

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
8/5/2019 12:31 PM  
BY SUSAN L. CARLSON  
CLERK

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
8/13/2019  
BY SUSAN L. CARLSON  
CLERK

NO. 96943-4  
COA NO. 353699

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,  
Petitioner,

v.

DAVID NICKELS,  
Respondent.

---

BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS and WASHINGTON DEFENDER  
ASSOCIATION IN SUPPORT OF PETITIONER NICKELS

---

JOHN A. STRAIT  
Emeritus Professor of Law  
Seattle University School of Law  
Faculty Offices, Room 438  
901 12<sup>th</sup> Avenue  
Seattle, WA 98112

RITA J. GRIFFITH, PLLC  
WACDL  
4616 25<sup>th</sup> Avenue NE, #453  
Seattle, WA 547-1742

HILLARY BEHRMAN  
Director of Legal Services  
WDA  
110 Prefontaine Place South  
Suite 610  
Seattle, WA 98104  
(206) 623-4321

## TABLE OF CONTENTS

	Page
<b>A. IDENTITY AND INTEREST OF AMICUS CURIAE.....</b>	<b>1</b>
<b>B. ISSUE OF CONCERN TO AMICUS</b>	
<b>C. STATEMENT OF THE CASE</b>	
<b>D. ANALYSIS</b>	
<b>1. THE PROPOSED RULE WOULD APPLY ONLY         IN VERY LIMITED CIRCUMSTANCES WHERE         DISQUALIFICATION IS NECESSARY BOTH TO         PROTECT THE INTEGRITY OF THE SPECIFIC         PROSECUTOR’S OFFICE AND TO PROTECT THE         APPEARANCE OF FAIRNESS AND INTEGRITY OF         THE CRIMINAL JUSTICE SYSTEM AS A WHOLE.</b>	
<b>a. The rule protects the integrity of elected             prosecutors in performing their fundamental             policy and oversight functions for which they are             responsible to the public.</b>	
<b>b. The rule protects the appearance of fairness and             integrity of the criminal justice system.</b>	
<b>c. The bright-line rule would avoid the risk to             confidentiality, privileges of defendants and             defense counsel and avoid intrusive inquiry into             the internal affairs of the prosecutor’s office             while assuring minimal interference with the             elected prosecutor’s policies.</b>	
<b>2. A BRIGHT-LINE RULE OF DISQUALIFICATION IS         CONSISTENT WITH THE WASHINGTON RULES         OF PROFESSIONAL CONDUCT.</b>	

**TABLE OF CONTENTS – cont'd**

Page

- 3. A BRIGHT-LINE – OR NEAR BRIGHT-LINE RULE OF DISQUALIFICATION WOULD PROTECT THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.**

- E. CONCLUSION**

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON CASES:</b>	
<u>In the Matter of Johnston</u> , 99 Wn.2d 465, 663 P.2d 411 (1983).....	11
<u>Matter of Estate of Griffith</u> , No. 75440-8-1, 2018 Wn.2d 3629458, <u>review denied</u> , 192 Wn.2d 1006 .....	2
<u>Sherman v. State</u> , 128 Wn.2d 164, 195, 905 P.2d 355 (1995).....	4
<u>State v. ex rel State Board of Medical Examiners v. Clausen</u> , 84 Wash. 279, 284-85, 146 P. 630 (1915).....	11
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	7
<u>State v. Davila</u> , 184 Wn.2d 55, 357 P.3d 636 (2015).....	5
<u>State v. Dictado</u> , 102 Wn.2d 277, 687 P.2d 172 (1984).....	6
<u>State v. Fisher</u> , 165 Wn.2d 727, 746, 202 P.3d 937 (2009).....	6, 7
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	6
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	6

