MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

FILED
FEB 22 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State Of Missouri,
Plaintiff,
vs.

ERIC GREITENS
Alias(es):
4522 Maryland Ave
Saint Louis, MO 63108
Race / Sex / Age: W / M / 43 Dob: 4/10/74
Ht: 5'09" / Wt: 200
Complaint#: LID:
Arrest#: OCN:
SSNs:
Defendant

Division Number:
CA#:
Cause No.

Charge(s):

Count 1: Invasion of Privacy-1st Degree (Class D FELONY) RSMo 565.252 **ON** 3/21/2015 Time: **Place:** 4522 Maryland Ave, St. Louis, Mo 63108 (SCC 565.252-001Y200357)

Witnesses
K. S.
P. S.
J. W.

State Of Missouri)
City Of St. Louis) SS

INDICTMENT

The Grand Jurors of the City of St. Louis, State of Missouri, charge that:

Count I

The defendant, in violation of Section 565.252, RSMo, committed the class D felony of invasion of privacy in the first degree, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about March 21, 2015, in the City of St. Louis, State of Missouri, the defendant knowingly photographed K.S in a state of full or partial nudity without the knowledge and consent of K.S. and in a place where a person would have a reasonable expectation of privacy, and the defendant subsequently transmitted the image contained in the photograph in a manner that allowed access to that image via a computer.

A true bill

Foreman

Kimberly M. Gardner
Circuit Attorney
of the City of St. Louis,
State of Missouri, by

Assistant Circuit Attorney

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST. LOUIS, MISSOURI

FILED
FEB 23 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY
(Date File Stamp)

Judge or Division:	Case Number: 1822-CR00642		
Defendant's Name/Alias(es)/Address: **GREITENS, ERIC** Alias(es): **4522 Maryland Ave.** **St. Louis, MO 63108**	Court ORI Number:	Offense Cycle No. (OCN):	
	Investigating Agency ORI:		
	DOB: **4/10/74**		SSN:
	Warrant Number: **MSHP Number:**		Driver's License No. / Issuing State / Exp. Date: / /
	Sex: **M**	Height: **5'09"**	Weight: **200 lbs.** Race: **W**

Amended Warrant for Arrest

To Any Peace Officer in the State of Missouri:

You are hereby commanded to arrest the above-named defendant who is charged by indictment with:

Charge Code/Description	NCIC Modifier	Charge Level	Offense Date
565.252-001Y200357 **Cnt 1: Invasion of Privacy 1st Degree - 565.252 RSMo**		**Felony D**	**3-21-2015**

alleged to have been committed within the jurisdiction of this Court and in violation of the laws of the State of Missouri. You are further commanded to bring the defendant before this Court to be dealt with in accordance with the law.

If defendant is charged with any of the following and is a concealed carry endorsement holder, defendant shall surrender his/her license to the serving officer to be forwarded with the return of this warrant to the court.

1. Any felony;
2. Any misdemeanor involving explosive weapons, firearms, firearm silencer or gas guns;
3. Any misdemeanor offense involving a crime of violence;
4. Any misdemeanor offense involving possession or abuse of a controlled substance, or prior or persistent DWI alcohol or drugs; or
5. A fugitive from justice or charged by information or indictment in any other state of any similar offense described in the above paragraphs 1-4.

The officer serving this warrant shall execute in writing a return on this warrant to this Court.

2-23-2018
Date

Judge

By Thomas Kloeppinger
Circuit Clerk

Bond Conditions:
- ☐ Cash bond of $ _____ and surety bond of $ _____
- ☒ Written promise to appear
- ☐ Bond in the amount of $ _____, secured by: ☐ Cash ☐ Surety
- ☐ Bond in the amount of $ _____, with _____ % cash
- ☒ Other: DEFENDANT ALLOWED TO TRAVEL FREELY THROUGHOUT THE UNITED STATES

By Judge: _____

Officer's Return

I certify that I served this warrant in _____ (County/City of St. Louis), Missouri on _____ (date), by arresting the above named defendant and bringing him/her before the court on _____ (date).

Offense Cycle Number (OCN) if not indicated above **ck035407**

☐ Defendant's license surrendered for concealed carry suspension and is attached.

Sheriff's Fees

Fees $ N/A

Mileage $ (_____ miles @ $. _____ per mile)

Total $ _____

_____

Arresting Officer's Signature

_____

Title

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

AR#

FILED
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
18 FEB 23 AM 8:42

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)
PROMISE TO APPEAR AND ORDER OF PRE-TRIAL RELEASE

STATE OF MISSOURI, Plaintiff,

vs.

Greitens, Eric Defendant

Division No. 16
Cause # 1822-CR00642

Charge: Invasion Of Privacy

In accordance with the authority vested to this Court by the laws of the State of Missouri, you are hereby released under the conditions listed below until such time that you are discharged by this Court or any court of competent jurisdiction. This Court or any court of competent jurisdiction may at any time revoke or modify any conditions of your release. Your failure to meet any court appearance may result in a fine of not more than Five Thousand Dollars ($5,000.00) or imprisonment for not more than four (4) years for a felony charge or a fine of not more than One Thousand Dollars ($1,000.00) or confinement for not more than one (1) year for a misdemeanor charge, or punishment by the court for contempt. ***If you violate any of these conditions, a warrant for your arrest will be immediately issued.**

CONDITIONS OF RELEASE

1. You shall appear in this court or any other court, trial or appellate, in which the case may be prosecuted or appealed from time to time as required to answer the criminal charges

YOUR FIRST COURT DATE IS **March 16, 2018 at 9:00 AM Div. 16,** 1114 Market St., St. Louis, MO 63103.

2. You shall submit to the order, judgment and sentence and any process of any court having jurisdiction.

3. You shall have no contact with any complaining witness or victim.

4. ~~You shall remain in the state or such other area as may be designated by the Court.~~

5. You shall follow the directives of the representative of the Court and report any change in residency or employment immediately. Telephone: (314) 622-3340 Drug Court - (314) 613-7183

6. Other Conditions: Personal Recognizance- Allowed To Travel Freely Throughout The United States

I have read or have had read to me the Order of Pre-Trial Release set out herein. I promise to appear and otherwise agree to comply with such conditions of release.

X _____ Phone # 417-818-4842
DEFENDANT SIGNATURE
ADDRESS: 7733 Forsyth, 63105 Zip Code 63105
:

By signing this Order as a sponsor of the Defendant I hereby agree to (a) supervise the defendant in accordance with the above conditions; (b) use every effort to assure the defendant's appearance in Court; and (c) notify the Pre-Trial Release Office of any violation of any condition of release.

SPONSOR SIGNATURE_____ ADDRESS/PHONE NUMBER _____

WITNESSED BY _____ DATE_____
RELEASED DAY 22 MONTH **February** YEAR **2018**

PRE-TRIAL BOND OFFICER SO ORDERED _____ 4:12pm

311-36 (ML 08/04)

5:10pm

NOTICE OF PROHIBITED ACTIVITY

(Section 575.270 RSMo)

You are advised that the tampering with a witness or victim by you, or by someone in your behalf, will result in revocation of your pre-trial release, forfeiture of bail, and your arrest. Tampering with a witness or victim is defined as follows:

1. A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness in an official proceeding to disobey a subpoena or other legal process, or to absent himself or avoid subpoena or other legal process, or to withhold evidence, information or documents, or to testify false, he:

   (1) Threatens or causes harm to any person or property; or
   (2) Uses force, threats or deception; or
   (3) Offers, confers, or agrees to confer any benefit, direct or indirect, upon such witness; or
   (4) Conveys any of the foregoing to another in furtherance of a conspiracy.

2. A person commits the crime of victim tampering if, with purpose to do so, he prevents or dissuades or attempts to prevent or dissuade any person who has been a victim of any crime or a person who is acting on behalf of any such victim from:

   (a) Making any report of such victimization to any peace officer, or state, local or federal law enforcement officer or prosecuting agency or to any judge;
   (b) Causing a complaint, indictment or information to be sought and prosecuted or assisting in the prosecution thereof;
   (c) Arresting or causing or seeking the arrest of any person in connection with such victimization.

3. Tampering with a witness in a prosecution, tampering with a witness with purpose to induce the witness to testify falsely, or victim tampering is a class C felony if the original charge is a felony. Otherwise, tampering with a witness or victim tampering is a class A misdemeanor. Persons convicted under this section shall not be eligible for parole.

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
CITY OF ST. LOUIS

STATE OF MISSOURI

vs.

ERIC GREITENS

FILED
FEB 22 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

CASE NO. 1822-CR00642 DATE: 2/22/18

COURT ORDER

Defendant, by and through Counsel, hereby waives formal reading of the Indictment. Counsel states that the Defendant is fully aware of the substance of the charge(s) against him or her and that a copy of the indictment has been provided to the defense. The defense and the state, by the undersigned Assistant Circuit Attorney, agree to waiver of formal arraignment and agree to proceed to trial.

The Defendant, through Counsel, enters a plea of **NOT GUILTY** to the offense(s) charged.

___ Defendant was present through the video system.

X _____
Defendant

_____
Assistant Circuit Attorney

_____
Attorney for Defendant

Cause assigned to Division 16 for ~~trial~~ status setting on FRIDAY MARCH 16, 2018 at 9:00 a.m.

So ordered:

_____
~~Associate~~ Circuit Judge, Division 16

2-22-2018

Vernon's Annotated Missouri Statutes
Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders
Chapter 565. Offenses Against the Person (Refs & Annos)
Invasion of Privacy

This section has been updated. Click here for the updated version.

V.A.M.S. 565.252

565.252. Invasion of privacy, first degree, penalty

Effective: [See Text Amendments] to December 31, 2016

<Text of section eff. until Jan. 1, 2017. See, also, section eff. Jan. 1, 2017.>

1. A person commits the crime of invasion of privacy in the first degree if such person:

(1) Knowingly photographs or films another person, without the person's knowledge and consent, while the person being photographed or filmed is in a state of full or partial nudity and is in a place where one would have a reasonable expectation of privacy, and the person subsequently distributes the photograph or film to another or transmits the image contained in the photograph or film in a manner that allows access to that image via a computer; or

(2) Knowingly disseminates or permits the dissemination by any means, to another person, of a videotape, photograph, or film obtained in violation of subdivision (1) of this subsection or in violation of section 565.253.

2. Invasion of privacy in the first degree is a class D felony.

Credits
(L.2002, S.B. Nos. 969, 673 & 855, § A.)

RESEARCH REFERENCES
2012 Electronic Update
ALR Library
84 ALR 5th 1, Validity of Search or Seizure of Computer, Computer Disk, or Computer Peripheral Equipment.

Treatises and Practice Aids
32 MO Practice Series § 22.7, Invasion of Privacy.
NOTES OF DECISIONS

Construction and application 1

EXHIBIT
A

1 Construction and application

Images of child pornography were lawfully seized under the plain-view exception to the warrant requirement during execution of search warrant for evidence of violation of the Missouri invasion-of-privacy statute; criminal character of photographs of underage children, on which were printed the addresses of child pornography websites and which were accompanied by e-mail printout confirming a subscription to a child pornography website, was immediately apparent. U.S. v. Alexander, C.A.8 (Mo.)2009, 574 F.3d 484, certiorari denied 130 S.Ct. 3273, 560 U.S. 907, 176 L.Ed.2d 1188. Obscenity 277

Search warrant application would have been supported by probable cause even if detective had provided magistrate with the information that defendant was present in his secretly videotaped consensual sexual activity, since neutral magistrate could reasonably assume that under the Missouri invasion-of-privacy statute the defendant's partner did not sacrifice her privacy interest by permitting the defendant person to view her in the nude. U.S. v. Alexander, C.A.8 (Mo.)2009, 574 F.3d 484, certiorari denied 130 S.Ct. 3273, 560 U.S. 907, 176 L.Ed.2d 1188. Searches And Seizures 112

V. A. M. S. 565.252, MO ST 565.252

End of Document

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

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

DEFENDANT ERIC GREITENS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

COMES NOW Defendant Eric Greitens, through counsel and moves the Court to dismiss this case. In support of this Motion, defendant's counsel states as follows.

Counsel has been led to believe that there is being presented today an indictment against Defendant alleging violation of either § 565.253.1(1) RSMo. (2015), or § 565.252.1(1) RSMo. (2015). These statutes have a very narrow application which does not and cannot apply to the conduct alleged.

Missouri has adopted a law directed at invasions of privacy. The law prohibits photographs or videotaping by third-parties who take photographs or videotapes in locations where a person is in a partial or full state of nudity and where the victim does not believe he or she is being viewed by another. The law, then, applies to situations such as voyeurs or peeping toms who take photographs in locations such as restrooms, tanning

beds, locker rooms, changing rooms, and bedrooms. The law does not apply to the participants in sexual activity.[1]

No appellate case law exists approving criminal convictions where individuals involved were jointly participating in sexual activity. Nor has case law ever affirmed a conviction where the "victim" was in the home of the other person to engage in private sexual activity with that other person. The background behind the adoption of the statute and its text make clear that it does not apply to the actual participants in joint sexual activity. Any effort to apply it to a situation between two people engaged in consensual sexual activity would be unprecedented, improper, and permit the criminalization of routine activity between consenting adults. It would also be open to abuse by vindictive third-parties.

A. <u>The Statutory Text</u>

Section 565.252.1 states:

> A person commits the crime of invasion of privacy in the first degree if such person:
>
> (1) Knowingly photographs or films another person, without the person's knowledge and consent, while the person being photographed or filmed is in a state of full or partial nudity and is **in a place where one would have a reasonable expectation of privacy**, and the person subsequently distributes the photograph or film to another or transmits the image contained in the photograph or film in a manner that allows access to that image via a computer

Ex. A, § 565.252.1(1) RSMo. (2015) (emphasis added). Similarly, Section 565.253.1 states:

> "A person commits the crime of invasion of privacy in the second degree if:

[1] The law requires a lack of consent and full or partial nudity. This memorandum does not address those elements, although any defendant would prevail in the absence of proof of those elements. Those elements are not discussed herein because the sole focus of this memorandum is the expectation of privacy element.

> (1) Such person knowingly views, photographs or films another person, without that person's knowledge and consent, while the person being viewed, photographed or filmed is in a state of full or partial nudity and is **in a place where one would have a reasonable expectation of privacy** …"

Ex. A-1, § 565.253.1(1) RSMo. (2015) (emphasis added).

The above emphasized text, "place where a person would have a reasonable expectation of privacy," is defined as "**any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person's undressing was being viewed, photographed or filmed by another.**" Ex. B, § 565.250(3) RSMo. (2015), (emphasis added).[2] Regardless of the relationship between the parties (the impact of which is discussed in the following section), one cannot have an expectation of privacy in a common area of another person's home. In such a place there is an obvious expectation that one would be viewed by the person she is visiting, or even recorded on devices used for routine security. Not surprisingly, the statute does not criminalize such conduct.

B. The Statute Does Not Apply to Participants in Sexual Activity

Any attempt to apply this statute to prosecute a participant in sexual activity would be without precedent in reported Missouri legal decisions. It would be a complete overreach to attempt to apply the statute to a participant in sexual activity, and no decision in any Missouri appellate court has ever approved such a use of the statute. [3]

---

[2] The invasion of privacy law was amended in 2014, effective January 1, 2017. As part of the amendment, § 565.253 was repealed and its substance was combined with § 565.252 and § 565.250 was repealed and its definitions were moved to § 565.002. The amendments related to invasion of privacy were not substantive and further support the idea that no crime is committed when a photograph of a person who knows he or she is being viewed by the photographer.

[3] The only reported decision affirming a conviction under this section of the statute involved an adult placing cameras in the bathroom of a home to videotape minors who were using the bathroom. State v. Browning, 357 S.W.3d 229 (Mo. App. 2012).

1. The Clear Statutory Text

When a person engages in sexual activity with another, there is no possible argument that either participant could be "without … concern[] that the person's undressing was being viewed" by another person. The whole point of the sexual activity is to be viewed by the other person and to jointly participate in private activity. Thus, the statute, by its terms, does not apply to a situation where the photographed party knows he or she is being viewed by his or her partner who takes the photograph. The Missouri General Assembly made this clear when it required that the "victim" reasonably believe that he or she was not being "viewed" by another person. There is no definition of "reasonable expectation of privacy" that would apply where the person is aware of being viewed by the other person but is not aware of the photograph. This limitation makes sense because of the potential for abuse and overreach that is obvious if a person could attempt to assert years later that a photograph was taken without consent even when the circumstances of the photograph (or the photograph itself) would clearly show no crime took place.

The statute clearly criminalizes only photographing or videotaping where a person does not believe he or she is being viewed by another. Thus, the statute clearly applies to prohibit wrongful conduct of the type where a person sets up cameras in restrooms, locker rooms, or dressing rooms or is photographing or filming a person from outside a private home and does not believe he or she is being viewed. But there is no doubt that for the provision at issue to apply the "victim" must not believe that he or she is being viewed by another person.

2. The Clear Purpose of the Statute is to Apply to Third Parties

Missouri's invasion of privacy law was originally passed in 1995 to "fill[] a void in Missouri law in that no statute **covers the nonconsensual viewing of another person** who is

nude or partially nude in an area that is reasonably believed to be private." Ex. C, Committee Bill Summary, H.B. 160 (1995), Invasion of Privacy, available at https://house.mo.gov/content.aspx?info=/bills95/bills95/HB160.htm (last visited Feb. 18, 2018). Thus, the law, from the very beginning, has been directed at the activities of people (peeping toms and voyeurs) of whom the victim is not aware.

According to the 1995 House Committee Bill Summary for HB 160, "[t]he 'Tanning Bed' cases in Buffalo, Missouri, were cited as glaring examples of this legal loophole" that the invasion of privacy law was intended to fix. Id. In 1994, a prosecutor in Buffalo, Missouri discovered a camera at a tanning salon where his wife was using a tanning bed. Ex. D, Jerry Nachtigal, Tanning Salon Owner Charged in Secret Nude Videotaping, Associated Press, July 18, 1994, available at http://www.apnewsarchive.com/1994/Tanning-Salon-Owner-Charged-in-Secret-Nude-Videotaping/id-bac9025d540b94e9f4d20600228f6d7f, (last visited Feb. 18, 2018). The Attorney General at the time said that charges were not immediately filed because Missouri had no law against secret videotaping. Id. The tanning salon owner was eventually charged under the state's child abuse statute when it was discovered that ten of the victims were under the age of 18. Id. Thus, from the very beginning, the statute has been directed at third-parties and not those who are engaged in face-to-face consensual sexual activities.

However, the statute, as originally drafted, inadvertently criminalized broader conduct. It initially defined the "place where a person would have a reasonable expectation of privacy" as "any place where a reasonable person would believe that he could disrobe in privacy, without being concerned that his undressing was being photographed or filmed by another." Ex. E, § 565.250 RSMo. (1996) (emphasis added noting the lack of 'viewed'). Thus, the law as initially

drafted appeared to have accidentally criminalized photographs and filming even between two participants in sexual activity.

Almost immediately, the law was amended to fix this error. In 1997, the law was changed to explain "that a place where a person has a reasonable expectation of privacy is any place a reasonable person would believe that he or she could disrobe in privacy, without being viewed, photographed, or filmed by another." Ex. F, Introduced Bill Summary, H.B. 300 (1997), Places of Privacy, available at https://house.mo.gov/content.aspx?info=/bills97/bills97/HB300.htm (last visited Feb. 18, 2018). This clarification was accomplished by **"modif[ying] the definition of 'place where a person would have a reasonable expectation of privacy' by adding to what a reasonable person would believe about such a place that he or she was not being viewed by another person."** Ex. F, Truly Agreed Bill Summary, H.B. 300 (1997), Invasion of Privacy (emphasis added); see also Ex. G, § 565.250 RSMo. (1998). This amendment, then, makes clear that the law is directed at third-party voyeurs filming or photographing people in places like restrooms, hotel rooms, changing rooms, locker rooms, and bedrooms.

If this statute were intended to apply to photographing by a person actively participating in sexual activity, there would have been no reason to amend the statute to make clear that the photographed person needed to "believe … that he or she was not being viewed by another person." Ex. F, Truly Agreed Bill Summary. There is no serious argument to be made that this statute applies where the photographed person was participating in sexual activity in the common areas of another person's home and a photograph was taken by the other participant. The law has never been so applied in any reported case in the more than 20 years it has been in force.

The interpretation described above is consistent with the long-held view of the purpose of the statute as being directed at voyeurs. See, e.g., Ex H, Morley Swingle & Kevin M. Zoellner,

Criminalizing Invasion of Privacy: Taking A Big Stick to Peeping Toms, 52 J. Mo. B. 345 (1996) (describing the statute as directed at "peeping toms" and "voyeurs."). The authorities that have considered the statute also interpret it as a voyeurism statute and not one designed to apply between consenting adults engaged in sexual behavior. See e.g., Ex. I, National District Attorney's Association, Voyeurism Compilation (Updated July 2010), available at http://www.ndaa.org/pdf/Voyeurism%202010.pdf (last visited Feb. 18, 2018); Ex. J, Clay Calvert, et al., Video Voyeurism, Privacy, And the Internet: Exposing Peeping Toms in Cyberspace, 18 Cardozo Arts & Ent. L.J. 469, 535-536 (2000) (describing § 565.252 as directed at peeping toms and voyeurs and observing that the text of Missouri's law does not apply where the victim knows he or she is being viewed by others even if not aware of the photograph).

3. All Doubts are Resolved in Favor of Narrow Interpretations

The statutory text is clear as discussed above and establishes that the law does not apply to participants in sexual activity. Regardless, any doubt about this issue will be resolved in favor of the interpretation described above. Any court interpreting this statute would determine the legislature's intent from the words used and their plain and ordinary meaning. State v. Power, 281 S.W.3d 843, 846–47 (Mo. App. E.D. 2009) (citing State v. Myers, 248 S.W.3d 19, 26 (Mo. App. E.D. 2008)).

If there is any ambiguity in the text, that ambiguity is construed against an expanded interpretation of the statute. Under long-settled Missouri law, “criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof.” State v. Dougherty, 358 Mo. 734, 741 (1949). “If a statute is ambiguous, and ‘the ambiguity cannot be resolved by resort to other canons of construction, the rule of lenity applies, and the statute must be interpreted in favor of the defendant.’” Turner v. State, 245

S.W.3d 826, 829 (Mo. banc 2008).

Thus, even if there was any doubt about legislative intent, that doubt would be resolved in favor of a narrow interpretation of the statute and would firmly establish that the law does not apply to persons engaged in consensual activity. The Court will interpret the statute to apply to voyeurs and "peeping toms" and not to participants.

4. The General Assembly Took a Different Approach to Non-Private Locations

Missouri has decided to protect a person from photography in a location where the photographed person knows other people can view them but may not be aware of a photograph being taken. This is the second section of R.S.Mo. 565.253.1, which protects people even when they know they are being viewed. The criminal conduct that is covered in non-private places, however, is narrow and does not apply to a person who has voluntarily participated in sexual activity. This statute limits criminal prosecution to situations where a hidden camera is used to film "under or through the clothing worn by [the] other person." Id. at § 565.253.1(2).

Indeed, in State v. Cerna, 522 SW.3d 373 (Mo. App. 2017), a police officer filmed adolescents while frisking them using a hidden camera. Because some of this filming was in public places (where the victims knew they were being viewed), the defendant was not charged under the provision quoted above and instead had to be charged with a separate provision that prohibited use of concealed cameras to film "under or through the clothing worn by that other person." Id.; see also Ex. A-1, § 565.253.1(2) RSMo. (defining separate crime). Thus, Missouri has well-defined rules and they prohibit any photographs of nudity where a person does not believe they might be viewed and they prohibit secret photographs where a person knows he or she is being viewed, but only if the photograph is taken under or through the clothing.

Accordingly, this case should be dismissed.

Dated: February 22, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: 

James F. Bennett, #46826
Edward L. Dowd, #28785
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
Phone: (314) 889-7300
Fax: (314) 863-2111

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the Court's electronic filing system, this 22nd day of February, 2018.

/s/ 

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

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

ENTRY OF APPEARANCE

Comes now John F. Garvey of Carey Danis & Lowe, and hereby enters his appearance on behalf of Defendant in the above entitled matter.

CAREY DANIS & LOWE

By: /s/ *John F. Garvey*
John F. Garvey #35879
Carey Danis & Lowe
8235 Forsyth, Ste. 1100
St. Louis, MO 63105
Ph: 314-725-7700
Fax: 314-678-3401
jgarvey@careydanis.com
Attorney for Plaintiff

Certificate of Filing

The undersigned hereby certifies that the foregoing pleading has been filed using the court's electronic case filing system on this 23rd day of February, 2018, thereby serving the registered parties of record. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he/she has signed the original of this Certificate and the foregoing pleading.

/s/John F. Garvey

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

State Of Missouri,
Plaintiff,
vs.
Eric Greitens,
Defendant.

Case Number: 1822-CR00642

Entry of Appearance

Comes now undersigned counsel and enters his/her appearance as attorney of record for Eric Robert Greitens, Defendant, in the above-styled cause.

/s/ James F. Bennett
James Forrest Bennett
Mo Bar Number: 46826
Attorney for Defendant
Ste. 1900
7733 Forsyth
Clayton, MO 63105
Phone Number: (314) 889-7300
jbennett@dowdbennett.com

Certificate of Service

I hereby certify that on February 23rd, 2018, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

/s/ James F. Bennett
James Forrest Bennett

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

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

DEFENDANT'S REQUEST FOR DISCOVERY

COMES NOW defendant, by and through undersigned counsel, and hereby requests, pursuant to Rule 25.03 of the Missouri Supreme Court Rules, that you provide the following information to defendant's counsel within ten days after receipt of this request:

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

2. Any written or recorded statements and the substance of any oral statement made by defendant or any co-defendant, a list of all witnesses to the making and a list of all witnesses to the acknowledgement of such written, recorded, or oral statements, and the last known addresses of such witnesses;

3. Those portions of any existing ***transcript of grand jury proceedings*** which relate to the offenses with which defendant is charged, containing testimony of persons

whom the State intends to call as witnesses at a hearing or trial. If there are no such transcripts, please affirmatively indicate so.

4. Any existing transcript of the preliminary hearing and of any prior trial held in the defendant's case if the state has such in its possession or if such is available to the state;

5. ***Any reports or statements of experts*** made in connection with this particular case, including results of physical or mental examinations, scientific tests, experiments, or comparisons;

6. Any physical or documentary evidence to be offered at trial, including any books, papers, documents, ***photographs***, objects, audio recordings, video recordings, or telephone company records, which the State intends to introduce into evidence at the hearing or trial, or any objects or documents obtained from or belonging to defendant. If there are no ***photographs***, please affirmatively indicate so.

7. Any record of prior criminal arrests or convictions of persons the State intends to call as witnesses at a hearing or trial, and of any other person endorsed as a witness in this case;

8. If there has been photographic or electronic surveillance (including wiretapping), relating to the offense with which defendant is charged, of the defendant, or of conversations to which the defendant was a party or of his premises, this disclosure shall be in the form of a written statement by counsel for the State briefly setting forth the facts pertaining to the time, place, and persons making same;

9. Any and all police reports, or reports by any law enforcement or investigative agents employed by or hired by the Circuit Attorney's Office, relating to the Indictment. If no such reports exist, please affirmatively indicate so; and

10. Any material or information, within the possession or control of the state, which ***tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment.***

Furthermore, Defendants have a right to, and hereby request, all favorable evidence, including all impeachment information, that is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S.667, 676-77 (1985) (*Brady* also requires the Government to disclose impeachment evidence); *see also* 18 U.S.C. § 3500. **A prosecutor has a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case," and produce such information to the defendant. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).**

To further expand on the details of this request, pursuant to *Brady*, *United States v. Agurs*, 427 U.S. 97 (1976), and their progeny, the government is requested to produce any evidence in its possession, custody or control which may tend to exculpate the defendant, which may be of value to the preparation of his defense, or which may impeach any testimony of any anticipated government witness. These discovery requests apply to information regardless of whether the information subject to disclosure would itself constitute admissible evidence. Additionally, while items of information viewed in isolation may not reasonably be seen as meeting the standards outlined above, several items together can have such an effect. Regardless of whether items meet the standards

outlined above in isolation or in conjunction with other items, all such items are requested, including but not limited to the following:

(a) All Information [1] and Documents [2] suggesting that any prospective government witness has ever made a false statement to a state or federal government agency, whether or not under oath or penalty of perjury.

(b) All Information and Documents suggesting that the testimony of any prospective government witness is inconsistent with or contradicted by the testimony of any other person or witness or document.

(c) All Information and Documents suggesting that any prospective government witness has ever made a false, inaccurate, contradictory or inconstant statement with regard to the Investigation or the facts underlying the Indictment, including but not limited to any information that any witness or "victim" has memory issues.

(d) All Information and Documents suggesting that any prospective government witness has a bias or motive to fabricate testimony or evidence in this matter.

(e) All Information and Documents suggesting that any prospective government witness does not have a good reputation in the community for honesty.

(f) All Information and Documents relating to cooperation or plea agreements between the government and any government witness.

(g) All Information and Documents relating to draft cooperation or plea agreements attempted to be entered between the government and any witness or entity,

[1] The term "information" as used herein refers to all knowledge, facts, allegations, or details that are available in any format from any source.
[2] The term "document" as used herein, either in singular or plural, refers to data in both hard copy and electronic format.

including both witnesses who agreed to cooperate and those that did not, including agreements which were rejected or renegotiated with different terms.

(h) All Information and Documents relating to any threats or suggestions made by anyone to any potential witness or entity regarding cooperation with the government in the Investigation.

(i) The prior arrest and conviction records of all potential government witnesses or persons interviewed in the Investigation, including a complete criminal history for each and the docket number and jurisdiction for any pending matters.

(j) Aliases or fictitious names of all potential government witnesses or persons interviewed in the Investigation.

(k) All Information and Documents for any polygraph examinations administered as part of the Investigation or relating to the Indictment, including Identifying Information for each witness polygraphed

(l) All Information relating to immunity agreements or discussions with any person relevant to the Investigation or facts underlying the Indictment.

(m) All Information relating to any express or implicit promise, understanding, assurance or agreement between any government agent or attorney on the one hand, and any person relevant to the Investigation or facts underlying the Indictment.

(n) All Information relating to discussions of potential criminal or civil liability, or any discussion of or promises or grants of immunity, lenience, financial assistance, or any other assistance to any person the government intends to or may call as a witness or upon whose statements the government will or may rely.

(o) A detailed description of any help or promise to help the witness in his/her profession or business (including but not limited to money, leniency or anything of value given or promised to the witness),.

(p) All Information and Documents relating to potential prosecution of any prospective government witness.

(q) All Information and Documents relating to monetary payments to any person interviewed in the Investigation or expected to be a government witness.

(r) For in camera review by the District Court, the personnel file of all law enforcement witnesses who the prosecution intends to call at trial.

(s) A detailed description of any situation where a prosecution witness could be named as a defendant or co-conspirator in this or any other case but has not as yet been charged, and any threat to charge or prosecute this witness or promise not to charge or prosecute the witness. *See Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

(t) All Information and Documents related to statements of potential witnesses whom the government has determined it will not be calling as a witness, including useful impeachment information.

(u) All correspondence and emails between and among government officials that include useful impeachment information.

(v) All Information or Documents suggesting that Witness K.S. willingly entered Defendant's home for the intended purpose of sexual activity.

(w) The name(s) and address(es) of any persons(s) the Government reasonably believes has information helpful to the preparation of the defense.

(x) All information that is inconsistent with any element of any crime charged against the defendants or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendants for a charged crime.

(y) All information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendants for a charged crime.

(z) A list of all documents used, obtained or written in connection with the investigation preceding the indictment in this case that the government destroyed, for whatever reason, including but not limited to, rough notes of interviews, reports, memoranda, subpoenaed documents and other documents.

(aa) Any and all instructions given to the grand jury.

(bb) Any and all exculpatory evidence presented to the grand jury.

Dated: February 23, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James F. Bennett

James F. Bennett, #46826
Edward L. Dowd, #28785
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
Phone: (314) 889-7300
Fax: (314) 863-2111
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 23rd day of February, 2018.

/s/ James F. Bennett

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

State Of Missouri,
Plaintiff,
vs.
Eric Greitens,
Defendant.

Case Number: 1822-CR00642

Entry of Appearance

Comes now undersigned counsel and enters his/her appearance as attorney of record for Eric Robert Greitens, Defendant, in the above-styled cause.

/s/ Edward L. Dowd, Jr.
Edward L. Dowd, Jr.
Mo Bar Number: 28785
Attorney for Defendant
7733 Forsyth, Ste. 1900
Clayton, MO 63105
Phone Number: (314) 889-7300
edowd@dowdbennett.com

Certificate of Service

I hereby certify that on February 23rd, 2018, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

/s/ Edward L. Dowd, Jr.
Edward L. Dowd, Jr.

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

State Of Missouri,
Plaintiff,
vs.
Eric Greitens,
Defendant.

Case Number: 1822-CR00642

Entry of Appearance

Comes now undersigned counsel and enters his/her appearance as attorney of record for Eric Robert Greitens, Defendant, in the above-styled cause.

/s/ James G. Martin
James Garvin Martin
Mo Bar Number: 33586
Attorney for Defendant
Suite 1900
7733 Forsyth Boulevard
Saint Louis, MO 63105
Phone Number: (314) 889-7324
jmartin@dowdbennett.com

Certificate of Service

I hereby certify that on February 23rd, 2018, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

/s/ James G. Martin
James Garvin Martin

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

State Of Missouri,
Plaintiff,
vs.
Eric Greitens,
Defendant.

Case Number: 1822-CR00642

Entry of Appearance

Comes now undersigned counsel and enters his/her appearance as attorney of record for Eric Robert Greitens, Defendant, in the above-styled cause.

/s/ Michelle Nasser
Michelle Nasser
Mo Bar Number: 68952
Attorney for Defendant
7733 Forsyth Blvd., Ste. 1900
Saint Louis, MO 63105
Phone Number: (314) 889-7300
mnasser@dowdbennett.com

Certificate of Service

I hereby certify that on February 23rd, 2018, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

/s/ Michelle Nasser
Michelle Nasser

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642-01
v.	)	
	)	
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL REQUEST FOR DISCOVERY

COMES NOW defendant, by and through undersigned counsel, and hereby requests the following:

1. A copy of all legal instructions given to the grand jury related to this case, including any blow-ups/enlargements of the statutory law with blackouts/redactions which were in the original shown to the jury.
2. All grand jury minutes related to this case.
3. Any and all documents presented to the grand jury in this case, including any blow up of any evidence.
4. Any and all memoranda, notes, rough notes, e-mails or other communications by, from or to Enterra, LLC or any of its employees regarding any witness interviewed or spoken to regarding this case.

5. Any and all memoranda, notes, rough notes, e-mails or other communications by, from or to Enterra, LLC or any of its employees regarding evidence sought or obtained regarding this case.

Dated: February 27, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James F. Bennett

James F. Bennett, #46826
Edward L. Dowd, #28785
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
Phone: (314) 889-7300
Fax: (314) 863-2111
jbennett@dowdbennett.com
edowd@dowdbennett.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 27th day of February, 2018.

/s/ James F. Bennett

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

February 27, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

1. Request for Discovery (2 pages);
2. Transcripts of taped recordings of P.S and K.S (47 pages);
3. Email questions and answers for KMOV interview of P.S. (5 pages);
4. Email of K.S. to P.S dated March 24, 2015 (1page)
5. Email of K.S to P.S dated March 26, 2015 (1page)
6. Email of K.S to P.S dated July 8, 2015; (2 pages)
7. E.G's statements to the public (1 DVD);
8. Taped statements of K.S (1 DVD);
9. Picture of admin contact of E.G (1 page);
10. Picture of K.S (1page);
11. Picture of email from E.G. to K.S dated August 25, 2015 (1page);
12. Picture of email of K.S to E.G dated October 20, 2015 (1page);
13. E.G's Facebook post (3 pages);

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar #

cc: Court File

January 18, 2018

Kimberly M. Gardner
Circuit Attorney, City of St. Louis
1114 Market Street
St. Louis, MO 63130

Re: Criminal Investigation of Gov. Eric Greitens

Dear Mr. William Don Tisaby:

This engagement letter agreement ("Agreement") confirms that The St. Louis Circuit Attorney Office ("CAO") has retained Enterra, LLC ("Enterra") as a consultant in connection with the above-captioned matter. The following paragraphs outline the terms and conditions of the Eengagement.

Enterra is engaged to: (a) provide consulting advice to CAO to the extent requested, (b) to conduct an independent investigation into potential criminal (and civil) liability of the Governor under the guidance of the CAO provide, and to provide such litigation support (including expert testimony) as may be requested by CAO in connection with the above-captioned matter. Enterra shall prepare written reports regarding its work should this become necessary.

Terms and Conditions of the Engagement of Enterra, LLC

1. Fees and Expenses – Enterra will be compensated for time spent on this engagement at an hourly rate of $250 per for each individual working on the matter. CAO will also reimburse Enterra for all reasonable expenses incurred in the course of its work on this engagement at Enterra's actual cost.

CAO will pay Enterra a retainer of $10,000 to commence work. Enterra will initially bill against this retainer, which CAO agrees to replenish at such time as $5,000 or less remains available thereunder. Enterra will bill CAO monthly, and to the extent not covered by funds remaining in the retainer, CAO will pay Enterra's invoices within 15 days after the date thereof. The monthly invoices will set out all fees and expenses incurred in the period and will provide an itemized breakdown of Enterra's hours billed. If requested, the invoices will also include a brief description of daily tasks performed. Unpaid invoices shall bear interest at the "prime rate" announced from time-to-time in the Wall Street Journal, plus two percent (2%).

2. Timing of Services – Enterra agrees to perform its consulting services in a timely fashion and will report directly to Kimberly M. Gardner, Circuit Attorney, City of St. Louis on the progress of its work either orally or, if requested, in written form.

EXHIBIT
1

3. Conflict Check – Enterra has undertaken a reasonable process to determine whether any professional relationships exist between it and persons or entities that may be parties or otherwise involved in the above-captioned matter. As a result of that process Enterra has concluded that no conflict exists that would prevent it from accepting and performing this engagement. Enterra agrees that during the time of this Agreement it will not act as a consultant for or on behalf of any person or entity in a matter in which the person or entity has an interest adverse to the subject of the investigation or the CAO.

4. Communications Are Confidential and Privileged – In connection with this Engagement, all communications between or among Enterra personnel and CAO personnel shall be regarded as privileged in all respects, shall constitute attorney work product, and shall be kept in strictest confidence.

5. Hold Harmless – CAO agrees to hold harmless, defend, indemnify, and protect Enterra, whether under immunity of otherwise, from any and all claims by third parties in connection with the services provided by Enterra hereunder except only for Enterra's willful misconduct.

6. Governing Law– This Agreement shall be construed in accordance with the laws of the state of Missouri.

7. Ethical Conduct - Enterra shall perform the activities required by this Agreement in accordance with general accepted ethical guidelines of the investigative profession.

8. Entire Agreement – This Agreement, together with any exhibits attached hereto, constitutes the entire agreement between the parties with respect to the above-captioned matter.

9. No Assignment or Transfer -- Enterra is a professional independent contractor and not an employee or agent of CAO, or any affiliated entities. This Agreement may not be assigned or transferred in whole or in part by either party without prior written consent of the other party.

10. Termination – This Agreement will continue until terminated. This Agreement may be terminated at will by either party upon fifteen (15) days written notice. Any such termination will not affect payment due for compensation of work performed prior to the termination. Enterra agrees not to terminate the Agreement at a time or in a manner that would prejudice CAO's work on the investigation that serves as the basis of this Engagement.

11. Approval of CAO- The signature below of Circuit Attorney, Kimberley M. Gardner shall indicate CAO's agreement to the terms and conditions of this engagement letter including his obligation to pay Enterra's fees and expenses, which shall be invoiced to CAO.

If this Agreement meets with Enterra's approval, please indicate Enterra's acceptance by the signature of its authorized representative below and return to me. If Enterra has any questions, I would be pleased to discuss them with Enterra.

AGREED TO AND CONFIRMED:

ENTERRA, LLC

By: _____
WILLIAM DON TISABY, CGSO and Founder

Date: 1/18/2018

CIRCUIT OFFICE ATTORNEY

By: _____
KIMBERLY GARDNER, CIRCUIT ATTORNEY CITY OF ST. LOUIS

Date: 1/18/2018

CHECK REQUEST

DATE: 2-13-18

REQUESTED BY: Kim Gardner

AMOUNT REQUESTED: $120.65

PAYABLE TO: Kimberly Gardner

REASON: lunch + breakfast meetings with private investigator. ~~Receipts~~ Receipts are attached

APPROVED BY: Ferguson Johnson

DATE: 2-14-18

DEBIT TO: X BOND & ASSET FORFEITURE COST ACCOUNT

____ CONTINGENCY FUND

CHECK # 1010 ISSUED

DATE: 2-14-18

BY: Chris S.

[redacted]

Server: [redacted] 02/0[redacted]0.8
Cashier: Host
Table 73/1 6:56 AM
Guests: 3

#30011

Reprint #: 1
Order Type: ORDER

Seat 1

Hot Tea	2.59
Side Artisian Toast	1.99
Side UFL Bacon	4.69
Subtotal	9.27
Tax	0.85
Total	10.12

Seat 2

Coffee-Regular	2.79
French Toast Brioche	8.99
Side UFL Bacon	4.69
Subtotal	16.47
Tax	1.50
Total	17.97

Seat 3

Coffee-Regular	[illegible]
[illegible] Sausage L	9.79
[illegible]total	1.62
[illegible]	[illegible].4
[illegible]	13.72

Complete Subtotal	38.32
Subtotal	38.32
Tax	3.49
Total	41.81
[redacted]	41.81

Tip:

Total

X _____

Balance Due 0.00

Start your meal with an AR?
Download our new mobile
app and view wait times,
add your name to the list
and more
[redacted]

0208 Rec:164
[redacted]

MERCH ID: [redacted]9
PURCHASE USD $78.84
**********2469 MC
1/30/2018 3:33 PM
AUTH: 053318 Approved 000
ENTRY: CHIP READ
Debit MasterCard [redacted]
TC - E4247902E0771994
Mode: Issuer
TVR: 8000008000
IAD: 01106010OC2200J000000000000000000FF
TSI: 6800
ARC: 00

CHECK: 78.84

Gratuity Not Included
Suggested Gratuity for Table Check Total

22%	17.34
20%	15.77
18%	14.19
15%	11.83

TIP: _____.__

TOTAL: _____.__

X_____

Duplicate Copy

CARDHOLDER WILL PAY CARD ISSUER ABOVE
AMOUNT PURSUANT TO CARDHOLDER AGREEMENT
--PLEASE LEAVE SIGNED COPY FOR SERVER!-

We'd love to hear about your visit!
Please take our short survey
[redacted]
Enter this code within 5 days:
7080-00081-35012

DELUXE CORP 1-800-328-0304

6536

BAL. BRO'T FOR'D

DEPOSITS

TOTAL

THIS CHECK

OTHER

BALANCE

OFFICE OF THE CIRCUIT ATTORNEY
CONTINGENCY FUND ACCOUNT
1114 MARKET, RM. 401
ST LOUIS, MO 63101

6536

4-56/810

DATE

PAY TO THE ORDER OF $

DOLLARS

JEFFERSON BANK and TRUST

FOR

NOT NEGOTIABLE

⑈006536⑈ ⑆081000566⑆ 024 292 6⑈

CHECK REQUEST

DATE: 2-2-18

REQUESTED BY: Michael W.

AMOUNT REQUESTED: $10,000.00

PAYABLE TO: Enterra, LLC

REASON: 1st retainer installment per Engagement letter dated 1-31-18.

APPROVED BY: Cula Johnson

DATE: 2-5-18

DEBIT TO: ___ BOND & ASSET FORFEITURE COST ACCOUNT

X CONTINGENCY FUND

2-

2-6-18 per Cula Johnson ms. Gardner's assistant if we need the Engagement letter we need to see CA Kim Gardner or Maurice Hopworth.

CHECK # 6536 ISSUED

DATE: 2-6-18

BY: Chris S.

CHECK REQUEST

DATE: 2-13-18

REQUESTED BY: Kim Gardner

AMOUNT REQUESTED: $666.41

PAYABLE TO: Card Services

REASON: hotel reservations for private investigator + witness in a special investigation - see attached

APPROVED BY: Freda Thomas

DATE: 2-14-18

DEBIT TO: X **BOND & ASSET FORFEITURE COST ACCOUNT**

____ **CONTINGENCY FUND**

CHECK # 1009 ISSUED

DATE: 2-14-18

BY: Chris S.

PO BOX 419734
KANSAS CITY MO 64141-6734

UMB

Please Detach And Enclose Top Portion With Payment

New Balance	Payment Due Date	Past Due Amount	Minimum Payment	Amount Enclosed
0.00	02/26/18	0.00	0.00	$

Make Check Payable To:
Card Services

Card Services
PO Box 875852
Kansas City MO 64187-5852

☐ Please check box if making address change as indicated on the back

KIMBERLY GARDNER 12473
CIRCUIT ATTORNEY'S OFFICE Q102
1114 MARKET ST RM 401
SAINT LOUIS MO 63101-2039

4715620701110952 0000000 0000000

Account Number Ending In: XXXX XXXX XXXX 0952

1-2

Summary of Account Activity

Previous Balance	$	0.00
Payments	-	0.00
Other Credits	-	0.00
Purchases/Debits	+	0.00
Cash Advances	+	0.00
Finance Charges	+	0.00
New Balance		0.00
Credit Limit		3,000.00
Available Credit		2,960.00

An amount followed by a minus (-) is a credit or a credit balance, unless otherwise indicated.

Payment Information

Statement Closing Date	02/01/18
New Balance	0.00
Minimum Payment Due	0.00
Payment Due Date	02/26/18
Past Due Amount	0.00

RECEIVED
FEB 8 9 2018

PAYMENT ADDRESS
CARD SERVICES
PO BOX 875852
KANSAS CITY, MO 64187-5852

ACCOUNT INQUIRIES AND
LOST STOLEN CARDS
800-821-5184
816-843-2000 IN KANSAS CITY

CARD SERVICES
PO BOX 419734
KANSAS CITY MO 64141-6734

Telephoning about billing errors will not preserve your rights under federal law. See the Billing Rights Summary on the reverse side.

Transaction Information

Transaction Date	Posting Date	Reference Number	Purchases, Cash Advances, Payments, Credits and Adjustments since last statement	Amount
01/24	01/25	2471705D9M839HLWL	[redacted] LODGING CHECK-IN DATE: 01/22/18 SALES TAX: $ 0.00 TAX INCLUDED: 0	112.99
01/24	01/26	2471705DAM83M2QNB	[redacted] LODGING CHECK-IN DATE: 01/22/18 SALES TAX: $ 0.00 TAX INCLUDED: 0	112.99
01/28	01/29	2469216DQ2XV2563A	[redacted] SALES TAX: $ 0.00 TAX INCLUDED: 2	440.43
02/01	02/01	000000000000COMPC	TOTAL PURCHASES $666.41 TOTAL $666.41	0.00

Interest Charge Calculation

Your Annual Percentage Rate (APR) is the annual interest rate on your account

Current Billing Period Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge

Gardner, Kimberly

From: Gardner, Kimberly
Sent: Sunday, January 28, 2018 4:14 PM
To: Kimberly Gardner
Subject: Fwd: [redacted] Jan 29 - [redacted]

Sent from my iPhone

Begin forwarded message:

From: [redacted]
Date: January 28, 2018 at 4:10:55 PM CST
To: <gardnerk@stlouiscao.org>
Subject: [redacted]
Reply-To: [redacted]

[redacted]

Thanks!

Your reservation is confirmed. No need to call to reconfirm.

[redacted]

Jan 29, 2018 - Jan 31, 2018

See live updates to your itinerary, anywhere and anytime.

See your itinerary

Hotel overview

[redacted]MO,
[redacted]

View hotel Map and directions

Reservation dates
Jan 29, 2018 - Jan 31, 2018

Itinerary #
[redacted]

Check-in and Check-out

Check-in time
3 PM

Check-out time
noon

Check-in policies
Check-in time starts at 3 PM
Check-in time ends at 2 AM
Your room/unit will be guaranteed for late arrival.

Room

Guests
Reserved for Kimberly Gardner
2 adults

Room
Studio, 1 King Bed

Included amenities
Continental Breakfast, Free High-Speed Internet, Full Kitchen

Room requests
1 King Bed
Non-smoking room

Price summary

Price breakdown
Room price: $440.43
2 nights: $189.25 avg./night
1/29/2018: $159.21
1/30/2018: $219.28
Taxes & fees: $61.94

Total: $440.43

Unless specified otherwise, rates are quoted in US dollars.

Additional hotel fees

The below fees and deposits only apply if they are not included in your selected room rate.

The price shown above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Rules and restrictions

Cancellations and changes
We understand that sometimes plans fall through. We do not charge a cancel or change fee. When the property charges such fees in accordance with its own policies, the cost will be passed on to you. [redacted] the following cancellation and change fees.

Cancellations or changes made after 11:59pm (Central Daylight Time (US & Canada)) on Jan 27, 2018 or no-shows are subject to a property fee equal to the first nights rate plus taxes and fees.

Pricing and Payment
Hotel fees
The price above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Pricing
Your credit card is charged the total cost at time of purchase. Prices and room/unit availability are not guaranteed until full payment is received.

Gardner, Kimberly

From: Gardner, Kimberly
Sent: Monday, January 22, 2018 2:31 PM
To: Kimberly Gardner
Subject: [redacted] - Jan 23 - [redacted]

Sent from my iPhone

Begin forwarded message:

From: [redacted]
Date: January 22, 2018 at 2:28:50 PM CST
To: <gardnerk@stlouiscao.org>
Subject: [redacted]
Reply-To: [redacted]

[redacted]

Thanks!

Your reservation is confirmed. No need to call to reconfirm.

[redacted]

Jan 23, 2018 - Jan 25, 2018

See live updates to your itinerary, anywhere and anytime.

See your itinerary

Hotel overview

[redacted]

View hotel Map and directions

Reservation dates
Jan 23, 2018 - Jan 25, 2018

[redacted]

Check-in and Check-out

Check-in time
3 PM

Check-out time
11 AM

Check-in policies
Check-in time starts at 3 PM
Minimum check-in age is 18
If a late check-in is planned, contact this property directly for their late check-in policy.

Special instructions
This property requires a credit card authorization for USD 50 for any bookings where payment for the stay will be made on site in cash instead of at the time of booking. For more details, please contact the office using the information on the reservation confirmation received after booking.

Room

Guests
Reserved for Kimberly Gardner
2 adults

Room
Deluxe Room, 2 Double Beds, Non Smoking, Refrigerator & Microwave

Included amenities
Free Breakfast, Free Wireless Internet, Drinks and hors doeuvres

Room requests
2 Double Beds
Non-smoking room

Price summary

Price breakdown
Room price $225.98
2 nights: $99.99 /night
Taxes : $26.00

Total $225.98
Collected by the hotel

Unless specified otherwise, rates are quoted in US dollars.

Additional hotel fees

The below fees and deposits only apply if they are not included in your selected room rate.

The price shown above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Rules and restrictions

Cancellations and changes
If you cancel or change your plans, please cancel your reservation in accordance with the property's cancellation policies to avoid a no-show charge.

Cancellations or changes made after 11:00am (Central Daylight Time (US & Canada)) on Jan 23, 2018 or no-shows are subject to a property fee equal to the first nights rate plus taxes and fees.

Pricing and Payment
Hotel fees
The price above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Guest Charges and Room Capacity
Base rate is for 2 guests.

ENTERRA
SIX MOVES AHEAD. ALWAYS.

145 South Livernois
Suite 350 Rochester, MI 48307
P: 800.408.1730

Circuit Attorney, City of St. Louis
Attn: Miss Kimberly Gardner
1114 Market Street
St. Louis, MO 63130

Weeks: January 18 – 31, 2018

William Don Tisaby

Date	Action
1/17/18	Consultation [redacted] 3 hours
1/18/18	Consultation [redacted] 2 hours
1/19/18	[redacted] 3 hours
1/20-28/18	[redacted] 6.5 hours
1/29/18	[redacted] 4 hours
1/30/18	[redacted] 3 hours
1/31/18	[redacted] 2 hours 2

Total Hours Worked (23.5 hours x $250)	$ 5,875.00
Travel Expenses	$ 797.40
∘ Hotel	$ 197.73
∘ Meals	$ 135.05
∘ Rental Car & Fuel	$ 174.61
∘ Personal vehicle (fuel & wear)	$ 290.01

02/15/2018

Professional Services & Expenses TOTAL	**$6,672.40**

Enterra, LLC
145 South Livernois
Suite 350
Rochester, MI 48307

January 31, 2018

Circuit Attorney, City of St. Louis
1114 Market Street
St. Louis, MO 63130

Re: RETAINER INVOICE – INSTALLMENT #1

Description/Services

First Retainer Installment per Engagement Letter dated January 31, 2018	$10,000.00
TOTAL AMOUNT DUE:	**$10,000.00**

Please include a copy of this invoice, and make check payable to: Enterra, LLC

approved KN
2/2/2018

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642-01
v.	)	
	)	
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR PRESERVATION OF EVIDENCE

COMES NOW defendant, by and through undersigned counsel, and hereby requests the Court order the Circuit Attorney's Office to preserve records and documents being sought by Defendant's Supplemental Request for Discovery. In support of this motion, defense counsel states as follows:

1. Defense counsel has filed this day Defendant's Supplemental Request for Discovery. Included within that request is production for various grand jury materials and also investigative materials generated by a Michigan private investigation company.
2. Defense believes all of these materials should be produced in this case. However, because no discovery has yet been produced, and because the Circuit Attorney's Office may argue that Defendant is not entitled to such materials, we seek a Court order for the evidence's preservation to ensure such materials are available for production.

3. Specifically, as to the evidence related to the private investigation company, the Circuit Attorney's Office has informed defense counsel that, unlike any other case, there are no police reports to produce in discovery – items which are provided to defendants in every other criminal case. Instead, defense counsel has learned that the Circuit Attorney's Office has hired a company, Enterra, LLC, out of Rochester Hills, Michigan, to conduct its investigation. Attached hereto as Exhibit 1, is the engagement letter between Ms. Gardner, the Circuit Attorney and Mr. Tisaby of Enterra for consultation and to "conduct an independent investigation into potential criminal (and civil) liability of the Governor." In the engagement letter, Ms. Gardner agrees to pay Enterra $250 an hour (which happens to be about eight times more an hour than officers of the St. Louis Metropolitan Police Department are paid). Also as part of Exhibit 1, is documentation that Enterra also is charging the Circuit Attorney for food, living expenses and expense for both a rental car and Mr. Tisaby's personal car when he is in Missouri working on this case. At least $10,000 has already been paid to Enterra.
4. The engagement letter states that Enterra is not "an agent of CAO." Defense counsel has been unable to, as of this date, identify any steps Enterra has taken to obtain proper licensure to act as a private investigator in Missouri. Additionally, defense counsel has been unable, as of this date, to identify approval by the board of estimate and apportionment of the city of St. Louis for these additional criminal legal investigators, as required under 56.540.5, RSMo.

5. While defense counsel is still attempting to research this matter, there is grave concern that the Circuit Attorney's avoidance of using the SLMPD and instead using a private investigator from Michigan to carry out her investigation has and will impact the admissibility of evidence in this case. Additionally, the use of this private investigator may eliminate any argument the Circuit Attorney would have to a claim of privilege regarding communications between Enterra and the Circuit Attorney.
6. For all of these reasons, it is imperative that defense counsel have access to the records of Enterra. Therefore, in anticipation of the Circuit Attorney resisting production of these records, defense counsel respectfully request an order that all such records be preserved.
7. As to the grand jury material at issue, the charge in the indictment is a violation of Section 565.252 RSMo which prohibits the invasion of privacy "where a person would have a reasonable expectation of privacy." However, the statute defines the "place where a person would have a reasonable expectation of privacy" as "**any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person's undressing was being <u>viewed, photographed or filmed by another</u>."** § 565.250(3) RSMo. (2015), (emphasis added). However, the indictment makes no reference to this definitional mandate of the statute.
8. If the grand jury was improperly instructed on the law, or the CAO failed to provide any instructions on the law or specifically failed to provide the grand jury with the statutory definition of a place where a person would have a reasonable

expectation of privacy, then there may be grounds to dismiss the indictment. If the grand jury was not provided the statutory definition of a place where there exists an expectation of privacy, then they may have proceeded with a complete misunderstanding of the law.

9. In this case, where the CAO has chosen to indict the sitting Governor of Missouri, it is imperative that it was done properly. For this reason, it becomes imperative that defense counsel be able to ensure the grand jury was properly instructed on the law.

10. Section 540.100, RSMo, provides that the grand jury will keep minutes of its proceedings. To the extent the minutes reflect what instructions were given to the grand jury or that legal instructions were not given, those minutes are highly relevant to a possible motion to dismiss.

Wherefore, defense counsel respectfully request an order that the records sought in Defendant's Supplemental Discovery Request either be turned over or preserved for consideration at a later time.

Dated: February 27, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James F. Bennett

James F. Bennett, #46826
Edward L. Dowd, #28785
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
Phone: (314) 889-7300
Fax: (314) 863-2111
jbennett@dowdbennett.com
edowd@dowdbennett.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 27th day of February, 2018.

/s/ James F. Bennett

January 18, 2018

Kimberly M. Gardner
Circuit Attorney, City of St. Louis
1114 Market Street
St. Louis, MO 63130

Re: Criminal Investigation of Gov. Eric Greitens

Dear Mr. William Don Tisaby:

This engagement letter agreement ("Agreement") confirms that The St. Louis Circuit Attorney Office ("CAO") has retained Enterra, LLC ("Enterra") as a consultant in connection with the above-captioned matter. The following paragraphs outline the terms and conditions of the Eengagement.

Enterra is engaged to: (a) provide consulting advice to CAO to the extent requested, (b) to conduct an independent investigation into potential criminal (and civil) liability of the Governor under the guidance of the CAO provide, and to provide such litigation support (including expert testimony) as may be requested by CAO in connection with the above-captioned matter. Enterra shall prepare written reports regarding its work should this become necessary.

Terms and Conditions of the Engagement of Enterra, LLC

1. Fees and Expenses – Enterra will be compensated for time spent on this engagement at an hourly rate of $250 per for each individual working on the matter. CAO will also reimburse Enterra for all reasonable expenses incurred in the course of its work on this engagement at Enterra's actual cost.

CAO will pay Enterra a retainer of $10,000 to commence work. Enterra will initially bill against this retainer, which CAO agrees to replenish at such time as $5,000 or less remains available thereunder. Enterra will bill CAO monthly, and to the extent not covered by funds remaining in the retainer, CAO will pay Enterra's invoices within 15 days after the date thereof. The monthly invoices will set out all fees and expenses incurred in the period and will provide an itemized breakdown of Enterra's hours billed. If requested, the invoices will also include a brief description of daily tasks performed. Unpaid invoices shall bear interest at the "prime rate" announced from time-to-time in the Wall Street Journal, plus two percent (2%).

2. Timing of Services – Enterra agrees to perform its consulting services in a timely fashion and will report directly to Kimberly M. Gardner, Circuit Attorney, City of St. Louis on the progress of its work either orally or, if requested, in written form.

EXHIBIT
1

3. Conflict Check – Enterra has undertaken a reasonable process to determine whether any professional relationships exist between it and persons or entities that may be parties or otherwise involved in the above-captioned matter. As a result of that process Enterra has concluded that no conflict exists that would prevent it from accepting and performing this engagement. Enterra agrees that during the time of this Agreement it will not act as a consultant for or on behalf of any person or entity in a matter in which the person or entity has an interest adverse to the subject of the investigation or the CAO.

4. Communications Are Confidential and Privileged – In connection with this Engagement, all communications between or among Enterra personnel and CAO personnel shall be regarded as privileged in all respects, shall constitute attorney work product, and shall be kept in strictest confidence.

5. Hold Harmless – CAO agrees to hold harmless, defend, indemnify, and protect Enterra, whether under immunity of otherwise, from any and all claims by third parties in connection with the services provided by Enterra hereunder except only for Enterra's willful misconduct.

6. Governing Law– This Agreement shall be construed in accordance with the laws of the state of Missouri.

7. Ethical Conduct - Enterra shall perform the activities required by this Agreement in accordance with general accepted ethical guidelines of the investigative profession.

8. Entire Agreement – This Agreement, together with any exhibits attached hereto, constitutes the entire agreement between the parties with respect to the above-captioned matter.

9. No Assignment or Transfer -- Enterra is a professional independent contractor and not an employee or agent of CAO, or any affiliated entities. This Agreement may not be assigned or transferred in whole or in part by either party without prior written consent of the other party.

10. Termination – This Agreement will continue until terminated. This Agreement may be terminated at will by either party upon fifteen (15) days written notice. Any such termination will not affect payment due for compensation of work performed prior to the termination. Enterra agrees not to terminate the Agreement at a time or in a manner that would prejudice CAO's work on the investigation that serves as the basis of this Engagement.

11. Approval of CAO- The signature below of Circuit Attorney, Kimberley M. Gardner shall indicate CAO's agreement to the terms and conditions of this engagement letter including his obligation to pay Enterra's fees and expenses, which shall be invoiced to CAO.

If this Agreement meets with Enterra's approval, please indicate Enterra's acceptance by the signature of its authorized representative below and return to me. If Enterra has any questions, I would be pleased to discuss them with Enterra.

AGREED TO AND CONFIRMED:

ENTERRA, LLC

By: _____
WILLIAM DON TISABY, CGSO and Founder

Date: 1/18/2018

CIRCUIT OFFICE ATTORNEY

By: _____
KIMBERLY GARDNER, CIRCUIT ATTORNEY CITY OF ST. LOUIS

Date: 1/18/2018

CHECK REQUEST

DATE: 2-13-18

REQUESTED BY: Kim Gardner

AMOUNT REQUESTED: $120.65

PAYABLE TO: Kimberly Gardner

REASON: lunch + breakfast meetings with private investigator. ~~Receipts~~ Receipts are attached

APPROVED BY: Ferguson Johnson

DATE: 2-14-18

DEBIT TO: X BOND & ASSET FORFEITURE COST ACCOUNT

____ CONTINGENCY FUND

CHECK # 1010 ISSUED

DATE: 2-14-18

BY: Chris S.

[redacted]

Server: [redacted] 02/0[redacted]0.8
Cashier: Host
Table 73/1 6:56 AM
Guests: 3

#30011

Reprint #: 1
Order Type: ORDER

Seat 1

Hot Tea	2.59
Side Artisian Toast	1.99
Side UFL Bacon	4.69
Subtotal	9.27
Tax	0.85
Total	10.12

Seat 2

Coffee-Regular	2.79
French Toast Brioche	8.99
Side UFL Bacon	4.69
Subtotal	16.47
Tax	1.50
Total	17.97

Seat 3

Coffee-Regular	[illegible]
[illegible] Sausage L	9.79
[illegible]total	1.62
[illegible]	[illegible].4
[illegible]	13.72

Complete Subtotal	38.32
Subtotal	38.32
Tax	3.49
Total	41.81
[redacted]	41.81

Tip:

Total

X _____

Balance Due 0.00

Start your meal with an AR?
Download our new mobile
app and view wait times,
add your name to the list
and more
[redacted]

0208 Rec:164
[redacted]

MERCH ID: [redacted]9
PURCHASE USD $78.84
**********2469 MC
1/30/2018 3:33 PM
AUTH: 053318 Approved 000
ENTRY: CHIP READ
Debit MasterCard [redacted]
TC - E4247902E0771994
Mode: Issuer
TVR: 8000008000
IAD: 01106010OC2200J000000000000000000FF
TSI: 6800
ARC: 00

CHECK: 78.84

Gratuity Not Included
Suggested Gratuity for Table Check Total

22%	17.34
20%	15.77
18%	14.19
15%	11.83

TIP: _____.__

TOTAL: _____.__

X_____

Duplicate Copy

CARDHOLDER WILL PAY CARD ISSUER ABOVE
AMOUNT PURSUANT TO CARDHOLDER AGREEMENT
--PLEASE LEAVE SIGNED COPY FOR SERVER!-

We'd love to hear about your visit!
Please take our short survey
[redacted]
Enter this code within 5 days:
7080-00081-35012

DELUXE CORP 1-800-328-0304

6536

BAL. BRO'T FOR'D

DEPOSITS

TOTAL

THIS CHECK

OTHER

BALANCE

OFFICE OF THE CIRCUIT ATTORNEY
CONTINGENCY FUND ACCOUNT
1114 MARKET, RM. 401
ST LOUIS, MO 63101

6536

4-56/810

DATE

PAY TO THE ORDER OF $

DOLLARS

JEFFERSON BANK and TRUST

FOR

NOT NEGOTIABLE

⑈006536⑈ ⑆081000566⑆ 024 292 6⑈

CHECK REQUEST

DATE: 2-2-18

REQUESTED BY: Michael W.

AMOUNT REQUESTED: $10,000.00

PAYABLE TO: Enterra, LLC

REASON: 1st retainer installment per Engagement letter dated 1-31-18.

APPROVED BY: Cula Johnson

DATE: 2-5-18

DEBIT TO: ___ BOND & ASSET FORFEITURE COST ACCOUNT

X CONTINGENCY FUND

2-

2-6-18 per Cula Johnson ms. Gardner's assistant if we need the Engagement letter we need to see CA Kim Gardner or Maurice Hopworth.

CHECK # 6536 ISSUED

DATE: 2-6-18

BY: Chris S.

CHECK REQUEST

DATE: 2-13-18

REQUESTED BY: Kim Gardner

AMOUNT REQUESTED: $666.41

PAYABLE TO: Card Services

REASON: hotel reservations for private investigator + witness in a special investigation - see attached

APPROVED BY: Freda Thomas

DATE: 2-14-18

DEBIT TO: X **BOND & ASSET FORFEITURE COST ACCOUNT**

____ **CONTINGENCY FUND**

CHECK # 1009 ISSUED

DATE: 2-14-18

BY: Chris S.

PO BOX 419734
KANSAS CITY MO 64141-6734

UMB

Please Detach And Enclose Top Portion With Payment

New Balance	Payment Due Date	Past Due Amount	Minimum Payment	Amount Enclosed
0.00	02/26/18	0.00	0.00	$

Make Check Payable To:
Card Services

Card Services
PO Box 875852
Kansas City MO 64187-5852

☐ Please check box if making address change as indicated on the back

KIMBERLY GARDNER 12473
CIRCUIT ATTORNEY'S OFFICE Q102
1114 MARKET ST RM 401
SAINT LOUIS MO 63101-2039

4715620701110952 0000000 0000000

Account Number Ending In: XXXX XXXX XXXX 0952

1-2

Summary of Account Activity

Previous Balance	$	0.00
Payments	-	0.00
Other Credits	-	0.00
Purchases/Debits	+	0.00
Cash Advances	+	0.00
Finance Charges	+	0.00
New Balance		0.00
Credit Limit		3,000.00
Available Credit		2,960.00

An amount followed by a minus (-) is a credit or a credit balance, unless otherwise indicated.

Payment Information

Statement Closing Date	02/01/18
New Balance	0.00
Minimum Payment Due	0.00
Payment Due Date	02/26/18
Past Due Amount	0.00

RECEIVED
FEB 8 9 2018

PAYMENT ADDRESS
CARD SERVICES
PO BOX 875852
KANSAS CITY, MO 64187-5852

ACCOUNT INQUIRIES AND
LOST STOLEN CARDS
800-821-5184
816-843-2000 IN KANSAS CITY

CARD SERVICES
PO BOX 419734
KANSAS CITY MO 64141-6734

Telephoning about billing errors will not preserve your rights under federal law. See the Billing Rights Summary on the reverse side.

Transaction Information

Transaction Date	Posting Date	Reference Number	Purchases, Cash Advances, Payments, Credits and Adjustments since last statement	Amount
01/24	01/25	2471705D9M839HLWL	[redacted] LODGING CHECK-IN DATE: 01/22/18 SALES TAX: $ 0.00 TAX INCLUDED: 0	112.99
01/24	01/26	2471705DAM83M2QNB	[redacted] LODGING CHECK-IN DATE: 01/22/18 SALES TAX: $ 0.00 TAX INCLUDED: 0	112.99
01/28	01/29	2469216DQ2XV2563A	[redacted] SALES TAX: $ 0.00 TAX INCLUDED: 2	440.43
02/01	02/01	000000000000COMPC	TOTAL PURCHASES $666.41 TOTAL $666.41	0.00

Interest Charge Calculation

Your Annual Percentage Rate (APR) is the annual interest rate on your account

Current Billing Period Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge

Gardner, Kimberly

From: Gardner, Kimberly
Sent: Sunday, January 28, 2018 4:14 PM
To: Kimberly Gardner
Subject: Fwd: [redacted] Jan 29 - [redacted]

Sent from my iPhone

Begin forwarded message:

From: [redacted]
Date: January 28, 2018 at 4:10:55 PM CST
To: <gardnerk@stlouiscao.org>
Subject: [redacted]
Reply-To: [redacted]

[redacted]

Thanks!

Your reservation is confirmed. No need to call to reconfirm.

[redacted]

Jan 29, 2018 - Jan 31, 2018

See live updates to your itinerary, anywhere and anytime.

See your itinerary

Hotel overview

[redacted]MO,
[redacted]

View hotel Map and directions

Reservation dates
Jan 29, 2018 - Jan 31, 2018

Itinerary #
[redacted]

Check-in and Check-out

Check-in time
3 PM

Check-out time
noon

Check-in policies
Check-in time starts at 3 PM
Check-in time ends at 2 AM
Your room/unit will be guaranteed for late arrival.

