

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 MOTION TO DISQUALIFY THE CIRCUIT ATTORNEY AND THE
CIRCUIT ATTORNEY’S OFFICE**

COMES NOW Defendant, by and through undersigned counsel, and respectfully requests that this Court enter an order disqualifying Kim Gardner (“Ms. Gardner”) and the St. Louis Circuit Attorney’s Office (“CAO”) as counsel for the State, and further entering an order appointing a special prosecutor for this matter. As grounds therefore, Defendant submits this motion and memorandum.

Facts

Ms. Gardner is currently the elected prosecuting attorney, formally known as the Circuit Attorney, for the City of St. Louis. Ms. Gardner is currently engaged in a primary campaign for the re-nomination of the Democratic Party for that position, with the primary election scheduled for August 4, 2020. “Citizens to Elect Kimberly Gardner,” also known as “Team Kim,” is the campaign committee for Ms. Gardner, and Ms. Gardner is the designated treasurer of the organization.

The incident that led to the charges in this matter occurred on June 28, 2020. The investigation of the matter continued into July, when a search warrant was executed at Defendant’s home.

On July 17, 2020, prior to the issuance of charges, Ms. Gardner's campaign sent out an email solicitation to supporters. Exhibit A. The email began:

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.

This was a clear reference to Defendant. The email continued, describing comments made by the Governor of Missouri that referenced President Trump, then stated:

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.

The email continued, "Kim needs your help to fight back!" and included two links for readers to click and donate. It also stated:

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.

On July 20, 2020, this case was initiated by information. On July 22, 2020, Ms. Gardner's campaign sent out another email, Exhibit B, which opened referencing the charge against Defendant:

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.

The email then states that because she decided to press charges against Defendant (as the email put it, "For merely doing her job"), that Ms. Gardner has received death threats as well as criticism from Donald Trump, and the Governor, a senator, and the Attorney General of

Missouri. The email continues, “This is what happens when leaders like Kim stand up against a system that elevates the privileged and powerful.”

The email stated “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.” It again includes two links for readers to donate.

Analysis

Section 56.110 of the Revised Statutes of Missouri states that “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.” RSMo. § 56.110. In applying Section 56.110, the courts have stated that a prosecutor should be disqualified if the prosecutor has a personal interest in the outcome of the criminal prosecution which might preclude affording defendant the fair treatment to which defendant is entitled. *State v. McWhirter*, 935 S.W.2d 778, 781 (Mo. Ct. App. 1996).

“Interest” is not defined in Chapter 56. It is understood to include pecuniary or financial interests; all lawyers, including prosecutors, are prohibited from having any pecuniary interest in a matter where they serve as an attorney. Mo. R. Bar Rule 4-1.8.¹ However, with regards to a prosecutor, “interest” is not limited to pecuniary interests. The United States Supreme Court has stated that “[a] scheme injecting 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,

¹ Except some contingency matters inapplicable here.

100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) (citations omitted). As a result, the presence of an interested prosecutor is a fundamental error that “undermines confidence in the integrity of the criminal proceeding.” *United States v. Sigillito*, 759 F.3d 913, 928 (8th Cir. 2014).

Ms. Gardner, via her campaign mailers, linked the criminal proceedings against Defendant to her financial, political, and personal interests. The July 17th email drew a direct line from the incident, which had not yet resulted in criminal charges, to Ms. Gardner’s political antagonists, and from there to a call for donations to further her re-election efforts. It implied that Defendant was amongst those “perpetuating a system of systemic racism and police brutality.” The July 22nd email reiterated this link, equating the charge against Defendant with Ms. Gardner “doing her job,” and describing it as “Kim standing up against a system that elevates the privileged and the powerful.” Both emails contained a call to arms. The July 17th email read “Will you show Kim you stand with her?” and “Kim needs your help!” Once charges were issued, the July 22nd email implored “The next 2 weeks [until the election] are critical and we must get our message out there[,]” and “We cannot do this without you.”

Decades ago, when the Missouri Supreme Court abolished the practice of private retained prosecutors, it noted that the prosecutor “is not an advocate in the ordinary sense of the word, but is the people’s representative, and his primary duty is not to convict but to see that justice is done.” The Court further noted that private prosecutors are usually employed solely to secure a conviction, “and their zeal and energies are bent to accomplish that end. This is not the sole purpose of a criminal prosecution[.]” *State v. Harrington*, 534 S.W.2d 44, 49-50 (Mo. 1976).

