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

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MARGARET MURPHY,	)	
	)	
Defendant.	)	
	)	Case No. 3HO-23-00295CR

ORDER GRANTING MOTION TO DISMISS INDICTMENT

I. INTRODUCTION

A grand jury indictment provides the foundation underlying a criminal prosecution. It is often described as both a sword of justice, and a shield protecting the rights of the accused.[1] It is the duty of the prosecutor to present evidence in support of the indictment to the grand jury. Equally important, the prosecutor must inform the grand jury about the existence of potentially exculpatory evidence.[2] Fundamentally, the grand jury also protects the accused from a felony charge when there is no probable cause to believe they are guilty.[3]

The right to an indictment is enmeshed in both the United States Constitution and the Alaska Constitution. In addition, Alaska Statutes passed by the legislature and rules of procedure enacted by the Alaska Supreme Court implement these constitutional rights and guarantee the criminally accused the right to a fair and impartial grand jury proceeding. The Alaska Court of Appeals recently described the guiding principles this way:

> Article I, section 8 of the Alaska Constitution provides, in pertinent part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The

[1] *Preston v. State*, 615 P.2d 594, 602 (Alaska 1980); *Cameron v. State*, 171 P.3d 1154, 1156 (Alaska 2007).
[2] *Frink v. State*, 597 P.2d 154, 165-66 (Alaska 1979); *Zurlo v. State*, 506 P.3d 777, 782 (Alaska App. 2022).
[3] *Wassillie v. State*, 411 P.3d 59.8, 608 (Alaska 2018).

> constitutional right to a grand jury indictment in a felony prosecution "ensures that a group of citizens will make an independent determination about the probability of the accused's guilt 'before the accused suffers any of the grave inconveniences which are apt to ensue upon the return of a felony indictment.'" More than just a rubber stamp of the prosecution, the grand jury "plays a protective role by operat[ing] to control abuses by the government and protect[ing] the interests of the accused."[4]

In this case, a group of grand jurors issued a single count indictment for perjury against retired judge Margaret Murphy.[5] The entire factual basis for the indictment is contained in a single sentence: "That on or about November 3, 2022, at or near Homer in the Third Judicial District, State of Alaska, Margaret Murphy committed the crime of perjury."[6]

Currently before the Court is *Judge Margaret Murphy's Motion to Dismiss Indictment* ("*Motion to Dismiss Indictment*" or "*Motion to Dismiss*") filed on October 30, 2023. The State of Alaska filed an *Opposition* to the *Motion to Dismiss Indictment* on November 29, 2023. Judge Murphy filed her *Reply* to the *Opposition* on December 8, 2023. This Court held oral argument on January 8, 2024. For the reasons stated herein, the *Motion to Dismiss Indictment* is granted.

II. BACKGROUND FACTS

This case is a criminal case against retired Judge Margaret Murphy ("Judge Murphy").[7] The criminal indictment alleges that Judge Murphy committed an act of perjury on a specific day – November 3, 2022 – in Homer, Alaska. On that day, she was called as a witness to give testimony over the telephone before a grand jury about events which occurred in relation to a trial she presided over in McGrath seventeen (17) years earlier. The trial she presided over, *State of Alaska v. Haeg*, concluded in 2005 following a jury

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[4] *Zurlo v. State*, 506 P.3d 777, 782 (Alaska App. 2022) (internal citations omitted).
[5] Perjury is defined in Alaska Statute 11.56.200(a): "A person commits the crime of perjury if the person makes a false sworn statement which the person does not believe is true."
[6] April 28, 2023 Indictment. The indictment also includes the offense language: "All of which is a class B felony offense being contrary to and in violation of AS 11.56.200, and against the peace and dignity of the State of Alaska."
[7] Judge Murphy retired on July 1, 2019. She served as a magistrate judge and acting district court judge from April, 1998 – July 1, 2019. GJ Tr. at p627.