Room

Guests
Reserved for Kimberly Gardner
2 adults

Room
Studio, 1 King Bed

Included amenities
Continental Breakfast, Free High-Speed Internet, Full Kitchen

Room requests
1 King Bed
Non-smoking room

Price summary

Price breakdown
Room price: $440.43
2 nights: $189.25 avg./night
1/29/2018: $159.21
1/30/2018: $219.28
Taxes & fees: $61.94

Total: $440.43

Unless specified otherwise, rates are quoted in US dollars.

Additional hotel fees

The below fees and deposits only apply if they are not included in your selected room rate.

The price shown above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Rules and restrictions

Cancellations and changes
We understand that sometimes plans fall through. We do not charge a cancel or change fee. When the property charges such fees in accordance with its own policies, the cost will be passed on to you. [redacted] the following cancellation and change fees.

Cancellations or changes made after 11:59pm (Central Daylight Time (US & Canada)) on Jan 27, 2018 or no-shows are subject to a property fee equal to the first nights rate plus taxes and fees.

Pricing and Payment
Hotel fees
The price above DOES NOT include any applicable hotel service fees, charges for optional incidentals (such as minibar snacks or telephone calls), or regulatory surcharges. The hotel will assess these fees, charges, and surcharges upon check-out.

Pricing
Your credit card is charged the total cost at time of purchase. Prices and room/unit availability are not guaranteed until full payment is received.

Gardner, Kimberly

From: Gardner, Kimberly
Sent: Monday, January 22, 2018 2:31 PM
To: Kimberly Gardner
Subject: [redacted] - Jan 23 - [redacted]

Sent from my iPhone

Begin forwarded message:

From: [redacted]
Date: January 22, 2018 at 2:28:50 PM CST
To: <gardnerk@stlouiscao.org>
Subject: [redacted]
Reply-To: [redacted]

[redacted]

Thanks!

Your reservation is confirmed. No need to call to reconfirm.

[redacted]

Jan 23, 2018 - Jan 25, 2018

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Hotel overview

[redacted]

View hotel Map and directions

Reservation dates
Jan 23, 2018 - Jan 25, 2018

[redacted]

Check-in and Check-out

Check-in time
3 PM

Check-out time
11 AM

Check-in policies
Check-in time starts at 3 PM
Minimum check-in age is 18
If a late check-in is planned, contact this property directly for their late check-in policy.

Special instructions
This property requires a credit card authorization for USD 50 for any bookings where payment for the stay will be made on site in cash instead of at the time of booking. For more details, please contact the office using the information on the reservation confirmation received after booking.

Room

Guests
Reserved for Kimberly Gardner
2 adults

Room
Deluxe Room, 2 Double Beds, Non Smoking, Refrigerator & Microwave

Included amenities
Free Breakfast, Free Wireless Internet, Drinks and hors doeuvres

Room requests
2 Double Beds
Non-smoking room

Price summary

Price breakdown
Room price $225.98
2 nights: $99.99 /night
Taxes : $26.00

Total $225.98
Collected by the hotel

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Guest Charges and Room Capacity
Base rate is for 2 guests.

ENTERRA
SIX MOVES AHEAD. ALWAYS.

145 South Livernois
Suite 350 Rochester, MI 48307
P: 800.408.1730

Circuit Attorney, City of St. Louis
Attn: Miss Kimberly Gardner
1114 Market Street
St. Louis, MO 63130

Weeks: January 18 – 31, 2018

William Don Tisaby

Date	Action
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1/30/18	[redacted] 3 hours
1/31/18	[redacted] 2 hours 2

Total Hours Worked (23.5 hours x $250)	$ 5,875.00
Travel Expenses	$ 797.40
∘ Hotel	$ 197.73
∘ Meals	$ 135.05
∘ Rental Car & Fuel	$ 174.61
∘ Personal vehicle (fuel & wear)	$ 290.01

02/15/2018

Professional Services & Expenses TOTAL	**$6,672.40**

Enterra, LLC
145 South Livernois
Suite 350
Rochester, MI 48307

January 31, 2018

Circuit Attorney, City of St. Louis
1114 Market Street
St. Louis, MO 63130

Re: RETAINER INVOICE – INSTALLMENT #1

Description/Services

First Retainer Installment per Engagement Letter dated January 31, 2018	$10,000.00
TOTAL AMOUNT DUE:	**$10,000.00**

Please include a copy of this invoice, and make check payable to: Enterra, LLC

approved KN
2/2/2018

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642-01
v.	)	
	)	
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR PRESERVATION OF EVIDENCE

COMES NOW defendant, by and through undersigned counsel, and hereby requests the Court order the Circuit Attorney's Office to preserve records and documents being sought by Defendant's Supplemental Request for Discovery. In support of this motion, defense counsel states as follows:

1. Defense counsel has filed this day Defendant's Supplemental Request for Discovery. Included within that request is production for various grand jury materials and also investigative materials generated by a Michigan private investigation company.
2. Defense believes all of these materials should be produced in this case. However, because no discovery has yet been produced, and because the Circuit Attorney's Office may argue that Defendant is not entitled to such materials, we seek a Court order for the evidence's preservation to ensure such materials are available for production.

3. Specifically, as to the evidence related to the private investigation company, the Circuit Attorney's Office has informed defense counsel that, unlike any other case, there are no police reports to produce in discovery – items which are provided to defendants in every other criminal case. Instead, defense counsel has learned that the Circuit Attorney's Office has hired a company, Enterra, LLC, out of Rochester Hills, Michigan, to conduct its investigation. Attached hereto as Exhibit 1, is the engagement letter between Ms. Gardner, the Circuit Attorney and Mr. Tisaby of Enterra for consultation and to "conduct an independent investigation into potential criminal (and civil) liability of the Governor." In the engagement letter, Ms. Gardner agrees to pay Enterra $250 an hour (which happens to be about eight times more an hour than officers of the St. Louis Metropolitan Police Department are paid). Also as part of Exhibit 1, is documentation that Enterra also is charging the Circuit Attorney for food, living expenses and expense for both a rental car and Mr. Tisaby's personal car when he is in Missouri working on this case. At least $10,000 has already been paid to Enterra.
4. The engagement letter states that Enterra is not "an agent of CAO." Defense counsel has been unable to, as of this date, identify any steps Enterra has taken to obtain proper licensure to act as a private investigator in Missouri. Additionally, defense counsel has been unable, as of this date, to identify approval by the board of estimate and apportionment of the city of St. Louis for these additional criminal legal investigators, as required under 56.540.5, RSMo.

5. While defense counsel is still attempting to research this matter, there is grave concern that the Circuit Attorney's avoidance of using the SLMPD and instead using a private investigator from Michigan to carry out her investigation has and will impact the admissibility of evidence in this case. Additionally, the use of this private investigator may eliminate any argument the Circuit Attorney would have to a claim of privilege regarding communications between Enterra and the Circuit Attorney.
6. For all of these reasons, it is imperative that defense counsel have access to the records of Enterra. Therefore, in anticipation of the Circuit Attorney resisting production of these records, defense counsel respectfully request an order that all such records be preserved.
7. As to the grand jury material at issue, the charge in the indictment is a violation of Section 565.252 RSMo which prohibits the invasion of privacy "where a person would have a reasonable expectation of privacy." However, the statute defines the "place where a person would have a reasonable expectation of privacy" as "**any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person's undressing was being <u>viewed, photographed or filmed by another</u>."** § 565.250(3) RSMo. (2015), (emphasis added). However, the indictment makes no reference to this definitional mandate of the statute.
8. If the grand jury was improperly instructed on the law, or the CAO failed to provide any instructions on the law or specifically failed to provide the grand jury with the statutory definition of a place where a person would have a reasonable

expectation of privacy, then there may be grounds to dismiss the indictment. If the grand jury was not provided the statutory definition of a place where there exists an expectation of privacy, then they may have proceeded with a complete misunderstanding of the law.

9. In this case, where the CAO has chosen to indict the sitting Governor of Missouri, it is imperative that it was done properly. For this reason, it becomes imperative that defense counsel be able to ensure the grand jury was properly instructed on the law.

10. Section 540.100, RSMo, provides that the grand jury will keep minutes of its proceedings. To the extent the minutes reflect what instructions were given to the grand jury or that legal instructions were not given, those minutes are highly relevant to a possible motion to dismiss.

Wherefore, defense counsel respectfully request an order that the records sought in Defendant's Supplemental Discovery Request either be turned over or preserved for consideration at a later time.

Dated: February 27, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James F. Bennett

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Phone: (314) 889-7300
Fax: (314) 863-2111
jbennett@dowdbennett.com
edowd@dowdbennett.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 27th day of February, 2018.

/s/ James F. Bennett

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642-01
v.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

Motion to Intervene and for Reasonable Notice of Court Proceedings

Movants (1) Meredith Corporation d/b/a KMOV-TV, (2) The Associated Press, (3) Tribune Media Company, which through subsidiaries owns televisions stations KTVI and KPLR-TV, St. Louis, and WDAF-TV, Kansas City, (4) American City Business Journals, Inc. d/b/a *St. Louis Business Journal*, and (5) Riverfront Times, LLC, d/b/a *Riverfront Times*, by their undersigned attorneys, request leave to intervene herein for the limited purpose of requesting that the Court provide Movants with reasonable advance notice of proceedings. Specifically, Movants request that this Court establish procedures to ensure the news media are provided with reasonable advance notice of court proceedings in this action.

In support, Movants state:

1. This case is a criminal action against the governor of Missouri, Eric Greitens. There is, of course, widespread public interest in the case because it may have significant impact on the government of the state, and because citizens of Missouri have interest in their governor and his alleged misconduct.

2. Movants are news media organizations that report news and information to citizens and residents of Missouri. Meredith Corporation operates television station

KMOV-TV in St. Louis. Tribune Media Company, through subsidiaries, operates television stations KTVI (Fox2) and KPLR-TV in St. Louis, and WDAF-TV (Fox4) in Kansas City. The Associated Press, an independent, not-for-profit news cooperative, provides news content and services, and operates a news bureau in various cities in Missouri including St. Louis. American City Business Journals publishes the *St. Louis Business Journal*, a weekly business newspaper. Riverfront Times LLC publishes the *Riverfront Times*, a weekly newspaper.

3. Intervention is the typical and proper procedure for a media organization's request for access to judicial proceedings or materials. This procedure was followed, and permitted, in *Pulitzer Publishing Co. v. Transit Casualty Co. (In re Transit Cas. Co.),* 43 S.W.2d 293 (Mo. banc 2001), where the Supreme Court allowed a media company's request for access to documents from in a legal proceeding. *See also Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251 (11th Cir. 2001) (recognizing media intervention as the proper procedure with respect to media requests for access to court proceedings).

4. All court proceedings in Missouri are presumptively open. Mo. Const. Art. I, § 14 ("the courts of justice shall be open to every person"); Mo.Rev.Stat. § 476.170 ("[t]he sitting of every court shall be public and every person may freely attend same").

5. Despite the Missouri constitutional and statutory directive for open courts, the proceedings in this case have not been readily accessible to the public or to the news media, who act as the public's eyes and ears as to legal proceedings.

6. No notice was given to the media of defendant's initial appearance, and reporters who sought access were not allowed to enter the courtroom and observe it. Similarly, proceedings were apparently held on Monday, February 26, 2018, in which counsel discussed various issues with the court, but the hearing was not scheduled on the

court's docket and no notice of it was given to the media or the public. Later this week, on Wednesday, February 28, 2018, another hearing was held, and interested media representatives who have been covering the case were given only very short notice of it.

7. Because of the subject matter of this case and the public interest in it, it is important for the public to be able to follow all proceedings, and the news media necessarily act as proxy for the public in this regard. Accordingly, without effective advance notice to the media, and sufficient time for news reporters to get to court to observe the proceedings, the public will be cut off from the full opportunity to monitor and follow these proceedings. In addition to depriving the public of information, this situation can also be detrimental to the public's confidence in the courts.

8. The United States Supreme Court has held, in *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 10 (1986) (*"Press-Enterprise II"*), that "there has been a tradition of accessibility to preliminary hearings," and accordingly the First Amendment right of public access to criminal proceedings extends to not only to criminal trials but also to substantive preliminary hearings in criminal cases.

9. Under *Press-Enterprise II*, because of the presumption of openness of criminal proceedings—which has been recognized in Missouri in *State ex rel. Pulitzer, Inc. v. Autrey*, 19 S.W.3d 710, 713 (Mo. Ct. App. 2000)—the Supreme Court held that a preliminary hearing cannot be closed "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II* at 13-14 (quoting *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 510 (1984)) (*"Press-Enterprise I").*

10. Advance notice can be readily given to the media. It can be as simple as having court hearings set up in advance (usually at least several days in advance) through CaseNet, as occurs with the great majority of hearings in local courts. In extraordinary situations, where one or more of the parties seeks a hearing on unusually short notice, the court clerk can inform Bill McCormac, who serves as the court-appointed media coordinator for St. Louis City and County. Upon receiving notice, he would promptly notify all local news media on his contact lists. With this procedure, any hearings can be scheduled so that there is sufficient time for the media to attend.

FOR THESE REASONS, Movants request that this court establish procedures to ensure that reasonable advance notice is given to them and other interested news media organizations of any further proceedings in this matter.

Respectfully submitted,
THOMPSON COBURN LLP

By ___/s/ *Mark Sableman*_____
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msableman@thompsoncoburn.com

Attorneys for Movants KMOV-TV, KTVI, KPLR-TV, WDAF-TV, the St. Louis Business Journal, and the Riverfront Times

THE MANEKE LAW GROUP, L.C.

By _/s/ *Jean Maneke*_____
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FAX (816) 753-9009
jmaneke@manekelaw.com

Attorneys for The Associated Press

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

Mark Sableman

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

Notice of Hearing

Please take notice that Intervenor/Movants KMOV-TV, The Associated Press, KTVI, KPLR-TV, WDAF-TV, *St. Louis Business Journal*, and *Riverfront Times*, will call for hearing their **Motion to Intervene and for Reasonable Notice of Court Proceedings** on Tuesday, March 6, 2018, at 10:00 am in Division 16.

THE MANEKE LAW GROUP, L.C.

By */s/ Jean Maneke*
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Attorneys for Movants KMOV-TV, KTVI, KPLR-TV, WDAF-TV, the St. Louis Business Journal, and the Riverfront Times

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

Mark Sableman

STATE OF MISSOURI)
SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

State of Missouri,
Plaintiff,

vs.

Eric Greitens,
Defendant.

Cause Number: 1822-CR00642

Division Number:

ENTRY OF APPEARANCE

Comes now Kimberly Gardner, Circuit Attorney, for the City of St. Louis, State of Missouri, and enters his/her appearance as attorney for the State of Missouri in the above-styled cause.

Respectfully submitted,

/s/ Kimberly Gardner
Kimberly Gardner
MBE# 56780
Circuit Attorney

STATE OF MISSOURI)
SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

State of Missouri,
Plaintiff,

vs.

Eric Greitens,
Defendant.

Cause Number: 1822-CR00642

Division Number:

ENTRY OF APPEARANCE

Comes now Robert Steele, Assistant Circuit Attorney, for the City of St. Louis, State of Missouri, and enters his/her appearance as attorney for the State of Missouri in the above-styled cause.

Respectfully submitted,

/s/ Robert Steele
Robert Steele
MBE# 42418
Assistant Circuit Attorney

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI,
Plaintiff,
vs.

ERIC GREITENS,
Defendant.

Division Number: 16

Cause No. 1822-CR00642-01

REQUEST FOR DISCLOSURE

Comes now the State of Missouri and hereby requests the defendant to disclose the following material or information in compliance with Supreme Court Rules 25.02, 25.05, 25.06, 25.07 and 25.08, to wit:

1. All reports or statements of experts made in connection with his case, including but not limited to results of physical or mental examination and of scientific tests, experiments or comparisons which the defense intends to introduce into evidence at a hearing or a trial except those portions containing statements made by the defendant;

2. The names and last known addresses of persons other than defendant, who the defense intends to call as witnesses at a hearing, a trial, or a sentencing phase of a trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statement(s);

3. Those parts of any books, papers, documents, photographs or objects, excluding portions containing statement of defendant, which the defense intends to introduce at a hearing or a trial;

4. A written statement from defense counsel disclosing defendant's intention to rely on the defense of mental disease or defect excluding responsibility, if such defense will be relied on;

5. A written statement from defense counsel announcing the intention to rely on the defense of alibi, including specific information as the place at which the accused claims to have been at the time of the alleged offense, and as particularly as is known, the names and addresses of the witnesses by whom he proposes to establish such alibi, If defendant intends to rely on this defense.

6. Notes, memorandum, written or recorded statements reporting or summarizing ex-parte statements obtained from the State's witnesses and impeachment defense witnesses or alibi witnesses. (**State vs. Culkin**, 791 S.W.2d 803, (Mo. App. 1990); **Foote v. Hart**, 728 S.W.2d 295 (Mo. App. 1987)).

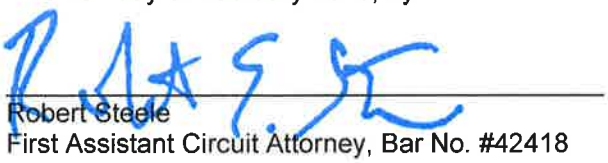
The defendant is charged with:

Count 1: Invasion of Privacy (Class D FELONY) RSMo 565.252 **Place:** 4522 Maryland Ave

A copy of the foregoing has been hand delivered to: Jack Garvey and/or James Martin and/or Dowd Bennett Law Firm

_____
Attorney for Defendant

This 26th day of February 2018, by



Robert Steele
First Assistant Circuit Attorney, Bar No. #42418
1114 Market St., Suite 401
St. Louis, MO 63101
(314) 622-4941

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

MOTION AND JOINDER OF THE ST. LOUIS POST-DISPATCH LLC TO MOTION TO INTERVENE AND FOR REASONABLE NOTICE OF COURT PROCEEDINGS

St. Louis Post-Dispatch, LLC, owner and publisher of the St. Louis Post-Dispatch ("Post-Dispatch"), hereby joins in the Motion to Intervene and for Reasonable Notice of Court Proceedings filed on behalf of various media entities on March 1, 2018 to the extent of the relief sought.

Respectfully submitted,

LEWIS RICE LLC

By: /s/ Joseph E. Martineau
Joseph E. Martineau, #32397
600 Washington Ave., Suite 2500
St. Louis, Missouri 63101
Tel: 314/444-7729;
Fax: 314/612-7729
Email: jmartineau@lewisrice.com

Attorney for St. Louis Post-Dispatch, LLC

CERTIFICATE OF SERVICE

The undersigned herby certifies that a true copy of the foregoing was filed electronically on this 5th day of March 2018, with the Clerk of the Court to be served by operation of the Court's electronic filing system to all counsel of record.

/s/ Joseph E. Martineau

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

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

MOTION FOR ADMISSION PRO HAC VICE

COME NOW Plaintiff, Circuit Attorney, Kimberly M. Gardner, respectfully requests that Ronald S. Sullivan, Jr. be admitted *pro hac vice* pursuant to Rule 9.03 of the Missouri Supreme Court Rules, and in support thereof states:

1. Ronald S. Sullivan, Jr. is a Clinical Professor of Law and Director, Criminal Justice Institute at Harvard Law School and an attorney, in good standing, of the Bar of the District of Columbia. See Exhibit A, a Certificate of Good Standing for the Bar of the District of Columbia.
2. Ronald S. Sullivan, Jr. is a member of the Bar of the District of Columbia, State Bar of Georgia, the Bar of the United States District Court for the District of Columbia; and the Bar of the United States Supreme Court.
3. Ronald S. Sullivan, Jr. is not currently suspended or disbarred from any court, and neither are any members of his appellate and trial practice team.
4. Ronald S. Sullivan, Jr. is familiar with the Missouri Rules of Civil Procedure, the local rules of the Circuit Court of the City of St. Louis, and has agreed to comply with the Rules of Professional Conduct as set forth in the Missouri Supreme Court Rules, and has agreed to become subject to the discipline of the courts of this State.
5. Circuit Attorney Kimberly M. Gardner, Missouri Bar Number 56780 of the St. Louis Circuit Attorney's Office, 1114 Market Street, Room 401, St. Louis, MO 63101, is a member in good

standing of the Missouri Bar, and pursuant to Missouri Supreme Court Rule 9.03, and has consented to serve as associate counsel with Ronal S. Sullivan, Jr.

6. The Clerk of the Supreme Court of Missouri has acknowledged receipt of the $410.00 fee required by Rule 6.01(m) of Missouri's Supreme Court Rules. See Exhibit B, Receipt from the Clerk of the Supreme Court.

7. A proposed Order is attached hereto as Exhibit C.

WHEREFORE Plaintiff, by and through his attorney Circuit Attorney Kimberly M. Gardner, respectfully request the Court to permit Ronald S. Sullivan, Jr. to appear in the instant litigation as counsel of record with the associated attorney.

Respectfully submitted,

St. Louis Circuit Attorney, Kimberly M. Gardner

BY: /s/ Kimberly M. Gardner
Kimberly Gardner MO#56780
St. Louis Circuit Attorney's Office
City of St. Louis
1114 Market Street, Room 401
St. Louis, MO 63101
Phone: (314) 589- 6222
Email: gardnerk@stlouiscao.org

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

BETSY AUBUCHON
CLERK

TELEPHONE
(573) 751-4144

March 2, 2018

This will hereby acknowledge receipt of $410 as required by Rule 6.01(m) for Ronald S. Sullivan, Jr., appearing in State of Missouri v. Eric Greitens, Case No. 1822-CR00642, before the Circuit Court of St. Louis City, State of Missouri.

Betsy AuBuchon, Clerk

On behalf of JULIO A. CASTILLO, Clerk of the District of Columbia Court of Appeals, the District of Columbia Bar does hereby certify that

Ronald S Sullivan Jr.

was duly qualified and admitted on **July 12, 1996** as an attorney and counselor entitled to practice before this Court; and is, on the date indicated below, an **Active** member in good standing of this Bar.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of this Court at the City of Washington, D.C., on February 28, 2018.

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

PENGAD 800-631-6989

STATE'S EXHIBIT
A

Issued By: Emily E. Jones
District of Columbia Bar Membership

For questions or concerns, please contact the D.C. Bar Membership Office at 202-626-3475 or email memberservices@dcbar.org.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

FILED
MAR – 5 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	**Case No. 1822-CR00642**
	)	
ERIC GREITENS	)	
	)	
Defendant.		

MOTION FOR ADMISSION PRO HAC VICE

ORDER

COMES NOW, Ronald S. Sullivan, Jr. by and through the St. Louis Circuit Attorney, Kimberly M. Gardner respectfully requests that Ronald S. Sullivan, Jr. be admitted pro hac vice pursuant to Rule 9.03 of the Missouri Supreme Court Rules, for admission as a visiting attorney of record.

This Court orders of March 5, 2018, and acknowledges that counsel has met the minimum standards of Rule 9.03 of the Missouri Supreme Court Rules and may appear in the instant litigation as counsel of record with the associated attorney.

SO ORDERED

Judge

3-5-2018
Date

PENGAD 800-631-6989
STATE'S EXHIBIT

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

Supplement to Motion to Intervene and for Reasonable Notice of Court Proceedings

In addition to the original movants, Multimedia KSDK, LLC d/b/a KSDK-TV, St. Louis, and Meredith Corporation d/b/a KCTV and KSMO, Kansas City, join in the request for leave to intervene herein for the limited purpose of requesting that the Court provide Movants with reasonable advance notice of proceedings. These movants adopt and incorporate herein the previously filed motion.

Respectfully submitted,
THOMPSON COBURN LLP

By ___/s/ *Mark Sableman*_____

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FAX 314-552-7000
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Attorneys for Movants KMOV-TV, KTVI, KPLR-TV, WDAF-TV, KCTV, KSMO, KSDK-TV, the St. Louis Business Journal, and the Riverfront Times

THE MANEKE LAW GROUP, L.C.

By */s/ Jean Maneke*

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jmaneke@manekelaw.com

Attorneys for The Associated Press

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

Mark Sableman

FILED
MAR – 5 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

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

State of Missouri

VS

ERIC GREITENS

CASE NO. 1822-CR00642 DIVISION 16 MARCH 5 2018

COURT ORDER

INTERVENOR/MOVANT'S MOTION to INTERVENE AND FOR REASONABLE NOTICE OF COURT PROCEEDINGS IS SET FOR HEARING ON TUESDAY MARCH 6, 2018 AT 2:00 P.M.

THE COURT INTENDS ON ENTERING A TRIAL SCHEDULING ORDER ON THE ABOVE DATE AND TIME.

ALL PARTIES ARE ORDERED TO APPEAR.

SO ORDERED:

DIV. 16

ENTERED
MAR - 5 2018
DP

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Defendant

_____
Judge

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1822-CR00642
	)	
ERIC GREITENS	)	Division No.: 16
	)	
Defendant.	)	

STATE'S RESPONSE TO DEFENDANT ERIC GREITENS' MOTION TO DISMISS THE INDICTMENT

The State, by and through, Robert Steele, First Assistant Circuit Attorney, respectfully submits this memorandum of law in opposition of the Defendant's Motion to Dismiss the Indictment. Defendant Eric Greitens ("Defendant") urges this court to grant extraordinary relief – a form of relief never permitted in any Missouri court and, as the State's research shows, never permitted in any federal court anywhere. Distilled to its essence, Defendant conflates his unsupported *theory* of defense with presumed undisputed fact and asks the Court to issue a ruling, as a matter of law. No Missouri case justifies such a result.

The State alleges, and a duly empaneled grand jury of Missouri citizens issued an Indictment alleging, that Defendant "knowingly photographed" the victim "*without the knowledge and consent*" of the victim. Defendant's motion ignores the grand jury's Indictment and interposes a set of facts not alleged by the State or put forward by the Grand Jury. Defendant introduces a theory containing two principal disputed factual assertions: (1) that there was sexual activity between K.S. and Defendant and (2) that this alleged sexual activity was consensual. Defendant has every right to argue this theory at trial if supported by admissible evidence, but, at the motion

to dismiss stage of the proceeding, there is no doctrinal basis for the Court to consider Defendant's putative theory of his case in determining the sufficiency of the Indictment.

In contrast, the Grand Jury has issued a facially valid Indictment alleging that Defendant violated section 565.252 of the Revised Statutes of Missouri(RSMO.). The law is clear in this jurisdiction: the Court cannot look outside of the four corners of an Indictment at disputed facts in determining whether to grant a motion to dismiss an Indictment. The one narrow exception that permits a court to consider material extrinsic to an Indictment is limited to undisputed facts. Defendant's putative theory of the case is disputed by the very allegations contained in the Indictment itself. Defendant makes unsupported claims about sexual relationships and consensual nudity. This is plainly disputed by the express language in the Indictment, which is silent on the issue of sexual relationships and alleges that Defendant photographed the victim *without* the victim's *knowledge and consent*. There simply is no read of the Indictment and Defendant's Motion to Dismiss the Indictment that leads to any reasonable conclusion that no dispute of fact exists.

Significantly, Defendant's claims are in form similar to affirmative defenses that, based on long-standing Missouri precedent, cannot be resolved at the motion to dismiss stage. Missouri law is clear that defenses based on exceptions contained in a separate statute from the charged crimes are affirmative defenses. Affirmative defenses raise questions of fact to be resolved by a fact finder, not questions of law that are properly resolved by a court. Since Defendant's entire Motion to Dismiss is based on an affirmative defense, the Court should DENY the Defendant's Motion.

Inasmuch as the law in Missouri and the entirety of persuasive federal law confirms, courts must decide a motion to dismiss an Indictment based on the sufficiency of allegations within the four corners of the Indictment itself. The one exception in Missouri is limited to undisputed and

supportable facts. Therefore, in accord with a long line and unbroken line of cases in this and every other pursuasive jurisdiction, the Court should DENY the Defendant's Motion and require the Defendant to litigate these disputed facts where disputed facts are meant to be litigated – at trial.

ARGUMENT

I. THE DEFENDANT'S MOTION TO DISMISS MUST BE DENIED BECAUSE THE DEFENDANT BASED HIS MOTION ON DISPUTED FACTS OUTSIDE THE FOUR CORNERS OF THE INDICTMENT.

A. A Defendant Can Only Base a Motion To Dismiss The Indictment On Facts Outside Of The Indictment If Those Facts Are Undisputed.

A glaring omission from the Defendant's Motion to Dismiss is any mention of a legal standard for this extraordinary remedy Defendant is asking from the Court. *See generally* Defendant Motion to Dismiss. This is because it is unprecedented in Missouri case law for a trial court to allow a defendant to rely on disputed facts at the Motion to Dismiss stage. Missouri courts have unequivocally stated that "[w]hen ruling on a motion to dismiss premised upon a claim that the charging document failed to charge an offense, the court need not examine evidence outside the four corners of the charging document itself." *State v. Wright*, 431 S.W.3d 526, 533 (Mo. Ct. App. 2014). Thus, the court in *Wright* recognized that a trial court relying on disputed facts at this point would be "akin to summary judgment in favor of Wright on the criminal charges. But, unlike in civil cases, there is no currently recognized procedural mechanism in Missouri akin to summary judgment in the criminal context." *Id.* Similarly, in *State v. Rousseau*, the court ruled that a motion to dismiss the indictment was proper only because "there is no dispute about the acts of the respondent alleged in the indictment as violating" the statute. *See* 34 S.W.3d 254, 259 (Mo. Ct. App. 2000)*; See also State v. Metzinger*, 456 S.W.3d 84, 93 (Mo. App. 2015) (ruling that a motion to dismiss the indictment was proper because "we do not agree that the trial court's analysis

required a factual determination.") (citing *U.S. v. Flores*, 404 F.3d 320, 323 (5th Cir.2005) (rejecting government's contention that district court procedurally erred in dismissing the indictment where "district court based its disposition entirely on its resolution of a legal question and the facts are undisputed")

Analogous federal law equally stymies a defendant's attempt to prevail on a motion to dismiss based on disputed facts, not in the indictment, that a defendant assumes to be true. According to federal law, at this pre-trial stage, a party may only raise by pretrial motion a defense that the court can determine "without a trial on the merits." Fed. R. Crim. P.12(b)(1). Thus, the U.S Supreme Court has ruled that the defense can only raise issues when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *U.S. v. Covington*, 395 U.S. 57, 60 (1969). Based on the U.S. Supreme Court's ruling, federal courts have consistently held that "court[s] **must deny a motion to dismiss if the motion relies on disputed facts.**" *United States v. Stepanets*, 879 F.3d 367, 372 (1st Cir. 2018) (emphasis added); *see also United States v. Grimmett*, 150 F.3d 958, 962 (8th Cir. 1998) ("if there are factual issues 'inevitably bound up with evidence about the alleged offense itself,' they may need to be deferred to trial") (quoting *United States v. Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994)); *United States v. Nabors*, 45 F.3d 238, 240 (8th Cir. 1995); *U.S. v. Weaver*, 659 F.3d 353, 355 (4th Cir.2011) ("As circuit courts have almost uniformly concluded, a district court may consider a motion to dismiss an indictment where the government does not dispute ability of court to reach motion and proffers, stipulates or otherwise does not dispute the pertinent facts").

Therefore, the Court should only grant the Defendant's Motion to Dismiss the Indictment if it rests upon facts that are undisputed. *See Rousseau,* 34 S.W.3d at 259 (ruling that granting a motion to dismiss the indictment was proper because "there is no dispute about the acts of the

respondent alleged in the indictment as violating" the statute); *see also U.S. v. Pope*, 613 F.3d 1255, 1261 (10th Cir. 2010) ("[t]o warrant dismissal, it must be clear from the parties' *agreed* representations about the facts surrounding the commission of the alleged offense that a trial of the general issue would serve no purpose") (emphasis in original). In other words, if there are facts surrounding the commission of the alleged offense that are not agreed upon, the Defendant's Motion to Dismiss the Indictment cannot be granted. As this Response will demonstrate, the Defendant's Motion to Dismiss is wholly based on disputed facts, outside of the four corners of the Indictment.

B. The Defendant Bases His Motion To Dismiss On Disputed Facts, Not In The Indictment, That The Defendant And K.S. Engaged In Sexual Activity And That This Sexual Activity Was Consensual.

Defendant's entire Motion to Dismiss is predicated on facts that are in dispute, and therefore, the Motion to Dismiss at the Indictment stage is not proper. Defendant's theory, at its core, rests upon his twin assumptions that: a) there was sexual activity between K.S. and Defendant; and b) this alleged sexual activity was consensual. Neither assumption is contained in the Indictment. Neither assumption is necessary to satisfy the elements of the charged crime.

Defendant's Motion to Dismiss throughout assumes the existence of sexual activity between Defendant and K.S. *See, e.g.*, Defendant Motion to Dismiss at 1 ("The law does not apply to the participants in sexual activity."). Moreover, for the Defendant's Motion to be even arguably consistent with Missouri law, it must further claim that the alleged sexual activity was consensual. Without these twin assumptions, Defendant cannot, in good faith, press a Motion to Dismiss the Indictment. The problem, of course, is that neither assumption – Defendant's putative trial theory – is given voice within the four corners of the Indictment. The Indictment does not reference sexual activity and plainly states that the photographs were taken without the consent of the victim. *See generally* Defendant Motion to Dismiss. Without adding the foregoing disputed

facts, even on the Defendant's read of § 565.250, [1] a person's reasonable expectation of privacy cannot be waived through a non-consensual act. Therefore, Defendant Motion relies on the Court accepting Defendant's twin assumptions as fact – that the claimed sexual activity was consensual. The law simply does not allow the Defendant to elevate his assumptions and disputed fact to the level of undisputed fact.

Significantly, neither of Defendant's two assumptions are contained in the Indictment. The Indictment plainly asserts that Defendant:

> knowingly photographed K.S. in a state of full or partial nudity without the knowledge and consent of K.S. and in a place where a person would have a reasonable expectation" of privacy, and the defendant subsequently transmitting the image contained in the photograph in a manner that allowed access to that image via a computer.

Indictment at 1. The Indictment does not, at any point, concede that there was sexual activity, and if there were, that it was consensual. The text of the Indictment does not even mention sexual activity, consensual or otherwise. Furthermore, all of the conduct claimed in the Indictment is alleged to have occurred "**without the. . . consent of K.S.**" Indictment at 1 (emphasis added). Clearly, whether there was consensual sexual activity is not an undisputed fact.

The Defendant is attempting to substitute his theory of the case for the allegations in the Indictment. Such a move, at this stage in the proceeding, is not permissible. Whether there was any sexual activity, and if there were, whether it was consensual, is a question of fact that must be decided at trial. At trial, the Defendant will have an opportunity to dispute the State's evidence and, if Defendant chooses, offer evidence in support of his theory of the case. Now is not the time. Accordingly, Defendant's argument cannot support a Motion to Dismiss at this early stage in the proceeding. Therefore, this Court should DENY the Defendant's Motion to Dismiss.

[1] There is no need for the State to respond to Defendant's incorrect claims about §565.250 since, as this Response demonstrates, the Defendant's arguments rest on untenable grounds.

II. EVEN IF THIS IS A SITUATION WHERE IT IS APPROPRIATE TO LOOK OUTSIDE THE FOUR CORNERS OF THE INDICTMENT, THIS TYPE OF EVIDENCE IS NOT THE TYPE WHICH IS ALLOWED TO BE CONSIDERED.

At this early stage in the proceedings, no Missouri court has ever looked outside the four corners of the indictment to consider Defendant's mere unsupported allegations of fact as evidence. *See, e.g.*, *Metzinger*, 456 S.W.3d 84; *State v. Fernow*, 328 S.W.3d 429. As explained above, Defendant's entire Motion to Dismiss is based on the premise that there was sexual activity and that it was consensual. However, Defendant has presented no actual, undisputed evidence *of consensual sexual activity* between himself and K.S. at the time and in the circumstance contained in the Indictment.

To illustrate the types of evidence that Missouri courts *do consider*, in the rare instances, when they consider evidence not in the indictment, in *State v. Metzinger*, the court allowed evidence in the form of four tweets written by the Defendant in order to examine whether the tweets constituted "communicating a threat," which was a key element of the offense. *Metzinger*, 456 S.W.3d at 93. In *Metzinger*, "neither the State nor the Defendant *disputed* that the Defendant tweeted the statements that formed the basis for the charge[s]." *Id.* at 92. (Emphasis Supplied). Thus, the court in *Metzinger* only looked to information extrinsic to the Indictment that was undisputed, relevant evidence that was tangible and clear, and undisputed by both parties in the form of tweets that were written by the Defendant, where the words themselves were relevant to the charged crime.

Similarly, in *State v. Fernow*, the court allowed in evidence that Defendant was in custody pursuant to a capias warrant on a misdemeanor, because the indictment charged him with escaping from custody for a felony. *See Fernow*, 328 S.W.3d at 431. A capias warrant, like a tweet, is actual, *undisputable* evidence that could directly prove the assertion on which the Defendant was relying

(i.e., Defendant was not in custody for a felony), as opposed to the Defendant simply alleging something to be true that is not in the indictment.

Even if the court, in the instant matter, were to look outside the four corners of the indictment, Defendant has not provided, and has indicated no means of providing, affirmative, *undisputed* evidence sufficient to dismiss an Indictment. Defendant cannot ask the Court to look outside the four corners of the Indictment on the basis of Defendant's mere theory of the case.

Missouri courts have never allowed a Defendant's mere word – his allegation or theory – to be admitted as undisputed evidence, the only sort of evidence that courts have used when looking outside of the four corners of the Indictment. Instead, courts uniformly insist upon *only* accepting undisputed facts as evidence extrinsic to an Indictment. Missouri law dictates that when courts are asked to grant a motion to dismiss an Indictment – an extraordinary remedy in and off itself – they are limited to the four corners of the Indictment. This clear doctrinal rule, of course, is supported by wise policy. It is the jury's role to decide factual disputes at trial.[2] Therefore, the Court should DENY the Defendant's Motion to Dismiss.

III. THE DEFENDANT IMPERMISSABLY BASES HIS MOTION TO DISMISS ON AN AFFIRMATIVE DEFENSE NOT IN THE CHARGED STATUTE CONTAINED IN THE INDICTMENT.

In addition to the above infirmities in the Defendant's Motion to Dismiss, the entire Motion to Dismiss also sounds in arguments that clearly cannot be raised at this early stage of proceeding under Missouri case law. The Motion to Dismiss asserts an affirmative defense to the charge of invasion of privacy under § 565.252, as the defense construes the statute. However, long-standing Missouri cases plainly state that trial courts cannot sustain a Motion to Dismiss because of a defendant's affirmative defenses, the putative substantive viability of such defenses

[2] Testimony by Defendant or any other purported factual assertion is not recognized as undisputable fact for purposes of a sufficiency claim under Missouri law.

notwithstanding.. *See State v. March*, 130 S.W.3d 746, 748 (Mo. Ct. App. 2004); *see also Sheehan v. Sheehan*, 901 S.W.2d 57, 59 (Mo. banc 1995). Therefore, Defendant's affirmative defenses are not relevant at this stage of the proceedings and are meant to be left for trial. Absent reliance on such an affirmative defense, Defendant does not assert any permissible ground as a basis for the grant of his Motion. Therefore, the Court should DENY the Defendant's Motion to Dismiss.

The central arguments of Defendant's Motion to Dismiss are clearly affirmative defenses to the charges brought against him. The Motion to Dismiss contends that Defendant's conduct is exempt from § 565.252 because K.S. had no reasonable expectation of privacy as defined in § 565.250. In order to claim this exemption, Defendant *relies exclusively* on the definition of "reasonable expectation of privacy" found in § 565.250 which is disconnected from the statutory offense listed in §565.252. Missouri courts have definitively stated that, "where an exception to a criminal statute is disconnected from the definition of the offense, [3] that exception is a matter that the defendant must assert as an affirmative defense." *State v. March*, 130 S.W.3d 746, 748 (Mo. App. 2004); *see also State v. Litterell*, 800 S.W.2d 7, 12 (Mo. App. 1990); *see also State v. Brown*, 306 Mo. 532, 267 S.W. 864, 865 (1924); *see also State v. Zammar*, 305 S.W.2d 441, 444 (Mo. 1957); *see also* 1 C. Torcia, *Wharton's Criminal Evidence* § 20 (13th ed. 1972).

The bulk of Defendant's Motion to Dismiss relies on a defense based on the text of § 565.250 – a separate statutory provision from the charged offense located in § 565.252. Defendant argues in his Motion to Dismiss that the language of § 565.250 means the statute only criminalizes "photographing or videotaping where a person does not believe he or she is being viewed by

[3] It cannot be disputed that, in this context, the use of the phrase "definition of the offense" means the explanation of the offense as opposed to referring to an actual definitions subsection. *See Definition Definition*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/definition (Last visited Mar. 2, 2018) (defining the word "definition" as "the action or the power of describing, explaining, or making definite and clear.").

another." Indictment at 4. Defendant's Motion to Dismiss relies exclusively on this exception for a reasonable expectation for privacy. Because this exception is disconnected from the definition of the statute itself, the Motion's central arguments undoubtedly qualify as affirmative defenses under Missouri case law.

State v. Henry's parallel situation is illustrative. There the Missouri court distinguished the phrase "nonintoxicating beer," which appeared in the statute's core language, from a subsection defining the phrase. *State v. Henry*, 254 S.W.2d 307, 308 (Mo. App. 1953). The court stated that the prosecution was only required to include in its indictment language from the core definition of the statute. *See id*. Even though the subsection defined a phrase in the core statutory language, the prosecution was under no duty to address the subsection in its indictment. *See id*. Because the prosecution does not have a duty to address the components of a definitional subsection, raising them falls to the defendant. Missouri courts consider arguments that fall solely to the defendant to be affirmative defenses. *State v. Wilkerson*, 616 S.W.2d 829, 835 (Mo. banc 1981) (asserting that "affirmative defenses must be proved by the defendant"). *State v. Wilkerson*, 616 S.W.2d 829, 835 (Mo. banc 1981) (asserting that "affirmative defenses must be proved by the defendant").

Missouri courts have further stated definitively that "because affirmative defenses must be proved by the defendant, a trial court could not sustain a pretrial motion to dismiss a charge merely because defendant asserts an affirmative defense." *State v. Wilkerson*, 616 S.W.2d 829, 835 (Mo. banc 1981); *see also State v. March*, 130 S.W.3d 746, 748 (Mo. App. 2004). Because the arguments in Defendant's Motion to Dismiss rely on § 565.250's definition of a reasonable expectation of privacy, Defendant's arguments are affirmative defenses, which cannot be raised at this stage. Defendant's Motion to Dismiss, as it stands, essentially attempts to levy a jury-defense before the State's case can even be presented to a jury. Without these plainly ineligible arguments,

Defendant's Motion to Dismiss has no grounds. Therefore, the Court should DENY Defendant's Motion to Dismiss.

CONCLUSION

For the foregoing reasons, the State asks this Honorable Court to DENY Defendant's Motion to Dismiss the Indictment.

Respectfully submitted,

_____

Robert Steele #42418
First Assistant Circuit Attorney

FILED
MAR – 6 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
DEPUTY

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

State of Missouri
VS
ERIC GREITENS

CASE NO. 1822-CR00642 DIVISION 16 MARCH 6 2018

COURT ORDER

ALL INFORMAL MATTERS SHALL BE HEARD ON MONDAYS AND THURSDAYS PROMPTLY AT 9:00 A.M.

THE TRIAL OF THIS MATTER IS SET FOR MONDAY MAY 14, 2018 AT 9:00 AM.

JUROR HARDSHIP AND CAUSE HEARINGS SHALL BEGIN ON THURSDAY MAY 10, 2018 AT 9:00 AM.

SO ORDERED.

DIV. 16

ENTERED
MAR - 6 2018
DP

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

CIRCUIT ATTORNEY KIMBERLY M. GARDNER
CITY OF ST. LOUIS

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

March 6, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

Please find enclosed the following discovery:

1. Notes of Kim Gardner

Please find enclosed the following discovery:
My records reflect that you are in possession of the following discovery:

1. Request for Discovery (2 pages);
2. Transcripts of taped recordings of P.S and K.S (47 pages);
3. Email questions and answers for KMOV interview of P.S. (5 pages);
4. Email of K.S. to P.S dated March 24, 2015 (1page)
5. Email of K.S to P.S dated March 26, 2015 (1page)
6. Email of K.S to P.S dated July 8, 2015; (2 pages)
7. E.G's statements to the public (1 DVD);
8. Taped statements of K.S (1 DVD);
9. Picture of admin contact of E.G (1 page);
10. Picture of K.S (1page);
11. Picture of email from E.G. to K.S dated August 25, 2015 (1page);
12. Picture of email of K.S to E.G dated October 20, 2015 (1page);
13. E.G's Facebook post (3 pages);
14. Grand Jury Indictment filed on February 22, 2018

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

IN THE 22ND JUDICIAL CIRCUIT COURT, CITY OF ST LOUIS, MISSOURI

State Of Missouri,
Plaintiff,

vs.

Eric Greitens,
Defendant.

Case Number: 1822-CR00642

Entry of Appearance

Comes now undersigned counsel and enters his/her appearance as attorney of record for Eric Robert Greitens, Defendant, in the above-styled cause.

/s/ N. Scott Rosenblum
N. Scott Rosenblum
Mo Bar Number: 33390
Attorney for Defendant
Ste. 130
120 S. Central Ave.
Clayton, MO 63105
Phone Number: (314) 862-4332
nkettler@rsflawfirm.com

Certificate of Service

I hereby certify that on March 7th, 2018, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

/s/ N. Scott Rosenblum
N. Scott Rosenblum

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

State of Missouri, Plaintiff,	)	
	)	Cause Number: 1822-CR00642
vs,	)	Division Number: 16
Eric Greitens, Defendant.	)	

ENTRY OF APPEARANCE

Comes now Robert Dierker, Assistant Circuit Attorney, for the City of St. Louis, State of Missouri, and enters his appearance as attorney for the State of Missouri in the above-styled cause.

Respectfully submitted,

/s/Robert Dierker
Robert Dierker
MBE# 23671
Assistant Circuit Attorney

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

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

JOINT PROPOSED SCHEDULING PLAN

The Circuit Attorney's Office and Defense Counsel submit the following joint proposed scheduling order:

1. The trial of this matter is set for May 14, 2018. It is anticipated that it will be a three to five day trial.
2. As to information known at this time, the Parties will file any motions to transfer venue on or before March 5, 2018.
3. The Circuit Attorney's Office will produce all available discoverable materials by March 5, 2018. The duty to provide all relevant discovery is ongoing. Any new documents or other discoverable materials obtained after March 5, 2018 will be produced within 48 hours of its receipt by the Circuit Attorney's Office.
4. The Defendants will produce any discoverable materials by March 15, 2018. The duty to provide all discovery is ongoing. Any new documents or other discoverable materials obtained after March 15, 2018 will be produced within 48 hours of the determination that it may be used by Defendant at trial in his case in chief.

5. No discovery, depositions, items of discovery or evidence will be secondarily distributed to any person or entity not employed by or working directly for the parties' legal team absent Court order.
6. Depositions may begin immediately. All depositions will be concluded by May 1, 2018. Notices for depositions and service shall be made only after consulting with opposing counsel as to availability. Depositions shall take place in a location agreed upon by the parties. Any existing related documents shall be turned over to the deposing party two business days prior to the deposition.
7. If the Circuit Attorney retains an expert to testify, if known, their identities will be disclosed by March 31, 2018, along with any report authored for this cause. Any additional government experts must be disclosed by April 10, 2018, along with any report authored for this cause. Defendant will have until April 24 to disclose any experts. Should either party need additional expert testimony, they may request leave of court to endorse additional expert witnesses as needed. Expert depositions must be completed by May 1, 2018.
8. Any motions shall be heard only after consulting opposing counsel on scheduling and with five (5) days notice. Any request for leave of shorten notice of motion shall include prior notice to opposing counsel of the request. The Court agrees to hold informal administrative hearings each Monday at 9 am and each Thursday at 9 am,
9. All discovery will be completed by May 1, 2018.
10. Any dispositive or other pretrial motions will be filed by May 1, 2018.
11. The Court will call 160 prospective jurors for voir dire. Voir dire will begin May 10, 2018.

12. The State and the Defense will provide their proposed instructions 24 hours prior to the beginning of voir dire.

On Behalf of the Defendant

On Behalf of the Circuit Attorney's Office

So Ordered:

DLU 16
2110 PM

Date: 3-8-2018

IN THE 22ND JUDICIAL CIRCUIT
STATE OF MISSOURI
ST. LOUIS CITY

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

MOTION TO COMPEL DISCLOSURE OF IMPEACHMENT EVIDENCE

COMES NOW Defendant, Eric Greitens, through his attorney, N. Scott Rosenblum, and moves this Court to compel the State to disclose the evidence detailed in Section I of this motion upon entry of this Court's order and without delay. In support of this Motion, Defendant states the following:

I. MATERIALS SOUGHT

In this Motion, Defendant seeks this Court's order compelling production by the State of the following materials constituting *Brady*/*Giglio* evidence and otherwise material impeachment evidence:

1) The existence of any and all promises or representations made with respect to: leniency; warning, notice, or threat of criminal charges; forgoing pursuit of criminal charges; and/or any favorable position or decision with respect to the pursuit or potential pursuit of criminal charges and/or civil penalties against K.S., the complaining witness identified in the Indictment in this matter, and/or any other witness identified in the Indictment, with respect to this matter or their testimony in this matter;

2) Reports, communications, emails, text messages, notes, recordings, and/or any other materials recording, referencing, or reflecting any and all promises or representations made with respect to: leniency; warning, notice, or threat of criminal charges; forgoing pursuit of criminal charges; and/or any favorable position or decision with respect to the pursuit or potential pursuit of criminal charges and/or civil penalties, K.S., the complaining witness identified in the Indictment in this matter, and/or any other witness identified in the Indictment, within the past three years; and

3) Reports, communications, emails, text messages, notes, recordings, and/or any other materials recording or reflecting any and all investigations, formal or informal, or discussion or consideration of any criminal charge(s) and/or civil penalties against K.S., the complaining witness identified in the Indictment in this matter, and/or any other witness identified in the Indictment, within the past three years.

II. FACTUAL BACKGROUND

On February 22, 2018, an Indictment was returned in this case, charging Defendant with one felony count of invasion of privacy under Section 565.252, RSMo. On February 23, 2018, Defendant filed his Request for Discovery, which included requests for disclosure of discovery in categories that include the items detailed in Section I above. On February 27, 2018, Defendant filed his Supplemental Request for Discovery. The joint scheduling plan issued by the Court provided that the Circuit Attorney's Office "will produce all discoverable materials by March 7, 2018.

Defendant received discovery from the Circuit Attorney's office on March 7, 2018 and

has reviewed that discovery in detail. That discovery does not include any of the *Brady* and *Giglio* information and materials identified in Section I above.

It is the understanding of undersigned counsel that witnesses identified in the Indictment did not pursue criminal charges in this matter and were initially uncooperative with media inquiries concerning the allegations that are incorporated in the charges in the Indictment, and that the same witnesses were likely similarly reluctant to fully participate in the Circuit Attorney's investigation of this matter. On information and belief, there is reason to believe that in fact offers of leniency and/or warnings of possible criminal charges were made to K.S. Any offers of leniency, warnings of possible criminal charges or adverse action against the witnesses, or communications of a favorable position or decision with respect to criminal charges constitute powerful exculpatory *Brady/Giglio* information to which Defendant is entitled without delay, and also constitute material impeachment evidence in this case. Defendant anticipates the possibility that the Circuit Attorney's office may take a substantially narrower interpretation of the demands of *Brady/Giglio* with respect to the information and materials detailed above, and requests this Court's Order making clear that each of the categories of information detailed in this motion must be promptly disclosed to Defendant.

III. DISCUSSION

Missouri Supreme Court Rule 25.03 provides, in relevant part, that:

> the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request:
>
> (1) The names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements;
>
> (2) Any written or recorded statements and the substance of any oral statements

> made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses;
> . . . .
> (6) Any books, papers, documents, photographs, or objects, which the state intends to introduce into evidence at the hearing or trial or which were obtained from or belong to the defendant;
> . . . .
> (9) **Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment**.

Id. (emphasis added). Rule 25.03 further directs:

> (C) If the defense in its request designates material or information which would be discoverable under this Rule if in the possession or control of the state, but which is, in fact, in the possession or control of other governmental personnel, the state shall use diligence and make good faith efforts to cause such materials to be made available to the defense counsel, and if the state's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court, upon request, shall issue suitable subpoenas or orders to cause such material or information to be made available to the state for disclosure to the defense.

Id.

"Prosecutors must disclose, even without a request, exculpatory evidence, including evidence that may be used to impeach a government witness." *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992). *See also Brady*, 373 U.S. 83. "Impeachment evidence is evidence that 'affect[s] [the] credibility' of a witness." *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 78–79 (Mo. 2015), citing *Giglio*, 405 U.S. at 154. Disclosure of evidence impacting credibility is mandatory "[w]hen the reliability of a given witness may well be determinative of guilt or innocence.'" *Giglio*, 405 U.S. at 154 (internal quotations omitted). *Brady*, *Giglio*, and their progeny further dictate that "the State has a duty to learn of any favorable evidence known to the others acting on the government's behalf, including the police or an investigative agency, and disclose that information to Defendant." *State v. Moore*, 411 S.W.3d 848 (Mo. App. 2013), citing

Kyles v. Whitley, 514 U.S. 419, 437 (1995) (internal quotations omitted). *Brady*'s disclosure mandate extends to "agreements or understandings between the government and a witness for leniency in exchange for testimony." *United States v. Rushing*, 388 F.3d 1153, 1158 (8th Cir. 2004) (citing *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)). *See also State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010) (undisclosed evidence in kidnapping prosecution was favorable to defendant, as element for *Brady* due process violation, where undisclosed impeachment evidence included evidence that investigators had sought leniency for the witness based on his cooperation in the kidnapping case).

"Deals and promises of leniency in exchange for particular testimony must be disclosed under *Brady*." *Glasgow v. State*, 218 S.W.3d 484, 491 (Mo.App. W.D. 2007), citing *Hutchison v. State*, 59 S.W.3d 494, 496 (Mo. banc 2001). "The State must disclose more than just iron-clad plea agreements"—"[t]acit agreements must be disclosed as well." *Glasgow*, 218 S.W.3d at 491, citing *Wisehart v. Davis*, 408 F.3d 321, 324 (7th Cir.2005).

Missouri Supreme Court Rule 25.04 additionally provides for the discovery of materials not covered by Rule 25.03. That Rule provides that:

> The defense may make a written motion in the court having jurisdiction to try said case requesting the state to disclose material and information not covered by Rule 25.03. Such motion shall specify the material or information sought to be disclosed. If the court finds the request to be reasonable, the court shall order the state to disclose to the defendant that material and information requested which is found by the court to be relevant and material to the defendant's case.

Id. Disclosure of the materials identified in Section I is mandated under *Brady* and *Giglio*. Their disclosure is also reasonable and appropriate under Rule 25.04. The order sought by this motion seeks only to clearly delineate the State's disclosure obligations in this matter and to assure that the constitutional mandates of disclosure under *Brady* and *Giglio* are clearly complied with in relation to the vitally important categories of information detailed in Section I of this motion. The

law is clear that promises and discussions of leniency must be disclosed under *Brady* and *Giglio*. Warnings, threats, and proof of investigation of possible criminal charges against witnesses similarly fall within this same obligation in situations like the one here with respect witnesses who appear to have been reluctant to participate in the Circuit Attorney's investigation and may ultimately been motivated by fear of punitive consequences to themselves in providing accounts of events and ultimately testifying on behalf of the State. Such information serves as powerful impeachment evidence in assessing the credibility of these witnesses and should be disclosed to Defendant under a clear, unequivocal directive mandating disclosure.

IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court enter its Order compelling the State to produce the discovery materials detailed in Section I above.

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James F. Bennett*
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By: */s/ N. Scott Rosenblum*
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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 March, 2018.

CIRCUIT ATTORNEY KIMBERLY M. GARDNER
CITY OF ST. LOUIS

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

March 8, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

2. K.S last known address
3. P.S last known address
4. J.W last known address
5. A.W last known address
6. Photos (6 photos)
7. Verizon Wireless phone Records (18 pages)
8. Grand Jury Transcripts (41 Pages)
9. Grand Jury Transcripts (90 pages)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

March 12, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

2. P.S Transcripts (41 pages)
3. A.W Transcripts (20 pages)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

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

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

STATE'S RESPONSE TO THE DEFENDANT'S MOTION FOR PRESERVATION OF EVIDENCE

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Prosecutor, and respectfully submits this response to Defendant's Motion for Preservation of Evidence, and states as follows:

1. On February 27, 2018, Defendant filed a Motion for Preservation of Evidence and a Supplemental Request for Discovery. The requests contained therein are overbroad, capricious, and seeks disclosure of material not contemplated by the Missouri Rules of Criminal Procedure.
2. The instant Defendant's Motion for Preservation of Evidence seeks an Order from this Court to preserve certain evidence.
3. It is the practice of the Circuit Attorney for the City of St. Louis to preserve evidence during the pendency of matters it prosecutes. As such, the Circuit Attorney will preserve evidence in *State v. Greitens*, Cause No. 1822-CR00642-01, including any and all material received from Enterra, LLC. and all grand jury material pertaining to *State v. Greitens*, Cause No. 1822-CR00642-01.

4. Defendant makes a number of specious claims regarding the potential of an improper charge to the grand jury. In the Twenty Second Judicial Circuit for the State of Missouri, there is no requirement for written instructions to the grand jury. The Court, through the Jury Supervisor supplies Grand Jurors the Missouri Criminal Code Handbook for Law Enforcement. As a consequence in line with the practice in the Circuit, there are no written instructions for the grand jurors in this case. Even if instructions existed, the defense is not entitled to them. The State notes that Defendant did not file a motion to dismiss the indictment of this basis. Rather, Defendant constructs its claims in the subjunctive mood; for example, the Defendant writes: "if the grand jury was improperly instructed on the law…" Defendant Motion to Preserve Evidence at 3.
5. Defendant egregiously misstates Missouri law as regards to the validity of an Indictment. In Missouri, the law is unequivocal that an indictment is valid if it tracks all of the constituent elements of the offense. Here, the Indictment clearly tracks each element of § 565.252 – the charged statute. The Indictment alleges that on or about March 21, 2015, Defendant knowingly photographed the victim in a state of full or partial nudity without the knowledge or consent of the victim and in a place where the person would have a reasonable expectation of privacy, and the Defendant subsequently transmitted the image contained in the photograph in a manner that allowed access to that image via a computer.
6. Missouri law simply requires an Indictment to provide notice and a factual foundation. The foregoing satisfies the sufficiency requirements for an Indictment.

7. The law in Missouri is equally clear that a definitions statute is not required to be included in an Indictment.§ 565.250(3) RSMo. is a definitions statute and not necessary to for an Indictment.

8. The Grand Jury plays a key role in the criminal process. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. amend V. This guarantee preserves the grand jury's two historical duties: (1) to decide whether there is probable cause to believe a crime has been committed and (2) to protect citizens against unfounded prosecutions. The grand jury's historical duties have long been protected by cloaking its proceedings in secrecy. Thus, "[t]he common law and the statutes generally provide that grand jury proceedings are to be conducted in secret."

9. Should Defendant wish to file a proper motion to dismiss the Indictment on this basis, however, the State will respond in accord with the procedure set forth in the Missouri Rules of Criminal Procedure.

10. Although Defendant did not cite any authority for its sufficiency argument, should the Court decide to treat its Motion for Preservation of Evidence as a motion to dismiss the Indictment, the State respectfully requests an opportunity to fully brief the issue.

For all the foregoing reasons, the State asks this Honorable Court to DENY Defendant's Motion For Preservation of Evidence as moot, as the State represents that it shall comply with its practice of preserving the material requested in the instant motion.

Respectfully submitted,

KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

Ronald S. Sullivan Jr.
Special Prosecutor

Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

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

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

STATE'S RESPONSE TO DEFENDANT ERIC GREITENS' MOTION TO COMPEL DISCLOSURE OF IMPEACHMENT EVIDENCE

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Prosecutor, and responds to Defendant's Motion to Compel Disclosure of Impeachment Evidence.

ARGUMENT

On February 22, 2018, grand jurors of the City of St. Louis, State of Missouri returned a 1-count indictment charging Defendant Eric Greitens ("Defendant") with Invasion of Privacy-1st Degree, in violation of RSMo Section 565.252, in connections with an investigation concerning the Defendant photographing the victim in a state of full or partial nudity without her knowledge and consent.

On February 23, 2018, Defendant filed his Request for Discovery and on February 27, 2018, Defendant filed his Supplemental Request for Discovery. The Circuit Attorney's office fully complied with their legal requirements and disclosed all applicable discovery on March 7, 2018.

On March 8, 2018, Defendant filed this Motion, without pointing to any competent evidence whatsoever, claiming the existence of impeachment evidence in the State's possession.

However, no such *Brady/Giglio* evidence exists. There were no "offers of leniency, warnings of possible criminal charges or adverse action against witnesses, or communication of a favorable position or decision with respect to criminal charges" made to K.S. Defendant's Motion at 3. In fact, the State possesses no information relative to K.S., not disclosed, "that may be used to impeach a government witness." Defendant's Motion at 4 (citing *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. Banc 1992)). Accordingly, the State has fully complied with all legal requirements through its provision of discovery to the Defense on March 7, 2018.

CONCLUSION

Because no such evidence exists, the State asks this Honorable Court to DENY Defendant's Motion to Compel Disclosure of Impeachment Evidence.

Respectfully submitted,

KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

Ronald S. Sullivan Jr.
Special Prosecutor

Robert Steele MBE 42418
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IN THE CIRCUIT COURT FOR
THE TWENTY-SECOND JUDICIAL CIRCUIT
ST. LOUIS CITY
STATE OF MISSOURI

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

STATE'S RESPONSE TO DEFENDANT ERIC GREITENS' SUPPLEMENTAL REQUEST FOR DISCOVERY

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Prosecutor, and responds to Defendant's Supplemental Request for Discovery as follows:

INTRODUCTION

On February 22, 2018 , grand jurors of the City of St. Louis, State of Missouri returned a 1-count indictment charging Defendant Eric Greitens ("Defendant") with Invasion of Privacy-1st Degree, in violation of RSMo Section 565.252, in connections with an investigation concerning the Defendant photographing the victim in a state of full or partial nudity without her knowledge and consent.

To date, the State has provided the Defendant with all appropriate discovery within its possession, custody, and control. The State will continue to provide additional discovery pursuant to its continuing discovery obligations under Rule 25.08 of the Missouri Rules of Criminal Procedure. *See* Mo. Sup. Ct. R. 25.08

ARGUMENT AND LEGAL STANDARD

Defendant's Supplemental Request for Discovery is overbroad and seeks disclosure not contemplated by the Missouri Rules of Criminal Procedure. Significantly, Defendant's motion is silent as to the basis for his request. In contrast to this silence, the Missouri Rules of Criminal Procedure speak plainly and demonstrate that Defendant's requests are overbroad and not justified by rule or law. Defendant's supplemental request principally implicates two Missouri Rules of Criminal Procedure: Rule 25.03(3) and Rule 25.10(A).

Rule 25.03(3) of the Missouri Rules of Criminal Procedure requires the State to disclose to Defendant, upon written request of Defendant's counsel, "those portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as a witness at a hearing or trial." Mo. Sup. Ct. R. 25.03. Defendant's requests, by their own terms, seek material plainly outside the scope of the Rule.

The second Rule implicated by Defendant's supplemental motion is Rule 25.10(A), which precludes disclosure of "Legal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinion, theories, or conclusions of counsel for the state or members of his legal or investigative staff…." Mo. Sup. Ct. R. 25.10. Defendant's capricious requests for disclosure plainly runs afoul of the limits on disclosure imposed by Rule 25.10(A).

ANALYSIS

I. Paragraph 1 of Supplemental Request

The State will fully comply with its discovery obligations under Rule 25.03(3) and its continuing discovery obligations under Rule 25.08.

In the Twenty Second Judicial Circuit for the State of Missouri, there is no requirement for written instructions to the grand jury. The Court, through the Jury Supervisor supplies Grand Jurors the Missouri Criminal Code Handbook for Law Enforcement. As a consequence in line with the practice in the Circuit, there are no written instructions for the grand jurors in this case. Even if instructions existed, the defense is not entitled to them. Defendant requests, "A copy of all legal instructions given to the grand jury related to this case, including any blow up/enlargements of the statutory law with blackouts/redactions which were in the original shown to the jury." Supplemental Request at 1. Defendant's request for "all legal instructions" is nowhere imposed by any Rule of Criminal Procedure. Instead, Rule 25.03(3) obligates, upon request, the State to disclose those "**portions** of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as a witness at a hearing or trial." Mo. Sup. Ct. R. 25.03 (emphasis added). Defendant's request for all grand jury "instructions" is not found in the text of the relevant rule. Defendant has cited no authority in support of this request even if such instructions existed.

II. Paragraph 2 of Supplemental Request

Defendant requests "All grand jury minutes related to this case." Supplemental Request at 1. The Twenty Second Judicial Circuit Court's local rules do not require the Grand Jury to maintain minutes. The Grand Jury does not keep minutes. Additionally, the Defendant offers no authority for this request, and the request clearly is significantly broader than what Rule 25.03(3) obligates the State to produce. Rule 25.03(3) affirmatively does *not* require the production of "all" grand jury minutes. Rather, it requires only the production of *certain* grand jury material as

described in the text of the Rule. *See* Mo. Sup. Ct. R. 25.03. Specifically, Rule 25.03(3) obligates the State to produce, on request, "those **portions** of any existing transcript of grand jury proceedings **which relate to the offense** with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as a witness at a hearing or trial." Mo. Sup. Ct. R. 25.03 (emphasis added showing limitation of requirement).

III. Paragraph 3 of Supplemental Request

Defendant requests, "Any and all documents presented to the grand jury in this case, including any blow up of any evidence." Supplemental Request at 1. Defendant's motion is silent with respect to any authority that justifies this capricious request for discovery. As noted above, Rule 25.03 limits disclosure of grand jury material to the specified class of materials described in the rule, namely, material "containing testimony of the defendant and testimony of persons whom the state intends to call as a witness at a hearing or trial." Mo. Sup. Ct. R. 25.03. There is no textual support for Defendant's request for "any and all documents" and Defendant has cited no authority in support thereof.

IV. Paragraph 4 of Supplemental Request

The State represents that it will disclose any and all material produced by Enterra, LLC that is in form similar to material produced by the St. Louis Metropolitan Police Department and that would be discoverable under Rule 25 of the Missouri Rules of Criminal Procedure.

Defendant requests, "Any and all memoranda, notes, rough notes, e-mails or other communications by, from or to Enterra, LLC or any of its employees regarding any witness interviewed or spoken to regarding this case." Supplemental Request at 1. Once again, Defendant provides no authority for its broad and capricious request. Notwithstanding the absence of citation, Defendant's request implicates Rule 25.10(A) of the Missouri Rules of Criminal Procedure. *See*

Mo. Sup. Ct. R. 25.10. Significantly, Rule 25.10(A) protects attorney work product, and the work product of an attorney's investigative staff from the disclosure requirements of Rule 25. Defendant's request is so broad that, on its plain reading, the request reaches "legal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinion, theories, or conclusions of counsel for the state or members of his legal or investigative staff." Mo. Sup. Ct. R. 25.10(A).

Paragraph 5 of Supplemental Motion

The State represents that it will disclose any and all material produced by Enterra, LLC that is in form similar to material produced by the St. Louis Metropolitan Police Department that would be discoverable under Rule 25 of the Missouri Rules of Criminal Procedure.

Defendant requests, "Any and all memoranda, notes, rough notes, e-mails or other communications by, from or to Entrerra, LLC or any of its employees regarding evidence sought or obtained regarding this case." Supplemental Request at 2. Similar to the State's response to paragraph 4 of Defendant's supplemental response, Defendant cites no authority whatsoever for its broad and capricious request. As noted with regard to the previous request, Rule 25.10(A) protects attorney work product, and the work product of an attorney's investigative staff from the disclosure requirements of Rule 25. *See* Mo. Sup. Ct. R. 25.10. Defendant's request is so broad that, on its plain reading, the request reaches "legal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinion, theories, or conclusions of counsel for the state or members of his legal or investigative staff." Mo. Sup. Ct. R. 25.10.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court DENY the Defendant's supplemental discovery request.

Respectfully Submitted,

KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

Ronald S. Sullivan Jr.
Special Prosecutor

Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

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

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

NOTICE OF HEARING OF DEFENDANT'S
MOTION FOR SUPPLEMENTAL DISCOVERY

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion for Supplemental Discovery in Division 16 of the Circuit Court of the City of St. Louis, Missouri, on the 19th day of March, 2018, at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated: March 13, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James G. Martin

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James F. Bennett #46826
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CAREY DANIS & LOWE

John F. Garvey #35879
Carey Danis & Lowe
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Fax: 314-678-3401
jgarvey@careydanis.com

Attorneys for Defendant

Certificate of Filing

The undersigned hereby certifies that the foregoing pleading has been filed using the court's electronic case filing system on this 13th day of March, 2018, thereby serving the registered parties of record. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he/she has signed the original of this Certificate and the foregoing pleading to: Kimberley Gardner, Rachel Smith, Robert Steele, and Ronald Sullivan.

/s/James G. Martin

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1822-CR00642-01
	)	Div. 25
ERIC GREITENS,	)	
	)	
Defendant.	)	

NOTICE OF HEARING AND MOTION TO SHORTEN TIME TO PRESENT MOTION TO QUASH AND FOR PROTECTIVE ORDER

Defendant has served a notice of deposition calling for production of documents by the State's special investigator, William Tisaby. Due to the time constraints of the scheduling order, the State is obliged to produce requested documents by the close of business on Friday, March 16. The document requests are overbroad, unreasonable and outside the scope of criminal discovery, and the State must seek relief in the form of a protective order or order quashing the notice of deposition.

The scheduling order calls for 5 days' advance notice, which is impracticable under the circumstances. The State orally notified defense counsel of this motion and the motion to quash.

