

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA

Plaintiff,

vs.

ROLAND MAW,

Defendant.

Case No. 1JU-16-43 CR

**MOTION TO DISMISS SECOND INDICTMENT**

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 offense 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.

Roland Maw, by and through counsel Nicholas Polasky, moves this Court to dismiss the indictment in this case dated January 18, 2017.

**BACKGROUND**

This case alleges that Mr. Maw lied in an online Permanent Fund Dividend (PFD) application in order to steal PFDs between 2009 and 2014. The case alleges Unsworn Falsification in the First Degree (Counts 1, 3, 5, 7, 9 and 11) based upon the claim that Mr. Maw filed out online applications for PFDs between 2009 and 2014 and said he had not been out of Alaska for more than 90 days per year, when he had been out of Alaska for more than 90 days per year. The case alleges Theft in the Second Degree (Counts 2, 4, 6, 8, 10 and 12) based on the claim that Mr. Maw received PFDs between 2009 and 2014 when he should not have.

FILED in the Trial Courts  
State of Alaska First District  
at Juneau  
NOV 06 2017  
By CLS Clerk of the Trial Courts  
Deputy

1 At the grand jury the prosecution presented the testimony of Special Agent Timothy  
2 Brady and Investigator Shawn Stendevad. The grand jury transcript and the two exhibits  
3 relevant to this motion (Grand Jury Exhibits 1 and 3) are submitted under seal separately.

#### 4 DISCUSSION

5 The indictment in this case should be dismissed for several reasons.

##### 6 **I. Insufficient evidence Mr. Maw completed the online applications.**

7 This is the second indictment brought against Mr. Maw. This Court dismissed the first  
8 indictment because the evidence against Mr. Maw was based on improper hearsay. In the  
9 court's memorandum to dismiss the first indictment, this Court noted "there was no other  
10 evidence on which the grand jury was asked to conclude that it was Mr. Maw 'who was sitting  
11 in the chair clicking the mouse.'" Order Granting Motion to Dismiss Indictment, P. 7. In the  
12 second indictment the same flaw exists.

13 A grand jury may indict a person when all of the evidence taken together, if  
14 unexplained or uncontradicted, would warrant a conviction. Alaska Criminal Rule 6(q). When  
15 an indictment is challenged for insufficient evidence, "every legitimate inference that may be  
16 drawn from the evidence must be drawn in favor of the indictment. The evidence is sufficient  
17 if, viewed in this manner, it is adequate to persuade reasonable minded persons that if  
18 unexplained or uncontradicted it would warrant a conviction of the person charged with an  
19 offense by the judge or jury trying the offense." *State v. Williams*, 855 P.2d 1337, 1346  
20 (Alaska App.1993)(internal citations and quotations omitted).

21 The charge of Unsworn Falsification in the First Degree, AS 11.56.205, provides:

- 22 (a) A person commits the crime of unsworn falsification in the first degree if  
23 the person violates AS 11.56.210 (a)(1) and the application is an  
application for a permanent fund dividend.  
(b) In this section,

- (1) "application for a permanent fund dividend" includes a written or electronic application and any other documentation submitted to support an application for a permanent fund dividend;
  - (2) "permanent fund dividend" has the meaning given in AS 43.23.095 .
- (c) Unsworn falsification in the first degree is a class C felony.

The charge refers to Unsworn Falsification in the Second Degree, AS 11.56.210(a)(1), which provides:

- (a) A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true
- (1) in an application for a benefit

In this case, Mr. Maw is alleged to have submitted an application with a false statement – that he was not out of Alaska for more than 90 days per year, when he was out of Alaska for more than 90 days per year. To make that claim, the prosecution must be able to show that Mr. Maw was the person who completed the online application. However, there is no evidence to show that Mr. Maw completed the application. In other words, there is no evidence to show that it was Mr. Maw “who was sitting in the chair clicking the mouse.”

The evidence related to the application was that the Dividend Application Information System (DAIS) was reviewed and records were located for Roland Maw. Grand Jury Transcript (GJ Tr.) P. 25-26. The prosecution entered into evidence data compilations from DAIS as Grand Jury Exhibit 1. GJ Tr. P. 25, Line 18 – P. 27, Line 5. However, the prosecution never entered anything into evidence to show that Mr. Maw was the person who entered the information or completed any of the applications.

