CONFIRM. PUBLIC DEFENDER Q. STEINER

CONFIRMATION COMMITTEE REPORT

Action date: 2/21/06

The State Affairs Committee has reviewed the qualifications of the following Governor's appointee and recommends that this name be forwarded to a joint session for consideration:

Public Defender
Mr. Quinlan Steiner
Appointed: 10/14/2005 Term Expires: 10/14/2009

This does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of confirmation.

Signature:	Printed Last Name
Barbara Gardner	Gardner
[illegible]	LYNN
[illegible]	GATTO
[illegible]	Gruenberg
[illegible]	RAMRAS.
Chair: Paul K Seaton	SEATON
Chair:	

Please return to the Chief Clerk's office.

Alaska State Legislature

House of Representatives

Office of the Chief Clerk

State Capitol, Room 216
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

Official Business

MEMORANDUM

Date: January 30, 2006

To: Representative Seaton, Chair
State Affairs Committee

From: Suzi Lowell
Chief Clerk

Subject: Governor's Appointment

Speaker Harris referred the following Governor's appointment to the State Affairs Committee:

Public Defender
Mr. Quinlan Steiner
Appointed: 10/14/2005 Term Expires: 10/14/2009

The resume and committee report are attached for your use.

Attachments as noted

Public Defender
Steiner

Alaska Judicial Council
Application for Public Defender Appointment

Position(s) for which you wish to be considered:
Alaska Public Defender

Date: May 31, 2005

I. Public Information (Questions 1-24)

Personal

1. (a) State full name* Quinlan Gary Steiner

Name as it should appear on bar survey: Quinlan Steiner

* Unless otherwise specified, this is how your name will appear on the bar survey.

(b) Have you ever used or been known by any other name? If so, please identify
No.

2. How long have you been a resident of the State of Alaska immediately preceding the date of this application?** 39 years 0 months
Total 39 years 0 months

3. How long have you been engaged in the active practice of law immediately preceding the date of this application?** 6 years 9 months
Total 6 years 9 months

Nonlegal Education

4. State names and dates of attendance of all colleges and professional schools (other than law schools) ever attended and degrees and dates conferred. List any honors.

Seattle University - Winter 1988 through Spring 1989 - B.A. Business Administration.

University of Alaska, Anchorage - Fall 1992 through Spring 1993, Spring 1987 through Fall 1987.

University of Colorado, Boulder - Fall 1984 through Fall 1986.

** See AS 22.10.090; see also 1984 Inf. Op. Atty. Gen. (July 19; 366- 624-84).

Legal Education

5. List all law schools, dates attended and degrees conferred. If you did not receive a degree from any law school, please indicate.

Northwestern School of Law of Lewis & Clark College - J.D. 1998

6. (a) Did you receive any honors in law school or belong to any honorary societies or groups?

☐ Yes ☑ No If yes, please give details.

(b) Have you taken any CLE (continuing legal education) courses during the past five years?

☑ Yes ☐ No

Please describe or list. Please do not attach individual certificates of attendance.

I have attended the Public Defender Conference each year I have been practicing law. Additionally, I have attended the following CLEs: Power Editing (2002), On the Record Bench/Bar (2003, 2004, 2005), Effective Brief Writing (2004), US Supreme Court Opinions & Alaska Consitutional Law (2004), ATLA - Advocating for a Bright-Line Rule (2005).

Military

7. Have you served in the armed forces (reserves or otherwise)? ☐ Yes ☑ No

If so, please provide the following information:

(a) Dates of service: _____

(b) Branch of service: _____

(c) Rank at time of discharge: _____

(d) Type of military discharge: _____

(e) Awards or citations:

(f) Have you ever been refused admission to or released from any of the armed services for reasons other than honorable discharge? ☐ Yes ☐ No If so, state the details.

Nonlegal Employment

8. Describe major nonlegal working experience. If you had a business or association that has been discontinued, please note whether there are unpaid debts or claims pending litigation.

National Bank of Alaska - Loan Officer/Management Trainee - July 1990 through July 1992.

Northwest Deck Construction - Co-owner - 1988 through 1989 (no unpaid debts, claims, or pending litigation).

Legal Experience

9. Describe chronologically your legal employment since admission to law school. **Please provide dates, name of employer, name of supervisor or person who can verify employment, addresses, the reason you left the position, and a brief description of type of practice (i.e., insurance defense, criminal, appellate, general, litigation, etc.)** ***for each position listed below.***

The Council will ask for comments from your current and former employers about your employment and your judicial qualifications. You may choose to list other persons as character and professional references in response to Question 20 of this application.

If the supervisor or contact person asks (in writing) that the letter be shared with the governor, the Council will send designated letters for each nominee. The applicant should not request a copy of the letter from the reference. References or letters not solicited by the Council are considered public (with few exceptions) and will be sent to the governor for all nominees.

Current Employer: Alaska Public Defender Agency

Supervisor or name of contact person who can verify employment: Margi Mock

Current address of this person: 900 W. 5th Ave., Suite 200

City Anchorage State AK Zip 99501

Dates of Employment: From August 1998 To Current

Description: Assistant Public Defender - Appeals

Previous Employers: *(In chronological order, most recent first)*

Employer: Steven Ungar, Attorney at Law

Supervisor or name of contact person who can verify employment: Steven Ungar

Current address of this person: 601 S.W. Second Avenue

City Portland State OR Zip 97204

Dates of Employment: From February 1998 To February 1998

Description: Isolated research project - Criminal law.

Reason for Leaving: Project completed.

Employer: Alaska Public Defender Agency

Supervisor or name of contact person who can verify employment: Margi Mock

Current address of this person: 900 W. 5th Ave., Suite 200

City Anchorage State AK Zip 99501

Dates of Employment: From June 1997 To December 1997

Description: Criminal Law Externship - Bail Attorney/Appeals

Reason for Leaving: End of Externship.

Previous Employers (continued)

Employer: Averil Lerman, Attorney at Law

Supervisor or name of contact person who can verify employment: Averil Lerman

Current address of this person: Office of Public Advocacy, 900 W. 5th Ave.

City Anchorage State AK Zip 99501

Dates of Employment: From Summer 1996 To

Description: Legal Intern - Research/Writing (criminal law).

Reason for Leaving: To return to law school.

Employer:

Supervisor or name of contact person who can verify employment:

Current address of this person:

City State Zip

Dates of Employment: From To

Description:

Reason for Leaving:

Employer:

Supervisor or name of contact person who can verify employment:

Current address of this person:

City State Zip

Dates of Employment: From To

Description:

Reason for Leaving:

Employer:

Supervisor or name of contact person who can verify employment:

Current address of this person:

City State Zip

Dates of Employment: From To

Description:

Reason for Leaving:

Employer:

Supervisor or name of contact person who can verify employment:

Current address of this person:

City State Zip

Dates of Employment: From To

Description:

Reason for Leaving:

10. For the past five years, please indicate (approximately) the following:

(a) Percent of your practice that was:
Civil _____
Criminal 100
Other _____
= 100%

Comment: _____

(b) Percent:
State 100
Federal _____
Other _____
= 100%

Comment: _____

(c) Of practice in state courts, percent:
Supreme Court 20
Court of Appeals 70
Superior Court 5
District Court 5
= 100%

Comment: _____

(d) Frequency of appearance in court:
☐ Regularly ☑ Occasionally ☐ Infrequently ☐ Not at All
Comment: _____

(e) Number of trials (by court or jury) you conducted in the past 5 years:
☐ None ☑ 1-5 ☐ 6-15 ☐ 16-30 ☐ 31 or more
Comment: _____

(f) Percent of these trials which were: Jury 100 Non-Jury _____
Comment: _____

(g) Approximate number of appellate matters handled: 50-60
Comment: _____

(h) Approximate number of arbitrations or administrative hearings:
☑ None ☐ 1-5 ☐ 6-15 ☐ 16-30 ☐ 31 or more
Briefly describe type of matters heard:

(i) Have you undertaken any *pro bono* work through a *pro bono* legal service provider (e.g. Alaska Legal Services, Alaska Network on Domestic Violence and Sexual Assault, etc.) during this period? ☐ Yes ☑ No
Describe:

11. List all the courts and administrative tribunals in the United States or elsewhere to which you are or have been admitted to practice, and the dates of admission.

State of Alaska - October 1998

Public Service

12. List bar associations, and sections and committees of which you are or have been a member or officer.

Alaska Bar Association

13. List legal publications, if any (give title, subject and date of publications).

14. Have you ever applied for a judgeship? ☐ Yes ☑ No

Please list dates and judgeships applied for, as well as whether you were nominated by the Judicial Council and appointed.

Judgeship	Date	Nominated By Council (Y/N)	Appointed By Governor (Y/N)

15. Have you ever held public or political office, elective or appointive? ☐ Yes ☑ No

If so, state office, manner selected, and when and where held

16. Please provide the Council with information that you would like the Council to consider about other legal and nonlegal organizations and clubs of which you are a member, including civic, charitable, religious, educational, social and fraternal organizations. Please indicate whether you participate in the organization's activities, or simply hold a membership. Your involvement in the community is one of the criteria the Council uses in its evaluations. The Council does not use affiliation with a particular group as a criterion except to the extent that it might raise questions of conflict of interest or would affect an applicant's ability to impartially apply the law.

17. Indicate (Yes or No) whether you have ever:

(a) been arrested, charged with, pled guilty or *nolo contendere* to, or been convicted of the violation of any law or ordinance, or been requested to appear before any prosecuting or investigative agency in connection with any matter in any jurisdiction, including all traffic offenses, unless the fine was less than $50 and there were no other sanctions?
☑ Yes ☐ No

(b) failed to answer any summons or other legal process served upon you personally at any time? ☐ Yes ☑ No

(c) as a member of any armed forces, been the subject of any charges which may have resulted in disciplinary action or court martial? ☐ Yes ☑ No

(d) had any proceedings brought to have you declared a ward of any court or adjudged an incompetent? ☐ Yes ☑ No

If your answer is "yes" to any part of this question, state the facts in detail. Give the name and place of the court or agency, dates of the beginning and end of any action or proceeding, case numbers, and the judgment or other disposition.

I have been issued traffic citations. I do not know the dates of the citations, but I received one speeding citation about five years ago.

18. (a) Has a tax lien or other collection procedure ever been instituted against you by federal, state or local authorities? ☐ Yes ☑ No

In particular, have you been the subject of any proceeding, criminal or civil, initiated against you by the Internal Revenue Service or a State Tax Office? ☐ Yes ☑ No

If so, give particulars, including case numbers.

(b) Have you ever been sued by a client? ☐ Yes ☑ No

If so, give particulars, including case numbers.

(c) Have you ever been a party in any other legal proceeding? ☐ Yes ☑ No

If so, give the particulars. Include all legal proceedings in which you were a party in interest, including petitioner or respondent in dissolution or divorce proceedings; a material witness; a named co-conspirator or correspondent; and subject or witness in any grand jury proceedings. Do not list proceedings in which you were sued only in a representative capacity (e.g. guardian ad litem, or as Commissioner of Natural Resources).

19 State the nature and disposition of any of the following actions which apply to you:

(a) Are there any unsatisfied judgments against you? ☐ Yes ☑ No

Have you ever defaulted in the performance of any court-imposed obligation, including payment of alimony or child support or compliance with another court order or decree?

