

**IN THE SUPREME COURT OF THE STATE OF MISSOURI  
EN BANC**

<b>IN RE:</b>	)	
	)	
<b>KIMBERLY M. GARDNER</b>	)	
	)	<b>Case No.: DHP-21-005</b>
<b>MBE# 56780</b>	)	
	)	
<b>Respondent.</b>	)	

**JOINT STIPULATION OF FACTS,  
JOINT CONCLUSIONS OF LAW,  
AND JOINT RECOMMENDED DISCIPLINE**

COME NOW Informant and Respondent Kimberly M. Gardner and stipulate to the following:

**STIPULATION OF FACTS**

**Procedural History**

On March 1, 2021, Informant filed an Information in this matter. On April 30, 2021, Circuit Attorney Gardner filed her Answer and Affirmative Defenses to Information.

On May 12, 2021, a Disciplinary Hearing Panel (DHP), consisting of Panel Chair Keith Cutler and Panel Members Elizabeth McCarter and Sheryl Butler, was appointed to hear the matter.

The matter was initially set for hearing before the DHP on February 28, 2022. The DHP rescheduled the matter for hearing on April 11, 2022.

On April 11, 2022, Informant filed an Amended Information. This Stipulation serves as the Answer to that Amended Information.

## **General Information**

1. This is an attorney disciplinary case proceeding under Missouri Supreme Court Rule 5. As more fully discussed below, the Chief Disciplinary Counsel has alleged that Kimberly Gardner, Respondent, violated certain Missouri Rules of Professional Conduct while serving as the St. Louis City Circuit Attorney. The allegations arise from Circuit Attorney Gardner's Office's prosecution of then-Missouri Governor Eric Greitens in a criminal matter that Circuit Attorney Gardner and her Office voluntarily dismissed on May 14, 2018, before the case was tried.

2. More specifically, the charges in this case relate to Ms. Gardner's and her Office's handling – with Ms. Gardner's involvement and under her supervision – of certain documents and information related to the Circuit Attorney Office's investigation into Mr. Greitens' alleged criminal conduct, including whether certain materials created by Circuit Attorney Gardner, her Office, or their contract investigator William Don Tisaby and his firm Enterra were properly disclosed or listed on a privilege log as not subject to disclosure. These issues arise in a context where Mr. Greitens' defense focused in significant part on identifying potential problems with Mr. Tisaby's and Enterra's investigation.

3. To be clear, this attorney discipline matter does not directly address the propriety or impact of Mr. Tisaby's or Enterra's conduct. Also, this discipline matter does not suggest there was any misconduct relating to Circuit Attorney Gardner or her Office's role in the Grand Jury's indictment of Mr. Greitens, or to the adequacy of evidence in the underlying criminal case. Nor does it address the credibility of any witness or the defendant. Obviously, this is a unique matter related to a specific case with unique

circumstances such that the resolution here should not be tied to other cases without similar circumstances.

4. Informant is the Chief Disciplinary Counsel appointed by the Court pursuant to Supreme Court Rule 5.06.

5. Ms. Gardner is represented by counsel in this matter.

6. Ms. Gardner is a duly licensed attorney admitted to practice in and before all courts of this State and is a member of the Bar of the State of Missouri. Ms. Gardner's Missouri Bar number is 56780 and she has been licensed to practice law in Missouri since September 29, 2004.

7. During all times relevant to the facts stipulated herein, Ms. Gardner was the duly elected Circuit Attorney for the City of St. Louis and engaged in the practice of law at 1114 Market Street, St. Louis, Missouri 63101.

8. Ms. Gardner's law license is in good standing.

9. Ms. Gardner has no history of prior discipline.

#### **The Greitens Investigation**

10. In early January 2018, KMOV – the CBS-affiliate television station in St. Louis – aired and published a story regarding an alleged extramarital affair between then-Missouri Governor Greitens and a woman identified herein as “K.S.” The alleged affair occurred in 2015, before Governor Greitens was elected. KMOV's report included portions of an audiotape that K.S.'s ex-husband had provided which recorded K.S. discussing her interactions with Governor Greitens. The KMOV report indicated that K.S.'s ex-husband

accused Governor Greitens of blackmail, by threatening to release a nude photograph of K.S. if K.S. publicized the extramarital affair.

11. On January 11, 2018, Governor Greitens publicly denied the blackmail allegation.

12. That same day, on January 11, 2018, Circuit Attorney Gardner announced that her office, the St. Louis Circuit Attorney's Office, was opening a formal criminal investigation into Governor Greitens' alleged conduct.

13. Before announcing that the Circuit Attorney's Office would investigate Governor Greitens' alleged criminal conduct, Circuit Attorney Gardner sought investigative assistance from the Chief of Police for the City of St. Louis, John Hayden; the U.S. Attorney for the Eastern District of Missouri, Jeffrey Jensen; and Special Agent Richard Quinn, the Agent in charge of the St. Louis Office for the Federal Bureau of Investigation. She also sought the assistance of Hal Goldsmith, an attorney then in private practice with extensive experience prosecuting public corruption cases, with the goal of Mr. Goldsmith leading the prosecution. However, Ms. Gardner understood all these people and/or agencies were unable or unwilling to assist the Circuit Attorney's Office in investigating the allegations or to replace the Office in taking over the matter.

14. The Circuit Attorney's Office lacked a lead investigator at this time because the incoming new lead investigator at the Circuit Attorney's Office was completing military service. Therefore, at the suggestion of that incoming lead investigator, the Circuit Attorney's Office contacted former FBI agent William Don Tisaby ("Mr. Tisaby") and his investigation firm Enterra, LLC to see if they would agree to investigate the allegations of

potential criminal conduct related to Governor Greitens' 2015 interactions with K.S. and with regard to a second unrelated Greitens matter.

15. On January 18, 2018, the Circuit Attorney's Office contracted for Enterra, LLC and its investigator Mr. Tisaby to provide consulting advice to the Circuit Attorney's Office and to conduct an independent investigation into the possible criminal conduct by Governor Greitens described above. Prior to entering the January 2018 contract, Circuit Attorney Gardner did not know and had not previously worked with Enterra or Mr. Tisaby.

16. On January 24, 2018, Circuit Attorney Gardner met with K.S. and her attorney at a hotel in Illinois so that Circuit Attorney Gardner could interview K.S. about her interactions with Governor Greitens in 2015. Circuit Attorney Gardner had arranged this interview with K.S.'s attorney to allow Circuit Attorney Gardner to conduct a private evaluation of whether K.S. seemed credible.

17. At the beginning of the January 24 interview of K.S., Circuit Attorney Gardner took some handwritten notes ("Circuit Attorney Gardner's 1/24/18 Handwritten Notes," **Exhibit 1**). However, Circuit Attorney Gardner soon stopped taking notes at the request of K.S.'s attorney.

