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

State of Missouri,)
Plaintiff,)
)
vs.)
)
Mark McCloskey,)
Defendant.)
)

Cause: 2022-CR1301-01

Division 7

Order

Before the court is "Defendant's Motion to Disqualify the Circuit Attorney and the Circuit Attorney's Office" which was called, heard, argued and taken under submission by the court on October 28. On that date, Defendant appeared in person with his attorney Joel Schwartz. State of Missouri appeared by and through assistant circuit attorneys Christopher Hinckley and Rob Huq.

The case history is as follows:

On July 20, 2020, the Circuit Attorney charged Defendant by complaint with one count of Unlawful Use of a Weapon – subsection four - Exhibiting (Class E Felony);

On July 29, Defendant filed his motion to "Disqualify the Circuit Attorney and the Circuit Attorney's Office," with attachments including Exhibit A, July 17 email sent from "VoteKimGardner.com"(2 pgs.) and Exhibit B, July 22 email sent from "VoteKimGardner.com"(2 pgs.);

On August 5, the Circuit Attorney filed her "Response to Defendant's Motion to Disqualify the Circuit Attorney and the Circuit Attorney's Office;"

On September 10, Defendant filed his "Supplemental Motion to Disqualify Circuit Attorney Kimberly Gardner and the Circuit Attorney's Office," with attachments including Exhibit C, KSDK, Christine Byers, article dated July 30, 2020 (8 pgs.), Exhibit D Missouri Ethics Commission Disclosure Report filed by Kimberly Gardner on July 16 (8 pgs.), Exhibit E Missouri Ethics Commission Disclosure Report filed by Kimberly Gardner on July 27 (13 pgs.) and Exhibit F Warrant Office policies following Covid (6 pgs.);

On October 8, 2020, the grand jury issued a two count indictment, charging the Defendant in count one with Unlawful Use of a Weapon – subsection four - Exhibiting (Class E Felony) and charging him in count three(sic) with Tampering with Physical Evidence (Class E Felony);

and on October 28, 2020, the "Motion to Disqualify" was called, heard, argued and taken under submission by the court.

The court takes judicial notice of the court file, including the various motions, pleadings and attachments filed in this matter.[1]

In his motion, Defendant Mark McCloskey asks the court to disqualify the elected Circuit Attorney, Kim Gardner, and the Circuit Attorney's Office from prosecuting this matter and appoint a special prosecutor as a replacement. (Motion to Disqualify filed July 29, p.1,7.) Defendant cites §56.110 RSMo. as authorizing the court to replace the prosecuting attorney if that attorney demonstrates conduct or an "interest" in the matter "inconsistent with the duties of his (or her) office." (Motion to Disqualify filed July 29, p.3, citing §56.110 RSMo.)

More specifically, Defendant asserts that Ms. Gardner generated and distributed two different email solicitations requesting money for her re-election campaign by linking the external criticism to Defendant and the incident resulting in criminal prosecution. (Motion to Disqualify filed July 29, p.4.) Defendant contends that not only was this improper under the relevant legal standard, she was aiming to energize her supporters and elevate contribution amounts by referencing the Defendant and his alleged criminal conduct in campaign solicitations.[2] (Supplemental Motion filed September 10, p.8.) In sum, Ms. Gardner's solicitations were made at the expense of Defendant, compromised her professional judgment

1 On November 17, Ms. Gardner filed "State's Response to Defendant's Supplemental Motion to Disqualify the Circuit Attorney and the Circuit Attorney Office" without receiving leave of court to do so. Her supplemental response, coupled with the motion requesting leave to do so, was filed 68 days after Defendant submitted his Supplemental Motion and 20 days after the hearing when the court took this matter under submission. Despite this, the court considered this pleading.

2 Defendant argues that the standard to disqualify a prosecutor is when a reasonable person would have factual grounds to find an appearance of impropriety. (Motion to Disqualify filed July 29, p.6, citing State v. Lemasters, 456 S.W.3d 416, 423 (Mo.2015).

and warrants removal from the case. (Motion to Disqualify filed July 29, p.1-4.)

Conversely, Ms. Gardner requests that the court deny the motion, citing case law, advisory materials and even a most recent Missouri supreme court decision that strongly cautions the trial court against replacing the voters' choice to represent the interests of the people. (Response filed August 5, p.1, citing State ex rel. Gardner v. Boyer, 561 S.W.3d 389, 399 (2018).)