☐ Yes ☑ No

In each case, list the name and address of the creditor, the court which rendered the judgment, the case number, the date, the amount of the judgment, and the circumstances on which such claim was based.

Has property owned by you been either judicially or non-judicially foreclosed?

☐ Yes ☑ No

Please state the circumstances and outcome of any such unsatisfied or default judgment, or of any foreclosure.

(b) Have you ever made an assignment for the benefit of creditors? ☐ Yes ☑ No

Have you ever filed any petition in bankruptcy? ☐ Yes ☑ No

If so, state the circumstances, case number, and the outcome.

References and Counsel Questionnaires*

* **Please Note**: Letters of reference from these persons are confidential and will not be given to the applicant. If the reference asks (in writing) that the letter be shared with the governor, the Council will send designated letters and counsel questionnaires for each nominee. The applicant should not request a copy of the letter from the reference. (You **should not** list the Chief Justice of the Alaska Supreme Court.)

References or letters not solicited by the Council are considered public (with few exceptions) and will be sent to the governor for all nominees.

20. (a) List the names, addresses, **including zip codes**, and **phone numbers** of two persons whom the Judicial Council may contact who can discuss your general character and background.

Name: Danielle Ryman
Address: 310 K Street, Suite 200
City/State/Zip: Anchorage, AK Phone: 264-6726

Name: John Conway
Address: 9739 Hialeah Dr.
City/State/Zip: Anchorage, AK Phone: 277-9739

(b) List the names, addresses, **including zip codes**, and **phone numbers** of three other persons whom the Judicial Council may contact who can discuss your professional competence and qualifications for a judicial position.

Name: Margi Mock
Address: 900 W. 5th Avenue, Suite 200
City/State/Zip: Anchorage, AK Phone: 334-4400

Name: Averil Lerman
Address: 900 W. 5th Avenue - Office of Public Advocacy
City/State/Zip: Anchorage, AK Phone: 269-3500

Name: David Stewart
Address: 303 K Street
City/State/Zip: Anchorage, AK Phone: 264-0612

References and Counsel Questionnaires (continued)

(c) List the names, addresses, **including zip codes, and suite numbers where applicable,** and phone numbers of each attorney involved in your three most recent cases that have gone to trial. (Applicants who are currently judges should list the three most recent trials they presided over.) List only those cases which have gone to trial within the past three years. Please include the judge's name and case names and numbers. *(Attach additional pages if necessary.)*

Case Number 1

Case Name: My most recent trial was *Case Number:* _____

v. more that three years ago *Judge Name:* _____

Attorneys Involved:

Name: _____ Name: _____

Address: _____ Address: _____

City, State, Zip: _____ City, State, Zip: _____

Name: _____ Name: _____

Address: _____ Address: _____

City, State, Zip: _____ City, State, Zip: _____

Case Number 2

Case Name: _____ *Case Number:* _____

v. _____ *Judge Name:* _____

Attorneys Involved:

Name: _____ Name: _____

Address: _____ Address: _____

City, State, Zip: _____ City, State, Zip: _____

Name: _____ Name: _____

Address: _____ Address: _____

City, State, Zip: _____ City, State, Zip: _____

Case Number 3

Case Name: _____ *Case Number:* _____

v. _____ *Judge Name:* _____

Attorneys Involved:

Name: _____ Name: _____

Address: _____ Address: _____

City, State, Zip: _____ City, State, Zip: _____

Name: _____ Name: _____

Address: _____ Address: _____

City, State, Zip: _____ City, State, Zip: _____

References and Counsel Questionnaires (continued)

(d) List the names, addresses, **including zip codes, and suite numbers where applicable,** and phone numbers of each attorney involved in your three most recent cases that did not go to trial but in which you did significant work. (Applicants who are currently judges should list the three most recent cases they presided over that did not go to trial but in which they did significant work.) Please include the judge's name and case names and numbers. (*Attach additional pages if necessary.*)

Case Number 1

Case Name: Damyan Riggins v. State of Alaska

Case Number: A-8701

Judge Name: Court of Appeals

Attorneys Involved:

Name: John Scukanec
Address: OSPA, 310 K Street
City, State, Zip: Anchorage, AK 99501

Name:
Address:
City, State, Zip:

Name:
Address:
City, State, Zip:

Name:
Address:
City, State, Zip:

Case Number 2

Case Name: Jamar Howard v. State of Alaska

Case Number: A-8491

Judge Name: Court of Appeals

Attorneys Involved:

Name: Ken Rosenstein
Address: OSPA, 310 K Street
City, State, Zip: Anchorage, AK 99501

Name:
Address:
City, State, Zip:

Name:
Address:
City, State, Zip:

Name:
Address:
City, State, Zip:

Case Number 3

Case Name: Kevin Dell v. State of Alaska

Case Number: A-8389

Judge Name: Court of Appeals

Attorneys Involved:

Name: Teresia Chleborad
Address: OSPA, 310 K Street
City, State, Zip: Anchorage, AK 99501

Name:
Address:
City, State, Zip:

Name:
Address:
City, State, Zip:

Name:
Address:
City, State, Zip:

Writing Sample

21. Attach one example of a brief, memorandum of law, or legal opinion or similar example of legal writing (10-20 pages in length; 15-25 pages for appellate positions) prepared solely by you within the last five years. If you do not have a good sample of this length, include an excerpt from a longer writing. Make sure the sample contains sufficient facts to make it understandable.

Please do not submit: (a) coauthored writing samples, (b) samples with confidential information unless redacted to remove such information, (c) longer writing samples.

22. Has any **public** sanction been imposed against you in response to a complaint, charge or grievance brought against you as an attorney or a judge? ☐ Yes ☑ No

Have formal grievance procedures been brought against you? ☐ Yes ☑ No

See Bar Rule 22(b) & (e) concerning public grievance procedures against attorneys, and AS 22.30.011(b) and .060(b)(3) concerning public grievance procedures against judges.

Have you ever been held in contempt of court? ☐ Yes ☑ No

In each case, state in detail the circumstances and the outcome.

Additional Comments (Non-Confidential)

23. Please make any additional comments that you wish to bring to the Council's attention about your experience and suitability for this judgeship.

I began working at the Public Defender as a legal intern during law school, conducting bail hearings and drafting appellate arguments. I was able to conduct an oral argument before the Alaska Court of Appeals before I returned to school. After law school, I started in the appellate section of the Agency, drafting appeals and representing parole clients. I then managed a trial case load in Anchorage and for St. Paul Island. During that time, I conducted trials in District and Superior Court.

Following the trial case load, I returned to the appellate section. As an attorney in the appellate section, I am responsible for drafting appeals and conducting oral argument before the Alaska Court of Appeals and the Alaska Supreme Court on all types of cases, including unclassified felonies. I also consult with trial attorneys on legal issues that arise during litigation and the Public Defender on pending legislation and other legal issues affecting the Agency. I have also trained and supervised legal interns and new attorneys hired to represent our parole clients. Additionally, I have assisted in planning the Public Defender Conference, developing and implementing a training session specifically designed for the Agency's new lawyers.

Additional Comments (Continued)

24. Please prepare a brief biographical statement (limited to 150 words) about your background, legal education, and legal experience. Your picture and a copy of this statement will be scanned and posted on the Council's website after the application deadline. In its Bar survey, the Council will invite attorneys to review the information if they wish to become more familiar with your background and experience. Use the form on the following page for your biographical statement. Please leave the box at the top empty. The Council will use this space for your scanned picture.

Biographical Statement

Name Quinlan Steiner

Position(s) for which you wish to be considered:

Alaska Public Defender

Date: May 31, 2005

I am years old, married, and a fourth-generation Alaskan. I received a B.A. in Business Administration from Seattle University in 1989. I received my J.D. from Northwestern School of Law of Lewis & Clark College in 1998. Prior to attending law school, I worked as a loan officer for the National Bank of Alaska in Juneau. I started with the Alaska Public Defender Agency as an intern during law school, conducting bail hearings, representing clients on parole and probation, and drafting appeals. I began working for the Agency after graduating from law school. I have managed a trial caseload in Anchorage and for St. Paul Island, trying cases in both District and Superior Court. I am currently working in the appellate unit. As an appellate attorney, I practice before the Alaska Court of Appeals and the Alaska Supreme Court.

Certification and Waiver

I hereby certify that, to the best of my knowledge, the information provided on this application is true and complete; and that I am a citizen of the United States and of the State, and will be eligible to be licensed to practice law in Alaska at the time of expected appointment (Ak. Const. Art IV; § 4).

I waive any privilege of confidentiality I may have with respect to information concerning my qualifications for judicial office that the Judicial Council may desire to obtain. I specifically authorize the Council to obtain and examine my personnel files from current and past employers, including all files maintained by the Alaska Court System, and to obtain information, records and documents regarding me from any credit reporting agency, any law enforcement agency, any bar association, any occupational licensing board, any educational institution, and any disciplinary body, including specifically the Alaska Bar Association and the Alaska Judicial Conduct Commission. I further authorize these institutions, organizations, and individuals, and any other institutions, organizations and individuals to make available to the Council all confidential and non-confidential documents, records and information concerning me that the Council may request.

Signature of Applicant

Quinlan Steiner
Typed Name

5.31.05
Date

Subscribed and sworn to before me this 31 day of May, 2005.

Notary Public, State of Alaska
My Commission expires: July 31 2008

CHERI C. BAIRD NOTARY PUBLIC STATE OF ALASKA

DAVID STEWART, JUDGE

Court of Appeals
State of Alaska

303 "K" STREET
ANCHORAGE, ALASKA
99501
907-264-0731

June 24, 2005

Larry Cohn
Executive Director
Alaska Judicial Council
1029 W. Third Ave., Suite 201
Anchorage, Alaska 99501-1969

RE: Quinlan Steiner

Dear Mr. Cohn:

I first met Quinlan Steiner when he was an intern with the Public Defender Agency. In the years since then, Mr. Steiner has continuously represented clients in the Court of Appeals. As a result, I am familiar with his work through the briefs that he has filed and through the cases in which he has participated in oral argument. I have also attended various administrative and committee meetings at which Mr. Steiner has represented the Public Defender Agency.

I draw several conclusions about Mr. Steiner from these contacts. The quality of his work is excellent. His briefs are well-written. His arguments are thorough, fair, and sound. He possesses outstanding judgment and first-rate legal skills. In short, he is a consummate professional.

I believe that Mr. Steiner's work has shown that he understands the subject matter that the Public Defender Agency handles. When this knowledge is combined with his financial experience, I have no doubt that Mr. Steiner has the skills to serve as the Public Defender. If I served on the Council, I would vote in favor of Mr. Steiner's candidacy. If the Council does refer Mr. Steiner to Governor Murkowski, please provide this letter to the Governor.

Regards,

David Stewart

13 September 2005

Larry Cohn
Executive Director
Alaska Judicial Council
1029 W.3rd Ave., Suite 201
Anchorage, AK 99501-1969

Re: Recommendation of Quinlan Steiner for Public Defender

Dear Mr. Cohn (and other members of the Judicial Council),

I submit this letter in support of Quinlan Steiner, who is seeking appointment to the post of Public Defender. I have, of course, the utmost respect and admiration for *all* of the candidates, three of whom I have had the pleasure of working with on an occasional to regular basis (Ms. Linda Wilson, Quinlan Steiner, and David Reineke). And, although each of the candidates for this position is extremely well-qualified and dedicated, I believe that Quinlan would be best-suited for this appointment.

