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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
 THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

v.

Case No. 3AN-23-08873CR

TUPE SMITH,

Defendant.

**MOTION TO DISMISS INDICTMENT**

**VRA CERTIFICATION**

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

**INTRODUCTION**

Comes now, Tupe Smith, by and through counsel, Assistant Public Defender Jesslin Wooliver, and hereby moves this court for an order dismissing the remaining counts of the Grand Jury Indictment. This motion is made pursuant to *Zurlo v. State*, 506 P.3d 777 (Alaska App. 2022), *Kim v. State*, 390 P.3d 1207, 1209 (Alaska App. 2017), and Alaska Criminal Rule of Procedure 6(r) (sufficiency of the evidence).

**FACTS**

**A. Initial investigation and interview**

On November 30, 2023, Sergeant Nathan Bucknall and his colleague James Curtis travelled to Whittier, Alaska to arrest Tupe Smith on a warrant in this case.<sup>1</sup>

<sup>1</sup>Exhibit A, Audio of interview generally.

Before conducting the arrest, Sergeant Bucknall introduced himself to Ms. Smith and told her he'd like to speak with her.<sup>2</sup> He read her her *Miranda* rights and Ms. Smith indicated she was fine to talk.<sup>3</sup>

Sergeant Bucknall initially asked Ms. Smith about: her history of residency in Whittier; when she obtained her Alaska driver's license; and her history of applying for the PFD.<sup>4</sup> He then began to ask her about her history of registering to vote, asking; "Okay, so when you filed for your voter registration application, did you mark that you were a U.S. citizen?"<sup>5</sup> Ms. Smith responded: "No, because if I filed through the food stamp, I am a U.S. national."<sup>6</sup> Sergeant Bucknall clarified with Ms. Smith that she has never applied to be a U.S. citizen.<sup>7</sup> He then asked, "what are some of the things that you can't do as a national that you can do as a citizen?"<sup>8</sup> Ms. Smith responded, "Voting for your, I know, voting for president. No, but that's all I know for voting."<sup>9</sup> Sergeant Bucknall responded: "Okay. Yeah. How about like running for office or be a certified police?"<sup>10</sup> Ms. Smith responded:

I did not know, so I just run for the school board and I didn't know because on the application it doesn't say if you're a citizen or U.S. national because I think I can do anything because of a U.S. national, but I just run for the board. And then I run for the board, but then they told me that I cannot be a part of the board because I was a U.S.

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<sup>2</sup> Audio at 00:49-1:06.

<sup>3</sup> Audio at 1:35-55.

<sup>4</sup> Audio at 1:54-3:43.

<sup>5</sup> Audio at 3:43-4:11.

<sup>6</sup> Audio at 4:11-18.

<sup>7</sup> Audio at 4:18-36.

<sup>8</sup> Audio at 4:36-5:00.

<sup>9</sup> Audio at 5:12-20.

<sup>10</sup> Audio at 5:21-30.

1  
2 National, no a U.S. citizen. So I was like, okay, because it's a safe  
3 thing. So I can't be part of the board. So that's why I'm no longer on  
4 the school board because of it.<sup>11</sup>

5 Sergeant Bucknall observed that prior to running for the school board,  
6 Ms. Smith had registered to vote.<sup>12</sup> He pointed out to Ms. Smith that on voter  
7 registration forms it asks if the applicant is a U.S. citizen.<sup>13</sup> Sergeant Bucknall  
8 asked Ms. Smith what she had said on those forms.<sup>14</sup> Ms. Smith responded:  
9 "Well, if I go, I will ask whoever's in the office, because it doesn't show that  
10 there's a U.S. national, that I'm not a U.S. citizen. And then I asked them what  
11 do I put it on? And they said, no there's a section where it says U.S.  
12 National."<sup>15</sup> Ms. Smith clarified that in most instances there is a section to  
13 indicate that one is a U.S. national, and she does.<sup>16</sup> She told Sergeant  
14 Bucknall:  
15

16 So if I go fill in an application where it doesn't show anything, U.S.  
17 national, they usually tell me to put the U.S. citizen, but they will write  
18 something like a notice as a U.S. national instead of being at the  
19 application show that I am a U.S. citizen.<sup>17</sup>

20 Sergeant Bucknall responded: "Okay. So would it surprise you to find  
21 out that you didn't, you actually checked that you were a U.S. citizen on each  
22  
23

24 <sup>11</sup> Audio at 5:30-6:14.

25 <sup>12</sup> Audio at 6:14-55.

26 <sup>13</sup> *Id.*

27 <sup>14</sup> Audio at 6:45-7:10.

28 <sup>15</sup> Audio 7:11-27.

<sup>16</sup> Audio at 7:27-8:10.

<sup>17</sup> Audio at 7:54-8:10.

