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Division III
State of Washington
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Respondent,

vs.

DAVID E. NICKELS,

Petitioner.

BRIEF OF RESPONDENT

**GRANT COUNTY
PROSECUTING ATTORNEY**

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Deputy Prosecuting Attorney
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I. ASSIGNMENT OF ERROR

The trial court erred when it declined to disqualify the Grant County Prosecutor's Office due to a disqualification of the elected prosecuting attorney under RPC 1.9.

II. ISSUE RELATED TO ASSIGNMENT OF ERROR

Does an RPC 1.9 conflict of the elected prosecuting attorney result in a per se disqualification of the entire office?

III. STATEMENT OF THE CASE

In 2009 David Nickels murdered Sage Munro in a dispute over a girlfriend. Mr. Nickels was charged with first degree murder of Mr. Munro by D. Angus Lee and his Grant County Prosecutor's Office. ORP 7¹. Mr. Lee was the elected prosecutor for Grant County at all relevant times up to January of 2015. Detective Dan Dale of the State Patrol was one of the two lead investigators in the case. CP² 118. The case was prosecuted by Deputy Prosecutors Tyson Hill and Edward Owens. In 2012 Mr. Nickels was convicted of the murder. CP 112. During the trial Mr. Nickels was represented by Mr. Larranaga and Ms. Walsh. During jury selection Robert Schiffner, a local attorney, assisted Mr. Larranaga and

¹ If the State is referring to the report of proceedings from the previous trial it will refer to the volume number, RP, and then the page number. If it is referring to the report of proceedings on the current issue, it will refer to it as RP page number, with no volume number.

² CP will refer to the clerk's papers for the current appeal.

Ms. Walsh. 5RP 13. He made inappropriate comments on Facebook during jury selection. 5RP 7-18. In response the court ordered “that no one who is participating in the trial, witnesses, lawyers, assistants, investigators, paralegals, no one, should make a public comment of any sort or a semi-public one such as a Facebook posting, about this trial during the duration of the matter and the court would so order.” 5RP 19. Garth Dano, then an attorney in private practice, provided commentary on a local internet news channel during the trial.³ CP 3. As far as the State is aware, Ms. Walsh and Mr. Larranaga made no comments or objections regarding Mr. Dano’s commentary. Also during trial Alan White, then an attorney in private practice, represented material witness Ian Libby in the case. CP 3. Mr. Dano then associated while the jury was deliberating to assist defense counsel, as Ms. Walsh and Mr. Larranaga were unavailable. During deliberation the jury had a question. Rather than Mr. Dano appearing for this question, it was handled by Mr. Larranaga via e-mail. CP 108-13. During the reading of the verdict Mr. Larranaga and Ms. Walsh were on the phone, with Mr. Dano present in court. Mr. Dano said nothing of substance, even deferring to Mr. Larranaga and Ms. Walsh on scheduling. CP 118-24.

³*Fiber One News*, Kody Johnson and attorney Garth Dano discuss the David Nickels Murder Trial (Aug 1, 2012) available at <https://www.youtube.com/watch?v=v2sVhFxx05A> (last visited January 25, 2018).

After the verdict there were extensive post-trial motions. Mr. Dano referred a witness to defense counsel, who had the witness do a declaration. CP 126-29. After trial an issue came up about contact with a juror. In his declaration regarding the incident Mr. Dano stated “I do not represent Mr. Nickels.” CP 131.

After trial the lead prosecutor on the case, Tyson Hill, was appointed Grant County District Court Judge. Mr. Hill was also the lead appellate attorney for Grant County. CP 99. In July of 2013 Mr. Lee decided the appeal in this case should be contracted out due to personnel issues and arranged for the Kitsap County Prosecutor’s Office to handle it. *Id.* Deputy Prosecuting Attorney Kevin McCrae took Mr. Hill’s position within the office.

