

NATASHA NORRIS
ATTORNEY AT LAW

134 WEST 15TH AVENUE
ANCHORAGE, ALASKA 99501

TEL: 907-222-7771

FAX: 907-222-3228
natasha.norris@acsalaska.net

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

FILED
STATE OF ALASKA
DISTRICT

10 JAN 11 AM 11:07

CLERK, TRIAL COURTS

BY EG DEPUTY

STATE OF ALASKA,)
)
Plaintiff,)
)
vs.)
)
THOMAS JACK JR,)
)
Defendant.)

Case No. 1JU-09-194CR

MOTION TO DISMISS TO 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 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.

Defendant Thomas Jack Jr., by and through counsel, Natasha Norris, hereby moves this Court to dismiss the Indictment dated October 23, 2009. The state failed to present exculpatory evidence and presented hearsay and speculative testimony in error. The Indictment is thus fatally flawed and should be dismissed.

The defense has filed three attachments, Attachments A, B, and C, to assist the Court. Attachments A and B are sealed as they are transcripts of the two grand juries that were conducted in the above-captioned case. Attachment A is the transcript for first grand jury, dated February 27, 2009 and Attachment B is the transcript for the second grand jury, dated October 23, 2009. Attachment C is a memorandum, drafted by defense counsel, titled "Background Information and Exculpatory Evidence that Must be Presented to the Grand Jury" and a copy of the email from Assistant District attorney Angie Kemp confirming that she received the document.

10 21.07 1101 01111151ed 007-270-0400 1-792 P003/017 F-448

FACTS

1
2
3 1. Time line of events including disclosure of the allegations, the
4 investigation, the medical exams and the grand juries in this case.

5
6 T.T. alleged that she had been sexually abused by the defendant, Thomas
7 Jack, to her older sister some time in December 2008. In January, 2009, T.T. was
8 interviewed at the Child Advocacy Center. Z.T., T.T.'s younger sister was also
9 interviewed. T.T. and her sister Z.T. have been in foster care for several years. They
10 were placed at the Jack's residence in August 2007. The only people residing at the
11 Jack residence are T.T., Z.T. and Thomas and Angela Jack. Thomas and Angela
12 have no children of their own. This was the first foster child placement in the Jack
13 residence. The girls were removed from the Jack residence on November 4, 2009.

14
15 Once T.T. alleged sexual abuse, the Alaska State Troopers began an
16 investigation. They received a Glass warrant. Leah Ogoy, the social worker that
17 worked with the Jacks and the children T.T. and Z.T., called Thomas Jack on two
18 different occasions in February 2009 to discuss T.T.'s allegations. Both
19 conversations were recorded.

20
21 After the execution of the Glass warrant, Trooper Dobson interviewed Thomas
22 Jack on February 22, 2009. That interview was recorded. T.T. was also examined
23 by a doctor in January 2009 and February 2009. At the initial examination, Dr. Brown
24 did, in her opinion, observe what she believed to be injury to T.T.'s vagina. Dr.
25 Brown indicated in her report that "the problems seen at the fourchette might be
26 caused by sexual abuse or other mechanisms and manipulations." See Dr. Brown's
January 2009 report, page 3. The Court has a copy of this report. It was included in

1 the documents the Court provided both the DA's office and Defense counsel on
2 January 7, 2010.

3 On February 16, 2009, Dr. Brown did a follow up exam of T.T.. Dr. Brown
4 indicated in her report that she was concerned that T.T. had not menstruated in the
5 prior 5 to 6 weeks, and therefore suggested that T.T. get a pregnancy test. T.T.'s
6 last menstruation was a week before her first exam on January 18, 2009. T.T. did
7 have a pregnancy test and it was negative. Finally, Dr. Brown noted that it appeared
8 that "there was healing of the area compared to 1/18/09." See Dr. Brown's February
9 2009 report, page 2. Again, the Court has a copy of this report as it was included in
10 the documents provided by the Court on January 7, 2010.

11
12 On June 29, 2009, Dr. Brown wrote a memorandum to Assistant District
13 Attorney Angie Kemp: Dr. Brown noted that her findings "in a young person of this
14 age are consistent with some physical manipulation and trauma of the tissue at this
15 site. This could include but not be limited to sexual assault, sexual activity, digital or
16 hand manipulation of the area, foreign body manipulation of the area, a tampon or
17 other tissue pressure objects." See Dr. Brown's June 29, 2009 memorandum. The
18 Court has a copy of this memorandum, as it was included in the documents provided
19 by the Court on January 7, 2010.