The closest the prosecution came to establishing who completed the application was when Investigator Stendevad testified that Mr. Maw’s application was signed by an electronic signature. GJ Tr. P. 28. Investigator Stendevad testified that the online signature is “a verified

1 electronic signature through myAlaska.” GJ Tr. P. 27. However, there was never any  
2 testimony offered to explain how a myAlaska account is connected to a person and only to that  
3 person. But more importantly, there was no evidence introduced to show that Mr. Maw was  
4 the person who used the account, or that Mr. Maw was the person who used that account when  
5 the applications were submitted.

6 Without any evidence introduced to show that Mr. Maw was the person who completed  
7 the online application – that he was the person behind the keyboard – there is no evidence to  
8 show that Mr. Maw submitted the applications. Because of the lack of evidence the unsworn  
9 falsification charges should be dismissed.

10 **II. The theft charge should be dismissed because the prosecution failed to properly**  
11 **instruct, failed to introduce sufficient evidence, and shifted the burden of proof**  
**to Mr. Maw.**

12 The theft charges allege that Mr. Maw stole from the state when he received a PFD.  
13 The charges hinge on whether or not Mr. Maw qualified for a PFD. If Mr. Maw qualified for a  
14 PFD, then Mr. Maw obviously could not have committed the crime of theft because he would  
15 have been entitled to have received the PFDs.

16 However, in the presentation of this case, the prosecution did not provide the grand jury  
17 with any instructions to determine whether or not a person qualifies for a PFD, and the  
18 prosecution did not present evidence to show that Mr. Maw did not qualify for a PFD. Instead,  
19 the prosecution’s theory was that Mr. Maw did not provide sufficient information for the  
20 government to make that determination – and so he should be indicted for failure to provide  
21 information.

22 This was improper for three related reasons – (A) the prosecution failed to properly  
23 instruct the grand jury about what constituted the offense, (B) the prosecution failed to

1 introduce evidence that Mr. Maw was not eligible for a PFD, and (C) the prosecution  
2 improperly shifted the burden of proof to Mr. Maw to show that he was eligible for a PFD.

3 **A. Failure to instruct on the law.**

4 At grand jury, the prosecutor "acts as the grand jury's legal advisor, advising it of the  
5 applicable law answering legal questions that the grand jurors have." *Cameron v. State*, 171  
6 P.3d 1154, 1157 (Alaska App. 2007), internal citations and quotations omitted.

7 In this case, the prosecutor instructed the grand jury about the definition of theft, the  
8 definition of theft by deception, and the mens rea (intentionally) – but did not provided any  
9 instruction to determine whether or not Mr. Maw was entitled to receive the PFD.

10 Theft is defined in AS 11.46.100, which provides:

11 A person commits theft if (1) with intent to deprive another of property or to  
12 appropriate property of another to oneself or a third person, the person obtains  
the property of another.

13 An essential element of theft is that a defendant obtain the "property of another." The  
14 starting point for "property of another" is the definition in AS 11.46.990(13), which provides:

15 "property of another" means property in which a person has an interest which  
16 the defendant is not privileged to infringe, whether or not the defendant also has  
an interest in the property and whether or not the person from whom the  
17 property was obtained or withheld also obtained the property unlawfully;  
"property of another" does not include property in the possession of the  
18 defendant in which another has only a security interest, even if legal title is in  
the secured party under a conditional sales contract or other security agreement;  
19 in the absence of a specific agreement to the contrary, the holder of a security  
interest in property is not privileged to infringe the debtor's right of possession  
20 without the consent of the debtor;

21 In the case of an allegation of PFD theft, the relevant portion of the definition is  
22 whether or not the State of Alaska "ha[d] an interest which the defendant [wa]s not privileged  
23 to infringe." If Mr. Maw was entitled to receive the PFD, then he merely received what he was  
entitled to receive and he did not infringe on an interest that he was not entitled to infringe



1 upon. In other words – if Mr. Maw was entitled to receive a PFD then he did not obtain the  
2 property of another.

3 In this case, not only was the definition of “property of another” not read to the grand  
4 jury, but there was no instruction about the concept that if Mr. Maw was entitled to receive  
5 PFDs he could not commit the crime of theft.

