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Supreme Court No. 96943-4

Court of Appeals No. 353699

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

V.

DAVID NICKELS,
Respondent.

RESPONDENT'S RESPONSE TO BRIEF OF AMICUS CURIAE ATTORNEY GENERAL OF WASHINGTON

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL ARGUMENT 2

1. Any Unique Responsibility to the State by the Attorney General's Office is Inapplicable to and Unaffected by the Issue Before this Court 2

2. This Court's Decision in Stenger Does Not Conflict with the Rules of Professional Conduct 3

3. Division III Properly Applied this Court's Stenger Standard to the Facts of this Case 5

4. Stenger is not Overruled by the Rules of Professional Conduct 8

5. The Attorney General's Reliance on Foreign Cases is Misplaced 10

III. CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Am. Best Food, Inc. v. Alea London Ltd., 168 Wn.2d 398, 229 P.3d 693 (2010) 10

Ganger v. Peyton, 1379 F.2d 709 (4th Cir. 1967) 2

Grange Ins. Ass'n v. Roberts, 179 Wn.App. 739, 320 P.3d 77 (2013) 10

Howerton v. State, 1982 OK CR 12, 640 P.2d 566 (1982) 2

In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970) 9

Landers v. State,256 S.W.3d 295 (Tex. Crim. App. 2008) 2

Lux v. Commonwealth, 24 Va.App. 561,
484 S.E.2d 145 (Va.1997) 12

People v. Rankin, 149 A.D.2d 987, 540 Ny.Y.S.2d 628
(N.Y. App. Div. 1989) 12

Pisa v. Comm., 378 Mass. 724, 393 N.E.2d 386 (Mass.1979)..... 11

Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995) 2,3,9

State v. Addison, 166 N.H. 115, 89 A.3d 1214 (2014) 11

State v. Camacho, 329 NC. 589, 406 S.E. 868 (N.C. 1991) 12

State v. Kinkennon, 747 N.W.2d 437 (Neb. 2008) 12

State v. Nickels, 7 Wn.App.2d 491, 434 P.3d 535 (2019)..... *passim*

State v. Otton, 185 Wn.2 673, 374 P.3d 1108 (2016) 9

State v. Pennington, 1851 P.2d 494 (N.M. App. 1993) 12

State v. Stenger, 111 Wn. 2d 516, 760 P.2d 357 (1988) ..... *passim*

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

RULES

Rules of Professional Conduct (RPC) 1.11 4,10

OTHER AUTHORITY

Washington State Bar Association
Advisory Opinion 1773 (1997) 8

I. INTRODUCTION

Amicus for the Attorney General (the Attorney General) mischaracterizes the issue decided by the Division III and that is before this Court by suggesting it is the disqualification of an entire office "simply because the conflicted attorney is the elected head of the agency, or because the case is particularly significant." Attorney General Brief, pg. 1.

That is not the issue before this court. Rather, the issue is much narrower and limited: the disqualification of the Grant County Prosecutor's Office when the elected prosecutor – and supervisor of the office – personally represented the accused in the same case that his office is prosecuting. *See*, *State v. Nickels*, 7 Wn.App. 2d 491, 497, 434 P.3d 535 (2019)("Rather than a bright line rule, we interpret *Stenger*[1] as setting a general standard that an elected prosecutor's prior representation of the accused in the same or a similar case will ordinarily require office-wide recusal, but an exception can apply in extraordinary circumstances.")(emphasis added).

Because the Attorney General misconstrues this Court's decision in *Stenger* and Division III's decision in *Nickels* its argument and authority is both inapplicable and not pertinent.

[1] *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988).

II. LEGAL ARGUMENT

1. Any Unique Responsibility to the State by the Attorney General's Office is Inapplicable to and Unaffected by the Issue Before this Court.

The Attorney General claims the unique responsibilities of the its office is significantly affected by the issue before this Court. Attorney General Brief, pg. 3-5. To advance this position the Attorney General misconstrues the issue and facts before this Court. As such, the Attorney General fails to cite relevant authority to explain how the specific facts of this case, the *Stenger* standard or Division III's decision in *Nickels* affects the Attorney General's Office.

The sole case it relies upon is *Sherman v. State*, 128 Wn.2d 164, 187, 905 P.2d 355 (1995). But that reliance is misplaced. *Sherman* involved the disqualification of the Office of the Attorney General from representing the University of Washington in a civil wrongful termination claim. *Sherman*, 128 Wn.2d at 169. It was not, like here, a conflict of interest of the prosecuting attorney who represented the accused in the same criminal matter being prosecuted - a situation many courts have deemed a due process violation. *State v. Tracer*, 173Wn.2d 708, 720, 272 P.3d 199 (2012),

citing *Howerton v. State*, 1982 OK CR 12, 640 P.2d 566, 568 (1982).[2]

Furthermore, the Court concluded that disqualification was unnecessary because the record did not establish any attorney-client relationship existed. *Sherman*, 128 Wn.2d at 188-190. The facts before this Court clearly demonstrate the existence of an attorney-client relationship:

> 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. Nickel's first-degree murder prosecution.

