

IN THE SUPREME COURT OF
THE STATE OF MISSOURI



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

**ANSWER AND AFFIRMATIVE DEFENSES
TO INFORMATION**

COMES NOW respondent Kimberly M. Gardner, by and through her undersigned counsel, and for her Answer and Affirmative Defenses to Informant's Information states as follows:

Preliminary Statement

Ms. Gardner is the duly elected Circuit Attorney for the City of St. Louis. Ms. Gardner enjoys widespread support among those whom she serves, having recently won re-election with an overwhelming majority (74%) of the voters. Ms. Gardner's tireless and courageous efforts to reform the criminal justice system in the City of St. Louis have received recognition and praise beyond and within St. Louis, including among those who re-elected her to continue those efforts. Ms. Gardner's efforts, however, also have made her a target. Attacks on Ms. Gardner have taken many forms, ranging from overtly racist emails sent to her office to investigations and lawsuits against her. There are many who prefer the status quo and would like to see Ms. Gardner fail. They would like Ms. Gardner removed from office, and to warn others not to take up her efforts to unsettle established power, help those formerly powerless, and reform the system.

This Information is another attempt by Ms. Gardner's political enemies – largely from outside St. Louis – to remove Ms. Gardner and thwart the systemic reforms she champions. The allegations in the Information arise from the efforts of Ms. Gardner and her office in 2018 to investigate potential charges against then Governor Eric Greitens, at the time a “golden boy” of the Republican establishment, including a claim of attempted sexual blackmail that his hairstylist (K.S.) brought hesitantly against Mr. Greitens. The investigation and subsequent prosecution were not wrongfully motivated: there is no credible suggestion to that effect. In fact, even Republican-led groups rejected the efforts of Mr. Greitens’ well-resourced defense team to discredit Mr. Greitens’ alleged victim. The Special Investigative Sub-Committee on Oversight of the Missouri House of Representatives – a Republican-majority Committee – also investigated Mr. Greitens’ conduct and found K.S.’s allegations against then-Governor Greitens were credible, that instead Mr. Greitens and his defense team had “mischaracterize[d] the actual testimony received and reviewed by this Committee.”

Mr. Greitens’ high-powered defense team also sought to undermine the credibility and integrity of Ms. Gardner’s prosecution efforts, and they now are the complainants against Ms. Gardner in this proceeding. Mr. Greitens’ defense team attempted, successfully, to shift focus from Mr. Greitens’ alleged criminal misconduct to allegations of litigation misconduct against the Circuit Attorney’s office. Discovery in the case proceeded on an expedited basis and the Greitens defense team overwhelmed Ms. Gardner’s office by dissecting and scrutinizing its investigation process and production of investigative records in an unparalleled fashion. Responding to then Governor Greitens and

his lawyers' aggressive litigation strategy, while at the same time seeking to protect a vulnerable victim understandably nervous about surfacing her allegations against the sitting Governor and to maintain the integrity of the prosecution against Mr. Greitens, Ms. Gardner personally undertook aspects of the investigation, including work that normally line attorneys, investigators, and staff would handle. These burdens, plus handling her heavy duties as supervisor of an office of more than 100 attorneys and staff that prosecutes more than 3,000 cases per year, may have resulted in minor mistakes including with regard to handling the short-fused, aggressive discovery from Mr. Greitens' well-resourced defense team. If there were minor mistakes made, they were not deliberate, they did not undermine justice, and they did not deny the defendant a fair trial. When it found any possible issue or inconsistency, the Greitens defense team proclaimed that *Brady* violations had occurred without adequately substantiating those claims. The Greitens team's strategy ultimately proved largely successful: Mr. Greitens avoided a criminal conviction – and is now running for United States Senate – while Ms. Gardner faces this disciplinary proceeding that could result in unfair and unwarranted mistrust of the Circuit Attorney's office.

Ms. Gardner did not hide her role in the investigation, and her own notes taken during witness interviews, were all produced. Ms. Gardner alone handled an initial interview of K.S. Ms. Gardner's handwritten notes from that interview were produced to the defense team. Ms. Gardner also participated in a second, video-recorded interview of K.S. by Mr. Tisaby. Ms. Gardner's office originally could not get the video recording to play, but ultimately produced it – and Ms. Gardner's notes from this second interview – as

soon as they were able to get the tape to play. But Greitens' lawyers – and now the Informant – do not focus on those records. Instead, this case largely focuses on how Ms. Gardner's office handled, and what Ms. Gardner's office said about, two other sets of documents: first, some work-product, attorney impression bullet points that Ms. Gardner prepared on her personal iPad after the first interview and thought she had not retained, but were found when the special prosecutor (against Mr. Tisaby) Mr. Carmody used computer forensics to collect every file from Ms. Gardner's office, and second some documents and drafts that Mr. Tisaby created, including using Ms. Gardner's work-product bullet points, when interviewing K.S. Notably, what happened with these documents could not and did not impact the outcome of the charges against Mr. Greitens. The prosecution dismissed the charges against then Governor Greitens after Mr. Greitens' defense succeeded in having Ms. Gardner declared a witness (and Mr. Tisaby a potential defendant), and when Mr. Greitens resigned as Governor.

The gist of the instant Information, even with its focus on these two groups of documents, is whether Ms. Gardner knowingly made any misstatements to any court or Disciplinary Counsel, or whether Ms. Gardner and her Office knowingly withheld any discoverable materials that might have helped exculpate then Governor Greitens. The answer to both inquiries is no. As set forth in the Answer below, Ms. Gardner did not knowingly withhold any discoverable materials, and, in any event, none of the material that is the subject of this Information was exculpatory. In fact, although it acceded to many requests and arguments raised by the Greitens defense team, the trial court did not grant relief for the *Brady* violations that were asserted by Mr. Greitens, or that underlie this

Information. Even though the Information seeks to make much of *when* the defense got information, or what was said about *who* took what notes, the fact is that essentially everything complained of in the Information did get to the defense in sufficient time to make what use of it they would. And, to the degree there is some nugget that did not get provided prior to the case being dismissed, the Information makes no pretense of showing how it proved anything materially different from the information the Greitens defense team had received. Finally, of course, the Information fails to account for the most important fact as to all of these *Brady* assertions. At most, the evidence supposedly not produced was cumulative evidence supporting that Mr. Greitens and his victim had a consensual sexual relationship, something even the victim admitted. Further, Mr. Greitens was not tried, let alone convicted. The question in the prosecution of Mr. Greitens was whether taking a photograph of the victim in a compromising situation was consensual, an issue on which none of the evidence at issue here was probative.

