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NO. 53952-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Appellant,

v.

ROBERT GLEN CARPENTER,

Respondent.

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 18-1-04889-5

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Disqualification of an entire prosecuting attorney's office is a drastic remedy that should only be imposed when absolutely necessary. Our Supreme Court has repeatedly stated that when a deputy prosecuting attorney can be effectively screened from a case, then the drastic measure of disqualifying the entire prosecutor's office is "neither necessary nor wise." *State v. Stenger*, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988); *State v. Nickels*, 195 Wn.2d 132, 136, 456 P.3d 795 (2020).

Both the Rules of Professional Conduct (RPCs) and our Supreme Court authorize the screening of deputy prosecuting attorneys from cases where they have a conflict of interest, and any conflict of an individual deputy prosecuting attorney is not imputed to disqualify the entire prosecutor's office. Robert Carpenter wants this Court to overturn decades of Washington Supreme Court case law and issue a ruling not based on well-established law, but on what he refers to as the appearance of impropriety. It is undisputed that the deputy prosecuting attorneys assigned to Carpenter's criminal case have been completely screened from any information in the civil division. The timely and effective screening in Carpenter's case preserves the appearance of a just proceeding and

complements the long-standing principle that courts presume prosecutors act in good faith.

The Washington Supreme Court has recognized that since 2006, RPC 1.10 and RPC 1.11 have provided that a deputy prosecuting attorney's personal conflict of interest is not imputed to the entire prosecutor's office. These RPCs are dispositive in this case. Carpenter fails to cite any legal authority justifying disqualification of the entire Pierce County Prosecuting Attorney's Office (PCPAO). The only appellate decisions in Washington State that have upheld the disqualification of an entire prosecutor's office involve the rare situations where an *elected* prosecutor has represented a defendant in the same case or a closely interwoven matter. It is undisputed that the elected prosecutor never represented Carpenter in this case or any other case.

Effective screening methods have been in place since the inception of Carpenter's criminal case. The trial court erred by concluding that the RPCs "mandate when an office is personified" and imputing a civil deputy prosecuting attorney's conflict to the entire prosecutor's office. The trial court incorrectly applied the law and abused its discretion by disqualifying the entire prosecutor's office. This Court should reverse the trial court's ruling.

II. ARGUMENTS IN REPLY

A. Carpenter incorrectly argues that the standard of review in this case involves only an abuse of discretion standard.

Carpenter argues that a trial court's decision to disqualify an attorney is reviewed under an abuse of discretion standard and that this is "the most difficult standard for an appellant to meet." Br. of Respondent (hereafter, Response) at 6-7. This argument presents an incomplete picture of the standard of review applicable to Carpenter's case.

Appellate courts do review a trial court's decision to disqualify an entire prosecutor's office under an abuse of discretion standard. *State v. Schmitt*, 124 Wn. App. 662, 666-67, 102 P.3d 856 (2004). When a trial court applies the law incorrectly, it abuses its discretion. *State v. Orozco*, 144 Wn. App. 17, 20, 186 P.3d 1078 (2008). But whether an attorney's conduct violates the RPCs is a question of law that is reviewed de novo. *Nickels*, 195 Wn.2d at 136. And courts review a determination about whether a conflict of interest exists de novo because it is a question of law. *Orozco*, 144 Wn. App. at 20. Finally, the trial court's findings of fact are reviewed for substantial evidence, but whether the trial court derived proper conclusions of law from its factual findings is reviewed de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); *State v. McEnry*, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). Here, the PCPAO did not violate the RPCs, there was no conflict of interest precluding the PCPAO from prosecuting

Carpenter's criminal case, and the trial court's conclusions of law are improper. All of these issues are reviewed de novo.

B. The Rules of Professional Conduct are dispositive in this case and provide that the conflict of one deputy prosecuting attorney is not imputed to the entire prosecutor's office.