I have spoken with Quinlan in the past with respect to various current legal issues (*e.g.*, *Blakely* and its impact upon Alaska's sentencing scheme). Quinlan is well-versed in the law and takes a very pragmatic, yet zealous and professional approach to its implementation.

I also have spoken with Quinlan concerning what appears to be the negative perception that some prosecutors and criminal defense attorneys have concerning the mission with which each practitioner is charged. Quinlan, however, appears to take no such view; he vigorously fights the good fight both intellectually and practically on behalf of his clients, all the while conducting himself with the highest degree of professionalism towards his colleagues across the aisle. These qualities have not gone unnoticed and as a result, I believe that if Quinlan were to be appointed as the next Public Defender, he would, by such example, foster even more professional good will between prosecutors and criminal defense lawyers.

Finally, no one who hasn't already held the position as Public Defender can walk right in and easily handle such a position.

Quinlan, nevertheless, is very intelligent and articulate, and his quiet resolve lends itself particularly well to quickly learning and excelling at all of the duties and responsibilities that accompany this highly important position within the criminal justice system.

In sum, all of the above referenced qualities, along with his obvious desire to do good, lead me to conclude that Quinlan is best-suited to be the next Public Defender. I have tremendous respect for him – and for all of the candidates – and trust he will be given the consideration he deserves. Thank you very much for your consideration.

Sincerely,

Ken Diemer
Assistant Attorney General, OSPA

October 11, 2005

Teri Cams
Senior Staff Associate
Alaska Judicial Council
1029 W. Third Avenue, Suite 201
Anchorage, Alaska 99501-1969

Re: Application of Quinlan Steiner for Public Defender

Dear Ms. Cams:

I received a letter from the Alaska Judicial Council asking me to provide a personal and professional reference for Quinlan Steiner and to comment on his qualifications for the position of Director of the Alaska Public Defender Agency. I am very pleased to do so.

In 1997 while still in law school, Quinlan was hired by then-Director John Salemi for a six-month internship in trial court and appeals. During his tenure, Quinlan distinguished himself by his work ethic, his exceptionally good judgment, and his tenacious advocacy on behalf of parolees and misdemeanor clients. He also excelled in appellate advocacy. Many Agency interns have written briefs that were filed in the Court of Appeals. But we were so impressed with Quinlan's abilities that he became the first (and only) intern allowed to argue a client's case before the Court of Appeals—and he won! He is also the only intern who was guaranteed a full-time position before he graduated and passed the Bar. Quinlan did return to the Agency the next year. Although he has had other employment offers during the ensuing years and will not, I suspect, be a "career public defender", he has remained solidly committed to the Agency's mission to provide high quality representation to indigent defendants in every area encompassed within the Agency's statute. Quinlan has practiced before the parole board, the trial courts, and the Court of Appeals and Supreme Courts. He has also worked on CINA cases. In short, Quinlan has experience in every facet of public defender work.

From his first days at the Agency, Quinlan has demonstrated the high degree of integrity that is essential for the Director of the Public Defender Agency. Quinlan believes in the legal and moral strength of the criminal justice system and that the legal system stands or falls on the adherence of the participants to highest ethical standards. He never deviates from those standards. He is scrupulously honest with the courts, opposing counsel, and his clients. Quinlan also has a well-deserved reputation for assuming responsibility and for reliably following through with his commitments. For example, I recently needed to get some temporary help with a number of cases that were ready for briefing at the same time. Although I was promised that someone could

be hired, I was told that the only individuals who were available had no appellate experience. When I told Quinlan of my problem, he promised he would take immediate, active efforts to find someone. Before the week was out, Quinlan delivered as promised. He sought out a bright and talented former Alaska Supreme Court law clerk who was looking for part-time work. She's proved to be a godsend. If my experience is any example, Quinlan will reestablish the crucial practice employed by former directors Brian Shortell and Dana Fabe of actively recruiting new, energetic legal talent from among the court's law clerks. Like Quinlan, these new lawyers come with an excitement for the job and new ways of looking at issues. Both the Agency and the clients will benefit from renewed vitality and commitment to defense work.

Over the past ten years as state revenues have contracted and the Agency caseload has expanded, the primary task for the Director—at least from October to May—has become to prepare the Agency's annual budget and defend it before the legislature. Most public defenders have little or no interest in accounting or finance. Quinlan is the only assistant public defender on staff who has a background in finance and who understands the budgetary process. (To my knowledge, he's the only assistant public defender who actually balances his checkbook!) In addition, Quinlan's extensive experience in defending his clients' legal issues in the appellate courts will be invaluable when performing the director's task of testifying before the legislature on the impact and constitutionality of proposed legislation. Quinlan is very adept at explaining his position and answering the most penetrating and confrontational questions without reacting negatively or losing his composure. He also handles "unfriendly" questions from the court without losing his sense of humor—a particularly desirable quality when testifying before the judiciary and finance committees.

Ideally, the Director of the Agency should be someone to whom staff attorneys can turn for assistance in analyzing issues and brainstorming trial strategy. Quinlan already occupies that position in the Agency. He has an excellent legal mind and extensive knowledge of criminal law and criminal procedures. He is known as having argued and won more appeals than any other lawyer in the office. Thus, he is the lawyer in the office to whom all public defenders and many private defense attorneys turn when they need help with their cases or when they need to analyze an ethical question. Quinlan's judgment and knowledge has qualified him to become part of the "brain trust," a group of experienced attorneys who meet with the Director on a discuss the Agency's policy and position on legal issues that arise. Quinlan's particular talent in that group is using his exceptionally sound judgment to point out the pros and cons of every position espoused in the debates. Quinlan is not only highly regarded and sought out by the older more experienced attorneys in the Agency, he is respected by the newer assistant public defenders. Several years ago, Quinlan approached another lawyer with the suggestion that they set up training sessions for new attorneys at the annual Public Defender conference. The two of them now annually train new attorneys in everything from jury void dire, to cross-examination, to closing arguments. In fact, Quinlan wrote the training manual. The training is extremely popular and evaluations of the course from the participants indicate that it is very helpful.

The most important qualification for a Director is the ability to lead the Agency's lawyers. Quinlan certainly has the legal experience to do so. He has been working at the Agency for eight years. Only one of the Directors with whom I have worked during my twenty-plus years at the Agency had more than eight years experience before being appointed. That person was Barbara Brink, who had practiced for approximately ten years. Quinlan also has the necessary legal skills for the job. He has practiced in both the trial court and the appellate court, and has a breadth of legal knowledge that has made him the resource for attorneys seeking legal advice and assistance with their cases. While Quinlan's supervisory experience since he joined the Agency has been limited to overseeing the work of the parole attorney and Agency interns, he did have prior supervisory experience before going to law school. More importantly, Agency directors traditionally have allowed staff attorneys to remain autonomous in their practice and have refrained from actively micromanaging their cases. In positions other than that of misdemeanor supervisor, the term "supervisor" is somewhat of a misnomer. A "supervisor" at the Agency primarily acts as a resource for the less experienced lawyers in their sections who are seeking advice on how to handle a particular matter and also distribute the section's workload. Thus, prior supervisory experience is not a particularly important attribute for a director and some previous directors have not had any at all.

The essential and nonnegotiable qualification for the Director's position is the ability to lead by example. Quinlan already does. He is one of the first lawyers to arrive in the morning and one of the last to leave at night. He carries a very heavy caseload and still volunteers to cover for absent co-workers and to take cases that no one else wants. He constantly thinks about what is good for the Agency and acts accordingly. One memorable example of this quality occurred when Quinlan learned that a skilled lawyer was going to quit because he was exhausted from doing a number of taxing trials. Quinlan believed that this lawyer's departure would be a great loss to the Agency and the clients. He voluntarily gave up his appeals position to the lawyer and returned to the trial court so that the lawyer could have a hiatus.

Quinlan will bring great energy, and new ideas to the job. I suspect that he will make some changes in Agency policies that will be welcomed by staff attorneys who want the Agency to be among the nation's best. He will set high standards for staff lawyers and, rightly, will hold them accountable to the courts, to their co-workers, and most importantly, to their clients. Quinlan is certainly exceptionally well-qualified to lead the Public Defender Agency, and I urge the Council to recommend him.

Sincerely

Margi A. Mock
Assistant Public Defender

October 11, 2005

Alaska Judicial Council
1029 W. Third Avenue, suite 20[illegible]
Anchorage, Alaska 99501-1969

Re: Quinlan Steiner's Qualifications for Director of the Public Defender Agency

Dear Council Members,

My name is Paul Malin. I began working as an Assistant Public Defender in 1984. I have worked with Quinlan Steiner since he began his internship here eight years ago. All the applicants for the Agency Director position are well qualified. However, of all the applicants, Quinlan is probably the least well known and has been a lawyer for the shortest time. Based upon my knowledge of Quinlan's work and personal skills, I feel that I have a firm basis of knowledge to evaluate his suitability for the Director's position. Because I believe that Quinlan is exceptionally well qualified to be the Agency Director, I urge you to forward his name to the Governor for consideration.

Quinlan's background is unique for a public defender. He received his Bachelor's Degree in Business Administration from Seattle University. This four-year degree focused on accounting, business strategy, marketing, finance, management and supervision. Quinlan also has real life business experience. While pursuing this degree, Quinlan was a partner in a deck building company. He managed the revenue and built the decks.

Following his graduation, Quinlan worked as a loan officer in the Juneau branch of the National Bank of Alaska. After a one year training program, Quinlan made commercial, consumer, and residential loans. He interviewed the loan applicants, evaluated their financial history and business plans, and determined whether the applicants were qualified for the loan. He approved loans up to his loan limit, and made recommendations to the branch manager for loans that exceeded his limit. When the manager was absent, Quinlan supervised a staff of six.

Quinlan then sought to incorporate his business skills with his love of the outdoors. He worked for Adventures and Delights, an Anchorage based outdoor adventure company operated out of a coffee shop across from the courthouse. This job piqued Quinlan's interest in becoming a public defender because it led to his acquaintance with Assistant Public Defender and Appellate Section Chief Margi Mock, a frequent visitor to the coffee shop. The more Quinlan got to know Margi, the more he became fascinated by her cases, the legal issues that they raised, and the creativity that a public defender must have to make these issues alive, compelling and persuasive. Consequently, Quinlan decided to go to law school for the sole purpose of becoming a public defender.

One of Quinlan's first assignments at the Agency was to handle the parole caseload, a position affectionately referred to as the "Parole Slave." This is a thankless job of representing defendants who have been released on mandatory parole but who have violated, often within days of their release, their parole conditions and therefore face serving their "good time" in jail. Quinlan quickly became known as the "Parole Guru" and was revered for his amazing success in persuading the Parole Board to let his people go. This success underscores Quinlan's exceptional diplomacy and negotiation skills, as the Board invariably rejects technical legal arguments.