In fact, this case against Ms. Gardner stands in stark contrast to most cases that involve allegations of prosecutorial misconduct, cases that almost never result in professional discipline against prosecutors who (often, apparently deliberately) engage in misconduct to obtain convictions of generally powerless, and also often apparently innocent, criminal defendants. One does not have to look far to find evidence of this problem. Former prosecutor-turned-Congressman and now lobbyist Kenny Hulshof obtained multiple convictions at least six murder cases that were later overturned due to

misconduct.¹ But despite multiple court findings that Ms. Hulshof and his associates had engaged in conduct of such magnitude to require the reversal or vacating of convictions, Ms. Hulshof remains a lawyer with no history of public disciplinary investigation or discipline. Further, Mr. Hulshoff's situation is not exceptional. As the *St. Louis Post-Dispatch* noted in connection with the attacks on Ms. Gardner:

Between 1970 and 2003, there were more than 2,000 cases of prosecutorial misconduct that led appeals judges to overturn convictions in U.S. criminal courts. More than two dozen of those cases found that innocent people had been wrongly convicted.²

In reaching this conclusion, the *Post-Dispatch* cites a report from the Center for Public Integrity titled "*Harmless Error*," which found that among more than 2,000 overturned cases spanning three decades, only once was a prosecutor eventually disbarred for the misconduct related to the conviction.³ More recent studies confirm that trend has not changed. A 2020 report from the National Registry of Exonerations states, "Taken together,

¹ See, e.g., "*Multiple Murder Convictions Overturned on Account of Prosecutor's Misconduct*," The Open File: Prosecutorial Misconduct and Accountability (January 23, 2013), www.prosecutorialaccountability.com/2013/01/23/missouri-supreme-court-grants-relief-on-brady-claim. As this article emphasizes, no court has ever stated that Mr. Hulshof personally engaged in misconduct.

² Tony Messenger, *For decades, prosecutorial misconduct was overlooked. Then Kim Gardner happened.*, St. Louis Post-Dispatch (June 21, 2019), available at: <https://bit.ly/3vvTQL5>.

³ *Harmful Error: Nationwide Numbers*, The Center for Public Integrity (May 19, 2014), available at: <https://bit.ly/3aSYb35>.

the studies of prosecutorial misconduct reached two main conclusions: (1) a substantial number of prosecutors commit misconduct in criminal cases, and (2) almost none are disciplined for it.” It is critical to note all of those cases were ones where the misconduct resulted in conviction – a conviction later reversed because of misconduct. In Mr. Greitens’ case, however, there was no conviction and, perforce, no misconduct that led to such conviction.

In hindsight, were each and every one of Ms. Gardner’s actions in the intense, fast-paced Greitens investigation and prosecution perfect? No, but that is not the measure or purpose of attorney discipline. The question here is whether Ms. Gardner engaged in some conduct that should impair her ability to run her office, represent the interests of the citizens and St. Louis, and reform the St. Louis justice system as Ms. Gardner’s constituents want her to do. The answer to that question is a clear “no” – Ms. Gardner should be allowed to remain in office, with her work unimpeded by the proceedings brought here.

Response to Introduction of Information

Ms. Gardner responds to the specific allegations in the Information as follows:

1. Ms. Gardner does not dispute that the Informant is the Chief Disciplinary Counsel appointed by this Court pursuant to Rule 5.06.
2. Ms. Gardner denies probable cause exists to believe that Kimberly M. Gardner is guilty of professional misconduct. Ms. Gardner lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations in paragraph 2 of the Information, and therefore denies those allegations.

3. Ms. Gardner admits she 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 admits her Missouri Bar number is 56780 and she has been licensed to practice law in Missouri since September 29, 2004.

4. Ms. Gardner admits during all times relevant to the allegations set forth herein she was the Circuit Attorney for the City of St. Louis and engaged in the practice of law at 1114 Market Street, St. Louis, Missouri 63101. Ms. Gardner denies all remaining allegations in paragraph 4 of the Information.

5. Ms. Gardner admits her license is in good standing.

6. Ms. Gardner admits she has no disciplinary history.

7. Paragraph 7 of the Information and its subparts purport to summarize and define certain documents to be referenced throughout the Information. The documents listed in paragraph 7 of the Information are the best evidence of those documents, not their characterization by the Informant. Ms. Gardner denies the allegations in paragraph 7 of the Information to the extent those allegations are not consistent with the documents listed in paragraph 7 of the Information. Ms. Gardner further specifically denies that the “Bullet Points” quote oral statements made by K.S. during a meeting on January 24, 2018.

Response to Factual Allegations

8. Ms. Gardner admits that on January 11, 2018, she announced a formal criminal investigation into the alleged actions of then Missouri Governor Eric Greitens that occurred nearly three years earlier. Ms. Gardner admits the investigation arose from alleged illegal conduct in which Mr. Greitens had apparently engaged during and related to an

extramarital affair that Mr. Greitens had with the purported victim referred to as K.S. Ms. Gardner denies all remaining allegations in paragraph 8 of the Information.

9. Ms. Gardner admits that her office engaged a private investigator William Don Tisaby (“Tisaby”) to assist the Circuit Attorney’s Office in investigating the potential criminal conduct by Mr. Greitens. Ms. Gardner further states that the Circuit Attorney’s Office engaged Mr. Tisaby only after the Metropolitan St. Louis City Police Department (“St. Louis City Police”) and the Federal Bureau of Investigation failed to respond to a request to take the lead investigating Governor Greitens’ alleged criminal conduct: the St. Louis City Police declined stating the FBI handled public corruption investigations and Ms. Gardner did not hear back from the FBI after she contacted them at the suggestion of the U.S. Attorney’s Office. Ms. Gardner denies all remaining allegations in paragraph 9 of the Information.

10. Ms. Gardner admits that, on or about January 17 or 18, 2018, she met with Mr. Tisaby in Baton Rouge, Louisiana, to discuss Mr. Tisaby assisting with the investigation of then Governor Greitens. Ms. Gardner further states that Ms. Gardner met only briefly with Mr. Tisaby at this time (due to weather delays and the fact Ms. Gardner and her husband were traveling to a prosecutors’ conference), and that they did not have any significant discussions regarding the facts or merits of the Greitens investigation at this time. Ms. Gardner lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding how much background information Mr. Tisaby reviewed, or how long Mr. Tisaby spent reviewing such information, so Ms. Gardner denies those

allegations. Ms. Gardner denies all remaining allegations in paragraph 10 of the Information.

11. Ms. Gardner admits that on or about January 18, 2018, the Circuit Attorney's Office entered a contract with Enterra, LLC for Enterra to provide consulting advice to the Circuit Attorney's Office and to investigate potential criminal liability of Mr. Greitens, and that Ms. Gardner signed the contract for the Circuit Attorney's Office and Mr. Tisaby signed the contract for Enterra. The remaining allegations in paragraph 11 of the Information purport to summarize and quote certain parts of this contract. The contract is the best evidence of its terms. Ms. Gardner denies the allegations in paragraph 11 of the Information to the extent the summary and quotes are inconsistent with the contract entered into between the Circuit Attorney's Office and Enterra, LLC.

12. Ms. Gardner admits that on January 24, 2018, she interviewed K.S. at an Illinois hotel. Ms. Gardner denies that she had "advanced preparation" from Mr. Tisaby prior to this interview on the basis that this assertion is vague, and Ms. Gardner did not receive substantial preparation from Mr. Tisaby prior to Ms. Gardner's interview of K.S. Ms. Gardner further admits that she took handwritten notes on six pages of lined paper during the initial stages of her interview of K.S., but Ms. Gardner then stopped taking notes at the request of K.S.'s counsel. Ms. Gardner denies all remaining allegations in paragraph 12 of the Information.

13. Ms. Gardner admits that between January 24 and 28, 2018, Ms. Gardner authored a single-spaced document with multiple bullet points on her personal iPad to summarize her thoughts about her interview with K.S. and to prepare for a possible second,

video-taped interview of K.S. Ms. Gardner further states that she does not believe the bullet points significantly quoted any statements by K.S., because Ms. Gardner prepared the document by memory after her initial meeting with K.S. had ended. Ms. Gardner denies all remaining allegations in paragraph 13 of the Information.