Reminding the court that it can only remove the prosecutor in extremely rare circumstances, the twice elected prosecutor for the City of St. Louis argues that the court must deny the motion because, among other reasons, Defendant has not presented any evidence that her campaign violated the legal standard or that she abused her discretion; her campaign emails were generated in response to "unprecedented," high profile, public verbal attacks by several critics; an objective reading of the emails does not suggest any impropriety and certainly does not warrant disqualification; that the Circuit Attorney's conduct does not suggest a conflict or even an appearance of a conflict; and that the case law discourages the requested relief. (Response filed August 5, p.8,2,12,12,13,15,17.)

Facts

On July 20, Ms. Gardner charged the Defendant by complaint with one count of Unlawful Use of a Weapon-Exhibiting, a class E felony, following an incident occurring at Defendant's residence on June 28. (court file.) In the probable cause statement, she and her office allege that a group of individuals were participating in a protest march. After reaching Kingshighway, one group proceeded north on Kingshighway but the other group separated, then proceeded west through a gate entering Portland Place. Shortly thereafter, Defendant shouted at the protesters and pointed a semi-automatic rifle in their direction, according to her office. (court

file, probable cause statement filed July 20.)

At the time of the June 28 incident involving Defendant, Ms. Gardner was engaged in a contested Democratic primary with an upcoming August 4 election. Eventually, Ms. Gardner prevailed by wide voting margins in the August 4 primary against her Democratic opponent and was recently re-elected as the Circuit Attorney of the City of St. Louis in the November 3 general election.

During the election period, a campaign committee was accepting financial donations on behalf of Ms. Gardner. Her campaign committee is called "Citizens to Elect Kimberly Gardner" and the campaign treasurer is further identified as "Kimberly Gardner." (Exhibit D Committee Disclosure Report dated July 16 and Exhibit E Committee Disclosure Report dated July 27.)

Shortly after the June 28 incident but prior to charging Defendant, Ms. Gardner issued a public statement expressing her concern about the incident, claiming "peaceful protesters were met by guns."(Response filed August 5, p.2.) Likewise, various media outlets also interviewed Defendant and the incident received widespread media attention. Even some nationally elected and state elected officials commented on the situation, some specifically criticizing Ms. Gardner for investigating Defendant. (Response filed August 5, p.3.) Pursuant to the pleadings, Ms. Gardner's Democratic primary opponent did not criticize her attention to the incident involving Defendant, rather individuals outside the Democratic party denounced her interest in the case. (Response filed August 5, p.3-8.) Following the criticism but before charging Defendant, the Gardner campaign distributed the following email to supporters on July 17:

> Dear
>
> Because you are a supporter of Kim, I want to make you aware of a few late-breaking developments that are making national headlines right now.

You might be familiar with the story of the couple who brandished guns during a peaceful protest outside of their mansion. Well, today the Governor of Missouri weighed in, telling the press:

"[President Trump] understands the situation in Missouri, he understands the situation in St. Louis and how out of control it is for a prosecutor to let violent criminals off and to not do their job and try to attack law-abiding citizens."

Instead of fighting for the millions of Americans affected by the pandemic--including 31 *thousand* Missourians--President Trump and the Governor are fighting for the two who pointed guns at peaceful citizens during the Black Lives Matter protests. Both President Trump and Governor Parsons(sic) are playing politics at a time when they should be doing their elected jobs.

Kim needs your help to fight back! Her election is only weeks away. And right now she is under national scrutiny from our divisive President, the Republican establishment of Missouri, and the right-wing media, including Fox News.

Will you show Kim you stand with her and rush a donation today?

St. Louis will have an opportunity to re-elect progressive circuit attorney Kim Gardner, who time and time again has shown us she isn't afraid to stand up and hold those accountable who are perpetuating a system of systemic racism and police brutality.

Kim needs your help! Please make a donation of $5, $10 or $25 right now.

Thank you,
#TeamKim

(VoteKimGardner.com July 17 email; Exhibit A.)

