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Supreme Court No. 96943-4
Court of Appeals No. 353699

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

V.

DAVID NICKELS,
Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK A. LARRAÑAGA
JACQUELINE K. WALSH
Attorneys for Respondent

WALSH & LARRAÑAGA
705 Second Avenue, #501
Seattle, WA 98104-1781
(206) 325-7900

Walsh & Larrañaga
705 Second Ave., Suite 501
Seattle, WA 98104
206.325.7900
mark@jamlegal.com

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A. INTRODUCTION

In *State v. Stenger*, 111 Wn.2d 566, 760 P.2d 357 (1988), this Court was asked whether the entire prosecutor's office should be disqualified when the elected prosecutor previously represented a defendant who is being prosecuted by that elected prosecutor's office.

The answer turned on whether the previous representation of the accused was on the same or a closely related case as the one prosecuted. If it was *not*, then disqualification of the entire prosecutor's office may not be required with appropriate screening procedures. *Id.*, at 522-23. This Court concluded differently when the prior representation was on the *same case*:

... 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.

Stenger, 111 Wn.2d at 520-22.

Here, it is undisputed that the elected prosecutor, Garth Dano, previously represented the respondent on the same case that

Mr. Dano’s office is prosecuting.¹ The issue before this Court is whether *Stenger* established a bright-line or a general rule of office wide disqualification whenever an elected prosecutor has a conflict of interest based on prior representation of a client in the same or a similar case as the one currently pending prosecution. *State v. Nickels*, 7 Wn.App. 2d 491, 496, 434 P.3d 535 (2019).

Division III concluded *Stenger* came close to establishing a bright-line rule, but ultimately fell short. Instead, Division III found *Stenger* created a general standard that an elected prosecutor's prior representation of the accused in the same case will ordinarily require office-wide recusal, but extraordinary circumstances may justify an exception to the general rule. *Nickels*, 7 Wn.App 2d at *Id.*, at 497.

Under either interpretation of *Stenger*, “no extraordinary circumstances” exist to allow the Grant County Prosecuting Attorney's Office to continue prosecuting on the same case that its elected prosecutor - who possesses administrative control and

¹ The Grant County Prosecutor’s Office is no longer prosecuting the matter. On March 18, 2019, pursuant to RCW 43.10.232 and at the “written request of Garth Dano, Grant County Prosecutor, the Attorney General’s Office filed a Notice of Appearance. On May 31, 2019, Grant County Prosecutor submitted a declaration stating that it finished providing documents related to the prosecution of respondent to the Attorney General’s Office.

supervision of the entire office - previously represented the accused.
Nickels, 7 Wn.App. 2d at 496.

B. RECORD CLARIFICATION

Citing to the dissent in *Nickels*, petitioner suggests circumstances against disqualification exist. Pet. for Rev. at 19-20, citing *Nickels*, 7 Wn.App at 507-08. One such suggestion is that Mr. Dano “had pretty minimal” involvement and a mere “token appearance” in the case. *Id.*, at 502,503. This misrepresentation not only confuses court appearances with Mr. Dano’s actual involvement, but is also contradicted by the record:

According to an uncontested affidavit by Ms. Walsh, defense counsel routinely consulted with Mr. Dano about a wide range of matters regarding Mr. Nickel's defense, including defense strategy, theory of the case, potential witnesses, and jury selection. Ms. Walsh states Mr. Dano was considered a consulting defense attorney on the case and as such all confidences and communications fell under the attorney client, work product doctrine.

It is uncontested, based on Ms. Walsh's affidavit, that Mr. Dano was privy to privileged work product information during his association with Mr. Nickels's defense team. In addition, because Mr. Dano met with Mr. Nickels individually after entry of the jury verdict, he presumably engaged in confidential attorney-client communications.

Id., at 493, 501.

