NO. 96943-4

COA No. 35369-9-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner,

v.

DAVID EMERSON NICKELS, Respondent.

PETITION FOR REVIEW

PAMELA B. LOGINSKY
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I. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Pamela B. Loginsky, Special Deputy Prosecuting Attorney for Grant County,[1] asks this Court to accept review of that portion of the Court of Appeals decision terminating review designated in section II of this petition.

II. COURT OF APPEALS DECISION

The State seeks review of the published Court of Appeals decision that disqualified the entire Grant County Prosecuting Attorney's Office despite the timely and effective screening of the personally disqualified newly elected prosecuting attorney. A copy of the Court of Appeals decision in *State v. Nickels*, No. 35369-9-III (Feb. 7, 2019), is in the appendix at pages B-1 through B-23. Division III's opinion was filed February 7, 2019.

III. ISSUES PRESENTED FOR REVIEW

"This court has previously stated that where a disqualified attorney can be effectively screened and separated from participation, 'then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.'" *Sherman v. State*, 128 Wn.2d 164, 195, 905 P.2d 355 (1995) (quoting *State v. Stenger*, 111 Wn.2d 516, 523, 760 P.2d 357 (1988)

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[1]Ms. Loginsky was appointed as a special deputy prosecuting attorney pursuant to RCW 36.27.040. Neither Grant County Prosecuting Attorney Garth Dano nor any other member of the Grant County Prosecuting Attorney's Office participated in the decision to file a petition for review or in Ms. Loginsky's selection as a special deputy prosecuting attorney. *See* Appendix A (Declaration of Pamela B. Loginsky and Appointment of Special Deputy and Oath of Office).

(footnote omitted). This principle was codified when the Rules of Professional Responsibility were amended in 2006. *See* RPC 1.11(d); Comment 2 to RPC 1.11. Division III's opinion in *State v. Nickels,* nonetheless, adopted an "elected prosecuting attorney" exception which requires the recussal of the entire prosecutor's office absent extraordinary circumstances.

1. Does RPC 1.11(d) apply equally to elected prosecuting attorneys as it does to other government attorneys?

2. If arguendo, RPC 1.11(d) does not apply to a timely and effectively screened elected prosecuting attorney, must the office wide disqualification abatement test take into account the complexity of the case, proximity to trial, and availability of substitute counsel?

IV. STATEMENT OF THE CASE

Nickels was charged with first degree premeditated murder on June 16, 2010, when D. Angus Lee was the Grant County elected prosecuting attorney. *See* Grant County Auditor, November 23, 2009, General Election Results.[2] *Accord* CP 2. After numerous pretrial motions and hearings, jury

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[2]The 2009 general election results are available at http://results.vote.wa.gov/results/20091103/Grant/ (last visited Mar. 10, 2019).

Evidence rule 201 authorizes a party to request a court to take judicial notice of adjudicative facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(a), (b) and (d). This rule applies at all stages of proceedings, including appeals. ER 201(f); *State v. Royal*, 122 Wn.2d 413, 417-18, 858 P.2d 259 (1993). "Facts which a court may judicially notice are those 'facts capable of immediate and accurate demonstration by resort to easily accessible sources of

selection began on July 9, 2012, and the jury reached a verdict on September 6, 2012. CP 2.

The State was represented throughout the pretrial and trial proceedings by a number of attorneys including Edward Owens, Tyson Hill, Albert Lee, and Douglas Mitchell. CP 24, 116, 143. Nickels was primarily represented by Jacqueline Walsh and Mark Larranaga, with Garth Dano making a limited appearance to receive the verdict while Ms. Walsh and Mr. Larranaga were out of state. *See* CP 178 ¶ 1, 131 ¶ 1.[3]

Nickels filed a timely appeal. Prosecutor Lee made arrangements in July of 2013 for a Kitsap County Deputy Prosecuting Attorney (DPA) to represent the State on appeal after the lead trial attorney was appointed to the bench. CP 188-190. Prosecutor Lee was no longer in office when Nickels conviction was reversed in an unpublished opinion for structural error arising

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indisputable accuracy and verifiable certainty.'" *CLEAN v. State*, 130 Wn.2d 782,809,928 P.2d 1054 (1996) (quoting *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772,779,380 P.2d 735 (1963)). Courts routinely take judicial notice of election results and of public disclosure documents that candidates are required by law to file. *See, e.g., Siegel v. LePore*, 234 F.3d 1163, 1196 n.5 (11th Cir. 2000) (judicial notice taken of election reports that counties are required to file with the secretary of state); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (judicial notice of public disclosure documents required by law to be filed); *Proctor v. Parada*, 700 P.2d 901, 902 (Ariz. App. 1985) ("We take judicial notice of election results filed with the secretary of state of the State of Arizona."); *Santa Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Ass'n of Gov'ts*, 167 Cal. App. 4th 1229, 1234 n.3, 84 Cal. Rptr. 3d 714, 718 (2008) (judicial notice of appellant's campaign disclosure forms); *Eyman v. Ferguson*, No. 50819-2-II, slip op. at 4, ___ Wn. App. 2d ____, ___ P.3d ___ (Wash. App. Jan. 23, 2019) (judicial notice taken of election results).

[3]In his December 19, 2012, post-verdict declaration Mr. Dano states in relevant part that: "I do not represent Mr. David Nickels. The attorneys for Mr. Nickels were out of state on another matter and contacted me to stand in as counsel for Mr. Nickels when his jury verdict was announced."

from an erroneous court crafted "to convict" instruction. *See State v. Nickels*, 197 Wn. App. 1085 (2017). Prosecutor Lee's successor in office was Garth Dano. Grant County Auditor, November 4, 2014, General Election Results.[4] Prosecutor Dana first registered as a candidate for the office of Grant County Prosecuting Attorney on May 30, 2014, nearly 10 months after Prosecutor Lee transferred the Nickels case to the Kitsap County Prosecuting Attorney's Office. *See* Garth L. Dano, Candidate Registration, C1 (filed May 30, 2014).[5]

Following remand, Grant County DPA Kevin McCrae immediately screened Prosecutor Dano from the matter. 2RP 24. The screen was erected before Prosecutor Dano discussed the case with any members of the Grant County Prosecuting Attorney's Office. CP 93. Prosecutor Dano's computer access to the Grant County Prosecuting Attorney's Office's files in Nickels' case was disabled. A cover sheet advising of Prosecutor Dano's disqualification was inserted into the hard files. All officer personnel were instructed that the case was not to be discussed in Prosecutor Dano's presence and that Prosecutor Dano was to take no part in the litigation. CP 93.

DPA McCrae attempted to locate a government attorney from outside the Grant County Prosecuting Attorney's Office to represent the State at the new trial. 2RP 18-19. When those efforts failed, DPA McCrae and DPA Ed

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[4]The 2014 general election results may be found here http://results.vote.wa.gov/results/20141104/grant/

[5]This document is available on the Public Disclosure Commission's website at https://web.pdc.wa.gov/rptimg/default.aspx?docid=3841925 (last visited Mar. 10, 2019).

Owens appeared for the State upon remand. *See* 1RP 29; 2RP 1.[6] DPA Owens had represented the State in the original trial. *See, e.g.,* CP 24, 116.