18. After the January 24 interview, Circuit Attorney Gardner prepared and on January 28, 2018, emailed Mr. Tisaby a six-page, single-spaced typed set of bullet points (the "Circuit Attorney Gardner's 1/28/2018 Bullet Points," **Exhibit 2**).

19. Some of these Bullet Points paraphrased or, to the best of Circuit Attorney Gardner's memory, quoted statements that K.S. and K.S.'s lawyer had made during the January 24 interview. Circuit Attorney Gardner also included in the Bullet Points

information that Ms. Gardner obtained after the January 24 interview of K.S., as well as information Ms. Gardner had received from K.S.'s counsel. Circuit Attorney Gardner knew her 1/28/18 Bullet Points likely did not quote K.S. precisely, because K.S.'s attorney had asked Circuit Attorney Gardner to stop taking notes during the early stages of the January 24 interview, such that the Bullet Points were prepared from memory, not contemporaneously with the interview.

20. On January 28, 2018, Circuit Attorney Gardner sent Enterra investigator Mr. Tisaby an email (**Exhibit 3**) with Circuit Attorney Gardner's 1/28/2018 Bullet Points attached. Circuit Attorney Gardner's email stated: "Please find enclosed work product and draft of notes."

21. Subsequently Mr. Tisaby reformatted the Circuit Attorney Gardner 1/28/2018 Bullet Points document he had received, resulting in a double-spaced version of most of the Circuit Attorney Gardner's 1/28/2018 Bullet Points. Mr. Tisaby omitted from his reformatted document the final forty-five bullet points that Circuit Attorney Gardner had transmitted.

22. On January 29, 2018, Mr. Tisaby conducted an interview of K.S. Circuit Attorney Gardner was present for Mr. Tisaby's January 29 interview of K.S. and found K.S.'s account of what had occurred with Mr. Greitens in 2015 to be consistent with the account K.S. had previously provided to Circuit Attorney Gardner during the January 24 interview.

23. During the January 29 interview of K.S., Mr. Tisaby took the lead and conducted the January 29 interview so that Mr. Tisaby could also assess the credibility of

K.S. and K.S.'s account of what had occurred in 2015. Mr. Tisaby asked K.S. more than one hundred questions during the January 29 interview.

24. The Circuit Attorney's Office had also set up a video camera to record the January 29 interview of K.S. After the interview, however, Circuit Attorney Gardner and her Office initially believed the camera had malfunctioned and did not record the interview.

25. During the January 29 interview, Mr. Tisaby took handwritten notes on the double-spaced and reformatted set of most – but not the final forty-five – of Circuit Attorney Gardner's 1/28/2018 Bullet Points (the document described *supra* in paragraph 21). The document that Mr. Tisaby created by making handwritten notes on the reformatted set of most of Circuit Attorney Gardner's 1/28/2018 Bullet Points' is referred to in this Stipulation as "Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points" and is attached as **Exhibit 4**.

26. On February 14, 2018, Circuit Attorney Gardner emailed her 1/28/2018 Bullet Points to her First Assistant Robert Steele. Ms. Gardner's February 14 email had the subject "Attorney Work Product" and stated: "These are some notes and impressions going forward with the grand jury." Circuit Attorney Gardner's email to Mr. Steele is attached as **Exhibit 5** to this Stipulation.

#### **The Greitens Prosecution: Discovery**

27. On February 22, 2018, the Grand Jury of the City of St. Louis indicted then-Governor Greitens on one count on Invasion of Privacy-1<sup>st</sup> Degree (Class D Felony) R.S.Mo. § 565.252. Circuit Judge Rex Burlison was assigned to preside over the case,



captioned State of Missouri v. Eric Greitens, Cause No. 1822-CR00642 (Cir. Ct. St. Louis City).

28. Beginning on February 23, 2018, three law firms entered their appearances for then-Governor Greitens (Defendant).

29. Governor Greitens' defense team promptly requested that the case proceed, and the case did proceed, with a rigorous, expedited discovery schedule.

30. On February 23, 2018, Governor Greitens through counsel propounded to the State a Request for Discovery, including:

- a. "The names and last known addresses of all persons whom the State intends to call as witnesses at any hearing or trial, together with their written or recorded statements and existing memoranda reporting or summarizing part or all of their oral statements";
- b. "Any material or information, within the possession of control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment"; and
- c. "All favorable evidence, including all impeachment information that is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

A true and accurate copy of Governor Greitens' Request for Discovery is attached as **Exhibit 6** to this Joint Stipulation and incorporated herein.



31. On February 27, 2018, Governor Greitens through counsel propounded a Supplemental Request for Discovery, including: “Any and all memoranda, notes, rough notes, e-mails or other communications by, from or to Enterra, LLC or any of its employees regarding any witness interviewed or spoken to regarding this case.” A true and accurate copy of Governor Greitens’ Supplemental Request for Discovery is attached as **Exhibit 7** to this Joint Stipulation and incorporated herein.

32. On March 3, 2018, Circuit Attorney Gardner and her First Assistant Mr. Steele entered their appearances for the State. The Circuit Attorney’s Office anticipated Mr. Steele would serve as chief trial counsel on the case, although Mr. Steele was also preparing for multiple murder trials at the same time. Meanwhile, Circuit Attorney Gardner did not as a regular part of her responsibilities directly participate in investigating and prosecuting specific criminal matters, because Ms. Gardner’s responsibilities for overseeing proper operation of the entire Circuit Attorney’s Office usually kept Ms. Gardner very busy. However, other attorneys in the Circuit Attorney’s Office had voiced concern about having significant involvement in prosecuting a sitting governor defended by an aggressive defense team using litigation tactics that, even at the time, the Circuit Attorney’s Office described as “scorched earth.” As a result of the foregoing factors, Circuit Attorney Gardner elected to directly participate in the case and asked several of the Circuit Attorney’s most experienced and respected Executive Committee attorneys – including the First Assistant Steele, Special Assistant Rachel Smith, and former Circuit Judge and the CAO’s Chief Trial Assistant Robert Dierker – to work on the Greitens prosecution.

33. First Assistant Steele was expected to serve as lead trial attorney for the case against Mr. Greitens. Circuit Attorney Gardner and Special Assistant Smith were expected to handle many pre-trial matters and to assist Mr. Steele at trial. Initially, Chief Trial Assistant Dierker was expected not to enter his appearance, but to consult with and assist the Office's team. The Circuit Attorney's Office also sought additional resources from outside the office, including engaging Ronald Sullivan, a former criminal defense attorney and head of the Criminal Justice Institute at Harvard Law School, to serve as a special prosecutor to assist with the prosecution and trial of the case.