As a member of the appellate section, I have proof read many of Quinlan's briefs and have attended his oral arguments. Quinlan is an accomplished appellate lawyer who excels at technical legal arguments. He is a "quick study" who can rapidly synthesize and distill the essence of a legal argument. He is a brilliant abstract thinker. His legal writing is clear, concise, and persuasive. These qualities have led other lawyers to bring Quinlan their most difficult, complex legal issues.

Quinlan is a born teacher as well. I have observed this skill over the past several years when Quinlan co-led the training sessions for the new lawyers at the annual Public Defender Training Conferences. Quinlan prepared the training manual and presented the material in an organized and understandable way. He has also co-taught (with Margi Mock) an undergraduate class in Criminal Law at the University of Alaska at Anchorage.

Quinlan also possesses sound, thoughtful and pragmatic judgment, both legally and politically. He displays a calm, objective, and usually unflappable demeanor, a characteristic that should be invaluable in dealing with the Legislature. Moreover, Quinlan's business background makes him uniquely well qualified to manage the Agency's budget. The combination of these three qualities – unusually strong analytical legal skills, sound political judgment, and a solid business acumen -- are rare and highly desirable for the Agency Director.

My observations of Quinlan would not be complete without mention of his ability to place the Agency's interests above his own interests. For example, Quinlan volunteered to assume a trial caseload in order to give a talented but burned out trial lawyer (Mike Deini) a much-deserved rest. Quinlan believed that the Agency would be hurt by Deini's departure and was willing to give up his beloved appellate position to keep him.

Quinlan demonstrated his ability to place the needs of others above his own needs this winter when the administrative section moved to the appellate section's floor. Because the administrative section wanted to keep all their members in a contiguous unit, I was directed to move to an office in the southern part of the floor. I was not happy with this prospect because I do not tolerate heat well, and my office was north facing and cool. Quinlan's office was next to mine, and was also cool. Even though he also preferred a cool office, he unselfishly volunteered to give me his office and take the south facing, hotter office (which was also by the lunchroom, making it noisier) because he knew how uncomfortable I would be.

In sum, even though Quinlan has not practiced law as long as the other applicants, he has the maturity, legal skills and political savvy of a much more experienced lawyer. More importantly, he possesses the passion, enthusiasm, and creativity to lead the next generation of public defenders. Please allow the Governor to consider his application.

Sincerely,

Paul E. Malin

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARK EDWARDS,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A- 8507

Trial Court No. 3AN-S99-1269CR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT
HONORABLE ELAINE ANDREWS, JUDGE

OPENING BRIEF OF APPELLANT

PUBLIC DEFENDER AGENCY

BARBARA K. BRINK (82-06009)
PUBLIC DEFENDER

Quinlan Steiner (93-11057)
Assistant Public Defender
900 West 5th Avenue, Suite 200
Anchorage, Alaska 99501
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VRA CERTIFICATION AND APP. R. 513.5 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. I further certify, pursuant to App. R. 513.5, that the font used in this document is Univers 12.5 point.

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STATEMENT OF THE CASE

Police officers responded to the home of M.E. after receiving a welfare call indicating that M.E. failed to report for work. [Tr. 758] Responding officers found M.E. and her friend, M.C., dead at the scene from gunshot wounds. [Tr. 285-290] Mark Edwards, M.E.'s ex-husband, was also found at the scene with a gun shot wound to the head. [Tr. 238-290] Officers found a .22 caliber Derringer pistol on the floor of the room in which Edwards and M.E. were located. [Tr. 290] Officers later found nine .22 caliber bullets in Edwards's pants pocket when the pants were processed into evidence. [Tr. 857]

Although Edwards suffered permanent brain damage and total blindness as a result of the gunshot wound, the trial court found him competent to stand trial. [R. 1829] Mark Edwards was subsequently indicted on two charges of first-degree murder. [Exc. 1-2; R. 1982-83] The state pursued the indictment under the theory that Edwards shot M.E. and M.C., then shot himself in retaliation for a domestic violence protective order obtained by M.E. against Edwards shortly before the homicide. [Exc. 90; G.J. 7-8] The state supported its request for a true bill with a single witness, Detective Branchflower. [Exc. 90-95; G.J. 9-29]

Edwards filed a motion to dismiss the indictment arguing that the indictment rested entirely upon improperly admitted hearsay evidence. [Exc. 3-14; R. 1713-29] Edwards also filed a motion to suppress the bullets found in his pants pocket arguing that they had been obtained through an illegal warrantless search. [Exc. 15-20; R.1732-37] The trial court denied Edwards's motions. [Exc. 58-82; R. 1646-1678]

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in failing to dismiss the indictment where the state obtained a true bill based upon the uncorroborated and improperly introduced hearsay testimony of a single witness?

2. Did the trial court err in failing to suppress evidence obtained from an illegal warrantless search of Edwards's pants pocket?

Edwards was convicted at trial and received a sentence of ninety-six years to serve. [Exc. 83-87; R. 1977-1981] This appeal follows.

ARGUMENT

I. THE GRAND JURY'S VERDICT RESTS ENTIRELY UPON IMPROPERLY ADMITTED HEARSAY EVIDENCE

A. Introduction

No person shall be held to answer for a felony offense without the support of a grand jury indictment.[1] "[T]o obtain an indictment, the State must prove to the grand jury 'that the evidence ... establishe[s] a probability of [the defendant's] guilt.'"[2] The Alaska Supreme Court has stated that this determination should be a reliable one.[3] Hearsay evidence that is inadmissible at trial is, therefore, only admissible before the grand jury under certain limited circumstances.[4]

The rationale for limiting hearsay testimony is based upon the view that a reliable determination of probable guilt is required "before the accused suffers any of the grave inconveniences which are apt to ensue upon the return of a felony indictment."[5] As the Alaska Supreme Court has stated, "[t]his can best be guaranteed when witnesses against the accused appear in person before the grand

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1 The Constitution of the State of Alaska, Article I, section 8.

2 State v. Ladd, 951 P.2d 1220, 1222-23 (Alaska App. 1998) (citations omitted).

3 State v. Gieffels, 554 P.2d 460, 465 (Alaska 1976).

4 Alaska Rule of Criminal Procedure 6(r)(1), (2), (3), & (6).

5 Gieffels, 554 P.2d at 465.

jury so that the panel can view their demeanor and subject them to cross-examination."[6] The Alaska Supreme Court has warned that "hearsay evidence, if unchecked, would erode the protective value of the grand jury so as to make it nothing more than an administrative arm of the district attorney's office."[7]

B. The State Improperly Introduced The Firearm And Toolmark Expert's Opinion Through Detective Branchflower

To strengthen the protective value of the grand jury, Alaska Rule of Criminal Procedure 6(r)(1) states that hearsay evidence is inadmissible before the grand jury absent a "compelling justification" that is stated on the record. The time and expense of presenting an expert to the grand jury may be a sufficiently compelling justification for presenting the expert's opinion through hearsay testimony if the opinion is based on "accepted scientific procedures that yield objective results."[8] If an expert's opinion, however, is "subjectively based or depend[s] on procedures the reliability of which has not been established," the time and expense of presenting the expert to the grand jury will not be a sufficiently compelling justification.[9]

Appellate courts in Alaska have held that drug testing results are objectively based on accepted scientific procedures and that the technician who

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6 Id.

7 Id.

8 Ingram v. State, 703 P.2d 415, 432 (Alaska App. 1985).

9 Id.

performs a drug test is not required to testify before the grand jury.[10] In so holding, the Alaska Supreme Court has reasoned that the competence of the technician and the reliability of the test would not likely be tested by vigorous cross-examination and that "the technician could do no more that affirm that he did perform the test reported, and that those tests did indicate the presence of a narcotic substance."[11]

Conversely, appellate courts in Alaska have held that the conclusions of handwriting experts and treating physicians are not excluded from the requirement that they testify.[12] In Metler v. State, for example, the state secured an indictment using hearsay testimony concerning the opinions of two handwriting experts. The state did not present a report from either expert or provide any information concerning their professional credibility. According to the Alaska Supreme Court, the method of proof employed by the state failed to provide a basis for showing the grand jury how the experts' reached their conclusions or for presuming that the comparisons were performed and reported accurately.[13] The

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10 McKinnon v. State, 526 P.2d 18, 27-28 (Alaska 1974) (Holding that the laboratory analysis of cocaine was properly admitted through the hearsay testimony of a police officer.); Ingram v. State, 703 P.2d 415, 432 (Alaska App. 1985) (Holding that the chemical analysis of LSD was properly admitted through the hearsay testimony of an investigating officer.).

11 McKinnon, 526 P.2d at 27-28.

12 Adams v. State, 598 P.2d 503, 508 (Alaska 1979) (hearsay evidence concerning treating physician's opinion of victim's medical condition inadmissible before the grand jury without a showing of compelling justification); Metler v. State, 581 P.2d 669, 673-74 (Alaska 1978) (hearsay testimony concerning the results of handwriting analysis inadmissible before the grand jury absent a showing of credibility and reliability).

13 Metler, 581 P.2d at 674.

court ultimately held that the state had failed to establish the reliability of the handwriting expert's opinion.[14]

Although the court's decision in Metler appears at first blush to turn on the state's failure to present a report to the grand jury, as this court's decision in Ingram v. State[15] indicates, such a limited reading of Metler would fail to account for the continued applicability of the "compelling justification" requirement. In Ingram, the defendant argued that the Alaska Supreme Court's earlier decision in McKinnon v. State,[16] which held that the state was not required to present a technician who performs a drug test to the grand jury, had been subsequently overruled by cases requiring the state to present handwriting experts and treating physicians to the grand jury. This court, however held that McKinnon was still good law.[17] In so holding, this court stated that later cases simply distinguished between two classes of expert opinions: subjectively based and objectively based.[18] Thus, Ingram reiterates the necessity for a compelling justification when introducing an expert's subjective opinion through hearsay regardless of whether the hearsay method is in the form of a report, live testimony, or both.

In the present case, the trial court concluded that Robert Shem, the

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14 Id.

15 703 P.2d 415 (Alaska App. 1985).

16 Supra, n. 10.

17 Ingram, 703 P.2d at 432.

18 Id.

firearm and toolmark expert, issued a report that was "an expert opinion based on accepted scientific procedures that yield objective results" similar to drug testing results. [Exc. 75; R. 1666] The court reasoned that toolmark identification was based upon viewing tool marks that are objectively visible. [Exc. 75; R. 1666] The court further reasoned that because Shem's report was submitted to the grand jury, they were allowed to examine it for themselves. [Exc. 76; R. 1667] The court, therefore, concluded that Shem's testimony would not have added to the proceedings and his opinion, introduced through a written report and Branchflower's testimony, was not improperly presented to the grand jury. [Exc. 75-76; R. 1666-67]

The art of toolmark identification is, however, subjective and not objective. Toolmark identification typically involves microscopic examination of toolmarks to determine if the toolmarks have a sufficient number of microscopic features of sufficient clarity and definition for identification.[19] Identification is possible when unique surface contours are compared and are found to be in "sufficient agreement."[20] Sufficient agreement means that "the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so

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19 Alfred A. Biasotti & John Murdock, The Scientific Basis Of Firearms And Toolmark Identification, § 29-2.2 at 502, in Modern Scientific Evidence: The Law And Science Of Expert Testimony (David L. Faigman, David H. Kaye, Michael J. Saks, & Joseph Sanders eds., 2002).