In his response, Carpenter completely ignores the RPCs and their applicability to his case. He fails to provide any analysis of the relevant RPCs or explain why this Court should disregard RPC 1.10 and RPC 1.11, which are dispositive of the issue in this case. Instead, he mischaracterizes the trial court's ruling by claiming that it was issued "less on the basis of RPC 1.7, RPC 1.9, and more on the appearance of impropriety" of a prosecutor's office representing an officer it had previously represented and used as an expert witness. *See* Response at 4-5. This Court should reject Carpenter's attempt to recast his argument and completely disregard the RPCs, which were the sole basis of the trial court's written order.

Carpenter's assertion that the trial court's ruling was "less on the basis of RPC 1.7, RPC 1.9" and "more on the appearance of impropriety" is not supported by the record. On the contrary, the trial court's written findings of fact and conclusions of law were explicitly based on the RPCs. Other than concluding that it had jurisdiction in this case, the trial court issued only two conclusions of law—neither of which involved the

appearance of impropriety. *See* CP 40. Rather, the trial court explicitly based its conclusions of law on the RPCs:

The Rules of Professional Conduct mandate when an office is personified, and in this case the Pierce County Prosecutors Office has a conflict prosecuting Defendant.

CP 40 (emphasis added). The trial court reached this conclusion of law after Carpenter explained that it means “if one DPA is conflicted, the office is conflicted.” 10/18/19 RP 5. The court then concluded that the conflict arises out of the office’s prior representation of Carpenter “in a same or similar civil allegation in federal court,” which includes his prior employment as a use of force expert. CP 40.

The trial court does not reference an “appearance of impropriety” anywhere in its findings or conclusions. CP 39-41. Carpenter’s assertion that the trial court did not rely on the RPCs in its written findings and conclusions misrepresents the record. *See* Response at 6, n. 24. The written order indicates that the RPCs were the sole basis of the trial court’s conclusions of law. CP 40.

Although the trial court’s oral ruling indicates that the “appearance” of the prosecutor’s office prosecuting Carpenter after representing him in the civil case and using him as an expert justifies disqualification, the court did not incorporate this oral ruling into its written order. *See* 10/9/19 RP 14-15; CP 39-41. A trial court’s oral decision has no binding or final effect unless it

is formally incorporated into the findings of fact and conclusions of law. *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980). A trial court's oral statements are "no more than a verbal expression of (its) informal opinion at that time" and "may be altered, modified, or completely abandoned." *Id.* at 458. The written decision is considered the court's "ultimate understanding" of the issue. *Id.* at 459.

The trial court's oral reference to the "appearance" of the proceedings has no binding effect because it was not incorporated into the findings and conclusions. In fact, the State included a reference to the appearance of the proceedings in its proposed findings of fact and conclusions of law, and the trial court declined to adopt it. CP 42-44; 10/18/19 RP 3-4, 10. Thus, this Court should reject Carpenter's repeated reliance on an oral ruling that the trial court completely abandoned when it issued its written order.

Further, the record shows that the trial court issued the exact ruling Carpenter requested—a ruling based on the RPCs. Carpenter's "memorandum of authorities" arguing for recusal of the entire prosecutor's office is barely three pages long and cites only RPC 1.7(a) and RPC 1.9 as the legal authority for his claim that the PCPAO must be disqualified. CP 30-32. Carpenter argued that "*the RPC's mandate that the Pierce County Prosecutor's Office must withdraw*" and recuse itself. CP 31 (emphasis added). But Carpenter cited to irrelevant and

inapplicable RPCs—RPC 1.7(a) and RPC 1.9—and misled the court that these RPCs mean that “if one DPA is conflicted, the office is conflicted.” *See* 10/18/19 RP 5. He informed the court that he cited the RPCs and “[t]hey simply say a law firm is a law firm. It’s personified.” 10/9/19 RP 3. But this is not what the RPCs state about government attorneys employed at a prosecutor’s office. Carpenter ignored the relevant RPCs—RPC 1.10 and RPC 1.11—which indicate that the conflict of a government attorney is *not* imputed to the entire prosecutor’s office. *See* RPC 1.10(d), RPC 1.11 cmt. 2. Thus, the trial court erred by relying on Carpenter’s flawed legal analysis and by issuing a ruling that was contrary to the RPCs.

