

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

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TUPE SMITH,	)	
	)	Case No. 3AN-23-08873CR
	)	
Defendant.	)	
_____	)	

**ORDER DENYING DEFENDANT’S MOTION TO DISMISS INDICTMENT**

On January 18, 2024, Defendant Tupe Smith (“Ms. Smith”) was indicted on two counts of voter misconduct in the first degree. On April 12, 2024, Ms. Smith filed a motion to dismiss the indictment, arguing the State mischaracterized evidence and impermissibly assessed Ms. Smith’s credibility in its grand jury presentation. The State filed its opposition on April 25, 2024. Ms. Smith filed a reply to the State’s motion on May 6, 2024.

For the foregoing reasons, Smith’s motion is DENIED.

**I. FACTS**

**A. Interview and Arrest**

Ms. Smith is a U.S. national born in American Samoa and resides in Whittier, Alaska. Ms. Smith was charged with voter fraud for claiming to be a U.S. citizen. Ms. Smith has no prior arrests or felonies. Ms. Smith moves to dismiss the remaining two counts of voter fraud.

On November 30, 2023, Sergeant Nathan Bucknall with the Alaska State Troopers under the Alaska Bureau of Investigations Division and colleague James Curtis traveled to Whittier with an arrest warrant for Ms. Smith. Upon arriving at her house, Sgt. Bucknall introduced himself to Ms. Smith, stated that he was investigating a voting discrepancy, and asked if she could answer some questions. He read her *Miranda* rights and Ms. Smith agreed to speak with him. English is not Ms. Smith’s first language.

Sgt. Bucknall asked Ms. Smith about her Alaska residency history and her Permanent Fund Dividend applications. In the PFD applications, she disclosed that she was a U.S. National. Sgt. Bucknall then asked Ms. Smith if there are things “you can’t do as a national that you can do as a citizen.” Ms. Smith responded U.S. nationals cannot vote for president, but that was all she knew about voting. Ms. Smith then explained that she recently learned she could not be on the school board because she is a U.S. national.

Sgt. Bucknall brought up that prior to running for the school board, Ms. Smith had registered to vote. He pointed out to Ms. Smith that voter registration forms ask if the applicant is a U.S. citizen. Sgt. Bucknall asked Ms. Smith what she had said on those forms. Ms. Smith responded: “Well, if I go, I will ask whoever’s in the office, because it doesn’t show that there’s a U.S. national, that I’m not a U.S. citizen. And then I asked them what do I put it on? And they said, no there’s a section where it says U.S. national.” Ms. Smith clarified that in most instances there is a section to indicate that one is a U.S. national, which she selects. She told Sgt. Bucknall that “if I go in an application where it doesn’t show anything, U.S. national, they usually tell me to put the U.S. citizen, but they will write something like a notice as a U.S. national instead of being at the application show that I am a U.S. citizen.”

Sgt. Bucknall then informed Ms. Smith that she had “actually checked that you were a U.S. citizen on each of these,” in reference to the counts in which she had voted. Ms. Smith responded that “I did check that. There are some of them that are U.S. citizens, but I have to make sure with the office that I’m a U.S. national.” Upon being asked for clarification regarding who she spoke to about what box to select, Ms. Smith stated that she had asked the City of Whittier “because they will ask me like the last vote that I went to, they asked me if I’m a U.S. national or a U.S. citizen. I told them I’m a U.S. national.” Sgt. Bucknell asked Ms. Smith what happened and if they let her vote. Ms. Smith responded “I still voted because I didn’t know if they were going to say not to vote. They wouldn’t tell me anything.” Ms. Smith further added that she knew she was not a U.S. citizen and could not vote for president, which she learned from co-workers when she worked in California, but that no one had told her she could not vote in other elections. Ms. Smith never voted or attempted to vote in a U.S. Presidential election.

When asked why she had never filed the paperwork to become a U.S. citizen, Ms. Smith explained that it is not difficult to become a citizen but that she had never seen the need to as she could already travel and work throughout the United States. But now that she knew she could not participate in the school board or vote, she was interested in becoming a citizen. Ms. Smith stated that:

“I didn’t know I was going to get in trouble for doing that because I usually let the person know I’m not a US citizen. If I knew that were a problem, I would not vote at all.” ... “I know that I cannot vote for U.S. President so, but all the other votes I wasn’t sure because I didn’t read anything about it.”

Sgt. Bucknall stated he had no further questions and that he needed to arrest Ms. Smith as there was a warrant for her arrest. They discussed travel to Hiland Mountain Correctional Facility and the bail amount of \$500. Sgt. Bucknall then drove Ms. Smith the hour and a half to Hiland Mountain Correctional.

