

PROBABLE CAUSE STATEMENT

DATE: April 20, 2018

I, Anthony Box, knowing that false statements on this form are punishable by law, state that the facts contained herein are true.

1. I have probable cause to believe that Eric Greitens, a WHITE MALE DOB: 4/10/74 Age: 44, committed one or more criminal offense(s).

Count 1 Tampering With Computer Data To Defraud Or Obtain Property (value \$500 Or More) (Class D Felony) RSMO 569.095
ON 4/22/2015 Time: PLACE: City of St. Louis, MO (SCC 569.095-001Y200229)

Or, in the alternative to Count 1:

Count 2 Tampering With Computer Data To Defraud Or Obtain Property (value \$500 Or More) (Class D Felony) RSMO 569.095
ON 4/22/2015 Time: PLACE: City of St. Louis, MO (SCC 569.095-001Y200229)

2. The facts supporting this belief are as follows:

I learned through an investigation that the defendant, acting with others, took and used data specifically owned by the Mission Continues for the purpose of soliciting funds for his political campaign.

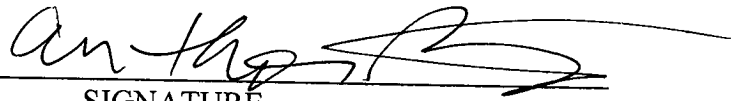
At the direction of the defendant, on April 22, 2015, K.T. disclosed data, specifically a donor list owned by The Mission Continues, to a political fundraiser (the "Fundraiser") working on behalf of Greitens for Missouri. The defendant directed this disclosure. The President of The Mission Continues explained neither the defendant nor K.T. had permission from The Mission Continues to disclose the donor list to the Fundraiser or to use the donor list for political purposes. The Mission Continues employee handbook and the non-disclosure agreements prohibited the disclosure of the donor list and the retention of it by anyone not employed by and working on behalf of The Mission Continues. The Mission Continues conflict of interest agreement signed by board members prohibited the personal use of The Mission Continues assets, including the donor list.

The defendant and K.T. knew that the donor list disclosed on April 22, 2015, was taken without the permission of The Mission Continues. The defendant was aware that K.T. retained or used the list without the permission or consent of The Mission Continues and the defendant directed K.T. to send the donor list in an April 22, 2015 email to the Fundraiser.

At the time of the April 22, 2015 disclosure of the donor list, the donor list resided and existed internal to a computer or computer system used by K.T. for the purpose of conducting business on behalf of The Greitens Group and/or Greitens for Missouri, as well as a computer or computer system belonging to the Mission Continues. The defendant and K.T. disclosed the donor list to the Fundraiser for the purpose of obtaining property of five hundred dollars or more.

Anthony Box

PRINT NAME



SIGNATURE

STATE OF MISSOURI VS Greitens, Eric		
DIV #:	CA#: 510704037	CAUSE#:
DESTINATION:		
DEFENDANT INFORMATION		
ADDRESS: 7733 Forsyth Blvd, # 1900, Clayton, MO 63105		
PEDIGREE:	RACE: W SEX: M	DOB: 04/10/1974 AGE: 44
		HGT: 5'09" WGT: 200
ID #s:	COMPLAINT#:	LID:
ARREST#:	DIST:	OCN:
ALIASES:		
SSNs:		

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

The Circuit Attorney of the City of St. Louis, State of Missouri, upon information and belief, charges that

Count 1: Tampering With Computer Data To Defraud Or Obtain Property (value \$500 Or More)
(Class D FELONY) RSMo 569.095 ON 4/22/2015 Time: **Place:** City of St. Louis, MO (SCC 569.095-001Y200229)

The defendant, in violation of Section 569.095, RSMo, committed the class D felony of tampering with computer data, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about April 22, 2015, in the City of St. Louis, State of Missouri, the defendant, acting with others, knowingly and without authorization for the purpose of devising or executing a scheme or artifice to defraud or obtain property of a value of five hundred dollars or more, disclosed data, specifically a donor list owned by Mission Continues residing and existing internal to a computer utilized by K.T. for the Greitens Group or Greitens for Missouri.

Or, in the alternative to Count I:

Count 2: Tampering With Computer Data To Defraud Or Obtain Property (value \$500 Or More)
(Class D FELONY) RSMo 569.095 ON 4/22/2015 Time: **Place:** City of St. Louis, MO (SCC 569.095-001Y200229)

The defendant, in violation of Section 569.095, RSMo, committed the class D felony of tampering with computer data, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about April 22, 2015, in the City of St. Louis, State of Missouri, the defendant, acting with others, knowingly and without authorization for the purpose of devising or executing a scheme or artifice

to defraud or obtain property of a value of five hundred dollars or more retains or uses data, specifically a donor list owned by Mission Continues, which the defendant knew and believed was taken by a person who did not have authorization to do so.