trial.[8] The jury convicted Mr. Haeg of five of the seven counts he was charged with, all relating to unlawful actions by a hunting guide.[9] The Court of Appeals affirmed Haeg's conviction in 2008.[10]

The grand jury that recommended the indictment was formed in August 2022 in order to investigate corruption allegations brought by David Haeg ("Mr. Haeg"). As described by Judge Murphy in her *Motion*, the "grand jury proceeding in this matter . . . convened to vindicate the private rights of David Haeg, was *anything but* fair and impartial."[11] But over the next few months, the grand jury conducted an investigation which, because of Mr. Haeg's allegations of corruption, was presided over by an independent prosecutor.[12] Judge Murphy's testimony occurred during that proceeding on November 3, 2022 and was very brief. It lasted approximately ten minutes, and consumed only ten pages in the transcript.[13]

On April 7, 2023, the grand jury wrapped up testimony and review of the evidence. They also voted to indict Judge Murphy for perjury, but they did not then have a specific indictment to consider.[14] When the grand jury returned on April 27, 2023 to consider and vote on the proposed written indictment, one of the twelve grand jurors was absent and refused to participate in further proceedings. Nonetheless, the remaining eleven grand jurors voted and approved the indictment. The next day, on April 28, 2023, the grand jury, then consisting of only eleven grand jurors, presented the indictment to the court.

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[8] Mr. Haeg was convicted by the jury, and then began a nearly two-decade effort to overturn the result, and find someone to blame. The facts relating to Mr. Haeg's original trial, his appeals and post-conviction relief applications are set forth in detail in the Court of Appeals decisions addressing Mr. Haeg's cases. See *Haeg v. State*, 2008 WL 4181532, Alaska App. (Sept. 10, 2008); *Haeg v. State,* 2016 WL 7422687, Alaska App., (Dec. 21, 2016); *Haeg v. State*, 2021 WL 815851, Alaska App., (Mar. 03, 2021).
[9] *Haeg v. State*, 2008 WL 4181532, *5 Alaska App. (Sept. 10, 2008), cert. denied, *Haeg v. Alaska*, 556 U.S. 1208 (2009).
[10] *Haeg v. State*, 2008 WL 4181532, Alaska App. (Sept. 10, 2008).
[11] Murphy's *Motion to Dismiss Indictment* at p1 (emphasis original).
[12] Grand jury proceedings, including their investigation are secret. Alaska R. Crim. P. 6(m)(1).
[13] GJ Tr. P626-636.
[14] GJ Tr. P1027.

III. ARGUMENTS

A. Judge Murphy's Arguments

In the *Motion to Dismiss Indictment*, Judge Murphy argues that the indictment should be dismissed for four reasons: (1) the indictment fails to allege perjury with the specificity required by Criminal Rule 7(c)(1) and AS 12.40.100; (2) the grand jury did not have a quorum for the indictment; (3) the prosecutor gave the grand jury the wrong instructions regarding the standard of evidence; and (4) the indictment violates the *Stern* test, as set out in *Stern v. State*,[15] because inadmissible evidence was introduced to the grand jury.

In her first argument, Judge Murphy contends that the indictment fails to specify any information regarding her allegedly false statement. Judge Murphy claims the indictment also fails to identify a particular statement she made that she believed to be false. Moreover, there are no specifics about what Judge Murphy said that is alleged to be perjury. Therefore, Judge Murphy argues that the indictment does not comply with Criminal Rule 7(c)(1) and AS 12.40.100.

Next, Judge Murphy argues that the indictment fails because there was not a quorum when the indictment was presented. She contends that the grand jury lost its quorum when a grand juror left the state and refused to participate in further proceedings. Judge Murphy argues that the prosecutor clearly stated he had doubts about the indictment since there were only 11 jurors present who approved the indictment. Since the law requires a minimum of 12 grand jurors to take any official act, and a majority of those present to vote in favor of indictment, Judge Murphy says the indictment is fatally defective.