Wherefore, the State requests that its motion to quash or for protective order regarding the Tisaby deposition be heard at informal matters on Thursday, March 15, at 9:00 a.m., and hereby gives notice of same.

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

/s/ Robert Steele MBE 42418
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steeler@stlouiscao.org
/s/Robert H. Dierker 23671
Assistant Circuit Attorney
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1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 14 day of March 2018.

/s/Robert H. Dierker MBE 23671

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

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

MOTION TO QUASH AND FOR PROTECTIVE ORDER REGARDING THE DEFENDANT'S NOTICE OF VIDEOTAPED DEPOSITION OF WILLIAM DON TISABY

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Prosecutor, and moves this Court to Quash and Enter a Protective Order Defendant Eric Greitens' ("Defendant") Notice of Videotaped Deposition of William Don Tisaby, insofar as it requires production of documents identified in Exhibit A which are beyond the scope of discovery in a criminal cause.

Defendant's Notice of Videotaped Depostion is overbroad and fails to comply with relevant Missiouri rules and applicable law. The Missouri Rules of Criminal Procedure allow Defendant to depose witnesses and states that the "manner of taking" of the depositions is governed by the rules governing civil actions. This not a blanket incorporation of the Rules of Civil Procedure to criminal matters. A reasonable interpretation is that matters such as notice, motions to terminate, certification and delivery, oath taking, and the like, which are part of the "manner of taking" are governed by the same rules controlling depositions in civil actions. This reasonable interpretation is provided with unassailable support by the fact that the Missouri Rules of Criminal Procedure have their own rules governing disclosure of materials. It would be ludicrous to assert

that a defendant could circumvent these rules simply by deposing a witness. Therefore, the Court should quash Defendant's Notice and require them to follow the Rules of Criminal Procedure in this criminal matter.

However, even assuming that the Rules of Civil Procedure govern in this matter, Defendant's Notice of a Videotaped Deposition of William Don Tisaby ("Tisaby") should still be quashed. Defendant's Notice is a blunderbuss. The scope of Defendant's Notice of Deposition far exceeds the permissible scope of discoverable information even under Missouri civil law. Defendant's requests seemingly encompass virtually anything and everything related to Enterra, LLC's ("Enterra") business.

It is apparent that Defendant grossly misapprehends the reach of Missouri civil law relative to deposing witnesses in a criminal case. The right to depose is limited in several key ways. *First*, the scope of discovery is limited to relevant items, which require the Defendant to demonstrate that their request is reasonably calculated to lead to the discovery of admissible evidence. To this end, Missouri law bars simple fishing expeditions and, instead, assumes that requests without limitations are not relevant.

Defendant's requests are virtually unlimited. Defendant appears to have resorted to an exhaustive list of requests that include anything Defendant could possibly imagine relating to Enterra. However, Defendant's Notice of Deposition and the requests therein are improper and neither justified by rule or law. Defendant has the burden of proving that his requests are relevant. Defendant does not even attempt to meet this burden or otherwise justify his requests. Therefore, the requests contained in Defendant's Notice are inappropriate and must be quashed.

Second, even if Defendant's requests are relevant, they incorrectly demand discovery of protected work product. Tangible work product can only be subject to discovery when the

Defendant shows that there is a substantial need for the items and that there would be an undue hardship in obtaining comparable materials. Intangible work product is never subject to discovery. Defendant's Notice implicates both tangible work product (without even an attempt to show substantial need and undue hardship) and intangible work product. Therefore, for this reason as well, Defendant's Notice of Deposition must be quashed.[1]

ARGUMENT

I. DEFENDANT INAPPROPRIATELY SEEKS TO IMPUTE THE RULES OF CIVIL PROCEDURE AS THE GOVERNING RULES IN THIS CRIMINAL MATTER.

A. The ability to compel production of documents and tangible items attendant to a deposition is limited to civil actions only.

The only citation in Defendant's Notice is to Missouri Rule of Civil Procedure 57.03. *See generally* Defendant's Notice. Presumably, Defendant believes that this Rule grants him the legal right to compel the Deponent to produce the massive amount of documents requested in Exhibit A. However, Defendant is incorrectly attempting to treat this case as a civil matter.

Defendant's right to depose in a criminal case is granted in Supreme Court Rule 25.12 Misdemeanors or Felonies--Deposition by Defendant--How Taken. *See* Mo. Sup. Ct. R. 25.12. This Rule grants Defendant the right to depose any person. *See id.* The Rule further states that: "The ***manner of taking*** such depositions shall be governed by the rules relating to the taking of depositions in civil actions." *Id.* (emphasis added). It is simply the "manner of taking" depositions for which the Rules of Civil Procedure apply. From this phrase, Defendant is attempting to incorporate the Rules of Civil Procedure broadly to this criminal matter.

[1] To the extent that deposition notice Exhibit A includes matters discoverable under Rule 25.03, the State anticipates producing same: e.g., Item 1, statements of interviewed individuals who are endorsed witnesses, known defense witnesses, or whose statements include exculpatory or impeaching information. Rule 25.03(A)(1), (9).

This fails for two reasons. *First*, the only reasonable interpretation of the phrase "manner of taking" is that issues like notice, oath taking, attending a deposition via telephone, motions to terminate depositions, and certification, which are actually related to the "manner of taking" is what Rule 25.12 is referring to. This Rule does not allow Defendant to tack on a request for documents, which is wholly unrelated to the "manner of taking" the deposition. *Id.* Therefore, the ability to request document and tangible items when deposing someone *only applies* to civil actions since it is not a "manner of taking."

Second, allowing this interpretation would be a slap in the face to the Missouri Rules of Criminal Procedure as it would render them surplusage. This is because the Rules of Criminal Procedure have explicit rules governing the disclosure by the State of documents and materials. Supreme Court Rule 25.03 lists a number of materials which the State is required to disclose upon written request of defendant's counsel. *See* Mo. Sup. Ct. R. 25.03. All other matters of disclosure are governed by Supreme Court Rule 25.04. This Rule states in relevant part that:

> **(A)** **The defense may make a written motion in the court having jurisdiction to try said case requesting the state to disclose material and information not covered by Rule 25.03**. Such motion shall specify the material or information sought to be disclosed. If the court finds the request to be reasonable, the court shall order the state to disclose to the defendant that material and information requested which is found by the court to be relevant and material to the defendant's case.
>
> **(B)** The court shall specify the material and information to be disclosed and the time and manner in which the state shall make disclosure under this Rule.

Mo. Sup. Ct. R. 25.04 (emphasis added). Thus, in criminal cases, for information not covered by Rule 25.03, it is Rule 25.04 which applies – not the Rules of Civil Procedure. Defendant cannot attempt to render Rules 25.03 and 25.04 irrelevant by claiming the right to all documents once he exercises his right to depose.

Rather than trying to skirt the Missouri Rules of Criminal Procedure, if Defendant wants the information sought after in Exhibit A, he should make a written motion to the court specifying the sought after material and information. It is only upon a court order finding the request to be reasonable that the State is obligated to disclose any of the material requested in Exhibit A. Therefore, the Court should quash Defendant's Notice.

B. There is no right in criminal actions to videotape the deposition.

Similarly, Defendant asserts the right to videotape a criminal deposition without support. Presumably, this is because in civil matters there is a right to videotape the deposition. However, as explained above, it is only the "manner of taking" depositions which is governed by the rules relating to civil actions. Mo. Sup. Ct. R. 25.12. Whether or not a deposition is videotaped is not related to the "manner of taking." This is evidenced by Rule 25.12's considerations for allowing the presence of the Defendant. When considering allowing the presence of the Defendant, the Rule states that the court should consider, among other things:

> (3) Any available use of screening or alternative methods of taping or recording that would allow the defendant limited observation of the witness and the ability to confer with counsel.

Mo. Sup. Ct. R. 25.12. Obviously, if the civil right to videotape the deposition applied to criminal cases, there would be no need to consider this alternative to the Defendant's presence since he or she would, by right, already have that ability. Therefore, since there is no automatic right in the criminal context to videotape the deposition, the Court should also quash the Defendant's Notice for this reason as well.

II. EVEN IF THE RULES OF CIVIL PROCEDURE REGARDING DISCLOSURE OF MATERIALS APPLY, THE ITEMS IDENTIFIED IN DEFENDANT'S EXHIBIT A ARE NOT RELEVANT TO THE SUBJECT MATTER INVOLVED IN THE PENDING ACTION AND THEREFORE ARE NOT REQUIRED TO BE DISCLOSED.

Even assuming, *arguendo*, that the Rules of Civil Procedure govern this *criminal* matter, the materials requested in Exhibit A are still not subject to disclosure. The Defendant accurately claims the right to orally depose Tisaby, but fails to mention that "[t]he right to take a deposition is absolute **excepting as provided in Rule 56.01**."[2] *State ex rel. King v. Turpin*, 581 S.W.2d 929, 930 (Mo. Ct. App. 1979) (emphasis added) (citing *Norkunas v. Norkunas*, 480 S.W.2d 92, 94 (Mo.App.1972); *State ex rel. Chandler v. Scott*, 427 S.W.2d 759, 762 (Mo.App.1968); *State ex rel. Houser v. Goodman*, 406 S.W.2d 121, 125 (Mo.App.1966)). The Defendant claims that the Rules of Civil Procedure apply to this matter but fails to mention this point because Rule 56.01 clearly does not allow for the Defense's overbroad deposition request.

Rule 56.01 states in relevant part:

> **(b) Scope of Discovery**: Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General*. **Parties may obtain discovery regarding any matter, not privileged, <u>that is *relevant* to the subject matter involved in the pending action</u>**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought **appears reasonably calculated to lead to the discovery of admissible evidence.**

Mo. Sup. Ct. R. 56.01 (emphasis added); *see also State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 642 (Mo. Ct. App. 1994) ("This language is identical to the language of Federal Rule 26(b)(1)."). Furthermore, **"[t]he party seeking discovery shall bear the burden of establishing**

[2] As Defendant implies, Rule 57.03 of the Missouri Rules of Civil Procedure allows for a notice to a party deponent to be accompanied with a request for the production of documents and tangible things. *See* Mo. Sup. Ct. R. 57.03. However, what Defendant fails to note is that Rule 57.03 specifies that "[t]he procedure of Rule 58.01 shall apply to the request." *Id.* Rule 58.01 specifies that all production of documents and tangible things must be "within the scope of Rule 56.01(b)." Mo. Sup. Ct. R. 58.01. Thus, Rule 56.01(b) governs the scope of discovery for criminal depositions.

relevance." Mo. Sup. Ct. R. 56.01 (emphasis added). Thus, Defendant's Notice of Videotaped Deposition of William Don Tisaby must comport with these limitations. Because the rest of this section will demonstrate Defendant's complete failure to meet this burden, the Court should quash the Defendant's Notice.

"Relevant" in the context of discovery means that the request is "reasonably calculated to lead to the discovery of admissible evidence." Mo. Sup. Ct. R. 56.01; *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995); *In re Marriage of Hershewe*, 931 S.W.2d 198, 201 (Mo. Ct. App. 1996) (same); *State ex rel. Kuehl v. Baker*, 663 S.W.2d 410, 411 (Mo. Ct. App. 1983) (same). Missouri courts are equally clear that that the relevancy requirement means that the request is "neither designed nor intended for 'untrammeled use of a factual dragnet or **fishing expedition**.'" *Concerned Citizens for Crystal City v. City of Crystal City*, 334 S.W.3d 519, 523–24 (Mo. Ct. App. 2010) (quoting *Misischia v. St. John's Mercy Medical Center,* 30 S.W.3d 848, 864 (Mo.App.2000)) (emphasis added). To this end, an *en banc* Missouri Supreme Court has consistently held that "**Discovery without appropriate temporal, geographic or subject matter limitation is overbroad**" and therefore not relevant. *State ex rel. Gen. Motors Acceptance Corp. v. Standridge*, 181 S.W.3d 76, 78 (Mo. 2006) (emphasis added); *State ex rel. Ford Motor Co. v. Nixon*, 160 S.W.3d 379, 380 (Mo. 2005) (same).

The Defense has not limited their discovery request whatsoever. Instead, Defendant's request is an overbroad blunderbuss of a fishing expedition unrelated to the subject matter of the instant case. Each of the twelve requests in Exhibit A uses at least one of the following broad and unlimited terms: "all," "any," "any and all," "complete." Just one of the 12 requests has any delineated temporal limitation (and this request asks for documentation for *all* Enterra employees, without even the barest limitation). *See State ex rel. Brown v. Dickerson*, 136 S.W.3d 539, 545

(Mo. Ct. App. 2004) (ruling that defendant's interrogatories seeking health and medical information were overly broad and unlimited in scope, since they failed to set any time limits, and were not tailored to the physical conditions at issue). Likewise, the geographic breadth of the 12 request is without limitation.

To avoid going through each and every one of Defendant's 12 requests, the State offers Request 5 as an example. This request seeks "Any and all e-mails or other communications between any current or former employee of Enterra, LLC, and **Maurice Foxworth.**" Defendant Notice at 2 (bold in original). There is absolutely no limitation on this request. For illustrative purposes only, if Mr. Foxworth married a *former employee* of Enterra a month after she quit, under this request, all of his and his spouse's marital communications would have to disclosed even though they would be completely unrelated to this matter. This, of course, is absurd and clearly beyond what the discovery rules contemplate. This is why the Missouri Rules of Criminal Procedure impose reasonable limits on such requests. The 11 other requests suffer from being irredeemably overbroad. The Defendant is required to impose limitations on his discovery requests, yet he has completely failed to do so.

Defendant's Notice of Deposition is, simply put, a fishing expedition not reasonably calculated to obtain discovery of admissible evidence. The Defense is attempting to turn this case into a "war of paper." *Crystal City*, 334 S.W.3d at 523–24 (citing *Misischia,* 30 S.W.3d at 864). This is plainly inappropriate and the Court should not permit the Defendant to so blatantly flout the discovery rules. The Defensdant is entitled to discovery, but only if he appropriately limits his requests. The Defendant has the burden of demonstrating that his requests are relevant. Here, he has failed to meet this burden. The State welcomes a revised Notice where the Defendant meets his burden of showing that the requested discovery is appropriately limited to *relevant* information

reasonably calculated to obtain discovery of admissible evidence. However, because this Notice fails to meet this burden, the Court should quash the Defendant's Notice.

III. EVEN IF THE RULES OF CIVIL PROCEDURE REGARDING DISCLOSURE OF MATERIALS APPLY, AND EVEN IF THE ITEMS IDENTIFIED IN DEFENDANT'S EXHIBIT A ARE RELEVANT, THEY IMPLICATE PROTECTED WORK PRODUCT AND THEREFORE ARE NOT REQUIRED TO BE DISCLOSED.

Even if the Court rules that the requests in Defendant's Notice are governed by the Rules of Civil Procedure, and are relevant, the Notice must nonetheless be quashed because it requires the disclosure of material protected by work product. In *O'Malley*, an *en banc* Missouri Supreme Court succinctly explained the work product doctrine. *See State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552-53 (Mo. 1995). The Court explained that:

> Work product has evolved into a two-pronged doctrine that consists of both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories—sometimes called opinion work product)

Id. at 552. Thus, for tangible work product, Rule 56.01(b) applies. And, such work product is only discoverable "**upon a showing that the party seeking discovery has substantial need of the materials** in the preparation of the case **and** that the adverse party is **unable without undue hardship to obtain the substantial equivalent of the materials** by other means. *Id.* (emphasis added); *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45–46 (Mo. Ct. App. 2008) (same). Therefore, to obtain tangible work product, the Defense has the burden of showing that a) they have substantial need of the materials; and b) it would be an undue hardship to obtain substantially equivalent materials.

Significantly, the very high burden necessary to justify the discovery of tangible work product pales in comparison to the absolute inability of the Defense to obtain intangible work

product through discovery. The "protections of intangible work product . . . exist independently of Rule 56.01(b)(3)." *O'Malley*, 898 S.W.2d at 553. Thus, "Rule 56.01(b)(3) **does not permit the discovery of intangible work product** even if the party seeking it has a substantial need for it."[3] *Tillman*, 271 S.W.3d at 45–46 (citing *O'Malley,* 898 S.W.2d at 552–553) (emphasis added). The Defendant's Notice implicates both tangible and intangible work product. Therefore, the Court should quash the Defendant's Notice.

To illustrate, request 1 requires disclosure of "All reports, communications, emails, text messages, notes, recordings, and/or any other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting **statements of any individuals interviewed regarding this matter**." Defendant Notice at 2 (bold in original). This would implicate, for example, an email by an Enterra investigator containing trial preparation documents which references the statement of an interviewed individual. This is classic, protected tangible work product. Many of the other requests suffer from the same infirmity. Defendant has the burden of showing a substantial need for such material and the inability, without undue hardship, to obtain substantially equivalent material. However, Defendant fails even to attempt to justify his requests which implicates tangible work product.

But this does not represent the sole shortcoming of Defendant's Notice. Intangible work product is implicated too. Based on the same example, an Enterra investigator's report referencing legal theories or a prosecutor's mental impressions would have to be disclosed simply because it

[3] Of course, as explained above, it is actually the Missouri Rules of Criminal Procedure, as opposed to the Rules of Civil Procedure which apply here. *See supra*, 3-5. Under Missouri criminal law, Supreme Court Rule 25.10 is what actually applies to bar the disclosure of such documents. *See* Mo. Sup. Ct. R. 25.10 ("The following matters shall not be subject to disclosure: **(A)** Legal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of counsel for the state or members of his legal or investigative staff, or of the defendant, defense counsel, or members of his legal or investigative staff.").

referenced a witness's statement. *But see O'Malley*, 898 S.W.2d at 553 (ruling that such materials are not subject to disclosure). Similarly, request 5 asks for "Any and all e-mails or other communications between any current or former employee of Enterra, LLC, and **Maurice Foxworth.**" Defendant Notice at 2 (bold in original). Maurice Foxworth is a St. Louis Assistant Circuit Attorney. On its face, this request requires disclosure of any communications between him and Enterra employees which contain his "mental impressions, conclusions, opinions, and legal theories." *O'Malley*, 898 S.W.2d at 553. This cannot be allowed.

Most of the other requests in Defendant's Notice suffer from the same problems. Tangible work product is implicated without any showing of substantial need and undue hardship. Intangible work product is implicated despite its blanket exception from discovery. Therefore, Defendant's Notice simply cannot stand. The State welcomes a revised Notice that does not request material in direct contradiction to Missouri law. Until the Defendant complies with Missouri law, the Court should quash the Defendant's Notice.

Even if this were a civil matter, Defendant's Notice is, to put it lightly, an overbroad fishing expedition. The utter absence of any limiting principle operating on his requests is astounding. Defendant does not claim, and no sensible argument supports the claim, that his requests are reasonably calculated to discover admissible evidence. Moreover, Defendant's Notice is rife with requests that inappropriately implicate work product, both tangible and intangible.

Defendant has the burden of demonstrating the appropriateness of his requests, and he does not even attempt to do so. Therefore, the Court should quash Defendant's Notice Of Videotaped Deposition Of William Don Tisaby.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Honorable Court to GRANT the State's Motion to Quash Defendant's Notice of Videotaped Deposition of William Don Tisaby, limiting Exhibit A, items 1-12 to material within the scope of Rule 25.03. In the alternative, the State requests an *in camera* review of materials as to which the work product privilege applies, with a privilege log to be supplied.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
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1114 Market St., Rm. 230
St. Louis, MO 63101
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Ronald Sullivan, Special Assistant

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 14 day of March 2018.

/s/Robert H. Dierker MBE 23671

EXHIBIT A

1. All reports, communications, emails, text messages, notes, recordings, and/or any other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting **statements of any individuals interviewed regarding this matter** [CAN WE IDENTIFY IT BY GJ NUMBER?]

2. Reports, communications, emails, text messages, notes, recordings, and/or any other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting any and **all investigative steps regarding this matter**, including but not limited to any and all interviews attempted or conducted, evidence sought or obtained, searches sought or conducted, subpoenas issued, background research conducted, and forensic or scientific analyses performed

3. Any books, papers, documents, photographs, objects, documents, records, recordings, photographs, communications or other **evidence sought or obtained** by any current or former employee of Enterra, LLC, or any other investigator in this matter, and any **notes, logs, or documentation reflecting any such evidence**

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

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

6. Any and all document reflecting **invoices, work days and hours, work performed, payroll, receipts, expenses, or payment**s between Enterra, LLC, or any other investigator and any member of the Circuit Attorney's Office or any prosecutor assigned to this case or any other case

7. Documentation reflecting **all employees of Enterra, LLC, from January 1, 2018, to present**

8. Complete Enterra, LLC, **personnel file** for William Tisaby

9. Complete Enterra, LLC, **personnel file** for Anthony Box

10. Engagement letters between Enterra, LLC, and **any city, state, local, or federal prosecuting** offices

11. Official documentation reflecting all **licensures held by William Tisaby and Anthony Box**, including but not limited to documentation of licensure under Missouri Statute 324.1110-324.1148, et seq.

12. Any and all documentation reflecting the **official registration of Enterra, LLC, to conduct or transact business in Missouri**

EXHIBIT A

1. All reports, communications, emails, text messages, notes, recordings, and/or any other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting **statements of any individuals interviewed regarding this matter** [CAN WE IDENTIFY IT BY GJ NUMBER?]

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MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Case No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S NOTICE OF VIDEOTAPED DEPOSITION OF WILLIAM DON TISABY

TO: All Counsel of Record

WITNESS: William Don Tisaby

DATE & TIME: Monday, March 19, 2018 commencing at 9:30 a.m.

LOCATION: Circuit Attorney's Office, State of Missouri
Carnahan Courthouse
1114 Market Street – Room 401
St. Louis, MO 63101

PLEASE TAKE NOTICE that at the above date, time and location, and continuing from day to day until concluded, Defendant Eric Greitens will cause the video deposition of the above witness to be taken upon oral examination pursuant to 57.03 of the Missouri Rules of Civil Procedure before a shorthand reporter and suitable Notary Public. Any party or their attorney may appear and participate as they see fit. The deposition will be recorded by stenographic and videographic means by a representative of PohlmanUSA, 10 South Broadway, Suite 1400, St. Louis, MO 63102. Deponent is to produce at the time of his deposition the items identified in Exhibit A attached hereto.

Dated: March 14, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James F. Bennett*
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Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2018, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record in this matter.

/s/ James F. Bennett

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

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

MOTION TO QUASH AND FOR PROTECTIVE ORDER REGARDING THE DEFENDANT'S NOTICE OF VIDEOTAPED DEPOSITION OF WILLIAM DON TISABY

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Prosecutor, and moves this Court to Quash and Enter a Protective Order Defendant Eric Greitens' ("Defendant") Notice of Videotaped Deposition of William Don Tisaby, insofar as it requires production of documents identified in Exhibit A which are beyond the scope of discovery in a criminal cause.

Defendant's Notice of Videotaped Depostion is overbroad and fails to comply with relevant Missiouri rules and applicable law. The Missouri Rules of Criminal Procedure allow Defendant to depose witnesses and states that the "manner of taking" of the depositions is governed by the rules governing civil actions. This not a blanket incorporation of the Rules of Civil Procedure to criminal matters. A reasonable interpretation is that matters such as notice, motions to terminate, certification and delivery, oath taking, and the like, which are part of the "manner of taking" are governed by the same rules controlling depositions in civil actions. This reasonable interpretation is provided with unassailable support by the fact that the Missouri Rules of Criminal Procedure have their own rules governing disclosure of materials. It would be ludicrous to assert

that a defendant could circumvent these rules simply by deposing a witness. Therefore, the Court should quash Defendant's Notice and require them to follow the Rules of Criminal Procedure in this criminal matter.

However, even assuming that the Rules of Civil Procedure govern in this matter, Defendant's Notice of a Videotaped Deposition of William Don Tisaby ("Tisaby") should still be quashed. Defendant's Notice is a blunderbuss. The scope of Defendant's Notice of Deposition far exceeds the permissible scope of discoverable information even under Missouri civil law. Defendant's requests seemingly encompass virtually anything and everything related to Enterra, LLC's ("Enterra") business.

It is apparent that Defendant grossly misapprehends the reach of Missouri civil law relative to deposing witnesses in a criminal case. The right to depose is limited in several key ways. *First*, the scope of discovery is limited to relevant items, which require the Defendant to demonstrate that their request is reasonably calculated to lead to the discovery of admissible evidence. To this end, Missouri law bars simple fishing expeditions and, instead, assumes that requests without limitations are not relevant.

Defendant's requests are virtually unlimited. Defendant appears to have resorted to an exhaustive list of requests that include anything Defendant could possibly imagine relating to Enterra. However, Defendant's Notice of Deposition and the requests therein are improper and neither justified by rule or law. Defendant has the burden of proving that his requests are relevant. Defendant does not even attempt to meet this burden or otherwise justify his requests. Therefore, the requests contained in Defendant's Notice are inappropriate and must be quashed.

Second, even if Defendant's requests are relevant, they incorrectly demand discovery of protected work product. Tangible work product can only be subject to discovery when the

Defendant shows that there is a substantial need for the items and that there would be an undue hardship in obtaining comparable materials. Intangible work product is never subject to discovery. Defendant's Notice implicates both tangible work product (without even an attempt to show substantial need and undue hardship) and intangible work product. Therefore, for this reason as well, Defendant's Notice of Deposition must be quashed.[1]

ARGUMENT

I. DEFENDANT INAPPROPRIATELY SEEKS TO IMPUTE THE RULES OF CIVIL PROCEDURE AS THE GOVERNING RULES IN THIS CRIMINAL MATTER.

A. The ability to compel production of documents and tangible items attendant to a deposition is limited to civil actions only.

The only citation in Defendant's Notice is to Missouri Rule of Civil Procedure 57.03. *See generally* Defendant's Notice. Presumably, Defendant believes that this Rule grants him the legal right to compel the Deponent to produce the massive amount of documents requested in Exhibit A. However, Defendant is incorrectly attempting to treat this case as a civil matter.

Defendant's right to depose in a criminal case is granted in Supreme Court Rule 25.12 Misdemeanors or Felonies--Deposition by Defendant--How Taken. *See* Mo. Sup. Ct. R. 25.12. This Rule grants Defendant the right to depose any person. *See id.* The Rule further states that: "The ***manner of taking*** such depositions shall be governed by the rules relating to the taking of depositions in civil actions." *Id.* (emphasis added). It is simply the "manner of taking" depositions for which the Rules of Civil Procedure apply. From this phrase, Defendant is attempting to incorporate the Rules of Civil Procedure broadly to this criminal matter.

[1] To the extent that deposition notice Exhibit A includes matters discoverable under Rule 25.03, the State anticipates producing same: e.g., Item 1, statements of interviewed individuals who are endorsed witnesses, known defense witnesses, or whose statements include exculpatory or impeaching information. Rule 25.03(A)(1), (9).

This fails for two reasons. *First*, the only reasonable interpretation of the phrase "manner of taking" is that issues like notice, oath taking, attending a deposition via telephone, motions to terminate depositions, and certification, which are actually related to the "manner of taking" is what Rule 25.12 is referring to. This Rule does not allow Defendant to tack on a request for documents, which is wholly unrelated to the "manner of taking" the deposition. *Id.* Therefore, the ability to request document and tangible items when deposing someone *only applies* to civil actions since it is not a "manner of taking."

Second, allowing this interpretation would be a slap in the face to the Missouri Rules of Criminal Procedure as it would render them surplusage. This is because the Rules of Criminal Procedure have explicit rules governing the disclosure by the State of documents and materials. Supreme Court Rule 25.03 lists a number of materials which the State is required to disclose upon written request of defendant's counsel. *See* Mo. Sup. Ct. R. 25.03. All other matters of disclosure are governed by Supreme Court Rule 25.04. This Rule states in relevant part that:

> **(A)** **The defense may make a written motion in the court having jurisdiction to try said case requesting the state to disclose material and information not covered by Rule 25.03**. Such motion shall specify the material or information sought to be disclosed. If the court finds the request to be reasonable, the court shall order the state to disclose to the defendant that material and information requested which is found by the court to be relevant and material to the defendant's case.
>
> **(B)** The court shall specify the material and information to be disclosed and the time and manner in which the state shall make disclosure under this Rule.

Mo. Sup. Ct. R. 25.04 (emphasis added). Thus, in criminal cases, for information not covered by Rule 25.03, it is Rule 25.04 which applies – not the Rules of Civil Procedure. Defendant cannot attempt to render Rules 25.03 and 25.04 irrelevant by claiming the right to all documents once he exercises his right to depose.

Rather than trying to skirt the Missouri Rules of Criminal Procedure, if Defendant wants the information sought after in Exhibit A, he should make a written motion to the court specifying the sought after material and information. It is only upon a court order finding the request to be reasonable that the State is obligated to disclose any of the material requested in Exhibit A. Therefore, the Court should quash Defendant's Notice.

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Similarly, Defendant asserts the right to videotape a criminal deposition without support. Presumably, this is because in civil matters there is a right to videotape the deposition. However, as explained above, it is only the "manner of taking" depositions which is governed by the rules relating to civil actions. Mo. Sup. Ct. R. 25.12. Whether or not a deposition is videotaped is not related to the "manner of taking." This is evidenced by Rule 25.12's considerations for allowing the presence of the Defendant. When considering allowing the presence of the Defendant, the Rule states that the court should consider, among other things:

> (3) Any available use of screening or alternative methods of taping or recording that would allow the defendant limited observation of the witness and the ability to confer with counsel.

Mo. Sup. Ct. R. 25.12. Obviously, if the civil right to videotape the deposition applied to criminal cases, there would be no need to consider this alternative to the Defendant's presence since he or she would, by right, already have that ability. Therefore, since there is no automatic right in the criminal context to videotape the deposition, the Court should also quash the Defendant's Notice for this reason as well.

II. EVEN IF THE RULES OF CIVIL PROCEDURE REGARDING DISCLOSURE OF MATERIALS APPLY, THE ITEMS IDENTIFIED IN DEFENDANT'S EXHIBIT A ARE NOT RELEVANT TO THE SUBJECT MATTER INVOLVED IN THE PENDING ACTION AND THEREFORE ARE NOT REQUIRED TO BE DISCLOSED.

Even assuming, *arguendo*, that the Rules of Civil Procedure govern this *criminal* matter, the materials requested in Exhibit A are still not subject to disclosure. The Defendant accurately claims the right to orally depose Tisaby, but fails to mention that "[t]he right to take a deposition is absolute **excepting as provided in Rule 56.01**."[2] *State ex rel. King v. Turpin*, 581 S.W.2d 929, 930 (Mo. Ct. App. 1979) (emphasis added) (citing *Norkunas v. Norkunas*, 480 S.W.2d 92, 94 (Mo.App.1972); *State ex rel. Chandler v. Scott*, 427 S.W.2d 759, 762 (Mo.App.1968); *State ex rel. Houser v. Goodman*, 406 S.W.2d 121, 125 (Mo.App.1966)). The Defendant claims that the Rules of Civil Procedure apply to this matter but fails to mention this point because Rule 56.01 clearly does not allow for the Defense's overbroad deposition request.

Rule 56.01 states in relevant part:

> **(b) Scope of Discovery**: Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General*. **Parties may obtain discovery regarding any matter, not privileged, <u>that is *relevant* to the subject matter involved in the pending action</u>**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought **appears reasonably calculated to lead to the discovery of admissible evidence.**

Mo. Sup. Ct. R. 56.01 (emphasis added); *see also State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 642 (Mo. Ct. App. 1994) ("This language is identical to the language of Federal Rule 26(b)(1)."). Furthermore, **"[t]he party seeking discovery shall bear the burden of establishing**

[2] As Defendant implies, Rule 57.03 of the Missouri Rules of Civil Procedure allows for a notice to a party deponent to be accompanied with a request for the production of documents and tangible things. *See* Mo. Sup. Ct. R. 57.03. However, what Defendant fails to note is that Rule 57.03 specifies that "[t]he procedure of Rule 58.01 shall apply to the request." *Id.* Rule 58.01 specifies that all production of documents and tangible things must be "within the scope of Rule 56.01(b)." Mo. Sup. Ct. R. 58.01. Thus, Rule 56.01(b) governs the scope of discovery for criminal depositions.

relevance." Mo. Sup. Ct. R. 56.01 (emphasis added). Thus, Defendant's Notice of Videotaped Deposition of William Don Tisaby must comport with these limitations. Because the rest of this section will demonstrate Defendant's complete failure to meet this burden, the Court should quash the Defendant's Notice.

"Relevant" in the context of discovery means that the request is "reasonably calculated to lead to the discovery of admissible evidence." Mo. Sup. Ct. R. 56.01; *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. 1995); *In re Marriage of Hershewe*, 931 S.W.2d 198, 201 (Mo. Ct. App. 1996) (same); *State ex rel. Kuehl v. Baker*, 663 S.W.2d 410, 411 (Mo. Ct. App. 1983) (same). Missouri courts are equally clear that that the relevancy requirement means that the request is "neither designed nor intended for 'untrammeled use of a factual dragnet or **fishing expedition**.'" *Concerned Citizens for Crystal City v. City of Crystal City*, 334 S.W.3d 519, 523–24 (Mo. Ct. App. 2010) (quoting *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848, 864 (Mo.App.2000)) (emphasis added). To this end, an *en banc* Missouri Supreme Court has consistently held that "**Discovery without appropriate temporal, geographic or subject matter limitation is overbroad**" and therefore not relevant. *State ex rel. Gen. Motors Acceptance Corp. v. Standridge*, 181 S.W.3d 76, 78 (Mo. 2006) (emphasis added); *State ex rel. Ford Motor Co. v. Nixon*, 160 S.W.3d 379, 380 (Mo. 2005) (same).

The Defense has not limited their discovery request whatsoever. Instead, Defendant's request is an overbroad blunderbuss of a fishing expedition unrelated to the subject matter of the instant case. Each of the twelve requests in Exhibit A uses at least one of the following broad and unlimited terms: "all," "any," "any and all," "complete." Just one of the 12 requests has any delineated temporal limitation (and this request asks for documentation for *all* Enterra employees, without even the barest limitation). *See State ex rel. Brown v. Dickerson*, 136 S.W.3d 539, 545

(Mo. Ct. App. 2004) (ruling that defendant's interrogatories seeking health and medical information were overly broad and unlimited in scope, since they failed to set any time limits, and were not tailored to the physical conditions at issue). Likewise, the geographic breadth of the 12 request is without limitation.

To avoid going through each and every one of Defendant's 12 requests, the State offers Request 5 as an example. This request seeks "Any and all e-mails or other communications between any current or former employee of Enterra, LLC, and **Maurice Foxworth.**" Defendant Notice at 2 (bold in original). There is absolutely no limitation on this request. For illustrative purposes only, if Mr. Foxworth married a *former employee* of Enterra a month after she quit, under this request, all of his and his spouse's marital communications would have to disclosed even though they would be completely unrelated to this matter. This, of course, is absurd and clearly beyond what the discovery rules contemplate. This is why the Missouri Rules of Criminal Procedure impose reasonable limits on such requests. The 11 other requests suffer from being irredeemably overbroad. The Defendant is required to impose limitations on his discovery requests, yet he has completely failed to do so.

Defendant's Notice of Deposition is, simply put, a fishing expedition not reasonably calculated to obtain discovery of admissible evidence. The Defense is attempting to turn this case into a "war of paper." *Crystal City*, 334 S.W.3d at 523–24 (citing *Misischia*, 30 S.W.3d at 864). This is plainly inappropriate and the Court should not permit the Defendant to so blatantly flout the discovery rules. The Defensdant is entitled to discovery, but only if he appropriately limits his requests. The Defendant has the burden of demonstrating that his requests are relevant. Here, he has failed to meet this burden. The State welcomes a revised Notice where the Defendant meets his burden of showing that the requested discovery is appropriately limited to *relevant* information

reasonably calculated to obtain discovery of admissible evidence. However, because this Notice fails to meet this burden, the Court should quash the Defendant's Notice.

III. EVEN IF THE RULES OF CIVIL PROCEDURE REGARDING DISCLOSURE OF MATERIALS APPLY, AND EVEN IF THE ITEMS IDENTIFIED IN DEFENDANT'S EXHIBIT A ARE RELEVANT, THEY IMPLICATE PROTECTED WORK PRODUCT AND THEREFORE ARE NOT REQUIRED TO BE DISCLOSED.

Even if the Court rules that the requests in Defendant's Notice are governed by the Rules of Civil Procedure, and are relevant, the Notice must nonetheless be quashed because it requires the disclosure of material protected by work product. In *O'Malley*, an *en banc* Missouri Supreme Court succinctly explained the work product doctrine. *See State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552-53 (Mo. 1995). The Court explained that:

> Work product has evolved into a two-pronged doctrine that consists of both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories—sometimes called opinion work product)

Id. at 552. Thus, for tangible work product, Rule 56.01(b) applies. And, such work product is only discoverable "**upon a showing that the party seeking discovery has substantial need of the materials** in the preparation of the case **and** that the adverse party is **unable without undue hardship to obtain the substantial equivalent of the materials** by other means. *Id.* (emphasis added); *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45–46 (Mo. Ct. App. 2008) (same). Therefore, to obtain tangible work product, the Defense has the burden of showing that a) they have substantial need of the materials; and b) it would be an undue hardship to obtain substantially equivalent materials.

Significantly, the very high burden necessary to justify the discovery of tangible work product pales in comparison to the absolute inability of the Defense to obtain intangible work

product through discovery. The "protections of intangible work product . . . exist independently of Rule 56.01(b)(3)." *O'Malley*, 898 S.W.2d at 553. Thus, "Rule 56.01(b)(3) **does not permit the discovery of intangible work product** even if the party seeking it has a substantial need for it."[3] *Tillman*, 271 S.W.3d at 45–46 (citing *O'Malley*, 898 S.W.2d at 552–553) (emphasis added). The Defendant's Notice implicates both tangible and intangible work product. Therefore, the Court should quash the Defendant's Notice.

To illustrate, request 1 requires disclosure of "All reports, communications, emails, text messages, notes, recordings, and/or any other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting **statements of any individuals interviewed regarding this matter**." Defendant Notice at 2 (bold in original). This would implicate, for example, an email by an Enterra investigator containing trial preparation documents which references the statement of an interviewed individual. This is classic, protected tangible work product. Many of the other requests suffer from the same infirmity. Defendant has the burden of showing a substantial need for such material and the inability, without undue hardship, to obtain substantially equivalent material. However, Defendant fails even to attempt to justify his requests which implicates tangible work product.

But this does not represent the sole shortcoming of Defendant's Notice. Intangible work product is implicated too. Based on the same example, an Enterra investigator's report referencing legal theories or a prosecutor's mental impressions would have to be disclosed simply because it

[3] Of course, as explained above, it is actually the Missouri Rules of Criminal Procedure, as opposed to the Rules of Civil Procedure which apply here. *See supra*, 3-5. Under Missouri criminal law, Supreme Court Rule 25.10 is what actually applies to bar the disclosure of such documents. *See* Mo. Sup. Ct. R. 25.10 ("The following matters shall not be subject to disclosure: **(A)** Legal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of counsel for the state or members of his legal or investigative staff, or of the defendant, defense counsel, or members of his legal or investigative staff.").

referenced a witness's statement. *But see O'Malley*, 898 S.W.2d at 553 (ruling that such materials are not subject to disclosure). Similarly, request 5 asks for "Any and all e-mails or other communications between any current or former employee of Enterra, LLC, and **Maurice Foxworth.**" Defendant Notice at 2 (bold in original). Maurice Foxworth is a St. Louis Assistant Circuit Attorney. On its face, this request requires disclosure of any communications between him and Enterra employees which contain his "mental impressions, conclusions, opinions, and legal theories." *O'Malley*, 898 S.W.2d at 553. This cannot be allowed.

Most of the other requests in Defendant's Notice suffer from the same problems. Tangible work product is implicated without any showing of substantial need and undue hardship. Intangible work product is implicated despite its blanket exception from discovery. Therefore, Defendant's Notice simply cannot stand. The State welcomes a revised Notice that does not request material in direct contradiction to Missouri law. Until the Defendant complies with Missouri law, the Court should quash the Defendant's Notice.

Even if this were a civil matter, Defendant's Notice is, to put it lightly, an overbroad fishing expedition. The utter absence of any limiting principle operating on his requests is astounding. Defendant does not claim, and no sensible argument supports the claim, that his requests are reasonably calculated to discover admissible evidence. Moreover, Defendant's Notice is rife with requests that inappropriately implicate work product, both tangible and intangible.

Defendant has the burden of demonstrating the appropriateness of his requests, and he does not even attempt to do so. Therefore, the Court should quash Defendant's Notice Of Videotaped Deposition Of William Don Tisaby.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Honorable Court to GRANT the State's Motion to Quash Defendant's Notice of Videotaped Deposition of William Don Tisaby, limiting Exhibit A, items 1-12 to material within the scope of Rule 25.03. In the alternative, the State requests an *in camera* review of materials as to which the work product privilege applies, with a privilege log to be supplied.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
/s/Robert H. Dierker MBE 23671
Assistant Circuit Attorney
Rachel Smith
Assistant Circuit Attorney
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941
Ronald Sullivan, Special Assistant

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 14 day of March 2018.

/s/Robert H. Dierker MBE 23671

FILED
MAR 15 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

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

State of Missouri

VS

GREITENS

CASE NO. 1822-CR00642 DIVISION 16 3/15 2018

COURT ORDER

MOTION TO SHORTEN TIME ON MOTION TO QUASH IS GRANTED. MOTION TO QUASH IS MOOT AS TO TISABY DEPO. NOTICE ITEMS 6, 10, 11, AND 12, BY AGREEMENT. MOTION TO QUASH GRANTED AS TO ITEMS 8 + 9, AS TO ITEMS 1-5, CIRCUIT ATTORNEY WILL TURN OVER ALL MATERIALS THAT IT IS OBLIGATED TO PROVIDE. COURT ORDERS CIRCUIT ATTORNEY TO PROVIDE PRIVILEGE LOG AND ALL WITHHELD MATERIALS FOR IN CAMERA INSPECTION BY 9:00 A.M., MARCH 16, 2018.

MOTION FOR PROTECTIVE ORDER REGARDING VIDEOTAPING DEPOSITIONS IS DENIED.

James Hartman

RT

ACA

ENTERED
MAR 15 2018
DP

SO ORDERED:

Div. 16

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

March 15, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

2. Mr. Tisaby Report (1 flash drive)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar #

cc: Court File

CONSULTANT AGREEMENT

THIS AGREEMENT, dated this 1st day of March 2018, is by and between the City of St. Louis Circuit Attorney's Office and Ronald S. Sullivan Jr., an independent contractor whose social security /tax ID number is xxx-xx-xxxx.

WITNESSETH

WHEREAS the City of St. Louis Circuit Attorney's Office has contracted with Ronald S. Sullivan Jr. to provide consultant services, to provide the City of St. Louis Circuit Attorney's Office; and

WHEREAS the City of St. Louis Circuit Attorney's Office has determined that Ronald S. Sullivan Jr. has the necessary expertise to provide the services above, and that it is necessary, desirable and convenient to engage an independent contractor in order to enable the City to provide timely and efficient services to its members; and

WHEREAS, Ronald S. Sullivan Jr. desires, and pursuant to the terms set forth herein is able to provide said services to the City of St. Louis Circuit Attorney's Office.

NOW THEREFORE, in consideration of the foregoing premises and mutual promises herein contained, and intending to be bound legally hereby, Ronald S. Sullivan Jr. ("Consultant") and the City of St. Louis Circuit Attorney's Office agree as follows:

SERVICES

Consultant will provide the service of Special Prosecutor for STATE OF MISSOURI vs. ERIC GREITENS, Case No. 1822-CR00642, Division 16. Consultant may employ additional attorneys, with the permission of the Circuit Attorney, and at no expense to the City of St. Louis Circuit Attorney's Office, as required. Any aide or assistant to the Consultant shall be subject to the terms of this Consultant Agreement and shall be compensated by Consultant.

CONFIDENTIAL

Consultant shall regard as confidential all information, records, data and files of any nature provided by the City of St. Louis Circuit Attorney's Office. This provision shall survive the termination of this agreement.

Consultant understands that in the course of his/her work for the City of St. Louis Circuit Attorney's Office he may learn certain facts about individuals, relations with family members, and other such information.

Consultant understands and agrees that all such information must be treated as confidential. Consultant agrees not to disclose any information of a personal and confidential nature to any person not affiliated with the City of St. Louis Circuit Attorney's Office or authorized by the City

EXHIBIT
A

of St. Louis Circuit Attorney's Office or authorized by the City of St. Louis Circuit Attorney's Office to have such information without the specific written consent of the individual to whom such information pertains.

TERM

This agreement shall be deemed to have commenced on March 1, 2018 and shall continue, as applicable, during the pendency of STATE OF MISSOURI vs. ERIC GREITENS, Case No. 1822-CR00642, Division 16. This agreement may be terminated by either party within fourteen (14) days' notice to the other party.

COMPLIANCE

Consultant shall comply with the provisions of the Missouri Supreme Court, Rule 9.02 and all other applicable provisions for a visiting attorney.

PAYMENT

Consultant will be paid a pro-rated monthly fee of $12,000 based upon and not to exceed a $120,000 annual salary of an Attorney IV for services provided to the Office of the Circuit Attorney. Such prorated payments will only be paid during the term of this Agreement. The City of St. Louis Circuit Attorney's Office will also reimburse Consultant's reasonable travel and lodging expenses.

IN WITNESS WHEREOF, the parties have set their hands this 1st day of July 2018.

BY: Kimberly M. Gardner
City of St. Louis Circuit Attorney's Office
Kimberly M. Gardner
St. Louis Circuit Attorney

3/1/18
Date

By: _____
Ronald S. Sullivan Jr.
6 Everett Street
Suite 5116
Cambridge MA 02138

3/1/18
Date

This is to certify that I have this 6th day of March, 2018, appointed Ronald S. Sullivan, Jr., Special Assistant Circuit Attorney for the Twenty-Second Judicial Circuit Court of the City of St. Louis, Missouri, effective this 6th day of March, 2018.

Kimberly Gardner
Circuit Attorney

The above appointment is approved this 6th day of March, 2018.

STATE OF MISSOURI

CITY OF ST. LOUIS

I, Ronald S. Sullivan, Jr., do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Missouri, and faithfully demean myself in the position of Special Assistant Circuit Attorney for the Twenty-Second Judicial Circuit.

RONALD S. SULLIVAN, JR.

SUBSCRIBED and SWORN to before me, the undersigned Notary Public on this 6 day of March, 2018.

Notary Public

My Commission Expires: 11/6/2020

EXHIBIT
B

Criminal Std (6/13/2012)

HONORABLE: Alvin W. Thompson

DEPUTY CLERK L. S. Ferguson RPTR/ECRO/TAPE C. Thompson

USPO _____ INTERPRETER _____

TOTAL TIME: 5 hours 29 minutes

DATE: Mar 12, 2018 START TIME: 9:15 am END TIME: 3:37 pm

COURTROOM MINUTES 12:23 pm to 1:16 pm Recess

☐ IA INITIAL APPEAR	☐ BOND HRG	☐ CHANGE OF PLEA	☐ IN CAMERA HRG
☐ IA- RULE 5	☐ DETENTION HRG	☐ WAIVER/PLEA HRG	☐ COMPETENCY HRG
☐ ARRAIGNMENT	☐ PROBABLE CAUSE	☐ EXTRADITION HRG	☐ FORFEITURE
☐ CONFLICT HRG	☐ EVIDENTIARY HRG	☐ STATUS CONF	☒ MOTION HRG

CRIMINAL NO. 3:16-cr-00220-AWT DEFT # 1

Heather L. Cherry, Jonathan N. Francis
AUSA

UNITED STATES OF AMERICA
vs
DAVID DEMOS

Carboni
Leontire, Baez, Sharkey, Sullivan, Chambers,
Counsel for Defendant Ret ☒ CJA ☐ PDA ☐

☐ .....Deft failed to appear. Oral Motion for issuance of Warrant ☐ granted ☐ denied ☐ Bond FORFEITED
☐ ..... ☐ Arrest Date (CT Case): _____ ☐ Case unsealed or ☐ Rule 5 arrest, _____ Dist of _____
☐ ..... CJA 23 Financial Affidavit filed ☐ under seal
☐ ..... Order Appointing Federal Public Defender's Office filed
☐ ..... Court appoints Attorney_____ to represent defendant for ☐ this proceeding only ☐ all proceedings
☐ ..... Appearance of _____ filed
☐ ..... ☐ Complaint filed ☐ Sealed Complaint filed ☐ Affidavit of _____ filed
☐ ..... ☐ Information/Misdemeanor filed ☐ Sealed Information filed
☐ ..... ☐ Waiver of Indictment (case opening) filed ☐ Felony Information filed
☐ ..... ☐ Waiver of Indictment (mid case) filed ☐ Superseding Information filed
☐ ..... Plea Agreement Ltr filed ☐ under seal ☐ to be e-filed
☐ .....Plea of ☐ not guilty ☐ guilty ☐ nolo contendere to count(s)_____ of the _____
☐ ..... Petition to Enter Guilty Plea filed (indict,superseding indict,info)
☐ ..... Defendant motions due _____ ; Government responses due _____
☐ ..... Scheduling Order ☐ filed ☐ to be filed ☐ Sentencing Scheduling Order
☐ .....Hearing on Pending Motions scheduled for _____ at _____
☐ ..... Jury Selection set for _____ at _____
☐ ..... Remaining Count(s) to be dismissed at sentencing
☐ ..... Sentencing set for _____ at _____ ☐ Probation 246B Order for PSI & Report
☐ ..... Special Assessment of $_____ on count(s)_____. Total $ _____ ☐ Due immediately ☐ Pay at sentencing
☐ ..... Govt's Motion for Pretrial Detention filed ☐ GRANTED ☐ DENIED ☐ ADVISEMENT
☐ ..... Govt's ORAL Motion for Pretrial Detention ☐ GRANTED ☐ DENIED ☐ ADVISEMENT
☐ ..... Order of Detention filed
☐ ..... Deft ordered removed/committed to originating /another District of _____
☐ ..... No bond set at this time, Order of Temporary Detention Pending Hearing ☐ filed ☐ to be filed
☐ ..... Waiver of Rule 5 Hearing filed
☐ ..... Govt's Motion for waiver of 10 day notice ☐ GRANTED ☐ DENIED ☐ ADVISEMENT
☐ ..... Bond ☐ set at $_____ ☐ reduced to $_____ ☐ Non surety ☐ Surety ☐ Personal Recognizance
☐ ..... Bond ☐ revoked ☐ reinstated ☐ continued ☐ modified
☐ ..... Defendant detained
☐ ..... _____ Hearing ☐ waived ☐ set for _____ ☐ continued until _____
☐ ..... Set Attorney Flag and notify Federal Grievance Clerk

☒ SEE page II for ☐ conditions of bond ☒ additional proceedings

EXHIBIT
C

CONDITIONS OF BOND

☐ ..... Travel restricted to Connecticut of extended to _____ upon obtaining permission from USPO. A motion for any other travel with copies to the Govt and to USPO must be filed and approved by the Court.

☐ ..... Deft must reside at _____

☐ ..... Deft must report to USPO _____ times a ☐ week ☐ month ☐ by telephone ☐ in person ☐ at USPO discretion.

☐ ..... Deft ☐ must surrender passport by 4:00 p.m. on _____; ☐ Must not apply for a passport.

☐ .....Deft must refrain from the possession of firearms or dangerous weapons.

☐ ..... Deft must maintain employment or actively seek employment.

☐ ..... Deft must refrain from use or unlawful possession, or distribution of a narcotic drug.

☐ ..... as set forth in the Order Setting Conditions of Release

☐ ..... _____

_____

_____

_____

ADDITIONAL PROCEEDINGS

☐ ..... Deft's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ .....Deft's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ .....Deft's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ .....Deft's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... Govt's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... Govt's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... Govt's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... Govt's oral motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... #____ Deft _____ Motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... #____ Deft _____ Motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... #____ Govt Motion _____ ☐ granted ☐ denied ☐ advisement

☐ ..... #____ Govt Motion _____ ☐ granted ☐ denied ☐ advisement

☒ ..... Oral Argument re: Motions (Doc. Nos. 151, 143, 155, 147, 140, 137, ☐ filed ☐ granted ☐ denied ☒ advisement

☐ ..... 138, 139, 141, 153, 157, 145, 135, 149, 132, 134, 136, 225, 236, ☐ filed ☐ granted ☐ denied ☐ advisement

☐ ..... 239). ☐ filed ☐ granted ☐ denied ☐ advisement

☐ ..... Court will enter Orders on the Deft's and Govt's motions. ☐ filed ☐ granted ☐ denied ☐ advisement

☐ ..... _____ ☐ filed ☐ granted ☐ denied ☐ advisement

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

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

DEFENDANT'S MOTION TO DISQUALIFY RONALD S. SULLIVAN

Eric Greitens files this motion to disqualify Ronald S. Sullivan, Jr. for violations of his rights as a defendant and for violations of Missouri law. In support of his motion, Eric Greitens states as follows:

Introduction

Above all, a defendant is entitled to a "fair and impartial trial," and, as the Missouri Supreme Court explained, that is "always best afforded the accused *when the prosecution is conducted by the state's accredited representative*, who, no matter how vigorously [s]he may prosecute, does not, or at least should not, under [her] oath, lose sight of the fact that the accused is entitled to a fair trial." *State v. Harrington*, 534 S.W.2d 44, 50 (Mo. 1976) (emphasis added). This right cannot be "sacrifice[d]" to the prosecutor's "pride of professional success." *Id.* at 49 (quoting *Biemel v. State*, 71 Wis. 444, 37 N.W.244, 245-48 (1888)).

Likewise, the United States Constitution's Fourteenth Amendment prohibits a prosecutor from treating an individual "differently from others similarly situated." *Village of Willowbrook v.*

Olech, 528 U.S. 562, 564 (2000). "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.*

Without justification or explanation, in an unprecedented maneuver, and contrary to multiple state laws, Circuit Attorney Kimberly M. Gardner has attempted to appoint Ronald S. Sullivan, Jr. to prosecute this case. Putting aside the facts that Sullivan is not licensed to practice in Missouri and has no prosecutorial experience, given Ms. Gardner's position as the highest prosecutor in St. Louis, she must know that her own appointment of Sullivan to prosecute this case violates Missouri law. Sullivan's well-publicized and active simultaneous criminal defense practice makes his appointment as a "Special Circuit Attorney" a criminal offense under § 56.360, RSMo.[1,2]

Ms. Gardner similarly should know she possesses no authority to appoint a "Special Prosecutor." Under Missouri law, appointment of a special prosecutor is made only by the Court—not Ms. Gardner—and only when the Circuit Attorney has a conflict of interest. In those instances where a special prosecutor is appointed by the court, the Circuit Attorney is completely disqualified from prosecuting the case. Notably, under Missouri law, it is also the Court—not the Circuit Attorney—who determines the fee to be paid to a court-appointed special prosecutor. And, even under such court appointment, it is a misdemeanor for a special prosecutor to maintain a simultaneous criminal defense practice such as Sullivan's.

[1] His appointment to this case is a criminal offense which should be reported to the Missouri Office of Chief Disciplinary Counsel.

[2] All statutory references are to RSMo, 2017 unless otherwise stated.

Furthermore, Ms. Gardner's "Consultant Agreement" authorizing Sullivan to hire assistant attorneys at his own expense flies in the face of unmistakable precedent from the Supreme Court of Missouri banning the employment of private prosecutors.

As explained in detail below, Ms. Gardner's appointment of Sullivan clearly violates Missouri law, is an overreach of her authority as Circuit Attorney, threatens Governor Greitens's right to a fair and impartial trial, and violates the Governor's Fourteenth Amendment right not to be treated "differently from others similarly situated." For all these reasons, Sullivan must be disqualified.

In order to avoid bringing embarrassment to either Sullivan or Ms. Gardner's office, defense counsel brought these issues, including the violation of criminal law, to the attention of the Circuit Attorney. However, she declined to voluntarily correct the situation.

Factual Background

On February 22, 2018, St. Louis Circuit Attorney Kimberly M. Gardner personally signed and filed an indictment charging Governor Greitens with one count of Invasion of Privacy, a Class D Felony, based on an incident that allegedly occurred on March 21, 2015.

One week later, on March 1, 2018, Ms. Gardner and Ronald S. Sullivan, Jr. (who lives outside Missouri) signed a "Consultant Agreement" agreeing that "Consultant will provide the service of Special Prosecutor for State of Missouri vs. Eric Greitens, Case No. 1822-CR00642, Div 16." at "a pro-rated monthly fee of $12,000," not to include reimbursement of travel and lodging expenses. *See* Consultant Agreement, available at Joel Currier, *Greitens Prosecutor From Harvard Could Cost Taxpayers Up To $120,000, Agreement Says,* St. Louis Post Dispatch (March 14, 2018), http://www.stltoday.com/news/local/crime-and-courts/greitens-prosecutor-from-

harvard-could-cost-taxpayers-up-to-agreement/article_723f258c-7591-5632-bad3-2cf74911f92b.html, attached as Ex. A.

On March 5, 2018, St. Louis Circuit Attorney Kimberly M. Gardner filed a Motion for Admission *Pro Hac Vice* pursuant to Rule 9.03 seeking the admission of Ronald S. Sullivan, Jr. (who is not licensed as an attorney in Missouri), as a visiting attorney, "to appear in the instant litigation as counsel of record." [3]

On March 6, 2018, a document signed by Ms. Gardner and Sullivan was filed with the Circuit Clerk's office, certifying that Ms. Gardner had appointed Sullivan a "Special Assistant Circuit Attorney for the Twenty-Second Judicial Circuit Court of the City of St. Louis Missouri." *See* Sullivan Appointment, attached as Ex. B. The document cites no statutory authority for the appointment of "independent contractor" Sullivan as a prosecutor in this case.

On March 12, 2018, the State filed three pleadings in this case "by and through Ronald S. Sullivan Jr., Special Prosecutor," and submitted by "Ronald S. Sullivan Jr., Special Prosecutor."

Meanwhile, also on March 12, 2018, "Special Prosecutor" Sullivan appeared in U.S. District Court in Connecticut as a retained criminal defense counsel for defendant David Demos, a former Cantor Fitzgerald trader, to argue multiple motions in a criminal securities fraud case set for jury trial on April 23, 2018. *See U.S. v. Demos*, 3: 16-cr-0220-AWT-1 (D. Conn), ECF No. 241, attached as Ex. C.

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[3] The Gardner-Sullivan Consultant Agreement requires Sullivan to "comply with the provisions of the Missouri Supreme Court, Rule 9.02. . . ." Rule 9.02 explains that, "A *nonresident attorney who is a member of The Missouri Bar* and maintains an office in Missouri for the practice of law may practice law and do a law business as in the case of a resident attorney." However, according to an online search, Sullivan is not a member of the Missouri Bar.

On March 14, 2018, two days after Sullivan argued in Connecticut federal court on behalf of a securities fraud defendant, the State filed another pleading in this case, "by and through Ronald S. Sullivan Jr., Special Prosecutor," and submitted by "Ronald Sullivan, Special Assistant."

On March 16, 2018, the Circuit Attorney represented to defense counsel that Sullivan would be attending the deposition of Investigator William Tisaby (Enterra) on March 19, 2018.[4]

Demonstrating the dangers to Governor Greitens in this case of the use of a non-prosecutor without a Missouri license, in one of the filings "by and through Ronald S. Sullivan Jr., Special Prosecutor," Sullivan refused to provide discovery materials relying on the claim that the materials were protected by the attorney work product privilege because Maurice Foxworth was an Assistant Circuit Attorney. It has been well-publicized that Foxworth is not in fact an attorney licensed to practice law. When this glaring error was raised by defense counsel, Chief Assistant Circuit Attorney Robert Dierker readily admitted Foxworth was not an attorney licensed to practice law and not an Assistant Circuit Attorney.

Ms. Gardner's Appointment Of Sullivan As An Assistant Circuit Attorney Is A Criminal Offense Under RSMo 565.360

The Supreme Court of Missouri, in an *en banc* decision, stated clearly:

> The Legislature of this State long ago enacted statutes which spell out the qualifications for public prosecutor (§ 56.010, RSMo 1969) and mandatorily direct that the prosecuting attorney 'shall commence and prosecute' the criminal actions in his county (§ 56.060, RSMo 1969). Authority is granted for the appointment of assistant prosecuting attorneys (§ 56.240, RSMo 1969) and further assistance from the state's attorney general is made available (§ 27.030, RSMo 1969). *Provision is found for the court to appoint an attorney to prosecute if the prosecuting attorney is disqualified (§ 56.110, RSMo 1969)* or sick (§ 56.120, RSMo 1969) *and to fix the fee of such appointees, taxable as costs (§ 56.130, RSMo 1969). Further, the prosecuting attorney and assistant prosecuting attorney are specifically barred by statute from accepting employment by a defendant in a criminal case 'during the term of office' (§ 56.360, RSMo 1969).*

[4] On March 16, 2018, in an attempt to meet and confer before filing this motion, defense attorneys communicated to the Circuit Attorney's Office their intent to file this motion. In response, the Circuit Attorney's Office maintained that the appointment of Sullivan to prosecute this case is appropriate.

State v. Harrington, 534 S.W.2d 44, 48 (Mo. 1976) (emphasis added).

Specifically, § 56.360, provides:

> It shall be unlawful for *any prosecuting attorney or circuit attorney, or any assistant prosecuting attorney or any assistant circuit attorney*, during the term of office for which he shall have been elected or appointed, to accept employment by any party *other than the state of Missouri in any criminal case or proceeding*; provided, that nothing in this section shall be deemed to preclude the officers specified in this section from engaging in the *civil practice of law*. *Any violation of the provisions of this section shall be deemed a misdemeanor*.

§ 56.360 (emphasis added). Thus, as Ms. Gardner surely knows, Sullivan is precluded from engaging in the criminal practice of law during his term of office as assistant circuit attorney.

Contrary to the requirements of § 56.360, Sullivan is submitting briefs in multiple criminal cases and being of record for criminal defendants at present, including being of record as a criminal defense attorney in filings in criminal cases submitted on the day his appointment in this case was announced, and as recently as March 9, 2018, in a case that is set for jury trial on April 23, 2018. *See U.S. v. Demos*, 3: 16-cr-0220-AWT-1 (D. Conn), ECF Nos. 29, 225-27, 229-30, 236-37, 239-40. Furthermore, the courtroom minutes in *U.S. v. Demos* reflect that Sullivan appeared in court arguing motions as recently as March 12, 2018. Ex. C.

Sullivan is associated with a law firm in Florida that has an active criminal defense practice. *Ronald S. Sullivan, Jr., Litigation Consultant,* https://www.baezlawfirm.com/our-firm/ronald-s-sullivan-jr/ (last visited March 17, 2018).

Sullivan also is the Director of the Harvard Criminal Justice Institute which defends multiple clients in various criminal proceedings. *Ronald S. Sullivan Jr., Clinical Professor of Law, Director, Criminal Justice Institute,* http://hls.harvard.edu/faculty/directory/10870/Sullivan (last visited March 17, 2018); *Criminal Justice Institute, Ronald S. Sullivan Jr., Director,* http://clinics.law.harvard.edu/cji/staff/ (last visited March 17, 2018).

Ms. Gardner is authorized to appoint assistant circuit attorneys only under § 56.540, which provides that the circuit attorney may appoint "such additional assistant circuit attorneys as the circuit attorney deems necessary for the proper administration of his office." § 56.540. In the document filed on March 6, 2018, Sullivan signed a sworn statement, tracking the language in § 56.550, and agreeing to "support the Constitution of the United States and the Constitution of Missouri, and to faithfully demean myself in the position of *Special* Assistant Circuit Attorney" (emphasis added). Ms. Gardner's appointment of Sullivan as a "special" assistant circuit attorney, presumably under § 56.445, does not void the statutory requirement under § 56.360 that Sullivan not be employed by any party other than the state of Missouri in any criminal proceeding. Rather, § 56.445 simply provides that up to seven of the assistants provided for in § 56.540 may be designated as "special assistant circuit attorneys" who "may be allowed to engage in the *civil* practice of law" (emphasis added).[5] Under § 56.360, "*any* assistant circuit attorney"—which includes those who have been designated as "special" assistant circuit attorneys—are prohibited from engaging in the *criminal* practice of law on behalf of "any party *other than the state of Missouri*."

Because Sullivan is employed by a party other than the state of Missouri in criminal cases or proceedings—including his employment by defendant Demos and others—Ms. Gardner's appointment of Sullivan to prosecute this case violates § 56.360. This violation of § 56.360 is a misdemeanor criminal offense.

[5] § 56.445 also specifies that, "It shall be the duty of the circuit attorney of the City of St. Louis and of his assistants and associates to *devote their entire time and energy to the discharge of their official duties*." Sullivan is a professor at Harvard Law School, serves as Faculty Dean, and has an active criminal defense practice currently preparing for a high-profile jury trial beginning on April 23, 2018. He cannot possibly devote his "entire time and energy to the discharge of [his] official duties" as a special assistant circuit attorney.

Ms. Gardner Is Without Authority To Appoint A "Special Prosecutor"

Under Missouri law, only a court is authorized to appoint a "Special Prosecutor," and only upon a showing—customarily from a defendant, or when self-reported by the prosecutor—that the Circuit Attorney is disqualified from prosecuting the case due to a conflict of interest. *See, e.g.*, *State v. Eckelkamp*, 133 S.W.3d 72, 74 (Mo. App. E.D. 2004) ("[T]he power to appoint a special prosecutor is not limited by the statutory grounds specified in Section 56.110; rather, it is a power inherent in the court, to be exercised in the court's sound discretion, when for any reason, the regular prosecutor is disqualified.").

Like an assistant circuit attorney, a court-appointed special prosecutor also must not represent a party other than the state of Missouri in any criminal case, pursuant to § 56.360, the violation of which is deemed a misdemeanor. Specifically, § 56.110 provides:

> If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, *the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause. Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered an appointed prosecutor for purposes of section 56.360.*

§ 56.110. Thus, even if the Circuit Attorney is relying upon § 56.110 for Sullivan's appointment to this case—which appointment would be beyond Ms. Gardner's authority—such appointment of Sullivan to prosecute this case still would violate § 56.360 and constitute a misdemeanor.

Notably, if this court were to appoint a special prosecutor to this case, it is the court that would determine Sullivan's fee —not a consultant agreement with the Circuit Attorney providing a $12,000 monthly fee. Under § 56.130, a court-appointed special prosecutor, "shall receive a reasonable fee for each case prosecuted to be fixed by the court and to be taxed and paid as other

costs in criminal cases." *See Jenkins & Kling, P.C. v. Missouri Ethics Comm'n*, 945 S.W.2d 56, 60 (Mo. App. E.D. 1997) (holding in a case where a special prosecutor was appointed by the circuit court pursuant to § 56.110, as required by statute, to investigate a referral from the MEC regarding possible campaign finance violations, the "sole recourse for compensation" of the special prosecutor's services, "is under § 56.130. He has no claim for compensation against the Commission under a theory of contract, implied contract, quantum meruit, or other statutory provision.").

Ms. Gardner's "Consultant Contract" Allowing The Employment Of Private Prosecutors Violates Missouri Law

In violation of longstanding Missouri law, Ms. Gardner is initiating the employment of private prosecutors in this case. Ms. Gardner's "Consultant Agreement" allows Sullivan to "employ additional attorneys, with the permission of the Circuit Attorney, and at no expense to the City of St. Louis Circuit Attorney's Office . . . Any aide or assistant to the Consultant . . . *shall be compensated by Consultant*." Ex. A. Under Missouri law, Ms. Gardner and Sullivan cannot contractually agree to the employment of privately paid assistant circuit attorneys or assistant special prosecutors. Such a private agreement would enable any such assistant attorney to skirt all statutory requirements governing the Circuit Attorney's Office including 56.110 (conflict of interest requiring court appointment of special prosecutor), 56.360 (misdemeanor offense for employment in any other criminal case), and 56.540 (authority to appoint assistant circuit attorneys). This means that, with Ms. Gardner's permission, Sullivan could employ assistant prosecutors who have a conflict of interest or are employed in other criminal cases.[6]

[6] It is possible that Sullivan could employ assistant prosecutors funded by George Soros, which would be a clear and unchecked conflict of interest. In the first paragraph of his Harvard biography, Sullivan notes that he is "a founding member and Senior Fellow of the Jamestown Project." Ronald S. Sullivan Jr., *Clinical Professor of Law, Director, Criminal Justice Institute,* http://hls.harvard.edu/faculty/directory/10870/Sullivan (last visited March 12, 2018). The Jamestown

For this reason, as the highest prosecutor in St. Louis should know, the Missouri Supreme Court has emphatically forbidden the use of private prosecutors to "assist" the elected public prosecutors because such a practice is "fundamentally unfair." *Harrington*, 534 S.W.2d at 48 ("We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and fundamentally unfair, and that it should not be permitted on retrial of this case or in any case tried after publication of this opinion in the Southwestern Reporter."). Rather, "[o]ur scheme contemplates that an impartial [representative] selected by the electors of the county shall prosecute all criminal actions in the county unbiased . . . ." *Id.* at 49 (quoting *State v. Peterson*, 195 Wis. 351, 218 N.W. 367, 369 (1928)). This is because the "modern day prosecutor wields the power of the State's investigatory force, decides whom to indict and prosecute, decides what evidence to submit to the court, negotiates the State's position in plea bargaining and recommends punishment to the court." *Id.* at 50. And, given the prosecutor's remarkable power and grave responsibilities, the Court concluded: "The entry of a private prosecutor into a criminal prosecution exposes all of these areas to prejudicial influence. We consider such exposure intolerable." *Id.* at 50.