1  
2 of these?”<sup>18</sup> Ms. Smith stated: “I did check that. There are some of them that  
3 are U.S. citizens, but I have to make sure with the office that I’m a U.S.  
4 national.”<sup>19</sup> Sergeant Bucknall asked Ms. Smith who she would have spoken  
5 to about that.<sup>20</sup> He clarified: “Wherever you voted, you said you checked with  
6 someone. So my understanding, so I’m hearing.”<sup>21</sup> Ms. Smith stated: “Yeah,  
7 for the City of Whittier. Because they will ask me like the last vote that I went  
8 to, they asked me if I’m a U.S. national or a U.S. citizen. I told them I’m a U.S.  
9 national.”<sup>22</sup> Sergeant Bucknall asked “And what happened at that time? Did  
10 they still let you vote?”<sup>23</sup> Ms. Smith responded, “Well, I still voted because I  
11 didn’t know if they were going to say not to vote. They wouldn’t tell me  
12 anything.”<sup>24</sup> Ms. Smith went on, “Because I let them know that I’m a U.S.  
13 national, so that’s the only thing I know that I cannot vote for president. I didn’t  
14 know that I can’t vote for anything else. Yeah, but as long as for president, I  
15 know that I can’t vote for. But also, nobody told me that I cannot vote or can’t  
16 vote.”<sup>25</sup>  
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18  
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23 <sup>18</sup> Audio at 8:15-23.

24 <sup>19</sup> Audio at 8:23.

25 <sup>20</sup> Audio at 8:32.

26 <sup>21</sup> Audio at 8:39.

27 <sup>22</sup> Audio 8:45-57.

28 <sup>23</sup> Audio at 8:57.

<sup>24</sup> Audio 9:02-9:10.

<sup>25</sup> Audio 9:11-37.

1  
2 Sergeant Bucknall proceeded to ask, and then confirm in his records,  
3 that Ms. Smith had never voted in a Presidential election.<sup>26</sup> He then clarified  
4 that Ms. Smith, on her PFD application and public assistance applications,  
5 noted that she was a U.S. national.<sup>27</sup> She responded that was correct.<sup>28</sup>  
6 Sergeant Bucknall pointed out that Ms. Smith was not “doing a consistent job  
7 at claiming [her] citizenship.”<sup>29</sup> Sergeant Bucknall and Ms. Smith spoke about  
8 the PFD, and about how citizenship was not a requirement for the PFD.<sup>30</sup>  
9 Sergeant Bucknall told Ms. Smith: “And you told me when we first talked . . .  
10 you know, you’re not supposed to vote and you’re not supposed to run for a  
11 board. I mean honestly did you think you were just going to get one by? Is  
12 that what happened?”<sup>31</sup> Ms. Smith responded:

13  
14  
15 Its not that, because like I said, if I do that, when usually I do the voting  
16 or anything, I let whoever know that’s there, that’s the only box that says  
17 you’re a U.S. citizen. But I have to let them know I’m a U.S. national.  
18 But the only box they can check, they said that they’ll figure that out  
19 after because I am not a U.S. citizen. But for whoever know, I have to  
20 let them know before I put that option up, I didn’t know I was going to  
21 get in trouble for doing that. Because I usually let whoever the person  
22 that’s there know that I’m not a U.S. citizen. So that’s the thing. If I  
23 knew that that would be a problem I would not vote at all because if I  
24 will let a person know that I’m not a U.S. citizen, if they give me a paper  
25 that says I’m a U.S. citizen, I will let them know that I’m not a U.S.  
26 citizen, but what box do I check? If they tell me to check the U.S.  
27 citizen, I told them they would tell me that they will put it on a note on  
28 the paper says that I’m not a U.S. citizen. That’s what I explained that

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<sup>26</sup> Audio 10:41-11:53

<sup>27</sup> Audio 11:56-12:05

<sup>28</sup> Audio 12:05-12:06

<sup>29</sup> Audio 12:05-:37.

<sup>30</sup> Audio 12:37-15:26.

<sup>31</sup> Audio 15:10-:30.

1  
2 to you before. I know that I cannot vote for president. So with all the  
3 other voters I wasn't sure because I didn't read anything about it. So  
4 now that you're explaining to me that I'm a U.S. national, I cannot vote  
for all of these things that I have voted for, I would have never voted.<sup>32</sup>

5 Sergeant Bucknall then asked Ms. Smith why she has never applied to  
6 be a citizen.<sup>33</sup> She responded that she hasn't because she can travel  
7 throughout the United States, and she didn't think she couldn't do other things  
8 besides vote for president, but now that she knows about the citizenship  
9 requirement to be on the school board, she is thinking that she should apply.<sup>34</sup>

10  
11 Ms. Smith stated:

12 But I don't mind not getting a citizen at all or not being a citizen because  
13 I can do anything in the United States. I can get a job or anything, but  
14 I didn't know about the state stuff that I wanted to be in, that I cannot  
15 do any of that because I'm not a citizen. So now that I learn I have to  
be a citizen in order to attend some of the school and our city stuff, so  
it is a thing to look forward to to get citizenship.<sup>35</sup>

16 Sergeant Bucknall went on to summarize his view of what happened:

17 Okay. No, not a problem. So I'm going to be quite honest with  
18 you here, okay. Everything I've seen with all these documents  
19 and stuff in what I've been talking with you, the impression I  
20 get is that you check the box because you want to be part of  
the school board and stuff like that. So it's pretty obvious when  
21 you look at it and it says, are you US citizen? You check yes  
or no, and there's nothing else to check. So that's the  
22 impression I'm getting is what probably happened here. Okay.  
I'm not saying you murdered someone, anything like that.  
23 Okay. So I understand it's not the crime of the century. Okay.  
Obviously we're here, though. So there is a problem with this.  
24 Am I hitting on the head of the nail a little? Just you had this

25  
26 <sup>32</sup> Audio 15:30-16:51.