6 This failure to instruct was important, because it meant that the grand jury was not able  
7 to analyze whether or not Mr. Maw was entitled to receive a PFD. A grand juror raised this  
8 issue. The grand juror said “It’s not clear to me whether or not he was eligible to receive the  
9 PFD.” GJ Tr. P. 56, Lines 11-12. In response to the question there was not any instruction  
10 offered that would have allowed the juror to answer that question.

11 The only instruction related to PFD eligibility was when Investigator Stendevad was  
12 asked “Is it possible to be gone for more than 90 days but less than 180 days and still be  
13 eligible for the Permanent Fund.” GJ Tr. P. 52, Lines 11-13. Investigator Stendevad responded  
14 “absolutely.” GJ Tr. P. 52, Line 14.

15 Because the prosecution did not provide any instruction for the grand jury to use to  
16 determine whether or not Mr. Maw was entitled to receive the PFD the grand jury was not  
17 properly instructed, and the indictment should be dismissed.<sup>1</sup>

18 **B. Lack of evidence.**

19 Aside from the failure to properly instruct on the law, the prosecution did not introduce  
20 sufficient evidence that Mr. Maw was not entitled to receive a PFD. The law regarding  
21

22  
23 <sup>1</sup> Another way to show that the indictment should be dismissed is to consider what would  
happen if this case progressed to trial. At trial this Court would have to instruct the grand jury  
regarding whether or not Mr. Maw was entitled to receive a PFD. Similarly, instruction on that  
issue should have been provided to the grand jury.

1 sufficiency of the evidence is described above. Also, as noted, theft is defined in AS  
2 11.46.100, which provides:

3 A person commits theft if (1) with intent to deprive another of property or to  
4 appropriate property of another to oneself or a third person, the person obtains  
the property of another.

5 An essential element of theft is that a defendant obtain the "property of another." In  
6 this case, as described above, the "property of another" that Mr. Maw is alleged to have  
7 obtained was the PFD. Also, as described above, Mr. Maw would only be guilty of theft of the  
8 PFD if he obtained a PFD that he was not permitted to have obtained.

9 However, there was no evidence Mr. Maw was not permitted to receive the PFD's he  
10 received. Investigator Stendevad acknowledged as much when she said "we don't know" in  
11 response to the question about whether or not Mr. Maw was eligible for the PFD. GJ. Tr. P. 56,  
12 Line 13. Later, in argument, the prosecutor reiterated that when she said "we don't know if he  
13 would have gotten paid [the PFD] ... We don't know that." GJ Tr. P. 57, Lines 22-24.

14 The only thing the prosecution did to attempt to establish that Mr. Maw should not have  
15 received the PFDs was to introduce evidence to show some of the time periods that Mr. Maw  
16 was in Alaska or out of Alaska. The time periods the prosecution alleged that Mr. Maw was  
17 out of Alaska were 121 days in 2008 (GJ Tr. P. 34, Lines 22-23), 156 days in 2009 (GJ Tr. P.  
18 37, Lines 12-14), 141 days in 2010 (GJ Tr. P. 38, Lines 22-23), 138 days in 2011 (GJ Tr. P. 41,  
19 Lines 7-10), 180 days in 2012 (GJ Tr. P. 42, Lines 9-10), and 156 days in 2013 (GJ Tr. P. 43,  
20 Lines 2-3). But, as Detective Stendevad testified, it is possible for a person to be gone from  
21 Alaska for more than 90 days, even for more than six months (180 days), and still be eligible  
22 for a PFD. GJ Tr. P. 52, Lines 11-14. However, aside from demonstrating when Mr. Maw was  
23

1 and was not in Alaska – which ranged from 121 days to 180 days, the prosecution failed to  
2 present any other evidence that he did not qualify for the PFD.

3 Because the prosecution did not introduce sufficient evidence to show that Mr. Maw did  
4 not qualify for the PFD the indictment should be dismissed.

5 **C. Improper burden shifting.**

6 Finally, because the prosecution did not provide any instruction about PFD eligibly and  
7 because the prosecution failed to introduce any evidence that Mr. Maw was not eligible for the  
8 PFD – the prosecution obtained their indictment for theft by shifting the burden to Mr. Maw.