The Circuit Attorney's hiring of a private attorney to prosecute Governor Greitens presents all the issues identified as important by the Supreme Court: the private attorney has been hired specifically to prosecute one defendant; the private attorney has no apparent prosecutorial experience; the private attorney has a unique compensation arrangement which produces a

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Project was funded with a $100,000 grant from George Soros's Open Society Foundations, according to Soros's own website at www.opensocietyfoundations.org. Soros is a person of immense wealth, a primary supporter of the Circuit Attorney, and a primary political opponent of the defendant and his political party. The employment of assistant prosecutors paid by defendant's political adversary is a clear conflict of interest, and it serves as an example of why the Missouri Supreme Court has banned private prosecutors as "fundamentally unfair" because the exposure to "areas of prejudicial influence" is "intolerable." *Harrington*, 534 S.W.2d at 48, 50.

perceived incentive to push the case to trial regardless of the evidence (or lack thereof); the private attorney has a financial alignment with an adversary of the defendant (he is a Senior Fellow of an organization funded by the defendant's political enemy) and there are no protections against the private attorney's bias or prejudice against the defendant resulting from personal financial connections and other ties. And in this case, the private attorney is authorized to hire other private attorneys to assist him at his private expense. *See Harrington*, 534 S.W.2d at 48 (prohibiting private prosecutors and explaining that, in contrast to public prosecutors, "the private prosecutor need not be a resident of the county, his compensation comes from private sources rather than public funds, he is not subject to disqualification, and he is free to represent the defendant in the next criminal case on the docket.").

Both the United States Supreme Court and the Missouri Supreme Court have long highlighted the public prosecutor's distinct and necessary role. The United States Supreme Court relied on this unique responsibility in *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern *impartially* is as compelling as its obligation to govern at all; and *whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape *nor innocence suffer*.

Id. at 803 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). Likewise, the Missouri Supreme Court focused on the vast differences between a private attorney and public prosecutor in prohibiting the use of private prosecutors. In particular, the Court explained that the prosecutor "is the people's representative, and h*is primary duty is not to convict but to see that justice is done*. The prosecutor is an officer of the state who should have *no private interest in the prosecution* and who is charged with seeing that the criminal laws of the state are honestly and

impartially administered, *unprejudiced by any motives of private gain*." *Harrington*, 534 S.W.2d at 49 (emphasis added).

The Circuit Attorney's attempt to privatize this prosecution is a blatant departure from the role of public prosecutor and the established procedures and protections. Above all, the defendant is entitled to a "fair and impartial trial," and, as the Missouri Supreme Court explained, that is "always best afforded the accused *when the prosecution is conducted by the state's accredited representative*, who, no matter how vigorously he may prosecute, does not, or at least should not, under his oath, lose sight of the fact that the accused is entitled to a fair trial." *Id.* at 50 (emphasis added). This right cannot be "sacrifice[d]" to the prosecutor's "pride of professional success." *Id.* at 49 (quoting *Biemel v. State*, 71 Wis. 444, 37 N.W.244, 245-48 (1888)). Allowing Sullivan to participate in this targeted prosecution violates Governor Greitens due process right to an impartial prosecutor. *See, e.g.*, *Crowe v. Smith*, 151 F.3d 217, 227-28 (5th Cir. 1998) (appointment of interested private attorney to prosecute criminal contempt violated defendants' "right to due process by denying them an independent and impartial prosecutor"); *cf. Young*, 481 U.S. at 814 ("Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.").

Conclusion

The Circuit Attorney has grossly exceeded her statutory authority and violated the law by contractually agreeing that an active criminal defense attorney, openly funded by defendant's

political opponent, may not only prosecute the defendant, but may hire private prosecutors to aid him in their endeavor. At the very least, this appointment is a clear misdemeanor offense and a threat to the Governor's Constitutional rights. Sullivan must be disqualified.

For the foregoing reasons, Defendant's Motion to Disqualify Ronald Sullivan should be granted.

Dated: March 18, 2018

Respectfully submitted,

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 18th day of March, 2018.

/s/ James F. Bennett

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

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

NOTICE OF HEARING OF DEFENDANT'S
MOTION TO DISQUALIFY RONALD S. SULLIVAN

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion to Disqualify Ronald S. Sullivan in Division 16 of the Circuit Court of the City of St. Louis, Missouri, on the 26th day of March 2018, at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated: March 18, 2018

Respectfully submitted,

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 18th day of March 2018.

/s/ James G. Martin

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

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

DEFENDANT'S MOTION TO EXPEDITE THE TRIAL SETTING FROM MAY 14, 2018 TO THE FIRST WEEK IN APRIL

COMES NOW defense counsel, and seeks the Court's reconsideration of the request for a trial in April 2018**.** In support of this request, defense counsel states as follows:

1. As the Court is aware, the Missouri legislature has begun a process of investigating the same allegations which are the core of the pending indictment against Governor Greitens. The Committee conducting the investigation has informed defense counsel that its goal is to issue a report on April 9, 2018.

2. Resolution of the pending indictment before the issuance of any report by the Committee would be significantly influential in the conclusions reached by the Committee.

3. As the Court noted at the February 28, 2018 hearing, "[t]his case affects the course of business of the State of Missouri. And I don't think that there's any case that affects all the residents in the State of Missouri more than this does."

4. Also at the February 28 hearing, the Circuit Attorney's Office announced that it did not have evidence to prove its case beyond a reasonable doubt.

5. The lack of evidence necessary to justify this prosecution is exceedingly concerning, particularly when the Circuit Attorney choose to indict the sitting Governor of Missouri. Specifically:

   a. Though the core of the alleged offense is the taking of a photograph, the Circuit Attorney's Office has admitted it does not have any alleged photograph.

   b. Though under the statute charged the alleged photograph must depict an individual in a state of partial or full nudity (which is specifically defined by Missouri statute as showing specified private parts of the body), none of the three indorsed witnesses for the prosecution testified in the grand jury that they have ever seen any alleged photograph. Therefore, putting aside the lack of any such photograph, no witness exists who could say, if a photograph was ever taken, what image the alleged photograph depicted. Consequently, there exists no witness who could say that any alleged photograph depicted any individual in a state of partial or full nudity.

   c. Though the felony with which Governor Greitens is charged requires proof of the essential element of the subsequent transmission of the alleged photograph in a manner that allowed access to that image via a computer, the grand jury was provided absolutely no evidence of any subsequent transmission whatsoever. K.S. testified in the grand jury that she neither saw a camera nor a cell phone which could have been used to take the alleged photograph. Rather, she testified that she heard a sound similar to an iPhone camera. She and other grand jury witnesses were then asked "Do you know if you can transmit or

send photos from an iPhone to social media." Putting aside the speculation as to whether Governor Greitens had access to an iPhone on that alleged day, no witness was asked if there was a transmission, no witness was asked if they saw the alleged picture on social media, no witness was asked if they had even heard that the alleged photograph was somehow "transmitted." Rather, the grand jury was only told that if there was a picture taken, and if it was taken with an iPhone, then it might be possible to have the picture transmitted. That is not evidence of a transmission – it is nothing more than wishful dreaming on the part of the Circuit Attorney.

d. The key witness in the prosecution's case is K.S. She has been extremely vocal, through her attorney, that she did not want to be a part of this case and begged to have her privacy respected. The Circuit Attorney decided that K.S.'s desire was not worthy and therefore proceeded to indict this case knowing there was insufficient evidence to obtain a conviction.

6. Defense counsel is well aware that obtaining a proper jury pool for an April trial would be extremely difficult. Defense counsel, in any event, is also greatly concerned about finding jurors untainted by the negative press thus far, particularly that caused by the frequent communications made by the attorney for the Circuit Attorney's witness P.S. Consequently, defense counsel has consulted with Governor Greitens, and will waive the right to a jury trial and accept a trial by the Court in order to have this matter resolved as quickly as possible.

7. For all these reasons, the trial of this matter should be heard before the Missouri legislature takes any public action. That can only happen if the Court moves the trial setting from May 14 to the first week of April.

Dated: March 19, 2018

Respectfully submitted,

DOWD BENNETT LLP

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 19th day of March, 2018.

/s/ James G. Martin

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

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

DEFENDANT'S MOTION TO DISMISS BASED ON FALSE AND MISLEADING INSTRUCTIONS TO THE GRAND JURY

There are only a few actions by a prosecutor in presenting her case to a grand jury which can result in dismissal of the indictment. Offering misleading legal instructions is one of them. In this matter, in answering a grand juror's concern about the lack of a photograph, Assistant Circuit Attorney Robert Steele, whether intentional or not, flagrantly misstated the applicable law—misleading the entire grand jury as to the essential elements of the crime on which it was asked to vote.

I. THE LAW

While there appears to be no Missouri court case directly on point, the law is clear from other jurisdictions that materially incorrect grand jury instructs will result in dismissal of the resulting indictment. See, e.g., State v. Eldakroury, 439 N.J. Super. 304, 309, 108 A.3d 649, 651–52 (App. Div. 2015) ("[A]n indictment will fail where a prosecutor's instructions to the grand jury were misleading or an incorrect statement of law."); People v. Haste, 40 Misc. 3d 596, 598, 966 N.Y.S.2d 660, 662 (Sup. Ct. 2013) ("It is now axiomatic that a Grand Jury need not be instructed

with the same degree of precision as a petit jury; however, when the instructions are so incomplete or misleading that they undermine the grand jury's function to protect citizens from potentially unfounded prosecutions, a court is justified in dismissing the indictment on grounds that the Grand Jury's integrity has been impaired."); Ajabu v. State, 677 N.E.2d 1035, 1040 (Ind. Ct. App. 1997) ("the instructions as a whole were so misleading or deficient that the fundamental integrity of the grand jury proceedings itself were compromised."); U.S. v. Kasper, 2011 WL 7098042 at *7 (W.D.N.Y. 2011) ("[O]ne error that may lead to dismissal of an Indictment is the Government giving misleading legal instructions to the Grand Jury. . . . Thus while the Government need not instruct the Grand Jury on the pertinent law, error may arise if the Government endeavors to instruct but does so incompletely or erroneously."). When the legal instructions misstate or omit an essential element of the offense, the indictment is invalid and should be dismissed. See, e.g., id.; U.S. v. Stevens, 771 F. Supp. 2d 556, 567 (D. Md. 2011); U.S. v. Peralta, 763 F. Supp. 14, 18 (S.D.N.Y. 1991). Under United States v. Kenny, 645 F.2d 1323 (9th Cir.1982), and United States v. Sears, Roebuck & Co., Inc., 719 F.2d 1386 (9th Cir.1983), the prosecutor has no duty to outline all the elements of conspiracy so long as the instructions given are not flagrantly misleading or so long as all the elements are at least implied. "Erroneous grand jury instructions do not automatically invalidate an otherwise proper grand jury indictment." Wright, 667 F.2d at 796 (citing United States v. Linetsky, 533 F.2d 192, 200-201 (5th Cir.1976)). Appellants must show the conduct of the prosecutor was so "flagrant" it deceived the grand jury in a significant way infringing on their ability to exercise independent judgment. Id. at 796.

Regrettably, here in this case, the limited instructions given to the grand jury were flagrantly misleading.

The Missouri Approved Instructions provide the following instruction and elements:

319.44 INVASION OF PRIVACY IN THE FIRST DEGREE

1. PHOTOGRAPHING OR FILMING AND DISTRIBUTION

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [*date*], in the (City) (County) of _____, State of Missouri, [*name of victim*] was in [*Identify place, such as "a dressing room at the Acme Store on 14th Street."*], and

Second, that [*Identify place.*] was a place where a person would have a reasonable expectation of privacy, and

Third, that while [*name of victim*] was there, the defendant knowingly (photographed) (filmed) (him) (her), and

Fourth, that at the time of such (photographing) (filming), [*name of victim*] was in a state of full or partial nudity, and

Fifth, that such (photographing) (filming) was without the knowledge and consent of [*name of victim*], and

Sixth, that the defendant knew that such (photographing) (filming) was without the knowledge and consent of [*name of victim*], and

Seventh, that the defendant subsequently (distributed the (photograph) (film) to another) (transmitted the image contained in the (photograph) (film) in a manner that allowed access to that image via a computer),

Then you will find the defendant guilty (under Count ____) of invasion of privacy in the first degree. However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term "place where a person would have a reasonable expectation of privacy" means any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person's undressing was being viewed, photographed or filmed by another.

As used in this instruction, "full or partial nudity" means the showing of all or any part of the human genitals or pubic area or buttock, or any part of the nipple of the breast of any female person, with less than a fully opaque covering.

Therefore, under the statute and the instruction the evidence must establish:

1. A knowingly taken photograph

2. Of a person in a state of full or partial nudity

3. Without that person's knowledge and consent

4. In a place where a person would have a reasonable expectation of privacy, and,

5. Subsequent transmission in manner that allowed access to that image via a computer.

II. DISCUSSION

On March 12, 2018, the Circuit Attorney's Office filed its response to the defense's supplemental request for discovery. In it, the Circuit Attorney unequivocally stated, "there are no written instructions for the grand jurors in this case."

Though no written instructions on the applicable law were provided the grand jury, Assistant Circuit Attorney orally provided several wrong instructions during witness testimony. In multiple ways, the Circuit Attorney's office instructed the grand jury as to the law and its required elements contrary to the MAI. First, Mr.Steele told the grand jury: "under the law if the photo is taken without her consent or her knowledge and when the photo was taken she was partially or fully nude, she has an expectation of privacy." This is a clear misstatement of the law. Being in a place where there was an expectation of privacy is a separate element. Contrary to Mr. Steele's statement, it is not met simply when a photo is taken without someone's consent. Moreover, there is a specific statutory definition for a place where there was an expectation of privacy. See, § 565.250(3), RSMo 2015. Mr. Steeel's instruction that if when the alleged photo was taken the individual was nude then there was an expectation of privacy is a flagrant misstatement of the law.

Second, Mr. Steele next told the grand jury, "But under the law, if their photo is taken without her consent or knowledge and she's partially nude and she has an expectation of privacy, then that's it. What he does with the photo is irrelevant. The only issue is whether he took the picture without her consent if she was naked." Not only does he again tell the grand jury that "The only issue is whether he took the picture without her consent if she was naked," he tells the grand jury "{w]hat he does with the photo is irrelevant." This again is a flagrant misstatement of the law. The statute and the MAI very specifically require that there be a subsequent transmission. But, Mr. Steele told the grand jury what he "does with the photo is irrelevant."

Next, Mr. Steele told the jury - in response to a concern that there was no proof that a picture was taken – that KS testified she believed a photo was taken and therefore, "[t]he only

issue is whether he maintains that photo in his possession or he deleted it." Clearly, Mr. Steele again negated the required element of transmission. Moreover, with this second instruction he took away from the jury its ability to access the witness's credibility and determine if there was in fact proof of a picture. He undeniably told the grand jury what facts they were to assume were true---that a picture was taken. This exchange between Mr. Steele and the grand jury again misled the grand jury as to the essential elements of the applicable statute.

The only instructions on the law and the statutory elements given to the grand jury were the oral instructions of Mr. Steele. Those instruction are flagrantly misleading and instructed the grand jury to find probable cause for the violation of a statute for which they had no proper understanding.

III. THE LACK OF EVIDENCE COMPOUNDS THE ERROR

The flagrantly misleading instruction by Mr. Steele that "[w]hat he does with the photo is irrelevant" standing alone warrants dismissal of the indictment. There is no dispute that an essential element of the statute is proof of the subsequent transmission of the alleged photograph in manner that allowed access to that image via a computer. But, to instruct the grand jury that what a defendant did with the alleged photo is irrelevant is even more egregious when the prosecution fails to present any evidence whatsoever of an actual transmission (let alone of an actual picture[1]).

KS testified that she neither saw a camera nor a cell phone which could have been used to take the alleged photograph. Rather, she testified that she heard a sound similar to an iPhone camera. She and other grand jury witnesses were then asked "Do you know if you can transmit or send photos from an iPhone to social media." Putting aside the speculation as to whether

[1] The Circuit Attorney has acknowledged it does not have the alleged photograph. And, while KS testified that she believes a photograph was taken, (and while prosecutors might argue that may be enough for probable cause), the Circuit Attorney has admitted in open court it is not sufficient to prove a case beyond a reasonable doubt.

Governor Greitens had access to an iPhone on that alleged day, no witness was asked if there a transmission, no witness was asked if they saw an alleged picture on social media, no witness was asked if they had even heard that the alleged photo was somehow "transmitted." Rather, the grand jury was only told that if there was a picture taken, and if it was taken with an iPhone, then it might be possible to have the picture transmitted. That is not evidence of a transmission – it is nothing more than wishful dreaming on the part of the Circuit Attorney.

Demonstrable proof that the Circuit Attorney's hope for evidence of a subsequent transmission is fanciful comes from the deposition taken March 19, 2018 of the lead investigator, William Don Tisaby. Under oath he testified that he is unaware of anyone who has taken any steps to find evidence of a subsequent transmission of any alleged photo. He testified he is unaware of any witness who has information of a subsequent transmission. In fact, he also testified that he is unaware of any witness who has seen any photo as alleged in the indictment.[2] Given the fact Mr. Tisaby has been handling this investigation since January 18, 2018, his testimony is compelling evidence that no such evidence existed for the grand jury.

The complete lack of evidence of a transmission is not raised at this time to challenge the sufficiency of the evidence. Rather, the complete lack of evidence further adds to the gross misleading of the grand jury as to what were the elements of the charged offense. Having put on no evidence of a transmission, to then tell the grand jury that "[w]hat he does with the photo is irrelevant" is indisputably flagrantly misleading.

For all the above reasons, the indictment in this matter needs to be dismissed.

[2] An expedited transcript of the deposition has been ordered and is expected to be available in the next twenty-four hours.

Dated: March 19, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James G. Martin

James G. Martin, #33586
James F. Bennett, #46826
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Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 19th day of March 2018.

/s/ James G. Martin

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

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

DEFENDANT'S MOTION TO
SHORTEN TIME FOR NOTICE AND HEARING

Contemporaneous with this motion, defense counsel has filed a Motion to Expedite the Trial Setting from May 14, 2018 to the First Week in April. Defense counsel informed the Court and the State that this Motion to Expedite was forthcoming during a hearing on March 19, 2018. The Court informed the parties that the Court was available in the afternoon of Wednesday March 21, 2018.

Although the scheduling order calls for 5 days' advance notice for any hearing, such a delay would be burdensome under the circumstances. If granted, both parties would benefit from the additional time to prepare their respective cases for trial.

WHEREFORE, the undersigned requests that its Motion to Expedite the Trial Setting from May 14, 2018 to the First Week in April be heard Wednesday, March 21, 2018 at 3:00 p.m., and hereby gives notice of same.

Dated: March 19, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James G. Martin

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 19th day of March 2018.

/s/ James G. Martin

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

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

NOTICE OF HEARING OF DEFENDANT'S MOTION TO DISMISS
BASED ON FALSE AND MISLEADING INSTRUCTIONS TO THE GRAND JURY

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion to Dismiss Based on False and Misleading Instructions to the Grand Jury in Division 16 of the Circuit Court of the City of St. Louis, Missouri, on the 26th day of March 2018, at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated: March 19, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ James G. Martin

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James F. Bennett, #46826
Edward L. Dowd, #28785
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Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 19th day of March 2018.

/s/ James G. Martin

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

March 21, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

2. P.S/AW notes (10 pages)
3. KS notes (6 pages)
4. JW notes (1 page)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

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

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

MOTION TO QUASH THE DEFENDANT'S IMPROPER SUBPOENAS AND NOTICES FOR VIDEOTAPED DEPOSITIONS OF VICTIM K.S and WITNESS P.S. and TO DENY REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Robert Dierker, Chief Trial Attorney, and moves this Court to Quash Defendant Eric Greitens' ("Defendant") improper Subpoenas and Notices for Videotaped Depositions of K.S, and P.S ("Notices" hereinafter.) Defendant's Notices violate the Court's March 8, 2018 scheduling order and are impermissibility burdensome on the State, K.S. and P.S. The State explains:

TIMELINE

1.) The Court entered a scheduling order on March 8, 2018. Both parties agreed to the terms and dates contained within the scheduling order.

2.) The scheduling order required "[n]otices for depositions and service shall be made only after consulting with opposing counsel as to availability."

3.) On March 14, 2018, an attorney for the Defendant proposed by email two dates for depositions of endorsed State's witnesses: K.S. and P.S. Two deposition dates were suggested: (1) P.S. on March 30 at 9:30 am and (2) K.S. on April 13 at 9:30 am.

4.) On March 16, 2018, an attorney for the Defendant proposed by another email the same dates.

5.) An attorney for the State contacted and attempted to contact counsel for K.S. and P.S. to determine their availability and did not receive an immediate answer.

6.) On March 17, 2018, an attorney for the State emailed the Defense that the State would get back to them with answers.

7.) On March 19, 2018, the parties were in a daylong deposition. The deposition did not end until after 6 pm. The Defense never suggested different deposition dates for K.S. or P.S during the 8 hours the parties were together.

8.) On March 20, 2018, an attorney for the State emailed the Defense team and outlined that counsel for K.S. gave April 13, 2018 as a date she was available for deposition. The State also explained they would have an answer from P.S.' attorney on the proposed dates by March 21, 2018.

9.) On March 20, 2018, Defense Counsel answered the State's proposed deposition dates by emailing copies of subpoenas they had already served on K.S. and P.S. The dates in the documents were for March 29, 2018 for K.S. and March 26, 2018 for P.S. Such service was without notice to either the State or counsel for either person. The Notices were made without consulting the State. The subpoenas contained altogether different dates then those the Defense originally suggested. Neither of the new dates matched available dates for the witnesses themselves.

ARGUMENT

Defendant has the burden of demonstrating the appropriateness of his requests and actions. The Court required the parties to agree on a scheduling order. Such was an attempt to instill efficiency, civility and order to the discovery process in this matter. Such was an effort to prevent surprise and an abuse of process by either party. The Defense has ignored the Court's order. The parties were in another deposition on the above-reference cause until after 6 PM on March 20, 2018. Despite being together with the representatives of the State for over 8 hours, the Defense never mentioned needing different times or dates for the depositions of K.S. and P.S. The Defense made no effort to contact the attorneys for K.S. or P.S. The Defense made no effort to consult the State on the new dates or times for depositions. Such tactics provide an undue burden on the State and the witnesses. The State and witnesses were willing to come to deposition without need of subpoena on dates and times that do not present hardship. Instead, the Defense made no effort to follow the Court's March 8, 2018 as to the new dates and times.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Honorable Court to GRANT the State's Motion to Quash Defendant's Subpoenas and Notices for Videotaped Depositions of K.S. and P.S.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
/s/Robert H. Dierker 23671
Assistant Circuit Attorney

dierkerr@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 21 day of March 2018.

/s/Robert H. Dierker MBE 23671

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

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

NOTICE OF HEARING AND MOTION TO SHORTEN TIME TO PRESENT MOTION TO QUASH AND FOR PROTECTIVE ORDER—VICTIM AND WITNESS DEPOSITION

Defendant has served a notices of deposition and served subpoenas on the victim and another State's witness, despite the State's best efforts to provide reasonable dates. The State has therefore filed a motion to quash the subpoenas and asks the Court to shorten time for hearing said motion.

The scheduling order calls for 5 days' advance notice, which is impracticable under the circumstances. The State requests that the Court grant leave to notice the hearing on this new motion to quash for March 26, 2018, at 9:00 a.m., when other motions are scheduled.

Wherefore, the State requests that its motion to quash or for protective order regarding the victim and witness depositions notice by defendant be heard on March 26, 2018 at 9:00 a.m., and hereby gives notice of same.

Respectfully submitted,
KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE

CITY OF ST. LOUIS

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
/s/Robert H. Dierker 23671
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St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 21 day of March 2018.

/s/Robert H. Dierker MBE 23671

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

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

MEMORANDUM IN OPPOSITION TO MOTION TO EXPEDITE TRIAL

The State respectfully opposes the defendant's unseemly rushing of the Court with regard to jury waiver and trial setting in this matter.

The Court will recall that the present trial setting was fixed at the defendant's demand, over objection by the State. The parties then prepared a joint scheduling order that was approved by the Court. For obvious political reasons, the defense now demands that the carefully crafted scheduling order be thrown overboard and a trial be scheduled without a jury in a matter of a few weeks. This cynical effort to manipulate the Court and deny the State adequate time to prepare and present its case should be denied. In support of its position, the State represents:

1. The State can and will prove its case beyond a reasonable doubt. The State has never conceded that it lacks sufficient evidence to do so. However, unlike defense counsel, the State is under a continuing obligation to evaluate the merits of its case. Since the best evidence of defendant's conduct has been under the defendant's control for three years, the State's task is rendered extremely

difficult. In addition to the strong circumstantial case already apparent, the State has a right to seek additional evidence by all proper means, including obtaining expert assistance in preparing and proving the case. The State will not try this case in the media or through meritless motion hearings. The scheduling order prescribes when experts must be disclosed. If the State concludes that it cannot prove its case, the State will be ethically and legally bound to so inform the Court. The State is entitled to a fair trial as well as the defense, and defendant should not be permitted to rearrange the Court's scheduling order to secure a tactical advantage.

2. The public interest and importance of this case counsels careful and thorough investigation and trial preparation, and a deliberate schedule on the part of the Court. The Court is under no obligation to expedite this case on account of proceedings in the General Assembly. If defendant desires expeditious resolution of this case before any action by the General Assembly, he can enter into plea negotiations.

3. While the State has not standing to object to a jury trial waiver in most cases, the State respectfully reminds the Court that there is no absolute or constitutional right to waive trial by jury. Any such waiver must be with the assent of the Court. Mo.R.Ct. 27.01(b); *Singer v. U.S.*, 380 U.S. 24 (1965); *State v. Hornbuckle*, 746 S.W.2d 580 (Mo.App.E.D. 1988). Defendant's posturing about concern for the victim and for a tainted jury pool is cynical in the extreme. This victim, and all victims, has a constitutional right to be present

and be heard. The victim's reliance on the prior scheduling order should not be ignored.

4. If the defense is concerned about the jury pool, defense counsel can refrain from giving media interviews and presenting personal attacks in the guise of motions. The same public interest and importance that counsels no rush to judgment also counsels in favor of allowing ordinary citizens to make the final call in this case. The judiciary must not be seen as a mere pawn of the defendant. The State strongly urges the Court to reject defendant's tactical maneuvers and to retain the trial by jury setting herein.

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

/s/ Robert H. Dierker MBE 23671
Assistant Circuit Attorney
Robert Steele MBE 42418
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 21 day of March 2018.

/s/Robert H. Dierker

EXHIBIT No. 1

STATE OF MISSOURI)
CITY OF ST LOUIS) SS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL COURT
(ST. LOUIS CITY)

SUBPOENA
(Order to Appear and/or Produce Document)

STATE OF MISSOURI,
Plaintiff/Petitioner
Kimberly M. Gardner, Circuit Attorney

(314) 622-4941
Attorney for Plaintiff/Petitioner

Cause No. 1822-CR00642

vs.

Division No. 16

ERIC GREITENS,
Defendant/Respondent
James G. Martin, Esq.

(314)889-7300
Attorney for Defendant/Respondent

THE STATE OF MISSOURI, TO _____

_____ GREETING:

YOU ARE HEREBY COMMANDED. That setting aside all manner of excuse and delay, you be and appear at

Circuit Attorney's Office, 1114 Market St., Room 401, St. Louis, MO 63101

in the City of St. Louis, on the 26th day of March, 2018 at 9:00 o'clock A. M.,
and thereafter from time to time until the case can be disposed of or you are finally discharged.

☒ To testify on behalf of _____

☒ To produce the following: See Exhibit A attached hereto

☐ _____

Thomas L. Kloeppinger
CIRCUIT CLERK

Thomas Kloeppinger

The attorney or party requesting attendance of witness is: James G. Martin, Dowd Bennett LLP, 7733 Forsyth Blvd., Suite 1900, St. Louis, MO 63105; 314/889-7300

☐ The date and hour that your testimony shall be required cannot be stated with certainty. Therefore, you are directed to telephone _____ at _____, between the hours of 9:00 AM and 5:00 PM on _____, _____ at which time you will be further instructed concerning your appearance. Such instruction may require that you appear on a subsequent date, without further personal service.

FORM 21 (12/99ML)

OFFICER'S RETURN

Served a copy hereof, in the City of St. Louis, Missouri, on the _____ day of _____, _____ (by reading same) (by delivering a true copy) to the within names witness.

To summoning the witness $_____

To the return of the non est on this subpoena $_____

To _____ miles traveled serving this subpoena $_____

TOTAL FEES $_____

Sheriff of the City of St. Louis

By_____
Deputy

INSTRUCTIONS TO APPLY FOR WITNESS FEE

After the witness has testified of has been dismissed, the witness shall take this copy to the Office of the Circuit Clerk, or to the appropriate Division Clerk, for entry on the books as provided by law. Otherwise, witness fees cannot be taxed.

WITNESS CLAIM

I hereby certify that I am entitled to _____ days and _____ miles for service as a witness under a subpoena.

_____
Witness signature

Subscribed and sworn before me and entered this _____ day of _____, _____

Thomas L. Kloeppinger
Circuit Clerk

EXHIBIT A

1. Any and all documents related to the case State of MO v. Eric Greitens.

2. Any and all emails and text messages, or other communications related to this case, sent to anyone other than your attorney.

3. Any and all recordings or other records of conversations between you an K.S. related in any way to K.S.'s relationship with Eric Greitens.

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

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

COMBINED MOTION OF MOVANT, P.S., TO QUASH SUBPOENA AND FOR A PROTECTIVE ORDER

COMES NOW, Movant, PS, by and through his undersigned legal counsel, and for his Combined Motion to Quash Subpoena and for a Protective Order ("Motion") states to the Court as follows:

1. Movant, PS, is a non-party witness disclosed by the State of Missouri in the present cause in which the sitting Governor of the State of Missouri, Eric Greitens, is a named criminally accused Defendant charged with a Class D Felony.

2. On the 20th day of March, 2018, the criminally accused Defendant Governor, Eric Greitens ("Defendant Governor"), by and through his counsel of record, James G. Martin, caused a Subpoena to be served upon Movant, said Subpoena commanding Movant, setting aside all manner of excuse and delay, be and appear at a specific location in the City of St. Louis, Missouri, on the 26th day of March, 2018, to testify under oath in a deposition requested by Defendant Governor's counsel, James G.

Martin, and to produce documents and things. A true and correct redacted copy of the subject Subpoena is attached hereto, incorporated herein and marked Exhibit #1 ("Subpoena").

3. The service of the Subpoena on Movant occurred but six (6) days prior to the unilaterally scheduled deposition of Movant.

4. Counsel for Movant has been known to Defendant Governor's legal counsel to be legal counsel for Movant since prior to the indictment of Defendant Governor herein.

5. Notwithstanding the foregoing, and in a fashion not consistent with anything resembling "reasonable", counsel for Defendant Governor did not contact counsel for Movant to coordinate the logistics of Movant's deposition prior to the March 20, 2018 service of Defendant with the subject Subpoena instead counsel simply unilaterally set a date and time for Movant's deposition and caused Movant to be served with a Subpoena therefore.

6. It is respectfully noted that James G. Martin, attorney for the criminally accused Defendant Governor spent a significant portion of his professional career diligently and ably prosecuting federally accused criminal Defendants. As a result, Mr. Martin likely has had little exposure to State procedural rules governing depositions in State criminal cases, especially since criminally accused Defendants in federal criminal cases are not accorded the right to depose witnesses in preparation for trial.

7. In support of Movant's Motion, and for the benefit and ease of reference of Defendant Governor's counsel, Mr. Martin, Rule 25.12(a) of the Missouri Rules of Criminal Procedure specifically provides:

> "A Defendant in any criminal case pending in any Court may obtain the

deposition of any person on oral examination or written questions. The manner of taking such deposition shall be governed by the rules relating to the taking of depositions in civil actions."

8. Hence, punctilious scrutiny of the Missouri Rules of Civil Procedure may be of value to counsel whose legal travails have not to date encompassed depositions in State criminal proceedings. Again, for the benefit and ease of reference of Defendant Governor's counsel, Mr. Martin, Rule 57.09(c) of the Missouri Rules of Civil Procedure, provides in salient part:

> "A Subpoena to a non-party pursuant to Rule 57.09 for the production of documents and things shall be served **not fewer than 10 days before the time specified for compliance"** [emphasis added].

9. Rule 57.09(c) further provides in salient part:

> "A party or attorney responsible for issuing and servicing a Subpoena **must** take reasonable steps to avoid undue burden or expense on a non-party subject to the Subpoena" [emphasis added].

10. Defendant Governor's counsel unreasonably failed to take steps to avoid undue burden or expense by Movant and failed to comply with Rule 57.09(c) of the Missouri Rules of Civil Procedure in that the Subpoena issued at the request of Mr. Martin was served on Movant four (4) days fewer than the required ten (10) days before the scheduled deposition.

11. Movant, having already been compelled to endure the rigors and hardships of being in the line of fire of the Defendant Governor since March of 2015, is now forced and compelled to underwrite the cost of legal counsel to prepare, file and prosecute the

present Motion.

12. The Movant herein has been subjected to acts of the Defendant Governor that constitute, inter alia, nothing short of the reckless destruction of the integrity of the Movant's marriage. The Defendant Governor not only compromised the integrity of Movant's marriage, but also thwarted two separate subsequent efforts of the Movant and Movant's former spouse to reconcile and thereby save their marriage.

13. The Movant herein was thereafter forced and compelled to deal with and address ceaseless campaign news releases involving the Defendant Governor, advertisements for the Defendant Governor, radio commercials and television advertisements depicting the Defendant Governor, promotional signs, billboards, news articles, television news stories, fundraising literature, social media releases, and media related images of the Defendant Governor, including those depicting Defendant Governor spewing forth countless rounds of ammunition from a machine gun.

14. Movant herein endured the rigors of a divorce proceeding which followed two (2) unsuccessful reconciliation attempts between Movant and Movant's spouse, both of which were thwarted by the continued intrusion of the Defendant Governor into the lives of the then-married couple.

15. Movant still cares deeply for his former spouse.

16. Movant herein has been compelled to engage legal counsel to address contact from a political operative seeking to disclose the story of Movant's former spouse's victimization by the Defendant Governor just prior to the November 2016 election for statewide offices, including that of Governor, being the election ultimately won by Defendant Governor.

17. Movant herein was thereafter forced and compelled to deal with and address scores of continuing media contact attempts related to the story of the Defendant Governor and his victimizing interaction with the former spouse of the Movant.

18. Movant has been compelled to address protective measures relating to Movant's minor children, a protracted but ultimately unsuccessful attempt to shield them from inquiry into the victimizing relationship of the Governor with the Movant's former spouse.

19. The Movant has endured years of emotional pain and suffering as a result of the destruction of the marriage of the Movant with his former spouse.

20. Movant was compelled to release the March, 2015 confessional recording in which his former spouse confessed in graphic detail to the nature and character of the victimizing actions of the Defendant Governor. Movant did so in an attempt to mitigate to the greatest extent possible the inevitable damage which was going to inure to his detriment and that of his family by virtue of the year-plus investigative undertakings by a wide swath of members of the local and national media on a story about the Governor and his victimization of Movant's former spouse.

21. The Movant herein has been compelled to testify before the Grand Jury.

22. The Movant herein has been compelled to testify before the House Investigative Committee on Oversight.

23. Throughout this process, the Movant has been compelled to re-visit an extraordinarily painful and emotionally challenging period of trauma caused by the reckless disregard of the Defendant Governor for the integrity of the marital vows of the Movant and the Movant's former spouse.

24. Concurrently for much of this period, the Movant was compelled to be exposed to the protracted self-aggrandizing characterization of the Defendant Governor as a "family man" committed to "family values."

25. During this emotionally challenging and fearful time, Movant has incurred significant fees and costs and lost income, work, work-related opportunities, and been forced to take draconian measures to mitigate damage which would otherwise inure to the detriment of the Movant and that of the minor children of the Movant.

26. In short, Movant is highly fearful of the Defendant Governor who, by his words and actions, has demonstrated in the mind of the Movant an ongoing reckless disregard for the damage caused to the lives and well-being of the Movant, Movant's former spouse, Movant's minor children, the immediate family members of all involved, and a host of members of the social circle of the Movant, the Movant's former spouse, the Circuit Attorney, her staff, law enforcement personnel, the House Investigative Committee on Oversight, the State Attorney General, a host of State and Federal law enforcement authorities, civil litigation adversaries, members of the executive branch of our nation and, of course, the people of the State of Missouri. More concisely, the Movant has observed the Defendant Governor basically lash out against and attack anyone and everyone involved in undertakings designed to maintain the integrity of our laws and fundament tenets of right and wrong.

27. The Movant believes the Defendant Governor's political aspirations and road map for prospective pursuit included ascendency to the presidency of the United States.

28. Movant, along with virtually everyone who has heard the name of the Defendant

Governor, is aware of the fact that the Defendant Governor is a former Navy SEAL with a penchant for emoting, if not overtly promoting, that, as a Navy SEAL, he is possessed of a skill set that is appropriately worthy of genuine fear.

29. Movant's fear of reprisal and serious recriminations has been longstanding and is reasonable given the totality of the circumstances.

30. The Defendant Governor, by and through his counsel, has requested documents and things as part of the Subpoena served on the Movant herein.

31. Some of the things, the production of which has been requested, are electronically maintained recordings, the production of copies of which is time-consuming and costly.

32. The scope of that which is requested by the Governor in the Subpoena served on Movant is overly broad, vague and subject to potentially different and subjective interpretations. Request No. 1 to Exhibit A to the Defendant Governor's Subpoena served on the Movant seeks, "Any and all documents related to the case State of MO Re Eric Greitens."

33. The style of the case referenced in Request No. 1 of Exhibit A to the Subpoena could reasonably relate to any one of a host of legal proceedings possessed of the same style and moniker as that set forth in the Request No. 1.

34. The requests delineated in Exhibit A to the Subpoena are overly broad in that they are propounded without temporal restriction.

35. Request No. 2 delineated in Exhibit A to the Subpoena reads, "Any and all E-mails and text messages, or other communications related to this case, sent to anyone other than your attorney."

36. Request No 2 found in Exhibit A to the Subpoena served on the Movant herein does not specifically designate the sending party and is overly broad. It does not specifically delineate the author of the intended E-mails and text messages being sought, does not specifically define the words "other communications" and references the requirement that same "relate to this case" without defining the scope of that which constitutes "this case." Remembering that Movant is not a party to this case, and noting the obvious reality that the Movant is not possessed of first-hand knowledge about the scope and details of the State's case, Movant is unable to do anything other than guess as to what E-mails and/or text messages or "other communications" "related to this case" may encompass.

37. Request No. 3 delineated in Exhibit A to the Subpoena served on Movant herein requests "any and all recordings or other records of conversations between [Movant] an (sic) K.S. relating in any way to K.S.'s relationship with Eric Greitens."

38. Again, Request No. 3 delineated in Exhibit A to the Subpoena served on the Movant is without temporal restriction and is subject to broad interpretation. Further, it is difficult to ascertain what may be "related in any way" to the relationship between the Defendant Governor and the former spouse of the Movant.

39. It is important to note, it is understood that the Movant is not intended to be called upon to testify in the case-in-chief contemplated to be presented by the State herein.

40. Movant herein was not personally present during any one of the number of transgressions, acts of infidelity, and acts of violence that are understood to potentially encompass that which is the subject matter of the State's case herein. As such,

Movant is not a first-party witness to any of the foregoing described abhorrent behavior.

40. Knowledge of the Movant with respect to salacious details relating to his then wife's fornication with and vulgar victimization by the Defendant Governor, the violent aspects corresponding thereto, and the disrespectful characterization of the former spouse thereafter are a function of confessional conversations and undertakings relating to subsequent efforts to reconcile and were part of ongoing efforts by the Movant and the Movant's spouse to heal their marriage.

41. It is also important to note it is understood the Defendant Governor is already in possession of the transcript of the Grand Jury testimony of the Movant herein.

42. It is understood from cursory review of pleadings filed on behalf of the Defendant Governor by his legal counsel that the Defendant Governor's legal counsel are collectively aware of the fact that the Movant testified as a matter of record before the House Investigative Committee on Oversight; that the transcript of the testimony of the Movant before the House Investigative Committee on Oversight is slated to be released in short order and will immediately be made available to the Defendant Governor and his counsel as part of what is understood to be the intended public release of same.

43. As such, the Defendant Governor and the legal counsel for the Defendant Governor are acutely aware of the absence of first-hand probative value on any level to the underlying factual situation serving as the core of the State's case, except perhaps to verify/confirm the foundational elements of the recordings previously provided by the Movant to the State, copies of which are understood to already be in the possession of the Defendant Governor's counsel.

44. The Movant herein has always been desirous of protecting the integrity of the image of his former spouse in the eyes of his children.

45. The Movant is deeply committed to continuing to co-parent with this former spouse.

46. The longstanding and costly efforts of the Movant to suppress the story involving the gruesome, sad and earth-shattering relationship between the Defendant Governor and the former spouse of the Movant were forced to come to a screeching halt when a minor child of the Movant was compelled to address a pointed inquiry from an unwitting member of the media who evidently garnered a list of the cell phone numbers that were part of the cell phone plan of the Movant's family.

47. The contemplated deposition of the Movant is not reasonably calculated to lead to the discovery of admissible evidence. The Movant is a non-party and non-witness who is not a first-hand witness to any facts surrounding the behavior of the Defendant Governor as alleged in the Indictment herein.

48. The contemplated deposition of the Movant is nothing short of an abhorrent attempt on the part of the Defendant Governor to intimidate, lash out at, belittle, berate and induce abject fear in the Movant.

WHEREFORE, Movant prays this Honorable Court:

1. Quash and hold for naught the Subpoena and corresponding request for production of documents and things served on the Movant on March 20, 2018 for naught;

2. Deny the Defendant Governor the ability to depose the Movant;

3. If the Movant's deposition is deemed necessary and appropriate by the Court,

issue an Order to limit the scope of the deposition solely to the subject matter relating to the documents and things that have to date been provided by the Movant to the State of Missouri;

4. Order that the Defendant Governor and his counsel comply with the applicable procedural rules corresponding to depositions and the issuance and service of Subpoenas, replete with corresponding Requests for Production of Documents and Things;

5. Order that the Defendant Governor not be permitted to attend or appear in person or be present at or about the situs of the of the restricted-scope deposition of the Movant;

6. Order that the deposition be taken in a discreet and safe location not subject to public interference;

7. Require that the Defendant Governor pay a reasonable cost associated with the production of any documents and things, if any are required to be produced by Movant;

8. Block the Defendant Governor, his legal counsel and surrogates from directly or indirectly harassing, intimidating, threatening, contacting or shaming Movant in any form, including social media, and taking any measures that compromise business opportunities and the professional career of the Movant;

9. Appoint a special master to be present at the deposition to keep and maintain order and to otherwise be respectful of the emotional frailty of the Movant within the context of the subject matter of the Defendant Governor's actions, which gave rise, in whole or in part, to the present cause of action;

10. Order the immediate removal from public record of any Return of Service

relating to the Subpoena issued by James G. Martin which (presumably inadvertently) discloses the identity of Movant which, in turn, results in the disclosure of the identity of victim K.S. herein.

11. Award the Movant reasonable attorney's fees, costs and expenses associated with the preparation and prosecution of the present Motion, the appearance at the contemplated potential deposition; and for such other and further relief as the Court deems appropriate and just in the circumstances.

KODNER WATKINS, LC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 Attorney's Office this 22nd day of March, 2018.

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

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

DEFENDANT'S SUPPLEMENTAL AUTHORITY
FOR MOTION TO DISMISS BASED ON FALSE AND
MISLEADING INSTRUCTIONS TO THE GRAND JURY

This supplemental authority is being submitted in response to the Circuit Attorney's Office statement in court on Monday, March 19, 2018, that the only basis to challenge an indictment and grand jury procedures is when the grand jury hears no evidence at all. Because defendant's challenge is not based on the sufficiency of the evidence presented to the grand jury (though there can be no doubt the CAO failed to present any evidence related to essential elements of the alleged offense), the case law relied upon by the CAO is not applicable. Rather, the question for this court to determine is whether the flagrant misstatement of the applicable statutory elements impacted the Governor's recognized right to "the just, impartial, and unbiased judgment of the grand jury."

While the CAO appears to believe a defendant does not have the right to challenge infringements by or within the grand jury on his Constitutional rights, the Missouri Supreme Court has held otherwise. In *State v. Salmon*, 216 Mo. 466, 115 S.W. 1106, 1120 (1909), the Court cited *Wilson v. State*, 70 Miss. 595, 13 South. 225, and stated, "[i]t is a serious mistake to

suppose that the rights of one accused or suspected of crime to the orderly and impartial administration of the law begins only after indictment. One whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of the grand jury as he is to that of the petit jury on his final trial."

The Supreme Court in *Salmon* was clear that the courts were required to protect the rights of defendants at the grand jury stage.

> It is earnestly urged by the state that the secrecy and safeguards thrown around the grand jury are not for the benefit of the defendant. This may be conceded to be true, but **it by no means follows that the rights of the defendant in the investigation of charges before that body are not entitled to protection by the courts of this state. The substantial rights of one accused or suspected of crime to an orderly and impartial investigation of his conduct begins at the very inception of the prosecution; that is, when the matter is presented to the grand jury**.

Id. (emphasis added).

The Court went on to emphatically state that a defendant must have the right to insist on his substantive rights being protected at the grand jury stage: "the position is untenable that, because the defendant upon the final trial before the jury might make his defense, he should be denied the privilege of insisting upon his substantial right of having an orderly and impartial investigation at the very commencement of the prosecution before the grand jury." *Id*., at 1121. Moreover, the Court emphasized that protecting a defendant's rights at trial were not sufficient. "Even if upon final trial the vindication may be ever so complete, **every good citizen abhors the idea of a record being made for all time that he has even been charged with the commission of a criminal offense**, and doubtless for this reason the lawmakers of this state have at all times indicated by appropriate legislation that his rights at the very inception of a prosecution should be safeguarded." *Id*. (emphasis added).

What the Supreme Court made clear with its holding in *Salmon* is that contrary to the CAO's stated position - this motion is not at all "patently frivolous."

Dated: March 22, 2018

Respectfully submitted,

DOWD BENNETT LLP

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 22nd day of March 2018.

/s/ James G. Martin

KMOV
kmov.com

March 22, 2018

The Honorable Rex M. Burlison
22nd Judicial Circuit of Missouri
10 North Tucker Blvd
St. Louis, MO 63101

Re: KMOV-TV's Operating Rule 16 media request to allow cameras/audio in *State of Missouri v.Eric Greitens,* Case Number 1822-CR00642; Trial Date: May 14, 2018

Dear Judge Burlison:

We write today on behalf of media organizations and the public. One of us (Mr. McCormac) is the St. Louis Circuit Court Media Coordinator and the other (Mr. Diener) is the News Director for KMOV-TV, the CBS affiliate in St. Louis, Missouri.

We are joined by our parent company (Meredith Corporation—also owners of the CBS affiliate KCTV in Kansas City) and a consortium of media outlets and organizations from St. Louis, across Missouri, and the nation. The media entities joining this request are Tribune-owned television stations KTVI-TV, KPLR-TV and WDAF-TV; Tegna-owned KSDK-TV; St. Louis Post-Dispatch, LLC; Scripps-owned KSHB-TV and KMCI-TV; CNN; ABC, Inc. (ABC), NBCUniversal Media, LLC; Radio Television Digital News Association (RTDNA); Gannett Company (d/b/a Springfield Leader); and the Associated Press.

This consortium respectfully seeks the Court's permission, pursuant to Operating Rule 16, to respectively record and transmit to the public by various platforms the audio and video of the public trial proceedings in this matter, from the start of opening statements forward.

KMOV-TV originally requested camera coverage for the Greitens trial on March 12, 2018. We understand that the Circuit Attorney objected on generalized grounds. The defense did not express an opinion. Operating Rule 16 does not require the consent of the parties and leaves the issue of electronic media access entirely to the discretion of the judge. We urge your Honor to exercise that discretion to serve the public's right to know. We stand available to discuss narrowly tailored means by which the public, the judiciary, and justice can be appropriately served by cameras in this matter.

The type of coverage we are seeking has been extensively vetted here in St. Louis, including when the Courtroom View Network (CVN) was permitted to webcast talc powder trials (despite some party objections) on five separate occasions over the last two years. Each of those trials, like the current matter, was a high-

profile case with national interest. We believe that at each of those trials, CVN's minimal, unobtrusive presence in the courtroom caused no disruption or distraction.

Like the talc trials, this case will involve important public issues and will be of high interest to far more people than could be physically present in Your Honor's courtroom. Indeed, as your Honor stated at the February 28, 2018 hearing, "[t]his case affects the course of business of the State of Missouri. And I don't think that there's any case that affects all the residents in the State of Missouri more than this does." In essence, video, audio, and still photography recording and transmission will serve as a "virtual overflow room" for the citizens of Missouri. We see no greater risk of harm from a print reporter sitting in the front row of the gallery, than from a member of the public remotely observing the same proceedings on-line or on-air.

This media consortium is open to discussion with your Honor on the number and type of camera(s) allowed, the size of such cameras, the location of equipment, the number of microphones allowed and their placement, timing, and the opt-out of recording any victims in the case. As your Honor is aware, there are no external lights or distracting equipment in the modern video recording process.

In addition to the talc cases referenced above, other recent examples of successful cameras in the courtroom in high profile cases in our area have included:

-Francine Katz v. Anheuser Busch, Inc., et al., Circuit Court of the City of St. Louis

-St. Louis Regional Convention & Sports Complex Authority v. Nat'l Football League, et al., Circuit Court of the City of St. Louis

-State of Missouri v. Pamela Hupp, Circuit Court for St. Charles County

Members of the consortium are very familiar with appropriate courtroom decorum. In addition to these five trials, Missouri media members also routinely provide this coverage throughout the state.

The consortium's coverage would be strictly limited to fully public proceedings held in the jury's (or judge's, if a bench trial) presence. We understand there is no video recording of any jurors. We will carefully abide by all provisions of Operating Rule 16, including those relating to bench conferences and materials on counsel tables. There is no risk of recording any confidential material, since recording will be limited to public proceedings that print reporters or members of the public can also directly observe and report on, either in person or via a transcript.

We are available at 314-444-6396 or at sdiener@kmov.com or 314-444-3647 or at bmcormac@kmov.com if the Court requires additional information.

Sincerely,

Scott Diener
News Director
KMOV-TV
St. Louis

Bill McCormac
Media Coordinator
for the 22nd Circuit

Cc: Brian Barrett, Associated Press
Gilbert Bailon, St. Louis Post-Dispatch
David Giles, EW Scripps
Joseph Martineau, Lewis Rice LLC
Chris Moeser, Tegna, Inc.
Michael Nepple, Thompson Coburn LLP
Joshua Pila, Meredith Corporation
Mark Sableman, Thompson Coburn LLP
Indira Satyendra, ABC
Dan Shelley, RTDNA
Drew Shenkman, CNN
Barbara Wall, Gannett Company, Inc.
Elisabeth Washburn, Tribune Media Company
Susan Weiner, NBCUniversal Media, LLC

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

Motion for a Pre-Trial Conference on Cameras in Court and other Media Coverage Issues

Movant Meredith Corporation d/b/a KMOV-TV, St. Louis, and KCTV and KSMO, Kansas City, by its undersigned attorneys, requests on behalf of itself and other media entities, including Tribune Media Company, d/b/a KTVI and KPLR-TV, St. Louis, and WDAF-TV, Kansas City; Multimedia KSDK, LLC d/b/a KSDK-TV, St. Louis; Cable News Network; E.W. Scripps d/b/a KSHB-TV and KMCI-TV, Kansas City; NBCUniversal Media, LLC; Gannett Company d/b/a Springfield News-Leader; the St. Louis Post-Dispatch, LLC; the Associated Press, and Radio Television Digital News Association (collectively, including Meredith, "Interested Media Parties"), that the court set a pre-trial conference to consider issues related to the pending request for cameras in court, and other media news coverage issues.

In support Meredith states:

1. Interested Media Parties are news media companies that plan to cover the trial of this case, because of its significance and interest to the public, and Radio Television Digital News Association (RTDNA), the world's largest professional organization devoted exclusively to broadcast and digital journalism.

2. The Media Coordinator for the 22nd Circuit has made an application for camera coverage of the trial under Operating Rule 16. Interested Media Parties support the Media Coordinator's request for a conference with the Court on this application, and on related logistical issues relating to news reporting and how any photographic and/or audio coverage of the case would be handled.

3. As more fully explained in a letter from Media Coordinator Bill McCormac and KMOV-TV News Director Scott Diener to the court, a copy of which is attached as Exhibit A, Interested Media Parties recognize that any camera or audio coverage would be subject to the limitations of Operating Rule 16, including, for example, the ability of the victim to opt out of any photographic or audio coverage of her testimony. See Operating Rule 16.03(c). They also recognize that any photographic and/or audio coverage will need to be managed so that it is not disruptive to the trial.

4. For these reasons, Interested Media Parties seek a conference with the Court to discuss the request for camera and audio coverage, and ways in which it can be managed to address the various interests of the Court, the parties, and the public. They can discuss and demonstrate, for example, ways that cameras and audio equipment can be made unobtrusive, limitations that can be made on particular kinds of activities, and management of media coverage in ways that are least disruptive to the courtroom, while meeting the media's need for accessing and reporting information about the case. In other high-profile cases, protocols have been established and successfully implemented regarding the number of cameras, the use of audio, whether any transmission is live or delayed, and limitations on what may (and may not) be recorded.

5. As one example, in some high-profile cases, with cooperative advance planning, media coverage of high-profile trials has used a media room separate from the courtroom, thus reducing potentially disruptive activity in the courtroom and allowing media representatives more freedom to do timely news reporting. Such a media room can utilize pool camera and audio feeds from the courtroom. Similarly, other media coverage issues can be discussed and worked out in advance in a pre-trial conference on media coverage.

6. Such pre-trial conferences with the media on issues of camera and audio coverage, and the management of media coverage, have been successfully used in other Missouri cases, because they allow a full exchange of information and ideas, and address logistical issues regarding trial news coverage in advance.

7. To the extent it is necessary for purposes of this motion, Meredith seeks leave for itself and the Interested Media Parties to intervene in this action to raise the issues in this motion. Intervention is the typical and proper procedure for a media organization's request for access to judicial proceedings or materials. This procedure was followed, and permitted, in *Pulitzer Publishing Co. v. Transit Casualty Co. (In re Transit Cas. Co.),* 43 S.W.2d 293 (Mo. banc 2001), where the Supreme Court allowed a media company's request for access to documents from in a legal proceeding. *See also ABC, Inc. v. Stewart***,** 360 F.3d 90, 97 (2d Cir. 2004) (media coalition permitted to intervene in criminal case for purposes of access requests); *United States v. Moussaoui***,** 65 Fed.Appx. 881 (4th Cir. 2003) (members of media intervened in criminal case for limited purpose of obtaining access to certain portions of the record and oral argument on appeal); *United States v. Chang,* 47 Fed.Appx. 119 (3d Cir. 2002) (media organizations and U.S. Senator intervened in criminal

action for purpose of seeking access to judicial records); *In re Newark Morning Ledger Co.,* 260 F.3d 217 (3d Cir. 2001) (media organization intervened in criminal case for purpose of motion to unseal records); *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251 (11th Cir. 2001) (recognizing media intervention as the proper procedure with respect to media requests for access to court proceedings). In the prior motion for notice of hearings in this matter, the motion of Meredith and other media parties to intervene was not opposed by the parties.

WHEREFORE, Meredith, on behalf of the Interested Media Parties, requests that the Court schedule a pre-trial conference with the Media Coordinator, Interested Media Parties, and other interested parties, concerning the pending cameras in court request and other logistical issues regarding news media coverage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

Mark Sableman

Defendants request an extension of the time to respond to Plaintiff's discovery requests until either (1) seven days after the Court so rules, or (2) the date Defendants' discovery responses are due under the Missouri Rules of Civil Procedure, whichever date is later.

Dated: March 12, 2018

Respectfully Submitted,

DOWD BENNETT LLP

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Attorneys for Defendants
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Custodian of Records Michelle Hallford

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was caused to be served electronically via the Missouri electronic filing system on all counsel of record, as shown below this 12th day of March, 2018.

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

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

MOTION TO DISQUALIFY DEFENSE COUNSEL JAMES BENNETT AND DOWD AND BENNETT LLP

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Assistant Prosecutor, and moves this Court to Disqualify Defense Counsel James Bennett and Dowd and Bennett LLP (collectively "Dowd and Bennett").

For over two months, Dowd and Bennett knowingly engaged in a concurrent conflict of interest. At the same time that Dowd and Bennett was representing the State, regarding whether state actors, including the Governor, was using Confide – a confidential messaging service – to conduct state business in violation of state law, Dowd and Bennett was also representing Defendant in a proceeding against the State. This, by itself, is grounds for disqualification. While there is no need for the two matters, subject to conflict of interest prohibition, to be related, the fact that the instant two matters are significantly related illustrates the manifest need for disqualification in this case. The application Confide software application is at the center of both matters. Dowd and Bennett represented the Defendant *qua* State (i.e. the State) in a lawsuit filed over Defendant's use, in his official capacity, of the application Confide software application. At the same time, in the instant matter, Confide is relevant, material, and plays a key role.

Defendant is charged with photographing his victim and then transmitting said photograph. On information and belief, Defendant's use of Confide, Signal and/or other similar applications to engage in criminal behavior is alleged in the Indictment. The law imposed is an irrebuttable presumption that confidences are disclosed during an attorney-client relationship. Therefore, even though not necessary to show, the fact that the matters *are* related increases the need for disqualification.

Moreover, case law demonstrates that even if the conflict of interest is no longer active, the fact that, at some point during the litigation, there was a concurrent conflict of interest is grounds for disqualification. This case law is even more damning because James Bennett and Dowd and Bennett were involved first-hand and saw their co-counsel disqualified in this very similar matter. Thus, despite knowing how strict Missouri courts view conflicts of interest, Dowd and Bennett actively engaged in a concurrent conflict of interest for over two months. Such knowledge in the face of a clear conflict of interest constitutes a blatant violation of the Rule further necessitates disqualification.

Once it is established that a concurrent conflict of interest exist, the Court should disqualify Dowd and Bennett. The law provides only way for Dowd and Bennett to evade disqualification: Defendant has to meet all four elements of the exception to the concurrent conflict of interest rule. However, Dowd and Bennett cannot possibly satisfy even the first element of the test; to wit, Dowd and Bennett must demonstrate that he reasonably believed that he could provide competent and diligent representation to each client. However, the very fact that Dowd and Bennett withdrew from the Confide case indicates his understanding of the existence of a conflict of interest and his inability to satisfy his ethical obligations to both clients. Even more, that Defendant's spokesperson misrepresented the reason for Dowd and Bennett

withdrawing from the Confide case further shows that Dowd and Bennett knew he could not provide competent and diligent representation to both.

Indeed, Dowd and Bennett was right to withdraw since it was impossible to meet this standard. They represented the State, with access to all of the State's resources and knowledge about Confide, while, at the same time, Defendant's use of Confide to engage in activity, in violation of Missouri law, is a key issue in the instant case.

The failure to satisfy this first factor alone necessitates disqualification. However, there are two more elements which Dowd and Bennett similarly cannot meet. The second element which mandates disqualification is if the representation was prohibited by law. There is a requirement that a lawyer not undertake a representation that will require him or her to cross-examine another client. Due to Confide being at the heart of both cases, Dowd and Bennett fails this factor as well. There is a likelihood that in representing Defendant, Dowd and Bennett will have to cross-examine State actors about Defendant's use of Confide. This is in direct violation of their requirement not to undertake a representation that will require them to represent another client. Therefore, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett on this basis, as well.

Finally, there was no informed consent. The issue of consent was only potentially implicated by a letter from the Attorney General's Office to James Bennett mentioning the existence of a conflict. This, quite clearly, does not suffice to meet Dowd and Bennett's burden of demonstrating consent. *First*, the Attorney General cannot consent on behalf of the Circuit Attorney. There is no Missouri law that stands for such a proposition. *Second,* even assuming that the Attorney General could consent on behalf of the Circuit Attorney, Dowd and Bennett cannot meet their burden of proving that he made reasonable efforts to make sure the Attorney

General possessed enough information, including that he understood the advantages and disadvantages of the decision to allow the conflict of interest. Moreover, the Attorney General must have perfectly understood the adverse interest. Not only is there no proof that this occurred, but since the Attorney General did not know any details regarding the Circuit Attorney's investigation, it was simply impossible for the Attorney General to have perfectly understood the situation. Therefore, there was no informed consent to this dual representation, and Dowd and Bennett cannot meet three of the elements. Failure to meet just one necessitates disqualification. Accordingly, the Court should Grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

Furthermore, even if, the Court were to somehow find that there was no concurrent conflict of interest, disqualification is still necessary based on Dowd and Bennett's duties to former clients. It is indisputable that he did at one point have an attorney-client representation with the State. Furthermore, the State's interest is materially adverse to Dowd and Bennett's current client. Quite plainly, the State is prosecuting the Defendant while Dowd and Bennett's role is to thwart the prosecution initiated by State. Moreover, the matters are substantially related since, as explained above, Confide is at the center of both cases. Here, both the actual conflict of interest and the appearance of a conflict of interest necessitates disqualification. In the course of representing the State, Dowd and Bennett received confidential information regarding Confide, which Dowd and Bennett is now using to press interests antagonistic to the State. On this basis, as well, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

ARGUMENT

"Under Missouri law, an attorney owes a duty of undivided loyalty to the client." *In re McGregory*, 2006, 340 B.R. 915; *State v. Crockett* (Sup.1967) 419 S.W.2d 22 ("A lawyer forced, or attempting, to serve matters with conflicting interests cannot give to either the loyalty each deserves."). This is because "Sound public policy requires that an attorney should not represent conflicting interests." *Gardine v. Cottey* (1950) 230 S.W.2d 731, 360 Mo. 681. Defense Counsel's representation of Defendant is unavoidably tainted by their blatant violation of this basic tenet of Missouri law.

For at least two months, James Bennett, and the law firm Dowd and Bennett represented the Defendant Eric Greitens ("Defendant") in this criminal matter adverse to the State, while concurrently representing the State of Missouri in a proceeding directly averse to this proceeding. Over two months ago, following news reports that Defendant was using the "Confide" application for official State of Missouri business, Plaintiff Ben Sansone filed a "Sunshine Law" lawsuit against Defendant. This lawsuit explicitly sued Defendant "in his official capacity as the Governor of the State of Missouri." Exhibit 1 at 3. The law is unequivocally clear that "a suit against a state official acting in his or her official capacity is no different than a suit against the state itself." *Williston v. Vasterling*, 536 S.W.3d 321, 336 (Mo. Ct. App. 2017); Kentucky v. Graham, 473 U.S. 159, 105 (1985) ("suits against state officials in their official capacity…should be treated as suits against the state."); *Whitfield v. Brooks,* No. 4:15–CV–1386–SPM, 2015 WL 5316588 at *2 (E.D.MO Sept. 11, 2015) ("Naming a government official in his or her official capacity is the equivalent of naming the government entity that employs the official, in this case the State of Missouri."). The Attorney General of Missouri hired Dowd and Bennett to represent Defendant in that lawsuit against the State. *See*

Exhibit 2. Therefore, Dowd and Bennett represented the State beginning, at least, from January 5, 2018. *See id.* Dowd and Bennett continued this representation of the State until March 12, 2018.[1] *See* Kurt Erickson, St. Louis Post-Dispatch, *Greitens' Attorneys In Lawsuit Over Use Of Message-Destroying App Withdraw From Case*, (March 12, 2018), http://www.stltoday.com/news/local/crime-and-courts/greitens-attorneys-in-lawsuit-over-use-of-message-destroying-app/article_8129f009-28ef-5be0-8f02-116e785bcf2d.html. Attorneys from Dowd and Bennett have appeared and filed numerous motions for the State in the Confide matter.

From that initial January 5, 2018 email, there was the understanding that a conflict may have existed due to Dowd and Bennett's representation of Defendant in this criminal matter. *See* Exhibit 2 at 1 ("This letter confirms your appointment, due to a potential conflict"). Certainly, by January 11, 2018, the conflict with this case was clear. First Assistant and Solicitor D. John Sauer wrote that "Based on public statements made by James Bennett of the Dowd and Bennett firm . . . it appears that the same firm also represents Governor Greitens and/or his wife in their individual capacities relating to recently reported allegations of personal misconduct by the Governor." Exhibit 2 at 2. The purpose of this letter was to ensure the proper use of funds. *See id.* Despite being directly alerted to the existence of a concurrent conflict of interest, Dowd and Bennett did not withdraw.

On February 22, 2018 an Indictment was filed by the State charging Defendant in his personal capacity with Invasion of Privacy. Still Dowd and Bennett did not withdraw or disclose to this Court or the Circuit Attorney's Office the existence of the conflict of interest. It was only close to three weeks later that Dowd and Bennett withdrew from the Confide case. Thus, for more than two months Dowd and Bennett represented the State in the Confide matter knowing

[1] It was at this time that the Circuit Attorney's office became aware of this conflict of interest.

that they would also be involved in an adverse proceeding against the State. Three weeks of that time were *after* the Indictment was filed when Dowd and Bennett should have surely withdrawn and notified the Court and the Circuit Attorney's Office. This failure to do so warrants disqualification.

Missouri Supreme Court Rules of Professional Conduct 4-1.7 states in relevant part:

> **(a)** Except as provided in Rule 4-1.7(b), **a lawyer shall not represent a client if the representation involves a concurrent conflict of interest**. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client . . .
>
> **(b)** Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

MO R BAR Rule 4-1.7 (emphasis added); *see also State ex rel. Horn v. Ray*, 325 S.W.3d 500, 505–06 (Mo. Ct. App. 2010) ("except for its internal references to other paragraphs of Rule 4–1.7, the Missouri rule is identical to Rule 1.7 of the American Bar Association's Model Rules of Professional Conduct."). Thus, if a concurrent conflict of interest exists, Dowd and Bennett will have to demonstrate that *all* four parts of Rule 4-1.7(b) are met in order for there to not be a conflict of interest. As this Motion will show, Dowd and Bennett cannot hope to meet this burden. Therefore, the Court should grant State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

I. THE REPRESENTATION OF THE DEFENDANT IN HIS CRIMINAL MATTER AGAINST THE STATE IS DIRECTLY AVERSE TO REPRESENTING THE STATE IN THE CONFIDE MATTER.

The representation of the State in the Confide matter is clearly directly adverse to the simultaneous representation of Defendant in this criminal proceeding against the State. Comment 6 to the Rule explains "directly adverse" as, "a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, **even when the matters are wholly unrelated**." MO R BAR Rule 4-1.7 (emphasis added).

In this case, Dowd and Bennett acted as advocate in this matter against the State while at the same time representing the State in the Confide matter. This, by itself, would be enough to form a conflict of interest under Rule 4-1.7. *See id.* ("even when the matters are wholly unrelated"); *see also Commonwealth Land Title Ins. Co. v. St. Johns Bank & Tr. Co.*, No. 408CV1433CAS, 2009 WL 3069101, at *5 (E.D. Mo. Sept. 22, 2009) ("Even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required.").

However, providing further support for the existence of a conflict of interest, these matters are indisputably *related*. In the Confide lawsuit, Dowd and Bennett represented Defendant *qua* State in a lawsuit over the use of Confide since it "automatically destroys text messages, after the messages have been read, leaving no record or trace of the message exchange." Exhibit 1 at 3. In the instant matter, Defendant is charged with having "knowingly photographed" the victim and then having "subsequently transmitted the image." Indictment at 1. Thus, the application Confide is at the very heart of both matters. On information and belief, Confide is one of the applications that Defendant used to violate Missouri's Invasion of Privacy

law. The quintessential reasons for using an application like Confide is to exchange messages and photographs which one does not want others to see. The law maintains that dual representations do not have to be related in the slightest to be considered "directly adverse." Inasmuch as the dual representations are intimately related in matter at bar, Dowd and Bennett's representation of both the State and Defendant in a proceeding against the State is, *a fortiori* "directly adverse.": The question exists, if Dowd and Bennett as representatives of the State were aware evidence that the photograph of KS had been erased by the Confide or a similar application, would they have had an obligation to disclose that to their client, the State? This is the ethical conundrum created with, Dowd and Bennett's representing the State and being directly adverse to the State.

Hamilton v. City of Hayti is illustrative that the representations in this case constitute a conflict of interest. In this strikingly similar case, an attorney represented both a plaintiff suing the city of Hayti and the mayor in a criminal matter. *See Hamilton v. City of Hayti*, No. 1:14-CV-109 CEJ, 2014 WL 7157329 (E.D. Mo. Dec. 15, 2014). The city challenged this dual representation arguing that "confidential communications . . . concerning litigation strategies and other information" could be exchanged. *Id.* at *2. Applying Missouri Supreme Court Rule 4-1.7, the federal court ruled that "[t]he existence of an ongoing attorney-client relationship raises an **irrebuttable presumption that confidences are disclosed.**" *Id.* at *3 (emphasis added). The Court therefore ruled that "[t]o protect the principles of confidentiality and loyalty and integrity of these proceedings, therefore, **it is necessary to disqualify plaintiff's counsel.**" *Id.* (emphasis added).