In a footnote, Carpenter argues that the State spends an “inordinate amount of time discussing RPC 1.7, RPC 1.9, RPC 1.10, and RPC 1.11 and the development of the law regarding the presumptive disqualification of an entire prosecuting attorney’s office where the elected prosecutor previously represented the defendant.” Response at 6, n. 24. The State analyzed RPC 1.7(a) and RPC 1.9 because it was the sole basis of Carpenter’s motion to the trial court. And the trial court’s ruling was based on the RPCs. CP 40. The State analyzed RPC 1.10 and RPC 1.11 because these are the relevant RPCs that Carpenter should have provided to the trial court, which are dispositive in this case. Carpenter inexplicably fails to address any of the RPCs in his response.

Finally, the State analyzed the “development of the law” regarding disqualification of an entire prosecutor’s office because the case law is clear that there is no basis to disqualify the entire prosecutor’s office under the facts of this case. It is well established that when a deputy prosecuting attorney can be effectively screened from a case, then the drastic measure of disqualifying the entire prosecutor’s office is “neither necessary nor wise.” *Stenger*, 111 Wn.2d at 522-23; *Nickels*, 195 Wn.2d at 136. It is accepted practice for different attorneys within the same public office to represent different clients with conflicting interests if effective screening mechanisms are in place. *Sammamish Cmty. Mun. Corp. v. City of Bellevue*, 107 Wn. App. 686, 693, 27 P.3d 684 (2001); *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 686, 700 P.2d 350 (1985); *Sherman v. State*, 128 Wn.2d 164, 187, 195-96, 905 P.2d 355 (1995).

The *only* appellate decisions in Washington State that have upheld the disqualification of an entire prosecutor’s office involve the rare situations where an *elected* prosecutor has represented a defendant in the same case or a closely interwoven matter. Carpenter fails to cite to any legal authority that justifies disqualification of the entire prosecutor’s office.

The trial court’s conclusion that the PCPAO has a conflict prosecuting Carpenter because the “Rules of Professional Conduct

mandate when an office is personified” is error. *See* CP 40. The RPCs—specifically RPC 1.10 and RPC 1.11—indicate the exact opposite of the court’s conclusion. RPC 1.10 and RPC 1.11 provide that a government attorney’s conflict of interest is not imputed to the entire office. RPC 1.10(d); RPC 1.11 cmt. 2. These RPCs embrace screening as a means of avoiding disqualification of an entire prosecutor’s office based on the conflict of one deputy prosecuting attorney.

The deputy prosecuting attorneys assigned to Carpenter’s criminal case do not have a conflict of interest prosecuting the case. It is undisputed that they have been completely screened from any information in the civil division about Carpenter. And the civil attorney who represented Carpenter in the federal lawsuit no longer worked at the prosecutor’s office when the criminal charges were filed. CP 27-28; *see* CP 1. The declarations submitted by the deputy prosecuting attorneys indicate that no information was exchanged between the civil and criminal divisions. CP 21-28. In fact, the criminal prosecutors are *unable* to access any files, databases, or case information in the civil division. CP 22. Nothing in the record indicates that the civil attorneys revealed information regarding Carpenter’s representation in violation of the RPCs. The trial court erred by concluding that the PCPAO has a conflict of interest based on the RPCs. And the court abused its

discretion by disqualifying the entire prosecutor's office from handling Carpenter's criminal case.

C. This Court is not required to “defer” to the trial court’s findings because the trial court did not weigh conflicting testimony or make any credibility determinations.

Appellate courts defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Carpenter repeatedly asserts that the trial court made credibility determinations and that this Court “must defer” to those credibility determinations and not reweigh the evidence. Response at 16-17, 19-22. This Court should reject Carpenter's attempt to reframe the trial court's findings into an issue involving witness credibility. There was no testimony or conflicting evidence below, and the trial court did not make any credibility determinations.

