty, constitutional duty and court ordered duty to preserve evidence was willful and deliberate. No one has claimed this was an accidental test firing. DPA Rutherford admitted she gave a directive to her agents, the police, to go to the crime lab, remove evidence, and conduct test firing that she admitted she knew could destroy and/or contaminate the DNA and fingerprint evidence.[922] She admitted she weighed the destruction of the evidence against her desires to get the test fire and let the jury handle the gun and made a conscious decision to give up the fingerprint and DNA evidence.[923] This was a deliberated intentional choice to do an act she knew would destroy material evidence that the defense had specifically told her the defense wanted and that she knew the defense believed was exculpatory.

I find that these illegal actions by DPA Rutherford were further aggravated by the fact that when she later responded to this Sanctions Motion she made three misleading representations about the facts relating to the destruction of evidence. (1) DPA Rutherford misrepresented that she did not realize she was destroying evidence after she had already earlier at trial fully admitted the very reason she delayed testing was because she believed it would destroy evidence. This is discussed above. (2) DPA Rutherford misleadingly inferred she had a latent sense the defense wouldn't care if the evidence were destroyed when she had already been served with a defense motion stating exactly the opposite and was aware the defendant was telling people the evidence would be exculpatory. This is discussed above. (3) DPA Rutherford submitted a false

[922] *See* Transcript of June 4, 2019 at 4-6, 12, 24-25, 35, 141, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.
[923] *See* Transcript of June 4, 2019 at 4, 35, Docket No. 66; Transcript of June 5, 2019 at 43-44, Docket No. 67.

statement in her sworn declaration that she did not realize the gun had not been tested for operability until she was actually in trial.[924] This is discussed in detail in Section III.1, and III.7, *supra.*

These three sworn misrepresentations cannot be explained away by DPA Rutherford's stressful life circumstances in the spring; these misrepresentations were made months later at the end of the summer in response to the last hearing on the Motion for Sanctions.[925] The stress of DPA Rutherford's prior life circumstances would have lessened by then and she had weeks to prepare her declarations and all the transcripts and discovery to be sure she was accurate. She also was taken out of trial rotation and had two attorneys to assist her.[926]

These misleading statements were not accidents. DPA Rutherford would have read the brief and she was present in court for the oral argument on the Sanctions Motion.[927] She knew the other prosecutors were parroting her misrepresentations. The other prosecutors defending DPA Rutherford did not recognize they were making misrepresentations because they based their misrepresentations on DPA Rutherford's misrepresentations. However, DPA Rutherford knew. She had a duty to advise the other prosecutors defending her of all the surrounding circumstances so they were not proffering misleading evidence on her behalf to a court.

I find DPA Rutherford knowingly and willfully contaminated and/or destroyed material evidence in the middle of trial, to wit, fingerprints and DNA on the gun the prosecution alleged the defendant possessed during the charged crimes. I further find DPA Rutherford knew the defense wanted this evidence tested and knew the defense believed the testing would produce

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[924] *See* Declaration of Michelle Rutherford Opposing Sanctions at 6, Docket No. 51.
[925] *See id.* at 4-6.
[926] *See also* Declaration of Michelle Rutherford Opposing Sanctions at 1, Docket No. 51; Memorandum in Opposition to Sanctions, Docket No. 52; Declaration of Adam Cornell in Support of State's Briefing Opposing Sanctions, Docket No. 53.
[927] *See* Transcript of August 16 Sanctions Hearing, Docket No. 72.

exculpatory evidence. Knowing that she deliberately destroyed/contaminated the evidence without giving notice to the defense. This should be sanctioned because it was done in bad faith.

IV. SANCTIONS

I am sympathetic to DPA Rutherford's life circumstances and therefore have assumed all the numerous pretrial discovery violations not outlined above were not willful and were a product of those circumstances. This is giving her the benefit of the doubt as these involved numerous other discovery violations that resulted in turning over large amounts of other discovery in just the few days prior to trial.[928] None of these many other pretrial violations are even discussed herein for the sake of brevity, but they were also significant and clear violations of CrR 4.7, the Omnibus Order and case law.