20 Id. at 504-05 (citing Theory Of Identification, Range of Striae Comparison Reports, and Modified Glossary Definition—An AFTE Criteria for Identification Committee Report, 24 Ass'n Firearm & Toolmark Examiners J. 336 (1992)).

remote as to be considered a practical impossibility."[21] The Association of Firearm and Toolmark Examiners recognizes that this process is "subjective in nature, founded on scientific principles and based on the examiner's training and experience."[22] At least one published expert has noted that "it would be the 'art' of the experienced examiners that would be the basis" for a quantifiable model, not the science, even if this process could be objectively quantified.[23]

In contrast to drug testing, firearm and toolmark identification does not involve a test result which once obtained could be confirmed by a technician or simply communicated by report. The analysis performed by a firearm and toolmark examiner is similar to comparing handwriting samples and involves the judgment of an expert who has sufficient training, experience, and skill. Artful decisions must be made at each step of the process, including what types of marks to look for, what marks are sufficiently definite and clear to form a basis for identification, and whether the compared surfaces are in "sufficient agreement" as to exclude other tools, rendering misidentification a practical impossibility.

Although Shem's report was presented to the grand jury, the subjective nature of firearm and toolmark identification renders this method of proof unreliable and insufficient. Shem's report consisted of a single page that merely listed the items submitted and Shem's opinion. [Exc. 83] Moreover, Shem's report is

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21 Id.

22 Id.

23 Id. at 508 (quoting John E. Davis (author of An Introduction To Tool Marks, Firearms and the Striagraph (1958)) in a letter to John Murdock).

misleading because it reports his subjective opinion under the heading "Results." [Exc. 88] Shem's opinion is, however, not the result of a test; it is an opinion based upon his subjective judgment. Moreover, the report does not provide the grand jury with any information from which it could evaluate how Shem formed his opinion, whether he performed his analysis according to established and reliable procedures, or whether he was a qualified or credible expert.[24]

C. The State Improperly Relied on Detective Branchflower's Testimony Concerning The Investigation And The Scene Of The Crime.

As previously noted, Alaska Rule of Criminal Procedure 6(r)(1) states that hearsay evidence is inadmissible before the grand jury absent a "compelling justification." Rule 6(r) does permit otherwise inadmissible hearsay evidence to be presented to the grand jury if the evidence fits within an enumerated exception. One exception permits a police officer involved in an investigation to repeat the statements and observations of another officer if additional evidence is introduced to corroborate the statement.[25]

No reported opinions from Alaska's appellate courts have grappled with the extent to which hearsay testimony may be used under this exception or the level of corroboration required to permit its use. A legislative statement of findings and purpose for the rule provides some guidance, however. The 1994 legislature stated that the rule permitting police officer hearsay was enacted "to allow the grand jury to be fully informed about the evidence available on a criminal case through testimony

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24 See Ingram, 703 P.2d at 432.

25 Alaska Rule of Criminal Procedure 6(r)(3).

of lead peace officers, while allowing officers who played a minor role in the investigation not to personally appear and testify so that they can continue to perform their vital duties on the st_et to protect the public."[26]

One prior unreported opinion of this court does address of the level of corroboration required to justify the admission of police officer hearsay. In Wilson v. State,[27] the state established the location of a homicide victim's body through the hearsay testimony of an investigating officer. According to this court, the hearsay testimony concerning the location of the victim's body was properly admitted because photographs of the scene identified by the testifying detective corroborated his statement.[28]

In the present case, every material aspect of the state's case was introduced through Branchflower's hearsay testimony. Branchflower apparently did not investigate the scene of the homicide. [Tr.66] Branchflower, however, testified about both the report that lead officers to the scene and the responding officers' observations of the scene without stating the basis for her testimony. [Exc. 91-94; G.J. 11-14, 20-21, 24] Branchflower told the jury about a phone message from Edwards to M.E., but did not state who listened to the message or who wrote it down; she stated "I think they listened to the message." [Exc. 93; G.J. 20-21] The only observations of the scene that Branchflower testified to and also stated the

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26 Alaska S.L.A. 1994, ch. 114, sec. 1: Findings and Purpose.

27 Wilson v. State, 1998 WL 254000 (Alaska App. May 20, 1998).

28 Id. at 2.

basis for were those of Lieutenant Gifford, the crime scene reconstruction and blood spatter expert. [Exc. 92-93; G.J. 14-18]

Branchflower's testimony included a hearsay account of the location of the Derringer, bullets, and expended shells found at the scene. [Exc. 92-93; G.J. 14-18] Her testimony also included a statement from an unnamed source indicating that nine bullets were found in Edwards's pocket. [Exc. 95; G.J. 26] The state introduced photographs of the scene through Branchflower without any statement indicating who took the photographs, when the photographs were taken, or whether the photographs accurately represented the scene or the evidence. [Exc. 93-94; G.J. 21-23] The only evidence provided to the grand jury that was not improperly admitted was Branchflower's testimony that she searched Edwards's residence and found an empty box of .22 caliber bullets and the sheath to a knife several, and photographs that she had taken at Edwards's residence. [Exc. 95; G.J. 27-28]

Branchflower's non-hearsay testimony, however, did not corroborate the hearsay testimony. The fact that Branchflower observed an empty box of .22 caliber ammunition does not corroborate the number of bullets found at the scene or the existence of a gun with a discharged shell. It merely shows that Edwards had an empty box of the most common type of ammunition sold in the United States in the most common quantity available. [Tr. 1862, 1878] Branchflower's observation of a knife sheath at Edward's residence, again, fails to corroborate any observation of the scene upon which the grand jury's verdict rested. The fact that a filet knife was found at the scene that could possibly fit a sheath found at Edwards's residence is not surprising and does not establish that Edwards's shot M.C. and M.E.

This court's unpublished opinion in Wilson appears to indicate that the existence of photographs would serve to corroborate Branchflower's testimony. Unlike Wilson, however, the photographs introduced through Branchflower were not properly identified and can not reliably corroborate her testimony. Photographs are inadmissible at trial unless they are properly authenticated.[29] Here, the state introduced photographs through Branchflower, but there is no basis for concluding that the photographs are a faithful representation of what they purport to depict. Branchflower does not indicate who took the pictures, when the pictures were taken, or whether they are an accurate representation of the scene and evidence.

The state's presentation of the evidence to the grand jury violated the plain language of Rule 6(r)(3) and the intent of the legislature. The state presented its entire case using the uncorroborated hearsay testimony of an officer who, though involved in the investigation, played only a minor role in the investigation. This reliance on hearsay evidence has eliminated any protection provided by the grand jury process and should not be countenanced here.

D. The Indictment Must Be Dismissed Because It Rests Entirely Upon Improperly Admitted Evidence

"In deciding whether the presentation of improper evidence requires dismissal of the indictment, it is first necessary to decide whether there is sufficient

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29 Sheakley v. State, 644 P.2d 864, 870 (Alaska App. 1982) (stating that "[t]his court has held that a photograph is admissible in evidence in the discretion of the trial judge, as an aid to the court or jury, after it has been shown to be a faithful representation of whatever it purports to depict.")

admissible evidence to support the indictment."[30] If there is insufficient admissible evidence remaining, the indictment must be dismissed.[31] If, however, there is sufficient admissible evidence then it is necessary to evaluate the challenged evidence to determine whether it "appreciably affect[ed] the outcome of the grand jury's deliberations."[32]

In the present case, the material facts upon which the grand jury's verdict rested were all improperly presented through hearsay testimony. Branchflower testified that when police arrived at M.E.'s residence they kicked in the door because the key provided by a friend of M.E.'s would not unlock the deadbolt. [Exc. 91; G.J. 12-13] This evidence supported the inference that whoever committed the crime was still in the house. Branchflower testified that Edwards, M.E., and M.C. appeared to have been shot with a gun that was found on the floor near where Edwards was shot. [Exc. 92-93; G.J. 14-18] Branchflower testified that one empty shell casing was found in the .22 caliber derringer, that two empty .22 caliber shell casings were found on the floor, and that nine .22 caliber rounds were found in Edward's pants pocket. [Exc. 94; G.J. 24] This evidence supported the inference that Edwards shot M.C. and M.E., them reloaded the gun and shot himself.

The opinions of the state's experts provided critical support for the lin

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30 Newman v. State, 655 P.2d 1302, 1306 (Alaska App. 1982)

31 See Id.

32 Oxereok v. State, 611 P.2d 913, 916 (Alaska 1980).

between the evidence located at the scene and the grand jury's verdict.[33] Branchflower testified that Gifford concluded that "the subject shot the victim while she was in bed" and then the "suspect shot himself" and laid on the floor. [Exc. 92; G.J. 16] And Shem's report indicated that the ammunition at the scene was the same type of ammunition as the ammunition box found in Edward's residence. [Exc. 95; G.J. 28] Shem's report also indicated that the three expended shell casings had been fired from the derringer found at the scene. [Exc. 94; G.J. 25] This evidence endorsed the state's conclusion that Edward's perpetrated the homicide.

Without the improperly presented hearsay evidence, the state's presentation to the grand jury is insufficient to support the indictment. Alternatively, if this court concludes that the testimony concerning observations of the scene made by other police officers was properly admitted, the improper testimony concerning the expert opinions of Gifford and Shem appreciably affected the grand jury's deliberations.

The evidence based upon Gifford's and Shem's report provided the grand jury with information that must have overwhelmed the deliberations. The state's experts concluded that the gun and bullets found near Edwards were used by Edwards to commit the homicide and then to attempt suicide. Branchflower communicated these conclusions without explanation and without an opportunity for the grand jury to inquire into the basis for these conclusions. This testimony was sufficiently powerful that the jury likely abandoned its role of fact-finder in favor of the

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33 The trial court previously found that Lieutenant Gifford's report and

requirement of the Fourth Amendment."[38] Inventory searches may be considered reasonable and constitutional if they are conducted in accordance with the standard procedures of the agency conducting the search.[39] An inventory search of closed, locked or sealed luggage, containers or packages, however, is not within the scope of a reasonable warrantless inventory search.[40]

As constitutionally protected zones, the prohibition on closed container inventory searches extends to clothing pockets.[41] According to the California Court of Appeals:

> Although the foregoing decisions have come to be known as "closed container" cases, it is of no help to us in our analysis to note that a vest pocket, unlike a lunch box, has no lid or, like a tote bag, cannot be locked. ... If a person were to be handed an article which he intended to keep safe from theft or secure from prying eyes, that person would almost certainly place the article in his pocket. No more reprehensible petty thief can be found than a pickpocket, not because he steals, but because he does so by intruding into an area where his victim most wishes to remain secure. We find that a vest pocket is a protected receptacle of personal effects and may not be searched

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38 D'Antonio v. State, 926 P.2d 1158, 1162 (Alaska 1996)(citing Colorado v. Bertine, 479 U.S. 367, 373, 107 S.Ct. 738, 741-42, 93 L.Ed.2d 739 (1987)).

39 State v. Daniel, 589 P.2d 408, 417 (Alaska 1979); Florida v. Wells, 495 U.S. 1, 3-4, 110 S.Ct. 1632, 1634-35, 109 L.Ed.2d 1 (1990).

