

FILED in the Trial Courts
State of Alaska First District
at Juneau

JAN 18 2013

Clerk of the Trial Courts
By Deputy

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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

**REPLY IN SUPPORT OF
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, files this reply in support of the Motion to Dismiss Second Indictment.

DISCUSSION

I. The prosecution's evidence is not sufficient to show that Mr. Maw completed the online applications.

The prosecution claims there was sufficient evidence that Mr. Maw was the person who completed the online PFD applications based upon three things – (1) the applications were signed by Mr. Maw's electronic signature, (2) the applications were filed from a computer in Alaska at a time when Mr. Maw was in Alaska, and (3) the PFDs for each application were deposited into a checking account owned by Mr. Maw. None of those pieces of evidence show Mr. Maw completed the application.

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1 The first piece of evidence, that an electronic signature was used, is not sufficient. In
2 grand jury, Investigator Stendevad testified that Mr. Maw “signed his applications using ... an
3 electronic signature.” GJ. Tr. P 28, L. 3-5. There was no testimony to explain what an
4 electronic signature is, how it is obtained, how it is associated with only one person, or how an
5 electronic signature can be used to show that a specific person used that signature on any
6 particular occasion. Without any evidence to fill in those gaps, the testimony that an electronic
7 signature was used is not sufficient to show that it was Mr. Maw.

8 The second piece of evidence, that Mr. Maw was in Alaska when the application was
9 submitted from a computer in Alaska, has no value. The presence of a person in the state of
10 Alaska when a crime is alleged to have been committed in Alaska has no evidentiary value.

11 The third piece of evidence, that the PFDs were deposited in an account that was
12 alleged to be owned by Mr. Maw, has several problems. The testimony was that the PFDs were
13 deposited into an account owned by Mr. Maw. GJ. Tr. P. 47, L 16 to P. 50, L 18. In passing,
14 Investigator Stendevad noted it was a Wells Fargo account. GJ. Tr. P. 50, L. 8. The testimony
15 that the account belonged to Mr. Maw was hearsay. To show that it was Mr. Maw’s account,
16 the prosecution should have introduced records, properly certified, from Wells Fargo. They did
17 not. Because they did not, the testimony that it was Mr. Maw’s bank account is hearsay.

18 Moreover, whether or not a specific bank account received a PFD payment has nothing
19 to do with whether or not Mr. Maw completed the applications. The destination of the money
20 does not answer the question raised in this Court’s Order Granting Motion to Dismiss
21 Indictment – “who was sitting in the chair clicking the mouse.”

22 The three pieces of evidence suggested by the prosecution do not show Mr. Maw
23 completed the online applications.

1 **II. The new theory of theft in the prosecution's opposition should not prevent the**
2 **dismissal of the indictment.**

3 On the theft charges, Mr. Maw's position is that the grand jury was not properly
4 instructed on the law, there was insufficient evidence of theft, and there was improper burden
5 shifting. Mr. Maw also addressed why the prosecution's theory, theft by deception, does not
6 relieve the prosecution of proving the elements of theft nor can the prosecution show that Mr.
7 Maw did any of the acts that were alleged to be deceptive.

8 The prosecution responds to these arguments by advancing a new theory of theft – that
9 Mr. Maw is not eligible for a PFD because of 15 AAC 23.103(j), and by arguing that even if
10 Mr. Maw was eligible for the PFD it does not mean he could legally own the PFD.¹

11 The theory that Mr. Maw is not eligible for a PFD pursuant to 15 AAC 23.103(j) is not
12 correct. 15 AAC 23.103(j) provides:

13 The department will deny an application if the department determines that an
14 individual has intentionally provided deceptive information such as failing to
15 disclose a reportable absence to the department.

16 Under this theory, the prosecution argues that Mr. Maw is guilty of theft because he
17 intentionally provided deceptive information on his application. This argument must fail for at
18 least three reasons.