Another rational of the dissent against disqualification is that secrets could not be used against the respondent since the evidence and record has already been settled. *Nickels*, 7 Wn.App. at 504, 507 (J. Korsmo, dissent). This is contradicted by Division III's unanimous decision (including Justice Korsmo) to reverse respondent's underlining case on direct appeal. *State v. Nickels*, 2017 Wash.App. Lexis 501 at 11 ("The record suggests the evidence on remand is likely to change."). In fact, the evidentiary record is not settled and will change, including the potential legal and factual issues on remand. *Id.*, ("Instead, the parties should submit any evidentiary motions and objections to the new trial judge with analysis tailored to the evidence at hand. The trial judge will then have the discretion to make appropriate rulings, based on the applicable record. Unless the parties agree otherwise, evidentiary rulings made during Mr. Nickels's initial trial are not binding on retrial.").

Any suggestion that disqualification is unnecessary because appropriate screening was employed is belied by the record. The trial court neither thoroughly considered the adequacy of screening nor made any such findings. CP 159. Additionally, Division III concluded that screening was never before the trial court and as such

was not part of the appellate records.² Finally, Division III concluded that screening is an ordinary requirement applicable to all types of conflicts and not an extraordinary circumstance under this Court's *Stenger* standard; and under the facts of this case "[n]o amount of screening can be sufficient to fully wall off Mr. Dano from the case or prevent him from being fully cognizant of the resources being committed to Mr. Nickel's case, and thus not devoted to other office priorities." *Nickels*, 7 Wn.App. 2d at 498, 501.

Finally, there is no basis that Grant County is unable to find a special prosecutor to handle the case.³ As noted, pursuant to RCW 43.10.232 and at the written request of Mr. Dano, Grant County Prosecutor, the Attorney General's Office filed a Notice of Appearance and has been provided all of Grant County Prosecutor's documents related to the prosecution. *See* fn. 1, *supra*.

² *See* Commissioner's Ruling, 5/12/2018 ("This Court agrees that subsequent declarations [regarding alleged screening] are irrelevant. . . and the entirety of that supplemental designation is stricken from the record before this Court in the discretionary review.").

³ *Nickels*, 7 Wn.App at 508.

C. STATEMENT OF THE CASE

The facts of this case are largely undisputed and set out in *State v. Nickels*, 7 Wn.App. at 493-94.

On June 16, 2010, the state charged respondent with Murder in the First Degree. Respondent's attorneys, who did not work in Grant County, sought assistance from then private local counsel, Garth Dano. *Nickels*, 7 Wn.App. at 493. Mr. Dano was involved in respondent's representation by consulting and strategizing with appointed defense counsel about a wide range of matters regarding respondent's defense. *Id.* Furthermore, Mr. Dano was considered a consulting expert defense attorney on the case and "as such all confidences and communications fell under the attorney client, work product doctrine." *Id.*

Post-trial, Mr. Dano met with witnesses and assisted with declarations that were used as part of respondent's motion for new trial. CP 179. Mr. Dano also met respondent in private to strategically discuss the case. *Nickels*, 7 Wn.App. at 493.

While the matter was on direct appeal, Mr. Dano was elected the Grant County Deputy Prosecutor. The Grant County Prosecutors' Office contracted with Kitsap County to be a "Special Deputy Prosecuting Attorney" to handle the appeal. *Id.*

On February 18, 2017, the Court of Appeals, Division III, reversed the conviction and sentence.⁴ A mandate was issued on April 10, 2017, and defense counsel immediately moved to disqualify the Grant County Prosecutors' Office from further participation because of the conflict of interest.⁵ *Id.* Division III granted review and concluded:

Because Mr. Nickels has been charged with a serious offense, the same offense about which the Grant County Prosecuting Attorney has acquired privileged information through work product and attorney-client communications during his time as a private attorney, the entire Grant County Prosecuting Attorney's Office must be recused from Mr. Nickels's first degree murder prosecution. The trial court's ruling to the contrary is reversed. Mr. Nickels's case is remanded to the trial court for further proceedings consistent with this decision.

Id., at 502.

This Court accepted review.

⁴ *State v. Nickels*, 197 Wn.App. 1085 (2017).