The facts that form the basis for this information and belief are contained in the attached statement(s) of facts, made a part hereof and submitted as a basis upon which this court may find the existence of probable cause.

Wherefore, the Circuit Attorney prays that an arrest warrant be issued as provided by law.

Kimberly M. Gardner
Circuit Attorney of the City of St. Louis,
State of Missouri
By: /s/ Christopher W. Hinckley #50572
Assistant Circuit Attorney

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

STATE OF MISSOURI			
VS			
GREITENS, ERIC			
DIV #:	CA#: 510704037		CAUSE#:
DEFENDANT INFORMATION			
ADDRESS:	7733 Forsyth Blvd, # 1900, Clayton, MO 63105		
PEDIGREE:	RACE: W	DOB: 04/10/1974	HGT: 5'09
	SEX: M	AGE: 44	WGT: 200
ID #s:	COMPLAINT#:	LID:	
ARREST#:	DIST:	OCN:	
ALIASES:			
SSNs:			

CHARGE(S)

Count: 1 Tampering With Computer Data To Defraud Or Obtain Property (value \$500 Or More)(Class D FELONY) RSMo 569.095 **DATE: 4/22/2015 Place: City of St. Louis**
(SCC 569.095-001Y200229)

Or, in the alternative to Count I:

Count: 2 Tampering With Computer Data To Defraud Or Obtain Property (value \$500 Or More)(Class D FELONY) RSMo 569.095 **DATE: 4/22/2015 Place: City of St. Louis**
(SCC 569.095-001Y200229)

STATE OF MISSOURI)
CITY OF ST. LOUIS) **SUMMONS**

STATE OF MISSOURI TO THE ABOVE NAMED DEFENDANT: WHEREAS, you are charged in this court with the above-named offense(s); you are hereby summoned to appear in Division No. _____ of the Circuit Court of the City of St. Louis, in the CARNAHAN COURT HOUSE, 1114 MARKET ST., ST. LOUIS, MO. 63101 on _____, 20____ at _____ AM/PM then and there to plead and answer to the said charge(s).

ISSUED in the City and State aforesaid on this _____ day of _____, 20____

Thomas Hoeyinger

CIRCUIT CLERK
CITY OF ST. LOUIS

RETURN

Served the within Summons upon the within named Defendant in my City aforesaid and on this _____ day of _____ 20____.

By _____
Deputy Sheriff

PROBABLE CAUSE STATEMENT

DATE: April 20, 2018

I, Anthony Box, knowing that false statements on this form are punishable by law, state that the facts contained herein are true.

1. I have probable cause to believe that Eric Greitens, a WHITE MALE DOB: 4/10/74 Age: 44, committed one or more criminal offense(s).

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ON 4/22/2015 Time: PLACE: City of St. Louis, MO (SCC 569.095-001Y200229)

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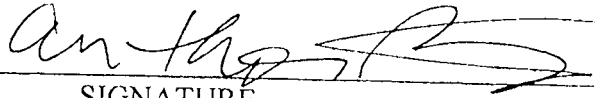
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Anthony Box

PRINT NAME



SIGNATURE



FILED

APR 20 2018

Judge or Division: MADELINE O CONNOLLY	Case Number: 1822-CR01377	22 ND JUDICIAL CIRCUIT CIRCUIT CLERK'S OFFICE BY <u>TM</u> DEPUTY
State of Missouri vs.	Offense Cycle No. (OCN):	
To: (Name and Address of Defendant to be served)	Charge(s): 569.095-001Y20022999.0 *Disc-Tmpr W/Comptr Dta-\$500 O 569.095-001Y20022999.0 *Disc-Tmpr W/Comptr Dta-\$500 O	Felony D Felony D
ERIC R GREITENS c/o DOWD BENNETT LLP 7733 FORSYTH BLVD SUITE 1900 CLAYTON, MO 63105	Date/Time of Hearing: 22-MAY-2018 09:00 AM	
	Location of Hearing: Division 25 1114 MARKET STREET SAINT LOUIS, MO 63101	

Summons-Criminal Case

Because you have been charged in this court with the above offense, you are summoned to appear at the above location and time to plead and answer to the charges. If you fail to appear, a warrant for your arrest may be issued.

COURT SEAL OF



CITY OF ST LOUIS

4-20-2018
Date

JUDGE MADELINE O CONNOLLY TM
Judge

By TM
Clerk

If you have a disability requiring special assistance for your court appearance, please contact the court at least 48 hours in advance of scheduled hearing.