Third, Judge Murphy argues that the indictment should be dismissed because the prosecutor did not properly instruct the grand jury on how to consider the evidence for purposes of a criminal indictment. According to Judge Murphy, the prosecutor only gave

[15] 827 P.2d 442 (Alaska App. 1992).

the instructions for how to conduct an investigation for a public safety and welfare report, and no instruction was given for the criminal indictment.

Lastly, Judge Murphy argues that the indictment fails the *Stern* test. Judge Murphy contends that the evidence presented to the grand jury included a great deal of inadmissible hearsay, as well as irrelevant and highly prejudicial evidence the grand jury is not allowed to consider. Under *Stern*, the Court is required to set aside the inadmissible evidence, and then determine whether what's left is sufficient to support the indictment. Because so much of the evidence is vague and non-specific, she reasons it is impossible to ascertain the grand jury's reasoning, and for the Court to determine if the evidence is sufficient to support an indictment. Judge Murphy accuses the prosecutor of not doing his job of ensuring that the grand jury only received admissible evidence. Since Mr. Haeg provided the grand jury with documents he assembled and testimony filled with inadmissible hearsay, Judge Murphy argues that it is questionable if the evidence was admissible. Judge Murphy argues that this action is against Criminal Rule 6.1(e)(2), and violates the *Stern* test.

B. The State's Opposition

In the *Opposition*, the State argues that the lack of specificity in the indictment can be cured by the Court ordering the Independent Prosecutor to file a Bill of Particulars.[16] The Independent Prosecutor contends that he can detail the alleged perjury and thus, the indictment should not be dismissed when he can provide the details.

Next, the State contends that there were 12 jurors present for every session, all deliberations, and voting; therefore, the Prosecutor argues that there was a quorum when the indictment "vote" happened. The State agrees there were only 11 jurors present that approved the proposed indictment, but argues the grand jury did not receive any additional evidence after all 12 had voted on the indictment. Moreover, the State contends that the court that accepted the grand jury return was aware of the "unusual

[16] *See* Alaska R. Crim. P. 7(f).

circumstances" when it published the indictment. Therefore, the State argues this Court should not dismiss for lack of quorum.

Further, the State argues that the grand jurors were experienced and regular grand jurors and they were given instructions about the standard of proof that applied to the report. In essence, the Independent Prosecutor argues that any error in the failure to further instruct the grand jury was harmless since they had been properly instructed at some other point in the past.

The State continues, stating that between September 16, 2022 and April 7, 2023, the grand jury only received admissible evidence. The State contends that evidence presented before September 16, 2022 was only to determine if the grand jury should move forward with the investigation. Consequently, any concern about this evidence is alleviated by the independent prosecutor's later instructions. He argues that under the totality of the circumstances, the Court should reject the argument.

Lastly, the State argues that most of Judge Murphy's argument regarding admissibility of evidence (under the *Stern* test) is moot because of the curative instructions he provided to the grand jury.

C. Judge Murphy's Reply

In her *Reply*, Judge Murphy argues that a Bill of Particulars cannot cure the lack of specificity required for the indictment under Criminal Rule 7(c). Judge Murphy notes the case the State relies on, *Lupro*, had an indictment that was specific and met requirements of Criminal Rule 7(c). Thus, this case differs from *Lupro*. Here, the grand jury received incomplete instructions on the law of perjury. Furthermore, the Independent Prosecutor gave the wrong standard of proof and the Prosecutor admits this.

Moreover, in reply to the State's contention that the prior experience of the grand jurors may cure a defect in the instructions, Judge Murphy argues the record does not reflect that all the grand jurors had prior experience. Even if there was such a record, she argues there is no legal authority that allows for prior experience or knowledge to substitute for incomplete or improper instructions.

