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DIVISION THREE

STATE OF WASHINGTON,
Respondent,

V.

DAVID NICKELS,
Petitioner

Court of Appeals No. 353699
Grant County No. 10-1-00322-6

PETITIONER'S OPENING BRIEF

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A. INTRODUCTION

Whether an entire prosecuting attorney's office must be disqualified because a prosecutor in the office represented a defendant depends on who is being disqualified and the basis for the disqualification. When the disqualification involves a deputy prosecutor, it *may* be possible not to disqualify the entire office if appropriate screening procedures are set in place. But, when the disqualification involves the elected prosecutor, the administrative head of the office, then whether the entire office must be disqualified turns on the reason for the disqualification.

If the disqualification of the elected prosecutor is something other than involvement in the same or related case as the one prosecuted, then the entire office's disqualification may not be necessary if appropriate screening procedures can alleviate the conflict. But when, as here, the elected prosecutor is disqualified because of his or her prior involvement in the same (or similarly related) case as the one being prosecuted, then the whole office is disqualified. This bright line rule furthers the public trust and confidence in the integrity of the administration of justice.

Here, the trial court erred when it refused to disqualify the Grant County Prosecuting Attorney's Office, concluding instead that screening mechanisms are appropriate even though the disqualification is of the elected prosecuting who was involved in the same case that his office is prosecuting.

B. ASSIGNMENT OF ERROR

The trial court erred when it denied defense's motion to disqualify the Grant County Prosecutor's Office when the elected prosecuting attorney personally represented and consulted professionally with the defendant/petitioner in the same case the elected prosecutor's office is now prosecuting.

C. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Should the Grant County Prosecutors' Office be disqualified when the elected prosecutor personally represented and had/has an attorney-client relationship with a defendant in the same case that the elected prosecutor's office is prosecuting?

D. STATEMENT OF THE CASE

On June 16, 2010, the Grant County Prosecutor's Office (GCPO) charged Mr. Nickels (Petitioner) with Murder in the First Degree. The defense has always maintained – and still does - that

Petitioner was wrongfully arrested, charged and convicted; and that the murder was committed by two other individuals.

Because defense counsel did not regularly practice in Grant County, they sought the assistance of then-private attorney Garth Dano (Dano), a Grant County criminal defense attorney. CP 178-179. More specifically, defense counsel consulted with Dano about a wide-range of matters, including defense strategy, case theories, potential witnesses, and jury selection. *Id.* Dano was considered a consulting defense attorney and as such was privy to privileges, confidences, communications and work-product. *Id.*, at ¶¶ 3,6. Due to defense counsels' unavailability, Dano entered a Notice of Appearance and represented Petitioner when the jury reached a verdict. *Id.*, at ¶3. He also privately met with Petitioner to discuss the case. *Id.*, at ¶¶3,6.

Dano was also instrumental in the defense post-verdict investigation and consultation. After the verdict, but before sentencing, Dano received information that supported the defense's theory of the case, namely Ian Libby and Julian Latimer were the real killers. CP 179 ¶4. Dano shared this information with defense counsel. *Id.* At the request of defense counsel, Dano contacted the three witnesses to obtain written declarations memorializing their

statements, which were used as a basis for a defense motion for a new trial. *Id.* Dano was also instrumental with assisting the Grant County Prosecutor’s interviews with the witnesses. *Id.*¹

While Petitioner’s appeal was pending, Dano was elected as the Grant County Deputy Prosecutor.² The Grant County Prosecutors’ Office did not handle the appeal, instead it contracted with the Kitsap County to be a “Special Deputy Prosecuting Attorney.”

On February 18, 2017, this Court reversed the conviction and sentence, finding the trial court’s jury instruction was structural error under *State v. Smith*, 174 Wn. App. 359,298 P.3d 785, *review denied*, 178 Wn.2d 1008 (2013). *State v. Nickels*, 197 Wn.App. 1085 (2017).

¹ The facts submitted by defense counsel regarding Dano’s involvement in the case went unchallenged and were accepted by the trial court. CP 159.