In November of 2014, after a hard-fought election, Mr. Dano defeated Mr. Lee. Mr. Dano took office in January 2015. Mr. Dano continued with the decision of his predecessor to have the Kitsap County Prosecutor handle the appeal. Mr. Dano hired Mr. Dale, who had retired from the State Patrol, as the Prosecutor’s Office investigator. CP 95. In 2017 the Court of Appeals reversed the trial court and remanded for a new trial. *State v. Nickels*, No. 31642-4-III, 2017 Wash. App. LEXIS 501 (Ct. App. Feb. 28, 2017) (unpublished). On remand the case went to DPA McCrae, as Mr. Hill’s replacement, and DPA Owens, the other prosecutor

who had been on the first trial. Mr. White and Mr. Dano were screened from the case, and have had no participation in the case for the Grant County Prosecutor's Office at any time.

In anticipation of a motion to disqualify the Grant County Prosecutor's Office the State inquired of other potential prosecutors to handle the case. No other prosecutor's offices indicated they had the manpower to prosecute a case of this length and complexity at a remote location. CP 100. The Attorney General's Office also indicated they were short personnel and did not have the manpower to take the case. *Id.* Attorneys that are qualified to handle a complex murder case such as this one either work for a prosecutor's office or formerly did. Most former prosecutors do criminal defense work, and thus have current cases against the State of Washington, and therefore are conflicted from prosecuting this case. *See State v. Tracer*, 173 Wn.2d 708, 720, 272 P.3d 199 (2012). The State did manage to find two qualified attorneys in private practice who indicated interest, but they have been out of criminal prosecution for many years. CP 100.

Mr. Larranaga and Ms. Walsh were reappointed to the case by the trial court judge. They moved to disqualify the Prosecutor's Office. Both sides agreed that the controlling case was *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988), but differed on its application. The court issued an

oral ruling denying the motion, followed up by a written ruling, and certified the issue under RAP 2.3(b)(4). RP 25-29, 33 CP 158. The State also agreed to stipulate the issue should be reviewed under that RAP.

IV. ARGUMENT

When a deputy prosecuting attorney is disqualified due to a conflict of interest the vast majority of jurisdictions do not require disqualifying the entire office, absent some showing there is actual prejudice to the defendant. *State v. McKibben*, 239 Kan. 574, 722 P.2d 518 (1986) (collecting cases). The rule for elected prosecutors is more searching, and the case law more limited, but many jurisdictions, including Washington, still allow the elected prosecutor to be screened. *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990); *Hannon v. State*, 48 Ala. App. 613, 266 So. 2d 825 (1972); *State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882 (Nev. 2014).

A. Standard of Review

This case essentially presents two questions: (1) if an elected prosecutor is disqualified on a case under RPC 1.9 is that conflict automatically imputed to the office, or does the Court look at the facts surrounding the disqualification? This is a question of law, reviewed de novo. (2) If the Court does look at the facts, do the facts in this case require disqualification of the office? This issue is reviewed for abuse of

discretion. *Young v. State*, 297 Md. 286, 465 A.2d 1149 (1983). Mr. Nickels' brief focuses on the first question; thus review is primarily de novo.

B. The Case Law in Washington

State v. Stenger, 111 Wn.2d 516, 760 P.2d 357 (1988), is the seminal case in Washington on this issue. In *Stenger* the issue was "Under the facts of this case, should the prosecuting attorney's representation of the defendant in a prior criminal case disqualify the prosecuting attorney as well as his staff from handling the prosecution of the defendant for the crime of aggravated murder in the first degree where the death penalty is sought?" *Id.* at 520. The holding in *Stenger* was "Under the facts of the case before us, although the prosecuting attorney did eventually delegate handling of the case to a deputy prosecuting attorney in his office, he did not effectively screen and separate himself from the case but instead maintained quite close contact with it. We need go no further in this capital case in order to conclude that it is appropriate that a special prosecuting attorney be appointed to handle and control the case." *Id.* at 523.

The rule pronounced in *Stenger* was "where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case or in a

matter so closely interwoven therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head *should ordinarily* also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed.” *Id.* at 522 (emphasis added). Should means recommended but not mandatory. *State v. Smith*, 174 Wn. App. 359, 368, 298 P.3d 785 (2013). When modified by the term ordinarily as in “should ordinarily,” that necessarily implies there is some subset of circumstances that is not ordinary and does not fit the rule. “If a prosecutor's interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff *may* be disqualified as well.” *State v. Ladenburg*, 67 Wn. App. 749, 840 P.2d 228 (1992) (citing *Stenger*) (emphasis added).