9 The burden of proof in a grand jury, and throughout a case, rests with the prosecution.  
10 The prosecution may not argue that a person should be indicted because they cannot show that  
11 they did not commit an offense. In a theft offense, the prosecution cannot obtain an indictment  
12 by stating that it is unknown whether or not the defendant is entitled to the property, and then  
13 stating that the defendant did not provide information to prove that they are entitled to the  
14 property. But in this case, the prosecution did exactly that. The prosecution's theory of the  
15 case was that Mr. Maw did not show to the government that he was entitled to the PFD.

16 The prosecution presented evidence to explain how the online application process  
17 proceeds in order to argue that Mr. Maw did not provide information.

18 The online questionnaire for the PFD application is a series of questions. The  
19 prosecution discussed the process of an online application at length. Investigator Stendevad  
20 explained that if a person does not answer yes to an application question about whether or not  
21 they are out of Alaska for 90 or 180 days, they are not presented with additional questions  
22 about their residency. GJ. Tr. Pgs. 45-46. Investigator Stendevad testified that if a person does  
23 not answer yes to the question about whether they are out of Alaska for more than 90 days



1 "PFD is denied the ability to look at the whole picture and determine their eligibility." GJ. Tr.  
2 P. 52.

3 With regards to Mr. Maw, Investigator Stendevad provided testimony that he was out of  
4 Alaska for more than 90 days, but that his application said that he was not gone for more than  
5 90 or 180 days. Investigator Stendevad then said "So, at this point, we have someone who is  
6 gone more than 90 days but has not disclosed that they were gone; and so he never had to  
7 answer those questions. And so that has deprived PFD of that ability to actually determine, you  
8 know, in equity with everyone else, anyone else who does say, "Yes, I was gone" – they never  
9 got to answer those – they have never got answers to those questions." GJ. Tr. P. 53.

10 In closing argument, the prosecutor said "by lying to PFD, he didn't give PFD the  
11 opportunity to get the appropriate information to make that [the PFD] eligibility determination.  
12 He made it for them. So by deceiving them on the PFD application, the result was that he got  
13 paid. We don't know if he would have gotten paid otherwise. We don't know that. But he got  
14 paid because he lied." GJ. Tr. P. 57, L. 16-25.

15 That evidence and argument was improper burden shifting. The prosecution's theory of  
16 the case was that Mr. Maw did not provide the government with enough information to show  
17 that he qualified for the PFD. That type of process, requiring a person to show that they qualify  
18 for a PFD, is an acceptable process for the administration of the PFD system. It is reasonable  
19 for the government to not provide a person with a PFD unless they demonstrate they qualify for  
20 a PFD. But for criminal law, where a person is charged with a crime, the prosecution may not  
21 require the person to show that they are eligible to receive the PFD.

1 Because the prosecution improperly shifted the burden of proof to Mr. Maw to produce  
2 information and/or prove that he did qualify for a PFD, this Court should dismiss the  
3 indictment.

4 **D. Theft by deception does not eliminate the requirement to show that a**  
5 **person obtained property of another.**

6 A review of the grand jury shows that the errors described above – the failure to  
7 instruct, the failure to present evidence, and the burden shifting – were all done because the  
8 prosecution charged Mr. Maw with theft by deception.

9 Theft by Deception, AS 11.46.180, provides

- 10 (a) A person commits theft by deception if, with intent to deprive another of  
11 property or to appropriate property of another to oneself or a third  
12 person, the person obtains the property of another by deception.  
13 (b) In a prosecution based on theft by deception, if the state seeks to prove  
14 that the defendant used deception by promising performance which the  
15 defendant did not intend to perform or knew would not be performed,  
16 that intent or knowledge may not be established solely by or inferred  
17 solely from the fact that the promise was not performed.  
18 (c) As used in this section, "deception" has the meaning ascribed to it in AS  
19 11.81.900 but does not include falsity as to matters having no pecuniary  
20 significance or "puffing" by statements unlikely to deceive reasonable  
21 persons in the group addressed.