I am also giving her the benefit of the doubt and not sanctioning her for withholding the items in the seven categories outlined in Sections III. 2-7, *supra*, from the time she had a duty to disclose through about the day prior to trial call when the defense filed the CrR 8.3 Motion to Dismiss for discovery misconduct.[929] Although she was aware of this missing discovery and blatantly in violation of discovery deadlines, I believe it is possible that she may have inadvertently or mistakenly failed to deal with all this until the day before trial call because of personal circumstances.

I am also not sanctioning her except as set forth in Sections III. 2-8, *supra*, for the other portion of the 249 pages of discovery and 6 media CDs of discovery she did not give to the

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[928] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates 278-341and media CDs 7,8,9.

[929] The one exception is Section III. 4, supra, involving the late disclosure of the content or recording of the proffer interview that is being sanctioned from May 21 when DPA realized it was missing from discovery until May 31 when it was turned over at trial call.

defense until after trial started.[930] Much of this came in so late that the defense never had a chance to add it to the defense Sanctions/CrR8.3 Motion to Dismiss or argue it and the prosecutor never explained how this much other discovery was not disclosed until days into the trial. This court and the parties literally did not even try to deal with all the potential additional discovery violations that were disclosed after the argument was truncated by dismissal of the charges. There was enough to deal with already. In particular, there was a major issue regarding withholding all the discovery material regarding a significant "other suspect" who the police had been investigating. All of that discovery was not turned over until after trial started.

I am also not sanctioning DPA Rutherford for making numerous misrepresentations during both the trial CrR 8.3/Sanction Motion and the later continued final Sanctions Hearing. I will note that making false statements under penalty of perjury is a serious matter.

As to the defense request to sanction the entire Snohomish County Prosecutor's Office to educational requirements, it is hereby,

ORDERED that this motion is granted, in part, as to the three lawyers involved in these hearings and denied, in part, as to the remainder of the Snohomish County Prosecutor's Office.

The defense request to impose training sanctions against the entire Snohomish County Prosecutor's Office is denied for three reasons. First, I do not believe the problems in this case arose from inadequate training. As to the acts I find should be sanctioned, DPA Rutherford knew she was supposed to timely supply these items in discovery and knew she should not destroy evidence the defense alleged was exculpatory. She just consciously chose to ignore the law for her own advantage. Second, I do not have evidence before me in this case that this is an office-wide problem. I have not seen any other criminal cases with discovery failures anything like this

[930] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates 342-518, separate Alfaro Discovery 1-74, and media CDs 10-15.

case. Snohomish County Prosecutors know to supply timely discovery and not to destroy evidence. Third, the Snohomish County Prosecutor's Office responded to this Sanctions Motion by indicating it would voluntarily do more training on discovery issues to prevent this from happening again, essentially agreeing to do some of what the defense requested. I assume the Snohomish County Prosecutor will do what he said he would do.

As to the two lawyers who argued the last Sanctions Motion hearing, it is hereby,

ORDERED that Snohomish County Prosecutor Adam Cornell shall read this court's entire decision herein and Civil Deputy Bridgette Casey shall read Section III.1, *supra*, as education. I have made a finding above that these two lawyers did not know they were proffering misrepresentations to the court essentially to protect them from any potential ramifications from DPA Rutherford's misrepresentations. I am not imposing this educational requirement as a sanction. However, these lawyers submitted a sworn declaration from DPA Rutherford with false and misleading facts to support their arguments and parroted additional oral misrepresentations made by DPA Rutherford. While they did not know their representations were false and misleading, they had the trial transcripts and could have figured it out if they had spent a lot of time comparing the transcripts and the discovery to her later representations.

Representative examples of DPA Rutherford's misrepresentations are identified in Section III. 1, *supra*, and throughout the body of this decision. These are examples that concentrate on the last hearing that did not occur until 2.5 months after trial. The reason I concentrated on these later examples was to make it clear this dishonesty was not just mistakes occurring around the earlier time of trial or a product of DPA Rutherford's life circumstances at that one time in life. These later examples demonstrate a pattern of ongoing behavior. The misleading representations discussed in this opinion are by no means the only ones. There were others during the first four

days of trial not discussed herein, but there are limits to the length of one decision. The facts that were misrepresented were significant to the CrR 8.3 Motion and the sanctions issues; they were not just minor details.[931]

RPC 3.3 imposes a duty on all lawyers to act with candor toward the court. CR 11 imposes a duty on all lawyers to make an adequate investigation before submitting claims. DPA Rutherford did not comply with these duties and her office did nothing during the last hearing to put the brakes on that behavior when it should have.