20
21 Dr. Brown found that the tissue had healed between the two visits, which were
22 about a month apart.

23
24 The entire investigation included the Glass warrant discussion between Leah
25 Ogoy and Thomas Jack, Thomas Jack's interview, T.T.'s interview and Z.T.'s
26 interview. The troopers did not interview the other adult in the household, Thomas
Jack's wife, Angela. The troopers did not take pictures of the home where the

1 allegations were said to have occurred. The troopers did conduct some follow up
2 interviews, with T.T.'s older sister and some other people, but not until ten months
3 later, on the eve of scheduled trial.

4 The state presented this case to a grand jury on February 27, 2009. The only
5 witnesses examined by the state were T.T. and Leah Ogo. This case was
6 scheduled to start trial November 1, 2009. The state decided to present the case to
7 the grand jury a second time on October 23, 2009. The state did give notice to
8 defense counsel that it was going to present the case to grand jury a second time.
9 Defense counsel drafted a memorandum titled "Background Information and
10 Exculpatory Evidence that Must be Presented to the Grand Jury." The
11 memorandum, and a copy of the email from Ms. Kemp confirming that she received it
12 is Attachment C to this motion.
13
14

15
16 **2. Frink facts not presented to the second grand jury.**

17 Defense counsel, in the memorandum she presented to the state before the
18 state conducted the second grand jury contained several items of exculpatory
19 evidence that should have been presented to the grand jury. While the prosecutor
20 did address some of these issues at the second grand jury, the following facts were
21 not presented to the grand jury:
22

- 23 • Thomas Jack was interviewed by Trooper Dobson. During the interview, when
24 Mr. Jack was directly confronted and accused of sexually abusing T.T., Mr.
25 Jack denied the allegations. Mr. Jack denied that he sexually abused T.T. at
26 least four times during the interview. Mr. Jack did not make any admissions of
guilt. Towards the end of the interview when the trooper was really pushing

1 Mr. Jack, he said "How many more ways can I say no?" See page 9 of the
2 memorandum provided to the state by defense counsel, Attachment C. These
3 statements were NOT provided to the grand jury. See Attachment B.

4
5 The state did ask Leah Ogoy about the Glass discussions with Thomas Jack
6 during the grand jury presentation, but did not actually play the recordings of
7 the discussions. See Attachment B. Ms. Ogoy's testified that Mr. Jack did not
8 make a specific denial of the allegations. See Attachment B at page 26 (page
9 99 of the transcript). In the memorandum provided to the state by defense
10 counsel, defense counsel noted that Ms. Ogoy did not accuse Mr. Jack of
11 anything. She simply told him about the allegations and Mr. Jack responded
12 with concern. More importantly, defense counsel noted that Mr. Jack told Ms.
13 Ogoy that he did not believe that T.T. was lying about the sexual activity and
14 the acts that she described, it just wasn't with him. See pages 6-8 of the
15 memorandum in Attachment C. This was never presented to the grand jury.
16 See Attachment B.

- 17
18
19
20
21 • Z.T., T.T.'s younger sister, was interviewed at the Child Advocacy Center.
22 Z.T. said her and her sister, T.T., often slept in the same bed. She said that
23 Mr. Jack would come in and read to them before they went to sleep. Z.T. said
24 that she did not see T.T. and Mr. Jack alone together in T.T.'s bedroom. Z.T.
25 said that Mr. Jack did not touch her (Z.T.) inappropriately. Z.T., being only a
26 year younger than T.T., and competent to testify, was not called as a witness

NATASHA NORRIS
ATTORNEY AT LAW

134 WEST 15TH AVENUE
ANCHORAGE, ALASKA 99501

TEL: 907-222-7771

PAX: 907-222-1228
natasha.norris@acpsalaska.net

at either grand jury. See Attachment A and Attachment B. Defense counsel discussed Z.T.'s statements on page 10 of the memorandum in Attachment C.