27 <sup>33</sup> Audio at 16:51-17:02,

28 <sup>34</sup> Audio at 17:02-:38.

<sup>35</sup> Audio at 18:14-:40.



1  
2 desire to kind of get involved, so you check the box knowing  
3 you shouldn't have.<sup>36</sup>

4 Ms. Smith was confused; she stated: "Oh wait, what?"<sup>37</sup> Sergeant  
5 Bucknall repeated himself:

6 Okay, I'll ask again and again. Remember, you don't have to talk to us.  
7 Okay. I don't want you to think you have to answer these questions at  
8 any time. You can tell me. We're done talking. The impression I'm  
9 getting from seeing all these documents and how things went and how  
10 you'd only do this on voter forms based off what you just told me, what  
11 it seems like is you're saying you want to be involved in the REA board  
12 and the school district and all that. So sounds to me like you were willing  
13 to check that box even though knowing you shouldn't have, because  
14 you want to be involved with the REA board and stuff like that. Does  
15 that sound accurate to what happened here?<sup>38</sup>

16 Ms. Smith responded: "Yes."<sup>39</sup>

17 Ms. Smith and Sergeant Bucknall went on to discuss her PFD  
18 application and her candidacy to get a PFD.<sup>40</sup> Sergeant Bucknall then asked  
19 Ms. Smith how she learned she could not vote in U.S. presidential elections.<sup>41</sup>  
20 Ms. Smith stated that she had learned that through her work when she lived  
21 in California; she heard that because she was not born in the United States,  
22 she could not vote in a Presidential election.<sup>42</sup> She stated "But anything else  
23 other than president, I did not know."<sup>43</sup>

24 <sup>36</sup> Audio 18:40-19:32.

25 <sup>37</sup> Audio at 19:33.

26 <sup>38</sup> Audio at 19:35-20:10.

27 <sup>39</sup> Audio at 20:11.

28 <sup>40</sup> Audio 20:49-23:00.

<sup>41</sup> Audio at 23:03.

<sup>42</sup> Audio at 23:08-23:39.

<sup>43</sup> Audio at 23:38-23:41.

Sergeant Bucknall proceeded to arrest Ms. Smith on her warrant for ten counts of voter misconduct and transported her to Hiland Mountain Correctional Facility.<sup>44</sup>

### **B. Grand Jury**

The State took this case to the grand jury and called two witnesses: Michaela Thompson, the division operations manager for the Division of Elections for the State of Alaska, and Sergeant Nathan Bucknall, the Alaska State Trooper who questioned Ms. Smith in the interview discussed above. Michaela Thompson testified about the process of registering to vote, the wording of the application, verified that the exhibits were standard forms with the Division, and confirmed that Ms. Smith had submitted a voter application form with the box checked that she was a U.S. citizen.<sup>45</sup> Sergeant Bucknall testified about his conversation with the defendant at her home in Whittier.<sup>46</sup>

Sergeant Bucknall first testified that according to U.S. Homeland Security, Ms. Smith was a U.S. national, not a U.S. citizen, and that she, at the time, had not started the process of becoming a citizen.<sup>47</sup> Sergeant Bucknall testified that he had spoken with Ms. Smith, and she had confirmed this.<sup>48</sup> He then testified that Ms. Smith had told him that she had filed an application to vote, and that “she did indicate that she knew she needed to be a citizen to vote.”<sup>49</sup> When asked by the prosecutor

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<sup>44</sup> Audio at 23:45-25:12.

<sup>45</sup> Exhibit B. GJ transcript at 9-22.

<sup>46</sup> GJ transcript at 22-39.

<sup>47</sup> GJ transcript at 24-25.

<sup>48</sup> GJ transcript at 25.

<sup>49</sup> *Id.*



whether this was for all elections, he clarified that “she believed that was only for presidential elections.”<sup>50</sup> When asked if Ms. Smith had acknowledged that she’d filled out that she was a U.S. citizen, Sergeant Bucknall testified: “Yes.”<sup>51</sup>

The prosecutor asked Sergeant Bucknall if Ms. Smith had spoken with anyone about her citizenship status, and Sergeant Bucknall responded: “She did indicate that she talked to people at the City of Whittier, who stated that even though she was a U.S. national that she should just check the U.S. citizen box on the – when she went to vote.”<sup>52</sup> The prosecutor asked, “Did you—at some point, did she acknowledge that she probably knew that she shouldn’t have voted?”<sup>53</sup> Sergeant Bucknall responded, “Yes.”<sup>54</sup>

The prosecutor then concluded her presentation and asked if any of the grand jurors had questions.<sup>55</sup> A grand juror asked: “If she had done this by accident, would that be a felony still, or would that be, like, lower?”<sup>56</sup> The prosecutor responded that “the statute requires intentional, so intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by the title.”<sup>57</sup> Another juror wanted clarification that Ms. Smith had been attempting to vote and had attempted to run for office, which the prosecutor clarified by referring the jurors to the exhibits

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> GJ transcript at 27.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> GJ transcript at 27-28.