Post-remand Nickels requested that Mr. Larranaga and Ms. Walsh be reappointed to represent him despite Grant County's Chapter 36.26 RCW Public Defender's Office having no conflict that would preclude its representation to Nickels. *See* 2RP 41-46. Nickels contended that the requisite "good cause" required by RCW 36.26.090 for appointing someone other than the Public Defender's Office was established by the complexity of the case which would require new lawyers to take "months, if not years" to master. 2RP 40. Nickels' briefly described the factors that render his murder case unusually complext as follows:

> The initial investigation was substantial, spanning several different states, including Montana, Washington, Idaho, Arizona, Utah, Wyoming, Oregon and Louisiana. In addition to investigating the state's allegation, the defense conducted extensive and credible investigation to support Ian Libby and Julian Latimer as the real killers. The forensic evidence was also plentiful including: DNA, cell phone evidence, ballistic, shoe impression, destruction of evidence, fingerprint and blood spatter. At trial, the state noted approximately 61 witnesses and the defense gave notice of 71 witnesses. The length and depth of the case is demonstrated by the appellate record, which consisted of 7,000 pages of transcripts and thousands of clerk's papers.

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[6]There are two volumes of verbatim report of proceedings. The page numbering for each volume begins with the number one. To avoid confusion, the State will cite to the volumes as follows:

> 1RP– May 9, 2017, and June 12, 2017 verbatim report of proceedings
> 2RP – May 31, 2017, verbatim report of proceedings

CP 17. The trial court ultimately found good cause for reappointing Mr. Larranaga and Ms. Waslh. 2RP 54, 57-58; CP 160-61.

After reappointing Nickels' prior counsel, the court heard Nickels' motion to disqualify the entire Grant County Prosecuting Attorney's Office. Nickels took the position that recusal of the entire office was required by *Stenger*, and that the "rule" from *Stenger* would require recusal even if Prosecutor Dano had assumed office just one week prior to the scheduled trial. 2RP 17.

The trial court rejected Nickels motion to disqualify the Grant County Prosecuting Attorney's Office. The court found that Nickels case was distinguishable from *Stenger* and the cases cited in *Stenger* as the charges were pending when Prosecutor Dano took office. 2RP 27. *See also* CP 158-160. The court determined that the State's screen had not been breached, CP 159-160, and that the State could maintain its screen, providing the court with a monthly statement that the screen has not been breached. 2RP 29.[7] The court reviewed the screen that was currently in place and provided Nickels with an opportunity to request additional measures. 2RP 30-32. Nickels did not request any additional measures when asked or at any subsequent point in time. 2RP 32.

[7]The State has complied with this requirement to throughout the appellate period. *See, e.g.,* CP 194-197.

Nickels obtained discretionary review of the order denying his motion to disqualify the entire Grant County Prosecuting Attorney's Office from participating in his case. In a 2-1 decision, with Judge Korsmo dissenting, Division III reversed the trial court's ruling and remanded the case. *Nickels*, slip op. at 14. The State files this timely petition for review.

V. ARGUMENT

RAP 13.4 discusses the considerations governing this Court's acceptance of review. Here, review is appropriate under RAP 13.4(b)(4) because the Court of Appeals' decision de facto office-wide disqualification rule unnecessarily restricts the electorate's choice of candidates for the elected office of prosecuting attorney and can jeopardize public safety by forcing the State to proceed to trial with poorly prepared counsel. Review is also appropriate under RAP 13.4(b)(1) because the majority's opinion conflicts with prior opinions of this Court, including but not limited to, *Sherman v. State*, 128 Wn.2d 164, 187, 905 P.2d 355 (1995), and *First Small Business Inv. Co. v. Intercapital Corporation of Oregon*, 108 Wn.2d 324, 322-32, 738 P.2d 263 (1987).

1. Nickels' Motion to Disqualify the Grant County Prosecuting Attorney's Office Must Be Rejected Under the Current Rules of Professional Conduct.

Division III ordered the disqualification of the entire Grant County Prosecuting Attorney's Office based upon dicta[8] contained in a factually distinguishable case. In *Stenger*, this Court disqualified the Clark County Prosecuting Attorney's Office from a murder case where a notice of special sentencing proceeding had been filed prior to the effective screening of the elected prosecuting attorney who had previously represented the defendant. *See Stenger*, 111 Wn.2d at 522-23. This Court, however, indicated that when an effective screen is erected the disqualification of an entire office is "neither necessary or wise." *Id.* at 523.

The Court's adoption of a screening exception to disqualification was progressive as the concept did not appear in the Rules of Professional Conduct ("RPC") that had been adopted in 1985, just three years before *Stenson* was issued. *See* 104 Wn.2d 1101-1139 (1985). In fact until the American Bar Association Committee on Professional Ethics issued Formal Opinion 342 on November 24, 2975, a per se rule of office wide disqualification was applied whenever a government lawyer who came from private practice had a conflict. The committee relied on two reasons in ruling that lawyers in a government office are not necessarily disqualified from

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[8] *See Nickels*, dissent slip op. 1 n. 2 (Korsmo, J., dissenting).

handling matters in which another lawyer in the office had participated while in private practice: (1) a contrary rule would unreasonably impair the government's ability to practice, and (2) salaried government employees do not have the financial interest in the success of departmental representation that is inherent in private practice. ABA Comm. on Professional Ethics, Formal Op. 342, 62 A.B.A.J. 517, 521 (1976).

Nearly twenty years after *Stenger* was issued this Court significantly amended the RPC. *See* 157 Wn.2d 1129–1342 (2006) (new RPC adopted effective Sep. 1, 2006). The new RPC, wholeheartedly embraced screening as a means of avoiding disqualification of a conflicted attorney's entire firm or office. A definition of "screened," RPC 1.0(k), was added to apply "to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12,1.18, or 6.5." Comment 8 to RPC 1.0.

"The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected." Comment 9 to RPC 1.0. Screening requires the personally disqualified lawyer to acknowledge a responsibility to not communicate with any of the other lawyers in the firm with respect to the matter. Other lawyers in the firm must be advised that they may not communicate with the personally disqualified lawyer in the firm about the matter. Non-lawyer

employees must also be instructed to not communicate with the personally disqualified lawyer or to restrict the personally disqualified lawyer's access to the files. *Id.*

While current RPC 1.9[9] and former RPC 1.9[10] both prohibit a lawyer who formerly represented a client in a matter to represent another party in the matter whose interests are materially adverse to the interests of the former client, the rules differ dramatically with respect to the impact of the attorney's personal disqualification upon other lawyers in the firm. Former RPC 1.10, 104 Wn.2d 113-14 (1985), prohibited a firm that a former client's lawyer becomes associated with from representing interests that are materially adverse to the former client absent a waiver from the former client. Former RPC 1.10(a) and (d) (1985). While former RPC 1.11, 104 Wn.2d 1114-15 (1985), contained special rules applicable to successive government and private employment, neither former RPC 1.10 nor former RPC 1.11 explicitly excused government offices from RPC 1.10's imputed disqualification provisions.

The 2016 RPCs still impute a lawyer's personal conflict to the entire firm. *See* RPC 1.10(a), 157 Wn.2d 1206(2006). This imputation rule, however, does not apply to government attorneys. *See* RPC 1.10(d), 157

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[9]157 Wn.2d 1202-06 (2006).