22 Deception is defined in AS 11.81.900(b)(18) as:

- 23 (18) "deception" means to knowingly  
(A) create or confirm another's false impression that the defendant  
does not believe to be true, including false impressions as to law  
or value and false impressions as to intention or other state of  
mind;  
(B) fail to correct another's false impression that the defendant  
previously has created or confirmed;  
(C) prevent another from acquiring information pertinent to the  
disposition of the property or service involved;  
(D) sell or otherwise transfer or encumber property and fail to  
disclose a lien, adverse claim, or other legal impediment to the  
enjoyment of the property, whether or not that impediment is a  
matter of official record; or

1 (E) promise performance that the defendant does not intend to  
2 perform or knows will not be performed;

3 In this case, the prosecution's theory of theft was that he committed theft by deception  
4 because he prevented the government from gathering information. The prosecutor explained  
5 the theory "the state has also charged him with theft by deception. By not – by lying to PFD,  
6 he didn't give PFD the opportunity to get the appropriate information to make that eligibility  
7 determination. He made it for them. So by deceiving them on the PFD application, the result  
8 was that he got paid. We don't know if he would have gotten paid otherwise. We don't know  
9 that. But he got paid because he lied. ... That's the state's position." G.J.Tr. P. 57, Line 16 –  
10 P. 58, Line 1.

11 There are two problems with this theory. First, theft by deception does not relieve the  
12 prosecution from proving that Mr. Maw obtained the property of another – in this case a PFD.  
13 There is nothing in the theft by deception statute that eliminates that requirement.

14 This makes sense. A person cannot be guilty of theft for receiving something they are  
15 entitled to receive, even if the person were to engage in deception. In this case, even if (for the  
16 sake of argument only), the prosecution could show that Mr. Maw committed a deceptive act,  
17 the completion of the online application, they cannot show that he obtained a PFD that he was  
18 not entitled to receive.

19 That raises the second issue. As described above, the prosecution cannot show that it  
20 was Mr. Maw who completed any of the applications. Because the prosecution cannot prove  
21 that it was Mr. Maw, they cannot prove that Mr. Maw committed the act that is alleged to be  
22 deceptive.

23 Mr. Maw is charged with theft by deception, but the prosecution cannot show that he  
committed the deceptive act, and even if that were possible theft by deception does not remove

1 the requirement that the prosecution prove that Mr. Maw obtained a PFD that he was not  
2 entitled to receive.

3 **III. The indictment should be dismissed because there was prejudicial improper**  
4 **evidence presented to the grand.**

5 The prosecution presented two pieces of improper evidence to the grand jury –  
6 improper opinion evidence and improper evidence that Mr. Maw's declined to be interviewed  
7 and referred investigators to his attorney.

8 When inadmissible evidence is presented to the grand jury, the court must subtract the  
9 improper evidence from the case that was presented and then determine whether the remaining  
10 evidence would be legally sufficient to support the indictment. *Stearns v. State*, 827 P.2d 442,  
11 446 (Alaska App. 1992), citing *Oxereok v. State*, 611 P.2d 913, 916 (Alaska 1980). If the  
12 improper evidence is removed and there is still sufficient evidence to uphold an indictment, the  
13 next question is whether "the probative force of that admissible evidence was so weak and the  
14 unfair prejudice so strong that it appears likely that the improper evidence was the decisive  
15 factor in the grand jury's decision to indict." *Id.*

16 There were two pieces of improper evidence. First, there was improper opinion  
17 evidence. Evidence Rule 701 provides:

18 If the witness is not testifying as an expert, the witness's testimony in the form  
19 of opinions or inferences is limited to those opinions or inferences which are (a)  
rationally based on the perception of the witness and (b) helpful to a clear  
understanding of the witness's testimony or the determination of a fact in issue.

20 In this case, Special Agent Timothy Brady of Homeland Security Investigations  
21 testified. G.J.Tr. page 15. After he described the process to monitor border crossings, Agent  
22 Brady turned to Mr. Maw's records. Agent Brady testified "it appears to me that this individual  
23 resides in Montana and travels to Alaska to work in the summertime and returns back home

1 again at the end of the – it appears that his departure dates coincide with the end of the fishing  
2 season up in Alaska.” GJ Tr. Page 18, Line 24 – Page 19, Line 4. Special Agent Brady went  
3 on to provide testimony about the dates Mr. Maw crossed the border. Special Agent Brady’s  
4 testimony about those crossings was brief, although he testified that he wrote a letter to  
5 Investigator Stendevad dated March 5, 2015 which showed when Mr. Maw came and went  
6 from the United States. That document was later introduced as Grand Jury Exhibit 3 – attached  
7 under seal. GJ Tr.. Page 21, Line 20-23.

8 Special Agent Brady’s testimony that Mr. Maw “appears to ... reside in Montana” was  
9 improper opinion evidence. Special Agent Brady’s knowledge of Mr. Maw is limited to when  
10 he crossed the United States border. There is nothing about that basis of information to qualify  
11 him to testify about Mr. Maw’s residence.