Further Information:

If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 U.S.C.922 (g) (9). If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

Certificate of Mailing

I certify that this summons was mailed on 4-23-2018 by first class mail to the above named defendant at the address listed above.

COURT SEAL OF



CITY OF ST LOUIS

4-20-2018
Date

By TM
Clerk

www.courts.mo.gov case.net

Sheriff's or Server's Return

I certify that I have served the above summons by: (check one)

- delivering a copy of the summons and a copy of the petition to the defendant.
- leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the defendant with _____ a person of the defendant's family over the age of 15 years.

(For service on a corporation) delivering a copy of the summons and a copy of the petition to:
(name) _____ (title) _____ at
(address) _____

other _____
Served in _____ (County/City of St. Louis), MO, on _____ (date) at _____ (time).

Sheriff's Fees

Fees \$ N/A
Mileage \$ _____ (_____ miles @ \$ _____ per mile)
Total \$ _____

Sheriff or Server

By: _____
Deputy



FILED

APR 20 2018

Judge or Division: MADELINE O CONNOLLY	Case Number: 1822-CR01377	22 ND JUDICIAL CIRCUIT CIRCUIT CLERK'S OFFICE
State of Missouri vs.	Offense Cycle No. (OCN):	BY <u>TM</u> DEPUTY
To: (Name and Address of Defendant to be served)	Charge(s): 569.095-001Y20022999.0 *Disc-Tmpr W/Comptr Dta-\$500 O 569.095-001Y20022999.0 *Disc-Tmpr W/Comptr Dta-\$500 O	Felony D Felony D
ERIC R GREITENS c/o DOWD BENNETT LLP 7733 FORSYTH BLVD SUITE 1900 CLAYTON, MO 63105	Date/Time of Hearing: 22-MAY-2018 09:00 AM	
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Summons-Criminal Case

Because you have been charged in this court with the above offense, you are summoned to appear at the above location and time to plead and answer to the charges. If you fail to appear, a warrant for your arrest may be issued.

COURT SEAL OF



CITY OF ST LOUIS

4-20-2018
Date

JUDGE MADELINE O CONNOLLY TM
Judge

By TM
Clerk

If you have a disability requiring special assistance for your court appearance, please contact the court at least 48 hours in advance of scheduled hearing.
Further information:

If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition, pursuant to federal law under 18 U.S.C. 922 (g) (9) If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney

Certificate of Mailing

I certify that this summons was mailed on 4-23-2018 by first class mail to the above named defendant at the address listed above

COURT SEAL OF



CITY OF ST LOUIS

4-20-2018
Date

By TM
Clerk

www.courts.mo.gov case.net

Sheriff's or Server's Return

I certify that I have served the above summons by: (check one)

- delivering a copy of the summons and a copy of the petition to the defendant.
- leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the defendant with _____ a person of the defendant's family over the age of 15 years
- (For service on a corporation) delivering a copy of the summons and a copy of the petition to _____ at _____ (name) _____ (title) _____ (address)
- other _____ Served in _____ (County/City of St. Louis), MO, on _____ (date) at _____ (time).

Sheriff's Fees

Fees \$ N/A

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

Total \$ _____

Sheriff or Server

By _____ Deputy

[FILED UNDER SEAL]

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

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	Cause No. 1822-CR01377
v.)	
)	
ERIC GREITENS,)	
)	
Defendant.)	

**MOTION TO DISQUALIFY KIMBERLY GARDNER AND
THE CITY OF ST. LOUIS CIRCUIT ATTORNEY’S OFFICE**

Defendant Eric Greitens, under RSMo § 56.110, hereby moves this Court to disqualify Ms. Kimberly Gardner and the St. Louis Circuit Attorney’s Office (“CAO”) from handling the prosecution of Defendant Eric Greitens in this new matter. Defendant further requests this Court appoint a special prosecutor, as under § 56.110. In support of this motion, Defendant states:

1. In the invasion of privacy case also pending in this Court, the Circuit Attorney's office has conceded that its lead investigator has given false testimony under oath. It further appears undisputed that the Circuit Attorney was aware of this false testimony and, in fact, elicited some of it. These matters will be the subject of further investigations. This same investigator appears to also have interviewed witnesses -- as many as 35 -- related to the current charges. It jeopardizes the rights of the individual defendant and presents a threat to the criminal justice system to have such a person in a position to assist in the making of charging or prosecution decisions. A fresh look is required under these circumstances.

2. In addition, significant Brady violations have been revealed by the defense in the invasion of privacy matter. This Court has specifically found, “[c]learly in this case the State has committed sanctionable discovery violations of the Rules of Criminal Procedure.” April 19, 2018

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Transcript Hearing at 25. In fact, the Court sanctioned the Circuit Attorney and will consider additional sanctions if appropriate. The prior prosecution has been tainted by Mr. Tisaby's conduct and the sanctions imposed by the Court.