The following timeline outlines important dates pertaining to Ms. Smith’s residency, voter, and PFD registration history.

August 26, 2017, the date Ms. Smith stated her Alaska residency began.

September 14, 2017, Ms. Smith received her first Alaska Operator’s License.

March 5, 2019, Ms. Smith provided a handwritten application to receive her Permanent Fund Dividend (“PFD”) and selected that she was a U.S. National. In applying for her PFD, Ms. Smith was automatically registered in the voter system.<sup>1</sup>

July 8, 2020, Ms. Smith completed a voter registration application and checked the box stating that she was a citizen of the United States.

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<sup>1</sup> Grand Jury Transcript at 32. It is not clear if Ms. Smith was automatically registered to vote in applying for her PFD or if she was automatically sent voter registration paperwork. This discrepancy does not impact the court’s decision.

March 30, 2022, Ms. Smith completed a voter registration application and checked the box stating that she was a citizen of the United States. Ms. Smith also provided a PFD application and selected that she is a U.S. national.

July 21, 2022, Ms. Smith declared her candidacy for a Regional Educational Attendance Area Board Member general election.

October 3, 2022, Ms. Smith selected that she was a U.S. citizen on an absentee in-person ballot oath and affidavit envelope. Ms. Smith voted absentee in the Whittier Local Election and the REAA Board Election (Counts I, II) and in person for the General Republican Election (Count III).

March 3, 2023, Ms. Smith submitted a PFD application indicating that she is a U.S. National.

July 30, 2023, Ms. Smith declared her candidacy for a Regional Educational Attendance Area Board Member general election. Ms. Smith voted absentee for the REAA Board Election (Count IV) and in person for the Whittier Local Election (Count V).

October 2023, Ms. Smith voted absentee and indicated on her voter registration application that she was not a citizen but was a U.S. National.

October 31, 2023, HIS advised Ms. Smith that she was a U.S. National and not allowed to vote in the U.S. election or hold a U.S. elected position.

## **B. Grand Jury**

This case was heard before the grand jury. Two witnesses were called, Michaela Thompson, the division operations manager for the Division of Elections for the State of Alaska, and Sgt. Nathan Bucknall, the Alaska State Trooper who questioned Ms. Smith before the arrest.

Michaela Thompson provided testimony concerning the process of registering to vote and the voting application's wording, and confirmed that Ms. Smith had submitted a voter application form with the box checked claiming to be a U.S. citizen. She confirmed that Ms. Smith submitted declaration of candidacy forms for the Regional Educational Attendance Area Board member.

Sgt. Bucknall testified that in his conversation with Ms. Smith, she had confirmed that she was aware she was a U.S. National and not a U.S. Citizen. The prosecutor asked Sgt. Bucknall if Ms. Smith had spoken with anyone about her citizenship status, and Sgt. Bucknall responded: “She did indicate that she talked to the 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.”

Sgt. Bucknall stated that he had received acknowledgment from Ms. Smith that she knew she should not have voted.

Jury members asked that if filling out the voter registration paperwork was done the day of voting and what steps Ms. Smith would have taken to fill out exhibit number two voter registration, made on March 3, 2022. Sgt. Bucknall stated that “When you apply for your PFD, there’s an automatic registration of the voter system that – that way” and that the paperwork Ms. Smith filled out in exhibit two was sent because she applied for a PFD and wasn’t something she filled out at the polls.<sup>2</sup>

A juror also asked for clarification regarding which occasions a Whittier official would have been able to advise Ms. Smith as to which box to check. Sgt. Bucknall responded that the voter registration paperwork was most likely all completed at Ms. Smith’s home, but that Ms. Smith stated that she asked when she went to vote in person.

Another juror asked if Ms. Smith was aware that if you’re a national you can’t vote. Sgt. Bucknall answered “yes.”<sup>3</sup>

The grand jury ultimately ruled that there was sufficient evidence for a true bill on Counts I and II. The grand jury did not have sufficient votes for a true bill on Counts III through V.

## **II. DISCUSSION**

AS 15.05.010 stipulates that a person may vote at any election who is a citizen of the United States.<sup>4</sup> Under AS 15.56.040(a)(3) a person commits the crime of voter misconduct in the first

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<sup>2</sup> Grand Jury Transcript at 32.

<sup>3</sup> Grand Jury Transcript at 35.