² As the elected prosecutor, Dano appointed Alan White as his Chief Deputy Prosecutor. During Petitioner’s trial, Alan White was appointed to represent Ian Libby, the individual who the defense submitted committed the murder. When the defense subpoenaed Libby to testify. A hearing was held to determine whether Libby had, as a matter of law, a Fifth Amendment privilege. CP 24-91. Outside the presence of the jury, Libby took the stand and when questioned by defense counsel, he, on the advice of White, refused to answer questions and invoked his privilege against self-incrimination upwards of ninety (90) times. *Id.*

A mandate was issued on April 10, 2017. On May 9, 2017, because the elected prosecutor had an attorney-client relationship with Petitioner on the same case that the Grant County Prosecutors' Office (GCPO) was currently prosecuting, defense counsel moved to disqualify GCPO from prosecuting the case. VRP 5/9/2017 at 4. The court directed the defense and GCPO to submit briefing on the issue. VRP 5/9/2017 at 23-24. Argument was held on May 31, 2017. VRP 5/31/2017.

The court denied the defense's motion and issued a written order on June 1, 2017. VRP 5/31/2017 at 26 - 29; CP 158-161. The court expressed reservation about the decision, noting there could be a difference of opinion. *Id* at 160. As such, the court issued a Certification Pursuant to RAP 2.3(b)(4) on June 12, 2017.

Defense filed a Motion for Discretionary Review on June 16, 2017. On July 5, 2017, the state filed an answer to the motion for discretionary review, in which it agreed the motion should be granted, but also included information and allegations not considered by Judge Estudillo in deciding this issue. Petitioner filed a reply and motion to strike the irrelevant portions of the state's answer.

On August 21, 2017, Commissioner Wasson granted the

Motion for Discretionary Review. The Commissioner did not rule on petitioner/defendant's motion to strike, noting that the panel of judges would be more familiar with the matter.

E. ARGUMENT

The issue presented here is whether the disqualification of the elected prosecutor, who previously represented Petitioner and consulted on the same case that his office seeks to prosecute, disqualifies his entire office. Legal authority supports that it does.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments of the U.S. Constitution. *State v. Sanchez*, 171 Wn. App. 518, 541, 288 P.3d 351 (2012); *State v. Sanchez*, 122 Wn. App. 579, 587, 94 P.3d 384 (2004). The Sixth Amendment also provides a right to conflict free counsel. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). The Washington Supreme Court has noted that a defendant's right to a fair trial is typically compromised in conflict of interest situations involving a prosecutor:

The rationale for this [conflict of interest] rule lies in the appearance of impropriety created by vesting the “inherently antagonistic and irreconcilable” roles of the prosecution and the defense in one attorney. *Howerton v. State*, 1982 OK CR 12, 640 P.2d 566, 567. In holding that a part-time district attorney may not represent a criminal defendant anywhere in the

state of Oklahoma, the Court of Criminal Appeals of Oklahoma reasoned that although it was difficult or impossible to determine whether the representation was actually affected, “[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice. The conflicts presented in this case, at the very minimum, give the proceeding an appearance of being unjust and prejudicial.” *Id.* at 568.

State v. Tracer, 173 Wn.2d 708, 720, 272 P.3d 199 (2012) (footnote omitted).

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

Rules of Professional Conduct (RPC) have been promulgated to prevent such conflicts of interest. *See e.g.*, RPC 1.9; RPC 1.10; *Tracer*, 173 Wn.2d at 718-19. RPC 1.9 requires that a lawyer who has formerly represented a client in a matter shall not

thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts. RPC 1.9(a). The Washington Supreme Court has reasoned:

As a corollary of this general rule, a prosecuting attorney is disqualified from acting in a criminal case if the prosecuting attorney has previously personally represented or been consulted professionally by an accused with respect to the offense charged or in relationship to matters so closely interwoven therewith as to be in effect a part thereof. One of the reasons a prosecuting attorney may not participate in such a criminal case is that it is inherent in such a situation that by virtue of the prosecuting attorney's prior representation of an accused, the prosecuting attorney has likely acquired some knowledge of facts upon which the prosecution is predicated or which are closely related thereto. Parenthetically, this rule as well as the previous rule is equally applicable to deputy prosecuting attorneys.

State v. Stenger, 111 Wn. 2d 516, 520–521, 760 P.2d 357 (1988)(footnotes omitted).

The disqualification of a *deputy prosecuting attorney* may not require the disqualification of the entire prosecuting attorney's office if appropriate screening procedures are implemented to alleviate the conflict.

There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as prosecuting attorney, public

defender, or attorney general; accordingly, where a *deputy prosecuting attorney* is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.

Stenger, 111 Wn.2d at 522-23 (emphasis added); *see generally* RPC

1.10(a)(e)(1)(2)(3).