34. On March 6, 2018, a court hearing was held regarding a scheduling order and the status of discovery in the case.

35. At that hearing, Circuit Attorney Gardner and her Office confirmed to the Circuit Court that all discovery had been turned over to Governor Greitens' counsel except witnesses, addresses, and transcripts. A true and accurate copy of the transcript of the March 6, 2018 court hearing is attached as **Exhibit 8** to this Joint Stipulation and incorporated herein.

36. By March 8, 2018, the Circuit Attorney's Office recognized that they needed additional attorneys to handle the Greitens case, including because the Circuit Court was allowing hearings to be held concurrently with depositions in the case. On March 8, 2018, therefore, Chief Trial Assistant Dierker entered his appearance for the State and began to personally participate in hearings before the Circuit Court.

37. On March 8, 2018, the Court entered a Joint Proposed Scheduling Plan, which provided as follows:

The Circuit Attorney's Office will produce all available discovery materials by March 5, 2018. The duty to provide all relevant discovery is ongoing. Any new documents or other discoverable materials obtained after March 5, 2018 will be produced within 48 hours of its receipt by the Circuit Attorney's Office.

A true and accurate copy of the Joint Proposed Scheduling Plan is attached as **Exhibit 9** to this Joint Stipulation and incorporated herein.

38. On March 6, 2018, the defense filed Defendant Eric Greitens' Motion to Compel Disclosure of Impeachment Evidence. A true and accurate copy of this Motion to Compel Disclosure is attached as **Exhibit 10** to this Joint Stipulation and incorporated herein.

39. On March 12, 2018, the State filed its Response to Defendant Eric Greitens' Motion to Compel Disclosure of Impeachment Evidence, declaring: "In fact, the State possesses no information relative to K.S. not disclosed, 'that may be used to impeach a government witness.'" A true and accurate copy of the State's Response to Defendant Eric Greitens' Motion to Compel Disclosure of Impeachment Evidence is attached as **Exhibit 11** to this Joint Stipulation and incorporated herein.

40. Also on March 12, 2018, the State filed its Response to Defendant Eric Greitens' Supplemental Request for Discovery. The State agreed that it would disclose any and all material produced by Enterra, LLC that were in form similar to material produced by the St. Louis Metropolitan Police Department and that would be discoverable under Rule 25 of the Missouri Rules of Criminal Procedure. However, the State also argued that Missouri Supreme Court Rule 25.10(A) protects attorney work product and the work product of an attorney's investigative staff from the disclosure requirements of Rule 25. A

true and accurate copy of the State's Response to Defendant Eric Greitens' Supplemental Request for Discovery is attached as **Exhibit 12** to this Joint Stipulation and incorporated herein.

41. On March 13, 2018, Mr. Tisaby emailed a draft report referred to herein as "Mr. Tisaby's Draft Investigative Narrative Confidential of K.S." (**Exhibit 13**) to Circuit Attorney Gardner and the incoming investigator for the Circuit Attorney's Office, using personal, non-Office email addresses. Mr. Tisaby's 3/13/18 email to Circuit Attorney Gardner is attached as **Exhibit 14** to this Stipulation.

42. On March 14, 2018, then-Governor Greitens through counsel filed his Notice of Videotaped Deposition of Mr. Tisaby with Exhibit A. Defense Counsel listed 12 categories of documents that Mr. Tisaby was to produce at the time of his deposition. The first five categories of documents were:

1. All reports, communications, emails, text messages, notes, recordings, and/or other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting statements of any individuals interviewed regarding this matter.
2. Reports, communications, emails, text messages, notes, recordings, and/or other materials by any current or former employee of Enterra, LLC, or any other investigator in this matter recording, referencing, or reflecting any and all investigative steps regarding this matter, including but not

limited to any and all interviews attempted or conducted, evidence sought or obtained, searches sought or conducted, subpoenas issued, background searches conducted, and forensic or scientific analyses performed.

3. Any books, papers, documents, photographs, objects, documents, records, recordings, photographs, communications, or other evidence sought or obtained by any current or former employee of Enterra, LLC or any other investigator in this matter, and any notes, logs, or documentation reflecting any such evidence.
4. Any and all memoranda, notes, rough notes, e-mails or other communications by any current or former employee of Enterra, LLC regarding any witness interviewed or spoken to regarding this case.
5. Any and all e-mails or other communications between any current or former employee of Enterra, LLC and Maurice Foxworth.

A true and accurate copy of Defendant's Notice of Videotaped Deposition of William Don Tisaby, with Exhibit A, is attached as **Exhibit 15** to this Joint Stipulation and incorporated herein.

43. On March 14, 2018, the State filed a Motion to Quash and for Protective Order Regarding Defendant's Notice of Videotaped Deposition of Mr. Tisaby. In this

Motion to Quash, the State opposed the production Mr. Greitens sought including by arguing that defendant Mr. Greitens was improperly seeking Enterra's work product, because the required production would include, "for example, an email by an Enterra investigator containing trial preparation documents which reference the statement of an interviewed individual." In the alternative, the State's Motion to Quash suggested the Circuit Court conduct an *in camera* review of materials as to which the work product privilege applies, with a privilege log to be supplied. A true and accurate copy of the State's Motion to Quash and for Protective Order is attached as **Exhibit 16** to this Joint Stipulation and incorporated herein.

44. At a hearing on March 15, 2018, the Circuit Court directed the State to "turn over all nonprivileged (documents), make a privilege log, turn over what's on the privilege log to [the Circuit Court] for an *in camera*, and then we'll have a quick hearing and that burden will be on the State to assert – to support its position of privilege." A true and accurate copy of the transcript of the March 15, 2018 court hearing is attached as **Exhibit 17** to this Joint Stipulation and incorporated herein.

45. On March 15, 2018, the Court entered its written order, stating: "As to items 1-5 (of Exhibit A attached to Defendant's Notice of Videotaped Deposition of William Don Mr. Tisaby), Circuit Attorney will turn over all materials that it is obligated to provide. Court orders Circuit Attorney to provide a privilege log and all withheld materials for *in camera* inspection by 9:00 a.m., March 16, 2018."

46. On March 15, 2018, the State produced to the Mr. Greitens' counsel a flash drive denominated "Mr. Tisaby Report." It contained:

- a. Mr. Tisaby's Final Investigative Narrative Confidential of K.S.; and
- b. Mr. Tisaby's Final J.W. Interview.

47. On March 16, 2018, the State produced a privilege log listing numerous documents being withheld as privileged.

48. The following documents were neither listed in State's privilege log nor produced to Governor Greitens and his counsel on March 15 and 16:

- a. Circuit Attorney Gardner's 1/28/2018 Bullet Points;
- b. Circuit Attorney Gardner's 1/28/2018 email to Mr. Tisaby;
- c. Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points;
- d. Mr. Tisaby's Draft Investigative Narrative Confidential of K.S.; and
- e. Mr. Tisaby's 3/13/18 email to Circuit Attorney Gardner.

