

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-Dispatch¹:

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-Dispatch²:



Prospective jurors saw following print front page headline on May 3, 2018:



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 statements⁴ 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

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":

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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

PROSECUTORS:



Gardner

Committed 'serious' violations of the rules of discovery, and may be subject to monetary sanctions.

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

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

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:

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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**



BY JACK HUNTRUP, KURT ERICKSON AND KEVIN MADENIOTT
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-made 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 loner for whom violence or the threat of it was an integral part of the affair.

Months 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 Eichelberger, like Greitens a Republican, said he would seek a special session

J.B. FORBES • [Forbes guest-the-patch.com](#)

Gov. Eric Greitens speaks Wednesday at a news conference about a report that was about to come out concerning his affair in 2016. Greitens called the investigation a “witch hunt.”

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:



- April 15, 2018:



- April 18, 2018:



- April 19, 2018:



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,

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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 Circuit Attorney's Office this 3rd day of May, 2018.

/s/ James F. Bennett