However, when it is the *elected prosecuting attorney* who is disqualified, then the Washington Supreme Court has applied a different analysis. In such a circumstance, courts may look at the basis for the disqualification. For instance, the entire prosecuting attorney's office is not necessarily disqualified when the elected prosecuting attorney was not previously involved in the same case (or closely related therewith) as the one being prosecuted. There, courts look at the degree of the elected prosecuting attorney's involvement in the current case to determine whether screening procedures are appropriate. *See e.g., Stenger*, 111 Wn.2d at 523.

But, when the elected prosecuting attorney's disqualification is because he or she personally represented or professionally consulted with the accused on *the same case* (or closely related therewith) as the one the elected prosecutor's office is prosecuting,

then screening procedures are inappropriate and the entire prosecuting attorney's office is disqualified.

... Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has *previously personally represented the accused in the same case or in a matter so closely interwoven therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed.*

This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney's office is also disqualified. *Where the previous case is not the same case* (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained.

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

Nearly a decade later, the Washington State Bar Association (WSBA) issued an advisory opinion supporting the position set out in *Stenger*: the disqualification of the entire prosecuting attorney

when the elected prosecuting attorney had represented the defendant in the same or a substantially related proceeding.

A lawyer is prohibited from prosecuting a former client if the two matters are substantially related or if confidences were revealed during the prior representation. If a lawyer is disqualified due to a conflict, then another lawyer in the office may be reassigned so long as the disqualified lawyer is totally separated from all aspects of the case and relinquishes all control, involvement and authority over the case. *The entire prosecuting attorney's office is disqualified when the death penalty is being sought, when the prosecuting attorney personally represented the defendant in the same or a substantially related proceeding or when other facts require disqualification under the RPCs.* A conflict of interest might be waived under RPC 1.9(a) and 1.8(b) if the accused gives written consent following full disclosure and RPC 1.6 is complied with.

WSBA Advisory Opinion 1773 (1997) (emphasis added).³

³ The West Virginia State Bar reached a similar opinion:

In the interest of fairness to the defendant and public confidence in the impartiality of a prosecution, the Committee believes that when a *Prosecuting Attorney is disqualified for any reason, that disqualification is imputed to the entire office.* When an assistant is disqualified for any reason, he/she may be screened from participation in the matter, and other assistants or the Prosecuting Attorney may represent the State.

L.E.I. 92-01, Imputed Disqualification of Prosecuting Attorneys and Their Assistants. (emphasis added).

More recently, the *Stenger* rule was followed by the Court of Appeals, Division Two in *State v. Fox*, 2017 Wash. App. LEXIS 839 (April 4, 2017), an unpublished opinion.⁴ In *Fox*, the elected prosecutor, who previously represented the defendant on the same case being prosecuted, became the county’s elected prosecutor. The elected prosecuting attorney acknowledged his disqualification, but argued that the entire office should not be disqualified because he was screened off from the subsequent prosecution and thus no confidences were revealed. *Id.* Relying on *Stenger*, the court disagreed and concluded that when the disqualification is of the elected county prosecutor his or her entire office is disqualified. *Id.*, at 7 (“And because Jurvakainen became the elected prosecutor for the county, the entire Cowlitz County Prosecuting Attorney’s Office should have been disqualified as well, and a special deputy prosecutor should have been appointed.”). The court further

⁴ General Rule (GR) 14.1(a) permits citation to an unpublished opinion as nonbinding authority and of no precedential value. Unpublished opinions may be accorded such persuasive value as the court deems appropriate. GR 14.1. Petitioner submits that given the unique nature of the issue presented coupled with the limited authority addressing the issue, this unpublished case provides appropriate guidance for the court to consider.

concluded that under such a situation, screening procedures for a disqualified elected prosecutor are insufficient:

Although screening procedures were set in place, such procedures are only sufficient when the prosecutor involved is a deputy prosecutor. The “public has a right to absolute confidence in the integrity and impartiality of the administration of justice” and “[t]he conflicts presented in this case [where one attorney holds the roles of prosecution and defense], at the very minimum, give the proceeding an appearance of being unjust and prejudicial.” *Tracer*, 173 Wn.2d at 720 (quoting *Howerton*, 640 P.2d at 567-68).

Id., at 7-8. (emphasis added).