<sup>57</sup> GJ transcript at 28.

1  
2 presented.<sup>58</sup> The grand jurors left to deliberate, but returned with a couple of  
3 questions.<sup>59</sup> The jurors stated, “We’re not quite sure if she understood prior to being  
4 charged with this.”<sup>60</sup> The prosecutor recalled Sergeant Bucknall.<sup>61</sup>

5  
6 The prosecutor asked Sergeant Bucknall: “You had testified that Ms. Smith  
7 had told you that the officials at Whittier had told her just to check the box?”<sup>62</sup> He  
8 responded, “Correct, yes.”<sup>63</sup> He elaborated:

9  
10 She indicated that when she would go to vote that she would tell them  
11 that she was not a citizen. And they would tell her at that time to fill,  
12 just go ahead, fill out the box that says you’re a citizen, and move  
forward. However, when you vote, there is no – on the registry, there  
is no place to indicate that. So that really wasn’t a truthful statement.<sup>64</sup>

13 The prosecutor cautioned jurors not to listen to Sergeant Bucknall’s testimony  
14 that Ms. Smith’s statement was not truthful, as that was something for the jurors to  
15 evaluate.<sup>65</sup> The prosecutor went on to hand the jurors Exhibits 1-5, and asked  
16 Sergeant Bucknall whether the registration forms are filled out at the time of voting.<sup>66</sup>  
17 Sergeant Bucknall responded “Typically not. Typically, you fill those out ahead of  
18 time because once you register to vote, you have to, I believe, wait 30 days before  
19 you can actually vote.”<sup>67</sup> The prosecutor clarified with the witness that these forms  
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21

22 <sup>58</sup> *Id.*

23 <sup>59</sup> GJ transcript at 29.

24 <sup>60</sup> *Id.*

25 <sup>61</sup> GJ transcript at 29-30.

26 <sup>62</sup> GJ transcript at 30.

27 <sup>63</sup> *Id.*

28 <sup>64</sup> GJ transcript at 30-31.

<sup>65</sup> GJ transcript at 31.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

1  
2 were not something she would have filled out at the polls, but rather something she  
3 would have filled out at home.<sup>68</sup> The prosecutor then asked Sergeant Bucknall if Ms.  
4 Smith had ever voted in Alaska, and how many times.<sup>69</sup> He responded that she had,  
5 five times in 2022 and 2023, and that she had first registered to vote in 2020.<sup>70</sup>  
6

7 A grand juror asked, “did she acknowledge the fact that she understood the  
8 entire time she was voting that she was a U.S. national and not – and that that didn’t  
9 make her a U.S. citizen, even though its one of our territories?”<sup>71</sup> The prosecutor  
10 rephrased for the witness: “I guess, can you – based on your conversation with her,  
11 did she indicate at any time she thought she was a U.S. citizen?”<sup>72</sup> Sergeant  
12 Bucknall responded: “No. In my interview with her, she did indicate that she was a  
13 U.S. national the whole time and that she hadn’t applied for citizenship yet. Yeah.”<sup>73</sup>  
14 The prosecutor followed up: “And she’s aware of the difference, that if you’re a  
15 national, you can’t vote?”<sup>74</sup> Sergeant Bucknall responded: “Yes.”<sup>75</sup>  
16  
17

18 The jurors had a few more questions, including asking for more details about  
19 Ms. Smith’s statement that she thought you only had to be a U.S. citizen for  
20 presidential elections.<sup>76</sup> Sergeant Bucknall testified:  
21

22  
23 <sup>68</sup> GJ transcript at 32.

24 <sup>69</sup> GJ transcript at 32-34.

25 <sup>70</sup> GJ transcript at 34.

26 <sup>71</sup> GJ transcript at 34-35.

27 <sup>72</sup> GJ transcript at 35.

28 <sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> GJ transcript at 35-38.

1  
2 During my conversation, I did – we did ask a little more about that. And  
3 she said that she learned that from an employment that she had in  
4 California – that that was the only thing that she could vote – or could  
5 not vote for. But that – also admitted that's all she knew about the  
6 voting system.<sup>77</sup>

7 Another juror then asked the prosecutor if she could read the definition of  
8 intentional again.<sup>78</sup> She responded:

9 A person acts intentionally with respect to a result described by a  
10 provision of law defining an offense when the person's conscious  
11 objective is to cause that result. When intentionally causing a  
12 particular result is an element of an offense, that intent need not be  
13 the person's only objective.<sup>79</sup>

14 She continued,

15 And I'll, I guess, just kind of take a step back, and I'll almost treat this  
16 as, like, sort of a mini closing argument. So this is not evidence. I am  
17 not a witness. If any evidence you've heard does not compute with  
18 what I'm saying, you should disregard what I'm saying. But I just want  
19 to be very clear, the allegations here are – the intentionality doesn't go  
20 to whether or not she wasn't intentionally voting when she wasn't  
21 allowed to. The intentionality component goes to whether she  
22 intentionally made a false affidavit or swore falsely or falsely affirmed  
23 under oath. And the crux of that goes to the question of, yes or no, I  
24 am a citizen of the United States. So the allegation here is that, by  
25 checking yes and then signing these documents under oath for 1 and  
26 2, and then for 3, 4 and 5, by saying I believe that I am qualified to  
27 vote, that each of those was an intentional false affirmation or, you  
28 know, swearing falsely under oath.