Shortly after Ms. Gardner charged Defendant with a felony on July 20, her campaign distributed another email solicitation requesting money on July 22. It reads:

This is Serious

In the last 24 hours, there has been a lot of national attention

surrounding Kim's decision to press charges against a couple that brandished guns at a peaceful Black Lives Matter protest. For merely doing her job, Kim received death threats, been attacked by Donald Trump and berated by Missouri's Governor, Senator, and Attorney General.

The Governor recently said that **"The conversation I had with the president said that he would do everything he could within his powers to help with the situation and that he would be taking action."**

The Senator of Missouri is also weighing in. He has requested that the DOJ launch an investigation against Kim for upholding the law – because he believes the couple's right to wave guns around at people who were not threatening them to be a civil right.

This is what happens when leaders like Kim stand up against a system that elevates the privileged and powerful. When Kim was first elected to office, she took an oath to uphold the law and hold those accountable who break it. The Republican leaders in Missouri are politicizing this incident and attempting to maim Kim's character in the process.

Right now, Kim's re-election is only weeks away. We need to do everything in our power to re-elect Kim for St. Louis District Attorney to send a message to Washington DC that the people of St. Louis gives her their full support.

Can you make a donation right now to help support Kim's reelection campaign? Please donate $25, $50, $100 (or whatever you can give.)

While the Governor, the President, and others will continue to politicize this situation, the people of St. Louis are the ultimate decision makers. The next 2 weeks are critical and we must get our message out there.

We cannot do this without you. Can you rush a donation right now to help Kim in the final sprint of the campaign?
Thank you -- #TeamKim

(VoteKimGardner.com July 22 email; Exhibit B.)

Both the July 17 and July 22 campaign emails are addressed to a specific email address and a specific recipient. Additionally, both emails identify VoteKimGardner.com on the reply line with this same moniker appearing again at the top of the email. Each email solicitation specifically invites and provides the recipient the opportunity to donate at two different locations. (Exhibit A July 17 email and Exhibit B July 22 email.) In her pleading Ms. Gardner admits that her campaign distributed both emails and during the argument her attorney concedes that the emails refer to Defendant. (Response filed August 5, p.7; court record October 28.)

As her campaign's treasurer, Ms. Gardner filed two separate campaign disclosure reports documenting both campaign contributions and expenditures in July. More specifically, the July 16 campaign report discloses the campaign's financial activity for three months, April 1 through June 30. (Exhibit D Committee Disclosure Report filed July 16, p.1.) The July 27 campaign report discloses the campaign's financial activity between July 1 and July 23, 2020. (Exhibit E Committee Disclosure Report filed July 27, p.1.)

Conclusions of Law

Defendant refers the court to the Revised Statutes of Missouri as authorizing prosecutorial removal when warranted. (Motion to Disqualify filed July 29, p.3.) More specifically, §56.110 RSMo. reads:

> If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office ….the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause. (§56.110 RSMo.)

In applying §56.110 the courts have held 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. W.D. 1996). Further, the United States Supreme Court holds that inserting a "a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Marshall v. Jerrico, Inc. 446 U.S. 238, 249-50, 100 S. Ct. 1610, 64 L.Ed.2d 182 (1980). As a result, the presence of an interested prosecutor is a fundamental error that "undermines confidence in the integrity of the criminal proceeding." Untied States v. Sigillito, 759 F.3d 913, 927-28 (8th Cir. 2014).

Similarly, the Vermont supreme court "strongly condemn(ed) the conduct of the state's attorney" in a matter after he placed an approximate 108-word campaign advertisement in a Vermont newspaper, explaining his role in a specific murder case and promising he would vigorously prosecute the same Defendant in a retrial, assuming he was re-elected. State v. Hohman, 138 Vt. 502, 505; 420 A.2d 852, 854-5 (1980 Vt.). This prosecutorial campaign candidate does not request any financial donations but concludes the print advertisement with: "Your support would be appreciated, Tuesday, November 7th" Ibid., at 505. The Vermont high court held that the trial court erred when it denied the motion to disqualify the prosecutor at the retrial, further explaining that "(t)he awesome power to prosecute ought never to be manipulated for personal or political profit." Ibid., at 506,505.