40 D'Antonio, 926 P.2d 1158, 1162 n. 5 (Alaska 1996)(citing Daniel, 589 P.2d at 417-18).

41 See Sibron v. New York, 392 U.S. 40, 65, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968) (holding that an officer's decision to invade a pocket was not permissible under the circumstances); State v. Gray, 793 P.2d 346, 350 (Alaska App. 1990)(holding that the emptying a suspect's pocket must be constitutionally justified).

except as permitted by the Fourth Amendment.[42]

The Ninth Circuit has also recognized that pockets are analagous to closed containers. In United States v. Ramos-Oseguera,[43] the police inventoried the defendant's car after arresting the defendant. The police searched the pockets of a pair of jeans found in the vehicle and discovered heroin. Police department policy required that all visible property be booked and inventoried for safekeeping. Judge Boocheever, writing for the Ninth Circuit, noted that the applicable procedures did not specifically provide authority for looking inside containers to find valuable property.[44] The court accordingly held that the search violated the Fourth Amendment.[45]

In the present case, Officer Soto received Edward's pants from a hospital employee who indicated that the pants were provided to Soto as part of hospital procedure. [Exc. 98: Tr. 20-21, 26] Soto took possession of the pants intending to place them in "property and evidence" as a piece of evidence in the case. [Exc. 98, 105; Tr. 26, 54] Soto stated that he was required to separate multiple items, tag them, and put them in lockers. [Exc. 98; Tr. 28-29] Soto also stated that he had to do an inventory of every item and "check of all the, basically, pockets or anything that I, you know, basically, find, basically separate every item

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42 People v. George, 168 Cal.Rptr. 44 (Cal.App. 1980).

43 120 F.3d 1028 (9th Cir. 1997) (overruled on other grounds).

44 Id. at 1036.

45 Id.

that I can find." [Exc. 98; Tr 29] Soto further stated that this was the department policy. [Exc. 98; Tr. 29] Soto testified that he "processed the evidence as I was trained." [Exc. 99; Tr. 30] Soto found bullets and a BIC lighter. [Exc. 99; Tr. 30]

On cross-examination, Soto was asked specifically whether he was instructed on the procedure for taking the pants into evidence or whether he made the decisions on his own. [Exc. 101; Tr. 39] Soto responded:

> No, sir. Well, basically, it goes – you know, we learned this on training and also, basically, the procedures I learned also in training. And it's before this day and after this day, we basically, contu – basically, continue doing the same procedure. And we had done this prior to this day as well. [Exc. 101; Tr. 39]

Then when immediately asked whether that meant that he made the decisions on his own, Soto responded: "Based on that procedure because I know it's–it's basically policy and procedures, yes, I – I do it that way." [Exc. 101; Tr. 39]

The trial court recognized that the warrantless inventory search of closed containers in unreasonable and unconstitutional. [Exc. 64; R. 1655] The court also recognized that the routine emptying of a defendant's pockets upon arrival at a pretrial detention center has been held unconstitutional. [Exc. 64; R. 1655] The court, however, stated that a search of pants pockets is less intrusive than a search of a closed container. [Exc. 65; R. 1656] The court found that Soto testified he was "required to do an inventory of the evidence, that he was required to check the pockets, and separate every item found." [Exc. 66; R 1657] According to the court, Soto had the right to "lift and move the evidence in order to book it into the evidence room." [Exc. 66; R. 1657]

The trial court's decision, however, was error. Soto did not testify that he was required to remove the items from pockets as a matter of established procedure. A closer reading of Soto's testimony reveals that Soto did not articulate any standard procedure. Soto merely stated that he needed to separate multiple items to tag them separately into evidence and had done it that way in the past. When asked specifically whether he was told to search pockets as part of the procedure of logging items into evidence or whether he made the decision on his own Soto did not specifically answer the question. Accordingly, the evidence does not support the trial court's conclusion that Soto was following an established inventory procedure.

Even if Soto was following established procedures, opening the pocket was an unreasonable procedure for logging inventory. In Daniel v. State,[46] police officers who were lawfully impounding a vehicle found a briefcase in the back seat that had open latches. The officers opened the briefcase and found contraband. The Alaska Supreme Court concluded that no principled distinction between locked and unlocked containers could be drawn.[47] The court held that "it is sufficient, for routine inventory purposes, that the officer merely list the item as a closed or locked footlocker, briefcase, package, or container and, if deemed necessary remove the same for safekeeping."[48] Soto had lawful possession of the pants and could have

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46 Daniel v. State, 589 P.2d 408 (Alaska 1979).

47 Id. at 417.

48 Id. at 418.

similarly taken them into evidence for safekeeping without violating the pockets.

Additionally, the search was impermissible because Soto was not conducting an inventory search, he was tagging evidence. In Newhall v. State,[49] a trooper obtained a search warrant to open a package that he suspected contained alcohol being shipped in violation of a local option law. The trooper opened the package and then opened a second package that he found inside the suspect package. The trooper, however, knew that the second package did not contain alcohol. This court held that the trooper was not permitted to search the second package without a warrant, even if he had abundant probable cause.[50] The court further held that with probable cause the police are permitted only to seize a closed container while they apply for a search warrant.[51]

Here, Soto had possession of pants and could have simply applied for a warrant if he wanted to inspect the interior of the pockets. Although Soto claimed that he had no reason to believe that there was evidence in the pockets, his stated purpose for inspecting the pocket was to take the pants into custody as evidence of a crime and separate items so that they would become "separate property evidence item[s]" [Exc. 98, 105; Tr. 28, 54] Soto's search can not be rendered permissible simply because he stated that he did not have an investigative purpose or by

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49 Newhall v. State, 843 P.2d 1254 (Alaska App. 1992).

50 Id. at 1257.

51 Id. at 1258.

labeling the search an inventory search.[52]

B. Introduction At Trial Of The Illegally Obtained Bullets Was Not Harmless Beyond A Reasonable Doubt

The admission of evidence obtained in violation of a defendant's constitutional rights requires reversing the conviction unless introduction of the evidence was harmless beyond a reasonable doubt.[53]

In the present case, the state pursued a conviction under the theory that Edwards shot M.E. and M.C. then shot himself. [Tr. 258-59] The state presented expert testimony attempting to establish that Edwards's injuries were self-inflicted. [Tr. 509-10] This evidence, however, was not conclusive on the issue. [Tr. 593-94] The strongest evidence indicating that Edwards committed the homicides and then shot himself was the bullets that were found in his pocket. [Tr. 857] Without this evidence, the state had no direct physical evidence tying Edwards to the bullets used in the homicide. This evidence substantially undermined the defense theory that Edwards was shot by an intruder who had shot M.C. and M.E. [Tr. 2022] Accordingly, it can not be said that introduction of this evidence was harmless beyond a reasonable doubt.

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52 C.f. State v. Grav, 798 P.2d 346, 350 (Alaska App. 1990). (holding that the routine emptying of an arrestee's pockets cannot be justified merely by labeling the procedure a "patdown").

53 Ingram v. State, 703 P.2d 415, 429 (Alaska App. 1985).

CONCLUSION

For the reasons stated above, this court must reverse Edwards's conviction and grant him a new trial.

DATED at Anchorage, Alaska on June _____, 2004.

PUBLIC DEFENDER AGENCY

BY: _____
QUINLAN STEINER (98-11057)
ASSISTANT PUBLIC DEFENDER

Edwards was convicted at trial and received a sentence of ninety-six years to serve. [Exc. 83-87; R. 1977-1981] This appeal follows.

ARGUMENT

I. THE GRAND JURY'S VERDICT RESTS ENTIRELY UPON IMPROPERLY ADMITTED HEARSAY EVIDENCE

A. Introduction

No person shall be held to answer for a felony offense without the support of a grand jury indictment.[1] "[T]o obtain an indictment, the State must prove to the grand jury 'that the evidence ... establishe[s] a probability of [the defendant's] guilt.'"[2] The Alaska Supreme Court has stated that this determination should be a reliable one.[3] Hearsay evidence that is inadmissible at trial is, therefore, only admissible before the grand jury under certain limited circumstances.[4]

The rationale for limiting hearsay testimony is based upon the view that a reliable determination of probable guilt is required "before the accused suffers any of the grave inconveniences which are apt to ensue upon the return of a felony indictment."[5] As the Alaska Supreme Court has stated, "[t]his can best be guaranteed when witnesses against the accused appear in person before the grand

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1 The Constitution of the State of Alaska, Article I, section 8.

2 State v. Ladd, 951 P.2d 1220, 1222-23 (Alaska App. 1998) (citations omitted).

3 State v. Gieffels, 554 P.2d 460, 465 (Alaska 1976).

4 Alaska Rule of Criminal Procedure 6(r)(1), (2), (3), & (6).

5 Gieffels, 554 P.2d at 465.

jury so that the panel can view their demeanor and subject them to cross-examination."[6] The Alaska Supreme Court has warned that "hearsay evidence, if unchecked, would erode the protective value of the grand jury so as to make it nothing more than an administrative arm of the district attorney's office."[7]

B. The State Improperly Introduced The Firearm And Toolmark Expert's Opinion Through Detective Branchflower

To strengthen the protective value of the grand jury, Alaska Rule of Criminal Procedure 6(r)(1) states that hearsay evidence is inadmissible before the grand jury absent a "compelling justification" that is stated on the record. The time and expense of presenting an expert to the grand jury may be a sufficiently compelling justification for presenting the expert's opinion through hearsay testimony if the opinion is based on "accepted scientific procedures that yield objective results."[8] If an expert's opinion, however, is "subjectively based or depend[s] on procedures the reliability of which has not been established," the time and expense of presenting the expert to the grand jury will not be a sufficiently compelling justification.[9]

Appellate courts in Alaska have held that drug testing results are objectively based on accepted scientific procedures and that the technician who

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6 Id.

7 Id.

8 Ingram v. State, 703 P.2d 415, 432 (Alaska App. 1985).

9 Id.

performs a drug test is not required to testify before the grand jury.[10] In so holding, the Alaska Supreme Court has reasoned that the competence of the technician and the reliability of the test would not likely be tested by vigorous cross-examination and that "the technician could do no more that affirm that he did perform the test reported, and that those tests did indicate the presence of a narcotic substance."[11]

Conversely, appellate courts in Alaska have held that the conclusions of handwriting experts and treating physicians are not excluded from the requirement that they testify.[12] In Metler v. State, for example, the state secured an indictment using hearsay testimony concerning the opinions of two handwriting experts. The state did not present a report from either expert or provide any information concerning their professional credibility. According to the Alaska Supreme Court, the method of proof employed by the state failed to provide a basis for showing the grand jury how the experts' reached their conclusions or for presuming that the comparisons were performed and reported accurately.[13] The

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10 McKinnon v. State, 526 P.2d 18, 27-28 (Alaska 1974) (Holding that the laboratory analysis of cocaine was properly admitted through the hearsay testimony of a police officer.); Ingram v. State, 703 P.2d 415, 432 (Alaska App. 1985) (Holding that the chemical analysis of LSD was properly admitted through the hearsay testimony of an investigating officer.).