The same logic applies here. Dowd and Bennett's represented the State in a lawsuit over Confide. There is an **irrebuttable presumption** that confidences regarding this matter were

disclosed in the course of representing the State. For over two months this irrebuttable presumption obtained. While receiving this confidential information, Dowd and Bennett was also representing Defendant in a matter where this information could be useful. Therefore, the Court should disqualify Dowd and Bennett.[2]

Further support is provided by *Process Controls Intern, Inc. v. Emerson Process Mgmt.*, No. 4:10CV645 CDP, 2011 WL 1791714 (E.D. Mo. May 10, 2011). In this additional, strikingly similar case, the plaintiff sought to disqualify Glenn Davis and the firm Gallop Johnson (collectively "Davis") who were representing the defendant. *See id.* at *3. In support of their claim they showed that another attorney at the firm represented plaintiff from January 2009 through December 2010. *See id.* Meanwhile, plaintiff showed that the complaint was filed in April 2010 and they provided evidence that Davis entered appearances on behalf of defendant Emerson in May 2010. *See id.* They further demonstrated that Davis had filed motions to dismiss the plaintiff's case during the concurrent conflict of interest. *See id.*

Similar to the instant case, the concurrent conflict of interest in *Process* was not discovered until after the dual representation had ceased to exist. It was not until March of 2011, at least 3 months after the last time the firm represented both parties that the conflict was discovered. *See id.* at *3. Similarly, here, the Circuit Attorney's Office only discovered the conflict of interest once Dowd and Bennett announced that they would be stepping down from representing Defendant *qua* State in the Confide matter. Predictably, in *Process*, the Defendant

[2] Even if it was only James Bennett who was hired to represent Defendant *qua* State, Missouri law is clear that this bars his entire law firm from engaging in work which would be a conflict of interest for him. *See* MO R BAR Rule 4-1.10 ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 4-1.7 or 4-1.9"); *see also Commonwealth Land Title Ins. Co. v. St. Johns Bank & Tr. Co.*, No. 408CV1433CAS, 2009 WL 3069101, at *4 (E.D. Mo. Sept. 22, 2009) ("The rule is based on the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client" and "the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated") (internal quotations omitted).

argued that Rule 4-1.7 did not apply because, by the time the claim was raised, there was no longer a concurrent conflict of interest. *See id.* They further argued that Davis only billed Defendant for 3.9 hours during that time. *See id.* at 4. The court disagreed and ruled that Rule 4-1.7 did nonetheless apply. The Court ruled that this was a concurrent conflict of interest covered by Rule 4-1.7 since, at some concurrent point, the "firm actually represented both Automation and Emerson during this litigation." *Id.* at 5. Therefore, the Court ruled that "this concurrent representation is prohibited by the Rules of Professional Conduct and subjects Davis and the Gallop Law Firm to disqualification." *Id.*

Process unequivocally demonstrates that there is a conflict of interest in this case. From January of 2018 through March 2018, Dowd and Bennett represented both the State and Defendant in a proceeding against the State. Therefore, like the courts in *Process* and *Hayti*, the Court should grant the State's Motion to Disqualify Defense Counsel.

What is striking here is that James Bennett and Dowd and Bennett were involved in the *Process* litigation. James Bennett and Dowd and Bennett were listed as co-counsel, with Davis, representing the defendant in that case. Dowd and Bennett watched as their co-counsel was disqualified for having a concurrent conflict of interest. Dowd and Bennett witnessed, first hand, how Missouri courts view conflicts of interest. Yet, for over two months they ignored this glaring conflict of interest. They filed a motion to dismiss in the instant case as well as several other motions, all while knowing that a conflict of interest existed. Dowd and Bennett knew that this was grounds for disqualification yet failed to act accordingly. Therefore, the Court should grant the State's Motion and disqualify Defense Counsel, James Bennett and Dowd and Bennett.

"[W]hen it is apparent that a conflict of interest exists that threatens a breakdown of the adversarial process, courts have the inherent power and duty to intervene." *State v. Planned*

Parenthood of Kansas, 66 S.W.3d 16, 20 (Mo. 2002). Allowing counsel to sneer in the face of conflict of interest rules certainly threatens the adversarial process. James Bennett is a partner of a respected law firm that certainly has conflict of interest checks in place. Dowd and Bennett was further a part of the *Process* litigation where it saw its co-counsel disqualified for the same violation of Missouri ethical rules. Therefore, "the public's interest in maintaining the fairness and integrity of the judicial process" and the State's interest in "a trial free from the risk that confidential information has been unfairly used" demands disqualification in this case. *Hallmark Cards, Inc. v. Hallmark Dodge, Inc.*, 616 F. Supp. 516, 521–22 (W.D. Mo. 1985) (internal quotations omitted).

II. DEFENSE COUNSEL FAILS TO MEET ALL FOUR OF THE ELEMENTS IN 4-1.7(b) NECESSARY TO ALLOW A LAWYER TO REPRESENT A CLIENT NOTWITHSTANDING A CONCURRENT CONFLICT OF INTEREST.

"[I]n all but a few cases, a per se rule of disqualification exists." *Commonwealth*, 2009 WL 3069101, at *5. Per Rule 4-1.7 a lawyer involved in a concurrent conflict of interest can withstand disqualification only by meeting *all* four of the factors in Rule 4-1.7(b). If Dowd and Bennett fails to meet any of the four, then the Court should disqualify them. As the succeeding sections will show, Dowd and Bennett cannot hope to do so. However, even if the Court finds that Dowd and Bennett does, when taking into account Dowd and Bennett's flagrant violation of the Rule the court should use its "inherent power and duty to intervene" and disqualify Dowd and Bennett. *Planned Parenthood*, 66 S.W.3d at 20.

A. Dowd and Bennett could not have reasonably believed that they could provide competent and diligent representation to each affected client.

From January of 2018 through March 12, 2018, Dowd and Bennett represented both parties – the State and Defendant. This is a textbook conflict of interest. It appears as though

Dowd and Bennett had an interest extrinsic to its professional obligation in representing Defendant Eric Greitens. Significantly, Dowd and Bennett's representation of Defendant *qua* State was on a pro-bono basis. *See* Kurt Erickson, St. Louis Post-Dispatch, *Greitens' Attorneys In Lawsuit Over Use Of Message-Destroying App Withdraw From Case*. This representation was at odds with Dowd and Bennett's own, articulated pro bono practices, which suggests personal reasons for the representation.[3] Despite the foregoing, on March 12, 2018, Dowd and Bennett announced that the firm would no longer represent Defendant in the Confide matter. *See id.* In its place, a new firm was hired to represent Defendant in that matter.[4] *See id.*

There is one obvious reason why Dowd and Bennett withdrew as counsel: counsel realized that it could not provide competent and diligent representation to each affected client. Defendant's spokesperson claimed that Dowd and Bennett withdrew due to the Attorney General's investigation having reached its completion and that Dowd and Bennett was only hired to defend Defendant from the Attorney General's probe. *See* Kurt Erickson, St. Louis Post-Dispatch, *Greitens' Attorneys In Lawsuit Over Use Of Message-Destroying App Withdraw From Case*. This is factually inaccurate. The Appointment Letter states that "At the request of the Office of the Governor, on January 5, 2018, the Attorney General's Office authorized Mr. James Bennett of Dowd and Bennett LLP to represent Governor Greitens and members of his

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[3] One would hope that free legal services to help the governor of Missouri is not what Dowd and Bennett intends to count towards its pro bono hours commitment in the 2018 Hon. Richard B. Teitelman Memorial St. Louis Pro Bono Challenge. *See* https://www.bamsl.org/index.cfm?pg=ProBono. Per the Pro Bono Challenge Announcement Letter, co-signed by Ed Dowd, it appears that pro bono hours are intended to be used to help "low income litigants," "small business owners," people "who cannot obtain effective legal representation either because of insufficient financial resources or lack of knowledge," and "pro-se litigants." *See https://s3.amazonaws.com/membercentralcdn/sitedocuments/bamsl/bamsl/0136/826136.pdf?AWSAccessKeyId=0D2JQDSRJ497X9B2QRR2&Expires=1521512103&Signature=odaz8aLwMP4kBAnIMrvyPpE3NM4%3D&response-content-disposition=inline%3B%20filename%3D%222018ProBonoChallengeLetter%2Epdf%22%3B%20filename%2A%3DUTF-8%27%272018ProBonoChallengeLetter%252Epdf.*

[4] The Circuit Attorney's office presumes this means that James Bennett is no longer representing Defendant either in the Confide matter.

administration sued in their *official* capacities in the matter *Sansone et al. v. Greitens, et al.*" Exhibit 2 at 1 (emphasis in original); *see also* Exhibit 3 (filings in *Sansone* case showing various actions by Attorneys Gore, Hoops, and Hoppenjans who are all employed by Dowd and Bennett, LLP); Exhibit 4 (motion in *Sansone* case filed under Dowd and Bennett's name). It strains credulity and assaults common sense to suggest that the firm Dowd and Bennett was not representing the State qua State. The clear misrepresentation that Dowd and Bennett was representing Defendant in the Confide matter, in his personal capacity only, appears only to make sense in an effort to avoid the force of this very conflict of interest argument.

Plainly, Dowd and Bennett could not provide competent and diligent representation to each client. On the one hand, they were representing the State, privy to all of the State's resources, discovery, and testimony regarding Confide. On the other hand, they represented Defendant against the State in a case where, as explained above, Confide an essential part of the case. Recognizing this tension, Dowd and Bennett withdrew from the Confide matter. However, they withdrew more than two months too late. For over two months they had access to State resources. When a conflict of interest exists, "Courts *presume* that confidential disclosures have been made." *See, e.g.*, *Hallmark*, 616 F. Supp. at 519–20.

Dowd and Bennett cannot meet its burden of proving that it could have reasonably believed that it could provide competent and diligent representation to both the State and the State's opposition. There is too much overlap between the two cases for any reasonable lawyer to think that he could do so. This is evidenced by Dowd and Bennett's decision to withdraw from the case and the subsequent misrepresentations made by Defendant's spokesperson regarding the reasons for withdrawal. Because Dowd and Bennett cannot hope to demonstrate that a reasonable lawyer would have thought he or she could provide competent and diligent representation to both

clients in such cases, Dowd and Bennett cannot meet this first of four factors all necessary to avoid disqualification. Moreover, Defendant has other counsel who are certainly in a position to provide competent and diligent representation. *See United States v. Anderson*, No. 4:14CR00246AGF (NAB), 2016 WL 194081, at *9 (E.D. Mo. Jan. 14, 2016) (ruling that new counsel could provide competent and diligent representation while here Defendant already has a team of non-conflicted lawyers in place). Therefore, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

B. This representation was prohibited by law.

At this point there is no need to demonstrate that Dowd and Bennett cannot satisfy the other three factors under Rule 4-1.7(b). Dowd and Bennett has the burden of proving *all* 4 and as just shown it cannot satisfy its burden as to the first factor. Nonetheless, the State will demonstrate that Rule 4-1.7(b)(1) is not the only factor that Dowd and Bennett cannot meet.

"[A] lawyer may not undertake representation that will require cross-examination of another client as an adverse witness." *Hamilton*, 2014 WL 7157329, at *4. In this case, Confide reasonably may become a keystone issue. At trial, Dowd and Bennett might be required to cross-examine State witnesses, such as investigators, about Confide. When Bennett signed on to represent Defendant in his personal capacity in this criminal matter, he undertook representation that would require him to cross-examine his other client, the State, about Confide. There was a just completed investigation into Defendant's practices in using Confide. Surely, State witnesses could testify about Defendant's use of Confide, which would require Dowd and Bennett to cross-examine them. This is unlawful. Therefore, Dowd and Bennett's dual representation was prohibited by law. Accordingly, even if the Court finds that they reasonably could have believed that they could provide competent and diligent representation to both adverse parties, Dowd and

Bennett fails to meet the second prong. Accordingly, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

There was no informed consent.

In addition to being unable to meet 4-1.7(b)(1) and (2), Dowd and Bennett cannot meet 4-1.7(b)(4). Of course, the failure to meet any one of them necessitates disqualification due to the concurrent conflict of interest. This is the third of four necessary conditions that Dowd and Bennett fails to meet.

The State's consent was necessary to avoid disqualification as a result of the concurrent conflict of interest. Under Missouri Rule 4-1.7, consent must be clearly given by all affected parties.

Dowd and Bennett's only possible argument for consent is the January 11, 2018, letter from the First Assistant and Solicitor of the Attorney General's Office to Defendant, James Bennett, and Dowd and Bennett. The letter stated:

> Based on public statements made by James Bennett of the Dowd and Bennett firm that have been reported in the media, it appears that this same firm also represents Governor Greitens and/or his wife in their individual capacities relating to recently reported allegations of personal misconduct by the Governor. We understand this law firm is also representing the Governor and/or members of his staff in connection with this Office's ongoing inquiry into their record-retention and open-records practices related to the publicly reported use of the "Confide" app.

Exhibit 2 at 2. Based on this letter, Dowd and Bennett has no legitimate argument that consent was given by the State.

First, there is no consent from the St. Louis Circuit Attorney's Office. No Missouri precedent reasonably stands for the proposition that the State Attorney General, let alone the First Assistant and Solicitor of the Attorney General's Office, could feasibly consent on behalf of the Circuit Attorney's Office. Not only are the Attorney General and the Circuit Attorney

different entities with different jurisdictional reach, but the Attorney General has no special statutory power to consent on behalf of the Circuit Attorney.[5] To illustrate, the Attorney General had no special insight into the workings of the St. Louis Circuit Attorney's Office. The Attorney General did not know if charges would be brought, and if they were, under what statutes and facts. It simply makes no sense to assert that, in such a circumstance, the Attorney General would have the power to consent on behalf of the Circuit Attorney.

Second, even if the Attorney General could for some reason consent on the behalf of a completely different office (i.e., the Circuit Attorney), Dowd and Bennett cannot reach the high burden of proving that the State gave informed consent, both under clear statutory language and Missouri common law.

Rule 4-1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MO R BAR Rule 4-1.0. The lawyer, in this case Dowd and Bennett, bears the burden to "make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." MO R BAR Rule 4-1.0 cmt. 6. There is no evidence to show that Dowd and Bennett made reasonable efforts to ensure that the State possessed reasonably adequate information.

The comments further elaborate that "ordinarily, **this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material**

[5] Unlike in other states, the Missouri Attorney General does not have the authority to step in and take over investigation from the Circuit Attorney's Office. *See* Mo. Ann. Stat. § 27.030 (West); *see also State v. Steffen*, 647 S.W.2d 146, 153 (Mo. Ct. App. 1982). In fact, the Missouri Attorney General has virtually nothing to do with the Circuit Attorney's Office.

advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives." MO R BAR Rule 4-1.7 cmt. 6 (emphasis added). In other words, simple awareness or acknowledgment of a conflict is not enough to constitute informed consent. Discussion of the facts, circumstances, advantages, and disadvantages is absolutely necessary. Dowd and Bennett cannot show that any discussion, let alone one regarding the material advantages and disadvantages of the conflict of interest, took place between Dowd and Bennett and the State. Therefore, under Rule 4-1.0, the State has not given informed consent.

Missouri case law further demonstrates the high standard of proof that Dowd and Bennett must reach in order to prove informed consent was given. *See generally In re Weier*, 994 S.W.2d 554, 558 (Mo. 1999); *see also Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595 (stating that attorney must expressly tell client about his adverse interest); *see generally Morton v. Forsee*, 155 S.W. 765, 775 (Mo. 1913). In Missouri, informed consent can only be obtained "after a full disclosure of the facts." *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. 1992). In order to prove full disclosure, the attorney "must prove by clear proof that his adverse interest was disclosed to the client and was **perfectly understood**." *In re Weier*, 994 S.W.2d 554 at 558 (quoting *Portman v Madesco*, 760 S.W.2D 457 (Mo. App. 1988)) (emphasis added). Thus, in order to show informed consent was given, Dowd and Bennett must show that they first disclosed their adverse interest and that it was "perfectly understood." *In re Weier*, 994 S.W.2d 554 at 558. In order to waive conflict of interest, all affected parties must give "knowing, intelligent, and voluntary" consent. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729 (Mo. 2004) (quoting *In re Schaeffer*, 824 S.W.2d 1 at 3). Even in cases where conflict of interest was more technical than actual, "representation of adverse interests could be

only **after full and complete disclosure and with express consent of all parties concerned.**" *Acorn Printing Co. v. Brown*, 385 S.W.2d 812, 817 (Mo. App. 1964) (Emphasis added).

Dowd and Bennett has no basis upon which it can posit that the Attorney General "perfectly understood" Dowd and Bennett's adverse interest, which forms the basis any claim of informed consent. In *In re Weier,* an attorney represented a partnership of doctors who owned a medical device that was leased to a corporation in which the attorney was a shareholder. *In re Weier*, 994 S.W.2d 554, 555. Thus, the attorney had a conflict of interest in that his financial interest in the corporation conflicted with his representation of the doctors. Id at 555. As in the case at hand, there was some evidence to suggest that some of the affected parties were aware of the conflict. Id. at 556. However, the court held that the attorney did not reach the standard necessary to meet full disclosure, because the conflict of interest was "never clearly defined" and Mr. Weier "remained idle where confusion regarding his representation persisted." Id. at 557. The same logic should follow in the case at hand. Mere awareness of a conflict, as demonstrated by the letter from the Attorney General's Office, is simply not enough to constitute disclosure. Without this disclosure, the claim for informed consent fails completely.

It is obvious that the Attorney General cannot consent on behalf of the Circuit Attorney. Regardless, there was no informed consent rising to the level necessary to withstand disqualification for a concurrent conflict of interest. There is no evidence that there was communication in which Dowd and Bennett explained all of the advantages and disadvantages of the dual representations. There is similarly no evidence that the adverse interest was perfectly understood. In fact, because the Attorney General was not privy to the Circuit Attorney's knowledge and decision-making it is impossible for him to have perfectly understood the extent of the adverse interest. Therefore, this is yet another element which Dowd and Bennett cannot

meet. Therefore, Dowd and Bennett has no hope of being a rare exception to disqualification in the case of a concurrent conflict of interest.

It is overwhelmingly clear that a concurrent conflict of interest existed. It is equally clear that Dowd and Bennett cannot hope to meet *all* four of the elements which can justify non-disqualification. When considering the issue in light of Bennett's open flouting of Missouri's conflict of interest law, it is unambiguous that disqualification is the proper remedy in this case. Therefore, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

III. EVEN IF THE COURT FINDS THAT THERE WAS NO CONCURRENT CONFLICT OF INTEREST, DOWD AND BENNETT VIOLATED ITS DUTIES TO A FORMER CLIENT BY REPRESENTING THE DEFENDANT IN THIS LITIGATION AND THEREFORE MUST BE DISQUALIFIED.

As persuasively shown above, James Bennett violated Rule 4-1.7 since him and his firm, Dowd and Bennett, had a concurrent conflict of interest with the State while representing Defendant in this proceeding against the State. Furthermore, Dowd and Bennett cannot meet all four elements of Rule 4-1.7(b), which would allow the Court to not disqualify Dowd and Bennett. Therefore, disqualification based on Rule 4-1.7 is the proper route for this Court to take.

Moreover, the court in *Process* unequivocally proved that even if the concurrent conflict of interest is no longer happening, as long as there was a concurrent conflict at some point in the litigation, Rule 4-1.7 applies. *See Process*, 2011 WL 1791714 at *5. However, even if the Court declines to apply the *Process* precedent, Dowd and Bennett must still be disqualified.

Pursuant to Rule 4-1.9 of the Missouri Supreme Court Rules of Professional Conduct, an attorney may not represent a new client whose interests in "the same or a substantially related matter" are "materially adverse" to the interests of a former client. Mo. S. Ct. R. Prof. Conduct

4-1.9(a); *see also Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591, 600 (Mo. Ct. App. 2010) (same). Rule 4-1.9(a) is "prophylactic, aimed at "preventing even the potential that a former client's confidences and secrets may be used against him." *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 932 (8th Cir. 2014) (citing *In re Carey*, 89 S.W.3d 477, 493 (Mo. 2002)); *see also Fant v. City of Ferguson*, No. 4:15-CV-00253-AGF, 2017 WL 3392073, at *3 (E.D. Mo. Aug. 7, 2017) (same).

Attorney disqualification is granted under this rule when: (1) an attorney had a former attorney-client relationship with the movant; (2) the interests of the attorney's current client are materially adverse to the movant's interests; and (3) the current representation involves the same or a substantially related matter as the attorney's former representation of the movant. *Id.* at 600-601. Like Rule 4-1.7, informed consent, confirmed in writing, is an exception to Rule 4-1.9. Dowd and Bennett's concurrent representation of the State in the Confide case, and of Defendant in this case, easily meet these three prongs, and, since there was no informed consent, the Court should grant the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

A. An attorney-client relationship existed between the State and Dowd and Bennett.

As explained above, Dowd and Bennett had an attorney-client relationship with the State of Missouri. He represented Defendant in his official capacity as Governor of Missouri in the *Sansone* lawsuit. *See, e.g.*, *Williston*, 536 S.W.3d at 336 ("a suit against a state official acting in

his or her official capacity is no different than a suit against the state itself.").[6] Therefore, the first prong of this test is easily satisfied.

B. The State's interest is materially adverse to Dowd and Bennett's current client's interest.

Whether a former client and current client have "materially adverse" interests is "not a difficult question" when two clients are "directly involved" in the same litigation. *See Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 933 (8th Cir. 2014) (quoting *Simpson Performance Prods., Inc. v. Robert W. Horn, P.C.*, 92 P.3d 283, 288 (Wyo.2004)). Here, the conflict is obvious: Dowd and Bennett's former client in the Confide case, the State, is pursuing criminal charges against Dowd and Bennett's new client, Defendant. Because both clients are directly involved in the current litigation, the second prong is also easily met.

Moreover, under this second prong, a key aspect is to "evaluate the degree to which the current representation may actually be harmful to the former client." *Id.* (internal quotations omitted). Here, the current representation of Defendant directly harms the former client, namely, the State. The State is attempting to prove Defendant's guilt. Dowd and Bennett is trying to impede the State's efforts, as the defense is obligated to do. Thus, Dowd and Bennett's instant representation injures his former client by definition.

C. The matters are substantially related.

Finally, because the Confide application plays a significant role in both cases, the two are "substantially related." Matters are considered substantially related if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially

[6] "Payment for legal services is not a prerequisite to the formation of an attorney-client relationship." *Polish Roman Catholic St. Stanislaus Par. v. Hettenbach*, 303 S.W.3d 591, 601 (Mo. Ct. App. 2010).

advance the client's position in the subsequent matter. Mo. S. Ct. R. Prof. Conduct 4–1.9, Cmt. 3. To obtain disqualification, only the "*possibility*, or appearance of the possibility that the attorney *may have* received confidential information during the prior representation" is necessary. *See In re Carey*, 89 S.W.3d 477, 492 (Mo. 2002) (emphasis added). As explained previously, issues involving Defendant's use of Confide are at the heart of both cases. While representing the State in the Confide case, there is little question that Dowd and Bennett was privy to information pertaining to Defendant's use of Confide. This is precisely the type of information that could be used to aid Dowd and Bennett's defense of Defendant in this case. Thus, there is a very strong "possibility" that Dowd and Bennett received information that could be used to aid Defendant. Therefore, even if the Court rules that there was not a concurrent conflict of interest, the Court should still disqualify Dowd and Bennett under Rule 4-1.9.

C. There was no informed consent.

As explained above, there was no consent to this conflict of interest. Therefore, this section will provide just a quick summary. *First*, the Attorney General cannot consent on behalf of the Circuit Attorney. *Second,* Dowd and Bennett cannot prove that he made reasonable efforts to make sure the Attorney General possessed enough information, including that he understood the advantages and disadvantages of the decision. Moreover, the Attorney General must have perfectly understood the adverse interest. Not only is there no proof that this occurred, but since the Attorney General did not know what was happening in the Circuit Attorney's Office it was simply impossible for him to have perfectly understood the situation. Therefore, there was no consent to this dual representation.

The interconnectedness of material issues between the Confide case and this litigation, most importantly Defendant's role and usage of the Confide application, is undeniable. This

Court has a duty to disqualify Dowd and Bennett if there is even the appearance of the possibility that Dowd and Bennett received confidential information from its representation of the State. *See Carey*, 89 S.W.3d at 492. The facts here overwhelmingly satisfy all three elements required to disqualify counsel under Rule 4-1.9. When, like here, a substantial relationship is found the Court "presume[s] that confidences were disclosed for conflict of interest purposes." *Id.* Similarly, it is clear that the high burden necessary for consent cannot be met here. Therefore, even if the Court rules that there was no concurrent conflict of interest, in order to ensure the integrity of this litigation and to prevent further violation of Dowd and Bennett's duties to its former client, the State, the Court should disqualify Dowd and Bennett as Defendant's Counsel for violating Rule 4-1.9 Duties to Former Clients.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Honorable Court to GRANT the State's Motion to Disqualify Defense Counsel James Bennett and Dowd and Bennett.

Respectfully submitted,

/s/KIMBERLY M. GARDNER
KIMBERLY M. GARDNER #56780
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

Ronald S. Sullivan Jr.
Special Prosecutor

/s/Robert Steele
Robert Steele #42418
Assistant Circuit Attorney
steeler@stlouiscao.org
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St. Louis, MO 63101
314-622-4941

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

BEN SANSONE, on behalf of
THE SUNSHINE PROJECT

Plaintiff,

v.

ERIC GREITENS, Governor of Missouri

Serve:
Office of the Governor
State Capitol Building, Room 218
Jefferson City, Missouri 65102

and

MICHELLE HALLFORD, Custodian of
Records for Missouri Governor Greitens

Serve:
Office of Administrator
301 West High Street, Room 270
Jefferson City, Missouri 65101

and

JOHN DOES 1 through 20.

Defendants.

JURY TRIAL DEMANDED

PETITION SEEKING INJUNCTION AGAINST MISSOURI GOVERNOR ERIC GREITENS AND HIS STAFF FROM USING COMMUNICATION PURGING SOFTWARE AND CLAIM FOR CONSPIRACY AND DAMAGES FOR VIOLATING MISSOURI'S SUNSHINE LAWS AND MISSOURI'S STATE AND LOCAL RECORDS LAW

1. The use of automatic communication destroying software by elected officials and government employees is illegal and constitutes an ongoing conspiracy to violate the Missouri

Sunshine law and Missouri State and Local Records law, not to mention a significant affront to the open government and democratic traditions of Missouri and the United States.

2. Pursuant to §109.270 RSMo "all records made or received by or under the authority of or coming into the custody, control or possession of state or local officials in the course of their public duties are the property of the state or local government and *shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of*, in whole or in part, except as provided by law." (emphasis added)

3. The use of automatic communication destruction software, like *Confide*, violates both Missouri's State and Local Records law and the Missouri Sunshine Act.

4. Defendants' failure (and/or inability) to provide access to the requested records and defendant's alleged use of automatic communication destroying software constitute knowing and purposeful violations of the Sunshine Law and Missouri's State and Local Records Laws.

5. This action is brought pursuant to the Missouri "Sunshine Law", Chapter § 610 of the Missouri Revised Statutes and Missouri "State and Local Records Law" Chapter §109 of the Missouri Revised Statutes.

6. This Court has jurisdiction over this action pursuant to § 610.010, RSMo. *et seq*.

7. This Court has jurisdiction to issue injunctions to enforce provisions of the Sunshine Law pursuant to § 610.030, RSMo and Chapter § 109 RSMo.

8. Venue for this action is proper in this Court pursuant to Mo. Rev. Stat. § 610.027(1), as the principal place of business for the governor of the State of Missouri is Cole County, Missouri.

9. Plaintiff Ben Sansone is a resident of the state of Missouri.

10. Defendant Eric Greitens is being sued in his official capacity as the governor of the state of Missouri.

11. Defendant Michelle Hallford, being sued in her official capacity, is the custodian of records for the governor responsible for the maintenance of the governor's records and for making such documents available for inspection and copying pursuant to Mo. Rev. Stat. § 610.023.

12. Defendants John Does 1 through 20 are staff of the governor or employees of the state of Missouri otherwise governed by the Sunshine Act and/or State and Local Records Law and are alleged to have automatically destroyed government communications while employed by the state of Missouri.

13. On December 7, 2017, the Kansas City Star reported that Gov. Eric Greitens and his senior staff use a mobile phone application *Confide* that automatically destroys text messages, after the messages have been read, leaving no record or trace of the message exchange, raising concerns that these actions violated Missouri Sunshine laws.[1]

14. On December 20, 2017, Plaintiff Ben Sansone submitted a written Sunshine request, by and through counsel, Mark Pedroli, upon the custodian of records for Defendant Governor Eric Greitens seeking documents related to the governor's alleged use of text message and communication destroying software, download and use logs, and retention policies.

15. On the same day, December 20, 2017, Missouri Attorney General Josh Hawley also announced an inquiry into the matter.

16. Pursuant to § 610.023(3) RSMo, the custodian of records for the Governor had three business days in which to act upon the Sunshine request. On December 26, 2017, Sarah Madden,

[1] http://www.kansascity.com/news/politics-government/article188405944.html

Special Counsel for Governor Greitens, mailed a letter in reply that stated, in part, that she "would be able to provide a response or a time and a cost estimate (if applicable) for records you have requested in no more than twenty business days. We will contact you at that time."

17. Pursuant to Mo. Rev. Stat 610.023(3) "If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection".

18. Special Counsel's letter didn't give any explanation, let alone a statutory "detailed explanation" of the cause for further delay. In fact, by responding that she "would be able to provide ***a response***" a full month later, she is suggesting, quite accurately, that her first response was really not a response at all, and certainly not a legally sufficient Sunshine response.

19. In fact, the Special Counsel's letter didn't even commit to the notion that Plaintiff would in fact ultimately be granted access to the requested records. This vague and non-responsive response, lacking in any explanation, is a facial violation of the Sunshine law and constitutes a de facto denial of access.

20. Therefore, Defendant governor and Defendant custodian of records is in violation of Mo. Rev. Stat 610.023(3) and (4).

21. The information and documents requested by Plaintiff are open records.

COUNT I: IMMEDIATE INJUNCTION AGAINST ALL DEFENDANTS

22. Plaintiff incorporates by reference and restates allegations 1 through 21 above.

23. The CLEAR AND IMMEDIATE interests of the State of Missouri and its citizens demand this court issue an IMMEDIATE INJUNCTION enjoining the governor, his staff, and all employees of the governor's office from using the software *Confide* and/or any other automatic communication destruction software. FURTHEMORE, along with the injunction, it is

in the public interest for this court to ORDER ALL DEFENDANTS to provide an immediate accounting (within three days) of the names of all John Does and Missouri government employees who have used or were using text message and/or communication destroying software so that this court can fully understand the breadth of the document destruction.

24. AN IMMEDIATE INJUNCTION will prevent more government communications from being destroyed in violation of Missouri's "State and Local Records Law", Chapter 109, specifically §109.270 RSMo, and in violation of Missouri's "Sunshine Law", particularly those communications not yet destroyed in the period between the date of this lawsuit and this court's final judgment. *An immediate injunction has the potential to preserve thousands of government communications*. In the absence of an immediate injunction, potentially thousands of government communications and/or government property will be destroyed. The risk of harm and loss of government records clearly and significantly outweigh any possible prejudice to defendants of preventing them from destroying more government communications.

25. AN IMMEDIATE INJUNCTION will not prejudice the governor or his staff in any way whatsoever. In that respect, this request for injunctive action is rare. The governor's remedy is simple, as simple as it was for governors and staff members before them; to simply communicate through other advanced means of communications, including SMS or text messaging, emailing, and/or one of the many forms of communication that do not self-immolate like a Mission Impossible directive. The injunction will not harm, prevent, or slow down government communication. An injunction will prevent the immediate, automatic, and permanent destruction of government records.

COUNT II – VIOLATION OF MISSOURI'S SUNSHINE LAWS AGAINST THE GOVERNOR AND CUSTODIAN OF RECORDS

26. Plaintiff incorporates by reference and restates allegations 1 through 25 above.

27. On December 20, 2017, the custodian of records for the governor received an Sunshine Request from Ben Sansone, by and through his counsel, Mark Pedroli.

28. The governor and the custodian of records failed to provide access within three days, violating Mo Rev. Stat 610.023(3).

29. The governor and the custodian of records failed to provide a detailed explanation of the cause of delay, within three days, violating Mo. Rev. Stat 610.023(3).

30. Both violations were knowing and purposeful.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count I in his favor and against Defendants Custodian and Governor; find that these defendants acted knowingly and purposefully; award the maximum civil penalty for both blatant violations by the highest office in the state; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT III: CIVIL CONSPIRACY TO VIOLATE MISSOURI'S SUNSHINE LAWS AGAINST ALL DEFENDANTS

31. Plaintiff incorporates by reference and restates allegations 1 through 30 above.

32. A claim for civil conspiracy must establish that: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged. Gettings v. Farr, 41 S.W.3d 539, 542 (Mo. App. E.D. 2001) (citing Gibson v. Brewer, 952 S.W.2d 239, 245 (Mo. banc 1997).

33. It is alleged that the governor, Custodian, and John Does 1 through 20, by using automatic message destroying software, *conspired to prevent public access to public records* by automatically destroying said government records.

34. Potentially thousands of government communications that were knowingly and purposefully destroyed, including communications by Missouri Governor Eric R. Greitens.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count III in his favor and against all Defendants; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT IV: VIOLATION OF MISSOURI'S STATE AND LOCAL RECORDS LAW

35. Plaintiff incorporates by reference and restates allegations 1 through 34 above.

36. Pursuant to the State and Local Records Law, a "record" is defined as any "document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business" §109.210(5) RSMo. According to the Secretary of State, this definition includes those records created, used and maintained in electronic form.

37. The use of automatic communication destroying software is a violation of Chapter 109 of Missouri Revised Statutes.

38. Based on information and belief, troves of government records have been destroyed because of the actions of all Defendants.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count IV in his favor and against all Defendants; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT V: CIVIL CONSPIRACY TO VIOLATE MISSOURI'S STATE AND LOCAL RECORDS LAWS AGAINST ALL DEFENDANTS

39. Plaintiff incorporates by reference and restates allegations 1 through 38 above.

40. It is alleged that the governor, custodian of records, and John Does 1 through 20, by using automatic message destroying software, separate from their obligations under the Sunshine Act, also *conspired to destroy public records* in violation of Chapter 109 RSMo, the State and Local Records Law.

41. Potentially thousands of government communications were destroyed, in violation of Chapter 109 RSMo, including communications by Missouri Governor Eric R. Greitens.

WHEREFORE, Plaintiff Ben Sansone respectfully requests that the Court enter judgment on Count V in his favor and against all Defendants; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Mark J. Pedroli, MBE 50787
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ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JOSHUA D. HAWLEY
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

January 5, 2018

James F. Bennett
DOWD BENNETT LLP
7733 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105

Re: ***Sansone, et al. v. Greitens, et al.*, No. 17AC-CC00635 (Cole County Circuit Court)**

Dear Mr. Bennett:

This letter confirms your appointment, due to a potential conflict, to represent the defendants in the above-referenced case. This appointment extends only to the representation of those defendants in connection with that pending litigation, and not to any other matter.

A copy of this office's billing policy for outside counsel is enclosed, and its provisions are made a part of the terms for your appointment. Pursuant to that policy's provisions on staffing, we note that this appointment is of you personally and not an appointment of your firm; if you wish to use the assistance of other attorneys or paralegals in this matter, we require that they be approved as provided in the attached policy.

This letter confirms your billing rate of one hundred forty dollars ($140.00) per hour. Please direct all billing statements to me in the care of the Attorney General's Office.

Sincerely,

D. John Sauer
First Assistant and Solicitor

cc: Lucinda Luetkemeyer

ATTORNEY GENERAL OF MISSOURI

JOSHUA D. HAWLEY
ATTORNEY GENERAL

JEFFERSON CITY
65102

P.O. BOX 899
(573) 751-3321

January 11, 2018

Lucinda Luetkemeyer
Counsel to the Governor
Office of Governor Eric Greitens
(573) 751-0290
(573) 526-3291 (fax)
Lucinda.Luetkemeyer@governor.mo.gov

Re: *Sansone, et al. v. Greitens, et al.*, No. 17AC-CC00635 (Cole County Circuit Court) – Scope of representation and LEF coverage

Dear Ms. Luetkemeyer:

At the request of the Office of the Governor, on January 5, 2017, the Attorney General's Office authorized Mr. James Bennett of Dowd Bennett LLP to represent Governor Greitens and members of his administration sued in their *official* capacities in the matter *Sansone et al. v. Greitens, et al.*, No. 17AC-CC00635 in Cole County Circuit Court. This representation was authorized at the standard government rate of $140 per hour. That suit involves allegations of Sunshine Law violations by the Governor's Office. This Office authorized outside representation, at your request, because of this Office's own pending review of Sunshine Law violations allegedly committed by the Office of the Governor. Our letter authorizing outside counsel clearly stated that "[t]his appointment extends only to the representation of those defendants in connection with that pending litigation, and not to any other matter."

Based on public statements made by James Bennett of the Dowd Bennett firm that have been reported in the media, it appears that this same firm also represents Governor Greitens and/or his wife in their individual capacities relating to recently reported allegations of personal misconduct by the Governor. We understand this law firm is also representing the Governor and/or members of his staff in connection with this Office's ongoing inquiry into their record-retention and open-records practices related to the publicly reported use of the "Confide" app.

The purpose of this letter is to emphasize that the State Legal Expense Fund (LEF) will not cover any charges or expenses related to legal representation of the Governor in his *personal* capacity for personal matters. The Attorney General's Office will not authorize payment on any bills that appear to relate to such matters. We remind you and counsel to engage in careful separation and accounting of time and expenses incurred in these distinct representations, and to

ensure that no invoice submitted to the Attorney General's Office includes any charges that were not fairly and directly incurred in representing the defendants in *Sansone v. Greitens*.

Please let me know if you have any questions.

Sincerely,

D. John Sauer
First Assistant and Solicitor

cc: James Bennett, Dowd Bennett LLP

17AC-CC00635 - BEN SANSONE V ERIC R GREITENS ET AL (E-CASE)

This information is provided as a service and is not considered an official court record.

Sort Date Entries: (•) Descending ( ) Ascending **Display Options:** All Entries

03/15/2018 **Hearing Scheduled**

Scheduled For: 04/06/2018; 3:00 PM ; JON EDWARD BEETEM; Cole Circuit

Hearing Held

Plaintiff by Atty Pedroli. Atty's Thompson and Russell enter for Defendant's/ Case set for argument on 04/06/2018 at 3 pm, 1 hour allowed. Attys Gore, Hoops & Hoppenjans granted leave to withdraw. Discovery due on 04/10/2018. /s/JEB/jw

Scheduled For: 03/15/2018; 8:45 AM ; JON EDWARD BEETEM; Cole Circuit

03/13/2018 **Cert Serv of Interrog Filed**

Cert of Serv Interrogatories to Gov Greitens and Custodian Hallford; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Response Filed

Response to Motion for Protective Order and Stay of Discovery; Exhibit A; Exhibit B; Electronic Filing Certificate of Service.

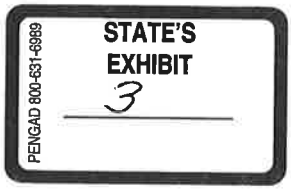
Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

03/12/2018 **Proposed Order Filed**

Proposed Order Granting Motion for Withdrawal of Counsel;Forwarded to Div I queue for Judge's review. msh

Filed By: JEFFREY SCOTT RUSSELL



Motion of Withdrawl of Counsel

Motion for Withdrawal of Counsel; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance for Barbara Smith; Electronic Filing Certificate of Service.

Filed By: BARBARA ANNE SMITH

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance; Electronic Filing Certificate of Service.

Filed By: JEFFREY SCOTT RUSSELL

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance; Electronic Filing Certificate of Service.

Filed By: ROBERT M. THOMPSON

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Suggestions in Support

Suggestions in Support of Motion for Protective Order and to Stay Discovery; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit E; Exhibit F; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Proposed Order Filed

Proposed Order Granting Motion for Protective Order and to Stay Discovery;Forwarded to Div I queue for Judge's review. msh

Filed By: JEFFREY ROBERT HOOPS

Motion to Stay

Motion for Protective Order and to Stay Discovery; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

03/07/2018 **Order Granting Leave**

By consent of all the parties, Plaintiff is granted leave to file their First Amended Petition. Defendants to file responsive pleading within 30 days of filing. Same deemed filed today. /s/JEB/jw

Filed By: JON EDWARD BEETEM

03/06/2018 **Certificate of Service**

Certificate of Service Interrogatories and Second Request for Admissions; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Consent to Ruling Filed

Amended Petition Consent order to file amended petition; Plaintiffs Amended Petition; Electronic Filing Certificate of Service.Forwarded to Div I queue for Judge's review. msh

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

03/02/2018 **Notice of Hearing Filed**

Notice of Hearing; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Conference Call Scheduled

Associated Entries: 03/15/2018 - Hearing Held

Scheduled For: 03/15/2018; 8:45 AM ; JON EDWARD BEETEM; Cole Circuit

Hearing Continued/Rescheduled

Hearing Continued From: 03/02/2018; 9:00 AM Case Review

02/16/2018 **Affidavit Filed**

Affidavit in Support of Motion to Dismiss; Exhibit 1; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Suggestions in Support

Suggestions in Support of Motion to Dismiss; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit E; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Motion to Dismiss

Motion to Dismiss; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

02/13/2018 **Order for Continuance**

Consent motion is sustained. Defendants' Answer due 2/16/18. /s/JEB/msh

Filed By: JON EDWARD BEETEM

Associated Entries: 02/09/2018 - Motion for Continuance

02/09/2018 **Cert Serv of Prod of Docs, etc**

Certificate of Service Request for Production of Documents; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Motion for Continuance

Motion for Continuance of the Date on which Defendants Response to Plaintiffs Petition is Due; Affidavit in Support of Defendants Motion for Continuance; Electronic Filing Certificate of Service.

Filed By: GABRIEL E. GORE

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Associated Entries: 02/13/2018 - Order for Continuance

02/08/2018 **Cert Serv of Req for Admission**

CERTIFICATE OF SERVICE - RFA; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

02/05/2018 **Case Review Scheduled**

Associated Entries: 03/02/2018 - Hearing Continued/Rescheduled

Scheduled For: 03/02/2018; 9:00 AM ; JON EDWARD BEETEM; Cole Circuit

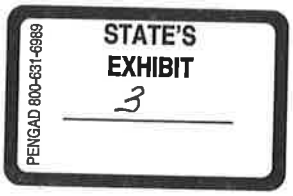
02/02/2018 **Judge/Clerk - Note**

Evidence taken by Court Reporter K. Asel on 2-2-18.

Hearing Held

Plaintiff by Atty Pedroli. Respondent by Atty Gore. Respondent by Hoppenjans. Parties present argument. Case set for status review on 03/02/2018 at 9 am. This is a law day docket only and not a day on which trials and hearings will be conducted. Counsel to arrange a telephone conference at least 72 hours prior to that date and time in lieu of appearance. The court does not conduct telephone conferences on law days. TRO denied on issue of irreparable injury. No other findings made. /s/JEB/jw

Scheduled For: 02/02/2018; 1:00 PM ; JON EDWARD BEETEM; Cole Circuit



02/01/2018 **Amended Affidavit Filed**

Amended Affidavit in Support of Suggestions in Opposition to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction; Exhibit 1; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

01/31/2018

Entry of Appearance Filed

Entry of Appearance of Lisa S Hoppenjans on behalf of Eric Grietens and Michelle Hallford; Electronic Filing Certificate of Service.

Filed By: LISA SUZANNE HOPPENJANS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Hearing Scheduled

Associated Entries: 01/31/2018 - Case Review Held

Associated Entries: 02/02/2018 - Hearing Held

Scheduled For: 02/02/2018; 1:00 PM ; JON EDWARD BEETEM; Cole Circuit

Case Review Held

Plaintiff by Atty Pedroli. Respondent by Atty Gore. Co-Counsel Hoops for Respondent. Case reviewed. Case set for TRO HEARING ONLY on 02/02/2018 at 1 pm. Counsel to bring draft order, made in compliance with Rule 92 to hearing. /s/JEB/jw

Scheduled For: 01/31/2018; 2:00 PM ; JON EDWARD BEETEM; Cole Circuit

Response Filed

Response to Motion for Continuance; Electronic Filing Certificate of Service.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

01/30/2018

Affidavit Filed

Affidavit in Support of Suggestions in Opposition to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction; Exhibit 1; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Suggestions in Opposition

Suggestions in Opposition to Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction; Exhibit A; Exhibit B; Exhibit C; Exhibit D; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Affidavit Filed

Affidavit in Support of Motion to Continue; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

Motion for Continuance

Motion to Continue; Electronic Filing Certificate of Service.

Filed By: JEFFREY ROBERT HOOPS

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

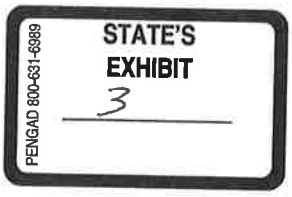
Hearing Scheduled

Associated Entries: 01/31/2018 - Case Review Held

Scheduled For: 01/31/2018; 2:00 PM ; JON EDWARD BEETEM; Cole Circuit

Amended Notice of Hrng Filed

Amended notice of hearing for Jan 31 2pm; Electronic Filing Certificate of Service.



Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Affidavit in Support of Pet
Affidavit in support of TRO; Electronic Filing Certificate of Service.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Mot for Temp Restraining Order
Amended Motion for TRO; Electronic Filing Certificate of Service.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

01/29/2018

Order for Change of Judge
Change of judge granted. Case assigned to DIV 1 for assignment. PSJ/rlo

Conference Call Held
Attorneys Pedrolli and Gore appear by phone. Change of judge granted. Case assigned to DIV 1 for assignment. Hearing cancelled for 1-30-18. PSJ/rlo
Scheduled For: 01/30/2018; 2:00 PM ; PATRICIA S JOYCE; Cole Circuit

Judge Assigned

01/26/2018

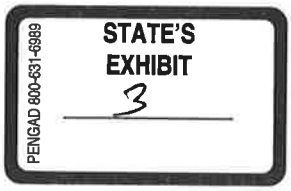
Notice of Hearing Filed
Notice of Hearing; Electronic Filing Certificate of Service.
Filed By: JEFFREY ROBERT HOOPS
On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Application Filed
Application for Change of Judge; Electronic Filing Certificate of Service.
Filed By: JEFFREY ROBERT HOOPS
On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

01/23/2018

Notice of Hearing Filed
Notice of hearing TRO and amended notice of prior hearing to correct date.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Mot for Temp Restraining Order
Motion for TRO and Preliminary Injunction.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE



Motion for Leave
Motion leave amend petition by interlineation.
Filed By: Mark Joseph Pedroli
On Behalf Of: BEN SANSONE

Entry of Appearance Filed
Entry of Appearance of Jeffrey R Hoops on behalf of Eric Grietens and Michelle Hallford; Electronic Filing Certificate of Service.
Filed By: JEFFREY ROBERT HOOPS
On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Entry of Appearance Filed

Entry of Appearance of Gabriel E Gore on behalf of Eric Grietens and Michelle Hallford; Electronic Filing Certificate of Service.

Filed By: GABRIEL E. GORE

On Behalf Of: ERIC R. GREITENS, CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR

Hearing Scheduled

Associated Entries: 01/29/2018 - Conference Call Held

Scheduled For: 01/30/2018; 2:00 PM ; PATRICIA S JOYCE; Cole Circuit

01/20/2018 **Notice of Hearing Filed**

NOTICE OF HEARING.Forwarded to Div IV queue for Judge's review. msh

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

01/16/2018 **Corporation Served**

Document ID - 17-SMCC-1025; Served To - CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR; Server - COLE COUNTY SHERIFF'S DEPARTMENT; Served Date - 12-JAN-18; Served Time - 13:09:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - Served to Debbie Gaeller, designee. jlb

Corporation Served

Document ID - 17-SMCC-1024; Served To - GREITENS, ERIC R.; Server - COLE COUNTY SHERIFF'S DEPARTMENT; Served Date - 12-JAN-18; Served Time - 13:09:00; Service Type - Sheriff Department; Reason Description - Served; Service Text - Served to Debbie Gaellner, designee. jlb

12/29/2017 **Summons Issued-Circuit**

Document ID: 17-SMCC-1025, for CUSTODIAN OF RECORDS FOR MISSOURI GOVERNOR.Attorney to print two copies of service document created to issue for service and return. Service copy to include filings to serve, if applicable. msh

Summons Issued-Circuit

Document ID: 17-SMCC-1024, for GREITENS, ERIC R..Attorney to print two copies of service document created to issue for service and return. Service copy to include filings to serve, if applicable. msh

Confid Filing Info Sheet Filed

Filing Info Sheet.

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Filing Info Sheet eFiling

Filed By: Mark Joseph Pedroli

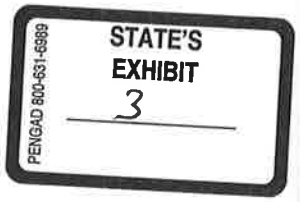
Pet Filed in Circuit Ct

PETITION FOR INJUNCTION AND DAMAGES. msh

Filed By: Mark Joseph Pedroli

On Behalf Of: BEN SANSONE

Judge Assigned



IN THE CIRCUIT COURT OF COLE COUNTY MISSOURI
NINETEENTH JUDICIAL CIRCUIT

BEN SANSONE, on behalf of THE SUNSHINE PROJECT, Plaintiff,	)	
	)	Case No. 17AC-CC00635
v.	)	
	)	Division No. 1
ERIC GREITENS, Governor of Missouri, et al., Defendants	)	

MOTION FOR PROTECTIVE ORDER AND TO STAY DISCOVERY

Defendants Eric Greitens, Governor of Missouri, and Michelle Hallford, Custodian of Records for the Office of the Governor, through counsel, pursuant to Missouri Rule of Civil Procedure 56.01(c)(2), move this Court to enter an Order staying all discovery in this matter and to enter a protective order relieving Defendants from responding to Plaintiff's outstanding discovery requests pending resolution of Defendants' motion to dismiss Plaintiff's Petition

1. Plaintiff filed his Petition on December 29, 2017, alleging violations of the Sunshine Law and the State and Local Records Law, Chapter 109 RSMo, related to the use of Confide, a messaging application that automatically deletes messages sent or received by the application, by employees of the Office of the Governor on their personal mobile phones, as well as Plaintiff's related Sunshine Law requests for records related to Defendants' use of Confide and similar applications.

2. On February 8, 2018, Plaintiff served the Governor of Missouri with 31 requests for admission, and on February 9, 2018, Plaintiff served the Custodian of Records for the Office of the Governor with 29 requests for documents.

3. On February 16, 2018, Defendants moved to dismiss Plaintiff's Petition on multiple grounds, including (1) Plaintiff lacks standing to bring his claims; (2) Plaintiff's claims

are not ripe; (3) Plaintiff fails to state a claim upon which relief may be granted; and (4) Plaintiff's claims are moot.

4. On March 6, 2018, Plaintiff filed a Consent Order to file his First Amended Petition and permitting Defendants to file their responsive pleading within 30 days of filing. On March 7, 2018, the Court granted the Consent Order and deemed the First Amended Petition to be filed as of that date.

5. The First Amended Petition, like the original petition, alleges violations of the Sunshine Law and the State and Local Records Law, Chapter 109 RSMo, related to the use of Confide by employees of the Office of the Governor and to responses to Plaintiff's Sunshine Law requests for records related to Defendants' use of Confide and similar applications.

6. Plaintiff's baseless and speculative claims that the Office of the Governor has used Confide to unlawfully destroy "government records" rely on a December 7, 2017 media report that individuals in the Office of the Governor have Confide on their personal mobile phones. First Am. Pet. ¶ 24. This report provides no basis to conclude that the Office of the Governor has violated either the Sunshine Law or the State and Local Records Law, and Plaintiff's speculative allegations to the contrary have no basis in law or fact.

7. Plaintiff also relies on a report issued by the Attorney General's office on March 1, 2018. First Am. Pet. ¶¶ 45-49. However, this report concluded, after an investigation, that there was no evidence to support a finding that the Office of the Governor had violated Missouri law through the use of Confide.

8. On March 6, 2018, Plaintiff served Defendants with 33 interrogatories and a second set of 37 requests for admissions, for a total of 68 requests for admissions and 130 discovery requests altogether.

9. Currently, Defendants' responses to Plaintiff's first set of requests for documents are due Monday, March 12, 2018.

10. Plaintiff's first set of requests for admissions are invalid because Plaintiff served them earlier than is permitted under Missouri Rule of Civil Procedure 59.01(c)(2)(B).

11. Defendants intend to move to dismiss Plaintiff's First Amended Petition on the grounds that (1) Plaintiff lacks standing to bring his claims; (2) Plaintiff's claims are not ripe; (3) Plaintiff fails to state a claim upon which relief may be granted; and (4) Plaintiff's claims are moot, among other potential bases.

12. If the forthcoming motion to dismiss is granted in full or in part, it will eliminate or narrow the causes of action and relevant issues in this action. Staying discovery until the Court decides the motion to dismiss will permit the parties, with the guidance of this Court, to define the appropriate scope of discovery for the remaining claims, if any.

13. Pursuant to Missouri Rule of Civil Procedure 56.01(c)(2), upon motion by a party and for good cause shown, "the court may make any order which justice requires to protect a party . . . from annoyance, oppression, or undue burden or expense," including an order "that the discovery may be had only on specified terms and conditions."

14. Courts often stay actions in these circumstances, and the Office of the Governor should not be forced to incur the burden of responding to Plaintiff's overbroad and oppressive discovery requests when the forthcoming motion to dismiss will potentially eliminate this entire action or, at a minimum, may narrow the causes of action and relevant issues in this action.

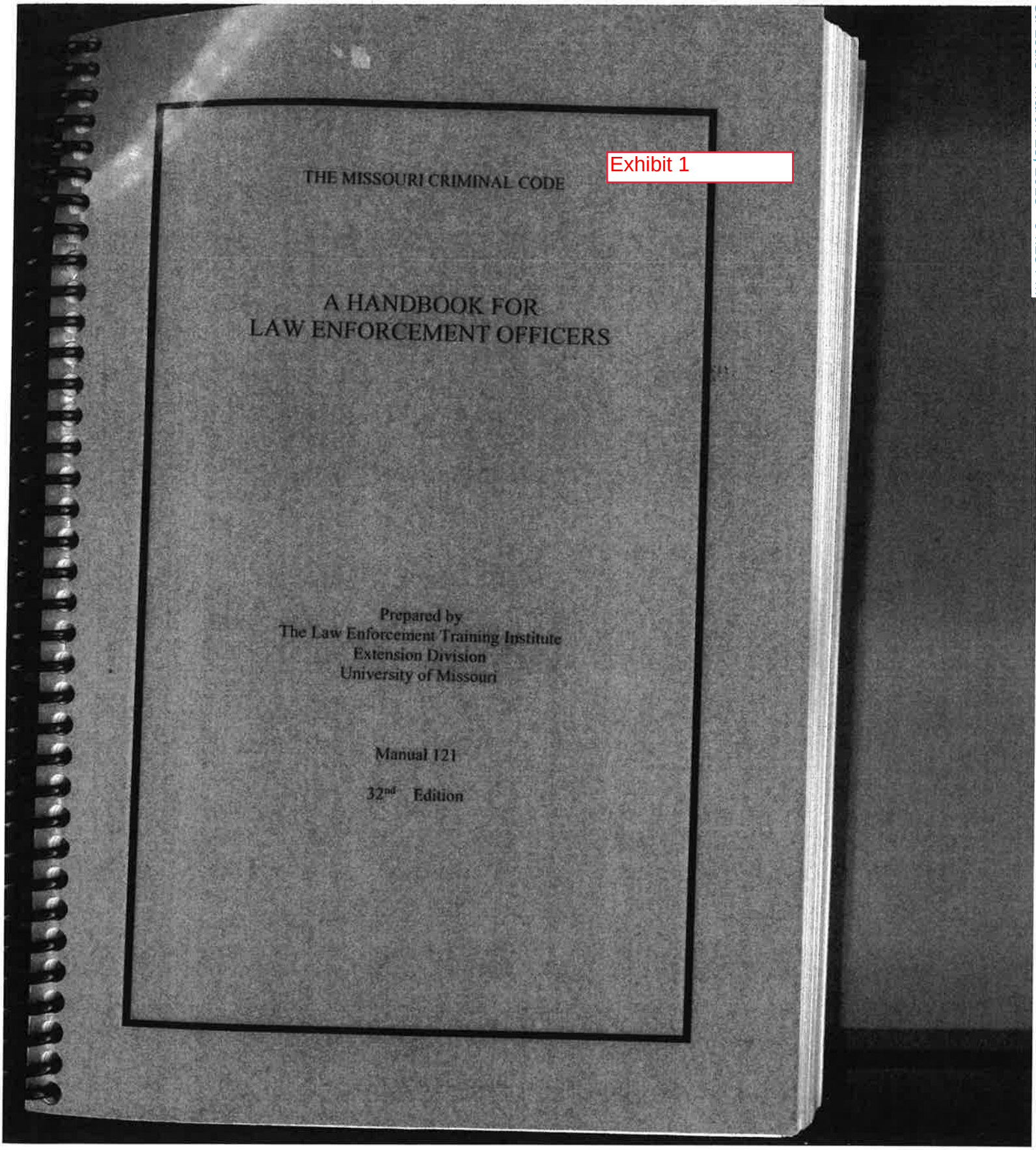
15. This is especially true here, where Plaintiff failed to plead any factual allegations in support of his conclusory claims. Plaintiff's burdensome discovery requests are a blatant

attempt to backfill his claims with the type of factual information that is required to plead a valid cause of action under Missouri law in the first instance.

16. Counsel for Defendants contacted Plaintiff's counsel to seek an extension of the time to respond to Plaintiff's discovery requests. Plaintiff's counsel refused to grant any extension unless Defendants would commit to providing responses to outstanding Plaintiff's discovery requests. It would be inefficient and unduly burdensome for Defendants to be required to respond to Plaintiff's overbroad and oppressive discovery requests, however, where the forthcoming motion to dismiss may render much of Plaintiff's sought-after discovery moot.

17. Thus, in the interests of justice and judicial efficiency, this Court should exercise its discretion and enter a protective order with respect to Plaintiff's outstanding discovery requests and stay discovery pending resolution of the forthcoming threshold motion to dismiss Plaintiff's First Amended Petition.

WHEREFORE, Defendants Eric Greitens, Governor of Missouri, and Michelle Hallford, Custodian of Records for the Office of the Governor, requests this Court grant a stay of all discovery, and enter a protective order that relieves the Office of the Governor and the Custodian of Records for the Office of the Governor from responding to Plaintiff's discovery requests, until the Court rules on Defendants' forthcoming motion to dismiss the First Amended Petition, and order such other relief as it deems appropriate. In the event that the Court grants Defendants' motion for a protective order and to stay discovery, Defendants request that the Court permit Defendants to respond to Plaintiff's discovery requests either (1) three days after the Court rules on Defendants' forthcoming motion to dismiss, or (2) the date Defendants' discovery responses are due under the Missouri Rules of Civil Procedure, whichever date is later. In the alternative, if the Court denies a stay of discovery pending resolution of the forthcoming motion to dismiss,



they damaged cost $3,000.00 to replace. John and Bob are guilty of institutional vandalism, and the offense is a class E felony.

2. Several members of a youth gang descend upon a synagogue and write graffiti all over the building wall. They are guilty of institutional vandalism. The class of the offense depends on the cost of repairing the damage.

11.11 Invasion of Privacy (§565.252)

Class A Misdemeanor

Class E Felony if defendant distributes the image to another or transmits the image in a manner that allows access via computer, or disseminates to another, or more than one person is viewed during the same course of conduct, or has previously been found guilty of invasion of privacy

Elements:

A defendant commits the offense of invasion of privacy if (s)he:

1. knowingly views, photographs or films;
2. another person;
3 without that person's knowledge and consent;
   a. while in a state of full or partial nudity and is in a place where (s)he would have a reasonable expectation of privacy; or

under or through the clothing worn by that other person for the purpose of viewing the body of or the undergarments worn by that other person .

Comments:

This statute was enacted to correct a loophole in current law which allowed the owner of a tanning parlor to secretly film female clients in various forms of undress in a tanning booth.

In the statute, "same course of conduct" means more than one person has been filmed in full or partial nudity under the same or similar circumstances pursuant to one scheme or course of conduct, whether at the same or different times.

11.12 Making a terrorist threat (§574.115)

Class D Felony

Elements:

A defendant commits the offense of making a terrorist threat if (s)he:

1. communicates a threat to cause an incident condition involving danger to life; OR

2. communicates
   involving dang
3. knowingly cau
   that a condition
   a. With the p
   b. With the p
      of any por
      assembly
4. Making a terro
5. For the purpos
   threat.
6. A person who
   not commit an

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

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

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The defendant has previously filed a motion to dismiss the indictment in this cause, to which the State has filed a response. Defendant recently supplemented that motion with a further motion to dismiss "based on false and misleading instructions to the grand jury." The supplemental motion has no more merit than the original motion and should be denied.

1. Defendant acknowledges that there is no Missouri authority supporting his extraordinary proposition that a prosecutor's "instructions" to the grand jury can authorize the Court to dismiss a facially valid indictment. Nor is there any general rule of law for that proposition. Defendant adverts to authorities in other states, and some federal cases, to support his proposition, but the cases from other states are inapposite, as they rest in part on statutes and rules having no application to Missouri jurisprudence. E.g., *Ajabu v. State,* 677 N.E.2d 1035 (Ind.App. 1997)(Indiana statute expressly authorized motion to dismiss based on defective grand jury proceeding; note that prejudice showing required). The greater weight of better authority, including the United States Supreme Court, is

that the courts do not have the authority to second-guess grand juries. See generally W. LaFave, et al., *Criminal Procedure* §15.7(g) (4th ed.).

2. "The prosecutor is under no obligation to give the grand jury legal instructions. See *United States v. Kenny*, 645 F.2d 1323, 1347 (9th Cir.), cert. denied, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981). '*An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.' Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956) (footnote omitted)." *United States v. Zangger,* 848 F.2d 923, 925 (8th Cir. 1988)[emphasis added]; see also *United States v. McKie,* 831 F.2d 819 (8th Cir. 1987): defendant bears heavy burden of establishing irregularities in the grand jury proceedings, and the extreme remedy of dismissal is appropriate only if there is a showing of actual prejudice.

3. While not explicitly rejecting defendant's argument in this case, the Missouri Supreme Court has clearly signaled its embrace of the rule enunciated by the United States Supreme Court in *Costello,* supra, and subsequent cases, to the effect that the courts do not sit to review the sufficiency of grand jury proceedings. Thus, in *State v. Tressler,* 503 S.W.2d 13 (Mo. 1973), the Court explained that the only issue that can be considered on a motion to dismiss a facially sufficient indictment is whether the grand jury heard evidence:

"'(T)he question is not as to the sufficiency of the evidence before the grand jurors, for of that they are the judges, but it is whether

they had before them any evidence at all. If it were otherwise, *it would result that the court would become the tribunal to indict as well as the tribunal to try the case*.'" 503 S.W.3d at 16, quoting *State v. Pierson,* 85 S.W.2d 48, 50 (Mo. 1935)[emphasis added].

4. Mo.Const. art. I, §16 provides:

> That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: Provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime; and that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.

The Missouri Constitution thus recognizes the grand jury as a separate institution, not under the prosecutor, convened by the Court. The prosecutor has statutory access and a statutory duty to advise the grand jury, not to instruct it. §540.130, RSMo. As the Court is well aware, the Court gives a general charge to the grand jury at the beginning of its term. Defendant presents no objection to the charge. Further, the grand jury is provided with a guide to Missouri criminal charges that is used by law enforcement generally. The portion of that guide which is pertinent to this case is attached hereto as Exhibit 1.[1] Defendant has completely failed to show any irregularity in the grand jury proceedings in this case that would warrant dismissal of the facially valid indictment.

5. Defendant relies on *State v. Salmon,* 115 S.W. 1106 (Mo. 1909) to support his claim that the Court can second guess the grand

[1] Exhibit 1 alludes to the 2017 Missouri Criminal Code, but the elements of the offense in this case are unchanged from 2015.

jury in this case. *Salmon,* however, turned on the use a court reporter who was also a witness to take down testimony of other witnesses and read such testimony to the trial jury. That was an irregularity contrary to the statutes at the time, resulting in prejudice at trial. *Salmon* is inapposite. See *State ex rel. Clagett v. James,* 327 S.W.2d 278 (Mo.banc 1959).

6. Even in cases embracing the notion that a court can review the grand jury's "instructions," the record must show that the prosecutor's conduct was "flagrant" to the point that the grand jury was deceived in some significant way. "The conduct must significantly infringe on the ability of the grand jury to exercise independent judgment." *United States v. Wright,* 667 F.2d 793, 796 (9th Cir. 1982). Here, the transcript of the testimony of the witness P.S. cited by defendant shows that ACA Steele made comments about the law in response to a question by a grand juror concerning the element of the taking of a picture. P.S. Tr. 24-25. Those remarks were accurate insofar as the misdemeanor version of invasion of privacy is concerned, as that offense requires no transmission of a photograph, §565.253.1(1), RSMo 2000 & Supp. Further, the grand jury had correct information regarding the substance of the felony charge from the handbook, Exhibit 1, and the indictment handed up is facially sufficient. Under any standard, defendant simply has not carried his burden that the conduct of the prosecution was so flagrant as to deceive the grand jury or infringe on its ability to exercise independent judgment.

7. Defendant continues to attempt to litigate the merits of the charges against him via pretrial motions. As noted, Missouri law does not permit the Court to review grand jury proceedings with regard to the sufficiency of the evidence or the accuracy of the advice given by the prosecutor. Apart from irregularities involving the presence or participation of unauthorized persons, the only issues on a motion to dismiss an indictment are its facial regularity and whether the grand jury heard some evidence. The quality of that evidence is not for the Court, but for the grand jury.[2] See *State v. Brown,* 588 S.W.2d 745 (Mo.App.E.D. 1979).

8. Finally, the State submits that this Court should adhere to the principles enunciated by the United States Supreme Court in rejecting pretrial attacks on grand jury proceedings, *Kaley v. United States,* 134 S.Ct. 1090, 1097-98, 1103 (2014):

> This Court has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a serious crime. See, e.g., *Costello v. United States*, 350 U.S. 359, 362, 76 S.Ct. 406, 100 L.Ed. 397 (1956). "[A]n indictment 'fair upon its face,' and returned by a 'properly constituted grand jury,' " we have explained, "conclusively determines the existence of probable cause" to believe the defendant perpetrated the offense alleged. *Gerstein v. Pugh*, 420 U.S. 103, 117, n. 19, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (quoting *Ex parte United States*, 287 U.S. 241, 250, 53 S.Ct. 129, 77 L.Ed. 283 (1932)). And "conclusively" has meant, case in and case out, just that. We have found no "authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *Costello*, 350 U.S., at 362-363, 76 S.Ct. 406 (quoting *United States v. Reed*, 27 F.Cas. 727, 738 (No. 16,134) (C.C.N.D.N.Y.1852) (Nelson, J.)). To the contrary, "the whole history of the grand jury institution" demonstrates that "a challenge to the reliability or competence of the evidence"

[2] The testimony of P.S. included an explanation of how the defendant could have transmitted a photo using his phone. Tr. 10-11. This is "some evidence" of transmission, sufficient to preclude defendant's specious arguments on the sufficiency of evidence. See *State v. Brown,* supra.

supporting a grand jury's finding of probable cause "will not be heard." *United States v. Williams*, 504 U.S. 36, 54, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992) (quoting *Costello*, 350 U.S., at 364, 76 S.Ct. 406, and *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988)). The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime.

* * *

This Court has repeatedly declined to require the use of adversarial procedures to make probable cause determinations. Probable cause, we have often told litigants, is not a high bar: It requires only the "kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.' " *Florida v. Harris*, 568 U.S. ----, ----, 133 S.Ct. 1050, 1055, 185 L.Ed.2d 61 (2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 231, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)); see *Gerstein*, 420 U.S., at 121, 95 S.Ct. 854 (contrasting probable cause to reasonable-doubt and preponderance standards). That is why a grand jury's finding of probable cause to think that a person committed a crime "can be [made] reliably without an adversary hearing," *id.*, at 120, 95 S.Ct. 854; it is and "has always been thought sufficient to hear only the prosecutor's side," *United States v. Williams*, 504 U.S. 36, 51, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). So, for example, we have held the "confrontation and cross-examination" of witnesses unnecessary in a grand jury proceeding. *Gerstein*, 420 U.S., at 121–122, 95 S.Ct. 854. Similarly, we have declined to require the presentation of exculpatory evidence, see Williams, 504 U.S., at 51, 112 S.Ct. 1735, and we have allowed the introduction of hearsay alone, see *Costello*, 350 U.S., at 362–364, 76 S.Ct. 406. On each occasion, we relied on the same reasoning, stemming from our recognition that probable cause served only a gateway function: Given the relatively undemanding "nature of the determination," the value of requiring *1104 any additional "formalities and safeguards" would "[i]n most cases ... be too slight." *Gerstein*, 420 U.S., at 121–122, 95 S.Ct. 854.

The State submits that the motion to dismiss can and must be denied.

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

/s/ Robert H. Dierker MBE 23671
Assistant Circuit Attorney
Robert Steele MBE 42418

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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 23 day of March 2018.

/s/Robert H. Dierker

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

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March 23, 2018

Mr. Jack Garvey
Mr. James Martin
773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

2. Amended Consultant agreement (3 pages)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

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

FILED
MAR 26 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri
VS
GREITENS

CASE NO. 1822-CR00642 DIVISION 16 3/26 20 18

COURT ORDER

MOTION TO DISMISS INDICTMENT HEARD AND SUBMITTED.
MOTION TO DISQUALIFY SPECIAL ACA SULLIVAN HEARD AND SUBMITTED.
WITNESS K.S. TO BE DEPOSED ON MARCH 30, APRIL 6 OR 7.
COURT REJECTS JURY WAIVER.

RT
ACA

for Defendant

ENTERED
MAR 26 2018
CRH

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

ORDER

Defendant's motions to dismiss the indictment in this case and to disqualify Ronald S. Sullivan, Jr. from participating in the prosecution of this case have been called, heard and submitted. The Court has considered the arguments of the parties and now rules as follows.

Defendant's motion to dismiss the indictment is Denied.