- Dr. Brown was not called as a witness to discuss the medical exams, her findings and the pregnancy concern regarding T.T. at either grand jury. See Attachment A and Attachment B. During the Glass discussions, Mr. Jack told Ms. Ogoy that he was concerned about T.T. becoming sexually active too young. He said he believed that she may have been sexually active, but not with him. Defense counsel noted in the memorandum to the state that the time line of the removal of the girls from the Jack home and the medical exams and findings was exculpatory evidence that needed to be presented to the grand jury. See page 11 of the memorandum in Attachment C. The only mention of the medical exam to the second grand jury was made by Leah Ogoy. See page 28 (page 107 and 108 of the transcript) of Attachment B.

3. Hearsay testimony that was presented to the second grand jury without a compelling justification.

Instead of calling Angela Jack and Z.T. to testify, Leah Ogoy testified regarding statements allegedly made by both to the grand jury. See pages 21-23 (pages 78 through 87 of the transcript) and page 30 (page 115 of the transcript) of Attachment B.

When T.T. testified to the second grand jury, the state asked her if she ever had told any white lies, and whether or not she was lying about the allegations. See page 19 (page 71 of the transcript) of Attachment B. However, Ms. Ogoy testified to the grand jury about a specific discussion with T.T.. T.T. had told Ms. Ogoy that she

1 dreamed that she told everyone that what happened was a lie. See page 29 (page
2 111 of the transcript) of Attachment B. The state did not confront T.T. about this
3 dream. See Attachment B.

4 The state did not offer any explanation or justification to the grand jury for the
5 hearsay testimony regarding statements allegedly made by Angela Jack, Z.T. and
6 T.T. to Ms. Ogoy. See Attachment B. The state did ask Ms. Ogoy if she kept notes
7 and records of her conversations with the Jacks and the children. See page 21
8 (page 78 of the transcript) of Attachment B. Presumably, the state meant to advise
9 the grand jury of the business records hearsay exception, but not only did the state
10 not advise the grand jury regarding the exception, the state failed to give any
11 justification for the hearsay testimony. Id.

12
13 LAW

14
15
16
17 **1. The state has a duty to present exculpatory evidence to the grand
18 jury.**

19 "A vital function of the grand jury is the protection of the innocent against
20 oppression and unjust prosecution." State v. Gieffels, 554 P.2d 460, 464 (Alaska
21 1976). A prosecutor has a duty to present exculpatory evidence to the grand jury
22 pursuant to Criminal Rule 6(q). Frink v. State, 597 P.2d 154, 164 (Alaska 1979).

23 This duty is also referred to as the Frink duty.

24
25 The Frink Court found that the requirement for a prosecutor to present
26 exculpatory evidence to the grand jury is implicit in the mandate of Criminal Rule 6
(q). Id at 165. Because, as stated above, a vital function of the grand jury is to
protect the innocent against oppression and unjust prosecution, the grand jury must

NATASHA NORRIS
ATTORNEY AT LAW

134 WEST 15TH AVENUE
ANCHORAGE, ALASKA 99501

TEL: 907-222-7771

FAX: 907-222-1228
natasha.norris@acsalaska.net

1 hear evidence that establishes guilt and evidence that refutes guilt. Id. It is the
2 prosecutor who mainly presents evidence to the grand jury. Therefore "if the
3 prosecutor does not present exculpatory evidence to the grand jury, it probably will
4 not hear such evidence." Id.

5 The Frink Court noted that the American Bar Association Standards Relating
6 to the Prosecution Function and the Defense Function (Approved Draft 1971)
7 imposed a similar obligation in Section 3.6 (b): "The prosecutor should disclose to
8 the grand jury any evidence which he knows will tend to negate guilt." Id.

9 The Frink duty is fully consistent with the role, the proper role, of the district
10 attorney in a criminal prosecution. "As a representative of the state, a district
11 attorney should seek justice, not simply indictment or conviction." Id. Thus, the
12 obligation for a prosecutor to present exculpatory evidence to the grand jury "flows
13 from the basic duty of the prosecutor to seek a just result." Id.

14 A prosecutor, while bound by the Frink duty to present exculpatory evidence,
15 need only present evidence which is "substantially favorable" to the defendant.
16 Tookak v. State, 648 P.2d 1018, 1021 (Alaska 1982). Exculpatory evidence will not
17 be deemed "substantially favorable," and its production by the prosecution will not be
18 required unless it is the type of evidence that tends, in and of itself, to negate the
19 defendant's guilt. York v. State, 757 P.2d 68, 73 (Alaska App. 1988) (emphasis
20 added).