3. As such, the Circuit Attorney has a personal motivation to justify the prior charges and conduct by bringing new charges, which the defendant believes to be equally unfounded. It is improper for a prosecutor to have a personal interest in creating another prosecution to distract from the way a prior prosecution was handled. Here, the Circuit Attorney has stated that Mr. Tisaby remains on the prosecution "team" and the Circuit Attorney has stated -- despite a prior commitment to investigate the allegations -- that it does not intend to review his conduct. These circumstances give rise to an appearance that the Circuit Attorney might have a personal interest in the continued prosecution of this defendant.

4. Mr. Tisaby gave false testimony when he said that he did not speak to the Circuit Attorney about witness K.S. When Mr. Tisaby gave this false testimony, he explained that he wanted to make sure that the investigation was independent of the politics that would be assumed should he have coordinated with the Circuit Attorney. Thus, Mr. Tisaby has acknowledged that the reason for his false testimony was to give the appearance of impartiality and independence. When it turns out that he was not telling the truth on these matters, he has essentially admitted that the investigations have been tainted by politics. Thus, there is a further appearance that the continued pursuit of this defendant by this prosecution team is based on bias and motivations other than providing this defendant equal treatment under the law.

LEGAL STANDARD

5. Section 56.110 sets forth Missouri's legal standard for the disqualification of prosecutors. That section provides that if the prosecuting attorney "be interested...the court

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having criminal jurisdiction may appoint some other attorney to prosecute...the cause.” § 56.110 RSMo. “[A]s a quasi-judicial officer, the prosecuting attorney must avoid even the appearance of impropriety.” State v. Ross, 829 S.W.2d 948, 951 (Mo. banc 1992).

6. “However, the 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.” State v. Eckelkamp, 133 S.W.3d 72, 74 (Mo. App. E.D. 2004). See also State v. Kroenung, 188 S.W.3d 89, 92 (Mo. App. 2006). “In applying Section 56.110 the courts have stated that a prosecutor should be disqualified if the prosecutor has a personal interest in the outcome of the criminal prosecution which might preclude affording defendant the fair treatment to which defendant is entitled.” State v. McWhirter, 935 S.W.2d 778, 781 (Mo. App. 1996) (citing State v. Pittman, 731 S.W.2d 43, 46 (Mo. App. 1987)).

7. Missouri’s rules of professional responsibility also make clear that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Mo. R. Bar. Rule 4-3.8, Comment 1. “The general rule is that ‘[a] prosecuting attorney who has a personal interest in the outcome of a criminal prosecution such as might preclude his according the defendant the fair treatment to which he is entitled should be disqualified from the prosecution of such a case.’” Vaughan v. State, 614 S.W.2d 718, 724 (Mo. App. 1981) (quoting State v. Harris, 477 S.W.2d 42, 44 (1, 2) (Mo. banc. 1972)).

BACKGROUND

8. A brief factual recitation may assist the Court in understanding why the Circuit Attorney appears to have a personal interest in creating another investigation or prosecution of the Defendant, or that the investigations and prosecutions have a political component to them:

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a. There are numerous documented instances in which Investigator William Tisaby gave false testimony under oath. The Circuit Attorney was present during an initial interview of K.S. and at her deposition. As such, she had reason to know Mr. Tisaby was giving false testimony. The Circuit Attorney also elicited false testimony from Mr. Tisaby.

b. The Court has noted a “prima facie showing here there may have been criminal perjury.” April 12, 2018 Transcript Hearing (In Chambers) at 3. The Court called these “severe allegations of criminal perjury,” and “very, very severe allegations.” April 12, 2018 Transcript Hearing at 28. On April 12, 2018, the Court stated, “I feel it’s incumbent upon me, before the State puts anything on the record, to advise Ms. Gardner and that any further reference is going to be under oath and that, Ms. Gardner, unfortunately, I need to advise you that you have the right to have an attorney, to consider the advice of an attorney.” April 12, 2018 Transcript Hearing (In Chambers) at 2.

c. On April 19th, the Court noted that “[i]t was announced in chambers earlier this week that your [Ms. Gardner’s] office was going to make the complaint [regarding the perjury allegations.]” April 19, 2018 Transcript Hearing (In Chambers) at 3-4. Confirming that the Circuit Attorney’s Office was going to refer the perjury matter for investigation, Mr. Dierker stated, “I did make that statement. So, Mr. Martin’s pleading is not inaccurate.” Id. at 4. The Court then explained to Ms. Gardner, “the point still remains is that the is allegations that someone has to investigate.” Id. Without explaining the basis for her conclusions and acknowledging that other members of her staff had stated that Mr. Tisaby would be investigated, the Circuit Attorney responded: “[t]hese are allegations that are unfounded.” Id. It is very difficult to understand how any person could conclude that Mr. Tisaby told the truth in his depositions. Thus, the Circuit Attorney’s support for Mr. Tisaby is difficult to understand.