As to educational sanctions against DPA Rutherford, it is further,

ORDERED that sanctions are hereby imposed against DPA Rutherford for the seven violations detailed in Sections III. 2-8, *supra.* This includes willfully destroying/contaminating physical evidence she knew the defense considered exculpatory and wanted tested and deliberately giving the defense no notice before destroying that evidence.[932] It includes continuing to withhold multiple pieces of discovery even after the defense filed a Motion to Dismiss for discovery violations and even well after trial began.[933] However valid DPA Rutherford's excuses were before that point, once a motion was filed and trial was imminent, DPA Rutherford's continued deliberate and willful withholding of discovery thereafter was inexcusable. These acts violated CrR 4.7, the Court's Omnibus Order, and well-established case authority. Her acts violated the law.

DPA Rutherford herself did not really claim during trial that these particular acts being sanctioned were mistakes or inadvertent due to her life circumstances. Instead, it was clear from DPA Rutherford's explanations at the time that the misconduct happened because she

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[931] *See also* Section III. 1, *supra.*
[932] *See* Sections III. 7 and 8, *supra.*
[933] *See* Sections III. 2-6, *supra.*

deliberately tried to skirt the rules by creatively interpreting her way around them. For example, DPA Rutherford insinuated she did not have to turn over *Brady* information she had actual knowledge of if she did not have it in a document because she has decided to make it her personal practice to *never consider in her own mind* whether any evidence she learns is *Brady* exculpatory evidence.[934] DPA Rutherford decided she did not have to provide the defense written copies or the details of her primary witness's written agreement to testify against the defendant before trial because she had no copies; it turned out no copies meant no copies with the original signatures on them.[935] Similarly, she asserted it was perfectly fine that she still had not disclosed the lead detective's main narrative police report missing from discovery by the middle of trial because it was not in her own personal possession; it was only in the possession of her office staff.[936] It did not matter that the author of the report was sitting next to her and had an electronic copy of the report in his hand that could be disclosed immediately. There was a consistent pattern of this kind of hairsplitting manipulation of the rules. These particular violations being sanctioned did not happen because DPA Rutherford's personal problems caused her to inadvertently simply not cope with the case or make mistakes. They happened because DPA Rutherford very consciously decided to get tricky with the legal discovery requirements.

I am sanctioning the acts outlined above in Sections III. 2-8, *supra*, because they demonstrated a flagrant pattern of deliberate violation of the law. DPA Rutherford knowingly and willfully continued to hold back the discovery outlined above even after it came to her attention she had previously failed to disclose it by the legal deadlines, even though the information was in her personal knowledge or control, even though the defense was seeking

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[934] See Transcript June 6, 2019 at 45-47, Docket No. 68.
[935] *See* Section III. 3, *supra;* Transcript June 3, 2019 at 48-49, Docket No. 65.
[936] *See* Section III. 5, *supra;* Transcript of June 3, 2019 at 91-92, 113, Docket No. 65; Transcript of June 4, 2019 at 150, Docket No. 66; Transcript of June 5, 2019 at 39, Docket No. 67.

sanctions for discovery violations, and even after the trial started. I am also sanctioning her because she hatched a plan before trial to wait and test evidence in the middle of trial without giving any notice to the defense and knowing it would destroy other evidence the defense had maintained was exculpatory evidence favorable to the defense that the defense wanted tested.[937] Her excuses for this plan were false facts in her sworn declaration that were later recanted.[938] While their were a lot of simple mistakes made, the argument that these acts were all just innocent mistakes was ridiculous when you examine the case as a whole and consider DPA Rutherford's own admissions she did some of these acts very deliberately. I hereby,

FIND remedial educational sanctions should be ordered against DPA Rutherford. As to the propriety of educational sanctions, remedial educational sanctions are one of the lowest levels of sanctions. I am imposing educational sanctions in this case because they are what the opposing side requested, and because I find they are the type of sanction most tailored to prevent the acts from occurring again.