I included the components where – the things that she told Sergeant  
Bucknall, out of, frankly, an abundance of caution, given that arguable  
her – in the law, we would call them self-serving hearsay statements.  
where she's providing a justification for it. So arguably, those could  
be exculpatory, so I'm presenting them to the members of the panel  
for your review so that you have them.

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<sup>77</sup> GJ transcript at 38.

<sup>78</sup> GJ transcript at 39.

<sup>79</sup> *Id.*

1  
2 But again, I think that the critical – what I would, again, as closing  
3 argument, not as evidence, encourage you to think about is the fact  
4 that these forms were not the types that were filled out on the day of  
5 when somebody goes to the polls. These were filled out earlier.  
6 Some of them were filled out years earlier. For the first one, it's 2020.  
7 So while she might have said that to Sergeant Bucknall, you also  
8 have forms that were filled out – as he just testified, this Exhibit  
9 Number 2 is filled out as part of a PFD process. It wasn't even a  
10 component of voting.<sup>80</sup>

11 The grand jury returned with a true bill for counts one and two.<sup>81</sup> On  
12 the remaining eight counts the grand jury returned with no true bill.<sup>82</sup>

## 13 ARGUMENT

### 14 A. The State misled the grand jury by mischaracterizing the evidence

15 When the State makes a conscious decision to present false or misleading  
16 information regarding a material fact to the grand jury, the resulting indictment must be  
17 dismissed.<sup>83</sup> Even the unwitting or unintentional presentation of false or inaccurate  
18 evidence requires dismissal of the indictment if the inaccuracy goes to a material  
19 fact.<sup>84</sup> Similarly, where a peace officer presents inaccurate testimony to the grand jury  
20 which prejudices the substantial rights of the defendant, including testimony which is  
21 inaccurate by omission, the court shall dismiss the indictment if the officer acted at  
22 least negligently.<sup>85</sup> This latter rule reinforces the prosecution's "affirmative duty to  
23 ensure that the hearsay testimony of peace officers. . . does not mislead the grand jury  
24

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25 <sup>80</sup> GJ transcript at 39-40.

26 <sup>81</sup> GJ transcript at 41-43.

27 <sup>82</sup> GJ transcript at 41-45.

28 <sup>83</sup> *Zurlo v. State*, 506 P.3d 777, 787-788 (2022).

<sup>84</sup> *See Id.* at 787.

<sup>85</sup> Alaska Rule of Criminal Procedure 6(r)(4).

or distort the known evidence in the case.”<sup>86</sup> The State’s duty to not mislead the grand jury is distinct from its duty to present exculpatory evidence.<sup>87</sup>

As the Alaska Court of Appeals recently explained in *Zurlo v. State*,<sup>88</sup> evidence presented to the grand jury need not be false in a literal sense in order to be so misleading as to warrant dismissal.<sup>89</sup> In *Zurlo*, the defendant, Chad Zurlo was charged with first degree murder for shooting his landlord, Steven Corcoran in the head.<sup>90</sup> When the police interviewed Zurlo, Zurlo told them that on the night Zurlo and his girlfriend had moved in, Corcoran had entered his room intoxicated, unannounced, and uninvited.<sup>91</sup> When Zurlo asked Corcoran to leave, Corcoran became belligerent and threatened to shoot or kill him.<sup>92</sup> Zurlo told police he knew Corcoran had some guns and rifles, but Zurlo had never actually seen them.<sup>93</sup> Zurlo told police that, on the night of the shooting, Corcoran had again entered Zurlo’s room unannounced, intoxicated, and belligerent, had again threatened to murder Zurlo, and had immediately thereafter reached behind his back with his free hand.<sup>94</sup> Zurlo told investigators that he believed Corcoran was reaching for a gun, though he did not actually see Corcoran with a gun so he pulled his own gun out and shot Corcoran in the head, killing him.<sup>95</sup> Zurlo’s girlfriend largely corroborated Zurlo’s account, except

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<sup>86</sup> *Zurlo*, 506 P.3d at 784.

<sup>87</sup> *Id.* at 783-786.

<sup>88</sup> 506 P.3d 777 (2022).

<sup>89</sup> *See Id.* at 778-781.

<sup>90</sup> *Id.* at 779, 781.

<sup>91</sup> *Id.* at 779.

<sup>92</sup> *Id.* at 779.