⁵ In addition to Mr. Dano, Grant County's Chief Deputy Prosecutor Alan White has a conflict. During respondent's initial trial, Mr. White was appointed to represent the individual who the defense submitted actually committed the murder. When that individual was subpoenaed to testify, he, at the advice of his counsel, Mr. White, refused to answer questions and invoked his privilege against self-incrimination upwards of ninety (90) times. CP 24-91.

D. LEGAL ARGUMENT

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *In re Pers. Restraint of Glassman*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012), citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

This Court has recognized that a defendant's right to a fair trial is typically compromised in conflict of interest situations involving a prosecutor.

The rationale for this [conflict of interest] rule lies in the appearance of impropriety created by vesting the “inherently antagonistic and irreconcilable” roles of the prosecution and the defense in one attorney. *Howerton v. State*. In holding that a part-time district attorney may not represent a criminal defendant anywhere in the state of Oklahoma, the Court of Criminal Appeals of Oklahoma reasoned that although it was difficult or impossible to determine whether the representation was actually affected, “[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice. The conflicts presented in this case, at the very minimum, give the proceeding an appearance of being unjust and prejudicial.”

State v. Tracer, 173 Wn.2d 708, 720, 272 P.3d 199 (2012) (footnote and internal citations omitted); *see also State v. Tjeerdsma*, 104 Wn. App. 878, 884-85, 17 P.3d 678 (2001)(conflict of interest was

created when attorney representing a criminal defendant in Skagit County Superior Court was appointed as a special deputy prosecuting attorney for the Skagit County Prosecuting Attorney's Office in an unrelated case).

1. *State v. Stenger Standard's Lengthy and Consistent History.*

When asked nearly thirty years ago if an elected prosecutor who previously represented a defendant requires disqualification of the entire prosecutor's office, this Court's answer turned on whether the elected prosecutor's previous representation of the accused was on the same or a closely related case as the one being prosecuted.

... 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.*

This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney's office is also disqualified. *Where the previous case is not the same case* (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority

and control over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained.

Stenger, 111 Wn.2d at 520-22 (emphasis added)(footnotes omitted).

Ten years later, in 1997, the Washington State Bar Association (WSBA) issued Advisory Opinion 1773 further supporting the *Stenger* standard.

A lawyer is prohibited from prosecuting a former client if the two matters are substantially related or if confidences were revealed during the prior representation. . . The entire prosecuting attorney's office is disqualified when the death penalty is being sought, *when the prosecuting attorney personally represented the defendant in the same or a substantially related proceeding or when other facts require disqualification under the RPCs. . .*

WSBA Advisory Opinion 1773 (1997) (emphasis added).

And two years ago, in *State v. Fox*, 2017 Wash.App. LEXIS 839, an unpublished opinion, Division Two of the Court of Appeals, also applied the *Stenger* standard.⁶ In *Fox*, the elected prosecutor, who previously represented the defendant on the same case being

⁶ General Rule (GR) 14.1(a) permits citation to an unpublished opinion as nonbinding authority and of no precedential value. Unpublished opinions may be accorded such persuasive value as the court deems appropriate. GR 14.1. Respondent submits that this unpublished case is appropriate to show Court's consistent reliance *Stenger*.

prosecuted, became the county's elected prosecutor. The elected prosecuting attorney acknowledged his disqualification, but argued that the entire office should not be disqualified because he was screened off from the subsequent prosecution and thus no confidences were revealed. *Id.*

Relying on *Stenger*, Division Two concluded the entire office is disqualified and screening procedures are insufficient when the elected prosecutor previously represented the defendant on the same case being prosecuted.

Although screening procedures were set in place, such procedures are only sufficient when the prosecutor involved is a deputy prosecutor. The “public has a right to absolute confidence in the integrity and impartiality of the administration of justice” and “[t]he conflicts presented in this case [where one attorney holds the roles of prosecution and defense], at the very minimum, give the proceeding an appearance of being unjust and prejudicial.”