State v. Fox, No. 48466-8-II, 2017 Wash. App. LEXIS 806 (2017) (unpublished)⁴, does not indicate otherwise. In looking at the merits of the conflict of interest challenge *Fox* looked at the facts, specifically for how far the elected prosecuting attorney had advanced in the case. *Id.* Slip op

⁴ Cited pursuant to GR 14.1. This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep't of Social and Health Services*, 197 Wn. App. 539, 544, 389 P.3d. 731 (2017).

at 11-12. They also attached significant weight to the fact that an amended information was produced with only the disqualified elected prosecutor's signature. The Court held "Therefore, *under the facts of this case*, a conflict of interest existed when the Cowlitz County Prosecuting Attorney's Office continued prosecuting Fox after Jurvakainen became the elected county prosecuting attorney." *Id.* at 12 (emphasis added). Unlike the prosecutor in *Fox* Mr. Dano did not "initiate and complete discovery, investigate the case, and conduct plea discussions." *Id.*

C. Foreign Cases

At least three foreign cases have considered whether the disqualification of the elected prosecuting attorney or equivalent requires disqualification of the entire office as a matter of law and have decided it does not.

Hannon v. State, 48 Ala. App. 613, 266 So. 2d 825 (1972), is factually similar to this one. The elected prosecuting attorney was originally one of three attorneys assigned to represent the defendant. The elected prosecutor, a Mr. Butler, interviewed the defendant and filed a motion on his behalf, but then had nothing to do with the case as it proceeded to the first trial. The case was returned on appeal and the defense moved to dismiss the case or change venue because of the conflict

of the prosecuting attorney. The prosecuting attorney did not discuss the case with the deputy actually trying the case. The Court ruled

The record in this case clearly shows that the District Attorney did not divulge the confidential information he gained from Hannon while he was a member of the Public Defender's Office. He had not been elected District Attorney when the grand jury indicted Hannon and had no connection therewith. He inherited for prosecution all indictments returned by grand juries in Mobile County not disposed of while his predecessor was in office. The public interest demanded that the prosecution go forward. There has been no breach of the attorney-client relationship, the privilege against disclosure has been preserved, and professional ethics, painstakingly observed, and the constitutional guarantee of a fair and impartial trial was not infringed.

Hannon, 48 Ala. App. at 618.

A Federal United States' Attorney sits in the same relationship to his assistant U.S. Attorneys as an elected prosecutor sits to his deputy prosecutors. In *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990), the defendant got wind of a pending indictment and hired James Richmond to represent him. Richmond remained Goot's attorney until Richmond was appointed U.S. Attorney for the Northern District of Indiana. After Goot was indicted in the Northern District he moved to disqualify the U.S. Attorney's Office. The Court applied the Indiana Rules of Professional Conduct, which are substantially similar to Washington's rules, and found that the U.S. Attorney's recusal and

delegation of the case was sufficient and appropriate. It should be noted that both *Goot* and the case Mr. Nickels relies upon, *State v. Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982), rely upon the Indiana rules of professional conduct, but reach different conclusions.

The *Goot* court applied a three-part test. “First, does a ‘substantial relationship’ exist between the subject matter of the prior and present representations? Second, if so, has the presumption of shared confidences with respect to the prior representation been rebutted? Third, if not, has the presumption of shared confidences with respect to the present representation been rebutted?” Similar to *Goot* the State agrees there is a substantial relationship between the subject matter of the prior and current representations, although the involvement Mr. Dano had was minimal in the prior representation and non-existent in the current one. While the State has its doubts about how much in the way of confidences were shared with Mr. Dano, as some of the statements of defense counsel are contradicted by the record, the State does not have sufficient information to rebut a presumption of shared confidences in the previous matter. However the State did rebut a presumption of shared confidences in the current matter to the

satisfaction of the trial court. Therefore, like *Goot*, there is no reason to disqualify the entire Grant County Prosecutor's Office.