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d. Clear Brady material was not provided to the defense in this case. This includes a videotaped interview of the key witness and notes of that interview. Beyond withholding exculpatory evidence, clear Brady material was deleted from a witness statement that was included in multiple drafts of the witness statement and excised from what was turned over. It was core Brady material that goes to the heart of the defense to many of the allegations being made in this case. On April 16, 2018, the First Assistant Circuit Attorney acknowledged that the excised information was exculpatory. April 16, 2018 Transcript Hearing at 28 (“[T]he only thing exculpatory is a sentence that K.S. thought E.G. cared about her.”).

e. The Circuit Attorney personally made the decision to hire Mr. Tisaby, signed his contract, approved paying him thousands of dollars, and was to supervise his conduct in this investigation. The Circuit Attorney appears to be fully supporting him even if the evidence he did not tell the truth is overwhelming. Mr. Tisaby acknowledged that some of the statements he made (that later turned out to be false) were that certain procedures were adopted in order to avoid the appearance of political bias or a lack of independence. Thus, the reasonable conclusion to reach from his false statements is that the prosecution of this defendant by this office does have a political component to it. This personal motivation (or even just the appearance of it) supports appointment of a special prosecutor.

DISCUSSION

9. The Circuit Attorney has a “personal interest in the outcome of a [new] criminal prosecution such as might preclude [her] according the defendant the fair treatment to which he is entitled” and thus she “should be disqualified from the prosecution of such a case.” Vaughn, 614 S.W.2d at 724. The Circuit Attorney’s interest in the outcome of any subsequent

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investigation or prosecution of Defendant is palpable, and seriously jeopardizes “the fair treatment to which [D]efendant is entitled.” McWhirter, 935 S.W.2d at 781.

10. The Court specifically noted that it was “troubling” that the Circuit Attorney tried to claim that the defense’s motion for sanctions was frivolous. April 19, 2018 Transcript Hearing at 25. It is even more troubling that Ms. Gardner claims the claims of perjury are false and unfounded. The evidence of false testimony is overwhelming: Mr. Tisaby gave false testimony about taking notes during the two interviews –the video shows it, and the notes have now been produced. Moreover, Mr. Tisaby's testimony that he did not ask witnesses any questions and that he did not talk to the Circuit Attorney in advance is also refuted by the tape and the notes. An unwavering defense of Mr. Tisaby seems to suggest that Mr. Tisaby and the investigation are being protected when they should not.

11. “The test for prosecutorial vindictiveness is whether the facts show a realistic likelihood of vindictiveness in the prosecutor's augmentation of charges.” State v. Gardner, 8 S.W.3d 66, 70 (Mo. banc 1999). When a charging “decision comes after an accused has exercised a constitutional or statutory right, those principles conflict with the premise that “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” State v. Potts, 181 S.W.3d 228, 232 (Mo. App. 2005) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). The Circuit Attorney’s personal interest in prosecuting Defendant “demonstrate[s] a realistic likelihood of vindictiveness” in any potential filing of charges against Defendant. Chrisman v. State, 297 S.W.3d 145, 148 (Mo. App. 2009). This realistic likelihood creates a “presumption of vindictiveness.” Id.

12. This Court is not constrained by any factor in § 56.110, RSMo. Instead, this Court’s power to disqualify The Circuit Attorney and the CAO “is a power inherent in the court,

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to be exercised in the court's sound discretion, when for any reason, the regular prosecutor is disqualified." Eckelkamp, 133 S.W.3d at 74. That is, "the power to appoint a special prosecutor is not limited by the statutory grounds specified in Section 56.110." Id.

13. The Circuit Attorney's own personal interest necessarily extends to the entire CAO, given that the Circuit Attorney has been personally involved in this matter and the entire office is no doubt well aware of her views. The defense has respect and admiration for other members of the Circuit Attorney's office, including Mr. Dierker, but, unfortunately, he has been called upon to speak for the office. "[T]he remainder of the prosecutor's office must be disqualified if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial." State v. Lemasters, 456 S.W.3d 416, 423 (Mo. banc 2015). This standard is met here.