<sup>4</sup> AS 15.05.010.

degree if the person “intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title.” Intentionality requires that the person’s conscious objective is to cause the result. The intentionality component applies in regard to whether Ms. Smith knowingly made a false affidavit or swore falsely under oath about whether she was a U.S. Citizen.

Article I, section 8 of the Alaska Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.” The constitutional right to a grand jury indictment ensures that “a group of citizens will make an independent determination about the probability of the accused’s guilt” and play “a protective role by operating to control abuses by the government and protecting the interests of the accused.”

There is a presumption that the grand jury acted on sufficient evidence.<sup>5</sup> In determining the sufficiency of the evidence, the court views the evidence in the light most favorable to the state.<sup>6</sup> “Typically, when we assess prejudice in the grand jury context, we look to whether the grand jury’s decision to indict was substantially affected.”<sup>7</sup> Alaska courts have condemned allowing witnesses to comment on the veracity of another witness’s testimony, including questions about whether a defendant or witness was lying.<sup>8</sup>

#### **A. Mischaracterizing Evidence**

Ms. Smith argues that the State mischaracterized the evidence by presenting inaccurate testimony to the grand jury. At the grand jury, Sgt. Bucknall testified that Ms. Smith knew she needed to be a citizen to vote, which the defense argues is a gross oversimplification.<sup>9</sup> Ms. Smith believed the voting restriction only applied to Presidential elections, and she would not have checked the U.S. citizen box had she known it was erroneous to do so. Ms. Smith also argues that Sgt. Bucknall affirmed that Ms. Smith acknowledged she knew she should not have voted.<sup>10</sup> She only became aware after the fact, and it is clear from the entirety of the conversation that Ms.

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<sup>5</sup> *Murray v. State*, 778 P.2d 237, 238 (Alaska 1989).

<sup>6</sup> *Id.*

<sup>7</sup> *Zurlo v. State*, 506 P.3d 777, 787 (Alaska App. 2022).

<sup>8</sup> *Kim v. State*, 390 P.3d 1207, 1210 (Alaska Ap. 2017).

<sup>9</sup> Def’s Mot. Dismiss Indictment at 16.

<sup>10</sup> *Id.* at 17.

Smith did not know she could not vote in local elections.<sup>11</sup> Further, Ms. Smith argues that she did not intentionally make a false sworn statement as she thought that for purposes of voting, she was regarded as a U.S. citizen.<sup>12</sup>

The State responds that Ms. Smith's motions to dismiss Sgt. Bucknall's statements were only relevant for Counts III-V and had no bearing on Counts I or II.<sup>13</sup> Further, there is no corroborating evidence in support of Ms. Smith. The State also argues that on the PFD application, Ms. Smith had checked the U.S. national box, indicating she knew her status.<sup>14</sup> Finally, there is sufficient evidence in her voting application paperwork to prove Ms. Smith intentionally made a false affidavit by claiming to be a U.S. citizen.<sup>15</sup> Although evidence omitted at a grand jury proceeding could provide material for a persuasive defense of a trial, omission of the evidence does not require dismissing the indictment.<sup>16</sup>

Under Alaska Criminal Rule 6(q), the State has an affirmative duty to present exculpatory evidence to the grand jury. Exculpatory evidence, for purposes of the prosecutor's duty to disclose, is evidence that is "substantially favorable to the defendant" or, in other words, evidence that in and of itself tends to negate the defendant's guilt.<sup>17</sup> Evidence that is "merely inconsistent" is not inherently exculpatory.<sup>18</sup> In *Frink v. State*, the Alaska Supreme Court held that unless the grand jury was made aware of evidence tending to negate the defendant's guilt, it could not be expected to exercise its powers to call additional witnesses and to inquire further into issues that it might deem significant.<sup>19</sup> Because the duty to present exculpatory evidence to the grand jury does not turn the prosecutor into a defense attorney, the prosecutor does not have to develop evidence for the defendant and present every lead possibly favorable to the defendant.<sup>20</sup> Under *Frink* as well as *Preston v. State*, the grand jury proceeding does not need to be a mini-trial; rather the proceeding must ensure the evidence presented by the prosecutor is "reasonably complete and fair in the

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<sup>11</sup> *Id.*

<sup>12</sup> Def's Reply Mot. Dismiss Indictment at 1.

<sup>13</sup> Pl's Opp. Mot. Dismiss Indictment at 11.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Zurlo*, 506 P.3d at 782-83.

<sup>18</sup> *Id.* at 782.

<sup>19</sup> *Frink v. State*, 597 P.2d 154, 165-66 (Alaska 1979).