These are light sanctions for the misconduct described above. I also could add attorney fees and monetary sanctions. The going rate for attorney fees in Everett is $300 per hour. Mr. Aull appeared for court on these matters seven times, on some occasions for a full day, and he filed at least four sets of briefing. A conservative estimate of his time spent would be 35 hours. That would be more than $10,000 in attorney fees even before the monetary sanction would be imposed on top. I could also charge DPA Rutherford the cost of keeping 50 jurors on hold for 2 days at $10 a juror per day, or a total of $1000. I also could have just turned this whole mess over to the Washington State Bar Association and saved myself a whole lot of time and trouble, but that would have increased the risk and extended this process for DPA Rutherford.

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[937] *See* Sections III. 7 and 8, *supra.*
[938] *See* Section III. 1, *supra.*

Furthermore, making false statements in a sworn declaration and not retracting them until after you are caught is not only an ethical violation, it is a crime that could have been reported. Any complaint that these educational sanctions are too harsh is utterly misinformed. Therefore, it is further,

ORDERED that DPA Rutherford is hereby sanctioned to attend and accrue a total of 30 CLE ethics credits approved by the Washington State Bar Association over and above any and all other CLE credits that she is required to accrue to maintain her bar license. This shall be accomplished by no later than the end of 2021, with no less than 15 of these credits completed by the end of 2020. Preferably these would be in the area of prosecutors' ethical duties, if such courses are available. DPA Rutherford is further hereby ordered to file a sworn declaration in the court file certifying the number of credits completed to comply with this sanction by the end of 2020 and by the end of 2021. Those certifications shall list the name of each course taken, the dates of each completed course, and the approved CLE hours for each course taken for this sanctions requirement. The certification shall also list the other courses taken for her bar license requirement during the same time period. It is further,

ORDERED that as an educational sanction, DPA Rutherford shall read and file in this court file a sworn certification that she has read the following materials within 90 days: (1) this entire decision on the Motion for Sanctions, (2) CrR 4.7, (3) RPC 3.3, (4) RCW 9A.72, (5) the ABA Standards for Prosecutors that I will file in the court file under separate cover, (6) the Omnibus Court Order and the standard public defender Request for Discovery filed in this case, (7) every case cited in this opinion, and (7) every appellate case cited by Mr. Aull in the briefs he filed in this case. Her certification shall list each item read including each case she has read by name and

citation. In the future, there will be no argument DPA Rutherford is unaware of her legal obligations to provide timely discovery and not destroy evidence. It is further,

ORDERED that DPA Rutherford will send written apologies to Snohomish County Prosecutor Adam Cornell, DPA Casey, Lead Detective Fagen and defense counsel Aull, and she shall file a sworn certification she has complied with this requirement within 90 days of this order.

DPA Rutherford shall apologize to Mr. Cornell and DPA Casey for having them argue those misrepresentations identified in Section III. 1, *supra*, without at least informing them she made contrary statements at trial and that there were contrary facts in the record. DPA Rutherford took horrible advantage of the fact that the other attorneys trusted what she told them. She also exploited the fact she knew it would be unreasonably time consuming if not impossible for these other lawyers to put together a coherent picture of all the facts from the voluminous discovery, long transcripts, and the court record to figure out why the things she was representing to them were false or misleading.[939] The excuses she made sounded plausible on their face if one did not piece together the complete story. DPA Rutherford sat silently watching and listening as the Snohomish County Prosecutor argued her misrepresentations to a court and made no effort to correct them.[940] Even when those misrepresentations were specifically questioned and her attorney would ask her to confirm them, rather than correcting the record she confirmed her false and misleading representations.[941] It is not even clear that those other attorneys are aware DPA Rutherford later retracted two of the sworn facts they presnted on her behalf for the Sanctions Hearing.