<sup>93</sup> *Id.* at 779-780.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*



1  
2 that she did not hear Corcoran explicitly threaten to kill Zurlo that night and, unlike  
3 Zurlo, she had personally seen Corcoran wielding a gun on other occasions.<sup>96</sup>

4 At grand jury, the State had a trooper testify to Zurlo's statements. The trooper  
5 omitted any mention of Zurlo's self-defense claim, referring only to Zurlo mentioning  
6 being in an argument with Corcoran.<sup>97</sup> The trooper testified that Zurlo shot Corcoran  
7 as "a reaction."<sup>98</sup> After this testimony, the prosecutor asked whether Zurlo had said  
8 that Corcoran physically assaulted him or "anything like that."<sup>99</sup> The trooper testified  
9 that Zurlo had not reported being physically assaulted by Corcoran, and the State  
10 asked no follow up questions.<sup>100</sup> The trooper subsequently testified that Zurlo had not  
11 claimed to have seen Corcoran carrying a gun before.<sup>101</sup> The grand jury also heard the  
12 testimony of Zurlo's girlfriend, but the prosecutor avoided asking Zurlo's girlfriend  
13 whether Corcoran had previously threatened to shoot Zurlo or whether Corcoran was  
14 known to carry a gun.<sup>102</sup> The grand jury returned an indictment against Zurlo.  
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18 None of the evidence presented to the grand jury was literally false: Zurlo and  
19 Corcoran had been in "an argument," one where Corcoran had threatened to kill Zurlo;  
20 Zurlo's act of shooting Corcoran was "just a reaction," specifically a reaction to being  
21 threatened with murder by an angry, drunk man who Zurlo believed was at that  
22 moment reaching for a gun; Zurlo had not seen Corcoran with a gun that night, he had  
23 only heard Corcoran talk about possessing multiple guns and threatening to shoot  
24  
25

26 <sup>96</sup> *Id.* at 779-780.

27 <sup>97</sup> *Id.* at 781.

28 <sup>98</sup> *Id.* at 780.

<sup>99</sup> *Id.* at 781.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 781.

<sup>102</sup> *Id.*

Zurlo; and Corcoran had never “physically assaulted” Corcoran, he only threatened to kill Zurlo multiple times. Finally, the witnesses called by the State did not affirmatively represent that Corcoran had not threatened to kill Zurlo, or that Zurlo did not have any reason to think Corcoran was armed, or that Zurlo was not afraid of Corcoran.

Nonetheless the Alaska Court of Appeals had no difficulty in finding that the testimony presented to the grand jury was “both incomplete and misleading,”<sup>103</sup> because it left the grand jury “with the erroneous impression that Zurlo had confessed to shooting Corcoran for essentially no reason.”<sup>104</sup> The result was the presentation of a “highly misleading version of facts.”<sup>105</sup> By misleading the grand jury about the defendant’s statements, “the prosecutor was actively subverting the integrity of the grand jury process and directly prejudicing the defendant’s substantial rights.”<sup>106</sup>

Just like *Zurlo*, in this case, the testimony presented to the grand jury was “incomplete and misleading” because it left the grand jury with the erroneous impression that Ms. Smith confessed to intentionally lying on her voting ballots.

At grand jury, Sergeant Bucknall stated that “she did indicate that she knew she needed to be a citizen to vote.”<sup>107</sup> He left it to the prosecutor to clarify that Ms. Smith had only stated that she knew she needed to be citizen to vote in presidential elections. This statement is a gross oversimplification of Ms. Smith’s comments, and is not supported by the recorded interview between Bucknall and Ms. Smith where she repeatedly indicates that: (1) she believed the citizenship requirement only applied to

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<sup>103</sup> *Id.* at 784.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 787.

<sup>106</sup> *Id.*

<sup>107</sup> GJ transcript at 25.

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2 presidential elections; (2) she asked and received clarification from town officials that  
3 for the purposes of local elections US nationals should mark the citizen box; and (3)  
4 would not have checked the U.S. citizen box had she known it was erroneous to do so.  
5 Review of the recorded interview supports the finding that Ms. Smith was confused  
6 about voting requirements and also, relevantly, does not speak English as a first  
7 language. Sergeant Bucknall's statement that "she knew she needed to be a citizen to  
8 vote" was "both incomplete and misleading,"<sup>108</sup> because it left the grand jury with the  
9 erroneous impression that Ms. Smith had a clear understanding of the voting  
10 requirements. This conclusion is directly contradicted by the recorded interview.

11  
12 Sergeant Bucknall also affirmed that Ms. Smith acknowledged that she  
13 probably knew that she shouldn't have voted.<sup>109</sup> Presumably this is referring to the  
14 end of Sergeant Bucknall and Ms. Smith's conversation when he went over his view of  
15 what had happened, and she affirmed that that is what happened.<sup>110</sup> But again, it is  
16 clear from the entirety of Ms. Smith and Sergeant Bucknall's conversation that she, at  
17 the time of their conversation, was learning for the first time that she shouldn't have  
18 voted. Ms. Smith made numerous comments to Sergeant Bucknall that she didn't  
19 know she couldn't vote in local elections, that she had heard from officials that she  
20 was able to vote and in fact was supposed to check that she was a U.S. citizen on her  
21 voter application, and that if she had known it was a problem for her to vote, she  
22 wouldn't have.<sup>111</sup> Any acknowledgment of the requirement was made in hindsight, with  
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27 <sup>108</sup> *Id.* at 784.