<sup>20</sup> *Id.*; *Zurlo* 506 P.3d at 782.

context of the grand jury proceeding.”<sup>21</sup> While a prosecutor is not required to present all possible exculpatory evidence to a grand jury, they “cannot be permitted to subvert the integrity of grand jury proceedings by selling the grand jury shoddy merchandise without appropriate disclaimers.”<sup>22</sup>

In *Zurlo*, the Alaska Court of Appeals dismissed an indictment due to the prosecutor's violation of his duty to present exculpatory evidence and deliberately presented a distorted view of the evidence to the grand jury.<sup>23</sup> The defendant, Zurlo, shot his landlord, the plaintiff, in the head when the plaintiff entered Zurlo's room and threatened to shoot or kill him.<sup>24</sup> During the grand jury proceeding the Officer testified and falsely stated that the defendant had not been threatened prior to firing a weapon at the plaintiff.<sup>25</sup> The court determined that the prosecutor made a “conscious decision” to reframe the question asking whether the plaintiff had physically assaulted the defendant instead of whether the defendant had been threatened.<sup>26</sup> This raised the bar required for an affirmative answer and negated the ability for the jury to be made known to the plaintiff having reached behind his back which the defendant read to be the plaintiff reaching for a weapon. This “pause and restatement of the second question suggests it was [a] conscious decision by the prosecutor to decline to ask a question that would necessitate opening up testimony about self-defense.”<sup>27</sup>

In the grand jury proceeding, the Sgt. Bucknall answered two questions without elaborating on the nuance of Ms. Smith's interview answers. Sgt. Bucknall stated that he had received acknowledgment from Ms. Smith that she knew she should not have voted. However, the statements Ms. Smith actually made in her interview with Sgt. Bucknall was not this clear-cut. First, Ms. Smith stated that if she had known she could not vote, she would not have. Second, Ms. Smith did acknowledge she knew she could not vote for the U.S. President but thought that she could vote in state elections. Later in the interview, Sgt. Bucknall asked a question preceded by a circuitous conjecture:

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<sup>21</sup> *Id.*; *Preston v. State*, 615 P.2d 594 (Alaska 1980).

<sup>22</sup> *Id.* at 783 (citing *Commonwealth v. Hall*, 485 Mass. 145, 147 N.E.3d 1078, 1093 (2020)).

<sup>23</sup> *Zurlo*, 506 P.3d 777, 778 (Alaska App. 2022).

<sup>24</sup> *Id.* at 779.

<sup>25</sup> *Id.* 781.

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

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



“Okay. No, not a problem. So I’m going to be quite honest with you here, okay. Everything I’ve seen with all these documents and stuff in what I’ve been talking with you, the impression I 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 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 impression I’m getting is what probably happened here. Okay. I’m not saying you murdered someone, anything like that. Okay. So I understand its not the crime of the century. Okay. Obviously we’re here, though. So there is a problem with this. Am I hitting the head of the nail a little? Just you had this desire to kind of get involved, so you check the box knowing you shouldn’t have.”

Ms. Smith responded confused with “Oh wait, what?” Sergeant Bucknall repeated himself:

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

This time, Ms. Smith stated “yes” in response, but not as to which question Sgt. Bucknall asked. There are several questions and statements within this question: (1) you wanted to be involved in the REA board; (2) you knew you shouldn’t check the box; (3) you wanted to be involved in the REA board; and (4) does that sound accurate. Making the statement that Ms. Smith knew she was not allowed to vote in the U.S. elections based off of this confusingly worded question, despite other clearer statements made in the interview is not dispositive.

The second instance occurred when a juror asked Sgt. Bucknell if Ms. Smith was aware that if you are a national you cannot vote to which he responded “yes.”<sup>28</sup> This was an overbroad statement; Ms. Smith stated that she knew she could not vote in the U.S. Presidential election, but that she did not know that she could not vote in other elections.<sup>29</sup> Answering yes to this question without further elaboration implies Ms. Smith was aware that all of the elections are open to U.S. citizens only and not her as a U.S. national. It improperly suggests her guilt beyond Ms. Smith’s interview.

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<sup>28</sup> Grand Jury Transcript at 35.

<sup>29</sup> Audio 9:11-37.

Despite these two instances of misleading information, the court does not find the grand jury to have been misled. The grand jury ruled affirmatively for two out of five counts, indicating that these incomplete statements did not prevent them from declining to indict Ms. Smith on the remaining three counts of voter fraud. The grand jury found that Ms. Smith intentionally made the false affirmation that she was a U.S. citizen. Even if the grand jury had received the information that Ms. Smith only knew she could not vote in the Presidential election, Ms. Smith still intentionally claimed to be a U.S. citizen knowing that she is a U.S. national. The missing information would not have changed this.