14. "[A]s a quasi-judicial officer, the prosecuting attorney must avoid even the appearance of impropriety." State v. Ross, 829 S.W.2d 948, 951 (Mo. banc 1992). This is an "overarching principle." State ex rel. Burns v. Richards, 248 S.W.3d 603, 605 (Mo. banc 2008). In other words, it is axiomatic that "prosecutorial conduct be beyond reproach and the integrity of judicial proceedings remain beyond reproach, criticism or appearance of impropriety." State v. Boyd, 560 S.W.2d 296, 297 (Mo. App. 1977). To protect the public confidence, the Circuit Attorney's office should be disqualified from further investigation of this defendant.

15. If the court determines that any investigation into and/or prosecution of Gov. Greitens is worthy of a special prosecutor, such special prosecutor must be outside and independent of the Missouri Attorney General's Office. On March 28, 2018, when asked by Fox News whether Gov. Greitens should step down, the Attorney General responded, "I don't want to say anything that would compromise in anyway my investigation, which is ongoing, or the other law

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enforcement activities.” Then on April 11, 2018, the Attorney General called on Gov. Greitens to “resign immediately.” It would be inappropriate to appoint a person whose office has already determined the outcome and who has announced a political decision regarding the defendant. A prosecutor must be independent of these political matters, meaning that the Attorney General’s Office should be recused.

CONCLUSION

For the above stated reasons, defendant requests that this Court disqualify the Circuit Attorney and her office from any such investigation or prosecution.

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
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jbennett@dowdbennett.com
edowd@dowdbennett.com
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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

[FILED UNDER SEAL]

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 23rd day of April, 2018.

/s/ James F. Bennett

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

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	
v.)	No. 1822-CR01377
)	
ERIC GREITENS,)	Div. 16
)	
Defendant.)	

MEMORANDUM IN OPPOSITION TO MOTION TO DISQUALIFY

The defendant has filed a motion to disqualify the office of the St. Louis Circuit Attorney in No. 1822-CR01377, but not in No. 1822-CR00642. Notably, the defendant is also attacking the Attorney General of Missouri in regard to the allegations of felony computer tampering which form the gravamen of the charges in No. 1822-CR01377. See Greitens v. Attorney General, No. 18AC-CC00143 (Cole County).

Defendant alleges that the Circuit Attorney's entire office should be disqualified on the ground of "interest" under §56.110, RSMo. It appears that the defendant's argument is that the Circuit Attorney is "interested" in the prosecution in No. 1822-CR01377, because the defendant has accused her of suborning perjury by a retained investigator in No. 1822-CR00642, and this perjury accusation has made the Circuit Attorney vindictive in pursuing No. 1822-CR01377. Thus, defendant's argument conflates two principles and essentially contends that the Circuit Attorney is interested because she is vindictive. For good measure, the defendant asserts an "appearance of impropriety."

Defendant's allegations are not self-proving. The Circuit Attorney categorically rejects the claim that she is "interested" or vindictive, and the Circuit Attorney likewise disputes the reckless and unwarranted accusation of subornation of perjury.¹

Defendant's motion boils down to this: a defendant's attack on a prosecutor in one case precludes the prosecution of any other case against him, as it raises an "appearance" that the prosecutor is interested or vindictive, or both, in pursuing the additional case. The Court must approach this novel argument with skepticism, particularly where a party may be seeking an advantage by disqualifying the elected prosecutor. See, e.g., *State ex rel. Director of Revenue v. McBeth*, 366 S.W.3d 95 (Mo.App.W.D. 2012) (prohibition granted to preclude enforcement of order disqualifying prosecutor); *State v. Eckelkamp*, 133 S.W.3d 72 (Mo.App.E.D. 2004) (same); cf. *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390 (Mo.App.E.D. 2011) (writ granted in civil case where counsel for party disqualified).

1. The allegations of "perjury" in connection with discovery disputes in a case alleging felony invasion of privacy do not establish an "interest" of the Circuit Attorney in prosecuting a wholly unrelated charge of felony computer data tampering.

As the Court is all too well aware, the defendant is charged in No. 1822-CR00642 with felony invasion of privacy, §565.252, RSMo 2000 & Supp., arising out of an encounter in his home in March 2015. The

¹ The defendant's allusion to a discovery sanction in another, closed case in this circuit, involving two of the State's counsel in this case, is surely an impertinent and unworthy aside.

defendant is charged in No. 1822-CR01377 with alternative counts of computer data tampering or computer tampering, by disclosure of data having a value in excess of \$500. §569.095, RSMo 2000 & Supp. The cases have only the defendant in common. The circumstances of each case are wholly different.