11 McKinnon, 526 P.2d at 27-28.

12 Adams v. State, 598 P.2d 503, 508 (Alaska 1979) (hearsay evidence concerning treating physician's opinion of victim's medical condition inadmissible before the grand jury without a showing of compelling justification); Metler v. State, 581 P.2d 669, 673-74 (Alaska 1978) (hearsay testimony concerning the results of handwriting analysis inadmissible before the grand jury absent a showing of credibility and reliability).

13 Metler, 581 P.2d at 674.

court ultimately held that the state had failed to establish the reliability of the handwriting expert's opinion.[14]

Although the court's decision in Metler appears at first blush to turn on the state's failure to present a report to the grand jury, as this court's decision in Ingram v. State[15] indicates, such a limited reading of Metler would fail to account for the continued applicability of the "compelling justification" requirement. In Ingram, the defendant argued that the Alaska Supreme Court's earlier decision in McKinnon v. State,[16] which held that the state was not required to present a technician who performs a drug test to the grand jury, had been subsequently overruled by cases requiring the state to present handwriting experts and treating physicians to the grand jury. This court, however, held that McKinnon was still good law.[17] In so holding, this court stated that later cases simply distinguished between two classes of expert opinions: subjectively based and objectively based.[18] Thus, Ingram reiterates the necessity for a compelling justification when introducing an expert's subjective opinion through hearsay regardless of whether the hearsay method is in the form of a report, live testimony, or both.

In the present case, the trial court concluded that Robert Shem, the

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14 Id.

15 703 P.2d 415 (Alaska App. 1985).

16 Supra, n. 10.

17 Ingram, 703 P.2d at 432.

18 Id.

firearm and toolmark expert, issued a report that was "an expert opinion based on accepted scientific procedures that yield objective results" similar to drug testing results. [Exc. 75; R. 1666] The court reasoned that toolmark identification was based upon viewing tool marks that are objectively visible. [Exc. 75; R. 1666] The court further reasoned that because Shem's report was submitted to the grand jury, they were allowed to examine it for themselves. [Exc 76; R. 1667] The court, therefore, concluded that Shem's testimony would not have added to the proceedings and his opinion, introduced through a written report and Branchflower's testimony, was not improperly presented to the grand jury. [Exc. 75-76; R. 1666-67]

The art of toolmark identification is, however, subjective and not objective. Toolmark identification typically involves microscopic examination of toolmarks to determine if the toolmarks have a sufficient number of microscopic features of sufficient clarity and definition for identification.[19] Identification is possible when unique surface contours are compared and are found to be in "sufficient agreement."[20] Sufficient agreement means that "the agreement is of a quantity and quality that the likelihood another tool could have made the mark is so

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19 Alfred A. Biasotti & John Murdock, The Scientific Basis Of Firearms And Toolmark Identification, § 29-2.2 at 502, in Modern Scientific Evidence: The Law And Science Of Expert Testimony (David L. Faigman, David H. Kaye, Michael J. Saks, & Joseph Sanders eds., 2002).

20 Id. at 504-05 (citing Theory Of Identification, Range of Striae Comparison Reports, and Modified Glossary Definition—An AFTE Criteria for Identification Committee Report, 24 Ass'n Firearm & Toolmark Examiners J. 336 (1992)).

remote as to be considered a practical impossibility."[21] The Association of Firearm and Toolmark Examiners recognizes that this process is "subjective in nature, founded on scientific principles and based on the examiner's training and experience."[22] At least one published expert has noted that "it would be the 'art' of the experienced examiners that would be the basis" for a quantifiable model, not the science, even if this process could be objectively quantified.[23]

In contrast to drug testing, firearm and toolmark identification does not involve a test result which once obtained could be confirmed by a technician or simply communicated by report. The analysis performed by a firearm and toolmark examiner is similar to comparing handwriting samples and involves the judgment of an expert who has sufficient training, experience, and skill. Artful decisions must be made at each step of the process, including what types of marks to look for, what marks are sufficiently definite and clear to form a basis for identification, and whether the compared surfaces are in "sufficient agreement" as to exclude other tools, rendering misidentification a practical impossibility.

Although Shem's report was presented to the grand jury, the subjective nature of firearm and toolmark identification renders this method of proof unreliable and insufficient. Shem's report consisted of a single page that merely listed the items submitted and Shem's opinion. [Exc. 88] Moreover, Shem's report is

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21 Id.

22 Id.

23 Id. at 508 (quoting John E. Davis (author of An Introduction To Tool Marks, Firearms and the Striagraph (1958)) in a letter to John Murdock).

misleading because it reports his subjective opinion under the heading "Results." [Exc. 88] Shem's opinion is, however, not the result of a test; it is an opinion based upon his subjective judgment. Moreover, the report does not provide the grand jury with any information from which it could evaluate how Shem formed his opinion, whether he performed his analysis according to established and reliable procedures, or whether he was a qualified or credible expert.[24]

C. The State Improperly Relied on Detective Branchflower's Testimony Concerning The Investigation And The Scene Of The Crime.

As previously noted, Alaska Rule of Criminal Procedure 6(r)(1) states that hearsay evidence is inadmissible before the grand jury absent a "compelling justification." Rule 6(r) does permit otherwise inadmissible hearsay evidence to be presented to the grand jury if the evidence fits within an enumerated exception. One exception permits a police officer involved in an investigation to repeat the statements and observations of another officer if additional evidence is introduced to corroborate the statement.[25]

No reported opinions from Alaska's appellate courts have grappled with the extent to which hearsay testimony may be used under this exception or the level of corroboration required to permit its use. A legislative statement of findings and purpose for the rule provides some guidance, however. The 1994 legislature stated that the rule permitting police officer hearsay was enacted "to allow the grand jury to be fully informed about the evidence available on a criminal case through testimony

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24 See Ingram, 703 P.2d at 432.

25 Alaska Rule of Criminal Procedure 6(r)(3).

of lead peace officers, while allowing officers who played a minor role in the investigation not to personally appear and testify so that they can continue to perform their vital duties on the street to protect the public."[26]

One prior unreported opinion of this court does address of the level of corroboration required to justify the admission of police officer hearsay. In Wilson v. State,[27] the state established the location of a homicide victim's body through the hearsay testimony of an investigating officer. According to this court, the hearsay testimony concerning the location of the victim's body was properly admitted because photographs of the scene identified by the testifying detective corroborated his statement.[28]

In the present case, every material aspect of the state's case was introduced through Branchflower's hearsay testimony. Branchflower apparently did not investigate the scene of the homicide. [Tr.66] Branchflower, however, testified about both the report that lead officers to the scene and the responding officers' observations of the scene without stating the basis for her testimony. [Exc. 91-94; G.J. 11-14, 20-21, 24] Branchflower told the jury about a phone message from Edwards to M.E., but did not state who listened to the message or who wrote it down; she stated "I think they listened to the message." [Exc. 93; G.J. 20-21] The only observations of the scene that Branchflower testified to and also stated the

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26 Alaska S.L.A. 1994, ch. 114, sec. 1: Findings and Purpose.

27 Wilson v. State, 1998 WL 254000 (Alaska App. May 20, 1998).

28 Id. at 2.

basis for were those of Lieutenant Gifford, the crime scene reconstruction and blood spatter expert. [Exc. 92-93; G.J. 14-18]

Branchflower's testimony included a hearsay account of the location of the Derringer, bullets, and expended shells found at the scene. [Exc. 92-93; G.J. 14-18] Her testimony also included a statement from an unnamed source indicating that nine bullets were found in Edwards's pocket. [Exc. 95; G.J. 26] The state introduced photographs of the scene through Branchflower without any statement indicating who took the photographs, when the photographs were taken, or whether the photographs accurately represented the scene or the evidence. [Exc. 93-94; G.J. 21-23] The only evidence provided to the grand jury that was not improperly admitted was Branchflower's testimony that she searched Edwards's residence and found an empty box of .22 caliber bullets and the sheath to a knife several, and photographs that she had taken at Edwards's residence. [Exc. 95; G.J. 27-28]

Branchflower's non-hearsay testimony, however, did not corroborate the hearsay testimony. The fact that Branchflower observed an empty box of .22 caliber ammunition does not corroborate the number of bullets found at the scene or the existence of a gun with a discharged shell. It merely shows that Edwards had an empty box of the most common type of ammunition sold in the United States in the most common quantity available. [Tr. 1862, 1878] Branchflower's observation of a knife sheath at Edward's residence, again, fails to corroborate any observation of the scene upon which the grand jury's verdict rested. The fact that a filet knife was found at the scene that could possibly fit a sheath found at Edwards's residence is not surprising and does not establish that Edwards's shot M.C. and M.E.

This court's unpublished opinion in Wilson appears to indicate that the existence of photographs would serve to corroborate Branchflower's testimony. Unlike Wilson, however, the photographs introduced through Branchflower were not properly identified and cannot reliably corroborate her testimony. Photographs are inadmissible at trial unless they are properly authenticated.[29] Here, the state introduced photographs through Branchflower, but there is no basis for concluding that the photographs are a faithful representation of what they purport to depict. Branchflower does not indicate who took the pictures, when the pictures were taken, or whether they are an accurate representation of the scene and evidence.

The state's presentation of the evidence to the grand jury violated the plain language of Rule 6(r)(3) and the intent of the legislature. The state presented its entire case using the uncorroborated hearsay testimony of an officer who, though involved in the investigation, played only a minor role in the investigation. This reliance on hearsay evidence has eliminated any protection provided by the grand jury process and should not be countenanced here.

D. The Indictment Must Be Dismissed Because It Rests Entirely Upon Improperly Admitted Evidence

"In deciding whether the presentation of improper evidence requires dismissal of the indictment, it is first necessary to decide whether there is sufficient

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29 Sheakley v. State, 644 P.2d 864, 870 (Alaska App. 1982) (stating that "[t]his court has held that a photograph is admissible in evidence in the discretion of the trial judge, as an aid to the court or jury, after it has been shown to be a faithful representation of whatever it purports to depict.")

admissible evidence to support the indictment."[30] If there is insufficient admissible evidence remaining, the indictment must be dismissed.[31] If, however, there is sufficient admissible evidence then it is necessary to evaluate the challenged evidence to determine whether it "appreciably affect[ed] the outcome of the grand jury's deliberations."[32]

In the present case, the material facts upon which the grand jury's verdict rested were all improperly presented through hearsay testimony. Branchflower testified that when police arrived at M.E.'s residence they kicked in the door because the key provided by a friend of M.E.'s would not unlock the deadbolt. [Exc. 91; G.J. 12-13] This evidence supported the inference that whoever committed the crime was still in the house. Branchflower testified that Edwards, M.E., and M.C. appeared to have been shot with a gun that was found on the floor near where Edwards was shot. [Exc. 92-93; G.J. 14-18] Branchflower testified that one empty shell casing was found in the .22 caliber derringer, that two empty .22 caliber shell casings were found on the floor, and that nine .22 caliber rounds were found in Edward's pants pocket. [Exc. 94; G.J. 24] This evidence supported the inference that Edwards shot M.C. and M.E., then reloaded the gun and shot himself.

