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.	)	

RESPONSE IN OPPOSITION TO STATE'S MOTION TO COMPEL

On April 25, 2018, the State filed its Motion to Compel, pursuant to Rule 25.06(A), asking this Court to order Gov. Greitens to provide his cell phone for forensic examination and his military service documents. This Court must deny the State's Motion to Compel both because it is an abuse of Rule 25.06(A) in violation of Rule 25.05(A), and also because compelled compliance would violate Gov. Greitens's Fifth Amendment right against self-incrimination.

First, the State's use of Rule 25.06(A) to compel production of a defendant's cell phone is an abuse of Rule 25.06(A) and in violation of Rule 25.05(A). The purpose of Rules 25.05 and 25.06(A) is for the State to discover in advance of trial or a hearing the evidence a defendant intends to use at that trial or hearing. Rules 25.05 and 25.06(A) are not a lawful mechanism for obtaining a forensic examination of a defendant's cell phone. The State cites no case, and the defense has found none, where a court has ordered production of a defendant's cell phone under Rule 25.06(A).

Supreme Court Rule 25.06(A) provides:

> *Subject to constitutional limitations*, the state may make a written motion in the court having jurisdiction to try the case requesting the defendant to disclose material and information not covered in Rule 25.05. 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 defendant to disclose to the state that material and information requested which is found by the court to be relevant and material to the state's case.

Meanwhile, Supreme Court Rule 25.05 provides for discovery of certain materials "which the defense intends to introduce into evidence at a hearing or trial," including reports or statements of experts, identities of persons whom defendant intends to call as witnesses, statements of the defendant which the defendant intends to introduce in evidence, and disclosure of defendant's intention to defend by insanity or alibi. *See* Rule 25.05. The State has made no showing that Gov. Greitens intends to introduce into evidence at trial his military records or contents of his cell phone.

Contrary to the State's request—and consistent with the Fifth Amendment of the Constitution—Rule 25.05 specifically *prohibits* any requirement that a defendant produce objects that contain his own statements, which a defendant's cell phone clearly would contain. *See* 25.05(A)(3) ("Those parts of any . . . objects, *except such as contain statements of the defendant, which the defendant intends to introduce in evidence at a hearing or trial.*"). The Circuit Attorney is attempting to use Rule 25.06 to obtain documents in violation of Rule 25.05, which would be contrary to the rules of statutory construction in Missouri, which require that the Missouri Court Rules be read consistently and harmoniously. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991). Such attempt must be denied.

Second, in addition to violating the Missouri rules, compelled compliance would violate Gov. Greitens's Fifth Amendment right against self-incrimination. Disclosure under Rule 25.06(A) is explicitly "[s]ubject to constitutional limitations." Rule 25.06(A). The Fifth Amendment to the United States Constitution provides, "No person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The Missouri Constitution similarly provides that "no person shall be compelled to testify against himself in a criminal case."

Mo. Const. Art. I, § 19. "The principles to be followed in applying these two provisions are consistent." *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 767 (Mo. banc 1987). "Both embody a privilege that 'reflects many of our fundamental values and most noble aspirations,' including 'our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.'" *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 562 (Mo. banc 2012) (citing *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 53 (1964)). "[T]he privilege against self-incrimination" has been recognized as "the essential mainstay of our adversary system[.]" *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

The privilege "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The right to invoke the privilege "extends not only to answers which would in themselves support a conviction of a crime but likewise embraces those answers which would simply furnish a link in the chain of evidence needed to convict the witness." *Munn*, 733 S.W.2d at 768.

As this Court is aware, "the very act of production may constitute a compulsory authentication of incriminating information." *State ex rel. Long v. Askren*, 874 S.W.2d 466, 475 (Mo. App. 1994) (quoting *Andresen v. Maryland*, 427 U.S. 463 (1976)). Compelling disclosure of "a document in the possession of the witness is barely distinguishable from requiring the witness to give testimony when the facts lie within the knowledge of the witness." *State ex rel. Rowland Group, Inc. v. Koehr*, 831 S.W.2d 930, 932 (Mo. banc 1992). Requiring a defendant to supply evidence under circumstances where the production of that evidence requires supplying a link that verifies their existence and location violates the Fifth Amendment. *See United States v. Hubbell*,

530 U.S. 27, 45 (2000) ("Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena, respondent could not be compelled to produce those documents absent a grant of immunity); *see also Askren*, 874 S.W.2d at 475-76 (where judgment creditors failed to rebut the presumption that the records subpoenaed for production at a judgment debtor's examination from a natural judgment debtor (who asserted his privilege against self-incrimination) could not possibly have incriminated him, the trial court erred by attempting to enforce the subpoena duces tecum); *Andresen v. Maryland*, 427 U.S. 463, 473-74 (1976) ("the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information"). Production of the materials sought by the State in its Motion to Compel must be denied under the protections of the Fifth Amendment.

Compelled production of both Gov. Greitens's phone and his military records would violate Missouri Rules and Gov. Greitens's Fifth Amendment right against self-incrimination. For the foregoing reasons, Gov. Greitens requests this Court deny the State's Motion to Compel.

Dated: May 4, 2018

Respectfully submitted,

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