19 First, 15 AAC 23.103(j) was not read to the grand jury. If the theory is that Mr. Maw is
20 not eligible for a PFD by operation of that regulation, then the grand jury should have been
21 instructed on that regulation. As noted below, Mr. Maw does not agree that 15 AAC 23.103(j)

22 ¹ As discussed in the Motion to Dismiss Second Indictment, the prosecution's theory at grand jury was that the
23 prosecution did not know whether or not Mr. Maw was eligible for a PFD because they had not received sufficient
information. This is most evident from the exchange at GJ. Tr. P. 56, L. 11-15:

Q. It's not clear to me whether or not he was eligible to receive the PFD.

A. We don't know, because we never were given all of the information that was necessary to
determine his eligibility.

1 makes a person ineligible to receive a PFD, but if it does, then it should have been read to the
2 grand jury.

3 Second, 15 AAC 23.103(j) does not provide that a person is not eligible to receive a
4 PFD. The regulation provides that a person's application will be denied, but it does not provide
5 that a person is not eligible for a PFD. It is possible that a person's application may be denied
6 but they may still be eligible for a PFD upon further review.

7 Third, AS 43.23.005 is the statute that provides for eligibility for the PFD. 15 AAC
8 23.103(j) should not be interpreted to provide for additional eligibility rules that are not
9 provided for under the statute.

10 The prosecution also argues that whether or not Mr. Maw is eligible for a PFD is not the
11 issue. The defense disagrees. If Mr. Maw were eligible to receive a PFD, he could not commit
12 theft by receiving the PFD. Because of that, to prove theft, the prosecution must prove that Mr.
13 Maw is not eligible for the PFD. In this case, as both the investigator and the prosecutor stated
14 in grand jury, the prosecution does not know whether Mr. Maw is eligible for the PFD or not.
15 Because the prosecution cannot prove that Mr. Maw is not eligible for the PFD, the case should
16 be dismissed.

17 **III. The improper evidence that was presented supports the dismissal of the**
18 **indictment.**

19 The last issue the prosecution addressed was whether or not improper evidence should
20 cause the indictment to be dismissed. The two pieces of improper evidence were Agent
21 Brady's improper opinion testimony on an issue that goes to the heart of this case, where Mr.
22 Maw lives, and the evidence that Mr. Maw said he wanted to talk to a lawyer.

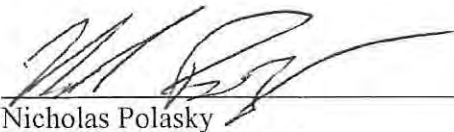
23 The first piece of evidence, opinion testimony from a witness, is a problem because it
was improper testimony, it mischaracterized the evidence, and it went to the heart of the case.

1 The second piece of evidence, the testimony that Mr. Maw declined to speak to an
2 investigator and instead referred the investigator to his lawyer, is more problematic. The
3 prosecution concedes that the testimony was improper, but says the protective instruction was
4 sufficient. The first part, that the testimony was indeed improper, begs the question of why the
5 evidence was presented in the first place. In grand jury, a grand juror asked if Mr. Maw was
6 questioned. The investigator was recalled to say that she had been referred to Mr. Maw's
7 lawyer. No other evidence was presented. Then the investigator was dismissed. G.J. Tr. P. 56,
8 L 15 to P. 60, L 17. If the evidence was not proper, then the witness should not have been
9 recalled to provide the testimony, only for the grand jury to be admonished to ignore the
10 answer. Under that scenario, recalling a witness to provide only one (improper) piece of
11 evidence, the curative instruction was insufficient to remedy the problem.

12 **CONCLUSION**

13 The indictment in this case should be dismissed. The insufficient evidence that Mr.
14 Maw completed the online application, the prosecution's theory under 15 AAC 23.103(j), and
15 the improper evidence all support the dismissal of the indictment.

16 Respectfully submitted at Juneau, Alaska, this 18th day of January, 2018.

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19 _____
Nicholas Polasky
Alaska Bar No. 0707045

20 I certify that a copy was served on prosecutor
Lisa Kelley by email on 1-18-18

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