A true and accurate copy of the State's Privilege Log is attached as **Exhibit 18** to this Joint Stipulation and incorporated herein.

49. Circuit Attorney Gardner was involved in and supervised her Office's team that was responsible for satisfying the Court's Order of March 15 related to gathering responsive documents, conducting a privilege review of those documents, and producing those documents either to Mr. Greitens' defense team or to the Court *in camera* with a corresponding privilege log. Circuit Attorney Gardner nevertheless failed to recognize that her Office had (for some undetermined reason) not properly collected for review and/or



production, and therefore had failed to review, produce (to Mr. Greitens' counsel or for *in camera* review), and as appropriate log the five documents listed in paragraph 48 of this Stipulation. Circuit Attorney Gardner agrees that, under the Court's March 15 Order, the documents listed in paragraph 48 of this Stipulation should have been produced and/or included in the privilege log to satisfy the March 15 Order and related discovery.

50. At the court hearing on March 19, 2018 regarding the State's privilege log, with Circuit Attorney Gardner present, the following colloquy occurred:

[Attorney James Martin for Defendant]: Your Honor, Mr. Dierker asserted that only Mr. Tisaby would know whether he took notes. Ms. Gardner is here and apparently participated in the interview. I would assume she would know whether Mr. Tisaby took notes. We're supposed to depose him today. And they were specifically subpoenaed, they were supposed to be turned over 48 hours.

[The Court]: Chief, you want to speak to Ms. Gardner to make sure.

(Discussion off the record.)

[Mr. Dierker for the State]: There are no other notes.

A true and accurate copy of the transcript of the March 19, 2018, court hearing is attached as **Exhibit 19** to this Joint Stipulation and incorporated herein.

51. Mr. Dierker consulted with Circuit Attorney Gardner off the record before he spoke.

52. At the time of the hearing on March 19, 2018, the State had not yet produced or listed on the privilege log the following three documents:

- a. Circuit Attorney Gardner's 1/28/2018 Bullet Points;
- b. Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points; and
- c. Mr. Tisaby's Draft Investigative Narrative Confidential of K.S.

53. Circuit Attorney Gardner and Mr. Dierker have both indicated that, when they conferred before Mr. Dierker responded as quoted in paragraph 50, they were focused on their understanding that the Circuit Court's inquiry related to whether there were additional notes that Mr. Tisaby had taken contemporaneously with witness interviews which had not yet been produced. Even under this narrow understanding of the question, Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points should have been produced or logged. But they had not. Neither Circuit Attorney Gardner nor anyone else in the Circuit Attorney's Office recognized that these notes had not been produced or logged before Mr. Dierker told the Court that the State had no additional notes to produce.<sup>1</sup> In addition, although they were not Mr. Tisaby's contemporaneous notes of a witness interview, neither the Circuit Attorney Gardner's 1/28/2018 Bullet Points nor Mr. Tisaby's Draft Narrative Interview Confidential of K.S. had as yet been produced to the defense or disclosed on the State's privilege log.

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<sup>1</sup> Soon after the videotape was found to confirm that Tisaby had, in fact, taken such contemporaneous notes, the document was obtained and produced to the defense on April 11, 2018, as discussed in paragraph 63 of this Stipulation.

54. On March 19, 2018, Governor Greitens' counsel took the sworn video deposition of Mr. Tisaby. Mr. Tisaby was not represented by counsel at this March 19 deposition.

55. Circuit Attorney Gardner attended Mr. Tisaby's March 19 deposition and Mr. Dierker also attended significant portions of this deposition, with both Ms. Gardner and Mr. Dierker acting as attorneys prosecuting the case, not as personal counsel to Mr. Tisaby. Both Circuit Attorney Gardner and Mr. Dierker were last-minute substitutes for the Circuit Attorney's Office, because the Circuit Attorney's Office had anticipated that special prosecutor Mr. Sullivan would attend Mr. Tisaby's March 19 deposition. Mr. Sullivan was unable to reach St. Louis because of a snowstorm.

56. During the March 19 deposition, Mr. Tisaby made certain statements that were inaccurate. Mr. Tisaby's inaccurate statements include:

- a. Mr. Tisaby testified that he did not receive any documents or information from Circuit Attorney Gardner prior to his interview of K.S., despite Circuit Attorney Gardner having emailed her 1/28/2018 Bullet Points to Mr. Tisaby on January 28, 2018;
- b. Mr. Tisaby testified that he did not ask K.S. any substantive questions during his interview of K.S., when Mr. Tisaby had asked many questions during the January 29 interview;

- c. Mr. Tisaby testified that he did not take any notes during his interview of K.S., when Mr. Tisaby had in fact taken notes during the January 29 interview;
- d. Mr. Tisaby testified that he did not communicate with Circuit Attorney Gardner during the lunch break of the March 19 deposition, when Mr. Tisaby had spoken with Circuit Attorney Gardner during the lunch break;
- e. Mr. Tisaby testified that the Mr. Tisaby Final Investigative Narrative Confidential of K.S. produced to then-Governor Greitens on March 15, 2018, contained everything communicated to him directly by K.S. and all quotes were verbatim repetitions of what K.S. had told Mr. Tisaby, when some of the statements were not said by K.S. during the January 29 interview; and
- f. Mr. Tisaby testified that he had no earlier drafts of Mr. Tisaby's Final Investigative Narrative Confidential of K.S., when Mr. Tisaby had prepared a draft of that Narrative and had emailed that draft to the personal email accounts of Circuit Attorney Gardner and the CAO's incoming lead investigator on March 13, 2018, less than a week before the March 19 deposition.

57. A true and accurate copy of the Mr. Tisaby deposition transcript taken on March 19, 2018 is attached as **Exhibit 20** to this Joint Stipulation and incorporated herein.

58. At the time of Mr. Tisaby's deposition on March 19, 2018, Circuit Attorney Gardner believed at least some of Mr. Tisaby's statements listed in paragraph 56 of this Stipulation were inaccurate. Ms. Gardner does not recall exactly which of the statements listed in paragraph 56 she believed were inaccurate during Mr. Tisaby's deposition and which of the statements listed in paragraph 56 she realized were inaccurate only after Mr. Tisaby's deposition had ended.

59. On March 20, 2018, Governor Greitens through counsel filed a Witness Endorsement of Mr. Tisaby.

60. On April 4, 2018, Governor Greitens filed a Motion to Compel Production of Subpoenaed Records and Notice of Second Deposition of Mr. Tisaby. True and accurate copies of the Motion to Compel Production of Subpoenaed Records and Notice of Second Deposition of Mr. Tisaby are attached as **Exhibits 21 and 22**, respectively, to this Joint Stipulation and incorporated herein.