12 Moreover, based only upon Grand Jury Exhibit 3, the opinion could just as likely be  
13 that Mr. Maw resided in Alaska. If the border crossings were to accurately represent when Mr.  
14 Maw was in Alaska and when he was in Montana,<sup>2</sup> it would show that Mr. Maw was in Alaska  
15 from April or May until October or November most years. According to those records, Mr.  
16 Maw was in Alaska for more than half of each year. Based on that, with equal time in Alaska  
17 and Montana (according to the border records), it was not logical for Agent Brady to express  
18 the opinion that Mr. Maw resided in Montana. In other words, not only should Agent Brady  
19 not have testified about his opinion, but his opinion was not reasonably based on the evidence.

20 Second, there was improper evidence that Mr. Maw was contacted and referred the  
21 investigators to his attorney.  
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<sup>2</sup> The defense does not concede that border crossings are sufficient to show when Mr. Maw was in either Alaska or Montana.



1           There is a strong line of cases in Alaska which provide that a person's exercise of their  
2 rights should not be used against them. Regarding a person's right remain silent and not talk to  
3 investigators, "Alaska case law protects a criminal defendant's right to remain silent both before  
4 and after arrest. As we explain below, evidence of a defendant's post-arrest silence is prohibited  
5 by the Alaska Constitution, and evidence of a defendant's pre-arrest silence will usually be  
6 inadmissible under Evidence Rule 403 due to its inherently low probative value and its high  
7 risk of unfair prejudice." *Adams v. State*, 261 P.3d 758, 765 (Alaska 2011). In *Adams*, the  
8 testimony regarding the defendant's pre-arrest silence resulted in plain error because the  
9 comment impacted "substantial rights" and was "obviously prejudicial". *Id.* at 771-773. The  
10 conviction in *Adams* was reversed. *Id.* at 775.

11           The reason the prosecution may not comment on pre-arrest silence was explained in  
12 *Bloomstrand v. State*, 656 P.2d 584, 587 (Alaska App.1982). The rationale provided in  
13 *Bloomstrand* was written 35 years ago, but it remains true:

14           [E]vidence of an individual's pretrial failure to speak ... is of extremely limited  
15 probative worth.... [T]he individual's silence in such circumstances may simply  
16 be attributable to his awareness that he is under no obligation to speak or to the  
17 natural caution that arises from his knowledge that anything he says might later  
18 be used against him at trial. Alternatively, the individual may refrain from  
19 speaking because he believes that efforts to exonerate himself under the  
20 circumstances would be futile. Finally, it is a lamentable but undeniable fact of  
21 modern society that some of our citizens harbor a mistrust for law enforcement  
22 authority which leads them to shun contact with the police even when the  
23 avoidance of contact is not in their own best interest.

          In this case, after the presentation of evidence was complete, a grand juror said "I don't  
know if this is an appropriate question or not, but did the state contact him for further  
information in the investigative process? In other words, he submitted the application. And  
then, in the state's investigation, did they contact him for more clarification?" GJ Tr. Page 59,  
Lines 15-21.

1 In response to the question the prosecution recalled Investigator Stendevad.  
2 Investigator Stendevad testified "I did contact Mr. Maw, and he referred us – us to his  
3 attorney." GJ Tr. Page 60, Lines 11-12.

4 The prosecutor then told the grand jury that they could not hold Mr. Maw's desire not to  
5 speak to Investigator Stendevad against him, excused Investigator Stendevad, and again  
6 instructed the grand jury to not hold the request against him. GJ Tr. Page 60, Lines 13-25.