There appears to be no Missouri case dealing with a prosecutor referencing a pending investigation and charging decision during campaign/fundraising activities, as well as extremely limited instances in other states. The novelty of the issue suggests that such conduct is obviously

and patently inappropriate. One of the few cases where a prosecutor made such a comment was in Vermont, where a prosecutor was disqualified for commenting in a campaign advertisement that he would vigorously re-prosecute a case on remand. *State v. Hohman*, 138 Vt. 502, 505, 420 A.2d 852, 854 (1980) overruled on other grounds by *Jones v. Shea*, 148 Vt. 307, 532 A.2d 571 (1987). Conversely, in California, a prosecutor was not required to be disqualified when he went on a radio show and commented on peculiar conduct by a defense attorney (namely abandoning the client mid trial), but “cautiously avoided” references to the merits of the defendant’s case. *People v. Phillips*, 169 Cal. App. 3d 632, 641, 215 Cal. Rptr. 394, 400 (Ct. App. 1985). Similarly, a West Virginia prosecutor’s advertisement was “ill-advised,” but not grounds for disqualification, where he “cautiously avoided discussing the merits of the appellant's case in these advertisements as well.” The West Virginia Supreme Court further noted that the prosecutor never mentioned the appellant by name, never promised to obtain a jury conviction and emphasized that the final verdict rested with the jury. In addition, the focus of the advertisements was not on the prospective conviction of the appellant, but rather on why a witness had been granted immunity. *State v. Pennington*, 179 W. Va. 139, 148, 365 S.E.2d 803, 812 (1987)

The degree to which a prosecutor should strive to avoid any incursion of a prosecutor’s personal interest into her responsibilities is reflected in the American Bar Association’s Criminal Justice Standards. The Criminal Justice Standards state that “The prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.” ABA Criminal Justice

Standards for the Prosecution Function 3-1.7(f). Similarly, the National District Attorney's Association and the Missouri Association of Prosecuting Attorneys have both noted that "The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised." NDAA Standard 1-3.3(d).

The standard for disqualification of a prosecutor is the same as that for a judge. A prosecutor (and a prosecutor's office as a whole when appropriate), should be disqualified where a reasonable person would have factual grounds to find an appearance of impropriety. *See State v. Lemasters*, 456 S.W.3d 416, 423 (Mo. 2015). Here, a reasonable person with access to all the facts would find that there was at least the appearance of impropriety, in that Ms. Gardner's decision may have been affected by her personal, political, financial, and professional interests, and that her neutrality, judgment, and ability to administer the law in an objective manner may have been compromised. Ms. Gardner has invited that concern by invoking Defendant's case specifically in her campaign. Ms. Gardner has lumped Defendant in with her political opposites, labeled Defendant amongst those "who are perpetuating a system of systemic racism and police brutality," and suggested that charging Defendant was standing up against "a system that elevates the privileged and powerful." She has then used the case to drive support for the coming election and to solicit donations.

The entirety of the CAO, unfortunately, falls under the same appearance of impropriety. Ms. Gardner is the elected Circuit Attorney, with ultimate authority over the office. She has indicated through her fundraising emails that she made the decision to initiate charges. A

reasonable person would conclude that any member of the CAO would know the importance the boss places on the case, and that this would color any assistant's decision-making process.

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
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CERTIFICATE OF SERVICE

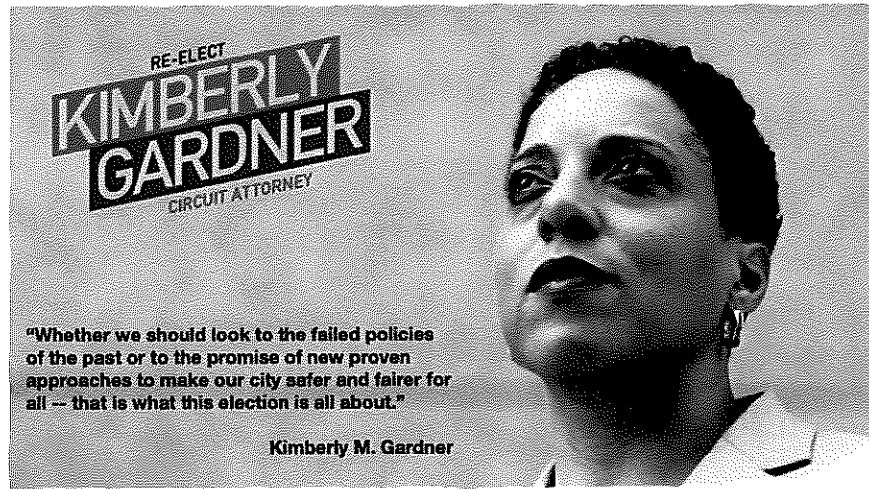
I hereby certify that on July 29, 2020, the foregoing was electronically filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the City of St. Louis, Missouri Prosecuting Attorney's Office.



BREAKING: Donald Trump is attacking Kim Gardner

VoteKimGardner.com <info@votekimgardner.com>
Reply-To: "VoteKimGardner.com" <info@votekimgardner.com>
To: [REDACTED]

Fri, Jul 17, 2020 at 1:10 PM



Dear [REDACTED]

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 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

[Unsubscribe](#)



This is Serious

VoteKimGardner.com <info@votekimgardner.com>
Reply-To: "VoteKimGardner.com" <info@votekimgardner.com>
To: [REDACTED]

Wed, Jul 22, 2020 at 3:10 PM

This is Serious

[REDACTED]

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 has 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 this 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

[Unsubscribe](#)