**TABLE OF AUTHORITIES – cont’d**

	Page
<u>State v. Nickels</u> , 197 Wn.App. 1085 (2017).....	3, 8
<u>State v. Stenger</u> , 111 Wn. 2d 516, 760 P.2d 357 (1988).....	3, 10-13
<u>State v. Walker</u> , 182 Wn.2d 463, 475-476, 341 P.3d 976 (2015).....	6
<u>State v. Watson</u> , 120 Wn. App. 521, 86 P.3d 158 (2004).....	7
 <b>FEDERAL CASES:</b>	
<u>Brady v. Maryland</u> , 373 U.S. 83, S3 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....	5
<u>Giglio v. United States</u> , 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).....	5
<u>In re Grand Jury 91-1</u> , 790 F. Supp. 109 (E.D. Vir. 1992).....	5
<u>United States v. Goot</u> , 894 F.2d 231 (7 <sup>th</sup> Cir. 1990).....	4
 <b>OTHER JURISDICTIONS</b>	
<u>People v. Perez</u> , 201 P.3d 1220 (Colo. 2009).....	4
<u>State v. Kinkennon</u> , 747 N.W.2d 437 (2008).....	4

**TABLE OF AUTHORITIES – cont’d**

	Page
<u>State v. Pennington</u> , 851 P.2d 494 (N.M. App. 1993). .....	4
 <b>STATUTES, RULES AND OTHER AUTHORITY</b>	
RCW 36.16.030.....	6
RCW 36.27.020(3), (4) and (11).....	6
RPC 1.6.....	8
RPC 1.9 .....	8, 9
RPC 1.10.....	10
<u>State v. Skeen</u> , Circuit Court for Klamouth County, #1300498 CR.....	9

**A. IDENTITY AND INTEREST OF AMICUS CURIAE**

John Strait, Rita Griffith and Hillary Behrman are attorneys licensed to practice law in Washington State who seek to appear in this case as *amicus curiae* on behalf Washington Association of Criminal Defense Lawyers (WACDL), Washington Defender Association (WDA), and respondent here, appellant below, David Nickels. Counsel for WACDL and WDA were granted permission to file an amicus brief in the Court of Appeals below in this case.

The Washington Association of Criminal Defense Lawyers, a non-profit organization formed in 1987, is dedicated to improving the quality and administration of justice. WACDL has over 800 members consisting of private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL holds many seminars throughout the year to educate lawyers on pertinent issues related to the defense of Washington citizens accused of crimes, including seminars on legal ethics. WACDL has previously been granted amicus status in numerous Washington appellate cases.

Washington Defender Association is a statewide non-profit organization with 501(c)(3) status founded in 1983. WDA's membership is comprised of over 40 public defender agencies, over 1,500 indigent

defenders, and others who are committed to seeking improvements in indigent defense. Its objectives and purposes are defined in its bylaws and include: protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; promoting, assisting, and encouraging public defense systems to ensure that all accused persons receive effective assistance of counsel. WDA has been granted leave on numerous prior occasions to file amicus briefs in this Court.

Professor Strait is a Emeritus Professor of Law at Seattle University School of law who has taught professional responsibility, criminal law and procedure, and constitutional law since 1976. He is a recognized expert in the field of legal ethics and has testified as an expert in disciplinary proceedings and in cases in a number of jurisdictions, including the Eastern and Western Districts of Washington, Oregon, Wyoming and Alaska as well as fourteen counties in Washington. He has been cited by this Court as an expert in legal ethics. See. E.g., Matter of Estate of Griffith, No. 75440-8-1, 2018 Wn.2d 3629458, at 5, review denied, 192 Wn.2d 1006 (“after consulting with John Strait, a well respected professor of Ethics at Seattle University”). In addition to his private practice where he has worked for both the prosecution and defense

on motions to disqualify, Professor Strait consults pro bono on virtually a daily basis on these issues. Professor Strait has specific experience with the procedural screening difficulties and policy issues raised by a rule as proposed by the state.

Ms. Griffith and Ms. Behrman are members of the Washington State Bar Association and experienced criminal defense attorneys; Ms. Griffith, co-chair of the WACDL amicus committee, is primarily an appellate attorney and Ms. Behrman is the Director of Legal Services at the Washington Defender Association and has practiced for many years as a public defender and a civil legal aid attorney.

**B. ISSUE OF CONCERN TO AMICUS**

This Court should confirm a bright-line rule disqualifying the entire prosecutor's office from prosecuting a defendant whenever the elected prosecutor has represented that defendant *in the same case* or a substantially related case.