Other jurisdictions have reached similar results. In *State v. Tippencanoe County Court*, 432 N.E.2d 1377 (1982), the Supreme Court of Indiana was asked to determine whether the entire prosecutors’ office should be disqualified when the elected prosecuting attorney had previously represented the accused in two prior cases. The court set out a rule based on the distinction between the disqualification of a deputy prosecutor or the elected prosecutor. In the former situation, the disqualification of the entire office is not necessarily required:

Where a lawyer who has represented a criminal defendant on prior occasions is one of the deputy prosecutors, disqualification of the entire office is not necessarily appropriate. Individual rather than

vicarious disqualification may be the appropriate action, depending upon the specific facts involved.

Tippencanoe, 432 N.E.2d at 1379 (internal citations omitted). However, when the disqualification is of the elected prosecuting attorney, then “his [or her] entire staff of deputies must be recused in order to maintain the integrity of the process of criminal justice.” *Id.*, citing *State ex rel. Latham v. Spencer Circuit Court*, 244 Ind. 552, 194 N.E.2d 606 (1963).

The Arizona Supreme Court also reached the same conclusion. *State v. Latigue*, 108 Ariz. 521, 523, 502 P.2d 1340, 1342 (Ariz. 1972), reaffirmed in *State v. Hursey*, 176 Ariz. 330, 333, 861 P.2d 615, 618 (Ariz. 1993). *Latigue* involved a deputy public defender, who had acted as the defendant’s co-counsel, accepting a position as the chief deputy county attorney while the defendant’s prosecution was pending. Although the chief deputy took no part in the prosecution, the court concluded that disqualification of the entire prosecutor’s office was required. *Latigue*, 108 Ariz. At 523.

The former defense counsel’s *position* in the prosecutor’s office was one of the factors that influenced the court’s decision. As chief deputy, the attorney had supervisory powers and duties over the assistant county attorney who was prosecuting the defendant. *Id.*

Moreover, the Arizona Supreme Court went even further in finding that even if the attorney was not the chief deputy, the “office would have to divorce itself from the prosecution* * * *because even the appearance of unfairness cannot be permitted.*” *Id*; see also *State v. Tracer*, 173 Wn.2d 708, 720, 272 P.3d 199 (2012).

Subsequently, the Arizona Court of Appeals was asked to determine whether the ethical rules governing Arizona lawyers had changed so as to distinguish between private law firms and government law offices for purposes of vicarious disqualification thus undermining *Latigue. Turbin v. Superior Court*, 165 Ariz. 195, 797 P.2d 734 (1990). The Court of Appeals rejected the state’s argument:

We begin by defining the role of a prosecutor in our criminal system. He represents the sovereign whose obligation is to govern impartially and whose chief object is justice. Public confidence in the criminal justice system is maintained by assuring that it operates in a fair and impartial manner. This confidence is eroded when a prosecutor has a conflict or personal interest in the criminal case which he is handling. *Latigue*, 108 Ariz. at 523, 502 P.2d at 1342.

We reject the state’s suggestion that the prosecutor’s office can never be disqualified unless the defendant can show that actual prejudice exists as a result of his former attorney joining that office. Two considerations weigh against this approach. First, in many instances actual prejudice may exist but may

be extremely difficult for the defendant to prove. As the Colorado Court of Appeals observed in *People v. Stevens*, 642 P.2d 39, 41 (Colo.App.1981):

A defendant should not be forced to attempt to prove that there was *actual* indiscretion or impropriety. Evidence of such conduct, being under the control of the prosecution, would be well-nigh impossible for a defendant to bring forth. [Emphasis in original.]

While we do not think that the defendant can be excused from demonstrating prejudice, such proof should not be essential to disqualification. We also suggest that, as a practical matter, if a defendant were required to show prejudice he might, in some cases, be forced to disclose a confidential communication he made to his former lawyer.

The second consideration that militates against the state's approach is that it fails to give *any* weight to the principle that criminal prosecutions must appear fair, as well as actually be fair. As our supreme court observed in *Latigue*:

What must a defendant and his family and friends think when his attorney leaves his case and goes to work in the very office that is prosecuting him? Even though there is no revelation by the attorney to his new colleagues, the defendant will never believe that.

Turbin, 165 Ariz. at 198-99.

In *People v. Courtney*, 288 Ill.App. 3d 1025, 687 N.Ed.2d 521 (1997), the Illinois Court of Appeals addressed a similar issue.

The court noted:

"It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; *it is enough if it places him in a position which leaves him open to such charge* ***. The administration of the law should be free from all temptation and suspicion, so far as human agencies are capable of accomplishing that object." In noting the ethical obligation and professional responsibility of an attorney to guard the confidences of his client, this court has said "it is the *possible divulgence or use* of information given counsel in confidence that is the evil to be guarded against."