Admittedly, the Missouri supreme court discourages the trial court from exercising this statutory authority vested in §56.110 RSMo. State ex rel. Gardner v. Boyer, 561 S.W.3d 389 (Mo. 2018); State v. Lemasters, 456 S.W.3d 416 (Mo. 2015). In 2015, the court held that the trial judge did not abuse his discretion when he overruled Defendant's motion to disqualify the entire Newton County prosecuting attorney office after Defendant's former attorney joined the office prosecuting Defendant on the same criminal matter. State v. Lemasters, 456 S.W.3d 416, 419-

425 (Mo. 2015).

In Lemasters, the court evaluated the issue pursuant to both the Rules of Professional Conduct and "if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial." Ibid., at 423. Ultimately, the court held there was not an appearance of impropriety and did not doubt the fairness of Defendant's trial because the prosecutor made efforts to "screen" Defendant's former attorney from his prosecution. Ibid., at 424-5. Finally, the Lemasters court distinguished the screening process for the elected prosecutor versus an assistant when eliminating the appearance of impropriety. Ibid., at 425. Specifically,

> Even a thorough and successful screening process may not be sufficient to remove the appearance of impropriety and dispel the resulting doubt 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. Ibid., at 425.

Also, the Missouri supreme court issued an extraordinary writ in favor of the circuit attorney and effectively reversed the trial court's decision to disqualify her when she was investigating the police officer who was simultaneously participating in Defendant's criminal prosecution. State ex rel. Gardner v. Boyer, 561 S.W.3d 389, 393-7 (Mo. 2018). Here, the trial court disqualified the circuit attorney's office from prosecuting criminal defendant Davis because an "appearance of impropriety" existed when the circuit attorney decided to simultaneously investigate police officer A.F. who was involved in the same criminal prosecution. Ibid., at 393. Citing Lemasters, the court reversed the lower court and held 'the appearance of impropriety test' was misapplied to the police officer instead of the criminal defendant who specifically has the constitutional right to a fair trial. Ibid., at 396.

Also in strong, straightforward language the court cautioned that exercising the disqualification "circumvents the voters' choice..." Ibid., at 398. The court held that "(I)n short, only in rare circumstances should a circuit court interfere with the democratic process and override the voters' choice as to who is best suited to represent the interests of the people as prosecuting attorney..." Ibid., at 398.

Analysis

This court does not seek to "interfere with the democratic process" but strongly believes the present "circumstances" justify disqualification. Deference to precedent, acknowledging the will of the voters, and respecting separation of powers are all vital to a representative government, an equitable criminal justice system and the rule of law. Likewise, campaigning without tainting the right to a fair trial is equally compelling and constitutionally sacred.

a. Conduct warrants Disqualification under §56.110 RSMo.

Pursuant to case law, the court has the inherent authority to preserve the administration of justice and guard the integrity of the judicial system when monitoring attorney conduct. State ex rel. Horn v. Ray, 325 S.W.3d 500, 511 (Mo.App.E.D. 2010). In addition to the vested statutory authority, the case law equally confirms that the court's inherent authority includes attorney disqualification. §56.110 RSMo., State ex rel. Horn v. Ray, 325 S.W.3d at 511.

After considering the arguments of counsel, the pleadings coupled with the attachments, the applicable case law and the relevant statute, the court finds the emails raise an appearance of impropriety and warrant disqualification. In short, the Circuit Attorney's conduct raises the appearance that she initiated a criminal prosecution for political purposes. Immediately before and after charging Defendant, she solicited campaign donations to advance her personal interests.

The court finds Ms. Gardner and her campaign are synonymous or so closely linked that they are indistinguishable. She serves as both candidate and campaign treasurer. (Exhibit D Committee Disclosure Report filed July 16, Exhibit E Committee Disclosure Report filed July 27.) Further, she admits that her campaign sent both the July 17 and July 22 email solicitations. (Response filed August 5, p.7.)

On July 17 her campaign sent the first email referencing Defendant and his alleged conduct when requesting money. (Exhibit D Committee Disclosure Report filed July 16; Exhibit E Committee Disclosure Report filed July 27; Exhibit A July 17 email.) Although she does not refer to the Defendant by name in the July 17 campaign email, she identifies him as part of "the couple who brandished guns … outside of their mansion." (Exhibit A July 17 email.) Moreover, Ms. Gardner's attorney admitted that the emails refer to Defendant and his wife at the October 28 hearing. (court record.) While also referencing the President, Missouri's Governor and their collective criticism, her July 17 email solicits financial donations in two different locations within this writing. The money requests are both underlined and in bold lettering. (Exhibit A July 17 email.)