### **B. Witness Offering Personal Opinion**

The grand jury plays a protective role by operating to control government abuses and protect the interests of the accused; it is not a mere rubber stamp for the prosecution.<sup>30</sup> The grand jury acts as both the sword and shield of justice and it is the State's duty to safeguard the fairness of this process.<sup>31</sup> The requirement that the State's presentation of evidence to a grand jury be "reasonably complete and fair" is universally recognized and stems directly from the independence of the grand jury.<sup>32</sup>

In *Kim*, the Alaska Court of Appeals found that it was improper to allow the officer to offer his opinion as to whether the defendants were telling the truth, but did not rise to plain error given the circumstances of the case.<sup>33</sup> Similarly, Sgt. Bucknall referred to one of Ms. Smith's statements as untruthful. The prosecution instructed the jurors "not to listen to that last statement" and ensured no jurors had an issue disregarding Sgt. Bucknall's opinion of Ms. Smith's truthfulness. This statement does not rise to the level of misleading the grand jury as it was immediately addressed, and the jurors ensured they could disregard the statement.

### **C. Sufficiency of the Evidence**

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<sup>30</sup> *Zurlo*, 506 P.3d 777, 782 (Alaska App. 2022).

<sup>31</sup> *Cameron v. State*, 171 P.3d 1154, 1156 (Alaska 2007).

<sup>32</sup> *Id.*

<sup>33</sup> *Kim v. State*, 390 P.3d 1207, 1208 (App. Alaska 2017).

Under AS 12.40.050, an indictment must be supported by sufficient admissible evidence to warrant the return of a true bill. It is the State's burden to present sufficient evidence to warrant an indictment on each offense.

Ms. Smith argues that the state failed to present sufficient admissible evidence that Ms. Smith "intended to falsify an affidavit, swear falsely, or falsely affirm under oath."<sup>34</sup> Ms. Smith claims that the State inaccurately told the grand jury that Ms. Smith knew that if she was a U.S. national, she could not vote without clarifying that she only knew she could not vote in Presidential elections.<sup>35</sup> This impacted the "intentionality" requirement in finding Ms. Smith committed voter fraud, knowing that she could not vote.

The court agrees that Sgt. Bucknall did not properly elaborate on this point and disclose that Ms. Smith knew she could not vote in the Presidential election, but did express she was unsure about other elections. Despite Ms. Smith not knowing that as a U.S. national she could not vote, Ms. Smith selected the box claiming she was a U.S. citizen. Despite Sgt. Bucknall's answer, the grand jury still only indicted Ms. Smith on Counts I and II indicating they received sufficient information to find no true bill on the three remaining counts.

The question presented before the grand jury was whether Ms. Smith knowingly and falsely claimed to be a U.S. citizen in the five counts of voting fraud she was charged with. Ms. Smith knew she was a U.S. national and yet selected a box claiming to be a U.S. citizen. While the PFD confusingly automatically registers recipients to vote in Alaska, Ms. Smith may have thought she could vote for state elections, and a voting official may have given her incorrect information, Ms. Smith knew she was not a U.S. citizen and still claimed to be one multiple times. While the court is sympathetic towards the confusing nature of the PFD automatic voter registration, the lack of voting right information regarding U.S. nationals, and navigating rights as a U.S. national, it is difficult under the law to assert that Ms. Smith thought she was a U.S. citizen and not a U.S. national in intentionally and falsely selecting the U.S. citizen box on her voter registration.

### **III. CONCLUSION**

For the foregoing reasons, Smith's Motion to Dismiss Indictment is DENIED.

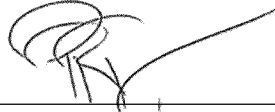
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<sup>34</sup> Def's Mot. Dismiss at 21.

<sup>35</sup> *Id.* at 22.

IT IS SO ORDERED.

DATED at Anchorage, Alaska on this 15<sup>th</sup> day of October, 2024.

A handwritten signature in black ink, appearing to be 'P. Ramgren', written over a horizontal line.

Peter R. Ramgren  
Superior Court Judge

# Alaska Trial Courts

## Certificate of Distribution

Case Number: 3AN-23-08873CR

Case Title: SOA VS. SMITH, TUPE

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The Alaska Trial Courts certify that the Order Denying Defendant's Motion to Dismiss Indictment was distributed to:

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