Appellate courts stand in the same position as the trial court in reviewing written submissions such as affidavits and declarations. *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 35-36, 769 P.2d 283 (1989); *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). They are not bound by a trial court's findings of fact that are based on documentary, nontestimonial evidence. *Danielson v. City of Seattle*, 45 Wn. App. 235, 240, 724 P.2d 1115

(1986), *affirmed*, 108 Wn.2d 788, 742 P.2d 717 (1987). In such a situation—where the trial court reviews affidavits without any witness testimony—the appellate court is as competent as the trial court to weigh and consider the evidence that supports the findings of fact and is not bound by the trial court’s findings. *Id.*

Here, the parties submitted only written declarations. *See* CP 20-28, 33-34. The trial court did not consider any testimony at the hearing. *See* 10/9/19 RP 2-15. Because the trial court did not hear any testimony requiring it to assess the credibility of witnesses or reconcile conflicting evidence, this Court is not bound by the trial court’s factual findings and should review the record de novo. *See Progressive Animal Welfare Soc.*, 125 Wn.2d at 252-53.

Carpenter claims that the trial court found his declaration “to be more credible and worthy of more weight” than the declarations submitted by the PCPAO. Response at 16-17. Carpenter’s argument mischaracterizes the record.

First, there was no conflicting evidence. *See* CP 8-28, 30-34. Carpenter never disputed the facts contained in the declarations submitted by the three deputy prosecuting attorneys.

Second, the trial court did not make any credibility determinations in its ruling. Carpenter asserts that the trial court found that the PCPAO’s

declarations were not “sufficiently credible” and found that there were insufficient screening practices in place to protect against the dissemination of confidential information. Response at 5, 19-21. The record does not support these assertions. The trial court did not make any credibility determinations. *See* CP 39-41; 10/9/19 RP 13-15. And the court did not find that the PCPAO implemented insufficient screening practices. Rather, it recognized that the PCPAO’s screening practices involve a completely “separate computer system” for the civil division. 10/9/19 RP 14.

It is undisputed that the criminal deputy prosecuting attorneys cannot access the civil division’s files. *See* CP 22. The trial court presumed—without any evidence—that screening does not work because “we all know how information travels within an office.” 10/9/19 RP 14. Nothing in the record supports this finding. Because the trial court did not hear testimony requiring it to assess the credibility of witnesses, this Court should not “defer” to the trial court’s factual findings and should instead review the record de novo.

D. The deputy prosecuting attorneys handling Carpenter’s criminal case do not have access to any confidential statements made by Carpenter in any civil case.

Carpenter claims that depending on how he testifies at trial, “the PCPAO could use statements made in confidence while represented by the PCPAO” or could use statements “when he testified as an expert witness”

against him at trial. Response at 14. This argument ignores the fact that the criminal deputy prosecuting attorneys are completely screened from Carpenter's civil cases and unable to access any of this information. And any testimony Carpenter gave as an expert witness is not confidential and may be used by any prosecutor's office at trial.

First, the deputy prosecuting attorneys handling Carpenter's criminal case cannot cross-examine him with statements "made in confidence while represented by the PCPAO" because they are unable to access any of this confidential information. The criminal prosecutors are completely screened from all civil cases. CP 22; *see also* CP 24-25, 27-28.

Carpenter's argument improperly presumes that the prosecutors will act unethically and secretly obtain information in bad faith. Prosecutors are presumed to act in good faith. *State v. Terrovonia*, 64 Wn. App. 417, 421, 824 P.2d 537 (1992); *see Nickels*, 195 Wn.2d at 151 (Yu, J., concurring in part and dissenting in part); *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 138 L.Ed.2d 97 (1997) (public officers are presumed to properly discharge their official duties).

Screening mechanisms have been in place since the inception of the criminal case and will continue throughout the proceedings. Even the trial court recognized that the civil division has "a separate computer system" and that all the prosecutors "would act in good faith." 10/9/19 RP 14; *see*

CP 40. Although the trial court inexplicably followed this acknowledgment by stating “but we all know how information travels within an office,” nothing in the record even remotely suggests that this happened in Carpenter’s case. *See* 10/9/19 RP 14. Carpenter argues that the trial court was more concerned with the “informal means” that information could travel in an office—by “gossip” between attorneys and support staff. Response at 19. But this argument assumes, without any evidence, that the civil and criminal divisions are “gossiping” about Carpenter in violation of confidentiality rules. The uncontested evidence is that no information about Carpenter traveled between the civil and criminal divisions. *See* CP 21-28. To disqualify an entire prosecutor’s office based on pure speculation is improper and an abuse of discretion.

