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

| | | |
|---|---|---|
| STATE OF MISSOURI, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Cause No.: 2022-CR01301 |
| vs. | ) | |
| | ) | Division: 25 |
| MARK MCCLOSKEY, | ) | |
| | ) | |
| Defendant. | ) | |

**DEFENDANT'S SUPPLEMENTAL MOTION TO DISQUALIFY CIRCUIT ATTORNEY KIMBERLY GARDNER AND THE CIRCUIT ATTORNEY'S OFFICE**

COMES NOW Defendant, by and through undersigned counsel, and submits this combined Reply to Circuit Attorney Kimberly Gardner's ("Gardner") Response to Motion to Disqualify and Supplemental Motion to Disqualify.

**Introduction and Additional Facts**

On July 29, 2020, Defendant filed a Motion to Disqualify the Circuit Attorney and Circuit Attorney's Office. On August 5, 2020, Gardner filed a response. That response begins with several pages of what-about-ism, then proceeds to repeatedly misstate the law and make use of altered and inaccurate quotations. It supports its arguments with alleged "facts" that have been called into question by recent revelations, and it advances arguments that are more damning then exonerating.

In her response, Gardner does not challenge the factual background of the motion. Gardner concedes that while this case was under investigation, Gardner caused an email to be sent by her re-election campaign to supporters with the intent of raising funds for her campaign.

That email referenced the then ongoing investigation of this matter. After Gardner issued the case, another email was sent to her supporters, again seeking funds and referencing this case.

Since the original Motion to Disqualify and Gardner's Response were filed, media reports and discovery led to a series of revelations regarding Christopher Hinckley, Chief Warrant Officer of the Circuit Attorney's Office and the attorney entered on this matter until recently. Discovery provided by the State revealed that during the police investigation of this case, Hinckley made repeated demands of the police department, including that they accelerate the investigation, despite a significant backlog of similar cases that have not been filed due to the COVID-19 pandemic. These demands included calls to the investigating detective and to his superior officer. After a search warrant resulted in the seizure of certain firearms allegedly relevant to this case, testing revealed that one firearm was non-functional. Hinckley then contacted the STLMPD crime lab to direct them to disassemble, modify, and reassemble the firearm to render it operational. Hinckley took an active role in drafting the probable cause statement, demanding certain phrases be included or omitted, and telling the detective at one point "I suggest you very quickly re-assess this evidence." Exhibit C.

**The Circuit Attorney Seeks Refuge in the Comments of Others**

Gardner's response begins with seven pages, and some twenty footnotes, of "Background," wherein she claims that the only public statement she made was where she referred to this case as an incident where "peaceful protesters were met by guns." Resp. Pg. 2. Gardner admits to sending the July 17th email, in which she references this matter. Resp. Pg. 7. She discusses comments by Defendant, by prior counsel, national media, Governor Mike Parson, and Missouri Senator Josh Hawley at length. She repeatedly complains that the co-defendants

were making statements regarding the case, and finally alleges that she received various racist and sexist messages from random individuals.

While Gardner may feel herself aggrieved by the national media attention, and certainly should not be the target of hateful speech or threats, she does not and cannot point to any reason why that would permit her to use Defendant's case in her fundraising efforts. Any school child can tell you that two wrongs do not make a right, and any first-year prosecutor can tell you that prosecutors are held to a different standard than both uninvolved parties and criminal defendants.

**The Circuit Attorney Omits the Relevant Language to Avoid the Import of the Emails**

In her response, Gardner highlighted certain excerpts of the email, while excluding others. She claims the July 17th email "asked supporters to contribute to the Circuit Attorney's campaign to help her 'fight back' against the Governor and the President's attacks on her and her valid exercise of prosecutorial discretio[sic]." Resp. Pg. 7. She then quotes the email in part.

Gardner emphasizes the two sentences that talk about the Governor and the President. Between the two, however, she excises her reference to how she "isn't afraid to stand up and those accountable who are perpetuating a system of systemic racism and police brutality." Who are these perpetrators? Gardner was and is not investigating Governor Parson and President Trump, so the only person within her jurisdiction is Defendant. Per Gardner's July 17th email, therefore, Defendant is perpetuating that system and she is going to hold Defendant accountable. That is how she wishes to exercise her prosecutorial discretion.

Gardner engages in the same deceptive practices with regards to the July 22, 2020 email. Omitted from her response is the statement "This is what happens when leaders like Kim stand up against a system that elevates the privileged and powerful." How did she stand up against the system that elevates the privileged and powerful? Gardner tells you in the first two sentences of

the email; by deciding to press charges against Defendant. The email does not defend the filing of charges on the ground that laws were broken, but on the ground that Gardner is pursuing the charges to stand up against the system.