[10]104 Wn.2d 1113 (1985).

Wn.2d 1208 (2006); Comment 2 to RPC 1.11, 157 Wn.2d 1215 (2006). Private firms may avoid disqualification through the erection of a nonconsensual screen when a former client's attorney joins the firm. RPC 1.10(e), 157 Wn.2d 1208 (2006). *See also* Amended Official Comment 9 to RPC 1.10, 171 Wn.2d 1107-09 (2011). While the former client cannot insist upon disqualification if a screen has been erected, the former client may challenge the screening mechanism and may request court supervision to ensure that effective and actual compliance has been achieved. RPC 1.10(e), 157 Wn.2d 1208-09 (2006).

The impact of a former or current government attorney's personal conflict upon his or her office or agency is governed by RPC 1.11. RPC 1.10(d). Subsection (d)(1) and (2)(I) apply when a lawyer who is currently serving as a public officer is disqualified due to RPC 1.9. Comment 2 to RPC 1.11 explains that

> Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

157 Wn.2d 1215 (2006).

Although Division III recognized that the RPC had been amended since the time of *Stenger*, *see Nickels*, slip op. 7 n. 2 and 3, the court's analysis is largely limited to the *Stenger* opinion. This was error. The law

of disqualification evolves as the rules of professional conduct are amended. Current verison of rules apply to cases, not former versions. *See First Small Business Inv. Co.*, 108 Wn.2d at 322-32 (overruling the court of appeal's decision disqualifying firm's involvement in case because the cases relied upon were based upon pre-ethics rule case law and prior versions of the Code of Professional Responsibility). One court describes the evolution as a repudiation of the notion of avoiding "even the appearance of professional impropriety" in favor of a "function approach" that concentrates on preserving confidentiality and avoiding positions actually adverse to the client. *State v. Dimaplas*, 978 P.2d 891, 893-94 (Kan. 1999).

Consistent with the functional approach, most jurisdictions refuse to disqualify an entire office when a timely and effective screen is erected and maintained. *See, e.g., United States v. Goot*, 894 F.2d 231 (7th Cir. 1990); *In re Grand Jury 91-1*, 790 F. Supp. 109, 112 (E.D. Vir. 1992) (noting that federal courts have been uniform in rejecting a "Caesar's Wife" theory and allowing an office continue to handle a case when the defendant's former attorney recuses and a screen is erected); *People v. Perez*, 201 P.3d 1220 (Colo. 2009) (capital case); *State v. Kinkennon*, 747 N.W.2d 437, 444 (Neb. 2008) (noting that the appearance of impropriety alone is "'simply too slender a reed'" upon which to rest an office wide disqualification); *State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882 (Nev. 2014) (appearance-of-

impropriety standard no longer applicable after adoption of the Model Rules of Professional Conduct); *State v. Pennington*, 851 P.2d 494 (N.M. App. 1993) (a per se rule of disqualification is against the great weight of authority).

This functional approach is applied even when a defendant's prior counsel assumes the position of chief prosecuting attorney while the defendant's criminal matter is still pending. *See United States v. Goot, supra* (United States Attorney's Office not disqualified because adequate measures screened the defendant's former counsel who was appointed the United States Attorney); *In re Grand Jury 91-1*, 790 F. Supp. 109 (E.D. Vir. 1992) (office wide disqualification unnecessary where the newly appointed U.S. Attorney for the Eastern District was immediately and effectively screened from his prior client's matter); *State v. Eighth Judicial Dist. Court of the State, supra* (a prosecutor's conflict of interest arising from transitioning from being defense counsel to the chief prosecutor is not imputed to the prosecutor's office).

The reasons given by the courts for rejecting an office wide disqualification rule include "the convenience of utilizing the office situated in the *locus criminis*," *Goot*, 894 F.2d at 236; "prosecutors do not choose the cases that come to them," *Perez*, 201 P.3d at 1229-1230; separation of powers issues, *Eighth Judicial Dist.*, 321 P.3d at 886, *State v. Hayes*, 997

So.2d 446, 448-49, (Fla. App. 2008); unnecessary interference with the prosecutor's performance of his or her constitutional and statutory duties, *Kinkennon*, 747 N.W.2d at 444; *State v. Camacho*, 406 S.E.2d 868 (N.C. 1991); upholding the voters' choice of prosecutor, *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387-88 (Mo. 2018); impairment of government's recruitment of lawyers, *State ex. rel. Horn*, 138 S.W.3d 729, 732 (Mo. App. 2002); *Kinkennon*, 747 N.W.2d at 444; *Pennington*, 851 P.2d at 499; limiting mobility in the legal profession, *Kinkennon*, 747 N.W.2d at 444; large cost to the county in paying for a special prosecutor to prosecute the case, *Eighth Judicial District*, 321 P.3d at 886; and the presumption that the personally disqualified attorney will perform his or her ethical duties and keep his or her former client's confidences and that staff members will comply with the screen, *Eighth Judicial District*, 321 P.3d at 886; *Pennington*, 851 P.2d at 498. All of these policy reasons are equally applicable to Washington.

Washington's current RPC do not contain an "elected prosecuting attorney" exception and this Court has already rejected a "supervisory attorney" office wide disqualification rule. *See Sherman*, 128 Wn.2d at 187 (entire attorney general's office not disqualified where the personally conflicted supervisory attorney of the assistant attorney generals who represented the State in the matter was screened from participation in the case). Division III's adoption of such a rule results in the disqualification of

entire government offices under circumstances in which private law firms are no longer disqualified.

The State strictly complied with the current RPC. Prosecutor Dano was immediately screened for the Nickels matter, as was the lawyer who advised Nickels' identified "other suspect" on his Fifth Amendment rights and all support staff who had been employed by Dano's private practice. The screen implemented complies with Comment 9 to RPC 1.0. Under these circumstances there are no facts that – if known to a reasonable persion – would create an appearance of impropriety that would cast doubt on the fairness of Nickels' retrial. Division III's decision to disqualify the entire Grant County Prosecuting Attorney's Office must be reversed.

The practical implications of applying Division III's virtual per se rule of disqualification highlight the wisdom of current RPC 1.11(d). Vicarious disqualification significantly impacts the efficiency of the administration of the criminal justice system. If vicarious disqualification of prosecuting attorney's offices were required each time the elected prosecuting attorney previously served as a criminal defense attorney, the electorate's choice of future prosecutors will be constrained due to the cost of procuring outside counsel. Even if the financial expense were not a major consideration of the voters, the electorate may not be pleased about having important cases prosecuted by people who do not have the criminal-law experience or the

knowledge of local culture (including the modes of thinking of the local judiciary and juries) possessed by an office's deputies. Division III's suggestion that the public can still elect a defense attorney whose practice has focused on misdemeanor work or juvenile court matters, *see Nickels*, slip op. at 12-13, provides scant comfort to voters who desire prosecuting attorneys with experience handling serious felonies.

