

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

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

**RESPONSE IN OPPOSITION TO THE STATE’S MOTION TO EXCLUDE EVIDENCE  
OF K.S.’s SEXUAL AND COUNSELING HISTORY**

Comes now Defendant, Eric Greitens, by and through his undersigned counsel, and for his Response in Opposition to the State’s Motion to Exclude Evidence of Victim’s Sexual and Counseling History (“Motion to Exclude”) filed May 1, 2018, states as follows:

**I. Background**

The State has moved to exclude evidence of K.S.’s “sexual history” and “psychiatric or counseling history,” noting K.S. testified about these matters at her deposition. K.S. testified about numerous instances of sexual contact with Defendant after the State alleges Defendant took and transmitted what it calls the “involuntary pornography” at issue. K.S. also testified about at least one sexual encounter with another man during her relationship with Defendant.

K.S. testified that she saw a counselor before, during, and after her affair with Defendant and that she and P.S. attended marital counseling. K.S. discussed Defendant in counseling. However, because the defense has not yet obtained any counselling records, the motion as to counseling is premature.

**II. Evidence of Sexual History**

The State has not indicated what particular evidence it believes to be inadmissible. The

State does agree that K.S.'s sexual and counseling history as it relates "to the defendant or to the victim's veracity," would be relevant. Motion to Exclude at 2. That concession opens the door to just about everything the defense anticipates introducing.

1. K.S. has painted a picture that she was less than fully consenting to the activities of March 21, 2015. The Circuit Attorney's Office refers to her a "victim." Therefore, the frequency or voluntariness of her sexual activity with Mr. Greitens most certainly is relevant to the issue of consent and her credibility if she denies consent for the activities of March 21.

2. K.S. has claimed that she never let anyone take a photograph of her naked. Therefore, evidence of other occasions where she had images of herself fully or partially naked or engaged in sexual activity would go directly to her credibility.

3. The State has attempted to portray K.S. as a victim who was trapped in her relationship with Mr. Greitens. Evidence that she was involved with another man at the same time she was involved with Mr. Greitens and while she was still married directly refutes that sort of portrayal.

4. K.S. has testified about supposedly being taped to exercise rings and other activities which have a Fifty Shades of Grey overtone. K.S.'s interest in the book and such activities is directly relevant to March 21.

In other words, K.S.'s sexual history will be a very relevant issue to her credibility.

Like in every case, any logically and legally relevant evidence will be admissible here. "Logically relevant evidence tends to make the existence of any fact more probable or less probable than it would be without the evidence, or tends to corroborate evidence that is itself relevant and bears upon the principal issue of the case." *Ball v. Allied Physicians Group, L.L.C.*, 2018 WL 1474196, at \*7 (Mo. App. E.D. 2018); *State v. Rios*, 314 S.W.3d 414, 421 (Mo. App.

W.D. 2010). Evidence is legally relevant if its probative value outweighs the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. *Rios*, 314 S.W.3d at 421.

Defendant's right to confront and cross-examine his accuser is sacrosanct. U.S. Const. Amend. VI; Mo. Const. Art. I, § 18(a); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). Courts allow "great," or "wide" latitude in cross-examination in criminal cases. *State v. Zink*, 181 S.W.3d 66, 72 (Mo. banc 2005). Simply because evidence may involve a private or sexual matter does not categorically preclude its admissibility. And as to the counseling records, if K.S. were to claim privilege or lack of relevance, the procedure to protect against public disclosure of the material is *in camera* inspection of the evidence to determine if it is relevant and material. *State v. Newton*, 925 S.W.2d 468, 471 (Mo. App. E.D. 1996)

Admitting the statute is not applicable to this case, the State argues the "policy" of Section 491.015, the rape shield statute, should guide the court in its evidentiary rulings at trial because "[t]he case involves conduct of a type that is clearly intended to be be [sic] covered by the spirit of the rape shield" and that none of the exceptions to the rape shield statute would apply. In criminal cases, the spirit of a statute is never the controlling factor, but rather the words of the statute control. The statute does not and cannot apply to this case.