61. On April 8, 2018, Governor Greitens through counsel filed a Motion to Compel Immediate Production of all Exculpatory Information including videotape or equipment used to record Mr. Tisaby's interview of K.S. A true and accurate copy of the Motion to Compel Immediate Production of all Exculpatory Information is attached as **Exhibit 23** to this Joint Stipulation and incorporated herein.

62. As part of its effort to respond to Governor Greitens' motions of April 4 and April 8, 2018, the Circuit Attorney's Office conducted an additional investigation and

identified certain documents responsive to Governor Greitens' prior discovery request that should have been previously produced or listed on the privilege log and produced for *in camera* review. When conducting this additional review, the Circuit Attorney's Office also re-tested the video of the January 29 interview of K.S. and succeeded in getting the video to run, although the first ten minutes of the video still lacked sound.

63. On April 11, 2018, the Circuit Attorney's Office produced to Governor Greitens and his counsel the following items:

- a. The video of Mr. Tisaby's January 29, 2018, interview of K.S.;
- b. Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points; and
- c. Circuit Attorney Gardner's handwritten notes of Mr. Tisaby's interview of K.S. on January 29, 2018.

64. On April 12, 2018, the Circuit Attorney's Office filed the State's Memorandum in Opposition of Motion to Compel and for Sanctions. This April 12 Memorandum stated that the "typescript bullet points" on Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points "were the work of Mr. Tisaby, not the Circuit Attorney." This was inaccurate because the Tisaby document was his reformatted version of Bullet Points document from Ms. Gardner, and it included most, but not all, of the bullet points from the document that Ms. Gardner had sent Mr. Tisaby. A true and accurate copy of the State's Memorandum filed on April 12, 2018 is attached as **Exhibit 24** to this Joint Stipulation and incorporated herein.

65. On April 18, 2018, the Circuit Attorney's Office filed the State's Supplemental Memorandum in Response to Defense Discovery Issues stating that: "All known notes of interviews with the victim have been provided." This response did not, however, account for two documents that the State had not yet produced or listed on the State's privilege log:

- a. The original 1/28/2018 Bullet Points, or a complete set of those Bullet Points (because Mr. Tisaby's Annotated Version of Gardner's 1/28/2018 Bullet Points did not include the final forty-five bullet points Circuit Attorney Gardner had prepared); and
- b. Mr. Tisaby's Draft Investigative Narrative Confidential of K.S.

As stated *supra* in paragraphs 48-49, these two documents had not been identified, and therefore not logged or produced, when the Circuit Attorney's Office originally collected documents for privilege review and production. They were also not identified when the Office searched a second time for responsive documents in April 2018. Thus, as of April 18, 2018, neither Circuit Attorney Gardner nor her Office realized in April 2018 that these two documents had not been produced or listed on the State's privilege log. The evidence does not support a conclusion that these documents were deliberately hid from production, including because Circuit Attorney Gardner had shared her original Bullet Points with Mr. Tisaby and Mr. Steele, and the Circuit Attorney's Office had already produced Ms. Gardner's handwritten notes from the January 24 and 29 interviews of K.S. and Mr. Tisaby's Final Investigative Narrative Confidential of K.S. Nevertheless, Circuit Attorney



Gardner admits and regrets that the Circuit Attorney's Office did not properly manage production or assertion of privilege over Circuit Attorney Gardner's Bullet Points and Mr. Tisaby's Draft Investigative Narrative Confidential of K.S., and did not properly answer questions regarding whether Mr. Tisaby had prepared or circulated any draft reports. To be clear, Ms. Gardner admits that she should have ensured these documents were logged and/or produced, and she regrets that they were not.

66. At a hearing on April 19, 2018, after considering Defendant's Motion to Compel and for Sanctions, Defendant's Motion to Produce Exculpatory Information, State's Memorandum in Opposition to Compel and for Sanctions, Defendant's Second Supplemental Reply in Support of Motion to Dismiss, and State's Supplemental Memorandum in Response to Defendant's Discovery Issues, the Circuit Court found that the State had violated the rules of criminal discovery, issued "lesser sanctions" against the State, and ordered that then-Governor Greitens and his counsel were allowed to retake certain depositions. A true and accurate copy of the transcript of the April 19, 2018 court hearing is attached as **Exhibit 25** to this Joint Stipulation and incorporated herein.

67. On May 10, 2018, in proceedings in chambers, the Circuit Court allowed then-Governor Greitens to endorse Circuit Attorney Gardner as a witness at trial.

68. On May 14, 2018, the State filed a *Nolle Prosequi* of State of Missouri vs. Eric Greitens (Cause No. 1822-CR00642), and the Circuit Court discharged then-Governor Greitens from his bond and closed the case.

## CONCLUSIONS OF LAW

69. Circuit Attorney Gardner violated Rules 4-3.4(a) and (d) by failing to ensure compliance with discovery obligations in the Greitens case, including but not limited to, the court Order of March 15, 2018, in that the Circuit Attorney's Office failed to timely ensure production or logging as privileged for an *in camera* review the following documents:

- a. Circuit Attorney Gardner's 1/28/2018 Bullet Points;
- b. Circuit Attorney Gardner's 1/28/2018 email to Mr. Tisaby attaching the 1/28/2018 Bullet Points;
- c. Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points;
- d. Mr. Tisaby's Draft Investigative Narrative Confidential of K.S.; and
- e. Mr. Tisaby's 3/13/18 email to Circuit Attorney Gardner's personal email account.

70. On April 12, 2018, the State submitted its Memorandum in Opposition to Motion to Compel and for Sanctions that related in part to the document in the possession of Mr. Tisaby during the January 29 interview (Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points), and which Memorandum stated that those "typescript bullet points were the work of Mr. Tisaby, not the Circuit Attorney," when in fact the Tisaby document was his reformatted version of the document that had been sent to him by Ms. Gardner (Circuit Attorney Gardner's 1/28/2018 Bullet Points). Although

Mr. Tisaby's Annotated Version of Circuit Attorney Gardner's 1/28/2018 Bullet Points was not the same document as Circuit Attorney Gardner's 1/28/2018 Bullet Points, it included most, but not all, of the bullet points in Ms. Gardner's document. Circuit Attorney Gardner violated Rule 4-3.3(a) when she failed to ensure correction of the above-referenced misstatement in the State's Memorandum in Opposition of Motion to Compel and for Sanctions dated April 12, 2018.