While Washington's prosecuting attorneys are not subject to the appearance of fairness doctrine[11] and a criminal defendant's constitutional right to due process does not entitle him to a prosecution free of the appearance of impropriety,[12] the State concedes that society's confidence in the criminal justice system depends on society's perception that the system is fair and its results are worthy of reliance. The touchstone of this test is not from Nickels' perspective, but from that of a reasonable disinterested person. *See State v. Lemasters*, 456 S.W.3d 416, 423 (Miss. 2015). *Accord Hoquiam v. Public Employment Relations Commission*, 97 Wn.2d 481, 646 P.2d 129 (1982) (a disinterested person who has been apprised of all the facts standard applies to appearance of fairness questions). Where, as here, the personally

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[11]"The mere appearance of impropriety is insufficient to remove a prosecutor because the appearance of fairness doctrine does not apply to the executive duties of a prosecutor." *Doyle v. Lee*, 166 Wn. App. 397, 403, 272 P.3d 256 (2012) (citing *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999)).

[12]*Goot*, 894 F.2d at 234 (violations of ethics rules do not per se give rise to a constitutional violation); *Lux v. Commonwealth*, 484 S.E.2d 145, 151 (Va. App, 1997) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)).

disqualified attorney is screened completely from the prosecution, a reasonable person would not doubt the fairness of the trial. *Lemasters*, 456 S.W.3d at 425. *Accord Hoquiam v. Public Employment Relations Commission, supra* (appearance of fairness not violated by a law firm's representation of a union before the Commission where a partner in the firm, who was also a commissioner, disqualified herself and was screened from the case in her law firm).

Finally, a number of courts have noted that the effect of transferring responsibility for representing the State to another office or an independent prosecutor is "more cosmetic than substantial." *State v. Cline*, 405 A.2d 1192, 1207 (R.I. 1979). The New Mexico Court of Appeals explains that

> insofar as disqualification of the entire staff of a district attorney is justified solely because of concern for the appearance of unfairness, the appointment of a special prosecutor cannot fully allay that concern. Unless the special prosecutor begins the investigation from scratch, even a special prosecutor of absolute integrity cannot avoid the possibility that material supplied by the district attorney's office or police agencies has been contaminated by disclosures from the disqualified employee.

Pennington, 851 P.2d at 500. In most cases an investigation cannot be started from scratch and the special prosecutor of necessity will be provided with all materials that were collected independently of the personally conflicted lawyer, including police reports, statements of witnesses, work product, and items of evidence. See, e.g., *State v. Latigue*, 502 P.2d 1340, 1342 (Ariz.

1972). Thus the office wide disqualification merely alters who must be screened from the individually tainted attorney; it does not remove the need for a screen.

Review of Division III's virtual per se elected prosecuting attorney office wide disqualification rule is required by both public policy and this Court's precedent. Reversal of Division III's opinion

2. The Extraordinary Circumstance Exception to Office Wide Disqualification Must Consider Current Circumstances.

Division III compounded its reliance on dicta in a factually distinct death penalty case by adopting a defendant centric test for determining when "extraordinary circumstances" will justify an exception to office wide disqualification. Division III's test focuses solely on the seriousness of the offense that the elected prosecuting attorney's former client is being tried for and whether the elected prosecuting attorney obtained confidential information while representing his former client. *See Nickels*, slip op. at 9-11, dissent slip op. at 3 -6. The proper test to determine whether office wide disqualification should be rejected must take into account the impact of disqualification on the interest of the prosecuting attorney's client. *Cf.* RPC 3.7(a)(3) (disqualification of lawyer/witness to be abated if doing so would work substantial hardship on client).

Factors to be considered in whether office wide disqualification

should be abated include the complexity of the case, cost of substitute lawyer, proximity to the trial date, availability of alternative counsel, and adequacy of screening measures. *See, e.g., Massachusetts School of Law v. American Bar Association*, 872 F. Supp. 1346, 1380 (E. D. Pa. 1994) (among the facts to consider in determining hardship are proximity to trial date and the amount of time and resources already spent); *Northbrook Digital LLC v. Vendio Servs.*, 625 F. Supp. 2d 728, 766 (Minn. D. 2008) (hardship factors include cost and lose of knowledge and expertise); *Dewey v. R.J. Reynolds Tobacco Co,* 536 A.2d 243, 251-52 (N.J. Super.1988) (abating office wide disqualification under RPC 1.10 due to complexity of case, number of witnesses, and proximity of trial date). These same factors are currently applied by Washington courts when considering requests for substitution of counsel. *See, e.g., State v. Stenson*, 132 Wn.2d 668, 736-37, 940 P.2d 1239 (1997) (affirming the denial of a motion for substitute counsel based upon complexity of case, number of witnesses, proximity to trial, and length of time case had been pending).

The abatement of office wide disqualification in the instant case is supported by the complexity of the case noted by Nickels' attorney, that one of the deputy prosecuting attorneys who represented the State during the 2012 trial is still available, the erection of an effective screening mechanism, the cost of paying for an independent or special prosecutor, and the difficulty in

locating an experienced attorney who is willing to represent the State in this case. *See generally Nickels*, dissent slip op. at 7-9.

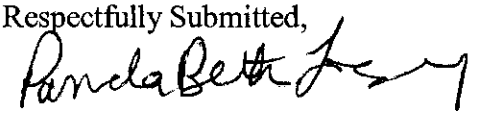
The State's petition for review should be granted as the public has a fundamental interest in a fair office wide disqualification abatement test.

VI. CONCLUSION

The State respectfully requests that this Court accept review of the issues identified in section III. of this pleading.

Dated this 11th day of March, 2019.

Respectfully Submitted,



Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 11th day of March, 2019, an electronic copy the document to which this proof of service is attached was, pursuant to the agreement of the parties and amici curiae, served upon the following individuals via the CM/ECF System and/or e-mail:

Jacqueline Walsh at jackie@jamlegal.com

Mark Larranaga at mark@jamlegal.com

John Strait at straitj@seattleu.edu

Rita Griffith at griff1984@comcast.net

Hillary Behrman at hillary@defensenet.org

Signed under the penalty of perjury under the laws of the state of Washington this 11th day of March, 2019, at Olympia, Washington.

PAMELA B. LOGINSKY, WSBA No. 18096

APPENDIX A

Declaration of Pamela B. Loginsky

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. III

STATE OF WASHINGTON, Respondent, vs. DAVID EMERSON NICKELS, Petitioner.	NO. 35369-9-III DECLARATION OF PAMELA B. LOGINSKY

I, PAMELA B. LOGINSKY, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

1. I am a duly appointed, qualified and acting Special Deputy Prosecuting Attorney in and for Grant County, representing the State of Washington in this matter.

2. I am also the staff attorney for the Washington Association of Prosecuting Attorneys ("WAPA"). WAPA's membership consists of the 39 elected county prosecuting attorneys in Washington state. WAPA assists the elected county prosecuting attorneys in fulfilling their duties.

3. My duties at WAPA include summarizing all published opinions issued by Washington appellate courts, coordinating the WAPA appellate attorney resource

program, staffing the WAPA Appellate Committee, representing WAPA as amicus curiae counsel, and serving as a special deputy prosecuting attorney in conflict and non-conflict situations.

4. When Division III released its published opinion in *State of Washington v. David Emerson Nickels*, COA No. 35369-9-III, on February 7, 2019, I immediately provided notice of the opinion to all 39 elected prosecuting attorneys and to the members of the WAPA Appellate Committee. A consensus was immediately reached that the interests of the State of Washington would be best served by seeking further review of the opinion in the Washington Supreme Court. Grant County Prosecuting Attorney Garth Dano did not take any position on whether a petition for review should be filed.