Within 48 hours of charging Defendant, Ms. Gardner's campaign generated a second email again soliciting money. (court file; Exhibit B July 22 email.) Similarly, she does not mention Defendant by name but acknowledges her decision to charge him following an incident where he brandished a firearm. (Exhibit B July 22 email.) Again, she references the President and Governor and asks for money in two different locations within the solicitation. (Exhibit B July 22 email.) The language requesting the money is underlined on both occasions with the second of the two solicitations suggesting specific dollar amounts, $25, $50, $100… (Exhibit B July 22 email.)

Without question, the high profile June 28 incident occurring at or around Defendant's residence and resulting in criminal charges generated national headlines, fueled passionate – even visceral – opinions and triggered commentary from a multitude of people including, but not limited to, a variety of local, state and even national officials during a combative election season.

Seeking to enhance her personal interests, Ms. Gardner distributes these two different emails following the June 28 event. Importantly, the emails solicit donations while highlighting Defendant and the events surrounding his alleged criminal conduct. Both emails are created within a five-day window of her decision to charge Defendant on July 20, linking her prosecutorial discretion to money solicitations. (Exhibit A July 17 email, Exhibit B July 22 email.)

Specifically, her July 17 campaign email refers to Defendant in the second paragraph as brandishing a gun outside his mansion. Following a quote attributed to the Governor, the fourth paragraph also references Defendant and accuses the President and the Governor of "fighting for the two[3] who pointed guns at citizens during the Black Lives Matter protests." (Exhibit A July 17 email.) In the final paragraph immediately preceding the final money solicitation, the email references Ms. Gardner's willingness to "stand up and hold those accountable who are perpetuating a system of systemic racism and police brutality." (Exhibit A July 17 email.)

An objective interpretation of this final paragraph reveals that she is still referencing Defendant when she pledges to hold him "accountable." (Exhibit A July 17 email.) Admittedly, the email intermingles references to the President, the Governor, among others. (Exhibit A July 17 email.) However, Defendant is the only person or entity mentioned in the email who is under

3 "The two" or "the couple" refers to Defendant and his wife, Patricia McCloskey, who was also charged following the June 28 incident under cause 2022-CR1300.

investigation for criminal conduct, specifically brandishing a weapon. (Exhibit A July 17 email.) In fact, she charged him three days later.

In Hohman, the court held that disqualification was proper, "strongly condemn(ing)" the prosecutor's conduct where he promised to prosecute a defendant while simultaneously asking for support on Election Day. State v. Hohman, 138 Vt. 502, 505-6; 420 A.2d 852, 854-5 (1980 Vt.) Although he did not make a single request for money, his conduct was strongly condemned by the court. Ibid., at 505. Here, Ms. Gardner likewise refers to Defendant and his case while repeatedly requesting money. While the court recognizes that this holding is not binding, it is illustrative, if not highly persuasive.

The July 22 email also reveals Ms. Gardner's intentions to mix her prosecutorial decision-making with campaigning. This email is dated within 48 hours of her charging document. (Exhibit B July 22 email; court file.) Although the email does not refer to Defendant by name, it continues to identify him by his conduct as being part of the "couple that(sic) brandished guns at a peaceful Black Lives Matter protest." (Exhibit B July 22 email.) Additionally, she references her critics as the President, Missouri's Governor and Attorney General as well as a U.S. Senator, who is specifically accused of supporting "the couple's right to wave guns around at people." (Exhibit B July 22 email.)

Ms. Gardner asserts that the emails were campaign speech, intended to respond to criticism and were simply soliciting assistance from voters to help her "fight back against the unprecedented level of verbal attacks from prominent Republicans and right wing media..." (Response filed August 5, p.12.) If this is so, why mention Defendant? Ostensibly, it appears unnecessary for Ms. Gardner to even mention Defendant if her intention is solely to rebut the criticism voiced by the state and national officials. If responding to her critics was the intent of

the campaign solicitations it seems reasonable that she would focus on them, not Defendant.