Nickels, 7 Wn.App. 2d at 502.

Finally, and unlike *Sherman*, the *Stenger* standard and *Nickels* apply to cases involving prosecuting attorneys who have previously represented the accused on the same criminal case his or her office is prosecuting - not individuals working at the Attorney

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

General's Office or the Attorney General's Office's ability to employ screening mechanisms in civil cases.

2. *Stenger* Does not Conflict with the Rules of Professional Conduct.

The Attorney General next claims that the *Stenger* standard and Division III's decision in *Nickels* conflicts with the Rules of Professional Conduct because "RPC 1.11 can effectively ameliorate conflicts of interest posed by individual officials, eliminating the need for office-wide disqualification." Attorney General Brief, pg. 5-7. But again the Attorney General misconstrues both *Stenger* and *Nickels* as well as the facts of this case to reach its position.

The Attorney General over-exaggerates the issue before this Court by suggesting *Stenger* or *Nickels* eliminates screening for "individual officials." However, *Stenger* makes clear that screening is still appropriate when the conflict involves a deputy prosecutor or where the elected prosecutor's previous representation is not the same case being prosecuted. *Stenger*, 111 Wn.2d at 522-23.

Moreover, although Mr. Nickels maintains that *Stenger* creates a bright-line office recusal when the elected prosecutor has previously represented the accused on the same case being prosecuted, Division III rejected this position. *Nickels*, 7 Wn.App. at 496. Instead, Division III concluded that "[r]ather 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 a similar case will ordinarily require office-wide recusal, but an exception can apply in extraordinary circumstances." *Id*. at 497. Thus, contrary to the Attorney General's fears, the ability to screen "individual officials" still reman is neither is altered nor eliminated by *Stenger* or *Nickels*.

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

Since neither *Stenger* nor *Nickels* prevents or eliminates screening "individual officials" in the appropriate situation, it cannot be argued that either conflicts with the Rules of Professional Conduct.

3. Division III Properly Applied this Court's *Stenger* Standard to the Facts of this Case.

The Attorney General suggests Division III misapplied the *Stenger* standard and imposed an overbroad vicarious disqualification standard. Attorney General Brief, pg. 8-9. This position is significantly flawed as again it mischaracterizes the *Stenger* and *Nickels*.

Division III's opinion is grounded in this Court's thirty-year *Stenger* rule. *Stenger* concluded that when an elected prosecuting attorney is disqualified because of her prior involvement in the same case as the one being prosecuted, then "the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed." *Stenger*, 111 Wn.2d at 520-22. But when the prior involvement was not in the same case, then the entire prosecuting attorney's office may not necessarily be disqualified with proper screening. *Id.*

> 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).

Therefore, the inquiry of the elected prosecuting attorney's involvement in the current case to determine whether the disqualification of the entire office is required or screening procedures are appropriate becomes relevant if the prior

representation was not on the same case being prosecuted. *Stenger*, 111 Wn.2d at 523.

Division III's opinion in *Nickels* followed *Stenger*. Contrary to the Attorney General's argument, Division III concluded that *Stenger* created a general rule, not an overbroad per se vicarious disqualification standard. *Nickels*, 7. Wn.App. at 496.

> 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 of the elected prosecutor.
>
> 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 a similar case will ordinarily require office-wide recusal, but an exception can apply in extraordinary circumstances.

Id., at 497. (emphasis added).

Following *Stenger*, Division III found that when the elected prosecutor's prior representation was on the same case being prosecuted, then the elected prosecutor's participation in the current matter is irrelevant to the question of extraordinary circumstances. *Id*. at 498.

> 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. (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.); Wash. State Bar Ass'n (WSBA) Rules of Prof'l Conduct Comm., Advisory Op. 1773 (1997) (Screening is required when a conflict is held by a deputy prosecuting attorney.).

Nickels, 7 Wn.App at 498, citing *Stenger*, 111 Wn.2d at 522-523.

Division III also observed how this Court, in announcing a general standard for imputed conflicts in *Stenger*, was primarily concerned with protecting "privileged information." *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 circumstance's 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.

Nickels, 7 Wn.App. at 499. (emphasis added).

Therefore, contrary to the Attorney General's claim, Division III did not conclude *Stenger* created an overbroad per se office-wide disqualification standard. Rather it relied on *Stenger* to conclude that, given the facts of this case, where the elected prosecutor's prior representation of the accused on the same case and who obtained privileged work-product and attorney-client

information, *Stenger*'s general rule of total office disqualification is necessary. *Id*. at 501-502.

4. *Stenger* is not Overruled by the Rules of Professional Conduct.

The Attorney General argues that the Rules of Professional Conduct left this Court's *Stenger'*s standard meaningless. Attorney General Brief, pg. 10-11. This Court does not overrule long-standing precedent lightly. "Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change" and courts will reject its prior holdings only upon "a clear showing that an established rule is incorrect and harmful." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016).