<sup>109</sup> GJ transcript at 27.

<sup>110</sup> Audio at 19:35-20:12.

<sup>111</sup> See Audio at 5:12-20; 9:11-37; 15:30-16:51; 18:14-40.

the understanding gleaned from her interrogation with Sergeant Bucknall. It was incredibly misleading for the prosecution to end their initial presentation of the case with testimony that Ms. Smith acknowledged that she knew she shouldn't have voted, especially when they failed to introduce any of the numerous and more straightforward statements Ms. Smith made to the contrary.<sup>112</sup>

After the grand jurors asked questions about Ms. Smith's actual understanding of her actions leading to these charges, the prosecutor clarified with Sergeant Bucknall that Ms. Smith always admitted to knowing she was a U.S. national, not a U.S. citizen, and the "she's aware of the difference, that if you're a national, you can't vote."<sup>113</sup> Sergeant Bucknall responded, "Yes."<sup>114</sup> Again, it is clear from Ms. Smith's conversation with Sergeant Bucknall that she did not know that as a U.S. national, she was not allowed to vote.<sup>115</sup> She explicitly stated that the only thing she knew about being a U.S. national that made her different than a U.S. citizen was that she could not vote in U.S. presidential elections.<sup>116</sup> The prosecution's characterization of Ms. Smith's understanding was therefore not only misleading but inaccurate, and because it was used to respond to jurors' specific questions about Ms. Smith's understanding about those aspects of her status, it was highly prejudicial to her right to a grand jury. Just as in *Zurlo*, the prosecutor's actions "undermined the grand jury's ability to fulfill its protective role and make an independent decision regarding the probability of [the

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<sup>112</sup> See Audio at 5:12-6:14; 7:11-8:10; 8:23-9:37; 15:30-16:31; 23:38-23:41.

<sup>113</sup> GJ transcript at 35.

<sup>114</sup> *Id.*

<sup>115</sup> Audio at 5:12-20; 9:11-37; 15:30-16:51.

<sup>116</sup> Audio at 5:12-20; 9:11-37.

defendant's] guilt."<sup>117</sup> Given the importance of Ofc. Bucknall's testimony in the state's presentation of the intentional element of these offenses, as well as the jury's questions about that element, counts one and two of the indictment must be dismissed.

**B. Sergeant Bucknall improperly offered personal opinion as to the credibility of Ms. Smith's statements**

The Alaska Court of Appeals has made it clear that a witness cannot act as a "human polygraph," or in other words cannot offer a personal opinion about the credibility of another witness's prior statements or testimony."<sup>118</sup> The court is particularly concerned when the witness is law enforcement. In *Kim v. State*, for example, the court found that it was improper in a theft case for an officer to testify that he thought the defendant was lying.<sup>119</sup> The court stated:

We have expressed particular concern when the testifying witness is a law enforcement officer, because "jurors may surmise that the police are privy to more facts than have been presented in court, or [jurors] may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator."<sup>120</sup>

In this case, Sergeant Bucknall testified that Ms. Smith's statement that Whittier officials had instructed her to check the "U.S. citizen" box on her voting registration form and allowed her to vote despite her telling the she was a U.S.

<sup>117</sup> 506 P.3d 777, 786 (Alaska App. 2022).

<sup>118</sup> *Kim v. State*, 390 P.3d 1207, 1209 (Alaska App. 2017) (citing *Sakeagak v. State*, 952 P.2d 278, 282 (Alaska App. 1998); *Flynn v. State*, 847 P.2d 1073, 1075-76 (Alaska App. 1993); *Thompson v. State*, 769 P.2d 997, 1003 (Alaska App. 1989); *George v. State*, 2014 WL 2937874, at \*1 (Alaska App. June 25, 2014) (unpublished), rev'd on other grounds, 362 P.3d 1026 (Alaska 2015)).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

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2 national “really wasn’t a truthful statement.”<sup>121</sup> Unlike in *Kim*, the prosecutor in this  
3 case cautioned the grand jury not to take this statement into account in their  
4 deliberations, stating that whether Ms. Smith’s statement was truthful or not was  
5 “something for you all to decide, not something for Sergeant Bucknall to testify to.  
6 Anyone have any problems doing that? Okay.”<sup>122</sup>  
7

8 A curative instruction was not sufficient to erase the prejudice to Ms. Smith.  
9 Sergeant Bucknall testified that Ms. Smith lied about a material fact that was directly  
10 relevant to a material element of the offense, *i.e.* whether she intentionally made a  
11 false statement on the voting documents. As indicated by their repeated questions,  
12 the grand jury had significant concern about this element.  
13

14 Though helpful for the prosecutor to give this curative instruction, it was not  
15 enough to erase the prejudice to Ms. Smith. The jurors were not formally given an  
16 instruction that it is solely their job to weigh the credibility of witnesses, and it was  
17 not the prosecutor who gave this statement as an argument, it was a law  
18 enforcement officer giving what is supposed to be a neutral telling of the facts. Just  
19 as the court in *Kim* warned, jurors are likely to give this kind of testimony improper  
20 weight in their deliberations because it comes from a witness with particularized  
21 knowledge about the defendant and the investigation. This statement, even with the  
22 prosecutor’s curative instruction, went to a contested element of the offenses  
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28 <sup>121</sup> GJ transcript at 30-31.