14. Ms. Gardner admits that, on or about January 28, 2018, she emailed her bullet points to Mr. Tisaby, via her work email, and wrote in the email that the bullet points were her “work product” and “draft of notes.” Ms. Gardner further states that subsequently Mr. Tisaby told Ms. Gardner that he did not intend to use any information that Ms. Gardner may have received from K.S., that he wanted to conduct his own independent interview. The remaining allegations in paragraph 14 of the Information purport to quote from an e-mail Ms. Gardner sent to Mr. Tisaby on January 28, 2018. That e-mail is the best evidence of its contents and attachments. Ms. Gardner denies the allegations in paragraph 14 of the Information to the extent the January 28, 2018, e-mail is incorrectly quoted. Ms. Gardner further denies any remaining allegations in paragraph 14 of the Information.

15. Ms. Gardner admits that on the next day, January 29, 2018, Mr. Tisaby interviewed K.S. Ms. Gardner further admits that she sat in a chair next to Mr. Tisaby if the chairs were facing toward the table; however, because they were actually looking at K.S., Ms. Gardner was effectively sitting behind Mr. Tisaby. Ms. Gardner further states that they attempted to record the interview of K.S. with a video camera owned by the Circuit Attorney’s Office. When they later attempted to replay the resulting video file, it immediately cut out without showing any content, leading Ms. Gardner and the Circuit Attorney’s Office to conclude initially that the video camera had not worked. Several

weeks later, the Circuit Attorney's Office learned that the video file would play. Ms. Gardner denies all remaining allegations in paragraph 15 of the Information.

16. Ms. Gardner admits on information and belief that, during the interview he conducted of K.S. on January 29, 2018, Mr. Tisaby asked numerous questions of K.S. Ms. Gardner denies all remaining allegations in paragraph 16 of the Information.

17. Ms. Gardner admits that during the January 29, 2018, interview it appears that Mr. Tisaby took handwritten notes on top of a document Mr. Tisaby had created by reformatting and revising the bullet points that Ms. Gardner had emailed Mr. Tisaby on January 28, 2018. Ms. Gardner denies all remaining allegations in paragraph 17 of the Information.

18. Ms. Gardner admits on information and belief that on January 30, 2018, Mr. Tisaby interviewed J.W., a friend of K.S. in whom K.S. had confided. Ms. Gardner also admits on information and belief that it was later discovered that Mr. Tisaby had taken handwritten notes of this interview. Ms. Gardner further states that she was unaware until a deposition of J.W. that Mr. Tisaby had taken handwritten notes while interviewing J.W. Ms. Gardner denies all remaining allegations in paragraph 18 of the Information.

19. Ms. Gardner admits that on February 22, 2018, the Grand Jury of the City of St. Louis indicted Mr. Greitens on one count of Invasion of Privacy in the First Degree (Class D Felony, Mo. Rev. Stat. § 565.252), in *State of Missouri v. Eric Greitens*, Cause No. 1822-CR00642 (Circuit Court of St. Louis, Twenty-Second Judicial Circuit). Ms. Gardner further admits that K.S., P.S. (the estranged husband of K.S.), and J.W. were

identified as witnesses in the case. Ms. Gardner denies all remaining allegations in paragraph 19 of the Information.

20. Ms. Gardner admits that on February 23, 2018, attorneys Edward L. Dowd, James F. Bennett, James G. Martin, Michelle Nassar, and John F. Garvey all entered their appearances on behalf of the defendant Governor Greitens.

21. Ms. Gardner admits that then Governor Greitens through counsel propounded discovery to the State on February 23, 2018, specifically a Request for Discovery. The remaining allegations in paragraph 21 of the Information purport to quote parts from the Request for Discovery propounded by defendant Greitens to the State on February 23, 2018. The Request for Discovery propounded by defendant Greitens to the State is the best evidence of those discovery requests. Ms. Gardner denies all allegations in paragraph 21 of the Information to the extent the allegations are inconsistent with the Request for Discovery propounded by defendant Greitens to the State on February 23, 2018. Ms. Gardner denies all remaining allegations in paragraph 21 of the Information.

22. Ms. Gardner admits that then Governor Greitens through counsel propounded discovery to the State on February 27, 2018, specifically a Supplemental Request for Discovery. The remaining allegations in paragraph 22 of the Information purport to quote parts of the Supplemental Request for Discovery propounded by defendant Greitens on February 27, 2018. The Supplemental Request for Discovery propounded by defendant Greitens on February 27, 2018 is the best evidence of those discovery requests. Ms. Gardner denies all allegations in paragraph 22 of the Information to the extent the

allegations are inconsistent with the Supplemental Request for Discovery propounded by defendant Greitens on February 27, 2018.

23. Ms. Gardner admits that the Hon. Rex Burlison, Circuit Judge, was assigned to preside over *State v. Greitens*. Ms. Gardner further admits that on February 28, 2018, Judge Burlison held a hearing that included discussions of the trial date for that prosecution. The remaining allegations in paragraph 23 of the Information purport to quote from a transcript of the hearing on February 28, 2018. The transcript from that hearing is the best evidence of what was said during that hearing. Ms. Gardner denies all allegations in paragraph 23 of the Information to the extent the allegations are inconsistent with the transcript from the hearing. Ms. Gardner denies all remaining allegations in paragraph 23 of the Information.

24. Paragraph 24 of the Information purports to summarize and quote from the transcript of a hearing held on February 28, 2018. The transcript from that hearing is the best evidence of what was said during that hearing. Ms. Gardner denies all allegations in paragraph 24 of the Information to the extent the allegations are inconsistent with the transcript from the hearing. Ms. Gardner denies all remaining allegations in paragraph 24 of the Information.

25. Ms. Gardner admits that on or about March 3, 2018, Robert Steele and Ms. Gardner entered their appearances on behalf of the State of Missouri in *State v. Greitens*. Ms. Gardner denies all remaining allegations in paragraph 25 of the Information.

26. Paragraph 26 of the Information purports to summarize and quote from an e-mail sent by Assistant Circuit Attorney (“ACA”) Rachel Smith on March 3, 2018. The e-

mail from ACA Attorney Smith dated March 3, 2018, is the best evidence of the contents of that e-mail. Ms. Gardner denies all allegations in paragraph 26 of the Information to the extent the allegations are inconsistent with the contents of that e-mail. Footnote 1 to paragraph 26, meanwhile, states several legal conclusions to which no response is required. To the extent a response is required, Ms. Gardner denies the allegations in footnote 1 of the Information to the extent they misquote or misstate Missouri law. Ms. Gardner denies all remaining allegations in paragraph 26 of the Information and the related footnote 1.

27. Paragraph 27 of the Information purports to summarize and quote an e-mail sent by Ms. Gardner to ACA Attorney Smith on March 3, 2018. The e-mail from Ms. Gardner to ACA Attorney Smith dated March 3, 2018, is the best evidence of the contents of that e-mail. Ms. Gardner denies all allegations in paragraph 27 of the Information to the extent the allegations are inconsistent with the contents of that e-mail.