Second, any prior testimony Carpenter offered as an expert witness is not confidential and is a matter of public record. It can be used by *any* prosecuting attorney’s office—including the prosecutor’s office appointed to represent the State if the PCPAO is disqualified. This does not provide a basis to disqualify the entire PCPAO. And to the extent that Carpenter is referring to any general statements he made as an expert witness in the 2009 civil case—or any other civil case—the criminal division of the prosecutor’s office is completely screened from those communications. CP 22. Further, as the trial court recognized,

there was no attorney-client relationship because prosecutors do not “represent” expert witnesses. *See* 10/9/19 RP 8. Rather, expert opinions are disclosable and available to both parties. *See State v. Hamlet*, 133 Wn.2d 314, 322, 944 P.2d 1026 (1997) (disclosure of psychiatrist’s evaluation of defendant is not prohibited and expert’s opinion and testimony are available to both the State and defendant).

Carpenter argues that the State “ignores the record below” by challenging Finding of Fact No. 8 and claiming that the record indicates that Carpenter was used as an expert witness one time in the civil division where he was deposed about his training and experience as a defensive tactics and firearms instructor. Response at 15. On the contrary, the State relied on Carpenter’s own declaration for this assertion. *See* CP 33-34. Carpenter mischaracterizes the record in an attempt to make his associations with the PCPAO more significant than they are.

In his response, Carpenter argues that his declaration “clearly states that, in addition to spending ‘significant time’ with the PCPAO prosecutors discussing ‘a wide range of topics to include [his] training...defense philosophies, and other confidential communications,’” he “had additional significant contacts with” the PCPAO. Response at 15. But Carpenter omits the fact that his reference to the “significant time” he spent with the prosecutors discussing “a wide range of topics,” refers only to the

Duckworth case—the 2014 civil lawsuit where he was sued for using excessive force. *See* CP 33.

Carpenter then claims that he had “additional significant contacts” with the PCPAO and implies that his declaration indicates his involvement in more cases than what is outlined in his declaration. Response at 15-16. It does not. His declaration indicates that he had “additional significant contacts” with the PCPAO and then provides specific information on what those “significant” contacts were: (1) his deposition as an expert witness about his training and experience as a defensive tactics and firearms instructor in a 2009 civil case; (2) his deposition in the 2014 civil case (Duckworth) where he was sued for using excessive force; and (3) conducting use of force and defensive tactics training for law enforcement officers where four unknown and unnamed deputy prosecuting attorneys attended during an eleven-year period. CP 33-34.

Nothing in Carpenter’s declaration states that he had any other “significant contacts” with the PCPAO. And it certainly does not establish that he engaged in “strategic and confidential communications” in the defense of other deputies as Carpenter claims. *See* Response at 16; *see also* CP 33-34. The declaration indicates only that he was *deposed* on another case about his training and experience—not that he engaged in any strategic

or confidential communications. CP 33. Not only is his training and experience not “confidential,” but neither is a deposition.

Carpenter’s limited involvement with the civil division of the PCPAO does not justify disqualification of the entire prosecutor’s office, particularly where the undisputed evidence is that the criminal deputy prosecuting attorneys cannot access any information in the civil division. Effective screening methods have been in place since the inception of the criminal case. There is no conflict of interest that supports disqualification of the entire prosecutor’s office.

E. The trial court erred by concluding that the entire PCPAO has a conflict of interest because its civil division represented Carpenter “in a same or similar civil” case.

Substantial evidence does not support the trial court’s finding that Carpenter’s civil lawsuit is analogous to the criminal case, and the trial court erred by concluding that the entire PCPAO has a conflict of interest due to its prior representation of Carpenter “in a same or similar civil allegation in federal court.” *See* CP 40.