As argued below, these omissions are intended to retroactively change the message of the emails.

**The Circuit Attorney Consistently Misstates and Alters Case Law**

Gardner next attempts to raise the appropriate standard for disqualifying a prosecutor. Prosecutors, she claims, should only be disqualified from a case "rarely and only in extreme circumstances." Resp. Pg. 9. Curiously, the cases to which Gardner cites do not contain that language.

*Young v. U.S. ex rel. Vuiton et Fils S.A.* (which Gardner calls *Young v. U.S.)* does not include the words "rare" or "extreme circumstances." It does note, however, that "Prosecution by someone with conflicting loyalties 'calls into question the objectivity of those charged with bringing a defendant to judgment.'" *Young v. U.S. ex rel. Vuitton et Fils S.*A., 481 U.S. 787, 810, 107 S. Ct. 2124, 2139, 95 L. Ed. 2d 740 (1987). It also notes that when a prosecutor has a conflict of interest, that conflict "undermine[s] confidence that a prosecution can be conducted in disinterested fashion. If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt." *Id.* at 811.

Conversely, *United States v. Bolden* does state "The disqualification of Government counsel is a drastic measure and a court should hesitate to impose it except where necessary." *United States v. Bolden,* 353 F.3d 870, 878 (10th Cir. 2003). This language is dicta, and not the legal standard for disqualification. Rather, *Bolden* makes clear that the standard on appeal is

bifurcated. "We review attorney disqualification orders under a bifurcated standard of review. First, we review the district court's factual conclusions under a clear error standard. Second, we review the district court's legal interpretation of particular ethical norms under a de novo standard when that interpretation implicates important constitutional rights." *Id.* At trial, the standard for disqualification is whether a reasonable person with access to all the facts would believe that there is an appearance of impropriety.

Gardner's response continues to mislead, stating "Generally, courts have been 'unreceptive, if not hostile' to attempts to disqualify prosecutors from a specific case." The actual quote is "Courts have been generally unreceptive, if not hostile, to attempts to disqualify prosecutors based on pervasive and institutional conflicts." Bruce A. Green & Rebecca Roiphe, Rethinking Prosecutors' Conflicts of Interest, 58 B.C.L. Rev. 463, 493 (2017). This is not a question of pervasive or institutional conflicts, so that language is not apropos.

Similarly, Gardner characterizes *Starr v. Mandanici* as "rejecting [a] claim that independent counsel had a disqualifying conflict of interest arising out of his political affiliation." Resp. Pg. 9. That case, however, was not decided on the merits, but was resolved entirely on the issue of standing. "We conclude that, although the Whitewater investigation and the propriety thereof are undoubtedly of national import, the constitutional and prudential principles of standing compel us to reject the kind of citizen standing that Mandanici seeks to establish." *Starr v. Mandanici*, 152 F.3d 741, 748 (8th Cir. 1998). This attempt to imply that the Eighth Circuit explicitly held that a prosecutor's political interests could not create a conflict of interest is particularly deceptive.

This effort to heighten the standard continues. Gardner insists that "there must be sufficient evidence of an improper motivation" and that Defendant must show "that the Circuit

Attorney has an improper personal interest[.]" Resp. Pg. 11. Unfortunately for Gardner, the actual standard is the appearance of impropriety. *State v. Lemasters*, 456 S.W.3d 416, 423 (Mo. 2015). This Court is not called upon to rule whether Gardner *has* an improper motivation, but rather whether she has created the *appearance* of impropriety.

Gardner also argues that that the impropriety must "rise to the level of creating an appearance the defendant cannot receive a fair trial." Resp. Pg. 11. She cites to *Lemasters* for this point, and summarizes that case as "a prosecutor may only be removed from a case when a reasonable view of all the facts establishes the appearance of impropriety of such magnitude as to deny a defendant the right to a fair trial." *Id.* Again, *Lemasters* did not hold any such thing. Rather, *Lemasters* made clear that even if a trial is *actually* fair, it must also *appear* to be fair. "A procedure that appears to be unfair can jeopardize society's confidence in the judicial system as a whole even if the procedure is—in fact—fair." *State v. Lemasters*, 456 S.W.3d 416, 423 (Mo. 2015). *Lemasters* specifically noted that the entirety of a prosecutor's office should be disqualified when there was an "appearance of impropriety" that "casts doubt on the fairness of the trial. *Id* at 422. Gardner attempts to ratchet "casts doubt on the fairness of a trial" up to "deny the defendant the right to a fair trial." The plain language of *Lemasters* puts the lie to that attempt.

Gardner then claims that there is no "realistic possibility" that her actions have been distorted by improper motivations or the appearance of such, Resp. Br. 11, citing to *Marshall v. Jerrico* for the proposition and again distorting the language. The Supreme Court noted in *Marshall,* "Nor is there a realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250, 100 S. Ct. 1610, 1617, 64 L. Ed. 2d 182 (1980).