Defendant's motion to disqualify Ronald S. Sullivan, Jr., is Denied at this time without prejudice.

SO ORDERED:

Rex M. Burlison, Judge
Div. 16

Dated: 3-26-2018

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

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

DEFENDANT'S NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion to Compel Production of Subpoenaed Records and a Second Deposition in Division 16 of the Circuit Court of the City of St. Louis, Missouri on the 12th day of April, 2018 at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated: April 4, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James G. Martin*

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Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 4th day of April, 2018.

/s/ James G. Martin

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

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

DEFENDANT'S MOTION TO COMPEL PRODUCTION OF SUBPOENAED RECORDS AND A SECOND DEPOSITION

COME NOW defense counsel and requests a court order compelling Mr. William Don Tisaby to retrieve all records and documents which fall within the purview of the subpoena duces tecum previously served upon him and to appear for a second deposition at the expense of the Circuit Attorney's Office. In support of this motion, defense counsel submits the following:

The testimony of Mr. Tisaby has raised multiple concerns about missing documents related to this investigation, a methodology of investigation which carries no credibility, and false statements made under oath by Mr. Tisaby during his deposition.

As set out in detail below, Mr. Tisaby, the lead investigator in this matter, was deposed on March 19, 2018. Prior to the deposition, as the Court is aware, defense counsel issued a subpoena duces tecum for a variety of documents which should have been in the possession of Mr. Tisaby and his company, Enterra. The requested documents included his notes from interviews done during his investigation. From almost the very beginning of the deposition, it became clear that Mr. Tisaby and/or the Circuit Attorney's Office had not turned over all the documents that had been called for under the subpoena. As a result, a significant portion of the deposition was

focused on attempting to determine what documents Mr. Tisaby had which should have been provided pursuant to the subpoena.

Throughout the course of the deposition, Mr. Tisaby's testimony changed wildly from claiming records existed to claiming they never existed. As discussed below, at one point the parties stopped the deposition for lunch to allow Mr. Tisaby to go back to his hotel to check his records and his laptop to see if he could locate some of the missing documents, including drafts of his reports of interview of the only two witnesses he talked to, KS and JW. After returning two hours later, Mr. Tisaby was asked very directly, "and it's your testimony under oath that you went to your laptop and you looked for earlier drafts, and you could not find your earlier drafts of the interview report of KS or JW?" His response was "Yes, sir." [128[1]] Yet by the last hour of the deposition, under further questioning, Mr. Tisaby admitted that his laptop was not even in St. Louis. He had not checked his laptop at all for the missing records, but rather, blatantly lied under oath.

Not only did grave concerns about the possible destruction of records and evidence arise because of his deposition, but Mr. Tisaby also provided testimony regarding his claimed method of investigating which would be almost impossible to be true. As discussed in detail below, early in the deposition, Mr. Tisaby testified that he had taken notes by putting pen to paper for his only two interviews he claimed he conducted related to this matter. Yet, later in the deposition, he testified that he did not have notes from the interviews because in fact he does not take any notes when he conducts an interview. ("Interview" is probably the wrong terminology because, incredibly, he testified that he did not ask questions in either the two hour meeting with KS or the one hour meeting with JW, but rather simply had the witnesses tell their story without any questioning whatsoever.) Defense counsel has been informed by the attorneys for JW that Mr. Tisaby in fact was taking notes,

[1] Bracketed numbers refer to the transcript page being referenced.

thus undercutting the testimony that he did not take notes. The changing explanation for the absence of interview notes and the claim that he literally wrote nothing down during interviews regarding these allegations against the Governor of Missouri has no credibility whatsoever.

Equally concerning, early in the deposition, Mr. Tisaby testified that he prepared a number of drafts of his reports of interviews. After lunch, he testified that he never had drafts for these interviews and worked on only one document.

Because of the demonstrable perjury, because of the unexplainable failure to produce subpoenaed records, because of testimony which was self-contradicting throughout, defense counsel seeks a court order for Mr. Tisaby to retrieve all records and documents which fall within the purview of the subpoena duces tecum and to appear for a second deposition at the expense of the Circuit Attorney's Office.

THE FACTS

1. The Question Whether Notes of Interviews Exists

Mr. Tisaby testified that he, and his company, Enterra, interviewed only two witnesses, KS and JW. [26] When first asked about notes he took during those interviews, he testified that the he had notes ("what you wrote with your pen"):

Q Okay. You haven't turned over what you wrote with your pen, have you?
A Oh, my pen, no.
Q Okay. But you still have those?
A I still have them.

[19] He admitted he had not turned them over and they may be at his home or in his hotel. [17-18, 34, 53]

However, much later in the day he testified, "Mr. Martin, I have no handwritten notes for the interview itself." [109] Rather, Mr. Tisaby claimed that he had a laptop but, "I was not typing simultaneous - - I just listened to Ms. S." [112] Regarding the two hour interview of KS, he was

asked, "So you just listened and then when the interview was over tried to remember everything she said and put it down in paper?" His response was, "Yes, sir." [113] This claim that he did not take notes (though he had earlier said he had notes), was not a misunderstanding as he said it more than once - Q: You don't take notes while the witness is talking? A: I sit and –I sit and _I sit and take in everything that they say. . . .I don't write it down." [115] Later, he testified, Q: And you are confident that you didn't ask questions? A: I'm confident. [174].[2] Multiple other times he reaffirmed that he asked no questions, [189, 199, 205]

Notwithstanding his claim that he took no notes while the witnesses were talking, several times during his testimony, Mr. Tisaby asserted that his reports of interviews of both KS and JW were almost verbatim of what the witnesses said. [195] The credibility of this claim became even shakier when he testified that it took him more than a month to complete each of the two reports of interview. Though the interview of KS took place on January 29, 2018, he testified he did not finish KS's interview report until February 28, 2018 [111], and claimed "As best as I recall, I put everything that I recall her telling me in that report" [181], and, "I promise you and I'm telling you this today, I promise you I did my best not to leave out anything that lady told me." [182] It is not credible that he did that without notes.

2. The Question of When the Reports Were Written

[2] See also, page 173:
Q: So your testimony is that you didn't ask her any questions about the events that you were investigating, you simply let her talk?
A I simply let her talk.
Q And you asked no questions?
A No questions other than, again, like I said, her -- the normal stuff like who she was.
Q That's the preamble stuff?
A The preamble stuff, yes, sir.
Q Okay. But so almost all of this investigative narrative Exhibit 11 is simply her talking without any questions being asked?
A Yes, sir.

The sequence of how the reports were written changed over the course of the deposition. At one point, he testified that the interview of KS lasted two hours and he started typing the report of interview "[a]s soon as she left" [116], but, "didn't finish the report that night" [117-18] and it was not completed "until latter part of February." [118]

After the two hour "lunch" break, Mr. Tisaby was asked again about the interview of KS and when he started to document any portion of the interview. This time, contradicting his earlier testimony that he started typing a first draft as soon as the witness left, he testified that after the interview he "called his wife . . . and I got in and I - - -I went to bed" without starting to document the interview. [132] Instead of starting the typing of the report that same night, he testified that he "might have" started documenting the interview (which ended at 9 pm) around 3:30 or 4:00 am – "just pecking away a little." [132] Several other times in the deposition he confirmed this new timing that he did not start documenting the interview until at least six and a half hours after the interview ended. [161, 167] He also testified that what he typed the morning after the interview was not complete sentences. [134] When he was questioned as to how he could remember the details of what was said he testified regarding the report, "I guarantee that that's what she told me." [135] He testified that though he did not have any notes, it took him over a month to finish the report. [136] He also testified that the first day he typed up anything on the KS interview it was only about a page long but the final report which was developed as much as a month after the interview was three and a half pages [156] and he claimed he used nothing to refresh his memory to finish the report. [157] Then, he later changed his position again and testified "let me correct that. I probably started before I went to bed. Let me correct that for the record." [168] Yet, during another point in the deposition, Mr. Tisaby actually testified that he did not have his laptop at all when he was in St. Louis for the interviews of KS and JW:

Q Okay. So, generally, when you come to St. Louis, you don't have a laptop with you?
A No, sir. I do not have my laptop with me.
Q Okay. And when you interviewed KS, you didn't have your laptop with you?
A I didn't have my laptop with me, and I did not have my laptop with JW.
Q Okay. So in other words, after you interviewed them you had no equipment to type up your report?
A Uh-huh

[281] He, then backed off of the testimony that he did not have his laptop on the day of the interviews.

3. Are There Missing Drafts

Importantly, regarding the development of different drafts of the reports of interview, Mr. Tisaby testified "I'll start typing or whatever and then when I come back and add it, I'll say it's -- I'll say KS 1, KS 2, KS 3 and then final. When I finish it up, it's final." [118] Soon after this statement, in order to clarify what he was saying, he was specifically asked, "So you create drafts?" to which he responded "Yes, sir." [119] He was then asked "So where are the drafts?, to which he responded, "On my computer."[119] He then suggested that he might no longer have the drafts and when asked why, he testified, "Didn't need them. I don't think you need them. I mean, if it's my final draft, I don't keep them." [120] He then testified that he may have deleted them "[s]ometime between when I started and when I ended in late February" [121] and said, "I may not have those other three drafts." [122]

After the two hour break in which Mr. Tisaby said he went back to his hotel, he was asked "And did you look on your computer laptop for the draft reports that you were testifying about this morning?" He responded, "I looked for them. I do not have any other drafts than what I did for that report. No other drafts." [126] To leave no doubt, he was then asked "and it's **your testimony under oath** that you went to your laptop and you looked for earlier drafts, and you could not find your

earlier drafts of the interview report of KS or JW?" and his full response was "Yes, sir." [128, emphasis added]

However, of great concern to defense counsel, later in the deposition Mr. Tisaby changed his story in two critical ways. First, he testified he never did have any drafts of the KS report of interview. [143] Then, he also testified that he actually did not have his laptop in St. Louis. After being asked "this trip did you bring a laptop with you?", he responded, "I did not bring my laptop, no, sir." [281] And then he admitted he had not in fact checked his laptop at lunch break. [287, 290]. This of course, cannot be considered anything but perjury. He had "under oath" testified that at the lunch break he had checked his laptop. He then later was forced to admit he did not even have his laptop available to be checked. Because he was caught and then forced to correct his false testimony, it might not be indictable, but it most certainly is reprehensible conduct on the part of an investigator working for the CAO and most certainly sanctionable.

Like his changing testimony regarding the report of interview of KS, Mr. Tisaby also provided contradicting testimony about the report of interview for JW. He originally testified he interviewed JW on the 30th, and "I started typing it up couple days later." Subsequently, he changed his testimony to "the next day." [252][3] Defense counsel has been informed by the attorneys for JW that Mr. Tisaby in fact was taking notes., though Mr. Tisaby said his only notes were two sticky notes with very limited demographic information. This is obviously very concerning.

4. Can Any Part of Mr. Tisaby's Report Be Considered Reliable

Another significant concern regarding Mr. Tisaby's testimony was his assertion,

[3] As to the JW interview he also testified the report was "a verbatim rendition of what she told." [250] and that he again did not ask any questions, [250, 265, 273] except about her employment [251]. And, he again claimed he did not take notes [252-3].

notwithstanding his claimed lack of notes, that he included everything in his report that the witness said. When asked about the final report of interview "Is this everything she said to you?" he responded "yes sir." [159] When asked, "there's nothing you left out?" he responded, "No, sir." [160] In fact, he testified at one point that KS had told him her middle name, and it was pointed out that that was not in the report. He then testified "that's probably the only thing I didn't write.**"** Though he seemed to get his words a little crisscrossed, Mr. Tisaby left no doubt he believe he captured everything the witness said. "[W]hat I'm saying to you today emphatically, I did not leave out anything that she did not say." [181]

However, when Ms. Gardner asked him questions towards the end of the deposition, he suddenly remembered eight different supposed statements by KS that he failed to put in his report of interview. [322-324, 328] By way of example, when Mr. Martin questioned him, he testified he did not know how KS got to the Maryland address on March 21 – whether by walking or by car. [188] When Ms. Gardner questioned him, he testified without hesitation that she had walked to the house. [301] Then with further questioning by Mr. Martin, he admitted there was nothing in his report about KS walking to the house. [316-17] While such a detail may seem unimportant, Ms. Gardner thought it important enough to ask, and Mr. Tisaby suddenly remembered it when he never remembered to put it in his report a month earlier. Moreover, the eight occurrences of missing information after he "emphatically" testified that had included everything the witness said raises concerns either of the accuracy of his reports or of his testimony.

5. Did Mr. Tisaby Properly Preserve His Records

Back on February 27, 2018, defense counsel had filed a Motion for Preservation to ensure that Mr. Tisaby and no one from the CAO would destroy or delete any possibly relevant records – specifically drafts of his reports of interview (which were not completed until sometime in March,

2018). In the morning portion of the deposition, Mr. Tisaby indicated he was unaware of the motion being filed and testified that he may have deleted records. In the afternoon, while he was claiming he did not delete anything from his laptop, he changed his story as to knowing about that motion for preservation also:

> Q Why -- why did you testify in the morning that you hadn't been told about the motion for preservation?
> A I didn't know. I didn't recall – I recalled that she told me orally.
> Q No, you -- that's not what you testified to.
> A I'm saying but I recall that -- that we talked about it orally.
> Q You never told us that in the morning, though, did you?
> A I missed it. No, I –I missed that.

[335-36]

Though the CAO filed a response to the motion for preservation which indicated it was the practice of the CAO to preserve all records, it is far from clear whether Mr. Tisaby was properly informed of the motion and the policy to preserve such potential evidence. Throughout the deposition, Mr. Tisaby demonstrated a lack of candor and a blatant disregard for the truth. Therefore, his late in time claims that he was notified of the motion and did not destroy any records must be discounted.

6. Did Mr. Tisaby Look For the Alleged Photograph

Mr. Tisaby testified that:

> [T]he Circuit Attorney asked me to do an independent review of the matter and to report back to her, and then I said it -- and -- and I said the Circuit Attorney has in no way instructed me to do anything else other than do a fair and impartial interview -- I mean, investigation. And I said I owe it to the Circuit Attorney, and I say I owe it to you, and I owe it to the State of Missouri to do -- do a fair and impartial [investigation.]

[169]. He also testified that the core issue of his investigation was whether a photograph was taken. [171, 172] Obviously, no investigation of the current allegations would be complete, let alone fair and impartial, without making every attempt to locate the alleged photograph. However,

incredibly, Mr. Tisaby testified that he made no effort whatsoever.

Specifically, Mr. Tisaby was asked "But you have not seen any alleged picture? He responded. "No, I have not. I don't think anybody has." [64] In fact, he testified "I don't know whether one exists or not," [171] because he never found evidence of a photograph. [170] He also testified, "Mr. Martin, I did not pursue trying to find this photograph. I'm not technically oriented. An --an expert would have to do that, and I did not engage -- I didn't engage in trying to find this picture." [65] He likewise testified multiple times that he was unaware of anyone else making any effort to locate any alleged photo. [66, 74, 75] He also claimed he never even asked KS if she ever saw a photograph, [171, 172] or if she had any pictures from the alleged events. [174]

He was also asked, "Are you aware of any evidence that there was any picture that was transmitted as alleged in the indictment?" He responded, "Not that I know of." [76] And, he testified that he was unaware of anyone who was making any effort to find whether any alleged photograph was transmitted. [74, 75]

While defense counsel is aware Ms. Gardner claimed in court on March 21, 2018 that Mr. Tisaby's "only task" was to find two witnesses, Mr. Tisaby's testimony does not support such a claim. To the contrary, he testified that "Ms. Gardner has never instructed me as far as what investigative steps that I'm doing. I report to her and things that I need as far as my grand jury perspective I tell her, but she just -- but -- but she and I talk and discuss it, but I -- I, again, is trying to do this independently as possible and as transparent as possible, and I do not consult with her every investigative step that I contemplate or every investigative step that I do." [74]

This denial of the lead investigator of ever even attempting to find evidence regarding the alleged photo and its alleged transmission contradicts the Circuit Attorney's Office's statements in court that they were still looking for a photograph. Defense counsel's concern is that if Mr. Tisaby

is hiding his efforts to find an alleged photo, he is also hiding what would indisputably be exculpatory evidence – that is, if they tried to find a photograph and failed, it likely suggests there is not, and never was, a photo.

THE NOTES AND EARLY DRAFTS OF INTERVIEW REPORTS ARE CRITICAL

There is strong reason to believe any interview notes or earlier drafts of the final interview reports could contain significantly exculpatory information. In fact, the deposition exposed specific facts which demonstrate that KS's assertion that the events of March 21were not 100% consensual is simply not true.[4]

Specifically, during the interview, KS told Mr. Tisaby (and Ms. Gardner who also attended the interview) that when she got to the Greitens' home, she changed into a T shirt and pajama bottoms. When Mr. Tisaby was testifying about this specific alleged event occurring in the kitchen, he said, "[s]he said she was naked." He was then asked, "So she was naked in front of him putting on this T-shirt and pajamas?" He responded, "Yes, from – from what she said." [192] To ensure what he was saying, Mr. Martin asked, "So your testimony is from what she said she was naked at some point in the kitchen?" He again responded, "yes, sir. Naked some point in the kitchen." [193] Then one more time he was asked, "So she was in the kitchen. She was naked, then she put on the T-shirt and bottoms and then went down to the basement." He responded, "Yes, sir. Yes, sir." Then he was asked:

[4] While we challenge KS's credibility as to this occurrence, we in no way intend to attack her as a person. She is being forced into the public light over a very private matter. She did not in any way want her private interactions with Governor Greitens to be a public event. She has been victimized by both her former husband and the Circuit Attorney's Office by having a matter she rightly viewed as personal and private turned into a media and political circus. Under such circumstances, it is understandable that she would be telling a story which minimizes her own role. If an individual wanted to minimize their own culpability for infidelity, that would be expected.

Q: So – so according to what she told you, Mr. Greitens would have seen her naked in the kitchen before they went downstairs?
A: If that happened, yes.
Q: Well, that's what she told you?
A: Yes

[194] Yet, it is very concerning that Mr. Tisaby's interview report does not disclose that KS was voluntarily naked in front of Mr. Greitens before any of the other events of that day.[5] Just as concerning, when Ms. Gardner, who had been at the KS interview, questioned KS in the grand jury, she did not have KS testify that she had been naked with Mr. Greitens in the kitchen before they ever went down into the basement. What else Mr. Tisaby and Ms. Gardner were told which is exculpatory for the defense that did not make the interview reports or grand jury testimony cannot be known without access to all the notes and draft reports Mr. Tisaby has.

THE CIRCUIT ATTORNEY SHOULD PAY FOR THE SECOND DEPOSITION

The need to have the CAO pay for the costs and legal fees for the second deposition is compelling. While it is Mr. Tisaby who provided the false statements during his deposition, he was acting as an agent of the CAO. Moreover, the CAO must further take responsibility for Mr. Tisaby's action because it chose to hire a private investigator rather than utilize the St. Louis Metropolitan Police Department. In choosing an out of state private investigator, the CAO must assume the duty to select a company and individual who are both trustworthy and competent. The background history of Mr. Tisaby, which was all available through public records, should have been not just a red flag, but a glaring stop sign.

[5] This fact alone changes the entire storyline regarding the events of March 21. Mr. Tisaby testified that KS, after coming to the home knowing Ms. Greitens was out of town, changing in front of Mr. Greitens into a T-shirt and bottoms, and going into an unfinished basement, still believed she was there simply to talk. [338-39] It is completely incredible to believe she got naked in front of Mr. Greitens, changed into a T-shirt and pajama bottoms, went to an unfinished basement, and still thought they were only going to talk.

Amongst the issues which should have stopped the CAO from utilizing Mr. Tisaby's services include:

1. As he testified, the FBI, his former employer, found that he had lied under oath, though he asserted it was only a "lack of candor." [83-84]
2. He was found by the FBI to have violated the bigamy laws of Alabama. [246]
3. As he acknowledged, his partner at Enterra, Mr. Sabastian Lucido, was indicted for "mobster activities." [77] Though he at first tried to say it was only Mr. Lucido's father who was indicted, not Mr. Tisaby's partner, he eventually admitted it was his partner also.[6] [77-78]
4. He testified that since his time with the FBI, he has been involved in numerous companies, including Waste Management, Laclede Gas, Tisaby & Associates, Bowie Knife Security, and then Enterra, suggesting a less than stable employment history.

The CAO must take responsibility for the hiring of Mr. Tisaby, and therefore must take responsibility for the false testimony he provided in his deposition and failure to conduct a proper search for records and documents called for in the subpoena. Therefore, defense counsel submits, the CAO should pay the cost of having Mr. Tisaby redeposed.

The CAO cannot claim it does not have the funds to pay for defense counsel's fees and costs given the extraordinary costs Ms. Gardner has put on her office in engaging Mr. Sullivan and Mr. Tisaby.[7]

[6] The trial resulted in not guilty verdicts.

[7] Though Mr. Tisaby has claimed he only interviewed two witnesses related to this matter, he also testified that he has been coming to St. Louis for three or four days a week every week since January 18, 2018. Curious how that could be, he was questioned about the cost of all his time in St. Louis, and he acknowledged that he also got paid his hourly rate for traveling back and forth from Alabama and St. Louis each week [231-32]. Mr. Tisaby acknowledge in his testimony that he has earned well over $20,000. If Ms. Gardner has the funds to pay $250 an hour for an

WHEREFORE, Defendant respectfully seeks an order compelling Mr. Tisaby to produce all documents called for in the previously issued subpoena and that he submit to a second deposition at the CAO's costs.

Dated: April 4, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James G. Martin*
James F. Bennett, #46826
Edward L. Dowd, #28785
James G. Martin, #33586
Michelle Nasser, #68952
7733 Forsyth Blvd., Suite 1900
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N. Scott Rosenblum, #33390
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Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

investigator to travel 14 hours back and forth to his home each week, a claim of lack of funds would ring hollow.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 4th day of April, 2018.

/s/ James G. Martin

EUGENE G. BERNAT
ATTORNEY AT LAW

7423 FAWN COURT, BOARDMAN, OH 44512
PHONE: 330.729.0608 • EMAIL: EGBERNAT@GMAIL.COM

Thursday, March 29, 2018

City of St. Louis Circuit Court
Attn: Case Records/File Section
Faxed to 314-613-7486

Re: *State v. Greitens*, Case No. 1822-CR00642, Division 16

To Whom It May Concern:

The undersigned hereby request a copy of the motion for admission *pro hac vice* for Ronald S. Sullivan, Jr. filed in the above captioned matter on March 5, 2018. Please e-mail the motion to egbernat@gmail.com. If there is an applicable fee, the undersigned will pay by credit card.

Sincerely,

/s/Eugene G. Bernat
Attorney at Law

Complete
4-5-18

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Case No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S NOTICE OF VIDEOTAPED DEPOSITION OF J.W.

TO: All Counsel of Record

WITNESS: J.W.

DATE & TIME: Tuesday, April 17, 2018 commencing at 9:00 a.m.

LOCATION: Law Offices of Goldenberg Heller & Antognoli, P.C.
2227 South State Route 157
Edwardsville, IL 62025
618/656-5150

PLEASE TAKE NOTICE that at the above date, time and location, and continuing from day to day until concluded, Defendant Eric Greitens will cause the video deposition of the above witness to be taken upon oral examination pursuant to 57.03 of the Missouri Rules of Civil Procedure before a shorthand reporter and suitable Notary Public. Any party or their attorney may appear and participate as they see fit. The deposition will be recorded by stenographic and videographic means by a representative of PohlmanUSA, 10 South Broadway, Suite 1400, St. Louis, MO 63102.

Dated: April 5, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James G. Martin*

James F. Bennett, #46826
Edward L. Dowd, #28785
James G. Martin, #33586
Michelle Nasser, #68952
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edowd@dowdbennett.com
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St. Louis, MO 63105
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Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2018, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

I hereby certify that on April 5, 2018, the foregoing was e-mailed to the following non-participants in Electronic Case Filing:

Ann E. Callis, Esq.
Goldenberg Heller & Antognoli, P.C.
2227 South State Route 157
Edwardsville, IL 62025
acallis@ghalaw.com

/s/ James G. Martin

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

April 10, 2018

Mr. Jack Garvey
Mr. James Martin
7733 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

My records reflect that you are in possession of the following discovery:

1. Grand Jury Indictment filed on February 22, 2018

Please find enclosed the following discovery:

2. KTBI Eric Grieten's Interview 1/20/2018 includes outtakes (1 CD)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar #

cc: Court File

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

FILED
APR 10 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri
VS
GREITENS

CASE NO. 1822-00642 DIVISION 16 4/10 20 18

COURT ORDER

STATE'S MOTION FOR PROTECTIVE ORDER HEARD AND SUBMITTED.

ACA

#55859
Atty for D

So ordered.
Div. 16

ENTERED
APR 10 2018
CRH

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

STATE OF MISSOURI)
) ss.
CITY OF ST. LOUIS)

IN THE TWENTY – SECOND JUDICIAL COURT, STATE OF MISSOURI
CIRCUIT JUDGE DIVISION

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

ENTRY OF APPEARANCE

COMES NOW Scott Simpson and Knight and Simpson, and enter their appearance on behalf of K.S., for the purpose of notification of all hearings that qualify under the victim's rights statute.

KNIGHT & SIMPSON
423 Jackson Street
St. Charles, Missouri 63301
(636) 947-7412 Phone / (636) 947-7505 Fax
scott@knightsimpson.com
Attorneys for Respondent

By /s/ Scott Simpson
SCOTT SIMPSON #59828

CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of April, 2018, I electronically filed the foregoing with the Clerk of the St. Louis City, Missouri Court, using Missouri eFiling System and delivered via the same to: All parties that have entered their appearance through the eFiling System.

/s/ Scott Simpson

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

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

ORDER

The pending trial in this case is generating substantial public interest and publicity. The Court believes it has the duty to take appropriate steps to protect the due process rights of the defendant and particularly his right to an impartial jury, to avoid prejudice to the State of Missouri and to avoid tainting potential jury members. This Court has the authority to issue an appropriate order in accordance with the precepts set forth in Shephard v. Maxwell, 384 U.S. 333, 359-363 (1966) and Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

The Court now orders that all parties, attorneys, endorsed witnesses and their attorneys, are prohibited from making any public statements outside the courtroom that could interfere with a fair trial or prejudice either the State or the defendant. This includes the identity of potential witnesses and their expected testimony, references to specific evidence that may be admitted at trial, and any personal belief in the defendant's guilt or innocence.

It is further ordered that all counsel, parties, deposed witnesses or endorsed witnesses and their attorneys, are prohibited from publishing or disseminating any deposition testimony without leave of court, except that counsel may disseminate deposition testimony for trial preparation purposes only, without publication to any person other than parties, counsel, or endorsed or deposed witnesses.

Effective immediately, all motions to be filed, that allude to depositions and other discovery materials, shall not contain, within the body of the motion, any language taken verbatim from such depositions or other discovery material. Instead, such verbatim language shall be set forth, in a separate attachment, and filed confidentially. Thereafter, the Court shall review all attachments to determine if any, all or part of the attachments shall remain confidential.

This Order does not preclude statements or discussion of the general nature of the law and the allegations against defendant, scheduling information, the substance of any court orders or rulings that are a matter of public record, and the contents or substance of any motions that are in the public record.

The Court further prohibits, effective immediately, the holding of press conference regarding this case until the jury has been seated and sworn.

SO ORDERED:

Rex M. Burlison
Circuit Judge
Division 16

Dated: April 10, 2018

FILED
APR 12 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY DEPUTY

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

State of Missouri

VS

Eric Greitens

CASE NO. 1822-CR00642 DIVISION April 12 2018

COURT ORDER

Defendant's Motion to Compel Production of Subpoenaed Records and a Second Deposition and Sanctions heard. Matter taken under advisement.

ENTERED
APR 12 2018
D P

For Defendant

ACA

SO ORDERED:

Div. 16

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ 20 _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

FILED
APR 16 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

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

State of Missouri

VS

GREITENS

CASE NO. 1822-CR00642 DIVISION 16 4/16 2018

COURT ORDER

PARTIES GRANTED TO 12 NOON WED. APRIL 18, 2018 TO FILE SUPPLEMENTAL MEMORANDA ON MOTION TO DISMISS.
SUBPOENAS TO BANKS FOR ACCOUNT RECORDS OF P.S. TO ISSUE USING FULL CORRECT NAME, BUT TO BE FILED AS CONFIDENTIAL.

12

ACA

So ordered:

Div. 16

ENTERED
APR 16 2018
DP

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

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

ORDER

After this morning's hearing, it has come to the Court's attention that the videotape of the interview of witness K.S. was acquired by the Missouri Special Investigative Committee that is reviewing evidence related to the Defendant. The distribution of this videotape is in violation of Paragraph 5 of the Joint Proposed Scheduling Plan entered by the Court on March 8, 2018. As a result, the Defendant has requested the opportunity to respond to the Missouri Special Investigative Committee regarding the contents of the videotape, which response, the Defendant is concerned, may also violate Paragraph 5 of the Joint Proposed Scheduling Plan.

Thereon, the Court GRANTS the Defendant's request. Defendant and his counsel are permitted to submit information to the Missouri Special Investigative Committee which may otherwise be in violation of the Court's Scheduling Order and the Order issued by the Court on April 10, 2018. Defendant's response shall be limited to the contents of the videotape interview of witness K.S.

SO ORDERED:

Rex M. Burlison
Circuit Judge
Division 16

Dated: April 16, 2018

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

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

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

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

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

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

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

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

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

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

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

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

I. <u>Undeniable Lack of Evidence</u>

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

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

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

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

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

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

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

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

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

II. The Evidence of Political Motivation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But, the most significant evidence is:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The K.S. Interview Lies

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

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

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

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

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

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

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

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

Then, this testimony was given:

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

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

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

A: Her attorney and yourself, Ms. Gardner.

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

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

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

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

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

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

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

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

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

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

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

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

Q: You take it into your brain?

A: Yes, sir.

Q: But you don't write it down?

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

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

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

2. K.S. Interview Had Omitted Exculpatory Information

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

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

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

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

3. The Tisaby Interview Report Contained False Information

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

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

Q: "Mr. Tisaby?

A: Yes.

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

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

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

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

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

C. Lies About the Functioning of the Video

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

At the April 12 hearing, Ms. Gardner said;

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

On the other hand, Mr. Steele said:

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

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

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

D. Additional Concealment of Exculpatory Evidence –The Dream

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

E. Prejudice is Present

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

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

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

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

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

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

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

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

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

F. Dismissal is the Necessary Sanction

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

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

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

G. Requested Relief

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

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

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

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

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

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

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

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

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

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

Dated: April 18, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ James G. Martin

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

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

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

With apologies to the Court, the defense submits one more significant and compelling cause of prejudice resulting from the prosecutorial misconduct. As the Court knows, there is now a criminal investigation of Mr. Tisaby and possibly Ms. Gardner related to the perjury by Tisaby, which no one is denying, and the participation in the lies and concealment by Ms. Gardner.

If this case is not dismissed, then the defense will obviously need and be entitled to re-depose Mr. Tisaby. We need to know, what are facts and what is made up, how did he get debriefed by Ms. Gardner, how did he interact with the witnesses, what happened in the first ten minutes of the interview where there still is no audio, what was said to any witness not in the notes or on the tape, why were certain things suggested to witnesses during the interviews, and what interaction did he have with witnesses not documented?

But, in all probability, Mr. Tisaby will be exercising his Fifth Amendment rights and refuse to testify. When that occurs, none of the above questions will ever be answered. The answers to the questions however are critical to being able to defend this case. There is a reason why there were so many lies in this case. There is a reason sentences were removed from

memoranda. There is a reason they did not want the defense to see the video interview. And, if Mr. Tisaby refuses to testify, we will never have the answers. Nothing could be more prejudicial.

Dated: April 18, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James G. Martin*
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
edowd@dowdbennett.com
jmartin@dowdbennett.com
mnasser@dowdbennett.com

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

N. Scott Rosenblum, #33390
Rosenblum Schwartz & Fry
120 S. Central Ave., Suite 130
Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

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

/s/ James G. Martin

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

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

MOTION FOR LEAVE TO FILE OUT OF TIME

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

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

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

1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

SO ORDERED:
Div. 16

Certificate of Service

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

/s/Robert Steele

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

FILED
APR 18 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri
VS
GREITENS

CASE NO. 1822-CR00642 DIVISION 18 4/18 2018

COURT ORDER

EXHIBITS A, B + C TO SUPPLEMENTAL MEMORANDUM OF STATE TENDERED FOR IN CAMERA REVIEW.

RESPECTFULLY SUBMITTED,

RT
ACA

ENTERED
APR 18 2018
CRH

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

FILED
APR 19 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY DEPUTY

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

State of Missouri

VS

Eric Greitens

CASE NO. 1822-CR00064-12 DIVISION 16 April 19 2018

COURT ORDER

Pursuant to the Court's ruling on Monday, April 16, 2018, witness K.S is hereby ordered to produce to the Defendant any phone currently in her possession on which she received or has at any time been able to view the text messages from witness P.S. as referenced in K.S.'s interview conducted by William Don Tisaby in January 2018.

ENTERED
APR 19 2018
CRH

SO ORDERED:
DIV. 16

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

State of Missouri

VS

Eric Greitens

FILED
APR 19 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY [signature] DEPUTY

CASE NO. 1822-CR00642 DIVISION 16

ORDER/JUDGMENT/MEMORANDUM

Motion to Quash continued for submission of [redacted] amended affidavit

Agreed to by the parties

[signature]

So ordered,

[signature]

Div. 16

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Case No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S NOTICE OF VIDEOTAPED DEPOSITION OF P.S.

TO: All Counsel of Record

WITNESS: P.S.

DATE & TIME: Tuesday, April 24, 2018 commencing at 12:00 p.m.

LOCATION: Circuit Attorney's Office, State of Missouri
Carnahan Courthouse
1114 Market Street – Room 401
St. Louis, MO 63101

PLEASE TAKE NOTICE that at the above date, time and location, and continuing from day to day until concluded, Defendant Eric Greitens will cause the video deposition of the above witness to be taken upon oral examination pursuant to 57.03 of the Missouri Rules of Civil Procedure before a shorthand reporter and suitable Notary Public. Any party or their attorney may appear and participate as they see fit. The deposition will be recorded by stenographic and videographic means by a representative of PohlmanUSA, 10 South Broadway, Suite 1400, St. Louis, MO 63102.

Dated: April 23, 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
edowd@dowdbennett.com
jmartin@dowdbennett.com
mnasser@dowdbennett.com

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

N. Scott Rosenblum, #33390
Rosenblum Schwartz & Fry
120 S. Central Ave., Suite 130
Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2018, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record in this matter.

/s/ James F. Bennett

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Case No. 1822-CR00642
vs.	)	
	)	Division No. 16
ERIC GREITENS,	)	
	)	
Defendant.	)	

DEFENDANT'S NOTICE OF VIDEOTAPED DEPOSITION OF K.S.

TO: All Counsel of Record

WITNESS: K.S.

DATE & TIME: Wednesday, April 25, 2018 commencing at 2:00 p.m.

LOCATION: Circuit Attorney's Office, State of Missouri
Carnahan Courthouse
1114 Market Street – Room 401
St. Louis, MO 63101

PLEASE TAKE NOTICE that at the above date, time and location, and continuing from day to day until concluded, Defendant Eric Greitens will cause the video deposition of the above witness to be taken upon oral examination pursuant to 57.03 of the Missouri Rules of Civil Procedure before a shorthand reporter and suitable Notary Public. Any party or their attorney may appear and participate as they see fit. The deposition will be recorded by stenographic and videographic means by a representative of PohlmanUSA, 10 South Broadway, Suite 1400, St. Louis, MO 63102.

Dated: April 23, 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
edowd@dowdbennett.com
jmartin@dowdbennett.com
mnasser@dowdbennett.com

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

N. Scott Rosenblum, #33390
Rosenblum Schwartz & Fry
120 S. Central Ave., Suite 130
Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2018, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record in this matter.

/s/ James F. Bennett

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

FILED
APR 23 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri
VS
Greitens

CASE NO. 1822-CR642 DIVISION 16 4/23 20 18

COURT ORDER

The Circuit Attorney is ordered to produce William Don Tisaby for his deposition on Thursday 4/26/2018 at 9:00 AM or as agreed.

33590

NCA

ENTERED
APR 23 2018
CRH

SO ORDERED:
Div. 16

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

FILED
APR 23 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri

VS

Coleitha S

CASE NO. 1822-CR642 DIVISION 16 4/23 2018

COURT ORDER

Sheriff: deposition and videographer
For all depositions in this
case shall be allowed to
enter courthouse will all
equipment and allowed access
to 6th Floor to set-up
for deposition.

ENTERED
APR 23 2018
CRH

So Ordered:

Div. 16

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

FILED
APR 13 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri

VS

Greitens

CASE NO. 1822-CR642 DIVISION 16 4/23 2018

COURT ORDER

Witness K.S. + P.S. are ordered to submit their respective phones to Court approved forensic expert for forensic examination.

Defendant shall tender the name of its forensic expert for Court approval.

Phones will not be turned over to Def. and shall remain with forensic expert until forensic exam completed.

Phones shall be cloned by forensic expert w/ contents placed in digital file for review by special master for relevance and privilege.

Def shall provide a list of contents expected to be found on the phones and will provide to the special master.

ENTERED
APR 23 2018
CRH

So Ordered:
Div. 16

33550

RT HCA

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

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

MOTION FOR PROTECTIVE ORDER

The State of Missouri respectfully moves the Court to enter a protective order regarding the notice of deposition of Anthony Box, currently Chief Investigator for the Circuit Attorney's Office. Although Mr. Box was identified recently as the current lead investigator in regard to the above-captioned case, his role is to assist counsel in trial preparation, witness scheduling, assembling exhibits and serving trial subpoenas. He has had a minimal role in case preparation to date. By seeking to depose him, the defense continues to pursue its discovery strategy of draining the pond to search for hypothetical fish at the bottom. The Court previously excluded discovery of personnel records pertaining to Mr. Box. No useful purpose will be served by deposing him at the deadline for completion of discovery; rather, a deposition will merely disrupt the State's trial preparation and will inevitably trench on work product excluded from discovery by the express terms of Rule 25.10(A).

WHEREFORE the State requests an order precluding the deposition of Mr. Box; in the alternative, the State requests that any deposition be limited to one hour of direct examination.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org

/s/ Robert H. Dierker 23671
Assistant Circuit Attorney
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by hand delivery means this 25 day of April 2018.

/s/Robert H. Dierker

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI
22ND JUDICIAL CIRCUIT
ST. LOUIS CITY

FILED
APR 26 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

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

ORDER

Movant Temple has complied with the request to amend his Affidavit, through the filing with this Court his First Amended Affidavit and Second Amended Affidavit. Movant has requested any the Subpoena for his Deposition and the Subpoena duces tecum be quashed upon the filing of his Affidavits.

Thereon, the Court GRANTS the Movant's Motion to Quash the Subpoena and Subpoena duces tecum, and Temple will not be required to appear on April 30,2018, or any date thereafter to be deposed by Defendant Greitens.

SO ORDERED:

Rex M. Burlison
Circuit Judge
Division 16

Dated: April 26, 2018

ENTERED
APR 26 2018
D P

WA 11105217.1

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

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

AMENDED WITNESS ENDORSEMENT

The State of Missouri hereby amends its witness endorsements previously filed herein by deleting Kristal Taylor and adding Nikolaus Baer, whose last known address is c/o Robert Zeidman.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org

/s/ Robert H. Dierker 23671
Assistant Circuit Attorney
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by hand delivery means this 26 day of April 2018.

/s/Robert H. Dierker

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

FILED
APR 27 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri
VS
Eric Greitens

CASE NO. 1822CR00642 DIVISION 16 4-27 2018

COURT ORDER

Please allow cameras/equipment into the Carnahan Court House [redacted] Monday, April 30 for the depositions of Tony Box and Albert Watkins.

ENTERED
APR 27 2018
CRH

SO ORDERED:
Rus Bonf
DIV. 16

Edward T. Dowd
Attorney for Eric Greitens
28785

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

FILED
APR 27 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri

VS

Eric Gaitins

CASE NO. 1822CR00642 DIVISION 16 4-27 20 18

COURT ORDER

Albert Watkins motion to quash regarding the deposition of Albert Watkins is denied. It is ordered that the deposition take place at 1:00, Monday, April 30th.

ENTERED
APR 27 2018
CRH

SO ORDERED:
Rex Burlison
Div. 16

Charles W. Watkins #40363

Edward J. Dowdy 28385
Attorney for Eric Gaitins

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Defendant

_____
Judge

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

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

FILED
APR 27 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

State of Missouri

VS

Eric Greitens

CASE NO. 1822-CR00642 DIVISION 16 April 27 2018

COURT ORDER

The Court orders K.S. to produce her phone to the Defendant's expert on April 30 at 9:00 a.m. in Division 16.

ENTERED
APR 27 2018
CRH

So ordered.

Div. 16

Edward Z. Dowd
Attorney for Eric Greitens
28385

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ 20 _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No.: 1822-CR00642
vs.	)	
	)	Division: 10
ERIC GREITENS	)	
	)	
Defendant.	)	

NOTICE OF FILING BUSINESS RECORDS

COMES NOW Defendant, by and through his undersigned counsel, and pursuant to RSMO §§ 490.525 and 490.692, hereby certifies that counsel for all other parties to this action have been served with copies of the foregoing documents with affidavit.

- Certificate of Business Records and fourteen (14) pages of FedEx Records.

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
edowd@dowdbennett.com
jmartin@dowdbennett.com
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

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

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 1st day of May, 2018.

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CIRCUIT ATTORNEY'S OFFICE
1114 Market Street, Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369
www.circuitattorney.org

May 1, 2018

Edward L Dowd , Jr
Attorney for Defendant

Michelle Nasser,
Attorney for Defendant

James Forrest Bennett
Attorney for Defendant

James Garvin Martin
Attorney for Defendant

John Francis Garvey Jr,
Attorney for Defendant

N Scott Rosenblum
Attorney for Defendant

RE: 1822-CR00642 - ST V ERIC GREITENS

Defense Counsel:

I am writing regarding the following records previously furnished in discovery with an attendant Affidavit of Records Custodian for each:

Verizon
KTVI Fox 2 (video)
Apple
Google

As true and correct copies of those records were furnished in accordance with §490.692 RSMo, the State will introduce those records at trial as business records subject to that statute.

Sincerely,

/s/ Robert E. Steele, MBE# 42418
Robert E. Steele
Assistant Circuit Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served on defense counsel of record via operation of the Court's electronic filing system on this 1st day of May, 2018.

/s/ Robert E. Steele, MBE# 42418
Robert E. Steele
Assistant Circuit Attorney

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

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

NOTICE OF HEARING

Notice is hereby given that the State will call its motion to compel discovery for hearing on Monday, May 7, 2018, at 9:00 a.m. or as soon thereafter as the Court will permit.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
/s/Robert H. Dierker 23671
Assistant Circuit Attorney
dierkerr@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 1 day of May 2018.

/s/Robert H. Dierker MBE 23671

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

State Of Missouri,
Plaintiff,
vs.

ERIC GREITENS,
Defendant

Division Number:

CA#: 510702993

Cause No. 1822-CR00642

STATE'S ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW the State of Missouri, by and through Assistant Circuit Attorney Robert E Steele and endorses the following additional witness(es):

Columbia Daily Tribune-Custodian of Records

Endorsing all Defense Witnesses

Aaron Baker

Clout Public Affairs-Custodian of Records

Respectfully submitted,

/s/Robert Steele
Robert Steele, Bar No. 42418
Assistant Circuit Attorney
1114 Market Street, Room 401
St. Louis, MO 63101
(314) 622-4941

I hereby certify that a copy of the foregoing has been efiled, on this the 1st day of May, 2018.

/s/ Robert Steele
Robert Steele

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

State Of Missouri,
Plaintiff,
vs.

ERIC GREITENS,
Defendant

Division Number:

CA#: 510702993

Cause No. 1822-CR00642

STATE'S ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW the State of Missouri, by and through Assistant Circuit Attorney Robert E Steele and endorses the following additional witness(es):

Columbia Daily Tribune-Custodian of Records

Endorsing all Defense Witnesses

Respectfully submitted,

/s/Robert Steele
Robert Steele, Bar No. 42418
Assistant Circuit Attorney
1114 Market Street, Room 401
St. Louis, MO 63101
(314) 622-4941

I hereby certify that a copy of the foregoing has been efiled, on this the 1st day of May, 2018.

/s/ Robert Steele
Robert Steele

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No.: 1822-CR00642
vs.	)	
	)	Division: 10
ERIC GREITENS	)	
	)	
Defendant.	)	

NOTICE OF FILING BUSINESS RECORDS

COMES NOW Defendant, by and through his undersigned counsel, and pursuant to RSMO §§ 490.525 and 490.692, hereby certifies that counsel for all other parties to this action have been served with copies of the foregoing documents with affidavit.

- Certificate of Business Records and fourteen (14) pages of FedEx Records.

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
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jbennett@dowdbennett.com
edowd@dowdbennett.com
jmartin@dowdbennett.com
mnasser@dowdbennett.com

By: */s/ John F. Garvey*
John F. Garvey, #35879
Carey Danis & Lowe
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St. Louis, MO 63105
Phone: (314) 725-7700
Fax: (314) 678-3401
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

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 1st day of May, 2018.

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Cause No.: 1822-CR00642
vs.	)	
	)	Division: 10
ERIC GREITENS	)	
	)	
Defendant.	)	

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DOWD BENNETT LLP

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By: */s/ John F. Garvey*
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By: */s/ N. Scott Rosenblum*
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CIRCUIT ATTORNEY
CITY OF ST. LOUIS

KIMBERLY M. GARDNER

CIRCUIT ATTORNEY'S OFFICE
1114 Market Street, Room 401
St. Louis, Missouri 63101
(314) 622-4941
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May 1, 2018

Edward L Dowd , Jr
Attorney for Defendant

Michelle Nasser,
Attorney for Defendant

James Forrest Bennett
Attorney for Defendant

James Garvin Martin
Attorney for Defendant

John Francis Garvey Jr,
Attorney for Defendant

N Scott Rosenblum
Attorney for Defendant

RE: 1822-CR00642 - ST V ERIC GREITENS

Defense Counsel:

I am writing regarding the following records previously furnished in discovery with an attendant Affidavit of Records Custodian for each:

Verizon
KTVI Fox 2 (video)
Apple
Google

As true and correct copies of those records were furnished in accordance with §490.692 RSMo, the State will introduce those records at trial as business records subject to that statute.

Sincerely,

/s/ Robert E. Steele, MBE# 42418
Robert E. Steele
Assistant Circuit Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were served on defense counsel of record via operation of the Court's electronic filing system on this 1st day of May, 2018.

/s/ Robert E. Steele, MBE# 42418
Robert E. Steele
Assistant Circuit Attorney

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

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

NOTICE OF HEARING

Notice is hereby given that the State will call its motion to compel discovery for hearing on Monday, May 7, 2018, at 9:00 a.m. or as soon thereafter as the Court will permit.

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

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
/s/Robert H. Dierker 23671
Assistant Circuit Attorney
dierkerr@stlouiscao.org
1114 Market St., Rm. 230
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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 1 day of May 2018.

/s/Robert H. Dierker MBE 23671

CIRCUIT ATTORNEY Kimberly M. Gardner
CITY OF ST. LOUIS

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

Received by_____ on _____

May 1, 2018

Mr. Jack Garvey
Mr. James Martin
7773 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105

Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jack Garvey and James Martin:

Dear: Jack and James

Enclosed please find the following discovery:

1. Verizon Case #180095051 (1 DVD)
2. Zeidman supplemental (1 DVD)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

Robert Steele
Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

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

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

ERIC GREITENS' MOTION TO STRIKE MARY ANNE FRANKS AND FOR COSTS

The State has endorsed as a witness Mary Anne Franks, an out-of-state expert the State retained at $600 an hour to testify at trial. However, Ms. Franks testified at her deposition that she currently holds no specific opinion for the trial in this case. In fact, Ms. Franks testified that the Circuit Attorney has not even asked Ms. Franks to render an opinion. Nor has Ms. Franks reviewed, been provided, or even discussed with the Circuit Attorney's Office any evidence in this case from which she could base an opinion. Rather, when asked what opinion testimony she would offer at trial, Ms. Franks was able to state only that her testimony at trial would be based on an aspect of her expertise in a variety of areas, tailored to the questions that she will be asked on the witness stand at trial. Because Ms. Franks does not currently hold a specific opinion on this case, she cannot disclose what, if anything, she would testify to at trial, and any such opinions that are later presented necessarily would not have been disclosed in advance of trial. Ms. Franks—a law professor who advocates for legislation irrelevant to this case—would purportedly offer inadmissible legal testimony and psychological testimony for which she is unqualified under Section 490.065.2. For these reasons and others, Ms. Franks must be stricken as a witness from

this case, and the State should be ordered to pay costs related to her deposition. *See, e.g.*, Missouri Rule Crim. Pro. 25.12(d); § 490.065 RSMo.

Franks Must Be Stricken Because She Holds No Disclosable Opinion For Trial

It is fundamental that a defendant is entitled to discover in advance of trial any opinion that the State's expert witness may seek to offer at trial. This right is formalized in Missouri Rule of Criminal Procedure 25.12(d), which states that "The defense may discover by deposition the facts and opinions to which an expert is expected to testify." As Assistant Circuit Attorney Robert Dierker stated during the hearing in this case on April 25, 2018: "[T]he whole point of the deposition is for them to find out what the opinions of the experts are." April 25, 2018 Hearing Tran. 10:15-20.

Despite the fact that the State has endorsed Ms. Franks as a witness, the State has not asked Ms. Franks to render an expert opinion:

> Q. Well, typically an expert does render their opinion and provide it in advance of the deposition. . . . And you have not been asked to do that by the Circuit Attorney's office.
>
> A. No.
>
> Q. The Circuit Attorney's office has not asked you to render any particular opinion in this case.
>
> A. No.

Deposition Transcript of M. Franks, 43:10-19. Consistent with her interaction with the Circuit Attorney's Office, Ms. Franks testified at the outset that she currently holds no opinion related to the evidence or facts at issue in this case:

> Q: . . . Ms. Franks, are you offering—do you intend to offer an opinion in this case?
>
> A. Yes.
>
> Q. And would that be an expert opinion?
>
> A. Yes.

> Q. And what opinion do you intend to offer in this case?
>
> A. Could you be more specific.
>
> Q. Are you intending to testify as an expert?
>
> A. Yes.
>
> Q. And an expert who will render an opinion at trial?
>
> A. Yes. Depending on the questions that I'm asked, yes.
>
> Q. You can't tell me here right now based on your review of the material and your discussions with the Circuit Attorney's office what opinion you intend to render?
>
> A. No, because I think there are probably multiple issues that are going to come up at trial, and my answers will be tailored to those questions.

Id. at15:13-16:8. Ms. Franks explained,

> I have a lot of expertise in various areas, not all of which I assume will be relevant. And so I expect that there will be certain things that I'm asked about that will be more relevant than others . . . I can't speak with any certainty about what specifically will come up."

Id. at 33:19-34:5. She answered further,

> Q. So it sounds to me you've had some general conversations with the Circuit Attorney's office regarding your various areas of expertise but you do not yet know for certain what areas of expertise you'll be testifying to at trial, until you have further discussions or you actually are asked those questions at trial, is that right?
>
> A. To be very specific, yes. Because my areas of expertise on privacy law are quite considerable.

Id. at 38:7-15; 40:16-24 (Franks explains that her "[o]pinion at trial depends on what am I being asked."); 41:23-25 ("I haven't sat down and said this is my opinion on this subject that I will be reading off in court, no."). Relatedly, Ms. Franks confirmed that there will be no documentation related to the undisclosed opinions that she may provide at trial:

> Q. And so there will be no documentation in advance of trial of the opinion that you intend to offer, correct?
>
> A. That is correct.
>
> Q. And you don't know, sitting here today, what testimony you intend to offer at trial because it depends on the questions asked at trial, right?
>
> A. Yes.

Id. at 44:8-15.

Because the State's expert does not currently hold an expert opinion, there is no opinion for Defendant to discover in advance of trial. It necessarily follows that Ms. Franks's deposition did not disclose "the facts and opinions to which" she is expected to testify, in violation of Rule 25.12(d); *see also* Rule 25.03 (mandatory expert disclosures); April 25, 2018 Hearing Trans. 10:15-20 ("[T]he whole point of the deposition is for them to find out what the opinions of the experts are.").

This prejudice to Defendant is compounded by the fact that, without any initial disclosure, there is no disclosure for Ms. Franks to supplement, as the Rules would require her to do if her opinion were to change between her deposition and trial, which provides yet another basis for striking Ms. Franks as a witness in this case. Indeed, if Ms. Franks were permitted to testify at trial, any opinion that she offered necessarily would be a *new* opinion, which would properly be excluded. *See, e.g.*, *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173, 180 (Mo. App. 2006) ("When evidence is presented during trial that has not been previously disclosed, the court has broad discretion, and it is within that discretion to reject such evidence."); *Green v. Fleishman*, 882 S.W.2d 219, 221–22 (Mo. App. 1994) (affirming striking of expert witness).

This non-disclosure of Ms. Franks's trial opinion is exacerbated by the incomplete document production pursuant to Defendant's subpoena directed to Ms. Franks. As Ms. Franks's testimony confirms, multiple files that Defendant subpoenaed for production by April 27, 2018 were not produced, including the engagement agreement between Ms. Franks and the Circuit Attorney's Office and an expert report that Ms. Franks prepared in connection with a different matter relating to nonconsensual pornography. With regard to the subpoena for documents, Ms. Franks testified that she did not fully comply because Ms. Gardner told her "that the engagement

letter was already provided. And that many of these items simply didn't apply." *Id.* at 77:4-10. The Circuit Attorney's Office has not produced the engagement agreement and did not file a motion to quash the subpoena or even discuss it with the defense attorneys.

Also, during the deposition, Ms. Franks refused to turn over documents she had reviewed and brought with her into the deposition, even in redacted form, or even to summarize for identification purposes the documents she had brought with her into the deposition. *Id.* at 6:8-14:8; 54:21-56:15. Mr. Steele, who attended the deposition for the Circuit Attorney's Office, never directed Ms. Franks to turn over her file. *Id.* Ms. Franks has never testified as an expert, so presumably has never been qualified by a court as one. However, bizarrely, Ms. Franks also refused to provide the public case caption for either of the two other cases in which she had previously prepared an expert report. *Id.* at 15:11-17:12.

Section 490.065.2 Further Compels The Exclusion of Ms. Franks as a Witness

Further counseling in favor of the exclusion of Ms. Franks as a witness, the fact that Ms. Franks does not have an opinion on this case and was unable to testify to such an opinion at her deposition means that there is no basis from which this Court can find that her testimony is admissible under § 490.065.2, which governs the admissibility of expert testimony in both criminal and civil cases. In the absence of testimony regarding the opinions that Ms. Franks may seek to offer at trial, the State necessarily cannot satisfy its burden of establishing the admissibility of Ms. Franks's testimony under § 490.065.2 at the pre-trial *Daubert* hearing.

Section 490.065.2 compels the exclusion of Ms. Franks as a witness for the related reason that Ms. Franks has no knowledge of the evidence in this case from which she could render an opinion. Section 490.065.2 provides:

> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case ….

Ms. Franks cannot meet this standard. Even disregarding the fact that Ms. Franks does not hold an opinion and that the State cannot satisfy its burden of establishing the admissibility of Ms. Franks's testimony, any opinion that the State may seek to elicit from Ms. Franks at trial necessarily would not be "based on sufficient facts or data" because Ms. Franks has not reviewed a single piece of evidence or has any knowledge of what evidence exists. She has reviewed no evidence or testimony, has not conducted a single witness interview, and has had no discussion with the Circuit Attorney's Office regarding what evidence exists or does not exist in this case. *Id.* at 56:24-57:23.

For this reason, any testimony that the State may seek to elicit from her would be deficient under § 490.065.2(b). It likewise follows that any testimony that she may offer would be deficient under § 490.065.2(a), (c), and (d), which are predicated on the expert's knowledge and application of the facts and evidence. Indeed, it is self-evident that an expert who does not know the facts or evidence cannot "help the trier of fact to understand the evidence or to determine a fact in issue." *See* § 490.065.2(a).[1]

[1] Even if the State intends to use Ms. Franks as some sort of "cold" or "blind expert," meaning she had not reviewed any case-specific evidence and was not going to testify about any of the events in the case, such opinion still would need to: (1) be provided by a witness with specialized knowledge and qualifications to provide such an opinion, which Ms. Franks does not have; (2) be disclosed in advance of trial, which it was not; and (3) be relevant to evidence at trial, such that its probative value is not

Further, despite the fact that Ms. Franks does not hold an opinion in this case, her testimony makes clear that any opinion that she could possibly offer at trial would be inadmissible because it would be either: (a) a legal opinion; or (b) unqualified under § 490.065.2. Ms. Franks is an attorney (apparently unlicensed) and law professor who, outside of academia, advises legislators on the passage of nonconsensual pornography legislation. When asked what in her field of expertise might be relevant to this case, she responded:

> It would be the kinds of psychological impact that a victim might undergo if she experienced having her picture taken while she was naked without her consent. About the ways she might act or respond to that particular type of violation. And about – I probably volunteered some of my thoughts on the legislation, because legislation is obviously something that I've spent many years working on about how the law is trying to catch up with evolving senses of norms about privacy.

Id. at 30:10-21. The two topics Ms. Franks identified as potentially relevant to this case are "revenge porn" legislation and psychology. At the outset, neither of these topics are relevant to the issues in this case.

First, this is not a revenge porn case—not only is there no evidence supporting such a crime (e.g., no photo and no distribution), but in fact, as Ms. Franks would testify, there is no revenge porn law in Missouri, and it certainly is not the charge in this case.[2] Moreover, any testimony that

---

substantially outweighed by the danger of unfair prejudice, which it is not. Testimony describing general characteristics of victim behavior not only conclusively suggests to the jury that a witness has been victimized in the first place, but it could inappropriately imply that a defendant is guilty. *See, e.g., State v. Haskie*, 242 Ariz. 582, 588 (2017). This potential for undue prejudice requires that trial courts carefully scrutinize such evidence. *Id.* Such proffered evidence must be screened by the Court through the evidentiary rules, including § 490.065.2, and must be limited to matters within the scope of the witness's expertise. As explained below, Ms. Franks has no qualifications under § 490.065.2 to provide any expert testimony regarding general characteristics of victim behavior.

[2] As recently as February 2018, Ms. Franks had personal contact with members of the Missouri house regarding passage of a nonconsensual pornography bill. Franks Dep. 59:14-60:15. Ms. Franks testified that the publicity of this case may advance that bill. *Id.* at 89:14-90:16. Even before she was retained in this case, she was an outspoken critic of the legal defense in this case, tweeting that it was "appalling." *Id.* at 60:16-61:15. It was after Ms. Franks commented publicly on this case that the Circuit Attorney contacted her to inquire whether Ms. Franks had any expertise relevant to this case.

Ms. Franks may seek to offer on legislation or privacy law would constitute inadmissible legal opinion. *See Hill v. City of St. Louis*, 371 S.W.3d 66, 77 (Mo. App. 2012) ("Generally, expert testimony on issues of law is inadmissible because this testimony encroaches upon the duty of the court to instruct on the law.") (citation omitted).

Further, Ms. Franks, who has no training, education, or licensure in psychology, medicine, counselling, sociology, social work, forensics, or forensic interviewing—and who has never herself conducted a forensic interview of any victim of any crime—is not qualified to testify as an expert in a court of law regarding the "kinds of psychological impact that a victim might undergo" or "the ways [a victim] might act or respond." Franks Dep. at 85:2-86:10. *See, e.g., State v. Baker*, 422 S.W.3d 508, 511 (Mo. App. 2014) (expert testimony regarding common behaviors in child victims of sexual abuse was qualified because she was a forensic interviewer with the Children's Advocacy Center, held a bachelor's degree and a master's degree in social work, was a licensed clinical social worker, completed extensive training in interviewing children, and had conducted nearly 700 interviews). Perhaps recognizing the fact Ms. Franks is not qualified to render an expert opinion on victim psychology, Mr. Steele attempted to rehabilitate Ms. Franks based on nonexistent evidence:

> Q. (BY MR. STEELE) In addition, if you were provided some of the records, perhaps an employment history, if she had some psych records or medical records, would those also assist you in forming an opinion as to whether her conduct was consistent with a victim of invasion of privacy?
>
> MS. NASSER: Objection. Psych, what did you say?
>
> MR. STEELE: Psych records.
>
> MS. NASSER: Do you have psych records?
>
> MR. STEELE: Not at this point.
>
> MS. NASSER: Okay.

A. Yes.

Q. (BY MR. STEELE) Just so we're clear, what I wanted to know is, if you were given information, that may include -- and this is just my prior experiences that you would do things – medical records, psych records, employment records, social histories, employment, educational records, collateral interviews, all these things are things that are given to a person to form an opinion. If you were given some of that information, not all of it because all of it may not be available, but if you were given some of that information, would it assist you in making a determination as to whether KS's conduct is consistent with a victim of invasion of privacy?

A. Yes, it would.

Q. And again, some of that information may not be available . . .

Id. at 95:23-96:14. As an academic and a lawyer who has never interviewed a single victim, Ms. Franks is not "qualified by knowledge, skill, experience, training, or education" to offer an expert opinion on victim psychology or victim dynamics. 490.065.2(1).

Not only is Ms. Franks not qualified to offer an opinion on victim psychology or victim dynamics, but also the probative value of any such testimony would be substantially outweighed by the danger of unfair prejudice, would cause confusion of the issues, undue delay, and would mislead the jury. The Court should use its broad discretion to exclude such testimony. *See, e.g., Kerr v. Missouri Veterans Comm'n*, 537 S.W.3d 865, 876 (Mo. App. 2017).

Conclusion

In conclusion, the State has failed to properly disclose Ms. Franks as an expert witness, and Mr. Greitens would be substantially prejudiced if Ms. Franks nonetheless is permitted to testify at trial because Mr. Greitens has been deprived of any opportunity to discover Ms. Franks's specific opinions in this case, which currently do not exist. Further, the State necessarily cannot establish the admissibility of Ms. Franks's testimony under § 490.065.2 because Ms. Franks has reviewed no evidence in this case and therefore has no basis on which to rest an opinion that could be in any way helpful to the jury. Ms. Franks would purport to offer inadmissible legal testimony

and psychological testimony for which she is unqualified under Section 490.065.2. And, perhaps most fundamentally, Ms. Franks should be excluded because Ms. Franks does not have an opinion in this case.

WHEREFORE, Mr. Greitens respectfully requests that this Court strike Ms. Franks as an expert witness in this case, award Defendant his costs, assess Ms. Franks's costs to the State, and enter such other and further relief as the Court deems just and proper.

Dated: May 1, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James F. Bennett*
James F. Bennett, #46826
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James G. Martin, #33586
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 1st day of May 2018.

/s/ *James F. Bennett*

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

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

MOTION TO STRIKE
ROBERT ZEIDMAN AND NIKOLAUS BAER

Comes now Eric Greitens, by and through undersigned counsel, and for his motion to strike the testimony of Robert Zeidman and Nikolaus Baer, respectfully states as follows:

I. Background

On or about February 22, 2018, Gov. Greitens was charged with one count of invasion of privacy, in violation of section 565.252 RSMo. To prove Gov. Greitens guilty of this charge, the State needs to prove beyond a reasonable doubt that "the defendant subsequently transmitted the image contained in the photograph in a manner that allowed access to that image via a computer." MAI 319.44. In maintaining its charge of transmission of a photo, the Circuit Attorney has yet to produce two key pieces of evidence—a photo and a transmission. Instead of dismissing its case for lack of required evidence, the Circuit Attorney has paid a $10,000 retainer to an out-of-state electrical engineer, at the rate of $475 an hour, to convince a jury (without evidence) that there was a photo and transmission in this case. Dep. 37:16-18; 71:1-22. As explained below, the unqualified and nonsensical testimony of Zeidman and Baer must be prohibited, and the Court may do so without need of a hearing.

The State has paid electrical engineers Zeidman and Baer to offer the following two extraordinary opinions:[1]

(1) A person can identify the sound that an iPhone makes that imitates a camera shutter closing when a picture is being taken and can differentiate that sound from similar ones on other smartphones. When an Apple iPhone shutter sound is heard, a user can determine that a picture was taken, particularly if that shutter sound is accompanied by a flash. Report at 17.

(2) All iPhone photographs are transmitted in a manner that allows access to that image via the computer inside the iPhone. Report at 15.

Zeidman and Baer are not forensic audiologists, experts in cognition, memory, or perception, or otherwise qualified in any way to render the first set of opinions. Their second opinion would require a bizarre construction of the statutory phrases "transmitted" and "allowed access," contrary to the plain language of the statute, and which would not comport with due process. The Court must exclude this testimony for failure to meet any of the standards under 490.065, RSMo,[2] because it has no probative value, and because it would cause unfair prejudice,

---

[1] Baer has not been deposed in this case and was not even disclosed as a possible witness until near the end of Zeidman's deposition. In fact, when asked who was going to be the testifying expert in case, Zeidman said, "I will." Dep. 46:10-12. Zeidman later said regarding Baer, "I'm not aware that he's going to testify." Zeidman Dep., 106:15-16.

[2] Section 490.065, RSMo governs the admissibility of expert testimony. In pertinent part, section 490.065.2 provides:

> (1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case;
>
> (2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect[.]

RSMo § 490.065.2(1). As amended (eff. Aug. 28, 2017), subsections 490.065.2(1) and (2) are now identical to Federal Rules of Evidence (FRE) 702 and 703, respectively. "To the extent that section 490.065 mirrors FRE 702 and FRE

confuse the issues, mislead the jury, cause undue delay, and waste time.

II. The Proffered Testimony Regarding the Sound of iPhone Shutter Must Be Excluded

Zeidman and Baer are not forensic audiologists, experts in cognition, memory, or perception, or otherwise qualified in any way to render opinions that: (1) *a person can identify the sound that an iPhone makes that imitates a camera shutter closing when a picture is being taken and can differentiate that sound from similar ones on other smartphones; and (2) when an Apple iPhone shutter sound is heard, a user can determine that a picture was taken, particularly if that shutter sound is accompanied by a flash.* To render these opinions, Zeidman and Baer took the following steps:

1. Baer made a single recording of the sound of an iPhone 5, iPad 2, Motorola Droid Mini, and BLU R1 HD using unknown and untested recording equipment in an unknown location. Dep. 86:9-88:8; 100:19-101:13. The exact duration of each recording is unknown but is less than half a second long. *Id.* 195:20-22.

2. Baer downloaded a free app, called Sonic Visualiser, to create—for the first time in his career—a "spectrogram." Zeidman is not aware of Sonic Visualiser being peer reviewed, neither Zeidman nor Baer were trained in Sonic Visualiser, and Zeidman could not even recall the name of the program without referencing his report. Dep. 75:18-76:25. Neither Zeidman nor Baer tested Sonic Visualiser. Sonic Visualiser is designed for analyzing musical recordings, obviously of a longer duration than a partial second.

3. Baer's spectrograms contain no measurements. Zeidman looked at Baer's spectrograms as "anyone with eyeballs" could do and rendered opinions—without any

703, as interpreted and applied in *Daubert* and its progeny, the cases interpreting those federal rules provide relevant and useful guidance in interpreting and applying section 490.065." *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 155 (Mo. banc 2003).

mathematical calculations or measurements—that certain spectrograms appeared "similar" or "different."

4. Zeidman played the shutter sound on either his wife or his assistant's iPhone of an unknown model for less than a minute, and then possibly at a different time played the shutter sound on his Samsung Galaxy phone. Dep. 32:13-25. Zeidman then rendered an opinion that certain phones sounded "virtually identical," "very similar," "very different," or "different."

5. Based on the above, Zeidman then rendered the opinions that (a) a person can identify the sound that an iPhone makes that imitates a camera shutter when a picture is being taken and can differentiate that sound from similar ones on other smartphones; and (b) when an Apple iPhone shutter sound is heard, a user can determine that a picture was taken, particularly if that shutter sound is accompanied by a flash.

For a variety of reasons, none of these opinions are admissible under Section 490.065.

First, and most importantly, neither Zeidman nor Baer is a witness "qualified as an expert by knowledge, skill, experience, training, or education" in this field whose "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." § 490.065.2(1). Neither Zeidman nor Baer—both electrical engineers, and neither of whom have reviewed any evidence or interviewed any witness in this case—have any degree or training in forensic audiology, medicine, cognition, memory, or perception, which qualifies them to render an opinion regarding the capability of the human ear in an unknown environment to perceive, distinguish, retain, and recall sounds over several years. Dep. 101:21-106:8. Zeidman testified,

> Q. Would you agree that a person's ability to perceive, retain, and recall a particular sound could depend on that person's medical conditions?
>
> A. I believe so. I'm not -- as you pointed out, I'm not an expert in these areas, but I believe that's true.

> Q. Could it also be impacted by a person's--the time period between when the person heard a sound and when they first recalled that sound?
>
> A. Again, I'm not an expert, but I believe that's true.
>
> Q. And so you're not an expert in -- in ear witness identification?
>
> A. Correct.
>
> Q. You're not an expert -- you're not a forensic audiology expert?
>
> A. That's correct.
>
> . . .
>
> Q. And especially given the very short duration of a camera shutter, it is possible that it is a very low percentage of people who could identify the sound an iPhone makes. You don't know?
>
> A. Not being an expert, I don't know.
>
> . . .
>
> Q. It would take an expert in the area of forensic audiology, cognition, or memory in order opine on whether the general population or a particular person that that witness had examined could perceive, recall, and retain a -- a particular sound?
>
> A. That sounds correct, but I don't know -- I don't know enough to say what kind of expertise is needed to make that determination.
>
> Q. You're not even enough of an expert to know what kind of expert?
>
> A. Correct.