Id., at 7-8. (emphasis added) (internal citations omitted).⁷

⁷ See also *State v. Schmitt*, 124 Wn.App. 662, 668, 102 P.3d 856 (Division II, 2004) (The *Stenger* court went on to distinguish between the effect of disqualifying the elected prosecuting attorney and a deputy prosecuting attorney. Whereas particular facts may require disqualifying an entire office based on the elected prosecutor's previous involvement in a case, the same action does not follow from a deputy's involvement and disqualification.).

Because of its long-standing authority, the respondent, the trial court, the Grant County Prosecutor's Office, and each of the Division III judges all agree that *Stenger* is the legal authority to address the specific facts of this case.⁸

2. *This Court Should Reject Petitioner's Implicit Request to Overturn Stenger.*

Without directly requesting, petitioner wants this Court to overturn *Stenger*. Pet. for Rev. at 8-19. It suggests, for instance, that reliance on the *Stenger* standard is no longer applicable given the 2006 amendments to the Rules of Professional Conduct (RPC) and that RPC 1.11 does not contain an "elected prosecutor" exception. Pet. for Rev. 11-12, 14.

This Court does not take an invitation to uproot long-standing precedent lightly. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). "Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change" and courts will reject

⁸ See e.g., CP 158 (trial court's Order); Petitioner/Nickels Opening Brief at 8; Brief of Respondent/Grant County at 4; *Nickels*, 7 Wn.App. at 495 ("The lead authority governing our analysis is *State v. Stenger*."); and *Nickels*, 7 Wn.App. at 542 (Korsmo, J., dissent) ("I agree with the majority that this case is controlled by *State v. Stenger*.") (citations omitted).

its prior holdings only upon “a clear showing that an established rule is incorrect and harmful.” *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The question is not whether the Court would make the same decision if the issue presented were a matter of first impression, but rather the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent— “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.” *Otton*, 185 Wn.2d at 678 (emphasis in original), citing *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) and quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)); *see also*, *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)(internal quotation marks omitted)(quoting *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 141 (1st Cir. 2000)) (there are “‘relatively rare’ occasions when a court should eschew prior precedent in deference to intervening authority” where “the legal underpinnings of our precedent have changed or disappeared altogether.”).

The 2006 amendments to the RPCs do not change or alter the *Stenger* standard. *Stenger* was clearly-established and controlling law by this Court when the amendments were adopted. Had the legislature, rules committee, or this Court in adopting the amendments intended *Stenger* to be overruled it would have specifically done so.⁹

Moreover, Division III relied on the RPC's 2006 amendments to conclude the disqualification of the Grant County Prosecutor's Office.

But there is no similar rule for government lawyers. Instead, the conflict rules for government lawyers are assessed more narrowly, according to each lawyer's individual circumstances.

Given an elected prosecutor's administrative duties, *Stenger* recognized that an elected prosecutor's individual circumstances generally will require recusal of the entire prosecuting attorney's office.

Nickels, 7 Wn.App 2d at 496-97, fn. 2, 3.

Petitioner also suggests that Division III's reliance on *Stenger* was erroneous because the principle in *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995) was codified in the 2006

⁹ RPC 1.11 has been amended twice since 2006 (2015 and 2018) and *Stenger's* principle was not overruled or altered, but rather cited as continued authority. See e.g., RPC 1.11 History, Case Notes (2018).

amendments. Pet. for Rev. at 1-2. *Sherman* does not demonstrate “a clear showing” that the “established rule” in *Stenger* “is incorrect and harmful” since there are significant differences between the two cases. For instance, *Sherman* did not involve a conflict of interest of a prosecuting attorney in a criminal matter – a situation that many courts have found a due process violation. *State v. Tracer*, 173 Wn.2d 708, 720, 272 P.3d 199 (2012), citing *Howerton v. State*, 1982 OK CR 12, 640 P.2d 566, 568 (1982).¹⁰

Moreover, this Court concluded the record in *Sherman* did not establish an attorney-client relationship. *Sherman*, 128 Wn.2d at 188-190.¹¹ By comparison, this Court acknowledged that a prosecutor who previously represented the defendant “has likely

¹⁰ See also *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008) (holding that when a prosecuting attorney switches sides in the same criminal case, an actual conflict of interest is apparent that constitutes a due-process violation, even without a specific showing of prejudice); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (holding that due process was violated when a part-time Commonwealth Attorney had a conflict of interest by prosecuting a defendant for assault while representing the defendant's wife in a divorce action).