This is not a question of institutional gain; it is a question of Gardner's fundraising efforts for her campaign. Hopefully, Gardner can differentiate between the institution of her office and her political campaign.

Her campaign, it should be noted, does appear to have gained from the emails. The quarterly campaign finance report for Citizens to Elect Kim Gardner filed July 16, 2020, showed the campaign received $41,017.05 in donations during that three-month quarter. Exhibit D. The report filed July 27, 2020, which encompasses the period during which the emails were disseminated, showed that since the prior report, the campaign had received $34,459 donations, nearly the same as the entire three previous months. Exhibit E.

**The Circuit Attorney's "Five Considerations" Are Irrelevant and Incorrect**

Gardner, and no one else, has created the appearance of impropriety, because her campaign appears to be using her investigatory and charging powers for fundraising purposes. In attempting to avoid this appearance, Gardner tries to show that there is no realistic possibility that she was improperly motivated (which, again, is not the actual standard). She claims that there are five considerations that support her conclusion, as "a matter of fact and law." These considerations are no more than misstatements of law, omissions of fact, and argument.

**I. The First Consideration**

"First," argues Gardner, "defendants have presented no evidence that the prosecutor's campaign violated the legal standards for abuse of discretion on the part of the prosecutor." As a matter of law, this is incorrect: Defendant does not have to prove, or even allege, that the prosecutor violated the legal standard for abuse of discretion. With emphasis this time, **t**he standard is **whether the appearance of impropriety exists.**

This argument is also incorrect as "a matter of fact." Gardner states, "Not a single word in either campaign" tied her interests to whether she would prosecute Defendant or how she would pursue an outcome. She can only make that assertion by the omissions detailed above. The July 17th email talked about holding accountable those "who are perpetuating a system of systemic racism and police brutality." The only people that could refer to in the context of the email are President Trump, Governor Parson, and Defendant. As Gardner was not investigating Trump or Parson, the only person that Gardner could intend to "hold accountable" was Defendant. Similarly, the second email made clear that Gardner was standing up against a "system that elevates the privileged and powerful" by charging Defendant.

Gardner is attempting to reduce the references to Defendant in the emails as part of an effort to minimize her actions, and she states, "the reference to the Defendants [in the emails] was at most incidental[.]" The reference was not incidental, as demonstrated here, but even if it were, that would mean that Gardner's campaign chose to make reference to a pending investigation and to a charging decision for no reason at all. If Defendant's case was not important to the email, then Gardner included it for no other reason than the hope that it would drive additional contributions. If the reference was incidental, then the choice to include it was *worse.*

## II. The Second Consideration

Gardner continues, "Second, the nearly unprecedented amount of verbal public attacks against the Circuit Attorney and her legitimate exercise of her prosecutorial duties, were the clear impetus for the campaign's decision to send the two fundraising emails." Gardner is right, a number of national political figures, who were not candidates for the local election, have commented on this matter. What harm is she alleging that she has suffered? Some new financial

need? None is alleged. As noted above, Gardner's campaign received nearly as many donations during the period these emails were sent as the prior three months. Notably, a third of those donations came from out of state. The clear impetus, as the she put it, was to take advantage of her temporary notoriety, by explicitly referencing Defendant, to maximize fundraising efforts.

**III. The Third Consideration**

Gardner's third consideration is yet another attempt to supplant the clear meaning of the emails through the omission of relevant language. Gardner notes that "filing charges is part of the job of any circuit attorney," but receiving threats and being attacked by outside politicians is not. This may be true, but fundraising is also not the job of any Circuit Attorney. It may be a necessity, but a line exists between the political actions of the candidate and the prosecutorial decisions of the attorney. Gardner blended and broached that line.

**IV. The Fourth Consideration**

"Fourth," declares Gardner, "a review of all the facts involved in the Circuit Attorney's actions in charging the Defendants establishes there is neither a conflict nor an appearance of conflict that would approach the legal standards justifying removal … Other than the fact that the events occurred and that charges were filed, Gardner has been silent about the facts of this case to the public." Gardner has not denied sending or being responsible for the emails sent by her campaign. Yet she pretends that she has been silent, and that the emails are not a public comment.

Gardner then claims that "In this case, she exercised that discretion only after the result of a proper, thorough process, including a month-long investigation that relied on the assistance of the police; an experienced police detective authored the statement of probable cause and swore an oath in doing so; and a neutral judge issued the summons after reviewing that statement for its

legal sufficiency." Here, additional investigation suggests that, contra her earlier claim, there is an appearance of a conflict of interest. Records provided in discovery suggest that Assistant Circuit Attorney Christopher Hinckley directed the crime lab to modify one of the firearms at issue from the condition it was seized to render it operable. Additionally, Christopher Hinckley apparently engaged in repeated arguments with the "experienced police detective" about what language should appear in the probable cause statement, with Hinckley excising language the officer wrote and demanding other phrases appear. Exhibit C.