28. Ms. Gardner denies the allegations in paragraph 28 of the Information, including because Ms. Gardner herself was not aware that the bullet points she had drafted still existed prior to the special prosecutor Gerard Carmody obtaining production of electronic records from the Circuit Attorney's Office during his investigation. Ms. Gardner further states that the bullet points were nothing more than her mental impressions in order to assist in a follow-up interview of K.S., and not something Ms. Gardner had focused on in terms of preservation or production.

29. Paragraph 29 of the Information purports to summarize and quote from the transcript of a hearing held on March 6, 2018. The transcript of the hearing held on March 6, 2018, is the best evidence of what was said during that hearing. Ms. Gardner denies the

allegations in paragraph 29 of the Information to the extent the allegations are inconsistent with the transcript from the March 6, 2018, hearing.

30. Ms. Gardner denies the allegations in paragraph 30 of the Information, including because paragraph 30 of the Information attributes to Ms. Gardner words that, according to paragraph 29 of the Information, were actually said by Judge Burlison. Further, to the extent Ms. Gardner confirmed that everything had been turned over, Ms. Gardner provided such confirmation based upon her personal knowledge and understanding of what documents existed and what had been produced to the defense at that time.

31. Paragraph 31 of the Information purports to summarize an email from ACA Attorney Smith sent to Ms. Gardner on or about March 7, 2018, as well as oral statements Ms. Smith made to Ms. Gardner. The e-mail sent from ACA Attorney Smith to Ms. Gardner on or about March 7, 2018 is the best evidence of that e-mail. Ms. Gardner denies the allegations in paragraph 31 of the Information to the extent the allegations are inconsistent with the March 7, 2018 e-mail sent from ACA Attorney Smith to Ms. Gardner. Ms. Gardner further states that she has and at the time had an understanding of her (and prosecutors') *Brady* obligations, and that Ms. Gardner intended to satisfy those obligations, prior to and separate from her communications regarding such matters with ACA Attorney Smith on March 7, 2018. Ms. Gardner also states that it is apparent from ACA Attorney Smith's March 7, 2018, e-mail that ACA Attorney Smith did not appreciate the difference between notes a prosecutor may take *during* a witness interview and a prosecutor recording his or her mental impressions written down *after* the interview. Ms. Gardner understood

and understands the former are discoverable but the latter are not. Further, Ms. Gardner's understanding on this point was confirmed by Mr. Dierker during the Greitens' investigation, and Mr. Dierker indicated in comments to Ms. Gardner that Mr. Greitens' defense team agreed with this distinction.

32. Ms. Gardner admits that on March 7, 2018, attorney N. Scott Rosenblum entered his appearance on behalf of defendant Greitens.

33. Ms. Gardner admits that on March 8, 2018, Robert Dierker entered his appearance on behalf of the State.

34. Ms. Gardner admits that Judge Burlison entered a Joint Proposed Scheduling Plan on March 8, 2018. The remaining allegations in paragraph 34 purports to quote from a Joint Proposed Scheduling Plan entered by the Court on March 8, 2018. The Joint Proposed Scheduling Plan entered by the Court on March 8, 2018, is the best evidence of the contents of that Joint Proposed Scheduling Plan. Ms. Gardner denies all allegations in paragraph 34 to the extent the allegations are inconsistent with the Joint Proposed Scheduling Plan.

35. Ms. Gardner denies the allegation in paragraph 35 of the Information as stated. Ms. Gardner further states that the bullet points Ms. Gardner prepared were her mental impressions and thus would not be discoverable, and Ms. Gardner believed she no longer had a copy of her bullet point document available as of March 8, 2018. Rather, that the Circuit Attorney's Office still had a copy of Ms. Gardner's original bullet point document only become known after the special prosecutor Mr. Carmody obtained all relevant electronic files from the Circuit Attorney's Office. Finally, Ms. Gardner was not

aware that (a), having assured Ms. Gardner he did not want and would not use anything she sent him, Mr. Tisaby had in fact reworked and reworked Ms. Gardner's bullet points, and then printed and took notes on that revised document, during the interview of K.S. on January 29, 2018; and (b) Mr. Tisaby had taken notes during his interview of J.W., an interview that Ms. Gardner did not attend.

36. Ms. Gardner admits that on March 6, 2018, defendant Greitens filed Defendant Eric Greitens' Motion to Compel Disclosure of Impeachment Evidence. Ms. Gardner denies all remaining allegations in paragraph 36 of the Information.

37. Ms. Gardner admits that on March 12, 2018, the State filed its response to Mr. Greitens' Motion to Compel Disclosure of Impeachment Evidence. The remaining allegations in paragraph 37 of the Information purports to quote from that Response. The State's Response is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 37 of the Information to the extent the allegations are inconsistent with that response filed by the State on March 12, 2018.

38. Ms. Gardner admits that on or about March 12, 2018, the State filed its Response to Defendant Eric Greitens' Supplemental Request for Discovery. The remaining allegations in paragraph 38 of the Information purport to summarize that Response. The State's Response is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 38 of the Information to the extent the allegations are inconsistent with the State's Response.

39. Paragraph 39 of the Information purports to summarize and quote from an e-mail sent from Mr. Tisaby to Ms. Gardner on March 13, 2018. The e-mail sent from Mr.

Tisaby to Ms. Gardner on March 13, 2018, is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 39 of the Information to the extent the allegations are inconsistent with the contents of the March 13, 2018, e-mail sent from Mr. Tisaby to Ms. Gardner. Ms. Gardner further states that she had asked Mr. Tisaby not to send emails to her personal email account, and Ms. Gardner did not recall seeing this email from Mr. Tisaby at the relevant time.

40. Ms. Gardner admits that on March 14, 2018, defendant Greitens filed a Notice of Videotaped Deposition of William Don Tisaby, with Exhibit A, which listed 12 categories of documents to be produced at the time of the deposition. The next sentence in paragraph 40 purports to list the first five categories of documents listed on Exhibit A of the Notice of Videotaped Deposition of William Don Tisaby. Exhibit A is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 40 of the Information to the extent the allegations are inconsistent with the first five categories listed in Exhibit A to the Notice of Videotaped Deposition of William Don Tisaby. Ms. Gardner denies all remaining allegations in paragraph 40 of the Information.

41. Ms. Gardner admits that on or about March 14, 2018, the State filed a Motion to Quash and for Protective Order regarding the Notice of Videotaped Deposition of Mr. Tisaby. The remaining allegations in paragraph 41 of the Information purport to summarize and quote from that Motion to Quash and for Protective Order. The Motion to Quash and for Protective Order is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 41 of the Information to the extent the allegations are inconsistent with the State's Motion to Quash and for Protective Order Regarding Defendant's Notice of

Videotaped Deposition of William Don Tisaby. Ms. Gardner denies all remaining allegations in paragraph 41 of the Information.

42. Ms. Gardner admits that, on or about March 15, 2018, the Court held a hearing where in part it addressed the State producing certain documents and preparing a privilege log. The remaining allegations in paragraph 42 of the Information purport to quote from the transcript from the hearing held on March 15, 2018. The hearing transcript is the best evidence of what it relates was said at that hearing. Ms. Gardner denies the allegations in paragraph 42 of the Information to the extent the allegations are inconsistent with the March 15, 2018, hearing transcript. Ms. Gardner denies all remaining allegations in paragraph 42 of the Information.

43. Ms. Gardner admits that on or about March 15, 2021, the Court entered an order in *State v. Greitens* concerning the production of records relating to Mr. Tisaby's deposition. The remaining allegations in paragraph 43 of the Information purport to quote from this Court order dated March 15, 2018. That Order is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 43 of the Information to the extent the allegations are inconsistent with the March 15, 2018, Court Order.