Carpenter goes into detail arguing the merits of his case for trial, including that he will be asserting a self-defense claim. He argues that an off-duty police officer not acting in his official capacity “maintains the authority of an on-duty officer to make arrests.” Response at 12. He then argues that he was the victim of a “strong-arm robbery where his service

handgun¹ was forcibly taken” from him and that he was merely attempting to “arrest the man.” Response at 13. According to the Declaration of Probable Cause, immediately before the incident, Carpenter was off-duty and consuming alcohol at a bar while armed with a firearm. CP 2. He flirted with the alleged victim, S.C., and left the bar—intoxicated—after making plans to meet S.C. and his friend at a marijuana dispensary before going to a hotel to engage in sexual acts. CP 2-3. The Probable Cause statement indicates that Carpenter and S.C. then got into a personal dispute in the parking lot at the marijuana dispensary, which turned violent. *Id.* When Carpenter exposed his handgun, S.C. became fearful, disarmed Carpenter, and tried to flee. *Id.* Carpenter did not arrest S.C.—he repeatedly stabbed him. *Id.* Police officers arrived and heard S.C. yelling, “Help me! He is killing me!” *See* CP 2. Whether Carpenter was a “victim” and acting in his “official capacity” by repeatedly stabbing S.C. is a factual issue that will be resolved at trial. This is not the issue on appeal.

The issue for purposes of this appeal is whether the trial court erred by concluding that the entire PCPAO has a conflict of interest due to its prior representation of Carpenter “in a same or similar civil allegation in federal court.” *See* CP 40. Our Supreme Court has affirmed decisions

¹ The probable cause statement indicates that the handgun was Carpenter’s personal handgun that he purchased approximately two months before the incident. CP 3.

disqualifying an entire prosecutor's office only in those rare cases where the *elected* prosecutor personally represented the defendant in either "the same case or a closely interwoven matter." *See, e.g., Nickels*, 195 Wn.2d at 134, 142; *Stenger*, 111 Wn.2d at 522-23. It is undisputed that the elected prosecutor did not represent Carpenter in this case or any other case. The trial court's conclusion that this case is "the same or similar" to Carpenter's civil lawsuit does not support disqualification of the entire prosecutor's office.

F. Public policy does not support disqualifying the entire prosecutor's office.

Contrary to Carpenter's assertion, the Washington Supreme Court did not reject the public policy arguments raised by the State in Carpenter's case. Carpenter's reliance on *Nickels* to support his public policy arguments is misplaced. *Nickels* is readily distinguishable from Carpenter's case.

First, the appearance of a just proceeding is not compromised where a deputy prosecuting attorney is effectively screened from the case. Although prosecutors are not subject to the appearance of fairness doctrine,² the State agrees that the public's confidence in the impartial administration of justice depends on society's perception that the proceedings are fair. *See* Br. of Appellant at 41; *see also Nickels*, 195 Wn.2d at 138.

² *State v. Finch*, 137 Wn.2d 792, 808-10, 975 P.2d 967 (1999).

In *Nickels*, the lead opinion held that *Stenger* remains good law and creates a narrow exception that presumptively requires disqualification of the entire prosecutor's office where the elected prosecutor previously represented the defendant in the same case or in a closely interwoven matter. *Nickels*, 195 Wn.2d at 134, 142. "In those cases, office-wide disqualification—not screening—is required to preserve the appearance of a just proceeding and the public's confidence in the impartial administration of justice." *Id.* at 142 (emphasis added). Central to the Court's analysis was its determination that "no amount of screening can be sufficient to fully wall off [the elected prosecutor] from the case." *Id.* at 139. It was the significant powers of a conflicted *elected* prosecutor in prosecuting the same defendant in the same case that affected the appearance of a just proceeding:

What is determinative is our evaluation of the effect of permitting the office of a conflicted elected prosecutor who retains significant administrative and discretionary powers, regardless of any screening—to prosecute the *same* defendant in the *same* case, which we must then measure against the public's right to *absolute* confidence in the integrity and impartiality of the administration of justice and the appearance of a just proceeding.

Id. at 140 (emphasis in original).

Carpenter's case is readily distinguishable from *Nickels*. Office-wide disqualification is not required to preserve the appearance of a just proceeding where the deputy prosecuting attorneys handling Carpenter's

criminal case were completely screened from all records in the civil division and where the civil attorney who represented Carpenter in the federal lawsuit no longer worked in the office when the criminal charges were filed. The concerns addressed in *Nickels* simply are not present in Carpenter's case.