Certainly, the rule of office-wide recusal should apply absent extraordinary circumstances. State v. Nickels, 7 Wn. App. 2d 491, 497, 434 P.3d 535 (20019); State v. Stenger, 111 Wn. 2d 516, 522, 760 P.2d 357 (1988). Since no such extraordinary circumstances exist here, the contours of such circumstances should await an appropriate case for filling in.

**C. STATEMENT OF THE CASE**

Amicus incorporates by reference the statement of the case as set out in the decision of the Court of Appeals, Division III, 7 Wn. App. 2d 491, 493-494, 434 P.3d 535 (2019).

**D. ANALYSIS**

**1. THE PROPOSED RULE WOULD APPLY ONLY IN VERY LIMITED CIRCUMSTANCES WHERE DISQUALIFICATION IS NECESSARY BOTH TO PROTECT THE INTEGRITY OF THE SPECIFIC PROSECUTOR’S OFFICE AND TO PROTECT THE APPEARANCE OF FAIRNESS AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM AS A WHOLE.**

**a. The rule protects the integrity of elected prosecutors in performing their fundamental policy and oversight functions for which they are responsible to the public.**

The rule urged by amici would apply only to cases involving an elected prosecutor. It would not, for example, apply to individual attorneys working within the attorney general’s office. See Sherman v. State, 128 Wn.2d 164, 195, 905 P.2d 355 (1995); People v. Perez, 201 P.3d 1220 (Colo. 2009); State v. Kinkennon, 747 N.W.2d 437 (2008). Nor would it apply to assistant U.S. Attorneys, see United States v. Goot, 894 F.2d 231 (7<sup>th</sup> Cir. 1990),<sup>1</sup> or private investigators hired by the

---

<sup>1</sup> Nor is an appointed United States Attorney comparable to an elected prosecutor where an acting United States Attorney can be appointed in matters for which the new U.S. Attorney would have a conflict. See In re

prosecutor's office. See State v. Pennington, 851 P.2d 494 (N.M. App. 1993).

Unlike other attorneys working within a governmental office -- including deputy prosecutors, assistant attorney generals and assistant U. S. attorneys -- the elected county prosecutor is answerable to the public for carrying out the fundamental functions of setting policy and standards within the office; allocating the resources of the office among competing demands; reviewing significant case prosecutions as well as hiring and termination, promotions, salaries and individual charging or disposition decisions. The elected prosecutor also has policy and supervisory authority over when the office should be disqualified, and the same authority over the deputy prosecutors and other investigative agents who work on the cases within the office. See Brady v. Maryland, 373 U.S. 83, 53 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (one prosecutor's knowledge imputed to another prosecutor for purposes of Brady suppression inquiry); State v. Davila, 184 Wn.2d 55, 357 P.3d 636 (2015).

Many of these functions ultimately depend on personal, executive, and political decisions for the elected prosecutor to make-- such as decisions to file charges, seek the death penalty, and plea bargain State v.

---

Grand Jury 91-1, 790 F. Supp. 109 (E.D. Vir. 1992).

Finch, 137 Wn.2d 792, 809-810, 975 P.2d 967 (1999) (citing State v. Dictado, 102 Wn.2d 277, 298-99, 687 P.2d 172 (1984)).

When a county prosecutor's office should refuse to prosecute because of conflict of interest is such a policy. Screening the elected prosecutor from setting or applying such a disqualification policy makes it impossible. Because county prosecutors are elected in the State of Washington, not appointed (RCW 36.16.030), the elected prosecutor is directly responsible to the electorate when setting policy and exercising discretion, thus assuring the public of his or her ultimate democratic responsibility for the decisions made. Responsibility for these duties cannot be delegated.

**b. The rule protects the appearance of fairness and integrity of the criminal justice system.**

A prosecuting attorney not only has the duty to appear for and represent his or her jurisdiction in criminal and civil proceedings in which the jurisdiction is a party and to make executive decisions related to such representation, the elected prosecutor has a duty to "[s]eek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law." RCW 36.27.020(3), (4) and (11). State v. Walker, 182 Wn.2d 463, 475-476, 341 P.3d 976 (2015) (citing State v. Monday, 171 Wn.2d 667, 676, 257 P.3d

551 (2011) and State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)) (a prosecutor’s duty is not just to enforce the law, but to function as a representative of the people in pursuit of justice). The elected prosecutor must ultimately be responsible, as well, for assuring that the deputy prosecutors in the office act with fairness and within the law. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (“as a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant”).