5. In light of Division III's opinion that the entire Grant County Prosecuting Attorney's Office is disqualified from representing the State in this matter, it was considered prudent that current counsel for the State not be involved in the preparation of a petition for review. WAPA's Board of Directors selected myself to prepare the petition for review and a conflict special deputy prosecuting attorney ("special DPA") appointment document with my name inserted was sent to Grant County Prosecuting Attorney Garth Dano. Prosecutor Garth Dano, who was not involved in my selection as the attorney for the State, signed the conflict appointment as presented to him.

6. Once the WAPA Board identified me as the attorney who should be

appointed as a special DPA in this case, I have had limited contact with the Grant County Prosecuting Attorney's Office and Grant County Deputy Prosecuting ("DPA") Attorney Kevin James McCrae. DPA McCrae was sent the special DPA appointment and he was asked to present it to Prosecuting Attorney Dano. DPA McCrae was asked to send me the clerks papers, VRP, briefs, appellate court motions and other papers, and all rulings by this Court. Finally, DPA McCrae was instructed to not file any motions in the trial court regarding this case, but to continue filing the previously ordered monthly declaration as to the sufficiency of the screen erected between Prosecutor Dano and all other Grant County Prosecuting Attorney's Office employees and deputies.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 27th day of February, 2019, at Olympia, Washington.

PAMELA B. LOGINSKY, WSBA NO. 18096
Special Deputy Prosecuting Attorney
206 10th Avenue SE
Olympia, WA 98501
Phone: 360-753-2175
E-mail: pamloginsky@waprosecutors.org

APPOINTMENT OF SPECIAL DEPUTY AND OATH OF OFFICE

KNOW ALL PERSONS:

That I, Garth L. Dano, Prosecuting Attorney for Grant County, State of Washington, have this day, pursuant to RCW 36.27.040, appointed Pamela B. Loginsky, WSBA No. 18096, of the Washington Association of Prosecuting Attorneys, my true and lawful Special Deputy for the limited purpose of representing the State of Washington in the Washington Supreme Court in any actions related to *State of Washington v. David Emerson Nichels*, Washington Court of Appeals No. 35369-9-III.

Pamela B. Loginsky may only perform additional tasks, services or duties with my express written authorization.

This appointment shall commence on February 27, 2019, and shall continue until the conclusion of services as described above, except as follows:

This appointment is made pursuant to *Herron v. McClanahan*, 28 Wn. App. 552 (1981), to address a conflict of interest. If the services described above have not been concluded, I may only refuse to reappoint Pamela B. Loginsky at the beginning of any subsequent term of office for cause and with the permission of the superior court. If the services described above have not been concluded, I may only revoke the appointment only for cause and only with the permission of the superior court.

The conflict necessitating the appointment of Pamela B. Loginsky is personal and proper screens have been erected in the Grant County Prosecuting

Attorney's Office between myself and staff.

As the Court of Appeals's February 7, 2019, opinion in *State v. Nickels*, No. 35369-9-III, holds that the entire Grant County Prosecuting Attorney's Office is precluded from representing the State of Washington in any matter related to *State of Washington v. David Emerson Nickels*, Grant County Superior Court Cause No. 10-1-00322-6, a screen is hereby erected between members of my office and Pamela B. Loginsky. The only communication allowed is a transfer of clerk's papers, transcripts, and court of appeals pleadings for *State of Washington v. David Emerson Nickels*, Court of Appeals No. 35369-9-III from the Grant County Prosecuting Attorney's Office to Pamela B. Loginsky.

With this appointment I give Pamela B. Loginsky full power and authority to do and act in my name the same as I would in law be empowered to do if personally present for the expressed purposes described above.

IN WITNESS WHEREOF, I have hereunder set my hand this 27 day of February, 2019.

GARTH L. DANO, WSBA No. 11226
Grant County Prosecuting Attorney

OATH OF OFFICE

STATE OF WASHINGTON

THURSTON COUNTY ss.

I, Pamela B. Loginsky, do solemnly swear that I will support the Constitution of the United State and Constitution of the State of Washington and that I will faithfully and impartially fulfill the office of Special Deputy Prosecuting Attorney for the expressed purposes stated above to the best of my ability.

Pamela Beth Loginsky

Pamela B. Loginsky, WSBA No. 18096

SUBSCRIBED AND SWORN this 27th day of February, 2019.

LYNN FIORILLO-LOWE NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-02-20

Lynn Fiorillo-Lowe

NOTARY PUBLIC IN AND FOR
Thurston County
Residing in Thurston County
My Commission expires on 10/2/20

After recording return to:
Grant County Prosecuting Attorney's Office

APPENDIX B

State v. Nickels, No. 35369-9-III (Feb. 7, 2019)

FILED
FEBRUARY 7, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 35369-9-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
DAVID EMERSON NICKELS,	)	
	)	
Petitioner.	)	

PENNELL, J. — When an attorney transitions from representing individual clients to the position of elected prosecutor, conflicts of interest can arise, restricting not only the attorney's ability to work on a given case, but also necessitating recusal of the entire prosecutor's office. The standard set by the Washington Supreme Court is that when an elected prosecutor has previously represented a criminally accused person in a case that is

the same, or substantially the same, as the one currently pending prosecution, the entire prosecutor's office should ordinarily be disqualified from further participation.

The questions raised by Mr. Nickels's appeal are whether the Supreme Court's office-wide recusal standard contemplates a bright-line rule and, if not, what circumstances can disentangle an elected prosecutor's need for recusal from that of the prosecutor's office. We hold that a prosecutor's office is not subject to bright-line recusal rules. While office-wide recusal under the Supreme Court's test is the norm, an exception can exist in extraordinary circumstances. Extraordinary circumstances are informed not by the nature of the elected prosecutor's current activities, but by his or her prior work as counsel, including (1) whether the prosecutor was privy to privileged information and (2) the nature of the case giving rise to the elected prosecutor's conflict of interest.

Here, Grant County Prosecuting Attorney Garth Dano previously represented David Nickels in a first degree murder case that remains pending in Grant County Superior Court. Mr. Dano's work caused him to be privy to confidential work product and attorney-client information. Given this circumstance, coupled with the seriousness of Mr. Nickels's criminal charge, extraordinary circumstances do not justify differentiating Mr. Dano's conflict of interest from that of the entire Grant County Prosecuting Attorney's Office. Instead, the general rule applies and the entire prosecutor's office must be recused along with Mr. Dano. The trial court's order to the contrary is reversed.

BACKGROUND

In 2012, a Grant County jury convicted David Nickels of first degree murder. Deputy prosecutors Tyson Hill and Edward Owens handled the case under the supervision of Grant County's elected prosecutor, D. Angus Lee.

Mr. Nickels was represented by Seattle-based attorneys Mark Larranaga and Jacqueline Walsh. Because they worked remotely, Mr. Nickels's attorneys sought local assistance from then-private attorney Garth Dano. 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." Clerk's Papers at 179.

On September 4, 2012, Mr. Dano entered a notice of association of counsel so that he could represent Mr. Nickels while Mr. Larranaga and Ms. Walsh attended to matters out of state. Mr. Dano subsequently appeared in court with Mr. Nickels for a jury question and when the jury returned its verdict. Mr. Dano did not provide any substantive input at the time of the jury question or the verdict. However, after the verdict, Mr. Dano met with Mr. Nickels to discuss the case.