But, even if the Court were to look at the spirit of the statute, the exceptions include, "(1) evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to alleged crime and the evidence is reasonably contemporaneous with the date of the alleged crime, or . . . (3) Evidence of immediate surrounding circumstances of the alleged crime." Section 491.015.1(1) and (3).

The rape shield statute creates a presumption that "prior sexual conduct" of a

complaining witness is irrelevant, subject to the particular exceptions. *State v. Smith*, 314 S.W.3d 802, 807-08 (Mo. App. E.D. 2010) (citing *State v. Osterloh*, 773 S.W.2d 213, 218 (Mo. App. W.D. 1989)). Because it curtails the otherwise broad right of the defendant to present a defense, see *Davis v. Alaska*, 415 U.S. 308 (1974), the rape shield statute is narrowly targeted to rape and sexual assault victims to prevent “rape victims [from suffering] unwarranted psychological and emotional abuse.” *State v. Brown*, 636 S.W.2d 929, 935 (Mo. banc 1982). The State seems to argue that some greater evidentiary standard should bar this particular defendant from presenting otherwise admissible evidence in an invasion of privacy case, which would naturally create an evidentiary hurdle for this particular defendant while reducing the State’s burden.

While the State understandably would hope to hamper the defense in this manner, even if the rape shield statute applied to the case, that statute can never be “so strictly applied as to deprive the defendant of the fair trial comprehended by the concept of due process.” *State v. Douglas*, 797 S.W.2d 532, 535 (Mo. App. 1990) (internal citation omitted). Further, the blanket assertion that none of the various rape shield exceptions would apply is actually quite unlikely. For example, a sex act with a person other than Defendant around the same time as the alleged act would be admissible to show “[e]vidence of immediate surrounding circumstances of the alleged crime.” *State v. Rycraw*, 507 S.W.3d 47, 57 (Mo. App. E.D. 2016) (citing Section 491.015.1(3)).

The State’s attempt to import principles and policy underlying rape shield would be a great injustice to the defendant.

### **III. Conclusion**

For the foregoing reasons, Defendant requests this Court enter its Order denying the State’s motion.

Dated: May 8, 2018

Respectfully submitted,

**DOWD BENNETT LLP**

By: /s/ James F. Bennett

James F. Bennett, #46826

Edward L. Dowd, #28785

James G. Martin, #33586

Michelle Nasser, #68952

7733 Forsyth Blvd., Suite 1900

St. Louis, MO 63105

Phone: (314) 889-7300

Fax: (314) 863-2111

[jbennett@dowdbennett.com](mailto:jbennett@dowdbennett.com)

[edowd@dowdbennett.com](mailto:edowd@dowdbennett.com)

[jmartin@dowdbennett.com](mailto:jmartin@dowdbennett.com)

[mnasser@dowdbennett.com](mailto:mnasser@dowdbennett.com)

By: /s/ John F. Garvey

John F. Garvey, #35879

Carey Danis & Lowe

8235 Forsyth, Suite 1100

St. Louis, MO 63105

Phone: (314) 725-7700

Fax: (314) 678-3401

[jgarvey@careydanis.com](mailto:jgarvey@careydanis.com)

By: /s/ N. Scott Rosenblum

N. Scott Rosenblum, #33390

Rosenblum Schwartz & Fry

120 S. Central Ave., Suite 130

Clayton, MO 63105

Phone: (314) 862-4332

Fax: (314)862-8050

[srosenblum@rsflawfirm.com](mailto:srosenblum@rsflawfirm.com)

**CERTIFICATE OF SERVICE**

Signature above is also certification that a true and correct copy of the above and foregoing document was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the City of St. Louis Circuit Attorney's Office this 8th day of May, 2018.

/s/ James F. Bennett