Courtney, 288 Ill. App 3d at 1032 (emphasis in the original) (internal citations omitted). Thus, the court concluded that when the former attorney becomes the head of the office which prosecutes the defendant then a *per se* conflict arises that requires the disqualification of the entire office. *Id.*⁵

⁵ Some courts have taken a more expansive approach beyond whether the disqualification is the elected prosecutor to reach an all-office disqualification. *See e.g., State v. Cooper*, 63 Ohio Misc. 1, 409 N.E.2d 1070(1980)(the court concluded that even though the attorney became an *assistant prosecutor* for the county and did not communicate any information to his new colleagues, nonetheless, because of the "overriding requirement that the public must be able to maintain the right to believe in the total integrity of the Bar as a whole", the county prosecutor and his staff must be disqualified.); *see also New York v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909 (1980)(Disqualification of entire office even though conflict was with *assistant deputy* attorney because the "[d]efendant, and indeed the public at large, are entitled to protection against the appearance of impropriety and rise of prejudice attendant on abuse of confidence, however slight.") (internal citations omitted). As noted, the Grant County's Chief Deputy Prosecutor, Alan White, also has a conflict because he represented the other suspect in the same case

When, like here, the disqualification involves a prosecuting attorney who assumes a supervisory function within the prosecuting attorney's office, the appearance of impropriety is greater and more troublesome. As demonstrated above, in such a situation the prevailing rule is to treat the situation as a *per se* conflict, requiring the disqualification of the entire prosecuting office and the appointment of a special prosecutor from outside the office.

The trial court did not follow this sound authority. Instead, the trial court concluded that “a court must review the specific circumstances of each case to determine if disqualification [of the entire prosecuting office] is warranted.” CP 158-159. Using this analysis, the trial court compared the involvement of the prosecuting attorney in *Stenger* to that of the elected prosecutor in this case to deny the motion to disqualify the GCPO. *Id.*

However, the trial court failed to appreciate a critical difference between the elected prosecuting attorney in *Stenger* and the one here. The elected prosecuting attorney in *Stenger* did not represent or consult on the same case as the one being prosecuted. *Stenger*, 111 Wn.2d at 519 (“The defendant then moved that the

his office is prosecuting. See fn. 2, *supra*.

Clark County Prosecuting Attorney and his staff be disqualified from participation in this prosecution because of an alleged conflict of interest resulting from the prosecuting attorney's *previous representation of the defendant in connection with other criminal charges*") (emphasis added). As noted, in that situation, the court looks at the degree of the elected prosecuting attorney's involvement to determine whether he or she may be separated from all connections with the case and delegate full authority and control over the case to a deputy prosecuting attorney. *Stenger*, 111 Wn.2d at 522.

But that is not the situation in this case. Here, the elected prosecuting attorney, who possesses administrative control and supervision of the entire staff, is disqualified because he previously represented and professionally consulted with the Petitioner on the exact same case his office is seeking to prosecute. As such, disqualification of the entire office is required and screening procedures are inappropriate. *Stenger*, 111 Wn.2d at 522; *see also Fox*, 2017 Wash.LEXIS 839 at 7 (Because prosecutor represented defendant "in this case" and was later elected prosecutor a conflict existed and entire prosecuting attorney's office is disqualified. "Although screening procedures were set in place, such procedures

are only sufficient when the prosecutor involved is a deputy prosecutor.”).

This bright-line approach ensures that criminal prosecutions not only appear fair, but actually are. Such a rule furthers the public trust and confidence in the integrity of the administration of justice. If this rule is not followed, then conflicts like those in this case – which the trial court is willing to permit – gives the proceeding an appearance of being unjust and prejudicial. *Tracer*, 173 Wn.2d at 720; *Howerton*, 640 P.2d at 567-68.

F. CONCLUSION

For the reason expressed above, the trial court erred in denying the defense’s motion to disqualify the Grant County Prosecuting Attorney’s Office. As such, the petitioner requests this court to overturn the trial court’s June 1, 2017 Order, Paragraph A (CP 158-160) and direct the trial court to disqualify the entire Grant County Prosecutor’s Office.

Respectfully submitted this 19th day of November, 2017.

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I hereby certify that on the 19th day of November, 2017, I served via fax, email or mail (as noted below) the *Petitioner's Opening Brief* to the following parties:

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