71. Circuit Attorney Gardner violated 4-3.4(a) when, on April 18, 2018, she participated in and allowed submission of the State's Supplemental Memorandum in Response to Defense Discovery Issues on April 18, 2018, which stated that "[a]ll known notes of interviews with the victim have been provided," when in fact as described in paragraph 69, the Circuit Attorney's Office had not yet ensured production to then-Governor Greitens or his counsel, or logged as privileged and submitted for *in camera* review, the following notes:

- a. Circuit Attorney Gardner's 1/28/2018 Bullet Points (inclusive of last forty-five bullet points) and
- b. Mr. Tisaby's Draft Investigative Narrative Confidential of K.S.

72. Circuit Attorney Gardner violated Rule 4-3.4(a) when, on April 23, 2018, having not ensured (1) her 1/28/2018 Bullet Points, (2) Mr. Tisaby's Draft Investigative Narrative Confidential of K.S., and (3) the emails between Circuit Attorney Gardner and Mr. Tisaby on January 29 and March 13, 2018 had been produced or logged as privileged, Circuit Attorney Gardner stated in court: "The notes when I had a previous interview of K.S. [were] turned over to the defense, as well as the notes on the second interview, so

what they have is what we have, your Honor, and it was turned over immediately. So they have everything that we have.”

73. The parties agree that none of the facts stipulated above, including in paragraphs 69-72, should be construed as suggesting or agreeing that Circuit Attorney Gardner violated any law other than certain discovery obligations in this case, including but not limited to, the court Order of March 15, 2018.

### SANCTION ANALYSIS

The Court has consistently explained the process for sanction analysis in attorney discipline cases:

In determining appropriate discipline, this Court is guided by two key principles: The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct.

*In re Kazanas*, 96 S.W.803, 807-08 (Mo. banc 2003). In furtherance of these principles, this Court looks at the individual facts and “considers the ethical duty violated, the attorney’s mental state, the extent of actual or potential injury caused by the attorney’s misconduct, and any aggravating or mitigating factors.” *In re McMillin*, 521 S.W.3d 604, 610 (Mo. banc 2017). This Court also looks for guidance from the American Bar Association Standards for Imposing Lawyer Sanctions (ABA Standards) and applies those

standards and its prior cases to those facts. *In re Madison*, 282 S.W.3d 350, 360 (Mo. banc 2009).

**Application of the ABA Sanction Standards.**

In this case, guidance can be found in these particular ABA Sanction Standards:

- Standard 3.0 (Factors applicable to all violation types);
- Standards 5.2 (Addressing prosecutors' and other public officials' failure to comply with rules and procedures);
- Standards 6.0 (Addressing conduct following the submission of false evidence);
- Standards 9.0 (Aggravating and Mitigating Circumstances).

As can be seen by reviewing these listed standards, the key factors in finding an appropriate baseline sanction are consistently reflected in both Standard 3.0 and within the Standards designed for specific circumstances. Three elements are considered in each analysis conducted under the ABA Standards: (a) the duty violated; (b) the lawyer's mental state; and (c) the potential or actual injury caused by the lawyer's misconduct. After that baseline analysis is complete, Standards 9.1, 9.2 and 9.3 permit the consideration of aggravating and mitigating factors. **ABA Standard 3.0**

**Ms. Gardner's mental state.**

Before considering aggravating and mitigating factors, this Court should first examine Ms. Gardner's mental state or *scienter*. In defining *scienter*, the Court has referred to the ABA Sanction Standards that define "intention," "knowledge," and "negligence," which are as follows:

“Intention” is defined as “the conscious objective or purpose to accomplish a particular result. *ABA Standards, Definitions*. ”Knowledge” is defined as “a conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a result.” *Id.* ”Negligence” is defined as “a failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in that situation.”

*In re Coleman*, 295 S.W.3d 857, 870 (Mo. banc 2009).

The facts evidence that Ms. Gardner’s mental state with regard to the conduct at issue here was negligent or perhaps reckless, but not intentional.

It is important to this issue of mental state to recognize that the Greitens case proceeded on an unusually expedited track, which partly led to the need to identify and produce documents on an extremely short time frame, such that the Circuit Attorney Gardner’s 1/28/2018 Bullet Points at issue here were not identified or produced. Ms. Gardner accepts responsibility for that failure, but in this context the evidence supports that it was not an intentional failure. Specifically, in regard to the discovery and trial schedule, the Circuit Court held motion hearings almost daily, including while the parties were also taking depositions in the case. On March 15, 2018, for example, the Circuit Court directed the Circuit Attorney’s Office to turn over all non-privileged documents and to produce a

privilege log and submit any alleged privileged documents for *in camera* review the next day.

The pattern of what was produced *versus* what was not produced timely also does not support any finding that Circuit Attorney Gardner or her Office had an improper motive or strategy regarding the production of materials in the Greitens case. For example, the Circuit Attorney's Office produced Circuit Attorney Gardner's 1/24/18 Handwritten Notes on March 6, 2018, but Ms. Gardner's handwritten notes from Mr. Tisaby's interview of K.S. on January 29, 2018 were not produced until April 11, 2018 – almost a month after the Circuit Attorney's Office had produced Mr. Tisaby's own final report from that interview on March 11, 2018. In addition, after the Circuit Court instructed the Circuit Attorney's Office that it would need to turn over Mr. Tisaby's and Enterra's work product on March 15, 2018, the Circuit Attorney's Office turned over the final copies of Mr. Tisaby's reports on his meetings with K.S. and J.W. later that same day (Mr. Tisaby's Final Investigative Narrative Confidential of K.S. and Mr. Tisaby's Final J.W. Interview, respectively). But the Circuit Attorney did not turn over Mr. Tisaby's Draft Investigative Narrative Confidential of K.S. during the pendency of the Greitens case. Mr. Tisaby's Final Investigative Narrative Confidential of K.S. was substantially similar to his earlier draft but omitted some detail that the Greitens' defense counsel alleged was significant to the case. Mr. Tisaby's earlier draft was neither produced nor listed on the privilege log prepared by the Circuit Attorney's Office.

Also, on April 11, 2018, the Circuit Attorney's Office turned over Mr. Tisaby's annotated version of Ms. Gardner's bullet points – which included many but not forty-five



of Ms. Gardner's bullet points. But the Circuit Attorney's Office did not produce – or more accurately, include on its privilege log – Ms. Gardner's own draft of those bullet points at any time prior to the dismissal of the case. In fact, Ms. Gardner's 1/28/2018 Bullet Points were transmitted by her not only to Mr. Tisaby, but also to Mr. Steele, who was expected to serve as lead trial counsel for the State. That transmission is consistent with the conclusion that Ms. Gardner and the Circuit Attorney's Office did not intentionally fail to log or produce them.

The foregoing supports a conclusion, which Circuit Attorney Gardner agrees to, that, under the timelines imposed in the Greitens case, the Circuit Attorney's Office failed to maintain a comprehensive approach to collecting, producing, and logging documents.