¹¹ The only contact was a brief memorandum that demonstrated the lack of an attorney-client relationship since it clearly stated counsel represented the University and not the physician, and was merely requesting information from the physician. *Sherman*, 128 Wn.2d at 188-190.

acquired some knowledge of facts upon which the prosecution is predicated." *Stenger*, 111 Wash. 2d at 520- 21. And in *Nickels*, Division III specifically concluded that the Grant County Prosecuting Attorney had acquired privileged information through work product and attorney-client communications during his time as a private attorney working on the same case being prosecuted. *Nickels*, 7 Wn.App. 2d at 502.

Petitioner also asks this Court to consider foreign cases to find *Stenger* is no longer valid. Pet. for Rev. at 12 - 14. Petitioner's invitation should be rejected. First, persuasive out-of-state precedent should not trump binding in-state law. *Am. Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 408, 229 P.3d 693 (2010). As demonstrated, this Court's *Stenger* standard has adequately addressed the issue at hand, removing the need to seek out-of-state guidance. *Grange Ins. Ass'n v. Roberts*, 179 Wn.App. 739, 320 P.3d 77 (2013)(Washington courts may want to consider other jurisdictions when Washington is silent regarding the particular issue).

Second, petitioner's suggestion that the amended RPCs eliminated *Stenger*'s disqualification standard was unanimously rejected by Division III. *Nickels*, 7 Wn.App. 2d at 495 ("The lead

authority governing our analysis is *State v. Stenger*.”); *Id.*, at 542 (Korsmo, J., dissent)(“I agree with the majority that this case is controlled by *State v. Stenger*.”) (citations omitted).

Finally, the cases cited by the petitioner are either factually and legally inapplicable, or consistent with Division III’s decision.

Pet. for Review at 12-13.

- *State v. Dimaplas*, 978 P.2d 891 (Kan. 1999). The conflict pertained to a deputy prosecutor (not elected prosecutor) who was a witness with no prior relationship with the accused to obtain confidential or privileged information.
- *People v. Perez*, 201 P.3d 1220 (Colo. 2009). The conflict involved a deputy prosecutor (not elected prosecutor) whose representation of the accused was on a different case.
- *State v. Kinkennon*, 747 N.W.2d 437 (Neb. 2008). Conflict of a deputy prosecutor (not elected prosecutor) with disputed facts whether previously represented the accused or obtained confidential or privileged information.¹²
- *State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882 (Nev. 2014). Conflict involved elected prosecutor who represented accused on a *different* case than the one being prosecuted. Moreover, the Nevada court’s rejection of a *per se* rule is consistent with Division III’s determination that exceptions to *Stenger*’s general rule may exist.¹³

¹² Additionally, the standard of review is not de novo but abuse of discretion. *Kinkennon*, 747 N.W.2d at 571.

¹³ Nevada and Washington have significantly different mechanisms to resolve the issue. In Nevada, review is restricted to the extraordinary remedy of a mandamus. *State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882, 884 (Nev. 2014). Cf. *State v.*

- *State v. Pennington*, 851 P.2d 494 (N.M., App. 1993). Conflict did not involve either a deputy or elected prosecutor, but rather an investigator. The decision is also consistent with Division III’s rejection of a per se disqualification rule in favor of the existence (or not) of extraordinary circumstances of the specific case.