In November 2014, while Mr. Nickels's case was pending appeal, Mr. Dano was elected as the Grant County Prosecuting Attorney. Mr. Dano took office in January 2015. The Grant County Prosecuting Attorney's Office did not handle Mr. Nickels's appeal. Instead it contracted with the Kitsap County Prosecuting Attorney's Office for the appointment of two of its deputies, pursuant to RCW 36.27.040, as special deputy prosecuting attorneys for Grant County. Contract details were arranged several months prior to Mr. Dano's election.

In early 2017, this court reversed Mr. Nickels's first degree murder conviction based on instructional error.[1] On remand, the case was assigned to Grant County deputy prosecutors Kevin McCrae and Edward Owens. Mr. Dano was recused from the case, and has had no participation at any time during his tenure as the prosecuting attorney.

After Mr. Nickels's case was remanded to superior court, defense counsel moved to disqualify the entire Grant County Prosecuting Attorney's Office from further participation based on Mr. Dano's conflict of interest. The trial court denied the motion; but, recognizing there were substantial grounds for a difference in opinion, the court certified its order for immediate appellate review under RAP 2.3(b)(4). We granted discretionary review.

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[1] *State v. Nickels*, No. 31642-4-III (Wash Ct. App. Feb. 28, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/316424_unp.pdf.

ANALYSIS

The issue in this case is narrow. The parties agree the elected prosecutor, Garth Dano, has a disqualifying conflict of interest and must be recused from Mr. Nickels's case. The only issue to be decided is whether Mr. Dano's entire office must be recused as well. Our review is de novo. *State v. Greco*, 57 Wn. App. 196, 200, 787 P.2d 940 (1990).

The lead authority governing our analysis is *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). *Stenger* addressed the issue of when, under the Rules of Professional Conduct (RPC), an elected prosecutor's conflict of interest must be imputed to the balance of the prosecutor's office. The *Stenger* court articulated the following standard:

> 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 of 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.

111 Wn.2d at 522 (footnote omitted).

The parties dispute the nature of the *Stenger* standard. According to Mr. Nickels, *Stenger* sets a bright-line rule, requiring office-wide recusal whenever an elected prosecutor has a conflict of interest based on prior representation of a client in the same or similar case as the one currently pending prosecution. The State claims *Stenger* articulated only a general standard, and that office-wide recusal is not required in extraordinary circumstances.

Stenger *did not create a bright-line recusal rule*

Stenger's imputed recusal standard comes close to creating a bright-line rule, but it ultimately falls short. For one thing, *Stenger*'s analysis is couched in qualified language. In announcing the standard for recusal of a prosecutor's office, *Stenger* used the auxillary verb "should;" not "shall" or "must." *Id.* In so doing, the decision indicated that recusal of an entire office is not always required, even when the elected prosecutor himself or herself must be recused based on prior representation in the same case.

In addition to *Stenger*'s qualified language, the decision did not purport to change the written RPCs, which specifically exclude government agencies from bright-line rules of imputed conflicts. As recognized in *Stenger*, 111 Wn.2d at 522-23 & n.15, a conflict based on a private attorney's prior representation is automatically imputed to other

attorneys in the same law firm. RPC 1.10.[2] But there is no similar rule for government lawyers. *See* RPC 1.11.[3] Instead, the conflict rules for government lawyers are assessed more narrowly, according to each lawyer's individual circumstances. *Id.*

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. But, because no per se recusal rule exists for public service attorneys, there is the possibility of an exception, based on the individual circumstances

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[2] At the time of *Stenger*, RPC 1.10(a) provided as follows: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9, or 2.2." Former RPC 1.10(a) (1987). The same provision now states, "Except as provided in paragraph (e) [regarding waiver], while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." RPC 1.10(a).

[3] At the time of *Stenger*, the applicable rule stated, "Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not . . . [p]articipate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful designation may be, authorized to act in the lawyer's stead in the matter." Former RPC 1.11(c)(1) (1987). The relevant provision now states, "Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee: (1) is subject to Rules 1.7 and 1.9; and (2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing." RPC 1.11(d).

of the elected prosecutor.

Stenger's *office-wide recusal rule does not apply in extraordinary circumstances.*

Rather than a bright-line rule, we interpret *Stenger* as setting a general standard that an elected prosecutor's prior representation of the accused in the same or similar case will ordinarily require office-wide recusal, but an exception can apply in extraordinary circumstances. The question left unanswered by *Stenger* is what constitutes extraordinary circumstances.

Extraordinary circumstances are not informed by the level of participation as a prosecutor

The State posits that the nature of an elected prosecutor's current activities are relevant to the issue of extraordinary circumstances. It points out that the elected prosecutor in *Stenger* had taken official actions in support of his former client's prosecution, including communicating with the press, being present at law enforcement briefings, and receiving updates on the case from deputy prosecutors. 111 Wn.2d at 519. In contrast, Mr. Dano has never been involved in any aspect of Mr. Nickels's prosecution. The decision to charge Mr. Nickels was handled by a prior administration and Mr. Dano has been completely screened from all information regarding the prosecution of Mr. Nickels by deputy prosecutors.

We find the elected prosecutor's current activities irrelevant to the question of extraordinary circumstances. Whether an elected prosecutor has participated in an ongoing case against a prior client goes to the issue of screening. Effective screening is not an extraordinary circumstance. It is an ordinary requirement, applicable to all types of conflicts regardless of the identity of conflict holder. *Id.* at 522-23 (Screening, as opposed to office-wide recusal, is required when a prosecuting attorney is conflicted for reasons other than prior representation in the same case.); Washington State Bar Association (WSBA) Advisory Opinion 1773 (1997) (Screening is required when a conflict is held by a deputy prosecuting attorney.). We therefore must look beyond an elected prosecutor's work as a prosecutor to discern the nature of *Stenger*'s extraordinary circumstances standard.

Extraordinary circumstances are informed by the prior representation

Rather than being informed by the nature of an elected prosecutor's current work as a prosecutor, we interpret *Stenger*'s extraordinary circumstances standard to be focused on the elected prosecutor's prior work as counsel for the accused. Two aspects of an elected prosecutor's prior work are salient: (1) whether the elected prosecutor's prior work involved acquisition of privileged work product and/or confidential attorney-client information, and (2) the nature of the case giving rise to the elected prosecutor's conflict of interest.

