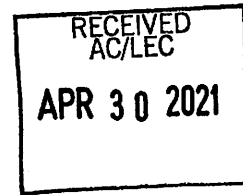


IN THE SUPREME COURT OF
THE STATE OF MISSOURI



IN RE)	
)	
KIMBERLY M. GARDNER)	DHP-21-005
)	OCDC File No. 18-1095-XI
Respondent.)	
)	

**Verified Motion of Respondent Kimberly M. Gardner to
Stay or Seal Disciplinary Proceedings**

COMES NOW respondent Kimberly M. Gardner, by and through her undersigned counsel, and moves this Panel and/or the Court to stay this disciplinary proceeding pending resolution of *State of Missouri v. Tisaby*, Case No. 1922-CR01819 (Cir. Ct. St. Louis), a criminal case being brought against a necessary witness in this case for actions related to this case; or alternatively seal the record of this disciplinary proceeding during its pendency pursuant to Rule 5.31(c). As further described in this Verified Motion to Stay or Seal, Ms. Gardner requests this relief for two reasons: (1) moving forward with the case against Ms. Gardner at this time will interfere with the pending criminal prosecution of William Tisaby in *State of Missouri v. Tisaby* – and the pending criminal charges against Mr. Tisaby will materially and unduly impair Ms. Gardner’s ability to defend herself in this discipline proceeding; and (2) moving forward with a public disciplinary case against Ms. Gardner at this time will materially impair the operation of her office, the Circuit Attorney’s Office for the City of St. Louis, among the busiest prosecutor’s offices in the State of Missouri. In further support of her Verified Motion to Stay or Seal, Ms. Gardner states:

1. Ms. Gardner is the duly elected Circuit Attorney for the City of St. Louis. She was re-elected in November 2020 with more than 74 percent of the certified vote.

2. As Circuit Attorney, Ms. Gardner manages and supervises the conduct of all misdemeanor and felony criminal cases in the Circuit Court of the City of St. Louis as well as certain appeals pursuant to Missouri Revised Statute § 56.450. Ms. Gardner's office employs approximately 60 attorneys and 60 non-attorney staff, and prosecutes more than 3,000 criminal cases per year.

3. The Information in this case charges Ms. Gardner with certain professional misconduct related to her Office's 2018 investigation and prosecution of then-Missouri Governor Eric Greitens for allegedly taking an unauthorized nude photograph of his hairstylist. Mr. Greitens is presently seeking the Republican nomination to seek a United States Senate seat in the November 2022 election.

4. In January 2018, the Circuit Attorney's Office contracted for Enterra, LLC and its president William Tisaby to assist the Circuit Attorney's Office with certain aspects of the Greitens investigation.

5. In May 2018, the Circuit Attorney's Office dismissed the criminal charge against Mr. Greitens arising from his alleged taking of the unauthorized photograph. Mr. Greitens subsequently resigned as Governor.

6. In July 2018, Mr. Greitens' defense team filed an ethics complaint against Ms. Gardner, alleging Ms. Gardner did not properly disclose certain documents relating to the investigation of Mr. Greitens during discovery, and made certain misstatements or failed to correct certain misstatements regarding those documents and their production.

7. A central part of this case against Ms. Gardner relates to documents that Mr. Tisaby received or created, and statements Mr. Tisaby made and actions Mr. Tisaby took related to providing his documents to the Circuit Attorney's Office. Mr. Tisaby is therefore a necessary and crucial witness for Ms. Gardner to rebut some aspects of the disciplinary charges against her, including what statements Mr. Tisaby made regarding whether he had prepared, retained possession of, and produced certain draft reports and witness summaries.

8. Currently a special prosecutor, Gerard Carmody, is pursuing a criminal case against Mr. Tisaby in *State v. Tisaby*. This criminal prosecution also arises from and relates to statements Mr. Tisaby made and actions Mr. Tisaby took regarding the same documents. Ms. Gardner therefore anticipates that Mr. Tisaby needs Ms. Gardner as a necessary and crucial witness for Mr. Tisaby's defense in *State v. Tisaby*.

9. Ms. Gardner anticipates a reasonable defense attorney would advise Mr. Tisaby to assert his protection against self-incrimination instead of testifying in this discipline case. Indeed, Mr. Tisaby has already asserted that privilege in an April 2018 deposition in the Greitens case. (Tisaby Transcript, Exhibit A) Ms. Gardner's ability to fairly defend herself and explain her conduct will be unduly impaired to her severe prejudice if Mr. Tisaby is unable to testify in this case because Mr. Tisaby decides to assert his right against self-incrimination.

10. Further, Ms. Gardner anticipates testimony and evidence obtained in these proceedings will be used including by the special prosecutor (who has previously cooperated with Informant on this discipline case) unfairly to the detriment of Mr. Tisaby – a non-party here – in Mr. Tisaby's defense of *State v. Tisaby*.

11. Ms. Gardner asks for appropriate protective measures, at minimum a stay of these proceedings pending resolution of *State v. Tisaby*, to allow Mr. Tisaby to properly defend himself, as guaranteed by the United States and Missouri Constitutions, and also to allow Ms. Gardner to mount a fair and appropriate defense of her own conduct in this case.

12. Alternatively, should this Court refuse to stay these proceedings pending resolution of *State v. Tisaby*, Ms. Gardner asks that this Court enter a protective order pursuant to Missouri Supreme Court Rule 5.31(b) and (c) that seals and thereby protect the integrity of these proceedings, to allow Ms. Gardner to properly defend herself in this case, to allow Mr. Tisaby the ability to appropriately defend his own conduct in *State v. Tisaby*, and to allow for the continued efficient and proper operation of the Circuit Attorney's Office and its handling of thousands of criminal investigations and prosecutions.