The opinions of the state's experts provided critical support for the link

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30 Newman v. State, 655 P.2d 1302, 1306 (Alaska App. 1982)

31 See Id.

32 Oxereok v. State, 611 P.2d 913, 916 (Alaska 1980).

between the evidence located at the scene and the grand jury's verdict.[33] Branchflower testified that Gifford concluded that "the subject shot the victim while she was in bed" and then the "suspect shot himself" and laid on the floor. [Exc. 92; G.J. 16] And Shem's report indicated that the ammunition at the scene was the same type of ammunition as the ammunition box found in Edward's residence. [Exc. 95; G.J. 28] Shem's report also indicated that the three expended shell casings had been fired from the derringer found at the scene. [Exc. 94; G.J. 25] This evidence endorsed the state's conclusion that Edward's perpetrated the homicide.

Without the improperly presented hearsay evidence, the state's presentation to the grand jury is insufficient to support the indictment. Alternatively, if this court concludes that the testimony concerning observations of the scene made by other police officers was properly admitted, the improper testimony concerning the expert opinions of Gifford and Shem appreciably affected the grand jury's deliberations.

The evidence based upon Gifford's and Shem's report provided the grand jury with information that must have overwhelmed the deliberations. The state's experts concluded that the gun and bullets found near Edwards were used by Edwards to commit the homicide and then to attempt suicide. Branchflower communicated these conclusions without explanation and without an opportunity for the grand jury to inquire into the basis for these conclusions. This testimony was sufficiently powerful that the jury likely abandoned its role of fact-finder in favor of the

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33 The trial court previously found that Lieutenant Gifford's report and

state's experts who had endorsed a verdict of guilty.

II. DETECTIVE SOTO CONDUCTED AN ILLEGAL WARRANTLESS SEARCH OF A CLOSED CONTAINER WHEN HE REMOVED EVIDENCE FROM EDWARDS'S PANTS POCKET.

A. Soto's Warrantless Search Of Edwards's Pants Pocket Was Not Justified Under Any Exception To The Warrant Requirement

The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated.[34] No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[35] A warrantless search is per se unreasonable unless it falls within one of the few specifically established and well-delineated exceptions to the warrant requirement.[36] "These exceptions have been 'jealously and carefully drawn,' and the burden falls upon the state to prove that 'the exigencies of the situation made the course imperative.'"[37]

"Inventory searches are now a well-defined exception to the warrant

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opinion were improperly presented to the grand jury. [Exc. 80-81; R. 1667-68]

34 Alaska Constitution Art. 1§14; United States Constitution, Fourth Amendment.

35 Id.

36 Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967). Schraff v. State, 544 P.2d 834, 838 (Alaska 1975).

37 Schraff v. State, 544 P.2d 834, 838 (Alaska 1975) (citing Jones v. United States, 357 U.S. 493, 499 (1958); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971)).

requirement of the Fourth Amendment."[38] Inventory searches may be considered reasonable and constitutional if they are conducted in accordance with the standard procedures of the agency conducting the search.[39] An inventory search of closed, locked or sealed luggage, containers or packages, however, is not within the scope of a reasonable warrantless inventory search.[40]

As constitutionally protected zones, the prohibition on closed container inventory searches extends to clothing pockets.[41] According to the California Court of Appeals:

> Although the foregoing decisions have come to be known as "closed container" cases, it is of no help to us in our analysis to note that a vest pocket, unlike a lunch box, has no lid or, like a tote bag, cannot be locked. ... If a person were to be handed an article which he intended to keep safe from theft or secure from prying eyes, that person would almost certainly place the article in his pocket. No more reprehensible petty thief can be found than a pickpocket, not because he steals, but because he does so by intruding into an area where his victim most wishes to remain secure. We find that a vest pocket is a protected receptacle of personal effects and may not be searched

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38 D'Antorio v. State, 926 P.2d 1158, 1162 (Alaska 1996)(citing Colorado v. Bertine, 479 U.S. 367, 373, 107 S.Ct. 738, 741-42, 93 L.Ed.2d 739 (1987)).

39 State v. Daniel, 589 P.2d 408, 417 (Alaska 1979); Florida v. Wells, 495 U.S. 1, 3-4, 110 S.Ct. 1632, 1634-35, 109 L.Ed.2d 1 (1990).

40 D'Antorio, 926 P.2d 1158, 1162 n. 5 (Alaska 1996)(citing Daniel, 589 P.2d at 417-18).

41 See Sibron v. New York, 392 U.S. 40, 65, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968) (holding that an officer's decision to invade a pocket was not permissible under the circumstances); State v. Gray, 798 P.2d 346, 350 (Alaska App. 1990)(holding that the emptying a suspect's pocket must be constitutionally justified).

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The Ninth Circuit has also recognized that pockets are analagous to closed containers. In United States v. Ramos-Osequera,[43] the police inventoried the defendant's car after arresting the defendant. The police searched the pockets of a pair of jeans found in the vehicle and discovered heroin. Police department policy required that all visible property be booked and inventoried for safekeeping. Judge Boocheever, writing for the Ninth Circuit, noted that the applicable procedures did not specifically provide authority for looking inside containers to find valuable property.[44] The court accordingly held that the search violated the Fourth Amendment.[45]

In the present case, Officer Soto received Edward's pants from a hospital employee who indicated that the pants were provided to Soto as part of hospital procedure. [Exc. 98; Tr. 20-21, 26] Soto took possession of the pants intending to place them in "property and evidence" as a piece of evidence in the case. [Exc. 98, 105; Tr. 26, 54] Soto stated that he was required to separate multiple items, tag them, and put them in lockers. [Exc. 98; Tr. 28-29] Soto also stated that he had to do an inventory of every item and "check of all the, basically, pockets or anything that I, you know, basically, find, basically separate every item

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42 People v. George, 168 Cal.Rptr. 44 (Cal.App. 1980).

43 120 F.3d 1028 (9th Cir. 1997) (overruled on other grounds).

44 Id. at 1036.

45 Id.

that I can find." [Exc. 98; Tr. 29] Soto further stated that this was the department policy. [Exc. 98; Tr. 29] Soto testified that he "processed the evidence as I was trained." [Exc. 99; Tr. 30] Soto found bullets and a BIC lighter. [Exc. 99; Tr. 30]

On cross-examination, Soto was asked specifically whether he was instructed on the procedure for taking the pants into evidence or whether he made the decisions on his own. [Exc. 101; Tr. 39] Soto responded:

> No, sir. Well, basically, it goes – you know, we learned this on training and also, basically, the procedures I learned also in training. And it's before this day and after this day, we basically, contu – basically, continue doing the same procedure. And we had done this prior to this day as well. [Exc. 101; Tr. 39]

Then when immediately asked whether that meant that he made the decisions on his own, Soto responded: "Based on that procedure because I know it's–it's basically policy and procedures, yes, I – I do it that way." [Exc. 101; Tr. 39]

The trial court recognized that the warrantless inventory search of closed containers in unreasonable and unconstitutional. [Exc. 64; R. 1655] The court also recognized that the routine emptying of a defendant's pockets upon arrival at a pretrial detention center has been held unconstitutional. [Exc. 64; R. 1655] The court, however, stated that a search of pants pockets is less intrusive than a search of a closed container. [Exc. 65; R. 1656] The court found that Soto testified he was "required to do an inventory of the evidence, that he was required to check the pockets, and separate every item found." [Exc. 66; R 1657] According to the court, Soto had the right to "lift and move the evidence in order to book it into the evidence room." [Exc. 66; R. 1657]

The trial court's decision, however, was error. Soto did not testify that he was required to remove the items from pockets as a matter of established procedure. A closer reading of Soto's testimony reveals that Soto did not articulate any standard procedure. Soto merely stated that he needed to separate multiple items to tag them separately into evidence and had done it that way in the past. When asked specifically whether he was told to search pockets as part of the procedure of logging items into evidence or whether he made the decision on his own Soto did not specifically answer the question. Accordingly, the evidence does not support the trial court's conclusion that Soto was following an established inventory procedure.

Even if Soto was following established procedures, opening the pocket was an unreasonable procedure for logging inventory. In Daniel v. State,[46] police officers who were lawfully impounding a vehicle found a briefcase in the back seat that had open latches. The officers opened the briefcase and found contraband. The Alaska Supreme Court concluded that no principled distinction between locked and unlocked containers could be drawn.[47] The court held that "it is sufficient, for routine inventory purposes, that the officer merely list the item as a closed or locked footlocker, briefcase, package, or container and, if deemed necessary remove the same for safekeeping."[48] Soto had lawful possession of the pants and could have

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46 Daniel v. State, 589 P.2d 408 (Alaska 1979).

47 Id. at 417.

48 Id. at 418.

similarly taken them into evidence for safekeeping without violating the pockets.

Additionally, the search was impermissible because Soto was not conducting an inventory search, he was tagging evidence. In Newhall v. State,[49] a trooper obtained a search warrant to open a package that he suspected contained alcohol being shipped in violation of a local option law. The trooper opened the package and then opened a second package that he found inside the suspect package. The trooper, however, knew that the second package did not contain alcohol. This court held that the trooper was not permitted to search the second package without a warrant, even if he had abundant probable cause.[50] The court further held that with probable cause the police are permitted only to seize a closed container while they apply for a search warrant.[51]

Here, Soto had possession of pants and could have simply applied for a warrant if he wanted to inspect the interior of the pockets. Although Soto claimed that he had no reason to believe that there was evidence in the pockets, his stated purpose for inspecting the pocket was to take the pants into custody as evidence of a crime and separate items so that they would become "separate property evidence item[s]" [Exc. 98, 105; Tr. 28, 54] Soto's search can not be rendered permissible simply because he stated that he did not have an investigative purpose or by

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49 Newhall v. State, 843 P.2d 1254 (Alaska App. 1992).

50 Id. at 1257.

51 Id. at 1258.

labeling the search an inventory search.[52]

B. Introduction At Trial Of The Illegally Obtained Bullets Was Not Harmless Beyond A Reasonable Doubt

The admission of evidence obtained in violation of a defendant's constitutional rights requires reversing the conviction unless introduction of the evidence was harmless beyond a reasonable doubt.[53]

In the present case, the state pursued a conviction under the theory that Edwards shot M.E. and M.C. then shot himself. [Tr. 258-59] The state presented expert testimony attempting to establish that Edwards's injuries were self-inflicted. [Tr. 509-10] This evidence, however, was not conclusive on the issue. [Tr. 593-94] The strongest evidence indicating that Edwards committed the homicides and then shot himself was the bullets that were found in his pocket. [Tr. 857] Without this evidence, the state had no direct physical evidence tying Edwards to the bullets used in the homicide. This evidence substantially undermined the defense theory that Edwards was shot by an intruder who had shot M.C. and M.E. [Tr. 2022] Accordingly, it can not be said that introduction of this evidence was harmless beyond a reasonable doubt.

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52 C.f. State v. Gray, 798 P.2d 346, 350 (Alaska App. 1990). (holding that the routine emptying of an arrestee's pockets cannot be justified merely by labeling the procedure a "patdown").

53 Ingram v. State, 703 P.2d 415, 429 (Alaska App. 1985).

CONCLUSION

For the reasons stated above, this court must reverse Edwards's conviction and grant him a new trial.

DATED at Anchorage, Alaska on June _____, 2004.

PUBLIC DEFENDER AGENCY

By: _____
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