In announcing a general standard for imputed conflicts, *Stenger* was primarily concerned with protecting "privileged information." 111 Wn.2d at 521-22. *Stenger* was a death penalty prosecution. The elected prosecutor had previously represented Mr. Stenger in an unrelated case. The Supreme Court recognized that had Mr. Stenger been charged with an ordinary felony, the elected prosecutor's prior representation would not have created a conflict of interest. However, because a death penalty prosecution involves an assessment of an accused's past, including "earlier criminal and antisocial conduct," there was a danger that the current prosecution could be tainted by "privileged information obtained by the prosecuting attorney when he was the defendant's counsel." *Id.*

Stenger relied heavily on *State v. Laughlin*, 232 Kan. 110, 652 P.2d 690 (1982), which also emphasized a concern for privileged information. According to the Kansas rule set out in *Laughlin*, the test for recusal of a prosecuting attorney and his office turns completely on access to confidential information. In Kansas, recusal of an entire prosecutor's office is required if "by reason of his [or her] prior professional relationship with the accused, [the prosecuting attorney] has obtained knowledge of facts upon which the later case is predicated or facts which are closely interwoven therewith." *Id.* at 114. If no material confidences were shared during the prior representation, disqualification is not required. *Id.*

Given *Stenger*'s emphasis on protecting privileged information, it is apparent that the existence of confidential attorney-client communications is relevant to the extraordinary circumstances analysis. Generally, an attorney's representation of a client will involve acquisition of privileged information through confidential communications. Thus, an elected prosecutor and his or her office will typically need to be recused from prosecuting a case in which the elected prosecutor previously served as defense counsel. But in unusual circumstances, the elected prosecutor's prior representation may have been so brief, or so attenuated, that no confidential communications were shared. Such circumstances would be extraordinary and might not necessitate recusal of the entire prosecutor's office.

Apart from the concern for privileged information, we recognize the *Stenger* standard as also informed by the nature of the case under prosecution. Because *Stenger* was a death penalty prosecution, there was a "heightened 'need for reliability in the determination that death [was] the appropriate punishment.'" *State v. Clark*, 143 Wn.2d 731, 761, 24 P.3d 1006 (2001) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)). Given the significant commitment of resources necessary for a death penalty prosecution, it is difficult to imagine that an elected prosecutor, tasked with prioritizing a county's prosecution resources, can ever be fully walled off from a death penalty prosecution. It is perhaps for this reason that in 1997 the

WSBA's RPC Committee[4] issued an advisory opinion, stating that, in death penalty cases, recusal of an elected prosecutor based on prior representation in the same criminal case must result in recusal of the prosecutor's office as a whole. WSBA Advisory Opinion 1773 (1997). But in less significant prosecutions, there is a greater chance that an elected prosecutor could be effectively walled off from a case brought by his or her office. We therefore discern the nature of the case as relevant to *Stenger*'s extraordinary circumstances standard.

Our assessment of the importance of the nature of the case under prosecution finds support in the commentary to Washington's RPCs. As recognized by the comment to RPC 1.11, the question of whether or how recusal should apply to a government agency involves "a balancing of interests." RPC 1.11 cmt. 4. Although steps must always be taken to protect client confidences, the recusal standard should not be so broad as to limit the pool of qualified attorneys who might work in government service. *Id.* This concern for the governmental talent pool applies to elected prosecutors. By taking the nature of a prior case into account, *Stenger*'s exceptional circumstances standard provides space for a greater pool of potential elected prosecutors including, for example, a defense attorney

[4] The RPC Committee was the predecessor of the current WSBA Committee on Professional Ethics. Advisory opinions of these committees are based solely on the RPCs, of which the Washington Supreme Court is the ultimate arbiter.

whose practice has focused on misdemeanor work or the supervisor in a public defender's juvenile unit. Under a flexible *Stenger* standard, individuals involved in routine defense cases would be free to seek election as prosecuting attorney without raising the concern that the county would be burdened by a significant number of office-wide recusals.

Extraordinary circumstances do not permit continued prosecution by the Grant County Prosecuting Attorney's Office

Having discerned two factors relevant to our analysis, we find no extraordinary circumstances that would excuse the Grant County Prosecuting Attorney's Office from being conflicted out of Mr. Nickels's case. 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. If Mr. Nickels were merely facing a low-profile misdemeanor charge, Mr. Dano's work on the case might not have created the need for office-wide recusal. In such a circumstance, Mr. Dano's conflict might have been sufficiently handled by instituting screening mechanisms. But Mr. Nickels is charged with first degree murder. While this is not a death penalty case, the charge against Mr. Nickels is of great significance. No amount of screening can be sufficient to fully wall off Mr. Dano from the case or prevent him from being cognizant of the

resources being committed to Mr. Nickels's case, and thus not devoted to other office priorities. Given the foregoing circumstances, Mr. Dano's conflict of interest and need for recusal must extend to the entire Grant County Prosecuting Attorney's Office.

CONCLUSION

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.

Pennell, J.

I CONCUR:

Lawrence-Berrey, C.J.

No. 35369-9-III

KORSMO, J. (dissenting) — Although I agree with much of what the majority writes, my concern is that the test adopted is too narrow and operates as a per se standard. The likely outcome is that no small county attorney with significant practice involving the county government, nor a head public defender in any county, could become the elected prosecutor without causing severe conflict of interest problems. Mr. Dano's token appearance at the end of the first trial rightly leads to his exclusion from the prosecution of his former client, but screening him from the retrial of this case is an adequate remedy. There is no need for recusal of the entire prosecutor's office for the retrial of a case previously prosecuted by another administration.[1]

I agree with the majority that this case is controlled by *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). I also agree with the majority's construction of the *Stenger* dicta[2] concerning recusal of the entire prosecutor's office when the elected prosecutor

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[1] Interestingly, this court once decided that a trial judge did not have to recuse from a criminal case even though he had both defended and prosecuted the defendant in earlier cases. *State v. Dominguez*, 81 Wn. App. 325, 914 P.2d 141 (1996). A former client's secrets can more easily be used against him by a judge than by an attorney.

[2] *Stenger* involved a death penalty prosecution of the defendant for aggravated murder; the elected prosecutor had previously represented the defendant a decade earlier in a different case. 111Wn.2d at 518. Thus, the discussion of how to address the elected prosecutor's representation of the defendant in the same case his new office was prosecuting technically is dicta, though it was understandable that the court would use the opportunity to opine on a problem that could easily arise.

previously represented the defendant in the same case—"ordinarily" the entire office will be recused. *Id.* at 522. However, I see nothing in that language suggesting that only "extraordinary" circumstances will justify a remedy other than recusal of the entire office; rather, recusal is the presumptive remedy. However, RPC 1.11 provides for screening of conflicted government attorneys, not recusal of the entire office.

Instead, I think the key to *Stenger* is found in the paragraphs of the opinion following the one emphasized by the majority. Noting that there is a significant difference in imputing disqualification in the government sphere than in the private firm context, the court opined, also in dicta, that screening ordinarily will be the remedy when a deputy prosecutor has a conflict of interest. *Stenger*, 111 Wn.2d at 522-23. The court then finally turned to the issue of the elected prosecutor's actions in that case:

> 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.

In sum, the prosecutor had been involved in the preparation of the case against his former client and was not screened. Under those circumstances, the entire office had to be recused. There would have been no need to talk about the ineffectual screening of the prosecutor if his conflict had required recusal of the entire office from the beginning.

Rather, the ineffectual screening simply demonstrated that recusal of the entire office was necessary since the screening remedy had failed.

This case is completely different. The charging decision had been made, the evidence developed, and the trial had been completed two years before Mr. Dano was elected prosecutor. Screening could be an effective remedy since there were no discretionary decisions to make about the case and none of the client's secrets could possibly be used against him in the future because the evidence and record already was settled. I do not believe that *Stenger* requires anything more in this case.