Similar problems arose with regard to Mr. Tisaby's deposition on March 19, 2018. Circuit Attorney Gardner was not expected to represent the State at this deposition: she was a last-minute substitution.. Further, neither the Circuit Attorney's Office nor anyone else was representing Mr. Tisaby at this deposition. Circuit Attorney Gardner and her colleague Mr. Dierker both believed that Mr. Tisaby had testified inaccurately during his deposition. But the Circuit Attorney's Office could not agree on what, if anything, the Office should do when (a) the Circuit Attorney's Office did not represent Mr. Tisaby; (b) the Circuit Attorney had not designated Mr. Tisaby as a witness and did not expect him to be called as a witness at any hearing or trial; (c) the Circuit Attorney's Office was not sponsoring Tisaby's testimony or seeking its admission at any trial; (d) subsequent to Mr. Tisaby's first deposition, on April 11, 2018, the Circuit Attorney's Office produced additional materials – including the videotape of the January 29 interview of K.S. – that

contradicted certain portions of Mr. Tisaby's prior testimony; and (e) the Circuit Attorney's Office dismissed the case against Mr. Greitens.

**Actual injury from the stipulated conduct.**

Secondarily, the determination of an appropriate sanction depends on the ultimate *harm* resulting from Circuit Attorney Gardner's conduct. As noted at the beginning of this Joint Stipulation, this lawyer discipline matter does not directly address or seek to punish or remedy any harm that may have resulted from anyone's conduct (such as, for instance, Mr. Tisaby's conduct) other than that of Circuit Attorney Gardner.

Circuit Attorney Gardner takes seriously her and her Office's obligation to provide discovery to criminal defendants, and has even taken steps for the Office to participate as a pilot program for adoption of a new electronic document management system that will help ensure appropriate discovery materials are produced in future criminal cases.

In the present case, the actual or potential injury was limited for three reasons. First, several of the items that were not properly produced or logged may have been later deemed by a court to constitute work product and thus not subject to discovery. Second, the information in non-privileged materials included some information that was cumulative of information that was disclosed. Third, the Circuit Attorney's Office dismissed the prosecution against Mr. Greitens on May 14, 2018.

**Application of the ABA Standards for Imposing Lawyer Sanctions.**

Based upon the foregoing, the parties stipulate and agree that the appropriate discipline for Ms. Gardner should be a reprimand. A reprimand is appropriate under the ABA Standards as follows:

ABA Standard 5.23. Standard 5.23 states:

Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Lawyers who serve as public officials, including prosecutors, are obligated to comply with court rules, statutes, and other law applicable to their position. Under Standard 5.23, reprimand is adequate for Ms. Gardner's failures here, particularly in light of the mitigating factors discussed below.

Here, Respondent acknowledges that despite the time constraints of the Greitens' prosecution, discovery obligations in the Greitens case nonetheless required her to promptly produce the various versions of her notes and Mr. Tisaby's notes to the defense. Circuit Attorney Gardner recognizes and regrets the impact her conduct and this resolution may have on the administration of justice in St. Louis. The Greitens case had unique circumstances due to the nature of the prosecution, the prominence of the defendant, the unusual staffing of the prosecution, the accelerated discovery schedule, and the agreed orders and productions to accommodate that accelerated discovery schedule. Nonetheless, and despite being aware of this potential, Ms. Gardner recognizes that she is the leader of an important public office, and needs to accept her responsibility for the discovery issues that surfaced in this case. Ms. Gardner also regrets that, when Circuit Attorney Gardner and her Office had agreed to produce or list as privileged all versions of reports and witness statements, she did not ensure that her office did so. Ms. Gardner's failure to do so, as

described above, appears to have been negligent or perhaps reckless, supporting imposition of a reprimand under Standard 5.23.

ABA Standard 6.13. Standard 6.13 states:

**6.13** Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Circuit Attorney Gardner has consistently acknowledged that Mr. Tisaby testified inaccurately during his deposition on March 19, 2018. Additionally, Circuit Attorney Gardner recognizes that Mr. Greitens' lawyers would claim, perhaps with some justification, that some of Mr. Tisaby's inaccurate statements may have been material to Mr. Greitens' right to evaluate the State's investigation, even if the prosecution did not plan to call Mr. Tisaby as a witness.

**Aggravating and mitigating factors.**

Aggravating factors in this case include that Circuit Attorney Gardner has substantial experience in the practice of law, although she had limited experience at the time of this 2018 prosecution in prosecuting such a high profile and sensitive case; and that there is more than one instance of misconduct in this case. *See* ABA Standard 9.22(d) and (i).

Meanwhile, considerable mitigating factors substantially outweigh these aggravating factors and support imposition of a lesser discipline. Circuit Attorney Gardner has no prior disciplinary history. *See* ABA Standard 9.32(a). She acted without selfish motive, and took action to rectify her mistakes. This includes that the Circuit Attorney's Office produced the video of the interview of K.S. two days after the Circuit Attorney's Office discovered it was operable, supplementing written discovery when additional documents were located, and ultimately dismissing the charges against Mr. Greitens. Circuit Attorney Gardner has also cooperated with disciplinary counsel. ABA Standard 9.32(e).

In addition, several weeks after Mr. Tisaby's deposition, Circuit Attorney Gardner acknowledged to the Circuit Court that Mr. Tisaby made inaccurate statements during his March 19 deposition testimony. Circuit Attorney Gardner now admits that, since Enterra and Mr. Tisaby were investigators retained by her Office, and she was exercising supervision over the investigation, pursuant to Missouri Supreme Court Rule 4-5.3, she had some responsibility to address Mr. Tisaby's and Enterra's conduct. Circuit Attorney Gardner's acknowledgment and her remorse for this situation may be considered mitigating under ABA Standard 9.32(d) and (l).

As an additional mitigating factor, Circuit Attorney Gardner has received numerous awards and recognitions for her leadership, reform efforts, and community service, including:

- 2022 Medgar Wiley Evers Medal of Freedom Award from the St. Louis City Branch NAACP;

- 2021 Midwest Innocence Project Freedom Award in recognition of Ms. Gardner’s “service and dedication to bring justice to those that have been wrongfully convicted”;
- 2020 recognition from the Cities of Pine Lawn and Wellston for Ms. Gardner’s “outstanding contribution to ‘Honoring a Legacy of Service’ commemorating the heritage of Dr. Martin Luther King, Jr.
- 2020 Frankie Muse Freeman Spirit Award from the St. Louis Black Rep;
- 2019 Innovator Mogul Award from the Sigma Gamma Rho Sorority Inc. Zeta Sigma Chapter for her “Dedicated Service to People in Our Community”;
- 2019 Ernest and De Verne Calloway Award from the St. Louis Chapter of the Coalition of Black Trade Unionists (CBTU) for Ms. Gardner’s work in “replacing the doctrine of mass incarceration with successful diversion programs”;
- 2019 Exemplary Leadership Award from the National Coalition of 100 Black Women Metropolitan St. Louis Chapter;
- 2018 Kappa League Pioneer Award from Kappa Alpha Psi Fraternity, Inc. Guide Right St. Louis Alumni Chapter;

- 2018 Civic Service award from Better Family Life;
- 2017 Outstanding Achievement in Public Service award from the Black Law Students Association of Washington University School of Law; and
- 2016 recognition from the Women in the Legal Profession Section of the Bar Association of Metropolitan St. Louis for her efforts in “mentoring women lawyers in the St. Louis legal community, her contributions to the Bar Association of Metropolitan St. Louis’ Women in the Legal Profession Section, and her appointment to Circuit Attorney for the City of St. Louis.”