Allowing the PCPAO to proceed with prosecuting Carpenter's criminal case does not create an appearance of unfairness. *See Amoss*, 40 Wn. App. at 686 (finding no impropriety or violation of the appearance of fairness doctrine when two assistant attorneys general represented conflicting interests but kept separate files and did not share information). The timely and effective screening in Carpenter's case preserves the appearance of a just proceeding and complements the long-standing principle that courts "presume our public officers act in good faith." *Nickels*, 195 Wn.2d at 151 (Yu, J., concurring in part and dissenting in part). It is a well-established principle that public officers are presumed to properly discharge their official duties. *Bracy v. Gramley*, 520 U.S. at 909; *Terrovonia*, 64 Wn. App. at 421 (presuming that prosecutors act in good faith). Because courts presume that prosecutors act in good faith, the appearance of fairness is not compromised if a conflicted *deputy* prosecuting attorney is properly screened from the case.

Second, office-wide disqualification in Carpenter’s case inflicts a distinct harm by depriving the citizenry of its chosen representative. *Nickels* was not an outright rejection of this argument as Carpenter claims. Rather, the Court explained that implicit in the State’s argument is its recognition that “an elected prosecutor retains considerable power over their office and employees in every case from which the elected prosecutor is merely screened” and “no amount of screening can be sufficient to fully wall off [the elected prosecutor] from the case.” *Nickels*, 195 Wn.2d at 139. The Court concluded that the same arguments the State advances in favor of screening and preserving the elected prosecutor’s power over his office—administrative oversight of cases, control over office policy, and the power to terminate employees at will—highlight the factors that weigh in favor of a presumptive rule of office-wide disqualification. *Id.*

Here, the considerable power that the elected prosecutor retains in every case is not at issue and does not weigh in favor of office-wide disqualification. It is undisputed that the elected prosecutor does not have a conflict of interest in prosecuting Carpenter’s criminal case. The prosecuting attorney has a duty to prosecute all criminal cases where the State or county is a party. RCW 36.27.020(4). When the voters choose an elected official, they necessarily choose who will be responsible for the duties of that office. *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 179,

385 P.3d 769 (2016); *see State v. Rice*, 174 Wn.2d 884, 905, 279 P.3d 849 (2012). And the citizenry expects that the State will only be represented in criminal matters in Pierce County by Prosecutor Mary Robnett or by deputy prosecuting attorneys whom she authorizes to represent the State. Disqualification of the entire prosecutor's office where there is no conflict of interest improperly denies the electorate's right to choose who provides the services of an elected office.

Finally, Carpenter claims that *Nickels* rejected the argument that the 2006 amendments to RPC 1.10 and RPC 1.11 supersede *Stenger*. Response at 23. But this conclusion in the *Nickels* lead opinion is not a majority decision. *See Nickels*, 195 Wn.2d at 136-38, 142-51. In the absence of a majority, a lead opinion is not binding precedent. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 192, 127 P.3d 5 (2005). But even the lead opinion recognizes that RPC 1.10 and RPC 1.11 "now provide that a government lawyer's personal conflict of interest is no longer imputed to their entire office" and reads these RPCs in harmony with the narrow rule announced in *Stenger*. *Nickels*, 195 Wn.2d at 137-38. Thus, RPC 1.10 and RPC 1.11 apply to Carpenter's case. This is undisputed, and Carpenter does not argue otherwise.

It is well established that the conflict of one deputy prosecuting attorney is not imputed to the entire prosecutor's office. The trial court erred

by concluding that the RPCs “mandate when an office is personified” and imputing a civil deputy prosecuting attorney’s conflict to the entire prosecutor’s office. The trial court incorrectly applied the law and abused its discretion by disqualifying the entire prosecutor’s office. This Court should reverse the trial court’s ruling.

III. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the trial court’s ruling to disqualify the entire Pierce County Prosecuting Attorney’s Office from prosecuting Carpenter’s criminal case.

RESPECTFULLY SUBMITTED this 8th day of October, 2020.

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10-8-20 s/Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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