44. Ms. Gardner admits that on March 15, 2018, the State produced to the defense a flash drive that contained the documents identified in the Information as "Tisaby's Final Investigative Narrative Confidential of KS" and "Tisaby's Final J.W. Interview." Ms. Gardner denies the remaining allegations in paragraph 44 of the Information.

45. Ms. Gardner admits that on March 16, 2018, the State produced a privilege log. Ms. Gardner further states that the State's privilege log did not list the bullet points that Ms. Gardner prepared on January 28, 2018; the email Ms. Gardner sent to Mr. Tisaby forwarding those bullet points; Mr. Tisaby's modified version of the bullet points; Mr. Tisaby's handwritten notes from his interviews of K.S and J.W.; Mr. Tisaby's email to Ms. Gardner dated March 13, 2018; Mr. Tisaby's draft of his Interview Narrative of K.S.; or Mr. Tisaby's draft J.W. interview. Ms. Gardner further states that Ms. Gardner participated in preparing the privilege log, that Mr. Dierker provided guidance for the Circuit Attorney's Office in preparing its privilege log, and Ms. Gardner understood that Mr. Dierker's guidance reflected discussions Mr. Dierker had with the Greitens defense team. Ms. Gardner specifically recalls that Mr. Dierker advised the Circuit Attorney's Office did not need to turn over its attorneys' mental impressions or work product. Ms. Gardner denies all remaining allegations in paragraph 45 of the Information.

46. Paragraph 46 of the Information purports to compare the contents of two documents. Each of those documents is the best evidence of its own contents. Ms. Gardner denies the allegations in paragraph 46 of the Information to the extent the allegations are inconsistent with contents of those two documents. Ms. Gardner also denies all remaining allegations in paragraph 46 of the Information.

47. Paragraph 47 of the Information purports to compare the contents of two documents. Each of those documents is the best evidence of its own contents. Ms. Gardner denies the allegations in paragraph 46 of the Information to the extent the allegations are

inconsistent with contents of those two documents. Ms. Gardner also denies all remaining allegations in paragraph 47 of the Information.

48. Ms. Gardner admits that on or about March 18, 2018, Mr. Dierker sent an e-mail to ACA Attorney Smith, copying Ms. Gardner and Mr. Steele, regarding arguments Mr. Greitens' attorneys apparently intended to make regarding discovery. The remaining allegations in paragraph 48 of the Information purport to quote from this email dated March 18, 2018. The e-mail is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 48 of the Information to the extent the allegations are inconsistent with the contents of that email. Ms. Gardner also denies all remaining allegations in paragraph 48 of the Information. In addition, the email quoted evidences that Mr. Dierker personally, and not Ms. Gardner, served in a lead role communicating with the Greitens defense team regarding discovery and directing the Circuit Attorney's Office regarding preparation of its privilege log.

49. Ms. Gardner admits that on or about March 18, 2018, ACA Attorney Smith sent an e-mail to Mr. Dierker apparently replying to his e-mail dated March 18, 2018. The remaining allegations in paragraph 49 of the Information purport to quote from ACA Attorney Smith's reply to Mr. Dierker's March 18, 2018, e-mail. That e-mail is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 49 of the Information to the extent the allegations are inconsistent with the contents of ACA Attorney Smith's e-mail to Mr. Dierker on March 18, 2018. In addition, the email quoted evidences that Mr. Dierker personally, and not Ms. Gardner, served in a lead role

communicating with the Greitens defense team regarding discovery and directing the Circuit Attorney's Office regarding preparation of its privilege log.

50. Ms. Gardner denies the allegations in paragraph 50 of the Information as stated. Ms. Gardner further states that the bullet points Ms. Gardner prepared were her mental impressions and thus would not be discoverable, and Ms. Gardner believed she no longer had a copy of her bullet point document available as of March 8, 2018. Rather, that the Circuit Attorney's Office still had a copy of Ms. Gardner's original bullet point document only become known after the special prosecutor Mr. Carmody obtained all relevant electronic files from the Circuit Attorney's Office. Finally, Ms. Gardner was not aware that (a), having assured Ms. Gardner he did not want and would not use anything she sent him, Mr. Tisaby had in fact reworked and reworked Ms. Gardner's bullet points, and then printed and took notes on that revised document, during the interview of K.S. on January 29, 2018; (b) Mr. Tisaby had taken notes during his interview of J.W., an interview that Ms. Gardner did not attend; and (c) Mr. Tisaby had prepared draft reports, because – as explained in Ms. Gardner's response to paragraph 39 of the Information – Mr. Tisaby had emailed copies of his draft reports to Ms. Gardner's personal email account, an account Ms. Gardner had asked Mr. Tisaby not to use.

51. Ms. Gardner admits there was a hearing in *State v. Greitens* on March 19, 2018. The remaining allegations in paragraph 51 of the Information purport to quote from the transcript of that hearing. The transcript of the hearing is the best evidence of what it reports was said during that hearing. Ms. Gardner denies the allegations in paragraph 51 of the Information to the extent the allegations are inconsistent with the transcript's contents.

Ms. Gardner denies all remaining allegations in paragraph 51 of the Information, including for the reasons stated in Ms. Gardner's response to paragraph 50 of the Information, which reasons are restated and incorporated herein by reference.

52. Ms. Gardner admits that Mr. Dierker consulted with Ms. Gardner off the record before he said the language reported in paragraph 52 of the Information. Ms. Gardner denies all remaining allegations in paragraph 52 of the Information, including for the reasons stated in Ms. Gardner's response to paragraph 50 of the Information, which reasons are restated and incorporated herein by reference.

53. Ms. Gardner denies the allegations in paragraph 53 as stated, including for the reasons stated in Ms. Gardner's response to paragraph 50 of the Information, which reasons are restated and incorporated herein by reference.

54. Paragraph 54 of the Information violates the requirement in Rule 55.11 that allegations shall be set forth in separate, numbered paragraphs, in that paragraph 54 runs more than eight pages and contains numerous separate allegations. To the extent a response is required, Ms. Gardner admits that on March 19, 2018, Jim Martin, attorney for Mr. Greitens, took the sworn video deposition of Mr. Tisaby. Ms. Gardner admits she was present at the deposition. However, the Circuit Attorney's Office had not endorsed Mr. Tisaby as a witness and did not expect Mr. Tisaby to testify in the case, and Ms. Gardner did not believe she was serving as counsel for Mr. Tisaby at the deposition. Paragraph 54 of the Information also purports to quote from the transcript of Mr. Tisaby's deposition of March 19, 2018. The transcript would be the best evidence of its contents. Ms. Gardner

denies the allegations to the extent they are inconsistent with the transcript. Ms. Gardner denies all remaining allegations in paragraph 54 of the Information.

55. Ms. Gardner denies the allegations in paragraph 55 of the Information, , including for the reasons stated in Ms. Gardner's response to paragraph 54 of the Information, which reasons are restated and incorporated herein by reference.