Section 56.110, RSMo, provides in pertinent part that if the prosecuting attorney is interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, the court having jurisdiction may appoint a special prosecutor. None of the cases construing that statute to date have applied it in the way in which the defendant seeks here. On the contrary, the cases have uniformly rejected disqualification of the elected prosecutor on the basis of assertions that the prosecutor does not like the defendant, has had prior confrontations with the defendant, made public statements regarding the defendant's case, or that the defendant voted for a political opponent of the prosecutor. See *State v. Wacaser*, 794 S.W.2d 190 (Mo.banc 1990); *State v. Stewart*, 869 S.W.2d 86 (Mo.App.W.D. 1994); *State v. Heistand*, 714 S.W.2d 842 (Mo.App.S.D. 1986); *State v. Holt*, 603 S.W.2d 698 (Mo.App.S.D. 1980).

While the Court has the authority under §56.110 as well as inherent power to disqualify a prosecutor, *State v. Copeland*, 928 S.W.2d 828 (Mo.banc 1996), that authority must be exercised cautiously. The allegations of defendant's motion in this case fall far short of the sort of proof that would warrant disqualification of the Circuit Attorney in No. 1822-CR01377 for "interest." Cf. *State v. Nicholson*, 7 S.W.2d 375 (Mo.App.Spr. 1928) (holding that prosecutor who

participated in search underlying criminal case, testified as a witness at trial, and misbehaved during trial, was disqualified for "interest").

2. The allegations of "perjury" or other misconduct in the invasion of privacy prosecution do not establish any disqualifying vindictiveness on the part the Circuit Attorney in charging defendant with computer data tampering, in that all actions of the Circuit Attorney have occurred pretrial, the investigation of the computer data tampering case has been supported by the recommendation of the Attorney General of Missouri, and the preferment of the computer data tampering charge cannot be shown to be in retaliation for the exercise of any procedural or constitutional right.

Defendant asserts that the allegations of "perjury" and the supposed weakness of the invasion of privacy case combine to establish not only "interest" but also vindictiveness in filing the computer data tampering charge. Defendant's motion is alike insufficient to show either a presumption of or actual vindictiveness.

The principles governing the issue of prosecutorial vindictiveness in the pretrial context have been summarized by the United States Supreme Court in *United States v. Goodwin*, 457 U.S. 368, 381ff. (1982), as follows (footnotes omitted):

There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely

that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.

. . . A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. . . . the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

The Missouri cases applying the constitutional precepts in regard to prosecutorial vindictiveness likewise reflect the heavy burden that a defendant must carry in the absence of a presumption of vindictiveness. See *State v. Gardner*, 8 S.W.3d 66 (Mo.banc 1999); *Chrisman v. State*, 297 S.W.3d 145 (Mo.App.S.D. 2009). In No. 1822-CR01377, there simply is no realistic likelihood of vindictiveness and no viable allegation of actual vindictiveness. The filing of the computer data tampering charge cannot be characterized as a retaliation for the defendant's invocation of any constitutional or procedural right. There simply is no realistic likelihood of vindictiveness when the prosecutor files an unrelated charge based on her own investigation and an investigation by the Attorney General of the State. Indeed, the insufficiency of defendant's allegations is

cast in sharp relief by the defendant's parallel accusations against the Attorney General. The defendant's motivation is transparent: he wishes to disable both the Circuit Attorney and the Attorney General—the responsible elected officers charged with enforcement of the criminal laws—from proceeding on a criminal charge, in an obvious effort to delay the cause so as to deflect the General Assembly from pursuing its own agenda. The Court should not aid or abet this gambit.

3. There is no "appearance of impropriety" created by the Circuit Attorney's conduct in filing a new, unrelated charge against defendant while another case is pending.

The Circuit Attorney does not dispute that, as a "quasi-judicial officer," she must avoid the "appearance of impropriety" in prosecuting criminal cases. *State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo.banc 2008) (disqualifying prosecutor from prosecuting a former client, due to interrelationship of prior representation and the criminal case). However, an appearance of impropriety does not exist unless there is an objective basis upon which a reasonable person could have a doubt about the fairness of the proceeding. *State v. Lemasters*, 456 S.W.3d 416 (Mo.banc 2015). Here, the defendant presents no objective basis upon which a reasonable person could doubt the fairness of the proceedings in No. 1822-CR01377.

A paramount duty of a prosecutor under the Rules of Professional Responsibility is to make sure probable cause exists for a criminal prosecution. The obligation is set out succinctly in Mo.R.Ct. 4-3.8(a): "The prosecutor in a criminal case shall . . .

refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The Comment to that Rule adds: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." A prosecutor's obligation is to do justice and to prosecute only those cases supported by probable cause.

The Missouri Supreme Court has described the prosecutor's role and the court's role in relation to the prosecutor as follows:

In Missouri it is recognized that a prosecuting attorney is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, and in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly guilty and the doubtfully guilty.