Gardner argues that requesting a warrant, as opposed to issuing a summons, suggests she is not politicizing this case. Resp. Pg. 17. Per the CAO Warrant Office COVID-19 Protocols, the CAO is only issuing warrants for confined prisoners with specific charges, or "dangerous" or "problem" offenders. Exhibit F. As Defendant was not confined, the CAO did nothing more than follow the protocols currently in place. It should also be noted that, currently, there are some 1,200 cases pending in the CAO Warrant Office.[1] Defendant has received information that those pending cases include approximately 150 uncharged Unlawful Use of a Weapon cases, some with commission dates going back to early 2020. Yet Christopher Hinckley repeatedly requested the investigating officer accelerate this particular case. Exhibit C.

It should also be noted that the CAO's COVID-19 protocols state "when the PC statement is ready, the attorney should email it to the officer[.]" Exhibit F. This would indicate that PC statements are drafted by Assistant Circuit Attorney's, not police officers. Yet Gardner claims that "an experienced police detective authored the statement of probable cause[.]" Resp. Br. 16.

[1]Joel Currier, "St. Louis police promise changes amid surge in backlog of cases." https://www.stltoday.com/news/local/crime-and-courts/st-louis-police-promise-changes-amid-surge-in-backlog-of-cases/article_805fe81d-7ecc-5f98-8d20-11ea08b1d200.html

## V. The Fifth Consideration

Fifth, Gardner suggests that the cases on which Defendant relies are inapplicable and instead support Gardner not being disqualified. Gardner attempts to differentiate this case from *State of Vermont v. Hohman* but cannot avoid a substantial misstatement of fact. In *Hohman*, contra Gardner, the prosecutor was disqualified because of a campaign advertisement in the newspaper, not a campaign fundraiser. *State v. Hohman*, 138 Vt. 502, 505, 420 A.2d 852, 854 (1980). This is a meaningful distinction. When Gardner claims, "She did not tie her re-election to the prosecution of this or any case," she is ignoring the fact that she has tied *fundraising* efforts to this case. She is also continuing to omit the fact that her emails described her actions in this case as standing up and holding accountable the supporters of a system of "systemic racism and police brutality," and standing up against a system that elevates the "privileged and powerful."

Finally, Gardner misstates the law with regards to the disqualification of an entire prosecutor's office. In *State ex rel. Peters-Baker v. Round* the Missouri Supreme Court noted that when one prosecutor is disqualified, in that case for a conflict of interest, the entire office would be disqualified if the conflict was imputed to the entire office, or if the appearance of impropriety existed on the part of the entire office. *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 386 (Mo. 2018). In that case, there was no such appearance of impropriety.

Gardner cites to *Round* for the suggestion "even where one prosecutor has a conflict of interest, the whole office should not be disqualified unless the office fails to screen out that prosecutor." But, yet again, this is not the holding of that case. In fact, the Supreme Court said the exact opposite: "To be clear, the Court does ***not*** hold a screening process will ***always*** be sufficient to dispel an appearance of impropriety. For instance, as this Court explained in

*Lemasters*, "when it is the prosecutor herself, i.e., 'the boss,' who supposedly is being screened from the remainder of her employees, rather than one assistant being screened from the others" even a "thorough and effective screening process" may not be sufficient to remove the appearance of impropriety." *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 388 (Mo. 2018) (italics and emphasis in original).

This is precisely the situation here. Gardner has, by using this case to fundraise, created the appearance of impropriety that necessitates her disqualification. Chief Warrant Officer Hinckley has rendered himself a witness both for this motion and a fact witness at trial. Both should be disqualified. Given Hinckley is a highly ranked member of the CAO, and that Gardner is, as the Missouri Supreme Court put it, "the boss," screening here is insufficient. The entirety of the office should be disqualified.

For the foregoing reasons, Defendant respectfully requests that this Court enter an order disqualifying the Circuit Attorney, and the Circuit Attorney's Office, from representing the State in this matter.

Respectfully submitted,

ROSENBLUM, SCHWARTZ, & FRY, PC

By: /s/ Joel J Schwartz

JOEL J SCHWARTZ, #39066
Attorney for Defendant
120 S. Central Avenue, Suite 130
Clayton, Missouri 63105
(314) 862-4332/Facsimile 862-8050

**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2020, the foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the City of St. Louis, Missouri Prosecuting Attorney's Office.