56. Paragraph 54 of the Information violates the requirement in Rule 55.11 that allegations shall be set forth in separate, numbered paragraphs, in that paragraph 56 runs almost five pages and contains numerous separate allegations. To the extent a response is required, Ms. Gardner denies that she knowingly elicited false testimony from Mr. Tisaby, including for the reasons stated in Ms. Gardner's response to paragraphs 50 and 54 of the Information, which reasons are restated and incorporated herein by reference. The remaining allegations in paragraph 56 of the Information purport to quote from the transcript of Mr. Tisaby's deposition on March 19, 2018. The transcript is the best evidence of what it reports was said during that deposition. Ms. Gardner denies the allegations in paragraph 56 of the Information to the extent the allegations are inconsistent with the transcript's contents. Ms. Gardner denies all remaining allegations in paragraph 56 of the Information.

57. Ms. Gardner admits that on March 20, 2018, defense counsel for defendant Greitens filed a Witness Endorsement of William Don Tisaby. Ms. Gardner denies all remaining allegations in paragraph 57 of the Information.

58. Ms. Gardner admits that on April 4, 2018, counsel for defendant Greitens filed a Motion to Compel Production of Subpoenaed Records and Notice of Second

Deposition of Mr. Tisaby. Ms. Gardner denies all remaining allegations in paragraph 58 of the Information.

59. Ms. Gardner admits that on April 8, 2018, defendant Greitens through counsel filed a Motion to Compel Immediate Production of all Exculpatory Information that included videotape or equipment used to record Mr. Tisaby's interview of K.S. Ms. Gardner denies all remaining allegations in paragraph 59 of the Information.

60. Ms. Gardner admits that on or about April 11, 2018, Mr. Dierker emailed Ms. Gardner a draft Memorandum in Opposition to Motion to Compel and Re-Depose Tisaby. The remaining allegations of paragraph 60 of the Information purports to quote that draft Memorandum. The draft Memorandum is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 60 to the extent the allegations are inconsistent with the draft Memorandum. Ms. Gardner denies all remaining allegations in paragraph 60 of the Information, including for the reasons stated in Ms. Gardner's response to paragraph 50 of the Information, which reasons are restated and incorporated herein by reference.

61. Ms. Gardner admits that at or about 11:30 a.m. on April 11, 2018, Mr. Dierker e-mailed Ms. Gardner asking if the draft Memorandum in Opposition to Motion to Compel and Re-Depose Tisaby referenced in paragraph 60 of the Information was ready to be filed. Ms. Gardner admits that at or about 12:00 p.m. on April 11, 2018, Ms. Gardner responded that the draft Memorandum was not ready. Ms. Gardner denies all remaining allegations in paragraph 61 of the Information.

62. Ms. Gardner admits that on the evening of April 11, 2018, the Circuit Attorney's Office provided to the defense via courier:

- a. The working video of Mr. Tisaby's interview of K.S. January 29, 2018;
- b. Mr. Tisaby's 11 pages of handwritten notes taken during his interview of K.S. on January 29, 2018; and
- c. Ms. Gardner's handwritten notes from Mr. Tisaby's interview of K.S. on January 29, 2018.

The remaining allegations in paragraph 62 of the Information purport to summarize the contents of the above-referenced video and notes. Ms. Gardner denies all remaining allegations in paragraph 62 of the Information. The video and documents are the best evidence of their contents. Ms. Gardner denies the allegations in paragraph 62 of the Information to the extent the allegations are inconsistent with the contents of the video and notes described. Ms. Gardner denies all remaining allegations in paragraph 62 of the Information.

63. Ms. Gardner admits that on April 12, 2018, the Court held a hearing at which defense counsel argued in *State v. Greitens* that the State had concealed evidence and had allowed Mr. Tisaby to give false testimony under oath, suborning perjury and prejudicing the defense, and that Mr. Greitens' counsel asked for sanctions including dismissal of the indictment. The remaining allegations in paragraph 63 of the Information purport to quote the transcript from that hearing on April 12, 2018. The transcript is the best evidence of what it reports was said during that hearing. Ms. Gardner denies the allegations in paragraph 63 of the Information to the extent the allegations are inconsistent with the transcript's contents. Ms. Gardner denies all remaining allegations in paragraph 63 of the Information.

64. Paragraph 64 of the Information purports to quote from transcript of a confidential proceeding held in the court's chambers on April 12, 2018. The transcript from that proceeding is the best evidence of the transcript's contents. Ms. Gardner denies the allegations in paragraph 64 of the Information to the extent the allegations are inconsistent with the transcript's contents concerning that confidential proceeding. Ms. Gardner denies all remaining allegations in paragraph 64 of the Information.

65. Ms. Gardner admits that during the hearing on April 18, 2021, Mr. Steele conceded that some information in the notes Mr. Tisaby had written on his modified version of Ms. Gardner's bullet points might be relevant to a defense Mr. Greitens was expected to assert. The remaining allegations in paragraph 65 of the Information purport to quote from the transcript of a hearing held on April 12, 2018. That transcript is the best evidence of the transcript's contents. Ms. Gardner denies the allegations in paragraph 65 of the Information to the extent the allegations are inconsistent with the transcript reports was said at the hearing on April 12, 2018. Ms. Gardner denies all remaining allegations in paragraph 65 of the Information.

66. Paragraph 66 of the Information violates the requirement in Rule 55.11 that allegations shall be set forth in separate, numbered paragraphs, in that paragraph 66 runs more than three pages and contains numerous separate allegations. To the extent a response is required, Ms. Gardner admits that during the hearing on April 18, 2021, Mr. Greitens' counsel Mr. Martin argued that some information in the notes Mr. Tisaby had taken was exculpatory. The remaining allegations in paragraph 66 of the Information purports to quote from the transcript of a hearing held on April 12, 2018. That transcript is the best

evidence of the transcript's contents. Ms. Gardner denies the allegations in paragraph 66 of the Information to the extent the allegations are inconsistent with the transcript reports was said at the hearing on April 12, 2018. Ms. Gardner denies all remaining allegations in paragraph 66 of the Information.

67. Ms. Gardner denies the allegations in paragraph 67 of the Information as to the characterizations of statements made by Mr. Dierker. The remaining allegations in paragraph 67 of the Information purports to quote from the transcript of a hearing held on April 12, 2018. That transcript is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 67 of the Information to the extent the allegations are inconsistent with what the transcript reports was said at the hearing on April 12, 2018. Ms. Gardner denies all remaining allegations in paragraph 67 of the Information.

68. Ms. Gardner denies the allegations in paragraph 68 of the Information and its subparagraphs A through D as stated.

69. Ms. Gardner admits that the State filed a Memorandum in Opposition to Motion to Compel and for Sanctions, and that Memorandum the State (including Ms. Gardner) attempted to explain (a) how Ms. Gardner became aware that Mr. Tisaby had taken notes during his interview of K.S. and (b) how Mr. Tisaby's bullet points and notes were created. The remaining allegations in paragraph 69 of the Information purport to quote from that Memorandum in Opposition. That Memorandum in Opposition is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 69 of the Information to the extent the allegations are inconsistent with the contents of the Memorandum in Opposition. Ms. Gardner denies the remaining allegations in paragraph

69 of the Information, including that Ms. Gardner expressly denies that she falsely stated anything when making the statements reflected in paragraph 69 of the Information. Ms. Gardner further states that, as of April 12, 2018, Ms. Gardner failed to recognize that the typed bullet points underlying Mr. Tisaby's handwritten notes were Ms. Tisaby's revised, reformatted version of Ms. Gardner's own bullet points, which Mr. Tisaby had in January 2018 indicated he did not want and would not use. Ms. Gardner also restates and incorporates by reference her response to paragraph 50 of the Information here by reference.