The email language extends beyond campaign rhetoric. Rather, it seeks to seemingly energize supporters to contribute by referencing Defendant, his conduct and even his social status. Just as the July 17 email references Defendant's "mansion," the July 22 email's middle paragraph references her efforts to "stand up against a system that elevates the privileged and powerful."[4] (Exhibit A July 17 email, Exhibit B July 22 email.) Clearly, this language is referencing Defendant at least in part, if not in full. (Exhibit B July 22 email.) Specifically, the very next sentence reiterates the earlier July 17 email language or her pledge to hold offenders "accountable." Again, Defendant is the only person or entity mentioned in the email who is under investigation for criminal conduct. (Exhibit A July 17 email, Exhibit B July 22 email.) Like a needle pulling thread, she links the Defendant and his conduct to her critics. These emails are tailored to use the June 28 incident to solicit money by positioning her against Defendant and her more vocal critics.

Interestingly, the campaign solicitations specify the attacks are voiced from outside her party, not from the August primary opponent. (Exhibit A July 17 email, Exhibit B July 22 email.) Considering she is not responding to a campaign opponent, it is questionable whether the emails are campaign speech or simply an effort to rebut criticism and raise money following a high profile event. Admittedly, Ms. Gardner has every right to respond to criticism but the court questions the appearance of raising money while referencing a case she and her office are actively investigating.

4 Describing Defendant's residence as a mansion deviates from the probable cause statement which limits the description of the residence by address. (Court file probable cause statement filed July 20.)

Ms. Gardner further argues that "not a single word in either campaign email… (indicates) whether she would prosecute the Defendants and how she might pursue an outcome in that case." (Response filed August 5, p.12) The court disagrees and refers the Circuit Attorney to her own campaign solicitations. After charging Defendant, Ms. Gardner waited only 48 hours before she distributed the July 22 campaign solicitation where she highlights her prosecutorial decision-making in the very first sentence. (Exhibit B July 22 email.)

Additionally, the July 17 email reflects that she is considering criminal prosecution when she mentions Defendant, his alleged conduct and his association with her critics. Beginning in the middle of the fourth paragraph she accuses the Governor and others as "fighting for the two who pointed guns at peaceful citizens…" (Exhibit A July17 email.) The following sentence accuses her critics of playing politics. (Exhibit A July 17 email.) But the next paragraph begins: "Kim needs your help to fight back!" intimating that she is not only fighting back against the Governor and others, but fighting back against the Defendant who is being protected by her critics. (Exhibit A July 17 email.) Admittedly, she does not need financial help to charge Defendant. Later in the email however, she again connects Defendant to her critics and the criticism, indicating that "she isn't afraid to stand up and hold those accountable..." (Exhibit A July 17 email.) In short, she identifies her critics, links them to Defendant, requests the campaign contribution to fight back and forewarns criminal prosecution by holding Defendant "accountable." (Exhibit A July 17 email.) To a reasonable person, this language forecasts prosecutorial action.

It is undisputed that Ms. Gardner raised more than $17,000.00 during the narrowly framed five day window between July 17 and 23 and she charged Defendant between these fundraising efforts. (Exhibit E Committee Disclosure Report filed July 27; court file.) The

contribution amount is less significant than the fact that she did this. She is pursuing political fundraising by using Defendant in a case that she is choosing to prosecute.

Ms. Gardner also counters that the references to Defendant and his actions were merely intended to provide context for the email recipient. (Response filed August 5, p.14.) The court is unpersuaded. The email reference to Defendant, his actions and the pledge to hold him accountable occur throughout both emails. The emails reveal her intention to use him to motivate contributors and generate campaign contributions.

Ms. Gardner would contend that her promise to "hold those accountable" is not necessarily directed at Defendant but reflects her over-arching commitment to target all criminal offenders. This defies credibility after recognizing that she begins the campaign solicitation by referencing her decision to charge Defendant then continues by criticizing a U.S. Senator for siding with Defendant three paragraphs later. In fact, the fifth paragraph confirms that she intends to specifically hold this Defendant accountable. In consecutive sentences she distinguishes her pledge to hold those accountable who break the law from the extraneous forces who are excusing this conduct by "politicizing this incident." (Exhibit B July 22 email.)