In addition, Circuit Attorney Gardner was re-elected Circuit Attorney in 2020, winning 60 percent of the vote in the Democratic primary and 74 percent of the vote in a contested general election.

Finally, Circuit Attorney Gardner’s Office has partnered with Amazon Web Services to develop a new document management system that should address the types of discovery issues that underlie the conduct in this case. Circuit Attorney Gardner anticipates this system should help prosecutors’ offices nationwide properly manage and produce documents for cases.

#### **Sanction Analysis Based on Previous Discipline in Missouri**

In addition to applying the ABA Sanction Standards to the facts, the Missouri Supreme Court often considers prior cases in which this Court has imposed discipline to



determine what discipline is appropriate. In 2019, the Missouri Supreme Court issued a stayed suspension with probation to a lawyer whose misconduct included both knowing and negligent violations related to his failure to comply with probate procedure and a court order. *In re R. Scott Gardner*, 565 S.W.3d 670 (Mo. banc 2003). The attorney in that case (no relation to Ms. Gardner) had taken fees from a supervised estate knowing he did not have the supervising court's permission. Noting that the incident was an "isolated instance," and, importantly, that attorney only took fees that he believed he would ultimately be entitled to take, the Court found that he negligently failed to inform himself "with the law governing when and how a personal representative may obtain fees." 565 S.W.3d at 678. Additionally, the Court found that the attorney's "failure to list his unauthorized payment in the final settlement to be negligent rather than intentional, in light of his attachment of the check showing the payment and his explanation he had forgotten to update the previously prepared settlement form." *Id.* In that case, the Court determined that the attorney had violated Rules 4-3.3 by making false statements to a tribunal, and Rule 4-8.4(c) (deceitful conduct). The Court concluded that an actual suspension was the appropriate baseline sanction because those violations were founded on both knowing and negligent conduct as well as a misunderstanding of the law. Ultimately, that Court stayed the attorney's suspension, upon finding significant mitigating circumstances, including that he did not act with a selfish or dishonest motive.

When the misconduct is "clearly a deviation from [the lawyer's] normal behavior and in part due to ... unfamiliarity with the rules...", and when "evidence of good

character” exists and when the “attorney has also admitted to the misdeeds and show some remorse,” mitigation can occur. 565 S.W.3d at 679–80.

In the instant case, Circuit Attorney Gardner admits that she should have been more vigilant in ensuring the prosecution’s discovery obligations were properly addressed in the expedited and highly public proceedings relating to the prosecution of Mr. Greitens. Circuit Attorney Gardner admits that she and her Office should have promptly disclosed all variations of her notes and Mr. Tisaby’s notes related to interviews of key witnesses at least for an *in camera* inspection. Circuit Attorney Gardner further states that, had she and her Office located the additional documents, they would have produced or listed on the privilege log all documents at issue in this Stipulation. With those admissions, mitigation is warranted.

Other Missouri disciplinary cases involving prosecutors have resulted in a variety of sanctions. In 1991, then St Louis County Prosecuting Attorney George Westfall was reprimanded for statements made about the integrity of a judge, in violation of Rule 4-8.2. *In re Westfall*, 808 S.W. 829 (Mo. banc 1991). In 1993, then St. Louis City Circuit Attorney surrendered his license and was disbarred. *See In re George A. Peach*, Case No. SC83071 (2010) (reinstatement case). Following a felony conviction of misprision of a felony, an Assistant St. Louis Circuit Attorney was disbarred in 2016. *In re Bliss Barber Worrell*, Case No. SC95871 (2016). Order Aug. 10, 2016. Also, the Supreme Court reprimanded Platte County Prosecutor Eric Zahnd for violating Rules 4-4.4(a), 4-8.4(a) and 4-8.4(d). *In re Eric G. Zahnd*, Case No. SC96939 (May 22, 2018).

## **CONCLUSION**

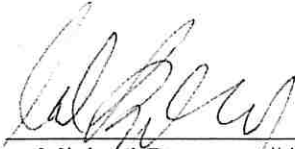
Upon consideration of the facts, the admitted violations, the application of the ABA Standards for Imposing Sanctions to the misconduct, and the Missouri Supreme Court's previous discipline decisions, the parties jointly ask the Panel to find the violations admitted herein and to recommend that the Supreme Court reprimand Respondent.

### **Averments Regarding Stipulation**


1. Respondent Kimberly M. Gardner has reviewed and approved this Stipulation.
2. Respondent is represented by counsel in this matter, including Michael P. Downey and Paige Tungate of Downey Law Group LLC, and has had opportunity to consult with such counsel regarding this stipulation.
3. Respondent has not been subjected to any coercion or other intimidating acts by any person or agency regarding this Stipulation.
4. Respondent understands the nature and consequences of the actions by Informant and she enters into this Stipulation voluntarily and of her own free will.
5. Respondent understands that she and Informant make this Joint Recommendation for Discipline with the understanding that it is only a recommendation and is not binding on the Advisory Committee, Disciplinary Hearing Panel, or the Supreme Court of Missouri. Regardless of whether the Advisory Committee, Disciplinary Hearing Panel, or the Supreme Court accepts or rejects the recommended discipline, Informant and Respondent agree to be bound by the factual stipulations contained in this Joint Stipulation of Facts, Joint Proposed Conclusions of Law and Joint Recommended Discipline.

6. Informant and Respondent agree and understand that the level of discipline to which the parties are stipulating concurrence is not binding on either party if the Supreme Court does not concur in the parties' stipulated discipline

Respectfully submitted,

By:   
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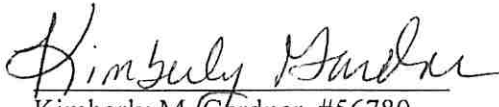
OFFICE OF CHIEF  
DISCIPLINARY COUNSEL

By:   
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Date: \_\_\_\_\_

Date: \_\_\_\_\_

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RESPONDENT