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[939] *See also* Transcript of August 16, 2019 at 49-50, Docket No. 71.
[940] *See* Section III. 1, *supra.*
[941] *See id.*

As to Detective Fagen, DPA Rutherford shall acknowledge in her apology letter that it was unfair for her to throw him under the bus and put the entire blame on him for the late delivery of the police report and the proffer interview recording or CD.[942] She shall acknowledge she had a responsibility to request Detective Fagen's report and the CD sooner as she knew of their existence from the time they were created. Detective Fagen's office reviewed, approved and delivered his long narrative report within 48 hours of DPA Rutherford first requesting it,[943] and then he sent it by an instantaneous electronic delivery method. It is DPA Rutherford who chose to leave this report to languish in her office delivery system that we now know would not have gotten the report to defense until after the fourth day of trial.[944] When DPA Rutherford continued to balk at delivering this report in the possession of her office even when being directed to do so by a Judge in the middle of trial, Detective Fagen interrupted DPA Rutherford's claims she could not possibly deliver the police report to advise he had the report on his work phone, and then he emailed it into the courtroom immediately.[945] Detective Fagen also sent the witness's proffer interview CD recording to DPA Rutherford no less than three times, once by mail and hand delivered twice, each the same day she requested it and multiple copies.[946] Detective Fagen was nothing but accommodating.

Deputy Rutherford shall also apologize to defense counsel Aull for accusing Mr. Aull of engaging in gamesmanship. DPA Rutherford made this claim in written briefing filed in response to Mr. Aull's Motion to Dismiss for prosecutorial misconduct in withholding discovery.[947] At the very moment DPA Rutherford accused defense counsel Aull of gamesmanship, she was

[942] *See* Transcript of June 5, 2019 at 35, 63-64, Docket No. 67; Section III. 5, *supra.*
[943] *See* Transcript of June 6, 2019 at 31, Docket No. 68; Section III. 5, *supra.*
[944] *See* Section III. 5, *supra.*
[945] *See id.*
[946] *See id.*
[947] *See id.*

knowingly and *secretly* still withholding numerous pieces of material discovery.[948] Unbeknownst to defense counsel and the court, at the moment DPA Rutherford was accusing the defense of gamesmanship when trial began, she was still knowingly withholding at least the following discovery:

- A request DPA Rutherford made to the Sheriff's Office to conduct testing on the gun in the middle of trial and her intent to add a testing witness, new testing evidence, and new physical evidence in the middle of trial;[949]

- Oral threats, assurances, and consideration DPA Rutherford had given to her primary witness to induce testimony;[950]

- A written agreement with the primary witness to testify against the defendant in return for a particular written plea bargain, both written agreements drafted by DPA Rutherford and in the possession of the prosecutor's office but never given to the defense;[951]

- The existence and content of the lead detective's entire narrative report spanning four months of ongoing investigation and containing undisclosed *Brady* exculpatory, *Brady* impeachment, and "other suspect" information, even though report was in the computer system at DPA Rutherford's office;[952]

- Police reports regarding a never before disclosed suspect who was found with the gun the police suspected was used in the shooting in this case and other items potentially matching the missing loot from this robbery.[953]

- Numerous unsuccessful attempts by the police to verify Emma May's identification of suspects, particularly the fact two of the co-suspects named by State's witness Emma May could not even be verified to be real people.[954]

There may be more than this. Pages and pages of new discovery continued to pour in after trial started and even after the case was slated to be dismissed.[955] I have not even tried to deal

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[948] *See* Sections III. 2, 3, 5, 7, 5, *supra.*
[949] *See* Section III. 7, *supra.*
[950] *See* Section III. 2, *supra.*
[951] *See* Section III. 3, *supra.*
[952] *See* Section III. 5, *supra.*
[953] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates separate Alfaro Discovery 1-74.
[954] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates 342-518.
[955] *See* State's Declaration Regarding Discovery, Docket Nos. 70 and 45; Exhibit 1 to August 16, 2019 Sanctions Hearing at bates 342-518, separate Alfaro Discovery 1-74, and media CDs 10-15.

with all of that. DPA Rutherford accused defense counsel of engaging in gamesmanship for seeking a remedy to discovery violations, when it was she who was engaging in gamesmanship by continuing to hide a trove of discovery she was fully aware of. DPA Rutherford is ordered to apologize to Mr. Aull for accusing him of engaging in gamesmanship while she was engaging in gamesmanship.

DPA Rutherford's gamesmanship significantly interfered with the administration of justice, resulting in a serious felony having to be dismissed solely because of her misconduct. The court has common law, CrR 4.7, and inherent powers and *duties* to sanction willful destruction of evidence and willful violations of discovery rules to prevent them from happening again. If this isn't the case for sanctions, then I don't know what is.

Dated this 5th day of December, 2019.

Anita L. Farris
Superior Court Judge