The Circuit Attorney reminds the court that Defendant himself was making public statements surrounding the June 28 events. (Response filed August 5, p.2.) But Defendant is not the elected prosecutor, Ms. Gardner is. Just because Defendant is making public statements about the events surrounding June 28, doesn't authorize her to use the circumstances to her political advantage. "The awesome power to prosecute ought never to be manipulated for personal or political profit..." instead, it is the solemn obligation to ensure "that justice shall be done." State v. Hohman, 138 Vt. 502, 505; 420 A.2d 852, 855 (1980 Vt.).

b. Legal Standard Appearance of Impropriety

The legal standard for disqualification is whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the fairness of the trial. State v. Lemasters, 456 S.W.3d 416, 423 (Mo. 2015). For many of the same reasons previously described, the court finds that a reasonable person would find the emails appear improper. Both emails mention Defendant and his conduct to facilitate fundraising thus jeopardizing Defendant's right to a fair trial. (Exhibit A July 17 email, Exhibit B July 22 email.)

In more recent decisions, the Missouri supreme court provides specific guidance when considering this issue and evaluating the arguments applicable to the legal standard. State ex rel. Gardner v. Boyer, 561 S.W.3d 389 (Mo. 2018). Citing Lemasters, the court held "(T)he appearance of impropriety test, therefore, arises from the criminal defendant's constitutional right to a fair trial" and it is the trial court's obligation to ensure the defendant receives a fair trial. State ex rel. Gardner, at 396, citing Lemasters, 456 S.W.3d at 422.

In State ex rel. Gardner, the court reversed the lower court and held that the appearance of impropriety test applies to the criminal defendant who is charged, not the police officer who is simultaneously under investigation. State ex rel. Gardner v. Boyer, 561 S.W.3d 389, 396 (Mo. 2018). Those circumstances are distinguishable from the present matter which does not involve a third party, only the Defendant. In fact, the criminal defendant in Gardner did not move to disqualify the circuit attorney which is equally distinguishable from this case. Ibid, at 395.

Applying State ex rel. Gardner, this court also believes that the emails recklessly infringe on Defendant's constitutional right to a fair trial, further enhancing the appearance of impropriety. Ibid., at 396-7. Moving beyond a criminal conduct allegation, these emails seem to magnify the June 28 events and vilify Defendant. Suggesting possible racial insensitivities, both

emails introduce the fact that Defendant's conduct was directed against those participating in the Black Lives Matter protests.[5] (Exhibit A dated July 17 and Exhibit B dated July 22.) The later email positions Ms. Gardner against Defendant, implying he benefits from "a system that elevates the privileged and powerful." (Exhibit B dated July 22.) Similarly, the earlier email also stigmatizes Defendant by his association to wealth, mentioning the June 28 incident occurred outside his "mansion." (Exhibit A dated July 17.) Potentially affecting his right to a fair trial and impacting the public perspective, the twin fundraising solicitations paint Defendant as a wealthy elitist and perhaps worse. (Exhibit B dated July 22.) Again, it strikes the court as inappropriate that this labeling is occurring within twin campaign solicitations aiming to raise money.

The court certainly recognizes Ms. Gardner's responsibility to safeguard this community, hold violent criminals accountable and advocate for the people of the City of St. Louis against transgressors. As cited in her brief, the court agrees that "...a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means." People v. Eubanks, 927 P.2d 310, 316 (Cal.1996).

But as reinforced in the last two words ringing in this opinion, the prosecutor is bound to use fair means when advocating for the state. Like the case law, the Rules of Professional Conduct also discourage the prosecutor from making excessive comments that jeopardize the rights of the accused. More specifically, Rule 4-3.8(f) states:

> (E)xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a

5 This description also deviates from the probable cause statement which refers to the events as a "protest march" and "protestors marched." (Court file, probable cause statement filed July 20.)

> legitimate law enforcement purpose, *refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused*, and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other person assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 4-3, 6 or this Rule 4-3.8.
> (Rules of Professional Conduct, Rule 4-3.8(f).)

As if to further discourage unnecessary extra-judicial statements and eliminate any confusion about castigating the accused unnecessarily, a comment following Rule 4-3.8(f) states:

> Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, *a prosecutor can and should avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood for increasing public opprobrium of the accused.*
> (Rules of Prof. Conduct 4-3.8, Comment 5.)

Understandably, Ms. Gardner has every right to rebut criticism, but it appears unnecessary to stigmatize Defendant – or even mention him - in campaign solicitations, especially when she purports to be responding to others. In fact, the case law and the Rules of Professional Conduct prohibit it. These expectations are real. For these collective reasons the court grants Defendant's motion and orders that the Circuit Attorney shall be disqualified from prosecuting this matter.