70. Ms. Gardner admits that paragraph 70 of the Information purports to quote part of the language in the Memorandum in Opposition referenced in paragraph 69 of the Information. Ms. Gardner expressly denies that she knowingly made a false statement in that Memorandum in Opposition, including for the reasons stated in Ms. Gardner's responses to paragraphs 50, 54, and 69 of the Information, which responses are restated and incorporated herein by reference. The remaining allegations in paragraph 70 of the Information purport to quote from the same Memorandum in Opposition. That Memorandum in Opposition is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 70 of the Information to the extent the allegations are inconsistent with the contents of the Memorandum in Opposition. Ms. Gardner denies the remaining allegations in paragraph 70 of the Information.

71. Ms. Gardner admits that paragraph 71 of the Information purports to quote part of the language in the Memorandum in Opposition referenced in paragraph 69 of the Information. Ms. Gardner expressly denies that she knowingly made a false statement in

that Memorandum in Opposition, including for the reasons stated in Ms. Gardner's responses to paragraphs 50, 54, and 69 of the Information, which responses are restated and incorporated herein by reference. The remaining allegations in paragraph 71 of the Information purport to quote from the same Memorandum in Opposition. That Memorandum in Opposition is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 71 of the Information to the extent the allegations are inconsistent with the contents of the Memorandum in Opposition. Ms. Gardner denies the remaining allegations in paragraph 71 of the Information.

72. Ms. Gardner denies the allegations in paragraph 72 of the Information as stated, including for the reasons stated in Ms. Gardner's responses to paragraphs 50, 54, and 69 of the Information, which responses are restated and incorporated herein by reference.

73. Ms. Gardner admits on or about April 16, 2018, the State produced Mr. Tisaby's handwritten notes from his interview of J.W., as well as his draft of the J.W. interview. Ms. Gardner further admits that, after the State produced those notes, Mr. Greitens' counsel argued that Mr. Tisaby had testified under oath that those documents did not exist, that information contained in those documents was exculpatory, and that some of the exculpatory information was not contained in documents previously produced to Mr. Greitens' defense counsel. Ms. Gardner denies all remaining allegations in paragraph 73 of the Information, including that Ms. Gardner disagrees with the statements from Ms. Greitens' counsel regarding why the information would be exculpatory.

74. Ms. Gardner admits that the State did not produce Mr. Tisaby's e-mail dated March 13, 2018, to the Court or Mr. Greitens' defense counsel. Ms. Gardner denies all remaining allegations in paragraph 74 of the Information, including because the Circuit Attorney's Office terminated, rendering wholly irrelevant issues raised in paragraph 74.

75. Ms. Gardner admits that, at the hearing on April 16, 2018, Mr. Greitens' defense counsel sought to exclude K.S. and J.W. from testifying at trial as a sanction for alleged prosecutorial misconduct. The remaining allegations in paragraph 75 of the Information purports to summarize and quote from the transcript of a hearing held on April 16, 2018. The transcript from the hearing is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 75 to the extent the allegations are inconsistent with what the transcript reports was said at the hearing on the April 16, 2018. Ms. Gardner denies all remaining allegations in paragraph 75 of the Information.

76. Ms. Gardner admits that on April 18, 2018, the State filed a Supplemental Memorandum in Response to Defense Discovery Issues. The remaining allegations in paragraph 76 of the Information purports to summarize and quote from that Supplemental Memorandum. The Supplemental Memorandum is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 76 to the extent the allegations are inconsistent with Supplemental Memorandum. Ms. Gardner denies all remaining allegations in paragraph 76 of the Information, including the allegation that the State still had not produced notes subject to disclosure in discovery, because Ms. Gardner's bullet points were attorney work product not subject to discovery. Finally, Ms. Gardner restates and incorporates by referenced her responses to paragraphs 50, 54, and 69 of the Information.

77. Ms. Gardner admits that on April 19, 2018, the Court made a public, oral ruling on the Defendant's Motion to Compel and for Sanctions, the Defendant's Motion to Produce Exculpatory Information, the State's Memorandum in Opposition to Compel and for Sanctions, the Defendant's Second Supplemental Reply in Support of Motion to Dismiss, and State's Supplemental Memorandum in Response to Defendant's Discovery Issues. The remaining allegations in paragraph 77 of the Information purports to summarize and quote from the transcript of a hearing held on April 19, 2018. The transcript from the hearing is the best evidence of its contents. Ms. Gardner denies the allegations in paragraph 77 to the extent the allegations are inconsistent with what the transcript reports was said at the hearing on the April 19, 2018, and also for the reasons stated in Ms. Gardner's responses to paragraphs 50, 54, and 69 of the Information, which responses are restated and incorporated herein by reference. Ms. Gardner denies all remaining allegations in paragraph 77 of the Information.

78. Ms. Gardner admits that on April 23, 2018, the court heard arguments related to the production of Mr. Tisaby for a second deposition. Ms. Gardner denies that she falsely stated in open court that all notes regarding K.S. had been turned over to the defense. The remaining allegations in paragraph 78 of the Information purports to summarize and quote from the transcript of a hearing held on April 23, 2018. The transcript from the hearing is the best evidence of the transcript's contents. Ms. Gardner denies the allegations in paragraph 78 to the extent the allegations are inconsistent with what the transcript reports was said at the hearing on the April 23, 2018. Ms. Gardner denies all remaining allegations in paragraph 78 of the Information.

79. Ms. Gardner admits that Mr. Steele spoke at the hearing on April 23, 2018, and that Ms. Gardner was present for Mr. Steele's statements. The remaining allegations in paragraph 79 of the Information purports to summarize and quote from the transcript of a hearing held on April 23, 2018. The transcript from the hearing is the best evidence of the transcript's contents. Ms. Gardner denies the allegations in paragraph 79 to the extent the allegations are inconsistent with what the transcript reports was said at the hearing on the April 23, 2018. Ms. Gardner denies all remaining allegations in paragraph 79 of the Information.

80. Ms. Gardner denies the allegations in paragraph 80 of the Information as stated, including for the reasons stated in Ms. Gardner's responses to paragraphs 50, 54, and 69 of the Information, which responses are restated and incorporated herein by reference.

81. Ms. Gardner admits that on April 26, 2018, the defense took the second deposition of Mr. Tisaby, who was then represented by attorney Jermaine Wooten. Ms. Gardner admits on information and belief that Mr. Tisaby invoked his Fifth Amendment after the Court refused to allow Mr. Tisaby time with counsel to review his prior deposition testimony, and that Mr. Tisaby refused answer any substantive questions. Ms. Gardner admits on information and belief that the deposition was then terminated. Ms. Gardner denies all remaining allegations in paragraph 81 of the Information.

82. Ms. Gardner admits that on May 10, 2018, in proceedings in chambers, the judge allowed the defense to endorse Ms. Gardner as a witness at trial. The remaining allegations in paragraph 82 of the Information purports to summarize and quote from the

transcript of a hearing held on May 10, 2018. The transcript from the hearing is the best evidence of the transcript's contents. Ms. Gardner denies the allegations in paragraph 82 to the extent the allegations are inconsistent with what the transcript reports was said at the hearing on the May 10, 2018. Ms. Gardner denies all remaining allegations in paragraph 82 of the Information.