The elected prosecutor, who is a lawyer formerly involved in the defense of the same case, cannot perform this supervisory, standard-setting, and individual substantive case review – nor seek “to improve the administration of criminal justice” -- if the elected prosecutor has been screened as asserted by Grant County. See State v. Watson, 120 Wn. App. 521, 535, 86 P.3d 158 (2004) (“We acknowledge that an elected prosecutor has the right and the obligation to set policy for his office. We also acknowledge that an elected prosecutor has the duty to communicate this policy to constituents and others affected by it.”) The responsibility to the public for decisions made in such a serious case is lost. The deputy prosecuting attorneys who Grant County proposes will exercise, or have exercised, these critical roles are the very same deputies who are not responsible to the electorate and whose conduct in this case may have to

be scrutinized as directed by the Court of Appeals for their trial conduct. See State v. Nickels, 197 Wn. App. 1085, 2017 WL 887218.

The election of a new prosecuting attorney necessarily reflected Grant County's electoral preferences for his platform over the policies of his predecessor. The prior participants in this case, however, decided on their own that the new prosecutor would be screened and unable to participate – at any level – in the retrial or assessment of conduct in the prior trial. This newly-elected prosecutor then, if effectively screened from the prosecution, has no supervisory authority over these participants in the retrial whose conduct took place under the policies and supervision of the unseated prosecutor.

- c. The bright-line rule would avoid the risk to confidentiality, privileges of defendants and defense counsel and avoid intrusive inquiry into the internal affairs of the prosecutor's office while assuring minimal interference with the elected prosecutor's policies.**

To implement a rule allowing screening of an elected prosecutor who represented a defendant in the same case currently being prosecuted by his or her office would require the trial court to explore the scope and content of the elected prosecuting attorney's prior participation in the pending case on the defense side. Such an inquiry places at risk the confidentiality guaranteed by RPC 1.6, 1.9, the attorney-client and work-product privileges, in order to explore -- as Grant County proposes -- the

extent of the former defense lawyer, now elected prosecuting attorney's involvement.

Further, the prosecutor's office would have to offer evidence establishing that the screen was meaningful and enforced. The prosecutor's office would have to demonstrate, through such an evidentiary proffer, that it could prevent any interchange of information between the elected prosecuting attorney and the remainder of the office handling the pending prosecution. The court would then have to allow defense inquiry and discovery to respond to such an evidentiary offer. Such an inquiry might produce extensive discovery and depositions in order to provide an adequate factual exploration of whether such a screen is legitimate, timely and enforced. Ultimately, the trial court would have to address not only discovery but resolve the contested testimony regarding the efficacy of the screen.

If the elected prosecutor were screened, the elected prosecutor would have no way of knowing that subordinates were not following the conflicts policies the elected had created nor be able to modify or improve such a policy. This is not a hypothetical concern. See State v. Skeen, Circuit Court for Klamouth County #1300498 CR (the county prosecutor was unaware, because of screening, that her written policy on disqualification of the office was being ignored in circumstances similar to

this case. When she learned what was going on after three days of testimony at the disqualification hearing, she entered a stipulated order of disqualification of her office.)

In the context of the Grant County Prosecutor's Office, a relatively small office with proximity and easy access among attorneys and staff, implementing such a screen, let alone enforcing it, would be difficult. Amici believe that the necessary judicial inquiries required to adequately explore the elected prosecutor's conflict, as well as the efficacy and enforceability of a proposed screen in such a setting, are unlikely to provide adequate assurance to the public; the defense bar, both public and private; the prosecuted defendant(s) and the courts, that the specter of a former defense lawyer now prosecuting the defendant is fundamentally fair.