The Attorney General's sole case, *Sherman*, does not demonstrate "a clear showing" that the "established rule" in *Stenger* "is incorrect and harmful." As previously noted, the facts in *Sherman* are significantly different than those presented in *Stenger* and *Nickels*. *Sherman* involved a potential conflict of interest in a civil case - not the disqualification of a prosecuting attorney who represented the accused in the same criminal case being prosecuted. *Sherman* did not establish an attorney-client relationship, whereas here there is little doubt an attorney-client relationship exists. Indeed, Division III specifically concluded that the Grant County

Prosecuting Attorney had acquired privileged information through work product and attorney-client communications during his time as a private attorney working on the same case being prosecuted. *Nickels*, 7 Wn. App. 2d at 502.

Finally, amendments to the Rules of Professional Conduct have not changed, altered or eliminated this Court's *Stenger* standard. *Stenger* was clearly-established and controlling law when the amendments were adopted, and had the legislature, rules committee, or this Court in adopting the amendments intended *Stenger* to be overruled it would have specifically done so.[3]

5. The Attorney General's Reliance on Foreign Cases is Misplaced.

The Attorney General points this Court to foreign cases to suggest how *Stenger* is no longer valid and should not be followed. Attorney General Brief, pg. 11-12. However, out-of-state precedent does not trump binding in-state law. *Am. Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 408, 229 P.3d 693 (2010). As demonstrated, this Court's *Stenger* standard has adequately addressed the issue at hand, removing the need to seek out-of-state guidance. *Grange Ins. Ass'n v. Roberts*, 179 Wn.App. 739, 320 P.3d 77 (2013)(Washington courts may want to consider other

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

jurisdictions when Washington is silent regarding the particular issue).

Additionally, the cases relied upon by the Attorney General are factually and legally inapplicable. For example, the Attorney General claims that *State v. Addison*, 166 N.H. 115, 89 A.3d 1214 (2014) "serves as an out-of-state exemplar that confirms the soundness of Washington's rule emphasizing screening." Attorney General Brief, pg. 12. *Addison* involved the disqualification of a deputy prosecutor (not the prosecuting attorney) and as such the New Hampshire Court declined to create a per se office wide disqualification rule. *Id.*, at 120. Furthermore, the deputy attorney in *Addison* first became involved in the case at the appellate level where the concern of obtaining confidential information is lessened because the prosecutor is bound by the facts of the appellate record.

> When a defendant's lawyer switches sides, the principal danger is that information supplied in confidence will be used to the defendant's disadvantage. That danger is greatest when the lawyer switches sides prior to trial, and is in a position to use confidential information in his formulation of strategy and development of the facts. Resulting prejudice would be impossible to assess. The danger of prejudice is far less when a prosecutorial conflict arises during appellate proceedings. At that stage, the prosecution has far less discretion; its role is to answer arguments made by the defendant.

Addison, 166 N.H. at 121, quoting *Pisa v. Com.*, 378 Mass. 724, 393 N.E.2d 386, 390 (Mass. 1979) (citations omitted); *see People v.*

Rankin, 149 A.D.2d 987, 540 N.Y.S.2d 628, 629 (N.Y. App. Div. 1989) (no risk of abuse of confidence when district attorney will be bound by the facts appearing in the record on appeal and thus cannot take advantage, to the defendant's prejudice, of any facts outside the record but within the knowledge of the switching attorney).

Unlike *Addison*, here the conflict involved the prosecuting attorney's prior representation in the same case and who obtained privileged work-product and attorney client information before, during and after trial (not on appeal). *Nickels*, 7 Wn.App. 2d at 501-502.

The other cases relied upon the Attorney General are equally flawed:

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

- *State v. Kinkennon*, 747 N.W.2d 437 (Neb. 2008). Conflict of a deputy prosecutor (not elected prosecutor) with disputed facts whether previously represented the accused or obtained confidential or privileged information.

- *State v. Camacho*, 329 N.C. 589, 406 S.E. 868 (N.C. 1991). Conflict of a deputy prosecutor (not prosecuting attorney) who had minimal to no involvement in the case and who did not obtain confidential information about the defendant's case.

- *Lux v. Commonwealth*, 24 Va.App. 561, 484 S.E.2d 145 (Va. 1997). *Pro se* defendant sought disqualification of entire prosecutor's office because a deputy prosecutor

> (not prosecuting attorney) who, as a former public defender, provided minimal assistance to the *pro se* litigant was named as a party in a federal civil litigation (not the same case being prosecuted).

Attorney General's reliance on dissimilar foreign cases does not provide evidence of a "clear showing" that this Court's *Stenger* standard is "incorrect or harmful" and should be abandoned after thirty years of consistent and reliable authority.

III. CONCLUSION

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

Respectfully submitted this 3rd day of September, 2019.

WALSH & LARRAÑAGA

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2019, I served via fax, email, mail or electronic court filing (ECF) (as noted below) the *Respondent's Response to Amicus Curie Attorney General's Office* to the following parties:

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