21 The grand jury process functions to protect the innocent from unjust
22 prosecutions. Clifton v. State, 728 P.2d 649, 650 (Alaska App. 1986) and State v.
23 Shelton, 368 P.2d 817 (Alaska 1962). However, grand jury is not a mini trial. The
24 duties of the prosecutor are to prepare indictments, examine witnesses and act as an
25
26

1 advisor to the grand jury. See Criminal Rule 6 (i). The prosecution does not need to
2 develop evidence for the defendant or present leads "possibly favorable" to the
3 defendant. Frink, 597 P.2d at 165. Material that defense counsel could use to
4 impeach witnesses or use to develop a theory of reasonable doubt is not
5 "substantially favorable," and is therefore, not exculpatory. McDonald v. State, 872
6 P.2d 627, 639 (Alaska 1994). However, the prosecutor is still bound by the Frink
7 duty to present exculpatory evidence when it is substantially favorable to a
8 defendant, and the prosecutor is not to interfere with its determination of the
9 probability of guilt. See Coleman v. State, 553 P.2d 40, 47 (Alaska 1976).

10
11 If the other evidence in front of the grand jury sufficiently justifies indictment,
12 then a prosecutor's failure to introduce exculpatory evidence to a grand jury is
13 harmless. See Lipscomb v. State, 700 P.2d 1298, 1304 and n.4 (Alaska 1985).

14
15 **2. There must be a compelling justification for the use of hearsay**
16 **evidence in grand jury, and the prosecutor must disclose the reasons for the**
17 **hearsay evidence to the grand jury.**

18
19 The hearsay rule forbids evidence of out-of court assertions introduced to
20 prove the truth of those assertions. See Alaska Rule of Evidence 801 and Frink, 597
21 P.2d at 161, 162 (internal citations omitted). However, Alaska Criminal Rule 6 r (1)
22 provides:

23
24 Evidence which would be legally admissible at trial shall be admissible before
25 the grand jury. In appropriate cases, however, witnesses may be presented to
26 summarize admissible evidence if the admissible evidence will be available at
trial. Except as stated in subparagraphs (2), (3), and (6), hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.

FAX: 907-222-1228
natasha.norris@acsalaska.net

NATASHA NORRIS
ATTORNEY AT LAW

134 WEST 15TH AVENUE
ANCHORAGE, ALASKA 99501

TEL: 907-222-7771

1 (emphasis added).

2 The prosecutor, while conducting a grand jury, is therefore required to make a
3 record supporting the justification for the use of hearsay statements. See Frisk, 597
4 P.2d at 163, and State v. Gieffels, 554 P.2d 460 (Alaska 1976).
5

6 ARGUMENT

7
8 **1. The state failed to present exculpatory evidence to the second**
9 **grand jury in this case on October 23, 2009.**

10
11 As stated above, the state was on notice of exculpatory evidence that should
12 have been provided to the grand jury on October 23, 2009. The prosecutor does not
13 need to conduct a minitrial to the grand jury, however, the prosecutor does have a
14 duty to provide exculpatory evidence and that did not happen in this case.

15 **First, the grand jury heard Ms. Ogoy's misleading testimony regarding Mr.**
16 **Thomas's statements.** At no time did the grand jury hear that Mr. Jack denied that he
17 sexually abused T.T. to Ms. Ogoy and to Trooper Dobson. Denial of guilt may be
18 considered exculpatory material for purposes of evaluating whether the prosecutor
19 has a duty to present particular evidence to the grand jury. Lipcomb, 700 P.2d at
20 1304 (internal citations omitted).
21

22
23 Mr. Jack has claimed his innocence of these charges from the beginning and
24 the grand jury should have heard that he denied the allegations multiple times.
25 Instead, what the grand jury heard testimony from Ms. Ogoy regarding what she
26 believed to be admissions of guilt by Mr. Jack. Ms. Ogoy testified about his *lack of*
denial from which the grand jury could, of course, infer guilt. There is no question that

1 Mr. Jack's multiple denials of guilt to both Ms. Ogoy and Trooper Dobson is
2 substantially favorable evidence for Mr. Jack. Evidence regarding Mr. Jack's denials
3 should have been presented to the grand jury.