**2. A BRIGHT-LINE RULE OF DISQUALIFICATION IS CONSISTENT WITH THE WASHINGTON RULES OF PROFESSIONAL CONDUCT.**

More than two years prior to the Stenger decision, the Washington Supreme Court promulgated RPCs 1.6, 1.7, 1.9 and 1.10 with regard to imputed conflicts of interest. Although minor adjustments were made to some of these rules in subsequent years, the current versions of these rules are for all relevant purposes to the Stenger rule, the same. There has been no substantive change in the law of ethics in the State of Washington that

is relevant to the concerns of the Washington Supreme Court in the Stenger decision. No subsequent modification of the Rules of Professional Conduct warrants any reconsideration of the Stenger bright line rule.

Amicus for the State of Washington argues that because different standards of long-standing precedent preceding the Stenger case applied to the unique rule of the Attorney General's Office with regard to conflicts, see e.g. In the Matter of Johnston, 99 Wn.2d 465, 663 P.2d 411 (1983) (and cases cited therein) and State v. ex rel State Board of Medical Examiners v. Clausen, 84 Wash. 279, 284-85, 146 P. 630 (1915), that county prosecutor attorneys should be treated the same. Washington Supreme Court case law long before the Washington Rules of Professional Conduct were ever adopted recognized the need for the Attorney General's Office to be subject to different screening rules because of the unique role the Attorney General's Office plays as the sole advocate for the state while advising numerous adversarial hearing bodies such as the Medical Quality assurance Commission while at the same time investigating and representing contested matters before such entities. County prosecuting attorneys, on the other hand, have other sources available to prosecute on their behalf and are not unique under the state constitution. It is not an equivalent analogy that because we allow

screening within the Attorney General's Office , therefore we should allow similar screening within prosecutor's offices at the county or city level. To the contrary, this Court disqualified numerous county prosecutor attorneys' offices because of the availability of either special prosecutor attorneys appointed or other county prosecutors to step in. The threat to the integrity and fairness of the system and public confidence in it would be ill-served by applying the conflict concepts that have previously been approved for the Attorney General's Office given its unique constitutional and administrative functions.

**3. A BRIGHT-LINE – OR NEAR BRIGHT-LINE RULE OF DISQUALIFICATION WOULD PROTECT THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.**

Separately and independently, the Court's concern in Stenger was the integrity of the criminal justice system. That integrity includes protection of client confidentiality, attorney-client and work-product privilege, fundamental fairness in the way in which prosecutions are performed and the public's confidence that the criminal justice system is fundamentally fair. Those concerns support a bright-line rule as a necessary exercise of the Court's regulatory and supervisory authority over the criminal justice system. These considerations as well as the Rules of Professional Conduct are determinative of the Stenger bright line

rule.

**E. CONCLUSION**

All of these concerns support a bright-line rule requiring disqualification of the whole prosecutor's office when the elected prosecutor represent a current accused person in the same or substantially the same case, as Amici advocate.

Respectfully submitted,

DATED this 5<sup>th</sup> of August, 2019.

/s/ John A. Strait

John A. Strait. WSBA # 4776  
Attorney for WACDL and WDA

/s/ Rita Griffith

Rita J. Griffith, WSBA #14360  
Attorney for WACDL

/s/ Hillary Behrman

Hillary Behrman, #WSBA 22675  
Attorney for WDA

**August 05, 2019 - 12:31 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96943-4  
**Appellate Court Case Title:** State of Washington v. David Emerson Nickels  
**Superior Court Case Number:** 10-1-00322-6

**The following documents have been uploaded:**

- 969434\_Briefs\_20190805122933SC062535\_0848.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was Nickels amicus brief supreme court final.pdf*
- 969434\_Motion\_20190805122933SC062535\_1214.pdf  
This File Contains:  
Motion 1 - Amicus Curiae Brief  
*The Original File Name was Nickels amicus motion Supreme Court.pdf*

**A copy of the uploaded files will be sent to:**

- Callie.Castillo@atg.wa.gov
- calliec@atg.wa.gov
- jackie@jamlegal.com
- mark@jamlegal.com
- pamloginsky@waprosecutors.org
- sgoolyef@atg.wa.gov

**Comments:**

---

Sender Name: Rita Griffith - Email: griff1984@comcast.net  
Address:  
4616 25TH AVE NE  
PMB 453  
SEATTLE, WA, 98105-4523  
Phone: 206-547-1742

**Note: The Filing Id is 20190805122933SC062535**