Nonetheless, I need to comment further because the majority's chosen test factors are ineffectual. First, the majority discounts the prosecutor's current activities as prosecutor, arguing they are irrelevant. They aren't. Prosecutor's offices run the gamut from two attorney offices to those numbering in the hundreds. Elected prosecutors vary in their practices—some are merely managers who set policy and have little or no responsibility for any particular case, while others maintain significant caseloads and have only minimal management functions. Some work solely on the civil or the criminal side of the office. Others leave civil and criminal department heads the job of managing their respective sides of the office. In many of these situations, it is easy to effectively screen the elected prosecutor from a particular case because it is a case that the prosecutor normally would not be involved with.

The majority ignores these differing office arrangements and turns, instead, to the nature of the prior representation of the defendant and the nature of the case charged. Without considering the possibility of effective screening in the particular circumstances of each office, the majority effectively writes that option out of existence. Instead, it relies on factors that are likely to always require recusal of the entire office.

The first of those factors is that nature of the prior representation. Although I agree that this factor could have some application to the remedy, the majority's limitation of the factor necessarily requires only one remedy—recusal. That arises from the fact that the majority is concerned with the prior representation only if the "prior work involved acquisition of privileged work product and/or confidential attorney-client communications." *All*[3] private communications between an attorney and client are privileged, whether or not the communications involve a client secret or not. In other words, as long as the client talked to the attorney, this factor will always suggest recusal is in order. As applied by the majority, this factor is largely meaningless except in those "extraordinary" cases where an attorney somehow represented a client without communicating with the client.

The second factor involves the seriousness of the case being prosecuted. This factor is problematic for two very different reasons. First, it draws the wrong lesson from

[3] Subject to the exceptions of RPC 1.6(b).

Stenger and fails to focus on the problem of privileged information. Second, this factor is going to be very difficult to apply.

As to the first problem, the majority rightly notes that *Stenger* was concerned with the possible misuse of privileged information in making the decision to seek the death penalty.[4] From this, it discerns that the nature of the case is meaningful in deciding whether recusal is required. That is an overly ambitious leap of logic. Capital cases are sui generis, in part because the defendant's character and his prior convictions necessarily are at issue during sentencing. They are not necessarily at issue in any other criminal case. The leap from *Stenger* to a non-capital case is not justified.

More importantly, this factor is problematic because it only considers how the potential misuse of privileged information will affect the pending case, not how it will affect the client whose secrets are being misused. I think such a narrow focus is misplaced. It is the nature of the privileged information, not the nature of the current charge, that can make the privileged information particularly problematic. On occasion privileged information will be relevant to the case at hand, but likely the privileged information is potentially more damaging to the client's reputation than it is to the case in

[4] From a practical perspective, admission of the prior judgment and sentence during the sentencing phase of a capital case that shows the prosecuting attorney's name as the former attorney for the defendant is likely to be extremely damaging to the defendant. A juror might conclude that the prosecutor who represented the client has additional valid reasons for seeking the death penalty than those presented at trial.

question. The fact that damaging secrets are betrayed in a misdemeanor case rather than in a Class A felony is of no comfort to the damaged client. Thus, I see this focus, too, as too narrow.

The significance of the current case factor also is going to be very difficult to apply. What makes a case serious? Although our legislature has established seriousness levels for felony cases, it would be an arbitrary decision for judges to determine which ones are serious enough to matter for conflict of interest purposes. And, how would that work in the civil context? If the newly elected prosecutor was the county's preeminent private land use attorney and represented most of the county's big land developers, would that fact require that all cases involving those developers be farmed out to special prosecutors over the length of the entire term, or simply require that only pending projects the prosecutor had worked on before the election be sent out? Would, or should, the standard vary simply because the prosecutor had worked on only one small land use case involving a non-developer? These are very real problems in smaller counties where the smaller bars necessarily means that most attorneys will have worked on behalf of clients who were being opposed by the prosecutor's office, or by county agencies represented by that office.

Contrary to the majority opinion, I also see no reason why the seriousness level of the prior crimes matters. The fact that high-volume misdemeanor or juvenile court cases are "routine defense cases" should be meaningless except to suggest the possibility of

large numbers of future conflicts arising from having large numbers of former clients. One's privileged secrets, shared with defense counsel, simply do not become less important because the case in which they were divulged is less serious than a current case.

At issue in *Stenger* was the potential importance of privileged information to the charging decision in the pending case. The factors discerned by the majority from that decision are largely divorced from the privilege problem presented there. For that reason, I don't think those factors work.

Rather, I think a totality of the circumstances approach is necessary to determine if this, or any other, case is exempted from the "ordinary" or presumptive remedy of office-wide recusal. Rather than apply fixed factors that, to my mind, don't appear to determine which cases are "extraordinary," I think that factors to consider are those aspects of the particular case that suggest the "ordinary" remedy is unnecessary.

As to the totality of the circumstances applied to this case, I have already stated most of those considerations: (1) Mr. Dano had pretty minimal involvement in the defense of Mr. Nickels, serving primarily as a local contact attorney and taking the verdict, while not developing or implementing the defense; (2) the case was tried two years before Mr. Dano was elected prosecutor; (3) the case against Mr. Nickels was developed long before the election and without any possible disclosure of client secrets by Dano; (4) one of the deputy prosecutors on the original trial is still available to try the

case, and the other deputy assigned to the case was hired by the prior prosecutor; (5) this court ordered a new trial due to judicial error, not error contributed to by the attorneys on either side; (6) as prosecutor, Dano has had no involvement with this case, nor is there any evidence in the record that suggests the elected prosecutor normally would have had any involvement with the retrial—ergo, the screening has been effective. Two other factors, not previously mentioned, also suggest that this is the out-of-the-ordinary case where screening per RPC 1.11 would be effective and office-wide recusal is unnecessary.

One reason is that the county has tried to find a special prosecutor to handle the retrial. No other county was willing to take the case on, nor was the attorney general. The second reason is related to the first. This case took multiple weeks to try.[5] It will be extremely burdensome to some other office to take on this case, and it will be extremely expensive to Grant County to pay for a special prosecutor. Major murder cases are tried by experienced deputy prosecutors, and few counties are so well stocked with such veterans that they can afford to be without them for several weeks.[6] Even if such attorneys can be located and borrowed, it will cost the county money to feed and house them for several weeks, to say nothing of any salary costs. While these factors are

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[5] My review of the previous file indicates that the Report of Proceedings totaled 29 volumes through final argument and verdict; sentencing and post-trial motions consumed additional hearings.

[6] As a result, I suspect that the attorney general is likely to be assigned these types of cases by trial judges needing to find a special prosecutor.

irrelevant to the determination that a conflict of interest exists, they should be factors taken into consideration in deciding whether there is any utility in imputing a conflict to an entire prosecutor's office in the absence of evidence that screening has failed to do the job.

The majority's resolution of this case will impose unnecessary office-wide recusals. While large offices can more easily address the comparatively small number of recusals generated by a single attorney in practice, even they will have problems dealing with the large number of cases handled by a public defender with significant supervisory authority. Small prosecutor offices will incur significant expenses in large cases, and probably have conflicts in a higher percentage of cases. Imputing an individual prosecutor's personal conflicts to the entire office is not necessary here.

In my opinion, the trial court did not err in deciding that screening Mr. Dano was adequate to protect Mr. Nickels' right to a fair retrial. Accordingly, I would affirm.

Korsmo, J.

WASHINGTON ASSOC OF PROSECUTING ATTY

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