The most recent case, and one also very on point, is *State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882 (Nev. 2014). In this case the newly elected District Attorney previously worked with the defendant's attorney in a firm and consulted on the case. The District Attorney recused and delegated. The lower court disqualified the District Attorney's Office. The Nevada Supreme Court reversed. It analyzed the appearance of impropriety standard used in *State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982), and urged by Mr. Nickels here. It noted that the ABA and the courts generally have moved away from an appearance of impropriety standard to an "unlikely the defendant would receive a fair trial standard." *Id.* at 886.

D. Policy Issues

This case essentially boils down to a policy choice. Should any disqualification of the elected prosecuting attorney under RPC 1.9 always be imputed to the entire office? The Washington Supreme Court did not give clear guidance on this issue in *Stenger*. The facts in this case could not be more favorable to the State and still trigger the issue. Mr. Dano was very limited in his involvement in this case. He did not represent Mr.

Nickels in the way that term is commonly understood, not saying anything of substance on the record, not directing or being involved in the case, only coming in at the last minute to fill in for taking of a verdict. He did not consider himself Mr. Nickels' attorney. As comment 2 to RPC 1.9 notes, a lawyer's involvement in a case is often a matter of degree. Mr. Dano's involvement was the minimum necessary to trigger disqualification under RPC 1.9. His disqualification was recognized however, and he was immediately and effectively screened from the case. Mr. Dano was not a prosecutor when the case was charged, and thus had absolutely no influence on the charging decision. Mr. Nickels advocates for an appearance of impropriety test. Even under this test the Grant County Prosecutor's Office should not be disqualified. At least one test for appearance of impropriety asks "whether in the eyes of a reasonable person with knowledge of the relevant circumstances, there is an appearance of a conflict of interest." *Healey v. Mass. Civil Serv. Comm'n*, 15 Mass. L. Rep. 491 (2002). In *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982)(citing *State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982)), the court described the issue as under all the facts and circumstances "whether the prosecutorial function could be carried out impartially and without breach of any privileged communication." Given all the relevant circumstances here, including Mr. Dano's limited

involvement and his effective screening, there is no appearance of impropriety.

However, the court should adopt the more modern test of asking whether it is unlikely the defendant would receive a fair trial as described by the Nevada Supreme Court. This test adequately balances the competing values. There is the defendant's right to attorney confidences and a fair trial to be considered. Against those considerations there are those issues described in *Eighth Judicial Dist.* "[T]here is a large cost to the county in paying for a special prosecutor to prosecute the case; an attorney is presumed to perform his ethical duties, including keeping the confidences of a former client, the courts should not unnecessarily interfere with the performance of a prosecutor's duties." *Eighth Judicial Dist.*, 321 P.3d at 886 (internal citations omitted). In addition this case is a retrial. The defense counsel in this case successfully argued they should be reappointed because they were familiar with the case and could most efficiently proceed. CP 17. The same argument applies to the prosecuting attorney. Mr. Owens was a prosecutor on the previous case and can most efficiently prosecute the retrial. Mr. Dale was the lead investigator and now works for the Prosecutor's Office. There is simply no way to separate him from the case as he is a fact witness who cannot be

replaced. There will be significant delay if a new prosecutor has to get up to speed on this case.

V. CONCLUSION

Mr. Dano has had no involvement in the prosecution of Mr. Nickels. This case was in charged before Mr. Dano became a prosecutor. His involvement in the original proceeding was extremely limited. Washington case law has focused on the specific facts when deciding about disqualifying an office due to the elected prosecutor's disqualification under RPC 1.9. Foreign case law has also looked at the specific facts in deciding whether a defendant's right to a fair trial is compromised. The trial court correctly analyzed the facts and concluded that Mr. Nickels' right to a fair trial is not compromised. That decision should be affirmed.

Dated this 6th day of April, 2018.

Respectfully submitted,

GRANT COUNTY PROSECUTING
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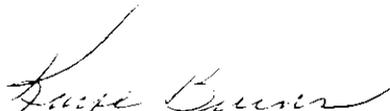
CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: April 7 2018.



Kaye Burns

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