4 Second, Z.T. was interviewed at the Child Advocacy Center. Z.T.'s
5 statements do not corroborate T.T.'s version of events. T.T. alleged that Mr. Jack
6 would come into her room multiple times in the month of October 2008 and sexually
7 abuse her. Z.T. said that T.T. and her shared a bed most nights. Z.T. said that Mr.
8 Jack did not spend any time alone with T.T. in her bedroom. Z.T. also denied that
9 Mr. Jack ever abused her. All of this information is substantially favorable to Mr.
10 Jack. If what Z.T. is said is true, it would make T.T.'s allegations nearly impossible,
11 logistically speaking. The state should have presented testimony from Z.T. to the
12 grand jury.

13 Third, the state failed to present evidence regarding the medical exams and
14 the pregnancy test. This evidence establishes a crucial time line. The injury
15 observed by Dr. Brown on January 18, 2009, healed within one month. This time
16 frame for healing, about a month, is within the normal range, of time between injury
17 and healing, according to Dr. Brown. The injury was observed on January 18, 2009,
18 almost three months after T.T. was removed from the Jack residence. That makes it
19 virtually impossible that Mr. Jack caused the injury observed by Dr. Brown.
20 Furthermore, T.T. was given a pregnancy test in February 2009. However, T.T. had
21 menstruated after she left the Jack residence. What can be so clearly and easily
22 inferred from this evidence is that the injury T.T. received was from someone else.
23 T.T. may have been sexually active with someone else, and may have had a
24
25
26

pregnancy scare. This is a motive for T.T. to lie and falsely accuse Mr. Jack of sexual abuse. None of this evidence was presented to the grand jury.

The evidence outlined above that the state failed to present to the grand jury is not merely impeachment evidence. This evidence is substantially favorable to Mr. Jack because the motive for T.T. to lie, the logistical impossibility of T.T.'s statements to be true given Z.T.'s statements, and Mr. Jack's multiple denials regarding the allegations, all negate Mr. Jack's guilt. It should have presented to the grand jury and it wasn't. Therefore, the indictment in this case must be dismissed.

2. The state presented hearsay to the second grand jury in this case on October 23, 2009 without stating the reasons for the hearsay evidence on the record.

The prosecutor in this case, Ms. Kemp, was the grand jury's only legal advisor. Ms. Ogoy testified regarding hearsay statements made by Angela Jack, Z.T. and T.T.. Although the Ms. Kemp is permitted by Criminal Rule 6 r (1) to present hearsay evidence to the grand jury, there must be a compelling justification for its introduction. Furthermore, pursuant to the Criminal Rule 6 r (1), Ms. Kemp must give the reasons for the hearsay evidence on the record. Ms. Kemp gave no explanation to the grand jury for not calling Angela Jack or Z.T. to the stand. Furthermore, there is no reason why Ms. Kemp could not have simply have called both Angela Jack and Z.T. as witnesses.

T.T. did testify, however Ms. Kemp did not question her about a specific instance where T.T. told Ms. Ogoy she had a dream about telling everyone that the allegations were a lie. Ms. Kemp gave no reason to the grand jury as to why she

1 couldn't have simply asked T.T. about this event rather than ask Ms. Ogoy what T.T.
2 had said. Because Ms. Kemp did not explain or advise to the grand jury why she
3 presented hearsay evidence, it is difficult to say whether the justification was not
4 compelling (because the justifications were never presented). However, there
5 doesn't appear to be any compelling reason or justification for the hearsay evidence
6 Ms. Kemp presented to the grand jury.

10 **CONCLUSION**

11 The state failed to present exculpatory evidence to the grand jury. The other
12 evidence provided to the grand jury was mostly hearsay. This hearsay evidence was
13 presented without explanation or justification by the state. Therefore, the other
14 evidence does not sufficiently justify the indictment. Ms. Kemp's failure to introduce
15 the exculpatory evidence and the hearsay evidence she did present yielded a fatally
16 flawed indictment. The indictment against Mr. Jack, therefore, must be dismissed as
17 a matter of law.

21 RESPECTFULLY SUBMITTED at JUNEAU, Alaska, this 11th day of
22 January, 2010.

25 **CERTIFICATION**

25 Copies Distributed
26 Date 11/11/10
To DA

By [Signature]

[Signature]
Natasha Norris
Attorney for the Defendant
Alaska Bar 0111071