Dep. 175:2-176:21. Based on Zeidman's and Baer's lack of audiology and cognition expertise alone, the Court should exclude their opinion.

Second, the proffered testimony is not "based on sufficient facts or data." § 490.065.2(1). There is: (1) no evidence that an iPhone—much less an iPhone 5—was the model of any phone used to take any photo in this case; and (2) questionable evidence, at best, that K.S. even heard a shutter sound. Before the grand jury and in her deposition, K.S. testified that she saw neither a camera nor a cell phone which could have taken any alleged photograph. And K.S.'s first mention of any shutter sound was three years after the alleged incident took place. Baer recorded only a handful of devices, not including any mechanical camera including the actual Canon camera from

which the iPhone shutter sound is captured.[3] Dep. 183:8-184:5.

Third, the testimony is not "the product of reliable principles and methods," and neither Zeidman nor Baer have "reliably applied the principles and methods to the facts of the case." § 490.065.2(1). Baer's creation of the spectrograms is not scientifically valid. For example, his recording equipment and circumstances are unknown; the spectrograms are of irrelevant and hypothetical devices made with no measurements; and Baer is untrained in creating spectrograms using the free, untested application designed to analyze musical files. Perhaps most importantly, spectrograms of devices and sounds not in evidence are irrelevant and confusing.

Fourth, it is impermissible lay opinion testimony that: (1) Zeidman could compare the spectrograms (which contain no measurements) "as well as any person with eyeballs" (Dep. 216:5-6); and (2) Zeidman personally can differentiate cell phone shutter sounds, when as Zeidman testified, the average person could form the opinion whether shutter sounds are distinguishable. Dep. 163:2-164:1. Such testimony would not be based on any knowledge not available to the jury, so such testimony must be prohibited. *See, e.g.*, *State v. Jefferso*n, 341 S.W.3d 690, 697 (Mo. App. 2011) ("A lay witness generally is not permitted to give opinion testimony about a matter in dispute because the jury and lay witness are ordinarily in equal positions to reach an accurate opinion about the matter. . . . [A] lay witness is permitted to give opinion testimony about a matter in dispute when the lay witness' opinion is based on knowledge not available to the jury and would be helpful to the jury in reaching the jury's own opinion.") (internal citations omitted). *See also Pedigo v. Roseberry*, 102 S.W.2d 600, 606 (Mo. 1937) (holding that expert testimony is not

[3] Apple's camera click sound comes from a 1970's Canon AE-1. *See* Pettitt, Jeniece, *Meet the man who created Apple's most iconic sounds — Sosumi, the camera click and the start-up chord*, CNBC (March 24, 2018), https://www.cnbc.com/2018/03/24/jim-reekes-the-apple-sound-designer-who-created-sosumi.html. According to Jim Reekes, the creator of the camera click sound, "[a]ny time you take a photo with the iPhone it's my camera, which kind of freaks me out because, even to this day when I hear people take photos with their iPhone I look to see who stole my camera." *Id.*

permitted on subjects "within the experience and knowledge common to mankind in general."); *Khoday v. Symantic Corp.*, 93 F.Supp.3d 1067, 1084 (D. Minn. 2015) ("Where an expert witness merely describes what he or she hears or sees, and that information is readily presentable to a jury without the expert's testimony, the testimony is inadmissible.").

Fifth, the proffered testimony must be excluded because it has no probative value. Any remote probative value of any such testimony would be substantially outweighed by the danger of unfair prejudice, would cause confusion of the issues and undue delay, and would mislead the jury. The Court should use its broad discretion to exclude such testimony. *See, e.g., Kerr v. Missouri Veterans Comm'n*, 537 S.W.3d 865, 876 (Mo.App. W.D. 2017).

III. The Proffered Testimony that All iPhone Photographs are Transmitted Must Be Excluded

The charged statute states, " . . . and the person subsequently . . . transmits the image contained in the photograph or film in a manner that allows access to that image via a computer." 565.252. The plain language of the statute requires that the photographic image be transmitted through a subsequent act by a defendant. If the statutory language does not mean what it plainly says—that there must be some act of transmission of a photograph by a defendant—then the statute must be considered unconstitutionally vague because it fails to place people on fair notice of what conduct is prohibited, and encourages arbitrary and discriminatory enforcement. *State v. Stokely*, 842 S.W.2d 77, 80–81 (Mo. banc 1992) ("One lacks notice if the statute is so unclear that [people] of common intelligence must necessarily guess at its meaning."). Even if the statutory language is considered ambiguous, then under the rule of lenity, an ambiguous criminal statute is strictly construed against the government and liberally in favor of the defendant. *Hill v. State*, 532 S.W.3d 744, 749 (Mo. App. 2017). As explained below, the proffered testimony that all iPhone photographs are transmitted would require a bizarre construction of the statutory phrases

"transmitted" and "allowed access," contrary to the plain language of the statute and in violation of due process.

Zeidman opines that <u>all</u> *iPhone photographs are transmitted in a manner that allows access to that image via the computer inside the iPhone*. Report, at 15. To form this opinion, Zeidman first requested and received from CAO Spokesperson Susan Ryan a copy of Section 565.252, because "transmission has a number of meanings in a technical sense," and he "needed to understand the statute to understand how it defined transmission . . . . Without that, I have no starting point." Dep. 48:12-55:19; 58:23-59:8; 60:1-13. Although unable to define computer without reviewing his report, Zeidman uses "an engineer's understanding of a computer," using the definition, "from my book entitled Just Enough Electronics to Impress your Friends and Colleagues." *Id.*, 107:16-111:7. Zeidman the opines that, "an iPhone contains a computer." *Id.*, 112:1-8. Zeidman's testimony rests on the following faulty, confusing and irrelevant premises.

First, Zeidman would testify only that binary image data—a series of 0s and 1s, which is not a viewable, seeable photographic image—is automatically transmitted within microseconds from the iPhone camera sensor to the iPhone memory when a user depresses the shutter button. Dep. 119:17-120:11; 121:7-9; 128:12-129:20; 130:13-25; 131:9-13. *See e.g., id.* 155:12-13 ("[T]he photograph transmission takes place with a single user action"). Zeidman answered:

> Q. And am I correct that your testimony is that all iPhone photographs are transmitted in a manner that allows access to that image via a computer inside the iPhone and that it's based on the fact that binary image data is transmitted to the computer. Therefore, all iPhone photographs are transmitted in a manner that allows access to that image via the computer inside the iPhone?
>
> A. Yes. I believe you correctly stated my opinion.

Id., 133:1-10.

> Q. And so the transmission is done by the phone as a result of the user pressing the button?

> A. Well, I would say it's done automatically as part of the process of the user pressing the button.
>
> . . .
>
> Q. But it's not a subsequent action that is taken after the depressing of the button, not a subsequent action by the user?
>
> A. That's correct.

Dep. 134:1-135:7.

Based on this testimony, Zeidman would then further testify that, "look[ing] at the wording of the statute," *when a photograph image is transferred from the camera to storage memory, it is transferred in a manner that* ***allows access*** *to that image via a computer, whether that computer is the computer in the iPhone, a computer in the iCloud, a computer that can use My Photo Stream, a computer that uses email, or a computer that can be connected to the iPhone via a USB cable, Wi-Fi connection, or Bluetooth connection*. Dep. 136:1-9; Report, at 17. Zeidman's reaches this conclusion because, e.g., even if iCloud is "disabled, it still allows access to that image because iCloud can be enabled." Dep. 136:1-33. Zeidman confirmed he has no basis to believe that there was any phone involved in this case in which an iCloud account was activated and enabled with available storage, or that had an updated iOS8.1, or Wi-Fi or cellular service turned on and connected. Dep., 136:16-139:1. Rather, Zeidman's testimony is that,

> [R]egardless of whether iCloud Photo Library's enabled or there's a Wi-Fi or cell connection, what I'm saying is that the photograph is transmitted in a manner that allows access, not that actually had access, but allows access to that image via computer connected -- well, connected to the iCloud. In other words, the phone allows access. Whether that access actually occurred doesn't seem to be written into the statute as I read it.

Dep. 139:15-24. When asked to clarify this opinion, Zeidman explained,

> Q. Explain to me what you mean when you say all photographs taken with an iPhone camera are transmitted in a manner that allows access to that image via computer even if the iCloud is disabled.
>
> A. So when I leave the door to my house open, it allows access to anybody walking by. It doesn't mean that anyone necessarily did access my house.

> Q. Do you mean that if they *then* enabled the iCloud, *then* it would have access *then*, so in that sense, it's *allowed* access?
>
> A. Yes. . . .

Id. 140:10-20. When asked again,

> Q. . . . So if someone doesn't have – has either a disabled app or an app that they have not created an account for, it's your testimony that if they take a photograph today with their phone in that condition, that photograph is still transmitted in a manner that allows access to that image via computer that uses email because in two years, that person later may create an account for that email on their phone?
>
> A. Correct, because it currently allows the access even though someone has not implemented that access.

Id. 148:24-149:10. Stated again,

> A. The image data is transmitted from a sensor to a memory. That memory is accessible by the computer in the phone, and it's also accessible to other computers via the transmission techniques that I talk about, Air Drop, iCloud, etc.
>
> Q. If those transmission techniques are enabled?
>
> A. The transmission will -- the -- the access will only occur if the transmission is enabled, but I believe it allows access even if they're not enabled.

Id. 153:6-16. Zeidman further clarified that, "So in -- in all of these including this No. 4 [Transmitted in a manner that allows access via email], the transmission I'm referring to is the transmission of the binary image data from the sensor to the memory. I'm always referring to that." *Id.* 146:13-16; *See also id.* 145:21-146:6.

Zeidman's testimony regarding the transmission of an un-seeable series of 0s and 1s being transmitted within a phone is surely not what is intended by the plain language of the statute. Such a reading of the statute would be a violation of due process, because it would fail to place people on fair notice of what conduct is prohibited. Without doubt, Zeidman's testimony would cause confusion and misstate the law. Zeidman's testimony is irrelevant in this case, in which there is no evidence of a phone, a photo, or a transmission. Zeidman has no factual foundation for any opinion related to whether "defendant subsequently transmitted the image contained in the photograph in a manner that allowed access to that image via a computer." The proffered testimony must be

excluded because it has no probative value. Any remote probative value of any such testimony would be substantially outweighed by the danger of unfair prejudice, would cause confusion of the issues and undue delay, and would mislead the jury. The Court should use its broad discretion to exclude such testimony. *Kerr*, 537 S.W.3d at 876.

IV. Conclusion

For all of the reasons set forth above, Gov. Greitens respectfully requests the Court strike Zeidman and Baer, without need for further hearing.

Dated: May 1, 2018

Respectfully submitted,

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 1st day of May 2018.

/s/ James F. Bennett

IN THE 22ND JUDICIAL CIRCUIT
STATE OF MISSOURI
ST. LOUIS CITY

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

DEFENSE ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW Defendant, Eric Greitens, through his attorneys, and hereby notifies the State that the following witnesses may be called to testify or produce records in the above-styled cause:

Ralph Caraffa
Nicole Lakebrink

Respectfully submitted,

DOWD BENNETT LLP

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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 2nd day of May, 2018.

CIRCUIT ATTORNEY
CITY OF ST. LOUIS

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May 3, 2018

Mr. James Martin
7733 Forsyth Blvd, Suite 1900
St. Louis, Missouri 63105
Re: State v. Greitens
Cause Number: 1822-CR00642-01

Mr. Jim Martin:

Please find enclosed the following additional discovery:

1. Columbia Daly Tribune video 1 (CD)
2. Columbia Daly Tribune custodian of records affidavit (1 page)
3. Google custodian of records affidavit (1page)
4. Apple custodian of records affidavit (1 page)
5. Verizon custodian of records affidavit (1 page)
6. KTVI/KPLR custodian of record affidavit (1 page)

As true and correct copies of those records were furnished in accordance with 490.692 RSMO, the state will introduce those records at trial as business records subject to that statute.

Sincerely,

/s/ Robert Steele

First Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

Revised Motion re Media Coverage

Meredith Corporation, on behalf of a group of Interested Media Parties, in follow up to the request made by their counsel in Court this morning, requests that media coverage of the trial in this action be allowed by means of (1) audio recording and/or (2) still photography.

Meredith and the Interested Media Parties request that more limited coverage, following the Court's ruling denying video coverage, because audio and/or still photographic coverage will be less intrusive and would help ensure the accuracy and completeness of news media coverage of the trial, which will inevitably receive great public interest and attention.

Audio coverage, if permitted, will allow the citizens of Missouri to hear trial proceedings for themselves, and help ensure the accuracy of all news reporting on the trial. It will help avoid mistakes and hearing problems caused by courtroom acoustics. Audio recording of court proceedings is not unusual; the U.S. Supreme Court and the Missouri Supreme Court record and disseminate recordings of their arguments. Moreover, as to the

witness K.S., her voice is already public and the content of her testimony will be public, so audio recording will not implicate any significant privacy interest.

Meredith further submits that Supreme Court Operating Rule 16 authorizes a trial judge to permit media coverage, which may include "electronic recording, or photographing of judicial proceedings." Local Rule 11 (which follows Rule 10 on court reporters, and addresses preservation of the record of proceedings) is void to the extent it contradicts Supreme Court Operating Rule 16. MO. CONST., Art. V, §15 (local court rules may not be inconsistent with Supreme Court rules); *Perry v. Aversman,* 168 S.W.3d 541, 544 (Mo. App. 2005) (local rule held void because it was inconsistent with Supreme Court Rules).

WHEREFORE, Meredith, on behalf of the Interested Media Parties, requests that the Court permit media coverage of the trial in this matter, by means of audio recording, still photography, or both.

Respectfully submitted,

THOMPSON COBURN LLP

By ___/s/ *Mark Sableman*_____

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Attorneys for The Associated Press

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

Mark Sableman

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

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

DEFENDANT'S MOTION FOR WAIVER OF JURY TRIAL

Eric Greitens hereby moves this Court to permit a waiver of jury trial, and in support of this motion states:

Gov. Greitens was hopeful that a fair and impartial jury could be impaneled. However, the constant negative publicity about Gov. Greitens has destroyed any chance of obtaining a fair jury. The stories are untrue, they leap to conclusions based on witnesses not subject to cross examination, and they will be refuted at trial.

This week alone, the House Committee ignored the pleas of Gov. Greitens's attorney not to publish another report so shortly before trial because it so obviously would impact the jury panel. In response to the pleas of Gov. Greitens's defense attorney, the House published two negative reports which claim to authoritatively determine that the State's witness is telling the truth (with no cross-examination whatsoever), bolstering the credibility of the State's witness and attacking Gov. Greitens.

The most recent House Committee Reports led to front page headlines in the St. Louis Post-Dispatch accusing Gov. Greitens of lying and committing crimes. These inaccurate, biased headlines were published on May 1 and 3, 2018—just days before the first scheduled voir dire is

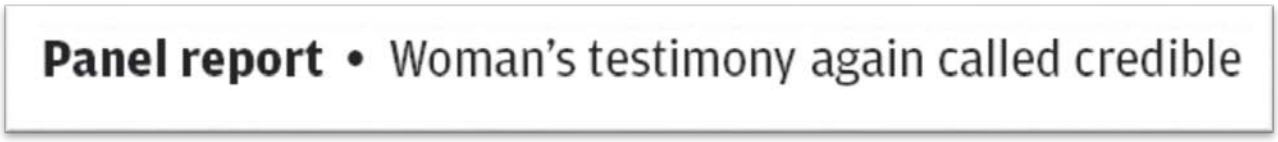
to take place on May 10, 2018. The timing and the ferocity of these reports and news stories make it look as though there is a concerted effort to pollute any possible jury pool.

The House Committee's decision to publish its one-sided reports on April 11, 2018, April 30, 2018, and May 5, 2018, destroyed any chance of Gov. Greitens receiving a fair and impartial jury in this case. The April 30, 2018 House Committee Report caused the following headline in the online version of the St. Louis Post-Dispatch[1]:

Missouri committee says, again, woman's testimony is credible in Greitens scandal

By Kurt Erickson St. Louis Post-Dispatch May 1, 2018 (6)

It caused the following print front page headline on May 1, 2018:



Panel report • Woman's testimony again called credible

This online version of the article included the following quotes:

- "The committee does not find anything in the Circuit Attorney interview that causes it to change its statement regarding Witness 1's credibility," the panel wrote. "Greitens' claims about the content of the Circuit Attorney interview mischaracterize the actual testimony received and reviewed by this committee."
- " . . . panel members unanimously agreed that her version of events were consistent."
- "Another committee member, Rep. Don Phillips, R-Kimberling City, added, "The video interview conducted by the Circuit Attorney's office only reinforces that view as it does not in any way contradict what she told the committee."

[1] http://www.stltoday.com/news/local/crime-and-courts/missouri-committee-says-again-woman-s-testimony-is-credible-in/article_b6017fa3-cfec-5849-a794-b034d081f4c8.html.

Meanwhile, one day after unilaterally vouching for the credibility of the State's witness, the May 2, 2018 House Committee Report caused this headline in the online version of the St. Louis Post-Dispatch[2]:

Greitens lied to state ethics commission, took charity donor list, report says

By Jack Suntrup and Kurt Erickson St. Louis Post-Dispatch 5 hrs ago (25)

Prospective jurors saw following print front page headline on May 3, 2018:

SERVING THE PUBLIC SINCE 1878 • WINNER OF 18 PULITZER PRIZES

stl TODAY ST. LOUIS POST-DISPATCH

THURSDAY • 05.03.2018 • $2.00

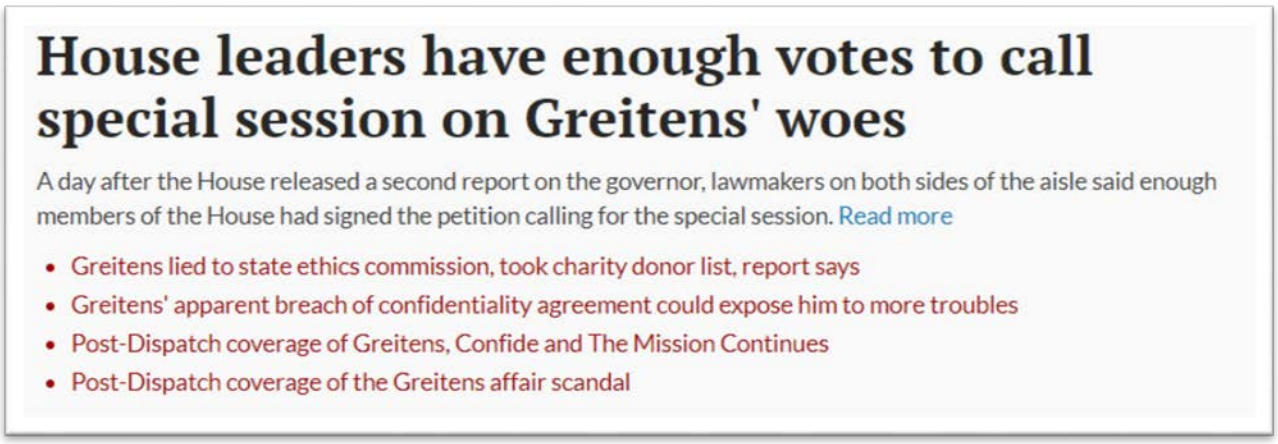
MISSOURI HOUSE COMMITTEE REPORT:

GREITENS LIED TO ETHICS PANEL, TOOK DONOR LIST

The most recent House Committee Reports prompted more coverage on the main page of the St. Louis Post-Dispatch online on May 3:[3]

[2] http://www.stltoday.com/news/local/govt-and-politics/greitens-lied-to-state-ethics-commission-took-charity-donor-list/article_bae3c7c0-f353-557c-9c66-4b7f710a7423 html

[3] http://www.stltoday.com/



House leaders have enough votes to call special session on Greitens' woes

A day after the House released a second report on the governor, lawmakers on both sides of the aisle said enough members of the House had signed the petition calling for the special session. Read more

- Greitens lied to state ethics commission, took charity donor list, report says
- Greitens' apparent breach of confidentiality agreement could expose him to more troubles
- Post-Dispatch coverage of Greitens, Confide and The Mission Continues
- Post-Dispatch coverage of the Greitens affair scandal

Exacerbating the prejudice caused by the reckless publication of the House Committee Reports just days before jury selection in this case, is the action of the Missouri Attorney General. AG Hawley, the topmost lawyer in Missouri, held a press conference on April 17, 2018 where he accused Gov. Greitens of committing crimes involving The Mission Continues, a charity founded and operated by Gov. Greitens for many years. In his press conference, AG Hawley made extrajudicial statements[4] that, "In the course of this investigation, we have uncovered evidence of wrongdoing that goes beyond Missouri's charity laws. To be specific, within the past several days, we have obtained evidence of potential criminal violations of Missouri law. And the evidence indicates that potentially criminal acts were committed by Gov. Eric Greitens." AG Hawley went on to say that, "The standards for impeachment say a crime is grounds for impeachment. So, I think you could certainly say these appear impeachable offenses." He also said, "I think the governor should resign." This is reckless, outrageous conduct so shortly before a scheduled jury trial, particularly because AG Hawley was not even announcing charges. Rather, AG Hawley made these accusations in announcing a referral to Kim Gardner, the Circuit Attorney of St. Louis,

[4] The Missouri Rules forbids extrajudicial comments that, "have a substantial likelihood of heightening public condemnation of the accused . . . ." MO R BAR Rule 4-3.8(f). Rule 4-3.8(f).

who is personally spearheading the case where her private investigator committed perjury over and over again while in her very presence. On April 11, 2018, even before this press conference, the official website of the Missouri Attorney General's Office posted a statement in which AG Hawley called on Gov. Greitens to "resign immediately" and characterized the allegations in the House Investigative Committee's Report, "certainly impeachable, in my judgment."[5] These extrajudicial comments so close to jury selection seem to be a concerted effort by AG Hawley and Circuit Attorney Gardner to ensure that Gov. Greitens has no chance for a fair trial.

The House Committee, Kim Gardner, and her associate Josh Hawley are all very consistent in totally ignoring one of our Constitution's most important safeguards against a rush to judgment—the presumption of innocence. The Governor is innocent. The House Committee, Kim Gardner, and her associate Josh Hawley also all seem to think the truth can be determined without the benefit of cross-examination, which has been described as the single greatest vehicle for determining the truth. *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (describing cross-examination as the "greatest legal engine ever invented for the discovery of truth").[6]

This motion is the culmination of continuous one-sided media coverage of this case, perhaps spurred by the fact—as recently revealed, only by the defense's dogged investigation—that certain members of the media, such as Scott Faughn, who are admittedly adverse to Gov. Greitens, are personally involved in pushing this story and a conviction in this case.[7]

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[5] https://www.ago.mo.gov/home/breaking-news/ag-hawley-statement-on-house-investigative-committee-report

[6] K.S. testified in her deposition that P.S. perjured himself in specific statements before both the House Committee and the Grand Jury, where he was not subject to cross-examination.

[7] See e.g., Scott Faughn, *Now that everyone knows what I've known all along about Eric Greitens*, https://themissouritimes.com/50797/now-that-everyone-knows-what-ive-known-all-along-about-eric-greitens/.

There also have been grievous mistakes in the media coverage in this case which will impact potential jurors. For example, on April 20, 2018, the St. Louis Post-Dispatch ran an erroneous front-page headline just one day after a highly anticipated ruling by the Court granting Gov. Greitens's request for sanctions against the Circuit Attorney's Office for its numerous discovery violations. The Court explicitly stated that it was "troubled" by the fact that, even faced with substantial objective evidence of sanctionable conduct, the Circuit Attorney still had the gall to tell the Court that there should be "no sanctions" and that Gov. Greitens's motions were "frivolous." No reasonable person in the courtroom could have misunderstood this statement to be anything other than a reprimand of the city's elected prosecutor. Nevertheless, the St. Louis Post-Dispatch, on the front page of its April 20, 2018 edition, erroneously credited the Court with calling Gov. Greitens's motions "frivolous":

SERVING THE PUBLIC SINCE 1878 • WINNER OF 18 PULITZER PRIZES

stl TODAY ST. LOUIS POST-DISPATCH

FRIDAY • 04.20.2018 • $2.00

DEFENSE:

Greitens

Can take new depositions, but are limited in their questioning. Judge also described their motions as 'frivolous.'

NO DISMISSAL

GREITENS CRIMINAL CASE ADVANCES

BY ROBERT PATRICK AND JOEL CURRIER
St. Louis Post-Dispatch

ST. LOUIS • A St. Louis judge on Thursday again refused to dismiss a criminal invasion of privacy charge against Gov. Eric Greitens after prosecutors committed "serious" violations of the rules of discovery. He will allow the defense to take new depositions, however, and prosecutors may be subject to monetary sanctions.

Circuit Judge Rex Burlison made his ruling about 9:45 a.m. after meeting with lawyers on both sides in chambers for more than 30 minutes. The governor's jury trial remains set for May 14.

Several prosecutors re-entered the courtroom smiling. Greitens' lawyers looked more grim.

After recapping the motions and responses that had been filed in the case since April 4, Burlison said that Circuit Attorney Kim Gardner had a "duty to be impartial" and ensure that all defendants be accorded "procedural justice." Prosecutors have an obligation to turn over certain documents

See GREITENS • Page A4

ETHICS PANEL
With Senate vote, watchdog can hear case against Greitens • A4

MESSENGER
Alleged predator in Capitol escapes notice • A2

EDITORIAL
Judge made the right call in letting trial proceed • A14

PROSECUTORS:

Gardner

Committed 'serious' violations of the rules of discovery, and may be subject to monetary sanctions.

LET THE VOTE BEGIN

Bike-sharer says none have been tossed into the river

BY ERIN HEFFERNAN

"It is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010) (*quoting Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009)). "If the right to trial by jury is to mean anything, all twelve jurors must be fair and impartial," and each "juror must enter the jury box disinterested and with an open mind, free from bias or prejudice." *Fleshner*, 304 S.W.3d at 87.

In a criminal case in Missouri, the accused, with the consent of *only the court*, can waive a jury and be tried before a judge alone, *over the objection of the prosecution*. *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 840 (Mo. App. 2000). In a criminal case, *the prosecution is allowed no right to demand a jury*. *Id.* In fact, should the Court deny Gov. Greitens's request to waive a jury, and "if an impartial jury cannot be impaneled, then the defendant is arguably entitled to dismissal of the case . . . ." *Id.* (citing *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968) ("There is a substantial danger that the defendant will be severely prejudiced if he is tried before a jury.")).

The Supreme Court has indicated that there may be "some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *Singer v. United States*, 380 U.S. 24, 37 (1965). This is such a case. In light of the reckless and one-sided House Committee Reports, the extrajudicial statements of the Missouri Attorney General, and the involvement of personally biased media such as Scott Faughn, a judge-tried case is the only way Gov. Greitens will receive a fair trial.

Courts recognize that there are situations where the pretrial publicity is so extraordinary that a defendant cannot be given the fair and impartial trial to which he is entitled. "In assessing the impact of potentially prejudicial publicity on prospective jurors, the critical question is not whether the jurors remember the case, but whether they have such fixed opinions regarding the

case that they could not impartially determine the guilt or innocence of the defendant." *State v. Johns*, 34 S.W.3d 93, 107 (Mo. banc 2000) (*citing State v. Middleton*, 995 S.W.2d 443, 463 (Mo. banc 1999)). In cases of extraordinary pretrial publicity, it may be appropriate for the trial court to disregard jurors' assertions of impartiality. *See Irvin v. Dowd*, 366 U.S. 717, 723-28 (1961). In *Irvin*, the United States Supreme Court held that in some circumstances involving extraordinary pretrial publicity or widespread public hostility toward a defendant, the trial court may disregard a juror's assertion that he or she can be impartial. *Id.* at 723-25. The doctrine announced in *Irvin* is appropriate where there is a "pattern of deep and bitter prejudice" *or* a "wave of public passion" such that the seating of an impartial jury is impossible. *Irvin*, 366 U.S. at 727-28; *see also United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998). In applying the test for a "wave of public passion," courts look to the amount of time that has passed that may have "soothed any public sentiment surrounding the case." *Johns*, 34 S.W.3d at 108 (two years passed from the time of defendant's capture to the time of jury selection); *see also Patton v. Yount*, 467 U.S. 1025 (1984). In this case, there is no similar passage of time.

At the hearing on the State's Motion for Protective Order, the Court asked what authority it had "to prevent the Missouri House from being reckless in the dissemination of information that's related to a coming trial." Tr. of April 11 Hearing, 5:1-4. The Court granted defense counsel time to research this issue of "what powers this Court has to prevent the reckless dissemination of information that may taint the jury pool that we're trying to accumulate here in the next month." *Id.* at 21:20-23. The Court further noted the importance in not "disseminati[ng] information on a trial this serious that has not gone through the rigors of every trial," *id.* at 24:1-2, and that such information should be "only disseminated through that process of decades of judicial rulings and precedent that have been on the book . . . for decades." *Id.* at 24:11-13. The House Committee did

not heed these words and nevertheless disseminated *three* Reports, on the eve of jury selection, which detail a voluminous amount of information in this case that has been untested by the rigors of proper cross-examination or the rules of evidence.

The House Committee Reports were released on April 11, April 30, and May 2, 2018. Jury Selection is scheduled to begin on May 10, 2018—less than 8 days after the release of the latest one-sided House Committee Report and testimony from key state witnesses not subjected to the rigors of cross-examination. The prejudice of the House Committee Reports and the impact it has had on media reporting is exemplified by the front-pages above, as well as the front page-report following the first House Report. The day after the April 11 House Committee Report was published, potential jurors saw this:

SERVING THE PUBLIC SINCE 1878 • WINNER OF 18 PULITZER PRIZES

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THURSDAY • 04.12.2018 • $2.00

WOMAN TESTIFIES THAT GREITENS GROPED AND STRUCK HER

'BEYOND DISTURBING'

"This was a private mistake that has nothing to do with governing. The people driving this story are part of an absurd political witch hunt."
— Gov. Eric Greitens

"And I instantly just started bawling and was just like, 'What is wrong with you? What is wrong with you?' And I just laid there crying while he was just like ... 'You're fine, you're fine.'"
— Woman's testimony

REACTION
Josh Hawley, other state politicians call for governor to resign. A6

TESTIMONY
Highlights of woman's sworn testimony to lawmakers. A7

MESSENGER
Report details the actions of a predator. A8

EDITORIAL
Amid credible stories of abuse, Greitens cannot continue to govern. A16

> Read the entire 300-page report at stltoday.com

J.B. FORBES • jforbes@post-dispatch.com
Gov. Eric Greitens speaks Wednesday at a news conference about a report that was about to come out concerning his affair in 2015. Greitens called the investigation a "witch hunt."

BY JACK SUNTRUP, KURT ERICKSON AND KEVIN MCDERMOTT
St. Louis Post-Dispatch

JEFFERSON CITY • During several sexual encounters with his hair stylist the year before he was elected Missouri's governor, Eric Greitens struck her in the face, touched her crotch without her consent and called her a "whore," the woman told a Missouri House committee, according to newly released documents.

The claims add disturbing new layers to the single criminal allegation Greitens faces – a felony invasion-of-privacy charge, for allegedly taking and transmitting a semi-nude photo of her without her consent.

In sworn testimony made March 7, the woman stood by that allegation, as presented in the House report released Wednesday afternoon. She also painted a broader picture of Greitens as a controlling, jealous lover for whom violence or the threat of it was an integral part of the affair.

Minutes before the report was issued, Greitens denounced the investigation as a "political witch hunt," using the term five times in about eight minutes. He referred to "lies and falsehoods," though he didn't specify which parts of the report he claims are false.

Later, House Speaker Todd Richardson, like Greitens a Republican, said he would seek a special session

See GOVERNOR • Page A6

The front-page of the St. Louis Post-Dispatch has consistently presented an overwhelmingly one-sided, negative portrayal of this case, such as the following published on April 13, 2018:

SERVING THE PUBLIC SINCE 1878 • WINNER OF 18 PULITZER PRIZES

stl TODAY ST. LOUIS POST-DISPATCH

FRIDAY • 04.13.2018 • $2.00

CALLS INTENSIFY FOR GOVERNOR TO RESIGN

CAN GREITENS GOVERN?

Top donor urges Greitens to step down from office

BY IKY CHADDE • St. Louis Post-Dispatch

JEFFERSON CITY • Amid a scramble by lawmakers to decide whether and how to remove Gov. Eric Greitens from office, a top donor to the embattled Republican joined a growing list of lawmakers and political leaders calling on the governor to resign.

In a statement issued Thursday, Joplin businessman David Humphreys said he was deeply disappointed by the actions of the governor described in a blistering report issued Wednesday.

The House report found that Greitens hit, groped and coerced sexual behavior out of a woman he admitted to having an affair with in 2015.

"While these actions took place before his election and are otherwise arguably a private matter, the testimony reveals behavior that should not be tolerated anywhere but especially not by those holding public office," Humphreys said. "Governor Greitens should resign as these new revelations describe behavior that makes it impossible to retain confidence in his ability to govern wisely and well."

Greitens, who received more than $2 million from the Humphreys family during his 2016 run for governor, said Wednesday that he would not

See GOVERNOR • Page A4

Embattled Missouri Gov. Eric Greitens

David Humphreys, CEO of Joplin's Eureka Building Products

St. Louis Circuit Attorney Kim Gardner

Defense team accuses Gardner of misconduct, incompetence

BY JOEL CURRIER • St. Louis Post-Dispatch

ST. LOUIS • A day after the release of a Missouri House investigative report on the invasion of privacy case against Gov. Eric Greitens, his attorneys accused St. Louis Circuit Attorney Kim Gardner of misconduct and "gross incompetence."

Defense attorney Jim Martin told the court Thursday that it wasn't until an hour after the release of the committee report that Gardner provided the defense with a videotaped interview of the woman with whom Greitens had an affair. The report, released in Jefferson City, presented new allegations that Greitens struck the woman during their sexual encounters.

Greitens, through a public relations firm, issued a statement

See DEFENSE • Page A4

Ex-husband mum on who provided $15,000 for fees for his attorney

BY KEVIN McDERMOTT • St. Louis Post-Dispatch

Did a mysterious benefactor anonymously put up $15,000 to cover the legal fees of the man who exposed Missouri Gov. Eric Greitens' extramarital affair?

That appears to be the claim of the ex-husband of Greitens' lover, according to transcripts of the man's testimony last month before a Missouri House committee investigating the matter.

"While I was talking with the Post, someone contacted my lawyer and said he was going to help with legal fees," the man said in the newly released testimony. He was referring to the Post-Dispatch, which interviewed him more than three months ago about his allegations regarding his ex-wife and Greitens.

He told the committee that,

See MONEY • Page A4

BUDGET • State lawmakers may move to cut governor's budget that could be used for legal defense. A4

TONY MESSENGER • Greitens emphasizes his right to trial, but that's in peril under his stewardship A2

- April 15, 2018:

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Nevertheless We Persist

We Will Not Be Silent

CAN HE SURVIVE IN THE #METOO ERA?

NEWS ANALYSIS

Affair may have been overlooked, but allegations of sexual violence put Greitens in unsavory company

BY KEVIN McDERMOTT • St. Louis Post-Dispatch

The biggest threat facing Gov. Eric Greitens right now might not be Missouri legislators pondering impeachment, or even a St. Louis prosecutor pressing a felony case. His biggest threat might be the era in which we live.

It's difficult to imagine a worse time for a sitting governor to try to navigate a scandal involving alleged sexual violence than this particular moment in America's cultural history:

See GREITENS • Page A4

INSIDE • Veterans of Greitens-founded mission Continues are shaken by scandal. A5

- April 18, 2018:

SERVING THE PUBLIC SINCE 1878 • WINNER OF 18 PULITZER PRIZES

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WEDNESDAY • 04.18.2018 • $2.00

GREITENS TOLD TO QUIT

GOP leaders act after Hawley says governor may have committed felony by using donor list

If Greitens doesn't step aside, 'it is my wish that we immediately start impeachment proceedings.'
Senate President Pro Tem Ron Richard

'In three weeks, this matter will go to a court of law – where it belongs and where the facts will prove my innocence.'
Gov. Eric Greitens on Twitter

'Under Missouri law, this is known as computer tampering. And given the value of the list in question, it is a felony.'
Attorney General Josh Hawley

INSIDE
Messenger: Greitens' greatest accomplishment is uniting strange bedfellows • A2
Kinder letter: Foreshadowed issues to come • A4
Editorial: Another reason for Greitens to resign • A14

BY JACK SUNTRUP
St. Louis Post-Dispatch

JEFFERSON CITY

Leaders in Missouri's GOP-controlled House issued a stinging rebuke of Republican Gov. Eric Greitens on Tuesday evening, calling on the state's chief executive to resign as scandals continue to consume his administration.

"Leaders at all levels of government are entrusted with an incredible responsibility to the Missourians we represent," said a joint statement from House Speaker Todd Richardson, House Majority Leader Rob Vescovo and House Speaker Pro Tem Elijah Haahr. "When leaders lose the ability to effectively lead our state, the right thing to do is step aside. In our view, the time has come for the governor to resign."

See GREITENS • Page A4

- April 19, 2018:

SERVING THE PUBLIC SINCE 1878 • WINNER OF 18 PULITZER PRIZES

STL TODAY ST. LOUIS POST-DISPATCH

THURSDAY • 04.19.2018 • $2.00

TWISTS AND TURNS IN GREITENS CASES

WHITE HOUSE KEEPING EYE ON SCANDAL

GOP wants to know how much support Greitens has

President Trump

BY JACK SUNTRUP AND CHUCK RAASCH
St. Louis Post-Dispatch

JEFFERSON CITY • President Donald Trump's administration is actively gauging the mood in Missouri's Capitol as it considers how to handle Gov. Eric Greitens, a governor from Trump's party who refuses to quit in the face of scandal, five GOP officials have told the Post-Dispatch.

"There's been interest from the White House about how this is playing out politically in Missouri" said one Republican Missouri House member, who spoke on the condition of anonymity. "So they're really just trying to get information about how much support the governor has in the Legislature, and how much he has, kind of, statewide."

White House officials believe that the president's weighing in would not necessarily prompt Greitens to resign. And Vice President Mike Pence, who campaigned for Greitens, is reluctant to weigh in on the scandal in part because he does not want

See WHITE HOUSE • Page A4

EX-FBI AGENT MAY BE UNDER INVESTIGATION

Governor's team alleges perjury inquiry of Tisaby

Gov. Greitens

BY ROBERT PATRICK, JACK SUNTRUP AND KURT ERICKSON
St. Louis Post-Dispatch

ST. LOUIS • Attorneys for Gov. Eric Greitens claimed in a court filing Wednesday that a former FBI agent involved in the investigation of Greitens' 2015 affair is himself being investigated for perjury.

The two-page filing offers no support for the assertion. It says simply that "As the Court knows, there is now a criminal investigation of Mr. [William Don] Tisaby and possibly Ms. Gardner related to the perjury by Tisaby, which no one is denying, and the participation in the lies and concealment by Ms. Gardner" referring to St. Louis Circuit Attorney Kim Gardner.

A St. Louis police spokeswoman wrote in an email to the Post-Dispatch that "No one has contacted the Department about an investigation involving Ms. Tisaby."

Gardner's office said in a statement that it had "no knowledge of any investigation being conducted by anyone on Mr. Tisaby or the Circuit Attorney." The statement

See GREITENS • Page A4

The Court can and should take judicial notice of the fact that the overwhelming amount of pretrial publicity, specifically as it relates to the House Reports, which make numerous, factually disputed findings directly related to the allegations in this case, rises to the level that would strip Gov. Greitens of his constitutionally guaranteed right to a fair and impartial jury. In Missouri, judicial notice may be taken of a fact which is common knowledge of people of ordinary intelligence, *Endicott v. St. Regis Investment Co.*, 443 S.W.2d 122, 126 (Mo. 1969), and it may be

taken of a fact, not commonly known, but which can be reliably determined by resort to a readily available, accurate and credible source. *State v. Weber*, 814 S.W.2d 298, 303 (Mo. App. E.D. 1991). Other courts have taken judicial notice of pretrial publicity relevant to obtaining a fair and impartial jury. *See Powell v. Superior Court*, 232 Cal. App. 3d 785, 790 (Cal. App. 1991) (taking "judicial notice of the continuing and pervasive publicity involving the ongoing political controversy in the City of Los Angeles.").

Accordingly, Gov. Greitens respectfully requests that this Court grant his Motion for waiver of jury trial.

Dated: May 3, 2018

Respectfully submitted,

DOWD BENNETT LLP

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 3rd day of May, 2018.

/s/ James F. Bennett

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

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

DEFENDANT'S NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion for Waiver of Jury Trial in Division 16 of the Circuit Court of the City of St. Louis, Missouri on the 7th day of May, 2018 at 11:00 a.m., or as soon thereafter as counsel may be heard.

Dated: May 3, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James F. Bennett*

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 3rd day of May, 2018.

/s/ James F. Bennett

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

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

DEFENDANT'S NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion to Strike Robert Zeidman and Nikolaus Baer in Division 16 of the Circuit Court of the City of St. Louis, Missouri on the 7th day of May, 2018 at 11:00 a.m., or as soon thereafter as counsel may be heard.

Dated: May 3, 2018

Respectfully submitted,

DOWD BENNETT LLP

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 3rd day of May, 2018.

/s/ James F. Bennett

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

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

DEFENDANT'S NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned shall call up for hearing Defendant's Motion to Strike Mary Anne Franks and For Costs in Division 16 of the Circuit Court of the City of St. Louis, Missouri on the 7th day of May, 2018 at 11:00 a.m., or as soon thereafter as counsel may be heard.

Dated: May 3, 2018

Respectfully submitted,

DOWD BENNETT LLP

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Rosenblum Schwartz & Fry
120 S. Central Ave., Suite 130
Clayton, MO 63105
Phone: (314) 862-4332
nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 3rd day of May, 2018.

/s/ James F. Bennett

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

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

DEFENDANT'S MOTION TO
SHORTEN TIME FOR NOTICE OF HEARING

Defense counsel has filed (1) Defendant's Motion for Waiver of Jury Trial, (2) Defendant's Motion to Strike Robert Zeidman and Nikolaus Baer, and (3) Defendant's Motion to Strike Mary Anne Franks. The Court has previously informed the parties that the Court was available to hear motions at 11 A.M. on May 7, 2018.

Although the scheduling order calls for 5 days' advance notice for any hearing, such a delay would be burdensome under the circumstances, with voir dire beginning May 10, 2018. Both parties would benefit from an early ruling on these motions, which will provide them additional time to prepare their respective cases for trial.

WHEREFORE, the undersigned requests that its Motion for Waiver of Jury Trial, Motion to Strike Mary Anne Franks and For Costs, and Motion to Strike Robert Zeidman and Nikolaus Baer be heard Monday May 7, 2018, at 11:00 a.m.

Dated: May 4, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ *James F. Bennett*

James G. Martin, #33586
James F. Bennett, #46826
Edward L. Dowd, #28785
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 4th of May 2018.

/s/ *James F. Bennett*

IN THE 22ND JUDICIAL CIRCUIT
STATE OF MISSOURI
ST. LOUIS CITY

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

DEFENSE ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW Defendant, Eric Greitens, through his attorneys, and hereby notifies the State that the following witnesses may be called to testify or produce records in the above-styled cause:

Albert Watkins

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James F. Bennett*
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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 4th day of May, 2018.

STATE OF MISSOURI)
CITY OF ST LOUIS) SS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL COURT
(ST. LOUIS CITY)

SUBPOENA
(Order to Appear and/or Produce Document)

STATE OF MISSOURI,
Plaintiff/Petitioner
Kimberly M. Gardner, Circuit Attorney

(314)622-4941
Attorney for Plaintiff/Petitioner

Cause No. 1822-CR00642

vs.

Division No. 16

ERIC GREITENS,
Defendant/Respondent
JAMES G. MARTIN, ESQ.

(314)889-7300
Attorney for Defendant/Respondent

THE STATE OF MISSOURI, TO Stinson Leonard Street

GREETING:

YOU ARE HEREBY COMMANDED. That setting aside all manner of excuse and delay, you be and appear at

Circuit Attorney's Office, 1114 Market St., Room 401, St. Louis, MO 63101

in the City of St. Louis, on the 7th day of May, 2018 at 9:00 o'clock A. M.,
and thereafter from time to time until the case can be disposed of or you are finally discharged.

☐ To testify on behalf of

☒ To produce the following: Any and all records of whatever kind that reflect in any way the payor for the legal fees incurred to represent Albert Watkins.

☐

Thomas L. Kloeppinger
CIRCUIT CLERK

Thomas Kloeppinger

The attorney or party requesting attendance of witness is : James G. Martin, Dowd Bennett LLP, 7733 Forsyth Blvd., Suite 1900, St. Louis, MO 63105; 314/889-7300

☐ The date and hour that your testimony shall be required cannot be stated with certainty. Therefore, you are directed to telephone _____ at _____, between the hours of 9:00 AM and 5:00 PM on _____, _____ at which time you will be further instructed concerning your appearance. Such instruction may require that you appear on a subsequent date, without further personal service.

FORM 21 (12/99ML)

EXHIBIT 1

OFFICER'S RETURN

Served a copy hereof, in the City of St. Louis, Missouri, on the _____ day of _____, _____ (by reading same) (by delivering a true copy) to the within names witness.

To summoning the witness $_____

To the return of the non est on this subpoena $_____

To _____ miles traveled serving this subpoena $_____

TOTAL FEES $_____

Sheriff of the City of St. Louis

By_____
Deputy

INSTRUCTIONS TO APPLY FOR WITNESS FEE

After the witness has testified of has been dismissed, the witness shall take this copy to the Office of the Circuit Clerk, or to the appropriate Division Clerk, for entry on the books as provided by law. Otherwise, witness fees cannot be taxed.

WITNESS CLAIM

I hereby certify that I am entitled to _____ days and _____ miles for service as a witness under a subpoena.

_____
Witness signature

Subscribed and sworn before me and entered this _____ day of _____, _____

Thomas L. Kloeppinger
Circuit Clerk

Confidentiality & Attorney Subpoenaed

Confidentiality and attorney subpoenaed to testify or asked to provide information

RULE 4–1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Under Rule 4-1.6, confidential information is "information relating to representation of a client." This is a very broad definition. An attorney may not disclose confidential information unless disclosure was impliedly or expressly authorized by the client. The scope of any implied authority to disclose should be determined with caution. For example, in an estate planning context, the attorney may disclose a will or trust, if the attorney believes it to still be valid, to the person or court that will act on the document. However, disclosure of other communications and circumstances would normally not be impliedly authorized. Express consent from a deceased client is sufficient for this purpose.

If an attorney who is representing a client identifies a realistic possibility that there will reasons to disclose confidential information, the attorney should discuss the extent of the client's consent for the attorney to disclose information without a court order, if the client is unavailable for consultation. Any consent given by the client should be documented.

In a situation where an attorney has been requested or subpoenaed to provide information and the client is unwilling or unable to consent, the attorney may not provide that information without a court order, after the issue of confidentiality has been fully presented to the court. If the attorney has been subpoenaed to a deposition, the attorney may attend the deposition and refuse to answer. Alternatively, the attorney may work with the parties to present the issues to the court short of going through that process. The procedures used in getting to a court order are not important. The important thing is that the court makes the decision after having all of the issues fully presented. The attorney should seek to have the court order as specific and limited as possible. A subpoena, by itself, does not authorize discoslure.

EXHIBIT 2

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

NON-PARTY STINSON LEONARD STREET, LLP'S MOTION TO QUASH

Escalating his quest for irrelevant information, Defendant Governor Eric Greitens has served a subpoena on Stinson Leonard Street LLP seeking documents reflecting the payor of Stinson's invoices, in connection with its representation of Albert Watkins in a discovery dispute in this matter. (Ex. 1, Subpoena). The Subpoena imposes a return date of Monday, May 7 at 9:00 a.m. Watkins, of course, is counsel for P.S., a witness endorsed to authenticate an audio recording in the underlying action. The Subpoena should be quashed because of its attenuated relationship to the issues, and because it seeks confidential information gained during the representation of a client. To be clear, the Subpoena seeks confidential information from attorneys—who represent another attorney in a discovery dispute—who in turn represents P.S., a witness endorsed simply to authenticate an audio recording made long before Greitens was even a defendant.

This discovery dispute began with Greitens arguing he needed evidence of who paid P.S.'s attorneys' fees because it goes to bias. But P.S. testified he does not know who paid his attorneys fees. Next, Greitens sought to depose P.S.' attorney, Watkins, who also testified P.S.

did not know who paid P.S.' attorneys' fees. There ended any relevant inquiry regarding whether P.S. is a biased witness.

Watkins testified about who delivered money to his office in connection with his representation of witness P.S., the victim's ex-husband. But he does not know the ultimate source of those funds. Now Greitens is pursuing Stinson, to determine who is responsible for covering Stinson's fees for representing Watkins. In an email to Stinson, Greitens' attorneys claim the payment of Stinson's fees is relevant to who paid P.S.'s fees. It is not, but more important, it is not relevant to any issue in this case, nor does it seek to discover any information that could be used to impeach P.S., or any witness. Greitens recently endorsed Watkins and may argue the sought-after information is relevant to Watkins' credibility, but Watkins testified he does not know who is paying for his representation by Stinson.

Greitens has the burden to present specific evidence establishing the Subpoena seeks information material and relevant to the issues in this case–a burden he cannot meet. The source of payment to Stinson, for its representation of Watkins in a discovery dispute, has nothing to do with what occurred in Greitens' basement on March 21, 2015 or P.S.'s recording a phone conversation later in 2015, nor does it bear on the credibility of P.S., Watkins, or any other witness.

Moreover, the Subpoena seeks confidential information. The Missouri Supreme Court Rules protect disclosure of information gained during the representation of a client. Notably, Missouri Supreme Court Advisory Committee & Legal Ethics Counsel has commented "(a) subpoena, by itself, does not authorize disclosure" of confidential information. (Ex. 2). While Greitens may believe he has much to gain in the media or political arena, nothing relevant or material to ***this proceeding*** will be gained by forcing Stinson to violate bedrock principles of

professional responsibility and expose confidential information. Even if Greitens could meet his burden to establish relevance, he cannot overcome essential protections of confidentiality. For these reasons, the Subpoena should be quashed.

ARGUMENT

I. The Payor of Stinson's Fees is not Relevant or Material to the Issues and Has no Bearing on the Credibility or Potential Bias of any Witness.

No general right to discovery exists in criminal cases. In the absence of some statutory provision or rule of court, it is not permitted. *State v. Garner*, 799 S.W.2d 950, 956 (Mo. Ct. App. 1990). Rule 26.02 authorizes a subpoena to command the production of documents, but with significant limitations. Indeed, Rule 26.02 is not intended to be a rule of discovery, but is instead a means of enforcing the production of documents or objects at deposition or trial ***that are material and relevant to trial issues***. *See State v. Pride*, 1 S.W.3d 494, 504 (1999); citing *State v. Engberg*, 377 S.W.2d 282 (Mo. 1964). Rule 26.02 authorizes the court to quash a subpoena if compliance would be unreasonable or oppressive. Missouri Supreme Court Rule 26.02.

The court is without jurisdiction to enforce a subpoena in the absence of good cause shown that the sought-after material contains evidence that is relevant and material to the issues. *State ex rel. St. Louis County v. Block,* 622 S.W.2d 367, 369 (Mo. Ct. App. 1981) (citing *McQueen,* 296 S.W.2d at 89 (holding the rule "is not intended as a rule of discovery")). It is the defendant's burden to show good cause for enforcement of the Subpoena, by adducing record evidence establishing the requested testimony is relevant and material. *McQueen,* 296 S.W.2d at 89-90.

Greitens cannot meet this burden. When pursuing discovery from Watkins, Greitens made a single, narrow relevance argument—that the source of the money delivered to Watkins is

relevant to the credibility and potential bias of a witness, P.S. Tenuous to begin with, that argument loses all viability in the attenuated chain presented here:

- P.S. testified he does not know who paid his legal fees;
- Watkins corroborated P.S.'s testimony, and does not know who provided funds to be used for the payment of P.S.'s legal fees; and
- Stinson does not represent P.S., and never has.

The identity of Stinson's payor, for its representation of Watkins in a discovery dispute, has no bearing on the credibility or potential bias of P.S. or any endorsed witness. This includes Watkins, who does not know the source of funds for P.S. or Stinson's representation. There is no record evidence to suggest otherwise—indeed, the record refutes Greitens' relevance argument. Rule 26.02 leaves the Court without jurisdiction to enforce the Subpoena, which should be quashed on relevance grounds alone.

II. Confidentiality Rules Warrant Quashing the Subpoena.

The Subpoena seeks information relating to Stinson's representation of Watkins. Such information is strictly confidential. The Missouri Rules of Professional Conduct provide: "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." Mo. Rule Prof. Conduct 4-1.6. Confidential information is "information relating to representation of a client." Mo. Rule Prof. Conduct 4-1.6, commentary of Missouri Supreme Court Advisory Committee & Legal Ethics Counsel (http://molegalethics.org/confidentiality-attorney-subpoenaed/). (Ex. 2). The definition of confidential information is "very broad" and the minor exceptions permitting attorney disclosure of confidential information "should be determined with caution." *Id.* "A subpoena, by itself, does not authorize disclosure" of confidential information. *Id.*

Under Rule 4-1.6, Stinson is prohibited from revealing such information (with certain exceptions that do not apply here) without client consent. As set forth in the Comment to Rule 4-1.6, this "confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Stinson does not have consent to disclose any information related to its representation of Watkins. Therefore, Stinson may not ethically produce any documents or testify concerning its representation because Stinson's client has not consented to such.

Both Missouri's confidentiality rules and the attorney-client privilege are designed to protect clients and ensure they can speak openly and freely with their attorneys to obtain appropriate legal advice. These principles are sacrosanct, and the policy reasons for protecting those types of communications are well established. Indeed, the Missouri Supreme Court has cautioned against intruding into "distinct and private matters" such as the identity of an attorney's clients. *See State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 79 (Mo. 1984). Notably, where—as here—the information sought relates to a client who is not the target of an investigation and has no substantive relationship to the charges brought, "the identities of these individuals are more deserving of a cloak of confidentiality than those whose affairs are known to be the subject of an investigation." *Id.*

Even if Greitens could establish some relevance or materiality, it would be insufficient to overcome the Missouri Supreme Court Rules and strong policy arguments preventing disclosure. Because the Subpoena seeks information gained solely in Stinson's representation of a client, it should be quashed.

CONCLUSION

The sought-after information has no bearing on the credibility of any witness, and the Subpoena should be quashed because of its attenuated connection to the issues in the underlying action. The Subpoena asks the Court to set aside important, fundamental principles of confidentiality and professional responsibility, so Greitens may pursue information not relevant to the charges. For the foregoing reasons, non-party Stinson Leonard Street, LLP asks that the Court enter an order quashing the Subpoena, along with any additional relief the Court deems appropriate.

Respectfully submitted,

STINSON LEONARD STREET LLP

/s/ John R. Munich
John R. Munich, Mo. Bar No. 29799
Andrew J. Scavotto, Mo. Bar No. 57826
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john.munich@stinson.com
andrew.scavotto@stinson.com

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2018, the foregoing document was served by filing electronically via the Court's electronic filing system on all counsel of record

/s/ John R. Munich
Attorney for Plaintiff

CIRCUIT ATTORNEY Kimberly M. Gardner
CITY OF ST. LOUIS

CARNAHAN COURTHOUSE
1114 Market St. Room 401
St. Louis, Missouri 63101
(314) 622-4941
FAX: (314) 622-3369

Received by_____ on _____

May 4, 2018

Mr. Jack Garvey
Mr. James Martin
7773 Forsyth Blvd, Suite 1900
St. Louis, MO 63105

Re: State v. Eric Greitens
Cause Number: 1822-CR00642

Dear: Jack Garvey and James Martin:

Enclosed please find the following discovery:

1. K.S. phone records (1 CD) already delivered
2. A copy of Search Warrant of EG Google account (8 pages)

I have not received any discovery from you to date. Please forward any discovery you may have. If you have any questions or would like to discuss the case, please call me at (314) 589-6289. I look forward to speaking with you.

Sincerely,

/s/ Robert Steele

Robert Steele
Assistant Circuit Attorney
MO Bar # 42418

cc: Court File

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

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

MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE DR. FRANKS

The Defense's Motion to Strike Relies on Characterizations of an Unsigned Transcript That the Witness Has Not Yet Had Opportunity to Review

The defense's motion to strike Dr. Mary Anne Franks as an expert witness rests entirely on characterizations of an unsigned deposition transcript that they failed to provide to either the Circuit Attorney or to Dr. Franks until Thursday, May 3, 2018. Mo. Ann. Stat. § 492.340 provides that "[w]hen the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties." Dr. Franks did not waive her right to this examination and reading of the deposition. Accordingly, the defense's characterization of the deposition cannot be considered credible until Dr. Franks has had the opportunity to review and sign the transcript.

Dr. Franks Is Clearly Qualified as a Witness Under §490.065

It is indisputable that Dr. Franks qualifies as an expert under Mo. Ann. Stat. §490.065. Dr. Franks is one of the leading national and international authorities on the subject of sexual privacy. Dr. Franks is a tenured law professor at the University Of Miami School Of Law with

expertise in privacy, intimate partner violence, sexual abuse, technology, bias, criminal law, and family law. In addition to holding a law degree from Harvard Law School and doctorate and master's degrees from Oxford University, where she studied as a Rhodes Scholar, Dr. Franks has served for the last five years as the Vice-President and the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative (CCRI), the leading national nonprofit organization providing support to victims of sexual privacy violations. CCRI provides a 24-hour helpline, educational resources, and online content removal guides to victims as well as collaborating with key players in the technology sector to address sexual privacy violations, conducting empirical research into the prevalence and pathology of what is broadly referred to as "image-based sexual abuse," and advocating for legislation reform to protect sexual privacy rights. CCRI has provided direct assistance to thousands of victims since its creation.

In addition to her forthcoming book published by Stanford University Press, Dr. Franks has authored more than thirty law review articles and book chapters and more than fifty shorter essays and editorials, the majority of which deal significantly with image-based sexual abuse, sexual privacy, intimate partner violence, sexual assault, technology, and violence against women. These publications include the very first law review article to analyze the need for criminal legislative reform to address the severe and often irremediable harm of sexual privacy violations, *Criminalizing "Revenge Porn"* (Wake Forest Law Review, 2014), co-authored with Professor Danielle Citron of the University of Maryland, another leading authority in the subject of sexual privacy.

Dr. Franks is the author of the first U.S. model criminal statute addressing the nonconsensual distribution of private, sexually explicit imagery, which has served as a template for the majority of the 38 U.S. states that have passed legislation protecting sexual privacy since

2013, as well as for the federal Intimate Privacy Protection Act (IPPA), introduced in the U. S. Congress in 2016 and reintroduced as the ENOUGH Act in 2017. Since 2016, Dr. Franks has also served as the reporter for the United States Uniform Law Commission's (ULC) Committee on the Unauthorized Disclosure of Intimate Images, which is tasked with drafting a uniform law providing civil remedies for invasions of sexual privacy. Dr. Franks's legislative drafting efforts have involved working personally and extensively with victims, victim advocates, tech industry leaders, prosecutors, defense attorneys, civil libertarians, and legislators in multiple states to study the impact and dynamics of sexual privacy violations and to develop the best means of addressing the harms they cause.

Dr. Franks has previously provided expert reports in two high-profile sexual privacy Canadian cases, *Sarah Doucet & L.K. and The Royal Winnipeg Ballet and Bruce Monk* (ongoing) and *Canadian Judicial Council's Complaint Re: Associate Chief Justice Lori Douglas* (2014). Dr. Franks did not provide the names of these cases to the defense during the deposition out of concern for the privacy of parties involved. She has since sought and received authorization to provide this information. Dr. Franks has also testified before federal, state, and city legislatures in the U.S. on the harm, impact, and dynamics of sexual privacy violations, as well as advising lawmakers and advocates in Australia, Canada, England, Iceland, Ireland, and Taiwan on legal, social, and cultural approaches to the issue. As illustrated by the hundreds of media appearances listed in her curriculum vitae, Dr. Franks is frequently sought out as an expert on sexual privacy by media outlets such as the BBC, CNN, the Guardian, Le Monde, the New Yorker, the New York Times, NPR, Rolling Stone, TIME magazine, the Wall Street Journal, and the Washington Post.

Dr. Franks's work as a scholar, victims' rights advocate, and legislative drafter makes her uniquely well-qualified to offer expert opinions on the nature, impact, dynamics, and cultural context of image-based sexual abuse. Dr. Franks is one of the few authorities in the country with a deep understanding of the interactions between privacy, technology, and sexuality. She is well-versed in the empirical, legal, sociological, and psychological literature that demonstrates how image-based sexual abuse fits into the broader spectrum of intimate partner violence, sexual abuse, and other harms disproportionately suffered by women and has had extensive firsthand experience with victims dealing with sexual privacy violations.

To dismiss Dr. Franks's extensive scholarly, advocacy, and legislative work as dealing with "revenge porn" betrays a fundamental lack of understanding both of Dr. Franks's work and the concept of sexual privacy itself. "Revenge porn" is a colloquial term with no legal significance; the underlying issue to which so much of Dr. Franks's professional energies have been devoted is the impact, dynamics, and context of sexual privacy harms. Dr. Franks' experience, knowledge, skill and experience qualify her to give opinions regarding behaviors of victims of invasion of privacy. Cf. *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo.App.E.D. 2000).

A copy of Dr. Franks's CV is included here for reference, with particular qualifications, publications, and experience relating to sexual privacy, intimate partner violence, sexual assault, and technology highlighted for ease of reading. Dr. Franks's knowledge, experience, and education regarding the nature, impact, dynamics, and cultural context of sexual privacy violations, which is based on extensive data, established scholarship, and firsthand interactions with victims, make her eminently qualified to "help the trier of fact to understand the evidence or to determine a fact in issue." Mo. Ann. Stat. § 490.065.

The Defense Mischaracterized Dr. Franks's Deposition

Contrary to the claims of the defense, Dr. Franks was in fact willing and able to provide specifics regarding her expert opinion on various aspects of the case. Unfortunately, by engaging in vague, open-ended, and repetitive questioning, the defense did not provide her with the opportunity to do so. See Franks depo. at 19 (lines 20-21), 37 (lines 5-8), 40, (lines 4-7), 47 (lines 1-2).

Also contrary to the claims of the defense, Dr. Franks had, at the time of the deposition, reviewed evidence in the form of the sworn testimony of witnesses in the April 11, 2018 Report of the Missouri House Special Investigative Committee on Oversight and did speak to details of that report. In addition, Dr. Franks' engagement letter was disclosed.

Finally, Dr. Franks did indeed disclose the opinions that she would render, as illustrated by the passage that the defense itself quoted:

> It would be the kinds of psychological impact that a victim might undergo if she experienced having her picture taken while she was naked without her consent. About the ways she might act or respond to that particular type of violation. And about – I probably volunteered some of my thoughts on the legislation, because legislation is obviously something that I've spent many years working on about how the law is trying to catch up with evolving senses of norms about privacy. [Franks depo. at 30.]

The defense also mischaracterizes Dr. Franks' deposition testimony. There was disclosure of opinions such that striking her as an expert for lack of discovery is not warranted. See Franks depo. at 21, lines15-24; 22, 2-6; 24, 3-15; 26, 1-7; 30, 12-21, 25; 31,1-20, 24-25; 32, 4-5; 38, 20-21; 45, 4-12, 16-23; 46, 22-25; 50 1-8; 63,17-20.

It is well established in Missouri law that experts may testify to general or "profile" victim behaviors in certain classes of cases, such as sexual assault or domestic violence, although they may not testify as to particularized opinions as to an individual victim's credibility. E.g., *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo.banc 2011); *State v. Churchill*, 98 S.W.3d 536, 539 (Mo.banc 2003). In the instant case, Dr. Franks' opinions, as intimated in the deposition, will

concern the behavior of persons in similar situations to K.S., when responding to the threat of circulation of a nude photograph ("revenge porn") on the Internet, including victims' reluctance and delay in coming forward. Such opinion testimony is routinely proffered in the closely analogous cases involving sexual or other abuse, and there is no reason to exclude it here.

Opinions regarding victim profile behaviors are admissible under §490.065.2, RSMo, as amended. While the statute's adoption of F.R.Ev. 702 worked an important change in Missouri law, it does not dictate wholesale exclusion of expert opinion evidence previously acceptable in this state. On the contrary, as declared by federal courts, Rule 702 is not intended to exclude expert opinion evidence and is actually a "liberal" standard. See, e.g., *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014).

Dr. Franks' opinion evidence meets the standard prescribed by §490.065.2(1): the expert's knowledge will assist the jury, the expert's testimony will be based on sufficient facts and data, the testimony will be the product of reliable principles and methods, and the expert has reliably applied the principles to the facts of this case.

WHEREFORE, the State requests that the motion to strike Dr. Franks be denied and that the defense be ordered to pay the reasonable fees of Dr. Franks as required by rule.

Respectfully submitted,

KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 4th day of May 2018.

/s/Robert Steele

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

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

RESPONSE TO DEFENDANT'S MOTIONS IN LIMINE

Defendant has moved *in limine* for the Court to exclude certain evidence and argument at trial. The State agrees in part with defendant's motions. For the convenience of the Court, the State will address the motions as presented.

II. Improper Opinion Testimony: The State agrees with item II(1) that it may not solicit lay opinion concerning any medical or psychiatric condition of the defendant, provided that the State's witnesses may testify to observed bizarre or peculiar behavior of the defendant in describing the defendant's conduct relevant to the offense at issue. The State agrees with item II(2) insofar as lay opinions regarding cell phone capabilities in general are concerned; however, the State submits that evidence that a certain type of cell phone is capable of transmitting a photograph is not opinion. If a witness is familiar with the use of a particular type of cell phone, the witness may testify to the manner of use as a matter of fact.

III. Defendant's silence/burden shifting and

IV. Defendant's evasive public statements and silence in face of accusation.

The State agrees with item III(2) that the State may not allude directly or indirectly to defendant's invocation of his right to silence at trial or at any other criminal or civil proceeding. Defendant, however, seeks to mutilate the basic principle into a form unrecognizable in light of established law. The State fully intends to proffer evidence of the defendant's silence and evasive statements in the face of accusations of the misconduct here at issue, and such evidence is unquestionably admissible. Furthermore, the facts that the victim and the defendant were the only two people present at the time of the offense and that the device used to take a photograph of the victim remained under the exclusive control of the defendant after March 2015 are indisputable facts, of which the jury must inevitably be aware. Moreover, it will be necessary that the State voir dire on the issue of the State's inability (so far) to produce the defendant's cell phone as precluding full consideration of all the evidence.

It is elementary that statements of a defendant made to third persons are admissible in evidence if indicative of guilt or involvement in the offense on trial. Such statements of a defendant and the statements of third persons putting the defendant's statements in context are admissible, and the statements need not be express acknowledgments of guilt. Similarly, tacit admissions of guilt by a defendant are admissible in evidence. See, e.g., *State v. Isa,* 850 S.W.2d 876 (Mo.banc 1993); *State v. Garner,* 103 S.W.3d 866

(Mo.App.S.D. 2003); *State v. Forest,* 973 S.W.2d 492 (Mo.App.E.D. 1998).

A defendant's evasions or silence in the face of accusations is admissible notwithstanding the Fifth Amendment, when such admissions are made in a non-custodial atmosphere. See *Salinas v. Texas,* 570 U.S. 178 (2013). A press conference of a Governor can hardly be considered a custodial or coercive setting. The idea that presenting evidence of a defendant's pre-arrest statements evincing consciousness of guilt somehow constitutes an indirect reference to the defendant's silence *at trial* is supported by neither reason nor authority.

Defendant's grossly overbroad motion to exclude evidence of defendant's pre-arrest admissions must be denied.

V. Prior Audio Recordings. Evidence of the prior audio recordings of statements of the victim to her then-husband is admissible, as such prior statements of the victim are relevant to explain her delay in reporting the offense at issue and as part of the circumstances surrounding the victim's relationship with the defendant. While it is true that the use of prior statements of a witness in the State's case in chief is not permissible if the sole object is to "bolster" the victim's trial testimony, that objection is proper only when the extrajudicial statements are offered solely to duplicate or corroborate the victim's trial testimony, which is not the case here. See *State v. Wright,* 383 S.W.3d 1 (Mo.App.W.D. 2012); *State v. Prince,* 311 S.W.3d 327 (Mo.App.W.D. 2010). In addition to the bases for admission of the P.S. recordings mentioned above, there can be little doubt that the victim's credibility will be vigorously attacked by the

defense, and certain the prior recordings will be admissible as prior consistent statements. See *State v. McFadden,* 391 S.W.3d 408 (Mo.banc), cert. denied, 134 S.Ct. 65 (2013).

VI. "Victim" term: The State believes that item VI can be adequately addressed by an admonition of the Court that the use of the word "victim" is merely a claim by the State that is subject to proof; there is no need to impose any restriction on the use of the term during trial. On the contrary, as noted below, as a matter of law, K.S. is a "victim."

VII. Use of Real Names. The State agrees with item VII.

VIII. Michael Brown case/expensive lawyers. The State agrees that references to Michael Brown and the expensive defense lawyers can be precluded, except that it may be necessary to voir dire regarding whether veniremen are familiar with Professor Sullivan due to the Brown connection. The State assumes that the defense will similarly not attempt to inject Professor Sullivan's fees into the case.

IX. Uncharged bad acts/other investigations. The State agrees that it cannot inject into evidence other pending investigations against defendant, including proceedings in the General Assembly, and so agrees with items IX(1)-(3). However, the State anticipates that testimony given in such other proceedings could be offered in this case, and its admissibility cannot be determined *in limine*. Moreover, the State reserves the right to inject such evidence if the defendant testifies and such evidence becomes germane to his credibility or otherwise. In particular, evidence that the defendant lied in other

proceedings can be admissible as directed to the issue of his veracity. *Mitchell v. Kardesch,* 313 S.W.3d 667 (Mo.banc 2010).