83. Ms. Gardner admits on May 14, 2018, the State filed a Nolle Prosequi of *State of Missouri vs. Eric Greitens* (Cause No. 1822-CR00642). Ms. Gardner admits the judge discharged defendant Greitens from his bond and closed the case. Ms. Gardner denies all remaining allegations in paragraph 83 of the Information.

84. Ms. Gardner admits on information and belief that on or about July 2, 2018, an ethics complaint against Ms. Gardner was submitted to the OCDC regarding Ms. Gardner's conduct in *State of Missouri v. Eric Greitens*, Cause No. 1822-CR00642. Ms. Gardner denies all remaining allegations in paragraph 84 of the Information.

85. Ms. Gardner admits on November 15, 2018, Ms. Gardner submitted her response to the ethics complaint. Ms. Gardner denies all remaining allegations in paragraph 85 of the Information.

86. Paragraph 86 of the Information violates the requirement in Rule 55.11 that allegations shall be set forth in separate, numbered paragraphs, in that paragraph 86 runs approximately one full page and contains numerous separate allegations. To the extent a response is required, Ms. Gardner denies the allegations in paragraph 86 as stated, including for the reasons stated in Ms. Gardner's responses to paragraphs 50, 54, and 69 of the Information, which responses are restated and incorporated herein by reference.

87. Ms. Gardner denies the allegations in paragraph 87 of the Information as stated.

88. Ms. Gardner denies the allegations in paragraph 88 of the Information.

89. Ms. Gardner denies the allegations in paragraph 89 of the Information.

90. Ms. Gardner denies the allegations in paragraph 90 of the Information.

91. Ms. Gardner denies the allegations in paragraph 91 of the Information.

92. Ms. Gardner denies the allegations in paragraph 92 of the Information.

93. Ms. Gardner denies the allegations in paragraph 93 of the Information.

94. Ms. Gardner denies the allegations in paragraph 94 of the Information.

95. Ms. Gardner denies the allegations in paragraph 95 of the Information.

96. Ms. Gardner denies the allegations in paragraph 96 of the Information.

97. Ms. Gardner denies the allegations in paragraph 97 of the Information.

98. Ms. Gardner denies the allegations in paragraph 98 of the Information.

99. Ms. Gardner denies the allegations in paragraph 99 of the Information.

100. Ms. Gardner denies the allegations in paragraph 100 of the Information.

101. Ms. Gardner denies the allegations in paragraph 101 of the Information.

102. Ms. Gardner denies the allegations in paragraph 102 of the Information.

103. Ms. Gardner denies the allegations in paragraph 103 of the Information.

104. Ms. Gardner denies the allegations in paragraph 104 of the Information. Ms.

Gardner also does not object to the designation of counsel for Informant after paragraph 104 of the Information.

WHEREFORE, respondent Kimberly M. Gardner asks this Court to dismiss the charges against her or otherwise resolve the charges against her in a fair, just, and equitable fashion, or grant Ms. Gardner any other or further relief as this Court deems just and proper.

DEFENSES AND AFFIRMATIVE DEFENSES

1. Ms. Gardner denies all allegations that have been or may be alleged against her that are not expressly admitted in this Answer, included in any superseding or amended Information. Ms. Gardner further asserts the Affirmative Defenses set forth in this Answer against all claims that have or may be asserted against her in this litigation.

2. Ms. Gardner denies that the State had an obligation to disclose Ms. Gardner's bullet points or her personal notes from the interview of K.S. on January 24, 2018, because Ms. Gardner's bullet points constituted her mental impressions and were attorney opinion work product, and thus protected from discovery. Also, neither Ms. Gardner or the Circuit Attorney's Office were aware Office had a copy of Ms. Gardner's document containing bullet points until the document was discovered when the special prosecutor against Mr. Tisaby Gerard Carmody obtained a wholly unprecedented seizure of every possible relevant electronically stored document from Ms. Gardner's office.

3. Ms. Gardner and the Circuit Attorney's Office promptly produced her six pages of handwritten notes taken during the interview of K.S. on January 24, 2018.

4. Ms. Gardner and the Circuit Attorney's Office disclosed her handwritten notes from the interview of K.S. on January 29, 2018, along with a video recording of that interview and Mr. Tisaby's notes from the interview. Ms. Gardner produced these three

items from the January 29, 2018 K.S. interview after Ms. Gardner viewed recording and realized she and Mr. Tisaby took notes during the interview.

5. Ms. Gardner denies that she made any knowing or deliberate misstatement regarding the existence of a functioning videorecording of the interview of K.S. on January 29, 2018.

6. Ms. Gardner should not be sanctioned for the conduct at issue during the prosecution of *State v. Greitens*, because (a) the trial court imposed its own sanctions; (b) Ms. Gardner would have been required to testify at subsequent proceedings in *State v. Greitens*; (c) the information sought by Mr. Greitens' defense counsel was not exculpatory to the charges against Mr. Greitens; and (d) the State voluntarily dismissed its prosecution of Mr. Greitens.

7. Ms. Gardner did not violate any obligation to correct a prior incorrect statement of material law or fact, because the statements cited in the Information were not material to the prosecution of Mr. Greitens and/or were discovered after the proceeding had concluded.

8. Ms. Gardner did not endorse Mr. Tisaby as a witness, intend to call Mr. Tisaby as a witness, or represent Mr. Tisaby at his deposition. Therefore, the professional obligations that attorneys have when their client is testifying did not apply to Ms. Gardner. In fact, it was appropriate for Ms. Gardner to ask Mr. Tisaby questions that reiterated his prior inaccurate testimony. Further, even if Ms. Gardner had an obligation to prevent Mr. Tisaby from testifying incorrectly, none of the misstatements made by Mr. Tisaby during his deposition were material to the Greitens case.

9. Ms. Gardner and the Circuit Attorney Office took guidance from Mr. Dierker regarding the privilege log submitted to defense counsel, including what information to disclose or not disclose on the privilege log. Mr. Dierker is a well-recognized expert on criminal law, evidence, and related issues. Therefore, Ms. Gardner reasonably relied upon Mr. Dierker's advice and professional judgment.

10. Ms. Gardner provided appropriate supervision, but allowed Mr. Dierker and Ms. Smith to have personal responsibility for, to make personal communications with the Greitens defense team, and to take personal action concerning responding to discovery in the Greitens matter. Thus, Ms. Gardner lacked personal involvement with every single aspects of the matters cited in the Information.

11. This matter remains in its earliest stages. Ms. Gardner therefore reserves the right to supplement this Answer with additional defenses or affirmative defenses as the facts may indicate appropriate.

WHEREFORE, respondent Kimberly M. Gardner asks this Court to dismiss the charges against her or otherwise resolve the charges against her in a fair, just, and equitable fashion, or grant Ms. Gardner any other or further relief as this Court deems just and proper.

Respectfully submitted,

DOWNEY LAW GROUP LLC

/s/ Michael P. Downey

Michael P. Downey, Mo. Bar # 47757

Paige Tungate, Mo. Bar #68447

49 North Gore Avenue, Suite 2

Saint Louis, MO 63119

(314) 961-6644 main

(314) 482-5449 direct

MDowney@DowneyLawGroup.com

PTungate@DowneyLawGroup.com

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
(573) 635-7400
Alan.pratzel@courts.mo.gov

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