<sup>122</sup> GJ transcript at 31.



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2 charged and gave the jury improper reason to doubt the reliability of Ms. Smith's  
3 statements. It was therefore prejudicial against Ms. Smith.

### 4 **C. Insufficiency of the Evidence**

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6 Pursuant to AS 12.40.050, an indictment must be supported by sufficient  
7 admissible evidence to warrant the return of a true bill. The state bears the burden at  
8 grand jury of presenting sufficient evidence on each element of an alleged offense.<sup>123</sup>  
9 The standard for sufficiency of evidence is whether "when all the evidence taken  
10 together, if unexplained or uncontradicted, would warrant a conviction of the  
11 defendant."<sup>124</sup> In this case, the state's presentation to the grand jury alleged Ms. Smith  
12 committed ten counts of voter misconduct in the first degree.<sup>125</sup> To warrant a true bill  
13 on these charges the state is required to present sufficient evidence that Ms. Smith  
14 intentionally made a false affidavit, swore falsely, or falsely affirmed under an oath  
15 required by this title.<sup>126</sup> To establish intent at grand jury, the state was required to  
16 present sufficient evidence showing that Ms. Smith's "conscious objective [was] to cause  
17 that result."<sup>127</sup> The state failed to present sufficient admissible evidence to the grand jury  
18 to establish that Ms. Smith intended to falsify an affidavit, swear falsely, or falsely affirm  
19 under oath.  
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25 <sup>123</sup> Alaska R. Crim. P. 6(q); See also *Adams v. State*, 598 P.2d 503, 508-09 (Alaska 1979); *Frink v. State*, 597 P.2d 154, 160 (Alaska 1979); *State v. Skan*, 511 P.2d 1296 (Alaska 1973); *State v. Parks*, 437 P.2d 642, 644 (Alaska 1968).

26 <sup>124</sup> *Id.*

27 <sup>125</sup> § AS 11.56.040(a)(3).

28 <sup>126</sup> *Id.*

<sup>127</sup> § AS 11.81.900(a)(1).

After the initial presentation of evidence, the jurors had questions about Ms. Smith's understanding of her actions and her status as a U.S. national. The prosecutor proceeded to elicit an inaccurate and therefore inadmissible statement: that Ms. Smith always admitted to knowing she was a U.S. national, not a U.S. citizen, and the "she's aware of the difference, that if you're a national, you can't vote."<sup>128</sup> Sergeant Bucknall responded, "Yes."<sup>129</sup> As discussed above, it is clear from Ms. Smith's conversation with Sergeant Bucknall that she did not know that as a U.S. national, she was not allowed to vote. She clearly stated that the only thing she knew about being a U.S. national that made her different than a U.S. citizen was that she could not vote in U.S. presidential elections. She further explained that she didn't think there were benefits to applying to be a U.S. citizen, because the only thing she couldn't do was vote for President.

The grand jury's question goes directly to their finding that Ms. Smith acted "intentionally," a necessary element in these charges. In response to the question, the prosecution elicited inaccurate testimony that Ms. Smith knew she wasn't supposed to vote. Without this testimony, there was insufficient evidence to show that Ms. Smith acted intentionally. The importance of this testimony is further made clear by the fact that for eight of the ten counts, the grand jury returned no true bill. The grand jury questioned Ms. Smith's understanding of her actions, but because Sergeant Bucknall inaccurately testified that Ms. Smith knew she wasn't supposed to vote, they found sufficient evidence of her intent to falsify an affidavit or make a false statement under oath in her voter registration forms. Without this testimony there was insufficient

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<sup>128</sup> GJ transcript at 35.

<sup>129</sup> Id.

evidence to return a true bill on counts one and two, therefore those counts must be dismissed.

### **Conclusion**

The remaining two counts of the indictment should be dismissed for three reasons. First, because the prosecution misrepresented essential and relevant aspects of Ms. Smith's statements to Sergeant Bucknall: statements that go directly to Ms. Smith's intent, which is a material element of the charged offenses. Second, because the law enforcement witness inappropriately characterized the truthfulness of Ms. Smith's statements. And third, because without the prosecution's inaccurate representation that Ms. Smith understood that as a U.S. National she could not vote in local elections, there was insufficient evidence to support the indictment. Therefore, Ms. Smith, through counsel, requests this court dismiss both counts of the indictment.

### **ALASKA PUBLIC DEFENDER AGENCY**

DATE 4/12/24\_\_\_\_\_

/s/ Jesslin Wooliver\_\_\_\_\_  
Jesslin Wooliver  
Assistant Public Defender  
Alaska Bar No. 2111135

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