7 The testimony that Mr. Maw did not talk to Investigator Stendevad was improper  
8 evidence of Mr. Maw's right to remain silent. The prosecutor provided a curative instruction,  
9 but the damage from the improper testimony was high because it was not a passing reference  
10 and this was not a case with overwhelming evidence. In that regard, this case is similar to  
11 *Smith v. State*, 1991 WL 11650695 (Alaska App. 1991). In *Smith* the prosecution commented  
12 on a person's pre-arrest silence in closing argument. *Id.* at \*2. *Smith* reversed, because the  
13 comments were "not a passing reference" and "the fact that the evidence in this case was far  
14 from overwhelming." *Id.*

15 Similarly in this case, the reference was not made in passing. The prosecutor called  
16 Investigator Stendevad, who had been excused, back into the room to elicit the improper  
17 testimony. No other evidence was presented – just the evidence that Mr. Maw had said he did  
18 not want to talk to Investigator Stendevad. Also, the evidence in this case was not  
19 overwhelming. As discussed above, the grand jury was confused and unconvinced by the  
20 evidence. The improper presentation of evidence that Mr. Maw did not want to talk to  
21 Investigator Stendevad and wanted to talk to his lawyer could have been the piece of evidence  
22 that caused the grand jury to vote for indictment.  
23

1 As discussed above, the standard for determining whether improper evidence merits the  
2 dismissal of an indictment is whether the remaining evidence is legally sufficient, and whether  
3 the “the probative force of that admissible evidence was so weak and the unfair prejudice so  
4 strong that it appears likely that the improper evidence was the decisive factor in the grand  
5 jury’s decision to indict.”

6 In this case, as discussed in Sections I and II, there was insufficient evidence to indict  
7 on any charge. But if this Court were to find that there was sufficient evidence, the removal of  
8 the improper opinion evidence and the evidence that Mr. Maw declined to be questioned would  
9 not take away from what evidence the Court could find to uphold the indictment.

10 However, if this Court were to find that there was sufficient evidence for the indictment,  
11 this Court should find that the probative force of the admissible evidence was low and the  
12 prejudicial effect of the improper evidence was high. Agent Brady’s opinion that Mr. Maw  
13 “resides in Montana” was baseless and went directly to an issue at the heart of the case – where  
14 did Mr. Maw reside. Also, in the absence of any evidence that it was Mr. Maw who did the  
15 application or that Mr. Maw was not entitled to receive a PFD, the evidence that he declined to  
16 speak with an investigator carried all of the harm outlined in *Bloomstrand*, but carried no  
17 evidentiary value.

18 This Court should find that the danger of unfair prejudice from the improper evidence  
19 was high, any evidence that could uphold the indictment was weak, and dismiss the indictment.

20 **IV. Cumulative issues require dismissal of indictment.**

21 If this court does not find that dismissal of the indictment is proper because of  
22 insufficient evidence of Mr. Maw completing the online form (as discussed in Section I),  
23

1 improper burden shifting (Section II), or improper evidence (Section III), this Court should  
2 dismiss the indictment for the combination of each of those issues.

3 “[T]he grand jury plays a protective role by operating to control abuses by the  
4 government and protecting the interests of the accused.” *Cameron v. State*, 171 P.3d 1154,  
5 1156 (Alaska App. 2007), citations and quotations omitted. The “protection of the innocent  
6 against oppression and unjust prosecution ranks among the grand jury's vital functions.” *Id.*  
7 *Cameron* summarized that “both the Criminal Rules and this court have taken special care to  
8 preserve the grand jury's ability to ensure fair and effective law enforcement. This attention to  
9 the grand jury's protective role helps prevent the grand jury from becoming a mere ‘rubber  
10 stamp’ for the prosecutor or an “administrative arm of the district attorney's office.” *Id.* at  
11 1157, citations and quotations omitted.

12 When a grand jury is not instructed on the law and is given insufficient evidence, the  
13 presence of improper and unfairly prejudicial evidence means that the grand jury cannot  
14 perform those tasks, and so the indictment should be dismissed.

### 15 CONCLUSION

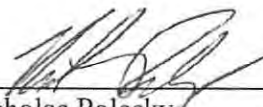
16 The indictment in this case should be dismissed. The unsworn falsification charges  
17 should be dismissed because there is no evidence that it was Mr. Maw who completed the  
18 online application. The theft charges should be dismissed because there was insufficient  
19 instruction, insufficient evidence, and burden shifting on the issue of whether or not Mr. Maw  
20 was eligible for the PFD.

21 If this Court does not dismiss the indictment for either of those independent reasons,  
22 this Court should dismiss the grand jury indictment because of the improper evidence that was  
23 admitted.

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1 Respectfully submitted at Juneau, Alaska, this 6th day of ~~October~~, 2017.

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3   
4 Nicholas Polasky  
Alaska Bar No. 0707045

5 I certify that a copy was served on prosecutor  
6 Lisa Kelley by email on 11-6-17

  
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