Petitioner’s reliance on two federal cases, *In re Grand Jury 91-1*, 790 F.Supp. 109 (E.D. Vir. 1992) and *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990), is equally unpersuasive. *In re Grand Jury* involved a conflict of an assistant deputy (not elected prosecutor) in a separation and divorce – not the same case being prosecuted by the office. It also relied heavily on *Goot*, which employed a three-part sequential inquiry specific to that federal circuit – and not used in Washington - to determine whether the issue of disqualification created a constitutional violation. *Goot*, 494, 894 F.2d 234 citing *Schiessle v. Stephens*, 717 F.2d 417, 420-21 (7th Cir. 1983) (“This circuit employs a three-part sequential inquiry in deciding the question whether disqualification of an office is necessary when an attorney has switched from one side to another.”).

Stenger, 111 Wn.2d 566, 521-22, 760 P.2d 357 (1988) (“We review *de novo* the trial court’s decision not to disqualify the prosecutor.”).

There is no evidence of a “clear showing” that this Court’s *Stenger* standard is “incorrect or harmful” to support abandoning thirty years of its consistent authority. Division III did not accept the invitation to uproot *Stenger* and nor should this Court.

3. *Under Either the Bright-Line or General Rule, Grant County Prosecutor’s Office Must be Disqualified.*

Petitioner maintains that *Stenger* created a bright-line disqualification rule whenever an elected prosecutor has a conflict of interest based on prior representation of a client in the same case as the one currently pending prosecution.¹⁴ Had the standard been permissive, this Court would have expressly stated so – as it did when the elected prosecutor’s previous representation was *not* the same case. *Stenger*, 111 Wn.2d at 522-23.

¹⁴ Policy concerns and judicial efficiency support a bright-line rule. It would prevent significant delays since prosecuting agencies would know immediately that when the elected prosecutor previously represented or consulted with the accused on the same or similar case that his or her office is prosecuting, the whole office is disqualified. Additionally, it eliminates the need for courts to hold in-camera hearings to determine the degree of the elected prosecutor’s involvement; whether disclosures of confidences were revealed; and/or whether screening procedures are appropriately sufficient and continually followed – hearings that would require testimony and evidence, resulting in a process that would inevitably reveal confidences, divulge attorney-client privileges and expose work-product in order for the court to make any findings of fact and conclusion of law for potential appellate review.

Petitioner’s argument that Division III created a per se disqualification of the entire office whenever the elected prosecutor is disqualified is incorrect. Pet. for Rev. at 15. As noted, Division III concluded that *Stenger* did not create a *per se* rule but rather a more limited approach. *Nickels*, 7 Wn.App.2d at 496-97 (“But, because no per se recusal rule exists for public service attorneys, there is the possibility of an exception, based on the individual circumstances of the elected prosecutor.”).

Under either the per se rule advanced by the respondent, or the general rule reached by Division III, extraordinary circumstances do not exist to permit continued prosecution by the Grant County Prosecutor’s Office.

E. CONCLUSION

For the reason expressed above, this Court should uphold Division III’s decision in *State v. Nickels*, 7 Wn.App. 2d 491 (2019).

Respectfully submitted this 8th day of July, 2019.

WALSH & LARRAÑAGA

/s/ Jacqueline K. Walsh

Jacqueline K. Walsh,
WSBA #21651

/s/ Mark A. Larrañaga

Mark A. Larrañaga,
WSBA #22715

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2019, I served via fax, email, mail or electronic court filing (ECF) (as noted below) the *Supplemental Brief of Respondent* to the following parties:

Washington State Supreme Court [x] ECF
Temple of Justice
P.O. Box 409
Olympia WA 98504-0929

Pamela Loginsky [x] ECF
Special Deputy Prosecuting Attorney [x] email
206 10th Avenue SE
Olympia, WA 98501
E-mail: pamloginsky@waprosecutors.org

John Strait at straitj@seattleu.edu [x] email

Rita Griffith at griff1984@comcast.net [x] email

Hillary Behrman at hillary@defensenet.org [x] email

David Nickels [x] mail
Grant County Jail
35 C St NW,
Ephrata, WA 98823

DATED this 8th day of July, 2019.

/s/ Mark A. Larrañaga
Mark A. Larrañaga
705 Second Ave., Suite 501
Seattle, WA 98104
206-325.7900

WALSH & LARRANAGA

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