As to item IX(4), reference to "revenge porn" legislation could arise in connection with evidence of Dr. Franks' qualifications.

As to item IX(5), evidence of conduct of the defendant regarding prior acts similar to the offense charged is certainly relevant and material on the issue of motive, intent, and absence of mistake or accident. See, e.g., *State v. Prince,* 534 S.W.3d 813 (Mo.banc 2017); *State v. Pascale,* 386 S.W.3d 777 (Mo.App.E.D. 2011)(intent); *State v. White,* 329 S.W.3d 710 (Mo.App.S.D. 2010). The issue of admissibility of evidence of defendant's similar misconduct must be decided at the time of proffer of such evidence, not *in limine.*

X. Exclusion of witnesses. The State agrees that the defense may invoke the "rule" on exclusion of witnesses, but that K.S. may not be excluded, as she has a constitutional and statutory right to be present at trial. She is squarely within the statutory definition of "victim" as a natural person who suffers direct or threatened emotional harm as a result of the commission of the charged offense. §595.200(6), RSMo 2000 & Supp.

XI. Pretrial ruling on jeopardy. This item seeks a hypothetical ruling on a situation that cannot be addressed *in limine*. Whether any act of the State or its witnesses is intended to provoke a mistrial cannot be determined in advance, and the State categorically rejects the defendant's assertion that a violation of any pretrial ruling amounts to an intentional provocation of a mistrial. Cf. *State v. Abdelmalik,* 273 S.W.3d 61 (Mo.App.W.D. 2008). The State also notes

that there has been no effort by the State to delay the trial of this cause and the allegation of "vocal interest" in delay is unsupported by the record.

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

/s/ Robert Steele MBE 42418
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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 6 day of May 2018.

/s/Robert H. Dierker MBE 23671

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

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

MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE DR. FRANKS

The Defense's Motion to Strike Relies on Characterizations of an Unsigned Transcript That the Witness Has Not Yet Had Opportunity to Review

The defense's motion to strike Dr. Mary Anne Franks as an expert witness rests entirely on characterizations of an unsigned deposition transcript that they failed to provide to either the Circuit Attorney or to Dr. Franks until Thursday, May 3, 2018. Mo. Ann. Stat. § 492.340 provides that "[w]hen the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties." Dr. Franks did not waive her right to this examination and reading of the deposition. Accordingly, the defense's characterization of the deposition cannot be considered credible until Dr. Franks has had the opportunity to review and sign the transcript.

Dr. Franks Is Clearly Qualified as a Witness Under §490.065

It is indisputable that Dr. Franks qualifies as an expert under Mo. Ann. Stat. §490.065. Dr. Franks is one of the leading national and international authorities on the subject of sexual privacy. Dr. Franks is a tenured law professor at the University Of Miami School Of Law with

expertise in privacy, intimate partner violence, sexual abuse, technology, bias, criminal law, and family law. In addition to holding a law degree from Harvard Law School and doctorate and master's degrees from Oxford University, where she studied as a Rhodes Scholar, Dr. Franks has served for the last five years as the Vice-President and the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative (CCRI), the leading national nonprofit organization providing support to victims of sexual privacy violations. CCRI provides a 24-hour helpline, educational resources, and online content removal guides to victims as well as collaborating with key players in the technology sector to address sexual privacy violations, conducting empirical research into the prevalence and pathology of what is broadly referred to as "image-based sexual abuse," and advocating for legislation reform to protect sexual privacy rights. CCRI has provided direct assistance to thousands of victims since its creation.

In addition to her forthcoming book published by Stanford University Press, Dr. Franks has authored more than thirty law review articles and book chapters and more than fifty shorter essays and editorials, the majority of which deal significantly with image-based sexual abuse, sexual privacy, intimate partner violence, sexual assault, technology, and violence against women. These publications include the very first law review article to analyze the need for criminal legislative reform to address the severe and often irremediable harm of sexual privacy violations, *Criminalizing "Revenge Porn"* (Wake Forest Law Review, 2014), co-authored with Professor Danielle Citron of the University of Maryland, another leading authority in the subject of sexual privacy.

Dr. Franks is the author of the first U.S. model criminal statute addressing the nonconsensual distribution of private, sexually explicit imagery, which has served as a template for the majority of the 38 U.S. states that have passed legislation protecting sexual privacy since

2013, as well as for the federal Intimate Privacy Protection Act (IPPA), introduced in the U. S. Congress in 2016 and reintroduced as the ENOUGH Act in 2017. Since 2016, Dr. Franks has also served as the reporter for the United States Uniform Law Commission's (ULC) Committee on the Unauthorized Disclosure of Intimate Images, which is tasked with drafting a uniform law providing civil remedies for invasions of sexual privacy. Dr. Franks's legislative drafting efforts have involved working personally and extensively with victims, victim advocates, tech industry leaders, prosecutors, defense attorneys, civil libertarians, and legislators in multiple states to study the impact and dynamics of sexual privacy violations and to develop the best means of addressing the harms they cause.

Dr. Franks has previously provided expert reports in two high-profile sexual privacy Canadian cases, *Sarah Doucet & L.K. and The Royal Winnipeg Ballet and Bruce Monk* (ongoing) and *Canadian Judicial Council's Complaint Re: Associate Chief Justice Lori Douglas* (2014). Dr. Franks did not provide the names of these cases to the defense during the deposition out of concern for the privacy of parties involved. She has since sought and received authorization to provide this information. Dr. Franks has also testified before federal, state, and city legislatures in the U.S. on the harm, impact, and dynamics of sexual privacy violations, as well as advising lawmakers and advocates in Australia, Canada, England, Iceland, Ireland, and Taiwan on legal, social, and cultural approaches to the issue. As illustrated by the hundreds of media appearances listed in her curriculum vitae, Dr. Franks is frequently sought out as an expert on sexual privacy by media outlets such as the BBC, CNN, the Guardian, Le Monde, the New Yorker, the New York Times, NPR, Rolling Stone, TIME magazine, the Wall Street Journal, and the Washington Post.

Dr. Franks's work as a scholar, victims' rights advocate, and legislative drafter makes her uniquely well-qualified to offer expert opinions on the nature, impact, dynamics, and cultural context of image-based sexual abuse. Dr. Franks is one of the few authorities in the country with a deep understanding of the interactions between privacy, technology, and sexuality. She is well-versed in the empirical, legal, sociological, and psychological literature that demonstrates how image-based sexual abuse fits into the broader spectrum of intimate partner violence, sexual abuse, and other harms disproportionately suffered by women and has had extensive firsthand experience with victims dealing with sexual privacy violations.

To dismiss Dr. Franks's extensive scholarly, advocacy, and legislative work as dealing with "revenge porn" betrays a fundamental lack of understanding both of Dr. Franks's work and the concept of sexual privacy itself. "Revenge porn" is a colloquial term with no legal significance; the underlying issue to which so much of Dr. Franks's professional energies have been devoted is the impact, dynamics, and context of sexual privacy harms. Dr. Franks' experience, knowledge, skill and experience qualify her to give opinions regarding behaviors of victims of invasion of privacy. Cf. *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo.App.E.D. 2000).

A copy of Dr. Franks's CV is included here for reference, with particular qualifications, publications, and experience relating to sexual privacy, intimate partner violence, sexual assault, and technology highlighted for ease of reading. Dr. Franks's knowledge, experience, and education regarding the nature, impact, dynamics, and cultural context of sexual privacy violations, which is based on extensive data, established scholarship, and firsthand interactions with victims, make her eminently qualified to "help the trier of fact to understand the evidence or to determine a fact in issue." Mo. Ann. Stat. § 490.065.

The Defense Mischaracterized Dr. Franks's Deposition

Contrary to the claims of the defense, Dr. Franks was in fact willing and able to provide specifics regarding her expert opinion on various aspects of the case. Unfortunately, by engaging in vague, open-ended, and repetitive questioning, the defense did not provide her with the opportunity to do so. See Franks depo. at 19 (lines 20-21), 37 (lines 5-8), 40, (lines 4-7), 47 (lines 1-2).

Also contrary to the claims of the defense, Dr. Franks had, at the time of the deposition, reviewed evidence in the form of the sworn testimony of witnesses in the April 11, 2018 Report of the Missouri House Special Investigative Committee on Oversight and did speak to details of that report. In addition, Dr. Franks' engagement letter was disclosed.

Finally, Dr. Franks did indeed disclose the opinions that she would render, as illustrated by the passage that the defense itself quoted:

> It would be the kinds of psychological impact that a victim might undergo if she experienced having her picture taken while she was naked without her consent. About the ways she might act or respond to that particular type of violation. And about – I probably volunteered some of my thoughts on the legislation, because legislation is obviously something that I've spent many years working on about how the law is trying to catch up with evolving senses of norms about privacy. [Franks depo. at 30.]

The defense also mischaracterizes Dr. Franks' deposition testimony. There was disclosure of opinions such that striking her as an expert for lack of discovery is not warranted. See Franks depo. at 21, lines15-24; 22, 2-6; 24, 3-15; 26, 1-7; 30, 12-21, 25; 31,1-20, 24-25; 32, 4-5; 38, 20-21; 45, 4-12, 16-23; 46, 22-25; 50 1-8; 63,17-20.

It is well established in Missouri law that experts may testify to general or "profile" victim behaviors in certain classes of cases, such as sexual assault or domestic violence, although they may not testify as to particularized opinions as to an individual victim's credibility. E.g., *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo.banc 2011); *State v. Churchill*, 98 S.W.3d 536, 539 (Mo.banc 2003). In the instant case, Dr. Franks' opinions, as intimated in the deposition, will

concern the behavior of persons in similar situations to K.S., when responding to the threat of circulation of a nude photograph ("revenge porn") on the Internet, including victims' reluctance and delay in coming forward. Such opinion testimony is routinely proffered in the closely analogous cases involving sexual or other abuse, and there is no reason to exclude it here.

Opinions regarding victim profile behaviors are admissible under §490.065.2, RSMo, as amended. While the statute's adoption of F.R.Ev. 702 worked an important change in Missouri law, it does not dictate wholesale exclusion of expert opinion evidence previously acceptable in this state. On the contrary, as declared by federal courts, Rule 702 is not intended to exclude expert opinion evidence and is actually a "liberal" standard. See, e.g., *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014).

Dr. Franks' opinion evidence meets the standard prescribed by §490.065.2(1): the expert's knowledge will assist the jury, the expert's testimony will be based on sufficient facts and data, the testimony will be the product of reliable principles and methods, and the expert has reliably applied the principles to the facts of this case.

WHEREFORE, the State requests that the motion to strike Dr. Franks be denied and that the defense be ordered to pay the reasonable fees of Dr. Franks as required by rule.

Respectfully submitted,

KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 4th day of May 2018.

/s/Robert Steele

IN THE CIRCUIT COURT FOR THE
TWENTY-SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

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

DEFENSE ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW Defendant, Eric Greitens, through his attorneys, and hereby notifies the State that the following witnesses may be called to testify or produce records in the above-styled cause:

J.W.

Dated: May 7, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ *James F. Bennett*
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Edward L. Dowd, #28785
James G. Martin, #33586
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N. Scott Rosenblum, #33390
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 7th of May 2018.

/s/ *James F. Bennett*

FILED
MAY - 7 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

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

State of Missouri
VS
Greitens

CASE NO. 1822-CR00642 DIVISION 16 May ~~April~~ 7 20 18

COURT ORDER

Defendant's Motion for Waiver of Jury Trial taken under advisement

Defendant Motion to Exclude Witnesses J.W. and K.S. Denied, MOTION TO DISMISS DENIED.

Defendant Motion to Exclude Expert Witnesses Franks, Zeidman, + Baer is GRANTED. As to State's case in chief.

So Ordered

AV-16

ATCA

Attorney for Defendant

ENTERED
MAY - 7 2018
DP

102-305 (Rev. 2/03)

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ **20** _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

FILED
MAY - 7 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

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

ENTERED
MAY - 7 2018
DP

State of Missouri
VS
ERIC GREITENS

CASE NO. 1822-CR00642 DIVISION 16 5-7 2018

COURT ORDER

DEFENDANT'S MOTION TO QUASH SEARCH WARRANT OF MAY 3, 2018 IS DENIED, SUBJECT TO THE FOLLOWING:

THE STATE IS ORDERED TO MAINTAIN ANY MATERIALS OBTAINED PURSUANT TO THE SEARCH WARRANT UNDER SEAL, UNOPENED AND UNREVIEWED, AND PROVIDE NOTICE TO DEFENSE COUNSEL WHEN ANY MATERIALS ARE PROVIDED RESPONSIVE TO THE SEARCH WARRANT. COUNSEL FOR THE STATE AND DEFENDANT WILL TOGETHER OPEN AND REVIEW IN CHAMBERS ANY MATERIALS SO PROVIDED AND A DETERMINATION WILL BE MADE REGARDING RELEVANCE AND PRIVILEGES

So ORDERED:

Div. 16

Cause No. _____

STATE OF MISSOURI

vs.

_____

IN THE

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(CITY OF ST. LOUIS)

_____ 20 _____

Cause continued at the request of the _____

to _____ for the reason(s) that:

WHEREFORE, the Court finds, for the above stated reason(s), that the ends of justice are served by granting the continuance and outweigh the best interests of the public and the defendant in a speedy trial.

_____
Judge

_____
Defendant

_____
Attorney for Defendant

_____
Assistant Circuit Attorney

IN THE CIRCUIT COURT FOR THE
TWENTY-SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

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

DEFENSE ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW Defendant, Eric Greitens, through his attorneys, and hereby notifies the State that the following witnesses may be called to testify or produce records in the above-styled cause:

J.W.

Dated: May 7, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: /s/ *James F. Bennett*
James F. Bennett, #46826
Edward L. Dowd, #28785
James G. Martin, #33586
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nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 7th of May 2018.

/s/ *James F. Bennett*

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

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

MOTION TO QUASH SUBPOENA

COMES NOW, P.S., by and through his undersigned counsel and Moves this Honorable Court to Quash Subpoena directed to AT&T by Defendant. In support of same, P.S. states to the Court as follows:

1. On the 18th day of April, 2018, Defendant Greitens, by and through his counsel, via facsimile served upon AT&T a Subpoena, to produce documents and things. A true and correct redacted copy of the subject Subpoena is attached hereto, incorporated herein by reference and marked Exhibit 1 ("Subpoena").

2. The Subpoena requests AT&T to produce the following: "[S]ubscriber info[rmation] as of March 2015 and current subscriber info[rmation] for [the phone number of P.S.]. Also include any and all data to include but not limited to incoming and outgoing calls during the time period of January 2015-March 2018." (hereinafter "Phone Records")

3. Substantively speaking, the Request for documents is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

4. It is clear from the nature of the items being sought in Defendant's subpoena that the subpoena was not served in order to procure documents which are evidentiary and relevant, but rather the Defendant's subpoena is merely another attempt to go on a fishing expedition at a non-party's expense.

5. Pursuant to RSMo.§491.100.3, "the court upon motion may, promptly, and in any event at or before the time specified in the subpoena for compliance therewith, ***quash the subpoena if it is unreasonable and oppressive*** or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the objects, books, papers, or documents."

6. The U.S. Supreme Court, in reference to Federal Rule of Criminal Procedure 17(c), discussed the "unreasonable or oppressive" standard in its *United States v. Nixon*[1] decision, stating that a subpoena for documents could be quashed "if their production would be 'unreasonable or oppressive....'"

7. In order for a subpoena Duces Tecum to survive a motion to quash, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[2]

8. The Nixon test requires a party seeking enforcement of a subpoena Duces Tecum to "clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity."[3]

---

[1] *United State v. Nixon*, 418 U.S. 683, at 699 (1974).
[2] *Ibid.* at 699-700.
[3] *Ibid.* at 700.

9. Blanket requests that ask for "any and all" information, data, etc., are nothing more than fishing expeditions and should be quashed.

10. Additionally, in the present case, the non-party witness, P.S., has already been subjected to three days of deposition, the surrendering of his cell phone for the overly broad cloning of same, a subpoena for the non-party witness's tax returns for the years 2014-2017, a subpoena to the non-party witness's attorney for non-relevant attorney-client information, and now a subpoena to the non-party witness's cellular phone provider for records wholly unrelated to the underlying fact situation which has given rise to the allegations as charged in the Indictment handed down by a Grand Jury in connection with the above-styled cause of action.

11. P.S. is entitled to the same privacy rights that are afforded to all citizens by the U.S. Constitution. A Criminal defendant who wishes to infringe upon the rights of a non-party witness with the issuance of a subpoena Duces Tecum must not make overly broad or unreasonable requests. Additionally, the documents sought must be evidentiary and relevant, or likely to lead to the discovery of relevant information. Defendant's subpoena to AT&T for P.S.'s subscriber information lacks clear specificity, in that Defendant requests "any and all data" and for a time period which encompasses dates months before all the way up to three years after the date of the allegations raise in the Grand Jury's Indictment of the Defendant in the above-styled cause of action.

WHEREFORE, Movant prays this Honorable Court:

1. Quash and hold for naught the Subpoena and corresponding request for production of documents and things served on AT&T on April 18, 2018 for naught;

2. Enter an Order prohibiting Defendant from obtaining the phone records of P.S.

3. Award the Movant reasonable attorney's fees, costs and expenses associated

with the preparation and prosecution of the present Motion and for such other and further relief as the Court deems appropriate and just in the circumstances.

KODNER WATKINS, LC

By: /s/ Albert S. Watkins

ALBERT S. WATKINS, #34553
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Phone: (314) 727-9111
Facsimile: (314) 727-9110
E-mail: albertswatkins@kwklaw.net

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record this 7th day of May, 2018.

EXHIBIT 1

STATE OF MISSOURI)
CITY OF ST LOUIS) SS

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL COURT
(ST. LOUIS CITY)

SUBPOENA
(Order to Appear and/or Produce Document)

State of Missouri
Plaintiff/Petitioner

c/o Circuit Attorney

[redacted]
Attorney for Plaintiff/Petitioner

Cause No. 1822-CR00642

vs.

Division No. 16

Eric Greitens
Defendant/Respondent

c/o N. Scott Rosenblum

[redacted]
Attorney for Defendant/Respondent

THE STATE OF MISSOURI, TO AT&T 11760 US HIhway 1 Notrth Palm Besch FL

FAX [redacted] GREETING:

YOU ARE HEREBY COMMANDED. That setting aside all manner of excuse and delay, you be and appear at

Carnahan Courthouse, 1114 Market St., St. Louis MO 63101 - Division 16

in the City of St. Louis, on the 10 day of May, at 9:00 o'clock A. M.,
and thereafter from time to time until the case can be disposed of or you are finally discharged.

☐ To testify on behalf of _____

☒ To produce the following: Subscriber info as of March 2015 and current subscriber info for [redacted]. Also include any and all data to include but not limited to incoming and outgoing calls during the time period of January 2015-March 2018

Thomas L. Kloeppinger
CIRCUIT CLERK

Thomas Kloeppinger

The attorney or party requesting attendance of witness is : N. Scott Rosenblum, Attorney for Gov. Greitens

120 S. Central Ave. Ste. 130 St. Louis MO 63105

☐ The date and hour that your testimony shall be required cannot be stated with certainty. Therefore, you are directed to telephone _____ at _____, between the hours of 9:00 AM and 5:00 PM on _____, at which time you will be further instructed concerning your appearance. Such instruction may require that you appear on a subsequent date, without further personal service.

FORM 21 (12/99ML)

FILED
MAY - 7 2018
22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPT

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

ENTERED
MAY - 7 2018
DP

State of Missouri
VS
ERIC GREITENS

CASE NO. 1822-CR00642 DIVISION 16 5-7 2018

COURT ORDER

"STATE'S MOTION TO COMPEL, FILED APRIL 25, 2018 IS GRANTED, IN PART.

PURSUANT TO RULE 25.06(A) THE DEFENDANT SHALL PROVIDE THE CELL PHONE ASSOCIATED WITH THE NUMBER FOR FORENSIC EXAMINATION FOR COMMUNICATIONS AND PHOTOGRAPHS WITH OR OF K.S DURING THE PERIOD FROM JANUARY 1, 2015 TO DECEMBER 31, 2015.

THE PARTIES SHALL APPEAR IN DIV. 16 ON TUESDAY MAY 8, 2018 AT 11:00 AM TO DISCUSS CONSTITUTIONAL RIGHTS/PRIVILEDGES OF DEFENDANT AND PROTOCALS FOR EXAMINATION OF THE CELL PHONE.

SO ORDERED:

DIV. 16

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

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

MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE DR. FRANKS

The Defense's Motion to Strike Relies on Characterizations of an Unsigned Transcript That the Witness Has Not Yet Had Opportunity to Review

The defense's motion to strike Dr. Mary Anne Franks as an expert witness rests entirely on characterizations of an unsigned deposition transcript that they failed to provide to either the Circuit Attorney or to Dr. Franks until Thursday, May 3, 2018. Mo. Ann. Stat. § 492.340 provides that "[w]hen the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties." Dr. Franks did not waive her right to this examination and reading of the deposition. Accordingly, the defense's characterization of the deposition cannot be considered credible until Dr. Franks has had the opportunity to review and sign the transcript.

Dr. Franks Is Clearly Qualified as a Witness Under §490.065

It is indisputable that Dr. Franks qualifies as an expert under Mo. Ann. Stat. §490.065. Dr. Franks is one of the leading national and international authorities on the subject of sexual privacy. Dr. Franks is a tenured law professor at the University Of Miami School Of Law with

expertise in privacy, intimate partner violence, sexual abuse, technology, bias, criminal law, and family law. In addition to holding a law degree from Harvard Law School and doctorate and master's degrees from Oxford University, where she studied as a Rhodes Scholar, Dr. Franks has served for the last five years as the Vice-President and the Legislative and Tech Policy Director of the Cyber Civil Rights Initiative (CCRI), the leading national nonprofit organization providing support to victims of sexual privacy violations. CCRI provides a 24-hour helpline, educational resources, and online content removal guides to victims as well as collaborating with key players in the technology sector to address sexual privacy violations, conducting empirical research into the prevalence and pathology of what is broadly referred to as "image-based sexual abuse," and advocating for legislation reform to protect sexual privacy rights. CCRI has provided direct assistance to thousands of victims since its creation.

In addition to her forthcoming book published by Stanford University Press, Dr. Franks has authored more than thirty law review articles and book chapters and more than fifty shorter essays and editorials, the majority of which deal significantly with image-based sexual abuse, sexual privacy, intimate partner violence, sexual assault, technology, and violence against women. These publications include the very first law review article to analyze the need for criminal legislative reform to address the severe and often irremediable harm of sexual privacy violations, *Criminalizing "Revenge Porn"* (Wake Forest Law Review, 2014), co-authored with Professor Danielle Citron of the University of Maryland, another leading authority in the subject of sexual privacy.

Dr. Franks is the author of the first U.S. model criminal statute addressing the nonconsensual distribution of private, sexually explicit imagery, which has served as a template for the majority of the 38 U.S. states that have passed legislation protecting sexual privacy since

2013, as well as for the federal Intimate Privacy Protection Act (IPPA), introduced in the U. S. Congress in 2016 and reintroduced as the ENOUGH Act in 2017. Since 2016, Dr. Franks has also served as the reporter for the United States Uniform Law Commission's (ULC) Committee on the Unauthorized Disclosure of Intimate Images, which is tasked with drafting a uniform law providing civil remedies for invasions of sexual privacy. Dr. Franks's legislative drafting efforts have involved working personally and extensively with victims, victim advocates, tech industry leaders, prosecutors, defense attorneys, civil libertarians, and legislators in multiple states to study the impact and dynamics of sexual privacy violations and to develop the best means of addressing the harms they cause.

Dr. Franks has previously provided expert reports in two high-profile sexual privacy Canadian cases, *Sarah Doucet & L.K. and The Royal Winnipeg Ballet and Bruce Monk* (ongoing) and *Canadian Judicial Council's Complaint Re: Associate Chief Justice Lori Douglas* (2014). Dr. Franks did not provide the names of these cases to the defense during the deposition out of concern for the privacy of parties involved. She has since sought and received authorization to provide this information. Dr. Franks has also testified before federal, state, and city legislatures in the U.S. on the harm, impact, and dynamics of sexual privacy violations, as well as advising lawmakers and advocates in Australia, Canada, England, Iceland, Ireland, and Taiwan on legal, social, and cultural approaches to the issue. As illustrated by the hundreds of media appearances listed in her curriculum vitae, Dr. Franks is frequently sought out as an expert on sexual privacy by media outlets such as the BBC, CNN, the Guardian, Le Monde, the New Yorker, the New York Times, NPR, Rolling Stone, TIME magazine, the Wall Street Journal, and the Washington Post.

Dr. Franks's work as a scholar, victims' rights advocate, and legislative drafter makes her uniquely well-qualified to offer expert opinions on the nature, impact, dynamics, and cultural context of image-based sexual abuse. Dr. Franks is one of the few authorities in the country with a deep understanding of the interactions between privacy, technology, and sexuality. She is well-versed in the empirical, legal, sociological, and psychological literature that demonstrates how image-based sexual abuse fits into the broader spectrum of intimate partner violence, sexual abuse, and other harms disproportionately suffered by women and has had extensive firsthand experience with victims dealing with sexual privacy violations.

To dismiss Dr. Franks's extensive scholarly, advocacy, and legislative work as dealing with "revenge porn" betrays a fundamental lack of understanding both of Dr. Franks's work and the concept of sexual privacy itself. "Revenge porn" is a colloquial term with no legal significance; the underlying issue to which so much of Dr. Franks's professional energies have been devoted is the impact, dynamics, and context of sexual privacy harms. Dr. Franks' experience, knowledge, skill and experience qualify her to give opinions regarding behaviors of victims of invasion of privacy. Cf. *Fierstein v. DePaul Health Center*, 24 S.W.3d 220 (Mo.App.E.D. 2000).

A copy of Dr. Franks's CV is included here for reference, with particular qualifications, publications, and experience relating to sexual privacy, intimate partner violence, sexual assault, and technology highlighted for ease of reading. Dr. Franks's knowledge, experience, and education regarding the nature, impact, dynamics, and cultural context of sexual privacy violations, which is based on extensive data, established scholarship, and firsthand interactions with victims, make her eminently qualified to "help the trier of fact to understand the evidence or to determine a fact in issue." Mo. Ann. Stat. § 490.065.

The Defense Mischaracterized Dr. Franks's Deposition

Contrary to the claims of the defense, Dr. Franks was in fact willing and able to provide specifics regarding her expert opinion on various aspects of the case. Unfortunately, by engaging in vague, open-ended, and repetitive questioning, the defense did not provide her with the opportunity to do so. See Franks depo. at 19 (lines 20-21), 37 (lines 5-8), 40, (lines 4-7), 47 (lines 1-2).

Also contrary to the claims of the defense, Dr. Franks had, at the time of the deposition, reviewed evidence in the form of the sworn testimony of witnesses in the April 11, 2018 Report of the Missouri House Special Investigative Committee on Oversight and did speak to details of that report. In addition, Dr. Franks' engagement letter was disclosed.

Finally, Dr. Franks did indeed disclose the opinions that she would render, as illustrated by the passage that the defense itself quoted:

> It would be the kinds of psychological impact that a victim might undergo if she experienced having her picture taken while she was naked without her consent. About the ways she might act or respond to that particular type of violation. And about – I probably volunteered some of my thoughts on the legislation, because legislation is obviously something that I've spent many years working on about how the law is trying to catch up with evolving senses of norms about privacy. [Franks depo. at 30.]

The defense also mischaracterizes Dr. Franks' deposition testimony. There was disclosure of opinions such that striking her as an expert for lack of discovery is not warranted. See Franks depo. at 21, lines15-24; 22, 2-6; 24, 3-15; 26, 1-7; 30, 12-21, 25; 31,1-20, 24-25; 32, 4-5; 38, 20-21; 45, 4-12, 16-23; 46, 22-25; 50 1-8; 63,17-20.

It is well established in Missouri law that experts may testify to general or "profile" victim behaviors in certain classes of cases, such as sexual assault or domestic violence, although they may not testify as to particularized opinions as to an individual victim's credibility. E.g., *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo.banc 2011); *State v. Churchill*, 98 S.W.3d 536, 539 (Mo.banc 2003). In the instant case, Dr. Franks' opinions, as intimated in the deposition, will

concern the behavior of persons in similar situations to K.S., when responding to the threat of circulation of a nude photograph ("revenge porn") on the Internet, including victims' reluctance and delay in coming forward. Such opinion testimony is routinely proffered in the closely analogous cases involving sexual or other abuse, and there is no reason to exclude it here.

Opinions regarding victim profile behaviors are admissible under §490.065.2, RSMo, as amended. While the statute's adoption of F.R.Ev. 702 worked an important change in Missouri law, it does not dictate wholesale exclusion of expert opinion evidence previously acceptable in this state. On the contrary, as declared by federal courts, Rule 702 is not intended to exclude expert opinion evidence and is actually a "liberal" standard. See, e.g., *Johnson v. Mead Johnson & Co.*, 754 F.3d 557 (8th Cir. 2014).

Dr. Franks' opinion evidence meets the standard prescribed by §490.065.2(1): the expert's knowledge will assist the jury, the expert's testimony will be based on sufficient facts and data, the testimony will be the product of reliable principles and methods, and the expert has reliably applied the principles to the facts of this case.

WHEREFORE, the State requests that the motion to strike Dr. Franks be denied and that the defense be ordered to pay the reasonable fees of Dr. Franks as required by rule.

Respectfully submitted,

KIMBERLY M. GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

/s/ Robert Steele MBE 42418
Assistant Circuit Attorney
steeler@stlouiscao.org
1114 Market St., Rm. 230
St. Louis, MO 63101
314-622-4941

Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by electronic means this 4th day of May 2018.

/s/Robert Steele

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

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

MOTION TO QUASH SUBPOENA

COMES NOW, P.S., by and through his undersigned counsel and Moves this Honorable Court to Quash Subpoena directed to Lou Fusz Motor Co. of Kirkwood, Inc. Toyota by Defendant. In support of same, P.S. states to the Court as follows:

1. On the 23rd day of April, 2018, Defendant Greitens, by and through his counsel, served upon Lou Fusz Motor Co. of Kirkwood, Inc. Toyota (hereinafter "Lou Fusz") a Subpoena, to produce documents and things with a return date of May 10, 2018 at 9:00 AM. A true and correct redacted copy of the subject Subpoena is attached hereto, incorporated herein by reference and marked Exhibit 1 ("Subpoena").

2. A copy of the April 23, 2018 subpoena was provided to counsel for P.S. by counsel for Lou Fusz on or about May 7, 2018.

3. The Subpoena requests Lou Fusz to produce the following: "Any and all records peretaining [sic] to the sale of a 2016 Toyota Truck with a [VIN] on or about December 2017."

4. Substantively speaking, the Request for documents is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible

evidence.

5. It is clear from the nature of the items being sought in Defendant's subpoena that the subpoena was not served in order to procure documents which are evidentiary and relevant, but rather the Defendant's subpoena is merely yet another attempt to go on a fishing expedition at a non-party's expense.

6. Pursuant to RSMo.§491.100.3, "the court upon motion may, promptly, and in any event at or before the time specified in the subpoena for compliance therewith, ***quash the subpoena if it is unreasonable and oppressive*** or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the objects, books, papers, or documents."

7. The U.S. Supreme Court, in reference to Federal Rule of Criminal Procedure 17(c), discussed the "unreasonable or oppressive" standard in its *United States v. Nixon*[1] decision, stating that a subpoena for documents could be quashed "if their production would be 'unreasonable or oppressive....'"

8. In order for a subpoena Duces Tecum to survive a motion to quash, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[2]

9. The Nixon test requires a party seeking enforcement of a subpoena Duces

---

[1] *United State v. Nixon*, 418 U.S. 683, at 699 (1974).
[2] *Ibid.* at 699-700.

Tecum to "clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity."[3]

10. Blanket requests that ask for "any and all" information, data, etc., are nothing more than fishing expeditions and should be quashed.

11. Additionally, in the present case, the non-party witness, P.S., has already been subjected to three days of deposition, the surrendering of his cell phone for the overly broad cloning of same, a subpoena for the non-party witness's tax returns for the years 2014-2017, a subpoena to the non-party witness's attorney for non-relevant attorney-client information, a subpoena to the non-party witness's cellular phone provider, and now for an area car dealership for sales records for a period that is 33 months removed from the underlying fact situation which has given rise to the allegations as charged in the Indictment handed down by a Grand Jury in connection with the above-styled cause of action.

12. P.S. is entitled to the same privacy rights that are afforded to all citizens by the U.S. Constitution. A Criminal defendant who wishes to infringe upon the rights of a non-party witness with the issuance of a subpoena Duces Tecum must not make overly broad or unreasonable requests. Additionally, the documents sought must be evidentiary and relevant, or likely to lead to the discovery of relevant information. Defendant's subpoena to Lou Fusz for their sales records related to a purchase by PS lacks clear specificity, in that Defendant requests "any and all records" and for a time period which is nearly three years after the date of the allegations raised in the Grand Jury's Indictment of the Defendant in the above-styled cause of action.

13. Not only does Defendant's latest subpoena request additional documentation that is irrelevant to the underlying charge, is invasive of a non-party witness's privacy, is

[3] *Ibid.* at 700.

unreasonable and oppressive but it appears to have been issued by Defendant solely for the purpose of harassing the witness P.S., especially in light of deposition testimony of P.S.

WHEREFORE, Movant prays this Honorable Court:

1. Quash and hold for naught the Subpoena and corresponding request for production of documents and things served on Lou Fusz on April 23, 2018 for naught;

2. Enter an Order prohibiting Defendant from obtaining the sales records of Lou Fusz as they relate to P.S.

3. Award the Movant reasonable attorney's fees, costs and expenses associated with the preparation and prosecution of the present Motion and for such other and further relief as the Court deems appropriate and just in the circumstances.

KODNER WATKINS, LC

By: /s/ Albert S. Watkins

ALBERT S. WATKINS, #34553
The Bank of America Building
7733 Forsyth Blvd., Suite 600
St. Louis, Missouri 63105
Phone: (314) 727-9111
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record this 8th day of May, 2018.

EXHIBIT 1

STATE OF MISSOURI)
CITY OF ST LOUIS) SS

APR 2 ? 2018

BY:

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL COURT
(ST. LOUIS CITY)

SUBPOENA
(Order to Appear and/or Produce Document)

State of Missouri
Plaintiff/Petitioner
C/O Circuit Attorney

[redacted]
Attorney for Plaintiff/Petitioner

Cause No. 1822-CR00542

Vs.

Division No. #16

Eric Greitens
Defendant/Respondent
C/O Mr. N. Scott Rosenblum

[redacted]
Attorney for Defendant/Respondent

THE STATE OF MISSOURI, TO Lou Fusz Motor Co. of Kirkwood, Inc. Toyot S

10725 Manchester Rd. St. GREETING

YOU ARE HEREBY COMMANDED. That setting aside all manner of excuse and delay, you be and appear at

Carnahan Courthouse, 1114 Market St., St. Louis, Missouri 63101 Division #16

in the City of St. Louis, on the 10th day of May at 9:00 o'clock A M.,
and thereafter from time to time until the case can be disposed of or you are finally discharged.

☐ To testify on behalf of

☒ To produce the following Any and all records pertaining to the sale of a 2016 Toyota Truck with

VIN [redacted] on or about December 2017.

☐

Thomas L. Kloeppinger
CIRCUIT CLERK

The attorney or party requesting attendance of witness is: Mr. N. Scott Rosenblum, Attorney for Eric Greitens,

120 S. Central, Suite 130, Clayton, Missouri 63105 (314) 862 4332

☐ The date and hour that your testimony shall be required cannot be stated with certainty. Therefore, you are directed to telephone _____ at _____, between the hours of 9:00 AM and 5:00 PM on _____ at which time you will be further instructed concerning your appearance. Such instruction may require that you appear on a subsequent date, without further personal service.

FORM 21 (12/99ML)

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

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

ERIC GREITENS' SUPPLEMENTAL MOTIONS *IN LIMINE*

Mr. Greitens respectfully submits the following supplemental motions *in limine* seeking pretrial rulings with respect to evidentiary matters.

I. Background

On May 1, 2018, Mr. Greitens filed motions *in limine* seeking pretrial rulings with respect to numerous evidentiary matters. Mr. Greitens respectfully submits the following additional motions *in limine* seeking pretrial rulings on matters he believes may arise at trial.

II. Motion to Preclude Argument, Evidence, or Lines of Inquiry that K.S. is Truthful or Credible Due to the Length of Her Deposition

Mr. Greitens moves this Court to preclude the State from arguing, directly or indirectly, or otherwise presenting evidence or pursuing lines of inquiry related to the length of K.S.'s deposition, including as part of an argument that K.S. is truthful or credible due to the number of hours she was subject to Defendant's deposition.

To allow this line of argument would amount to an impermissible comment on the Defense's right to confront and cross-examine witnesses, and would invite the jury to draw an adverse inference from Defendant's right to investigate and present a defense. U.S. Const. Amend. VI and XIV; Mo. Const. Art. I, §§ 10 ad 18(a); *see also* Rule 25.12(a). The length of a deposition,

further, has no relationship or relevancy to the credibility of the witness. Finally, and most importantly, much of the deposition time in question was the direct result of this Court imposing sanctions upon the State for failing to disclose evidence. Allowing the State to capitalize in any way upon the length of K.S.'s deposition would not only invite the jury to draw an adverse inference from the exercise of the right conferred by rule and the state and federal constitutions, but create an absurd situation where the State will profit from its own misconduct. *See, e.g., State v. Troupe*, 891 S.W.2d 808, 811 (Mo. banc 1995) (refusing to adopt a rule that would permit a defendant to benefit from his own misconduct).

III. Motion to Limit Direct and Cross-Examination of Witnesses to One Lawyer Per Witness

Mr. Greitens moves this Court to require the State to limit direct and cross-examination of each witness to one lawyer. Put another way, Defendant asks the court to not allow the State to use multiple lawyers to direct examine or cross-examine individual witnesses. Issues concerning the manner of witness examination and the conduct of counsel during trial are, of course, within the trial court's discretion. *Sutherland v. Sutherland*, 348 S.W.3d 84, 97 (Mo. App. 2011). But Defendant would respectfully suggest in this particular matter that this procedure, applied to both parties, would allow for an orderly presentation of the evidence while reducing any possibility of the jury's confusion of the evidence that could result from unlimited substitution of lawyers with respect to the same witness.

IV. Motion to Limit Reference to House Committee or Missouri Attorney General Investigations

Mr. Greitens moves this Court to prohibit the State from making any reference to the investigations conducted by the Missouri House or the Attorney General, including referencing any House testimony as being anything other than "prior testimony." Any reference to

investigations which have not resulted in a conviction would be unfairly prejudicial. *State v. Reese*, 364 Mo. 1221, 274 S.W.2d 304, 307 (1954).

V. Conclusion

WHEREFORE, Mr. Greitens respectfully requests that this Court grant these supplemental Motions *in Limine* and enter such other and further relief as the Court deems just and proper.

Dated: May 8, 2018

Respectfully submitted,

DOWD BENNETT LLP

By: */s/ James F. Bennett*
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nkettler@rsflawfirm.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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

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 statue 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,

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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

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

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

STATE'S MOTION TO RECONSIDER AND MEMORANDUM OF LAW REGARDING APPLICABILITY OF THE "TRANSMIT" ELEMENT IN § 565.252 TO THE FACTS OF THIS CASE

COMES NOW the Circuit Attorney for the City of St. Louis, by and through Ronald S. Sullivan Jr., Special Assistant Circuit Attorney, and submits this Motion to Reconsider and Memorandum of Law regarding the Court's Order, delivered from the bench, striking the State's expert on the issue of "transmit."

The defense has repeatedly argued that the transmission clause in §565.252 does not apply to Defendant's conduct and is not satisfied in this case. *See e.g.*, Defendant's Motion to Strike Robert Zeidman and Nikolaus Baer at 1, 2, 7, 8, 9, 10; Defendant's Final Motion for Exculpatory Information at 1, 2; Defendant's Motion for Production of Subpoenaed Records and Second Deposition at 10; Defendant's Motion to Dismiss Based on False and Misleading Instructions to the Grand Jury at 5, 6. It is quite inferable that the defense will argue this to the jury. While this theory is a demonstrably incorrect statement of the law, the defense's own repeated motions show how necessary it is that the State be able to respond to this claim when it is argued to the jury. Dr. Zeidman is needed for the purpose. Therefore, the State requests that this Court reconsider its oral Order excluding the state's expert.

Missouri Statute § 565.252 provides in relevant part that it is a crime to knowingly take photos of a person without their consent and to then "distribute [] the photograph or film to another or transmit [] the image contained in the photograph or film in a manner that allows access to that image via a computer." Mo. Rev. Stat. § 565.252. As an initial matter, based on the plain language of the statute, and the fact that any other interpretation would render the word "transmit" superfluous, it is clear that "transmit" in § 565.252 does not require transmission to another person. Instead, transmission to another place, which occurs in microseconds on a smartphone, is sufficient. Accordingly, what is effectively required is the instant matter is that the photograph be made accessible via a computer.

Victim K.S. has previously testified that she heard the distinctive sound of an iPhone camera taking a photograph. For two reasons, a photograph taken by any smartphone is covered by the "transmit" clause in § 565.252: a) the very act of taking a photograph with a smartphone transmits it in a way that allows access to the photograph via a computer, and b) any syncing to the Cloud, which is the default on the iPhone, is clearly a transmission according to the statute.

First, a smartphone *is* a computer. Furthermore, a photograph taken by a smartphone is automatically and subsequently transmitted *twice* within the smartphone – once to the camera microcomputer and once to the memory for storage. Thus, the very act of taking the photograph with a smartphone sets in motion the transmission of the image in a manner that allows access via a computer. Therefore, the "transmit" element is fulfilled through any photograph taken by a smartphone *qua* computer.

Moreover, beyond a smartphone photograph being accessible via the smartphone *qua* computer, such photographs are also transmitted in a manner that makes it accessible via other

computers. When the word "transmit" was added to the statute, photographs had to be physically transferred from a camera to a computer in order to be accessible via a computer. Thus, the transmit element signified the legislature's desire to preclude making such photographs readily available. Smartphones changed the game. Now as soon as the photograph is taken it is accessible via any computer around the world. Apple's smartphone patent is unequivocal about this point. Accordingly, all the State has to show to satisfy the "transmit" element is that Defendant used an iPhone to photograph K.S.

Second, even assuming, *arguendo*, that the above is not a transmission, the syncing of the photograph to the Cloud clearly constitutes a transmission. Once on the Cloud, the photograph would be accessible from any computer around the world. Case law from across the federal circuits, common usage in U.S. patents, and other state statutes, are all clear that syncing data constitutes a transmission. The Cloud is another place, not on the iPhone, which stores data. Therefore, syncing to the Cloud, which is the default iPhone setting, is undoubtedly a transmission.

The simple act of taking the photograph with a smartphone is a transmission under § 565.252. If the photograph was synced to the Cloud that would be yet another transmission. Therefore, the State asks that the Court recognize that the charged conduct fulfills this element of § 565.252. This information is not part of the normal ken and requires an expert to help the jury understand the nature of how iPhones operate.

ARGUMENT

I. "TRANSMIT" DOES NOT REQUIRE A TRANSFER TO ANOTHER PERSON; TRANSFER TO ANOTHER PLACE IS ENOUGH TO SATISFY THE STATUTE.

"[T]ransmit . . . in a manner that allows access to that image via a computer" includes any taking of a photograph with a smartphone regardless of whether the photograph was transmitted to another person. When interpreting statutes, the Missouri Supreme Court is unequivocal that the

court uses a word's plain meaning as expressed in the dictionary. *See, e.g.*, *Lincoln Indus., Inc. v. Dir. of Revenue*, 51 S.W.3d 462, 465 (Mo. 2001). Black's Law Dictionary defines transmit as "[t]o send or transfer (a thing) from one person *or* place to another." *Transmit*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added). Thus, to fulfill § 565.252's "transmit" element there is no need for the image to be transmitted to another person.

Moreover, § 565.252 allows for *either* distribution to another *or* transmission. If transmission required transmission to a person, then the distribution clause would be superfluous. Since it is presumed that the legislature did not insert superfluous terms into the statute, *see Turner v. State*, 245 S.W.3d 826, 828 (Mo. 2008), the transmission clause should be read to open the statute not just to transfer to other people, as already covered by the distribution clause, but any conveyance that allows access to the image via a computer. Therefore, to demonstrate that Defendant transmitted the photograph in a manner than allowed access via a computer, the State does not have to prove that the transmission was to another person.

An expert would undoubtedly help the jury to understand the transmission of the image to another, virtual place. The inner-workings of an iPhone is neither intuitive nor a matter within common knowledge. Section 490.065.2(1)(a) (2017); cf. *State v. Blurton,* 484 S.W.3d 758 (Mo.banc), cert. denied, 137 S.Ct. 333 (2016).

II. THE ACT OF TAKING A PHOTOGRAPH WITH A SMARTPHONE AUTOMATICALLY CONSTITUTES A TRANSMISSION UNDER § 565.252.

A. A smartphone is a computer; transmitting a photograph from the smartphone camera to the smartphone allows access to the photograph via that computer.

When the iPhone's camera takes a photograph, its transfer of that photograph to the iPhone is a transmission that makes the image accessible via a computer—the iPhone itself. Computer is defined as: "the box that houses the central processing unit (CPU), along with any internal storage devices, such as internal hard drives, and internal communication devices, such as internal modems

capable of sending or receiving electronic mail or fax cards, along with any other hardware stored or housed internally. Thus, computer refers to hardware, software and data contained in the main unit. Printers, external modems attached by cable to the main unit, monitors, and other external attachments will be referred to collectively as peripherals and discussed individually when appropriate. When the computer and all peripherals are referred to as a package, the term "computer system" is used. Information refers to all the information on a computer system including both software applications and data." §556.061(5), RSMo 2000 & Supp. The statutory definition is not dissimilar from the more common definition of computer as "[a] programmable electronic device that can store, retrieve, and process data." Merriam-Webster, Inc., *Merriam-Webster's Collegiate Dictionary* 237 (10th ed. 1996).

Apple Inc.'s U.S. Patent No. 8,223,134 (filed Mar. 5, 2012) makes clear that the iPhone stores, '134 Patent at col. 4 l. 10, retrieves, *id.* at col. 11 l. 52, and processes, *id.* at col. 13 l. 56, data. Courts, administrative bodies, academics, and journalists have all reached the conclusion that a smartphone is a computer. *See Riley v. California,* 134 S.Ct. 2473, at 2489 (2014)("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."); *U.S. v.* Kramer, 631 F.3d 900 (8th Cir. 2011) (holding that a cellphone *is* a computer). *State v. Hinton*, 280 P.3d 476, 491 (Wash. 2012), *rev'd on other grounds,* 319 P.3d 9 (2014) (finding that smartphones are a type of handheld computer); Certain Pers. Data & Mobile Commc'n Devices & Related Software, Inv. No. 337-TA-710, USITC Pub. 4331 (June 1, 2012) (Final) ("The iPhone is a computer-based system. . ."); Sarah

Burstein, *The "Article of Manufacture" in 1887*, 32 Berkeley Tech. L.J. 1, 74 (2017) ("A smartphone is a computer."); Christina Bonnington, *In Less Than Two Years, a Smartphone Could Be your only Computer*, Wired (Feb. 10, 2015, 3:42 AM), https://www.wired.com/2015/02/smartphone-only-computer/.

Moreover, *the image does not have to leave the smartphone for it to have been "transmitted" in common usage*. Patents often claim transmission when data transfers between components within a single device. U.S. Patent No. 9,202,321's fourth claim includes "transmitting the digital image signals" from a camera to the camera's built-in control unit. U.S. Patent No. 9,202,321 col. 6 l. 66 (filed Dec. 19, 2013). And U.S. Patent No. 8,111,322's specifications note that an image signal from the camera's "image pickup devices" is "transmitted to a camera microcomputer," all within the camera itself. *See* U.S. Patent No. 9,202,321 col. 5 l. 40 (filed Aug. 10, 2006); *see also* U.S. Patent No. 8,781,206 col. 13 l. 26 (filed Feb. 15, 2013) (specifying that the processing device "transmits the derived image data [ ] to the memory for storage"). Moreover, the act of taking a digital photo transmits light to a photodetector array. *See* U.S. Patent No. 8,781,206 (filed Feb. 15, 2013). Once transmitted within the smartphone, the photograph is readily accessible by the smartphone *qua* computer in any number of ways, including in virtually any application on the smartphone.

To summarize: a) a smartphone is a computer; b) when a person takes a photograph on a smartphone they transmit that photograph within the smartphone itself; and c) transmitting the photograph within the smartphone makes it accessible via the smartphone *qua* computer.[1]

[1] Beyond the fact that photographs taken on smartphones are transmitted to the smartphone *qua* computer, they are also accessible via any other computer. As explained below, the legislature's intent was to stop the spread of these illicit photographs. At that time the only way to spread the photographs was to transmit the photographs from the camera to another device. However, smartphones make it "very easy" to send emails with still images from the camera. *See* '134 Patent at col. 17 l. 17. Therefore, in addition to smartphone

Therefore, the "transmit" element of § 565.252 is unequivocally satisfied through the use of a smartphone to take the illicit photograph.

None of the foregoing is common knowledge. That a smartphone is a computer is not something that the average juror knows or understands. An expert able to explain the foregoing would aid the jury's understanding and, thus, is admissible.

B. The Missouri legislature intended to criminalize taking and storing photographs in a manner that allows access to them via other computers.

The Court should find that, as a matter of law, the "transmit" element is fulfilled simply by making the photograph accessible via the smartphone *qua* computer – which happens any time a smartphone is used to take a photograph. At a minimum, the Court should permit an expert to testify that a smartphone is a computer and that pictures taken on a smartphone *move* to the smartphone's computer. However, even if the Court does not accept this rationale, taking a photograph on a smartphone automatically transmits it in a manner that allow access to it via *other* computers too.

The transmission clause makes clear that the legislature was interested in deterring not just distribution of illicit photos but also access to those images on computers. Computers allow the spread of images on the Internet, so it makes sense that the legislature would try to stop that dissemination before it began. The statute was drafted before smartphones were the norm; for an image to be accessible via computer, it had to be transmitted via cord or file from a camera to a computer.[2] But with the advent of the smartphone age, it is clear that transmission occurs nearly

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photographs being accessible via the smartphone *qua* computer they are also accessible very easily from any other computer – exactly what the legislature foreclosed.

[2] The original language of "transmit" in this statute was added back in 2002, when photographs on cameras or cell phones could not be accessed from a computer without a physical wire transmission or, at its most advanced, by an email attachment. *See* Mo. Ann. Stat. 565.252.1(1), SEX OFFENSES—PREVENTION—PROSECUTION, S.B. 855 (Vernon's) (Mo. Legis. Serv. 2002).

instantly after the photo is taken without any other action necessary. As the United States Supreme Court has found, the legal definition of transmission evolves with progressions in technology. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 972 (2005) (holding that "unlike at the time of the DSL order, *substitute forms of Internet transmission exist today*, including wireline cable, terrestrial wireless, and satellite") (emphasis added). Therefore, because at the moment the camera takes the photograph and transmits it to the phone's memory and other components, the smartphone's in-phone-computer allows it to spread the images in exactly the way § 565.252 was intended to deter, such photographs are undoubtedly covered by the "transmit" element.

Apple Inc.'s smartphone patent makes clear the fact that taking a photograph with a smartphone makes for easy transmission. *See* '134 Patent at col. 17 l. 17 (explaining that the smartphone makes it "very easy" to send emails with still images from the camera). Although the cameras most-in-use when the statute was written may have also transmitted images to their data banks or to film when a photo was taken, modern smartphone cameras transmit the image in such a way that it is automatically accessible via any computer. From the smartphone itself one can disseminate the photograph in a multitude of ways with virtually no effort expended. There is no need to physically transfer the photograph from the smartphone in order to make it accessible via other computers. Therefore, the very act of taking a photo on a smartphone camera transmits an image in line with the statute.

The above demonstrates that there is no need to show that Defendant sent any photographs of K.S. to anyone else in order to sustain a conviction under § 565.252. K.S. has testified that she heard the sound of an iPhone taking a photograph. This use of a smartphone, by itself, constitutes a transmission under §565.252. A smartphone is a computer. Therefore, taking the photograph

with a smartphone transmits it in a way that makes it accessible via that computer. Moreover, the Missouri legislature intended to criminalize allowing access to photographs via a computer. Unlike at the time the transmission element was added, once a smartphone takes a photograph there is a plethora of ways with which that photograph becomes accessible via other computers.

III. SYNCING PHOTOGRAPHS TO THE CLOUD CONSTITUTES A TRANSMISSION.

As explained above, all the State has to show is that Defendant used a smartphone. However, in addition to simply taking a photograph with a smartphone constituting a transmission, the transmission clause is also triggered by any automatic or willful sync of a smartphone with a cloud server or with a computer. As previously stated, Black's Law Dictionary defines "transmit" as "[t]o send or transfer (a thing) from one person *or* place to another." *Transmit*, *Black's Law Dictionary* (10th ed. 2014). Likewise, Missouri courts have defined the word "transmit" to mean "to cause to go or to be conveyed to another person or place . . . [it means] to send or transfer (a thing) from one person or place to another. . . the plain and ordinary meaning . . . is conveyance from one place to another." *Union Elec. Co. v. PSC*, 422 S.W.3d 358, 366 (Mo. App. 2013).

When a phone syncs an image to the Cloud, it is conveying the image's data to another place. *See United States v. Thomas*, 74 F.3d 701, 707 (6th Cir. 1996) (holding that movement of electronic signals over the internet counts as transmission from one place to another for sake of criminal statute); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) (same). Many smartphones automatically sync to a cloud server. For example, the Apple iPhone has a "Photo Stream" feature that automatically syncs photographs taken by the phone's camera to a cloud server. *See My Photo Stream*, Apple Inc. (Mar. 29, 2018), https://support.apple.com/en-us/HT201317. Those photos are then instantly available via the phone owner's computer. *Id.* Photo Stream has been enabled by default in Apple iPhones since at least 2013, two years prior to the

events of the indictment. *See Turn Off "My Photo Stream" to Free Up 1GB+ of Space in iOS*, Osxdaily.com (Oct. 25, 2013), http://osxdaily.com/2013/10/25/delete-my-photo-stream-ios/. When a smartphone automatically syncs to the cloud, therefore, it is transmitting the image in a manner that makes it accessible via a computer.

Common usage in U.S. Patents makes clear that transmission include syncing images to the Cloud. For example, U.S. Patent No. 9,360,682's first claim includes that its camera is "operable to capture photographs and/or video through the camera lens and [. . .] transmit the data over a wireless communication network to a remote server or database." *See* U.S. Patent No. 9,360,682 col. 6 l. 66 (filed May 7, 2015). Its specification makes clear that a remote server includes the Cloud. *See id.* at col. 1 l. 39 ("[T]he device's innovation stems from its capability to capture video of what the wearer is seeing, transmit and save this content on the device or to a cloud-based server."). Many other patents use the word "transmit" to indicate the movement of an image wirelessly to a separate server. *See, e.g.*, U.S. Patent No. 7,161,622 col. 8 l. 35 (filed July 28, 2000) (claiming an electronic camera that "transmits" an image wirelessly to the nearest communication base). Even more patents use the word "transmit" to indicate transfer of data to a cloud server. *See, e.g.*, U.S. Patent No. 9,706,383 col. 2 l. 12 (filed July 10, 2014); U.S. Patent No. 9,648,478 col. 11 l. 57 (filed Dec. 11, 2014).

The word "transmit" is also used in other states' statutes to include syncing to a cloud server. In Indiana, Rhode Island, and Washington, criminal statutes use the word "transmit" to indicate the wireless transfer of data to a data storage space:

> Sec. 11. (a) Except as provided in subsection (b), *"transmit"* means to transfer, send, or *otherwise make available* computer software or a computer software component *through a network, the Internet, a wireless transmission, or any other medium, including a disk or data storage device.*
> (b) "Transmit" does not include an action by a person who provides:

> [. . .] (2) *the storage or hosting of computer software* or an Internet web page through which the computer software was made available . . .

Ind. Code Ann. § 24-4.8-1-11 (West) (emphasis added). Although section 11(b)(2) omits actions *by* storage companies, it does not omit actions by transmitters using storage or hosting. In fact, that the legislature felt the need to except data storers indicates that storage of data counts as transmission. The Rhode Island and Washington laws are functionally the same. *See* 11 R.I. Gen. Laws Ann. § 11-52.2-1 (West); Wash. Rev. Code Ann. § 19.270.010 (West). Since dictionaries, patents, and other states all view transmission as including syncing to cloud storage, this Court should construe § 565.252 to include cloud syncing.

The simple act of taking a photograph with a smartphone constitutes transmission that allows access via a computer. Within the smartphone itself, a photograph is transmitted in a way that allows this access. Therefore, there is no need to show that the photograph was transmitted to another person. The legislature intended to criminalize allowing access to such photographs via a computer and Defendant's use of a smartphone falls squarely into this intent.

Regardless, the use of the Cloud to backup Defendant's phone would be yet another transmission. The plain meaning, patent law, and a host of other state statutes all demonstrate that such syncing is a transmission. Similarly, a photograph on the Cloud is easily accessible via a computer which is exactly what the legislature intended to foreclose. Therefore, the State asks this Court to recognize that the Defendant's charged conduct falls squarely within § 565.252.

CONCLUSION

For the foregoing reasons the Court should permit the State's expert to assist the jury in understanding the foregoing.

Respectfully submitted,
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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by e-mail this 8 day of May 2018.

/s/Robert H. Dierker

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

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

ADDITIONAL STATE MOTIONS *IN LIMINE*

The State of Missouri respectfully moves the Court to enter an order limiting evidence at trial as follows:

1. The defense has endorsed William Tisaby as a defense witness. The record concerning Mr. Tisaby is abundant. The question, however, is whether his testimony is relevant and material to any issue in the case, or is to be proffered solely to inject collateral matters diverting the jury's attention from the merits of the indictment. It is clear that Mr. Tisaby cannot testify to any event at the defendant's residence in 2015. At most, he could testify to prior inconsistent statements of endorsed witnesses—except that the defense has labeled him a perjurer because he testified to statements that State's witnesses never made and omitted statements that they did make. The Court has already imposed sanctions designed to cure the State's errors in connection with Mr. Tisaby, and the defense has full discovery of the statements of the victim and the other State's witnesses. To allow evidence of Mr. Tisaby's misconduct will clearly tend to lead the jury to decide the case on some basis other than the

evidence germane to the elements of the charged offense—the very definition of unfair prejudice. In addition, an excursion into Mr. Tisaby's shortcomings will inevitably confuse or mislead the jury and inject wholly collateral issues. See, e.g., *State v. Dennis,* 315 S.W.3d 767 (Mo.App.E.D. 2010); cf. *Pittman v. Ripley County Mem. Hosp.,* 318 S.W.3d 289 (Mo.App.S.D. 2010). Evidence relating to Mr. Tisaby's errors, omissions, or falsehoods must be excluded.

2. The State expects that the defense will seek to introduce evidence of $100,000 or more in cash payments supposedly for the benefit of the witness P.S. The State intends to present P.S. for the sole purpose of authenticating recordings of the victim. While any witness is subject to cross-examination on matters of bias, prejudice or interest, the recordings that the State will seek to introduce were made at or near the time of the charged offense, long before any payments to or for the benefit of P.S. Furthermore, the record to date shows that all or nearly all of the cash payments was consumed by fees of P.S.'s lawyer, and nothing suggests that any benefit or promise of benefit was offered to or received by the victim.

The defense cites an ambiguous statement of P.S. to the House Committee regarding a children's trust fund, but the defense overlooks that P.S. has children other than by the victim herein, and the defense misstates the actual comment of P.S. Consequently, evidence of the cash payments is wholly irrelevant, even on the issue of bias, prejudice or interest of P.S., since it does not show any stake of P.S. in the outcome of this prosecution. See *State v. Taylor,* 466 S.W.3d 521 (Mo.banc 2015); *State v. Winfrey,* 337 S.W.3d 1 (Mo.banc

2011). The evidence of the payments should be excluded. In the alternative, such evidence should be limited to a showing that substantial cash payments were made long after the recordings at issue, and that such payments have gone exclusively to defray P.S.'s attorney's fees in connection with disclosure of the original recording of K.S.

WHEREFORE, the State requests an order *in limine* excluding evidence pertaining to Mr. Tisaby's conduct and to the cash payments received by P.S.'s lawyer.

Respectfully submitted,
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CIRCUIT ATTORNEY OF THE
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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by e-mail this 8 day of May 2018.

/s/Robert H. Dierker

IN THE CIRCUIT COURT FOR THE
TWENTY-SECOND JUDICIAL CIRCUIT
STATE OF MISSOURI

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

DEFENSE ENDORSEMENT OF ADDITIONAL WITNESSES

COMES NOW Defendant, Eric Greitens, through his attorneys, and hereby notifies the State that the following witness may be called to testify or produce records in the above-styled cause:

Anthony Box

Dated: May 10, 2018

Respectfully submitted,

DOWD BENNETT LLP

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing 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 10th of May 2018.

/s/ *James F. Bennett*

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

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

SUPPLEMENTAL RESPONSE TO DEFENDANT'S MOTIONS IN LIMINE

At argument concerning defendant's motions *in limine,* the Court appeared to express some uncertainty as to the admissibility of the defendant's published statements, evidencing consciousness of guilt regarding the photo at issue in this cause. While the defendant's arguments are wide of the mark, the State considers it advisable to supplement its argument. In addition to the Supreme Court's explicit rejection of defendant's theory in *Salinas v. Texas,* 570 U.S. 178 (2013), the issue has been addressed quite clearly in *United States v. Johnson,* 495 F.3d 951, 972-74 (8th Cir. 2007):

> During the government's merits-phase closing arguments, one of the prosecutors argued that if Johnson had been tricked by Honken into participating in the murders, as she essentially claimed, she would have said so when she spoke about the murders with various individuals. The prosecutor also displayed a chart during closing argument that read as follows:
>
> Gaubatz: no claim of innocence
>
> McNeese: no claim of innocence
>
> Bramow: no claim of innocence
>
> S. Johnson & W. Jacobson: no claim of innocence
>
> Baca: no claim of innocence

Hoover: no claim of innocence

Yager: no claim of innocence

Johnson contends that the prosecutor's remarks and his use of the chart was tantamount to improper commentary on her failure to testify and on her post-arrest silence. We disagree. We cannot see how any of the prosecutor's remarks could be reasonably interpreted as a comment on Johnson's decision to not testify. Johnson asserts that the prosecutor's remarks implied that Johnson was under an obligation to proclaim her innocence, but that plainly was not what the prosecutor was arguing. The prosecutor was contending instead that the jury could infer, relying on its common sense understanding of human motivations, that if Johnson had been duped by Honken, she would have stressed that detail when she spoke with others about the crimes. As for the chart, we do not believe that it constitutes either a direct or indirect comment on Johnson's failure to testify. Cf. *Graham v. Dormire*, 212 F.3d 437, 439 (8th Cir.2000) (stating that a prosecutor may not directly comment on a defendant's failure to testify and that an indirect comment is impermissible if it manifests "the prosecutor's intent to call attention to a defendant's failure to testify or would be naturally and necessarily taken by a jury as a comment on the defendant's failure to testify").

Nor was there improper commentary on Johnson's post-arrest silence. Ordinarily, a defendant's post-arrest, post-Miranda warnings silence may not be used against her. *Doyle v. Ohio*, 426 U.S. 610, 619-20, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The reasons for this rule are two-fold: 1) such silence may be nothing more than an arrestee's exercise of her constitutional rights; and 2) because the Miranda warnings carry an "implicit assurance" that an arrestee's silence will not be used against her, using her silence would unfairly penalize her for relying on these assurances. *United States v. Frazier*, 408 F.3d 1102, 1110 (8th Cir.2005) (citing *Doyle*, 426 U.S. at 617-18, 96 S.Ct. 2240), cert. denied, 546 U.S. 1151, 126 S.Ct. 1165, 163 L.Ed.2d 1130 (2006). We have observed, however, that the "'privilege against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when [s]he is under no official compulsion to speak.' " *Frazier*, 408 F.3d at 1110 (quoting *Jenkins v. Anderson*, 447 U.S. 231, 241, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (Stevens, J., concurring)). In other words, "in determining whether the privilege [to remain silent] is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." *Jenkins*, 447 U.S. at 244, 100 S.Ct. 2124 (Stevens, J., concurring). Thus, we concluded in *Frazier* that testimony regarding a defendant's post-arrest, pre-Miranda silence does not necessarily constitute a *Doyle* violation

> because the mere fact of arrest does not itself give rise to a "government-imposed compulsion to speak" triggering the assertion of an arrestee's Fifth Amendment privilege. *Frazier*, 408 F.3d at 1111. Here, Johnson's silence was not an exercise of her privilege to remain silent because she was under no official compulsion against which such a privilege would be asserted. Nor is there any reason to believe that Johnson was somehow relying on an implicit assurance by the government that her silence would not be used against her. Cf. *Fletcher v. Weir*, 455 U.S. 603, 606, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (per curiam) ("[W]e have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him."). In sum, as the district court observed, "Johnson has not shown how, when, or why her right to remain silent had attached as to any of these witnesses." Johnson, 403 F.Supp.2d at 828.

The foregoing is completely in accord with Missouri law. In the "good law is old law" category is *State v. Schmidt*, 38 S.W. 719 (Mo. 1897), in which the Missouri Supreme Court quite clearly held that a failure to deny an accusation in an extrajudicial setting is admissible in evidence and does not constitute a reference to the right not to testify.

None of the cases cited by the defendant in support of his motion to exclude his published statements is in point. Not a single one involved evidence of noncustodial, extrajudicial statements evincing consciousness of guilt. In particular, *Franklin v. Duncan*, 884 F.Supp. 1435 (N.D. Calif.), aff'd, 70 F.3d 75 (9th Cir. 1995), dealt with post-*Miranda* statements of a jailed prisoner, and in any event that case was rejected by the Missouri Court of Appeals in *State v. Prince*, 311 S.W.3d 327 (Mo.App.W.D. 2010), holding that jail recordings reflecting failure of the defendant to deny accusations or shift blame were admissible in evidence without transgressing the Fifth Amendment.

WHEREFORE, the State prays that the defendant's motion *in limine* regarding published statements of defendant evincing consciousness of guilt be denied.

Respectfully submitted,

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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing was served on counsel for defendant by ~~e-mail~~ HAND this 11 day of May 2018.

/s/Robert H. Dierker

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

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

REQUEST FOR ADVANCE NOTICE OF ANY PARTY'S INTENT TO CALL KMOV-TV REPORTER LAUREN TRAGER AS A TRIAL WITNESS IN ORDER TO PRESENT MOTION FOR PROTECTIVE ORDER

KMOV-TV and its reporter Lauren Trager would strongly object to any attempt to have Ms. Trager testify at trial. Use of a non-eyewitness journalist as a trial witness, as to events she has reported, would be extraordinary and would raise unusual and serious issues. Accordingly, KMOV-TV and Ms. Trager request advance notice if any party seeks to call Ms. Trager as a witness during this trial so that KMOV-TV and Ms. Trager can have sufficient time to raise constitutional and common law claims, including (for example) privilege claims, and seek a protective order.

As background, at the May 9 hearings on motions in limine, Chief Trial Assistant Circuit Attorney Dierker stated that the Circuit Attorney, who first listed Ms. Trager on the State's witness list, did not intend to call her as a witness. At that time, Defendant's counsel stated that they might call her, and requested her exclusion from the trial. Since then, KMOV-TV understands that Defendant's counsel withdrew their motion to exclude Ms. Trager, but reserved the right to call her as a witness during trial. On April 11, KMOV-TV had informed both parties by letter that it objected to any attempt to have Ms. Trager testify.

Ms. Trager and KMOV-TV respectfully request reasonable notice, of at least one business day, in advance of any party calling her as a witness so that they can present a motion for protective order. Ms. Trager's sources and conversations are protected under the reporter's privilege, the First Amendment of the U.S. Constitution, and Article 1, Section 8 of the Missouri Constitution. As recognized in many Missouri decisions, and in hundreds of other decisions, the reporter's privilege prevents the compelled testimony of journalists and their work product except in highly unusual situations when, among other things, the evidence that the reporter solely possesses goes to the heart of the underlying proceeding, and the party seeking the evidence has exhausted all other means of obtaining relevant evidence from non-journalistic sources. *E.g., State of Missouri ex rel. Classic III Inc. v. Ely,* 954 S.W.2d 650 (Mo.App. 1997) (journalist's privilege applied in civil case); *Continental Cablevision Inc. v. Storer Broad. Co.,* 583 F. Supp. 427 (E.D. Mo. 1984) (First Amendment qualified reporter's privilege recognized in Missouri; privilege applies not only to identity of confidential sources but also to non-confidential source material); *Gonzales v. National Broad. Co.,* 194 F.3d 29 (2d Cir. 1999); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972); *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980); *United States v. Burke,* 700 F.2d 70, 76-78 (2d Cir. 1983). Here, the evidence that Ms. Trager purportedly possesses does not go to the heart of the underlying proceeding, and Defendant's counsel has not exhausted all other means of obtaining relevant evidence from non-journalistic sources.

WHEREFORE, given the substantial constitutional protection for Ms. Trager's work product, she and KMOV-TV respectfully request reasonable notice, of at least 1 business day, of any party's intent to call her as a trial witness in order to have the opportunity to prepare, file, and present a motion for protective order.

Respectfully submitted,

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Attorneys for KMOV-TV and Lauren Trager

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all counsel of record.

Michael Nepple