Next, the court considers whether the circuit attorney's office also should be removed from the case, as argued by Defendant. (Defendant's Motion filed July 29, p.1,7.) Conversely, Ms. Gardner argues that the court should not remove her entire office because the court would have to find an appearance of impropriety which does not exist. (Response filed August 5, p.20.)

The case law distinguishes the challenge of effectively screening an assistant prosecutor from the elected prosecutor, opining that "(e)ven a thorough and successful screening process

may not be sufficient to remove the appearance of impropriety and dispel the resulting doubt when it is the prosecutor herself, i.e. 'the boss...'" State v. Lemasters, 456 S.W.3d 416, 425 (Mo. 2015).

As the elected prosecutor ultimately responsible for charging decisions, Ms. Gardner also defines office policies, hires and discharges the attorney staff, determines salaries as well as pay increases and exercises control over the office among other obligations. In fact, she takes direct responsibility and ownership for charging Defendant in this matter. (Exhibit B July 22 email; court file, criminal complaint filed July 20.)

The court finds that the process required to effectively screen her from involvement in this case would be extremely challenging if not impossible. For example, any attorney in the office handling this prosecution would be subject to her ultimate supervision. This is a high profile case, receiving extensive media coverage, eliminating any possibility that any assistant circuit attorney is unaware of Ms. Gardner's incipient interest, initial involvement and advocacy on this matter. In fact, any attorney prosecuting this case would understand that, at a minimum, Ms. Gardner's approval would be required for the office to initiate charges. Understanding Ms. Gardner's involvement in the case, any attorney working in this office would be acutely aware of the case significance which would most likely affect their prosecutorial discretion.

Further, the multiple challenges to effectively remove the appearance of impropriety and effectively screen the circuit attorney are further reinforced in more recent case law. State v. Lemasters, 456 S.W.3d 416, 425 (Mo. 2015). Consequently, the court concludes disqualifying the circuit attorney's office is the appropriate remedy.

Conclusion

The court is acutely aware and recognizes the significance of the string of supreme court case law, discouraging judicial intrusion. More specifically, "only in rare circumstances should a circuit court interfere with the democratic process and override the voters' choice as to who is best suited to represent the interests of the people..." State ex rel. Gardner, at 398, citing Lemasters, 456 S.W.3d at 423.

The court does not seek to disregard the will of the voters and does not make this decision lightly. Ms. Gardner enjoys the honor of representing the citizens as their elected official but she is equally bound by the applicable court precedent and the Revised Statutes of the State of Missouri. She assumed these obligations when she was elected as a public official as well as when she first entered the legal profession. She is accountable – not just to the voters but to the rule of law. The court is similarly obligated to follow the law.

The statute is explicitly clear and without any ambiguity, allowing the court to remove the prosecutor if the prosecutor has a personal interest in a particular case. §56.110 RSMo. The campaign emails demonstrate the Circuit Attorney's personal interest in this case, raise the appearance of impropriety and jeopardize the Defendant's right to a fair trial. Among other previously described concerns, these email solicitations aim to raise money using the Defendant and the circumstances surrounding the case to rally Ms. Gardner's political base and fuel contributions.

While the collateral consequence of the emails may have been inadvertent or unintentional, "intention" is not a factor under the legal standard. The legal standard only requires that the court conclude that the conduct appears inappropriate. Applying the case law, the court finds this legal standard is satisfied. State v. Lemasters, 456 S.W.3d 416, 423 (Mo.

2015). The court holds that the reasonable person standard to disqualify the prosecutor has been met and a factual basis exists which justifies the court finding an appearance of impropriety by the Circuit Attorney that warrants disqualification.

Applying §56.110 RSMo. and the applicable case law, the court grants "Defendant's Motion to Disqualify the Circuit Attorney and the Circuit Attorney's Office." Pursuant to statute, the presiding judge of the Twenty-Second Judicial Circuit will identify some other attorney to prosecute this case. This matter is continued to Thursday, January 7, 2021, at 9:30 a.m., in division seven, for status conference.

Dated, Entered and So Ordered this tenth day of December 2020.

Thos Clark

Thomas Clark, II
Circuit Court Judge
Twenty-Second Judicial Circuit