. . . .
When the law, in terms or impliedly, commits and entrusts to a public officer the affirmative duty of looking into facts, reaching conclusions therefrom and acting thereon, not in a way specifically directed, [i.e. not merely ministerially] but acting as the result of the exercise of an official and personal discretion vested by law in such officer and uncontrolled by the judgment or conscience of any other person, such function is clearly quasi judicial. This court has written much upon the broad discretion vested in a public prosecutor. [Citations omitted.] . . . With every other attorney at law a prosecuting attorney is, of course, an officer of the court in a larger sense; *but he is not a mere lackey of the court nor are his conclusions in the discharge of his official duties and responsibilities, in anywise subservient to the views of the judge as to the handling of the State's cases.* A public prosecutor is a responsible officer chosen for his office by the suffrage of the people. He is accountable to the law, and to the people. He is "vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. He is disqualified from becoming in any way entangled with private interests or grievances in any way connected with charges of crime. He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned." . . . [State ex rel. Griffin v. Smith, 258 S.W.2d 590, 593 (Mo. 1953), emphasis added.]

Defendant's argument, if accepted, presents the very real prospect that courts will be called upon to appoint a special prosecutor in every case where the defendant has aggressively attacked the methods and conduct of the prosecutor in one case, to preclude the prosecution of other meritorious cases against that defendant.

Tellingly, defendant can point to no appellate authority supporting his extraordinary motion. On the contrary, the weight of authority is that a trial court should not disqualify the elected prosecutor except in clear cases of direct personal interest in a prosecution—e.g., where the prosecutor himself was the crime victim, see *State v. Jones*, 268 S.W. 83 (Mo. 1924)—or where the prosecutor had formerly represented the defendant in a related matter, *State ex rel. Burns v. Richards*, supra—or where attorneys representing the defendant in a related civil matter were also part-time prosecutors in office that had charged their client criminally. *State v. Ross*, 829 S.W.2d 948 (Mo.banc 1992).

An "appearance of impropriety" is not some general warrant for courts to scrutinize the behavior of prosecutors (or other counsel, for that matter) in cases before them, and to disqualify them when the court disagrees with the manner in which the prosecutor exercises her statutory discretion. As noted above, circumstances creating an "appearance of impropriety" must be circumstances amounting to an objective basis upon which a reasonable person could base a doubt about the fairness of a trial or criminal proceeding. *State v. Lemasters*, 456 S.W.3d 416 (Mo.banc 2015). Defendant presents no objective basis to believe that the accusations leveled against the

Circuit Attorney in the invasion of privacy case have had any effect whatever in the pursuing the computer data tampering case. Probable cause for the computer data tampering charge is manifest. Defendant relies on his own characterization of a discovery dispute as "perjury" as the basis for the alleged "appearance of impropriety." That does not suffice to authorize this Court to disqualify the Circuit Attorney.²

Conclusion

For the foregoing reasons, the Circuit Attorney respectfully submits that the motion to disqualify the Circuit Attorney and her office must be denied.

Respectfully submitted,

KIMBERLY GARDNER
CIRCUIT ATTORNEY OF THE
CITY OF ST. LOUIS

/s/Robert Steele 42416
/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 23 day of April 2018.

² Because the motion is wholly without merit, the Circuit Attorney sees no reason to address the argument that her whole office must be disqualified because of defendant's personal attacks on her. Suffice it to say, the accusation of "interest" and vindictiveness does not require disqualification of the whole office.

/s/Robert H. Dierker 23671

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

STATE OF MISSOURI,)	
)	
Plaintiff,)	
)	
v.)	No. 1822-CR01377
)	Div. 16
ERIC GREITENS,)	
)	
Defendant.)	

ENTRY OF APPEARANCE

Undersigned counsel hereby enter their appearance in the above cause.

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

/s/Kimberly M. Gardner
/s/Robert Steele 42418
/s/Robert H. Dierker 23671

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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 April 2018.

/s/Robert H. Dierker

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

FILED
APR 24 2018

State of Missouri
VS
Greitens

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

CASE NO. 1822-CR1377 DIVISION 16 April 24 20 18

COURT ORDER

Defendant's motion to disqualify
called, argued, and ~~being~~ taken
under advisement.

ENTERED

APR 24 2018

CRH

So ordered:

[Signature]
Div. 16

[Signature]
ACA

[Signature] #68396
for Def.

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

State Of Missouri,
Plaintiff,

vs.

Eric Greitens,
Defendant.

Case Number: 1822-CR01377

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
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Certificate of Service

I hereby certify that on April 25th, 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