13. Missouri Supreme Court Rule 5.31(c)(1) authorizes the presiding chair of the Panel to issue a protective order "upon application . . . and ***for good cause shown to protect the interests of a complainant, witness, third party, or respondent.***" (Emphasis added) Such a protective order may "prohibit the disclosure of specific information and direct that the proceedings be conducted so as to implement the order including, but not limited to, an order that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application." Mo. S. Ct. R. 5.31(c)(2).

14. Ms. Gardner has shown good cause through this verified pleading by discussing the damage that public disclosure of information, evidence, and testimony from this case could cause to Mr. Tisaby's defense of *State v. Tisaby*, as set forth in paragraphs 10 and 11 of this Verified Motion.

15. In addition, Ms. Gardner reasonably anticipates that public coverage of this case – already extraordinarily high profile, before being further amplified by Mr. Greiten’s U.S. Senate campaign – will result in potentially thousands of criminal defendants seeking investigations into the operation of the Circuit Attorney’s Office and disclosure of discovery materials in their own case. These potential thousands of requests would unduly burden the Circuit Attorney’s Office and the Circuit Court, despite none of those cases involving Enterra and Mr. Tisaby, or any of the other factors at issue in this case. This is further good cause under Rule 5.31(c)(1).

16. Ms. Gardner anticipates that the requested relief, a stay or seal, should not cause undue prejudice to any party. The Information indicates Informant largely intends to prosecute this case based upon pleadings, testimony, and transcribed hearings from the 2018 Greitens prosecution, information that should survive entry of any stay or seal order. At most, Ms. Gardner may suffer the loss of valuable witnesses such as Mr. Tisaby or certain attorneys from her Office, but Ms. Gardner believes the value of a stay or seal outweighs such risks. Further, considering Ms. Gardner recently won re-election with more than 74 percent of the certified vote despite considerable publicity regarding *State v. Tisaby* and allegations Ms. Gardner made errors in the Greitens prosecution, it appears the public interest significantly favors Ms. Gardner and the Circuit Attorney’s Office continuing their work unimpeded.

17. Finally, undersigned counsel for Ms. Gardner contacted Informant’s counsel to see if it would consent to a stay on March 18, 2021, but Informant declined to agree to a stay.

WHEREFORE, respondent Kimberly M. Gardner requests that this Court (a) stay this disciplinary proceeding against Ms. Gardner pending resolution of *State v. Tisaby*, or alternatively (b) seal these proceedings both during and after litigation of this matter, and/or (c) grant Ms. Gardner such other or further relief as this Court deems just and proper.

Verification

I, Kimberly M. Gardner, of lawful age, being first duly sworn on oath, state that I have read the above and foregoing Verified Motion to Stay or Seal Disciplinary; and that the answers given are true and correct to the best of my knowledge and belief.

/s/ Kimberly M. Gardner
Kimberly M. Gardner

Subscribed and Sworn before me through remote means pursuant to Executive Order 20-08, as extended, this 30th day of April, 2021.

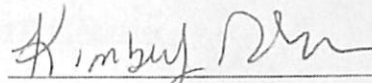
/s/ Michael P. Downey
Notary Public

My commission ends: 9/30/2022

WHEREFORE, respondent Kimberly M. Gardner requests that this Court (a) stay this disciplinary proceeding against Ms. Gardner pending resolution of *State v. Tisaby*, or alternatively (b) seal these proceedings both during and after litigation of this matter, and/or (c) grant Ms. Gardner such other or further relief as this Court deems just and proper.

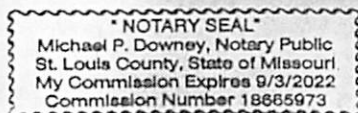
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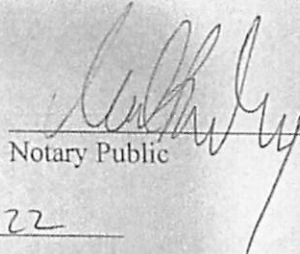
I, Kimberly M. Gardner, of lawful age, being first duly sworn on oath, state that I have read the above and foregoing Verified Motion to Stay or Seal Disciplinary; and that the answers given are true and correct to the best of my knowledge and belief.



Kimberly M. Gardner

Subscribed and Sworn before me through remote means pursuant to Executive Order 20-08, as extended, this 7th day of April, 2021.





Notary Public

My commission ends: 9/3/2022

Respectfully submitted,

DOWNEY LAW GROUP LLC

/s/ Michael P. Downey

Michael P. Downey, Mo. Bar No. 47757

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Counsel for Respondent Kimberly M. Gardner

Certificate of Service

The undersigned counsel hereby certifies that on this 30th day of April, 2021, a true and correct copy of the foregoing was served upon the following counsel of record:

Marc A. Lapp
P.O. Box 12406
St. Louis, Missouri 63132
specialrep@gmail.com

Alan D. Pratzel
Chief Disciplinary Counsel
3327 American Avenue
Jefferson City, Missouri 65109
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Counsel for Informant

The undersigned further states that on this 30th day of April, 2021, a true and correct copy of the foregoing, was filed by email to:

Missouri Advisory Committee
c/o Melinda Bentley
3335 American Avenue
Jefferson City, MO 65109
mbentley@mo-legal-ethics.org

/s/ Michael P. Downey