Regarding a quorum, Judge Murphy directs attention to the timeline of the grand jury proceedings. First, there was no indictment before the grand jury on April 7 when they initially voted. Then, between April 7 and April 27, one of the grand jury members left the state and refused to participate in any further proceedings. Therefore, by April 27, when the indictment was actually presented for the grand jury to consider, Judge Murphy contends the grand jury had lost its quorum. Since the grand jury lacked 12 members when the indictment happened, there was not a quorum and the indictment is invalid.

Finally, Judge Murphy argues that the grand jury proceedings did not comply with Criminal Rule 6(s). She argues forcefully that the evidence presented to the grand jury was predominately tainted by inadmissible evidence, hearsay, improper legal conclusions, accusations and rank speculation. Judge Murphy contends that the Independent Prosecutor's argument that the grand jury was told to disregard any inadmissible evidence presented early in the case does not "cure" the taint. Lastly, Judge Murphy argues that SCO 2000 does not authorize investigative grand juries to issue indictments.

IV. APPLICABLE LAW

The law relating to grand jury indictments is found in the Constitutions of the United States, the State of Alaska, statutes passed by the legislature, Court rules and orders promulgated by the Alaska Supreme Court, and Court decisions.

A. Indictment

An indictment shall be found by a grand jury when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant.[17]

In challenges to the sufficiency of the evidence before a grand jury, every legitimate inference that may be drawn from the evidence must be drawn in favor of the indictment.[18] A court must determine whether the evidence presented a sufficiently

[17] Alaska R. Crim. P. 6(r).
[18] *State v. Williams*, 855 P.2d 1337, 1346 (Alaska App. 1993).

detailed account of criminal activity and the defendant's participation in the activity.[19] Dismissal of an indictment is only warranted "if the balance of the evidence before the grand jury was insufficient to support an indictment."[20]

The decision whether or not "to dismiss an indictment is a matter within the discretion of the trial judge."[21] However, the Alaska Supreme Court has held if an indictment is flawed, a conviction cannot stand.[22] Therefore, a flawed indictment must result in the dismissal of the indictment.

B. Quorum for Grand Jury

The Alaska Constitution specifically details that a grand jury must consist of a minimum of twelve grand jurors and then Criminal Rule 6(d) further details that a grand jury shall range between twelve and eighteen jurors. The relevant section of the Alaska Constitution states that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.[23]

Then Criminal Rule 6(d) further states:

> At least once each year the presiding judge of the superior court in each judicial district shall order one or more grand juries to be convened at such times as the public interest requires. The grand jury shall consist of not less than 12 nor more than 18 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement. Any qualified member of the grand jury panel not designated to serve as a member of the grand jury may be placed on the petit jury panel. An

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[19] *Fox v. State*, 908 P.2d 1053, 1059 (Alaska App. 1995).
[20] *Drumbarger v. State*, 716 P.2d 6, 16 (Alaska App. 1986).
[21] *Sheldon v. State*, 796 P.2d 831, 834 (Alaska App. 1990).
[22] *Taggard v. State*, 500 P.2d 238, 243 (Alaska 1972), disapproved on other grounds by *McCracken v. Corey*, 612 P.2d 990 (Alaska 1980); *See* also *Zurlo v. State*, 506 P.3d 777, 788 (Alaska App. 2022); *Keith v. State*, 612 P.2d 977, 980 (Alaska 1980).
[23] Alaska Const. art. I, § 8.

otherwise qualified person called for petit jury service may be placed on the grand jury panel. A grand jury shall serve until discharged by the presiding judge but no grand jury may serve more than 4 months, unless this period is extended for good cause.[24]

C. Specificity of the Indictment

Alaska Rule of Criminal Procedure 7(c) states:

> (1) The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.
> (2) An indictment or information must include:
> (A) the defendant and offense information required by Criminal Rule 3(c);
> (B) search warrant information as required by Criminal Rule 37(e)(2);
> (C) the victim information certificate required by Criminal Rule 44(f); and
> (D) if the defendant is charged with an offense listed in AS 18.66.990, whether the prosecution claims that the alleged offense is a crime involving domestic violence as defined in AS 18.66.990(3) and (5).[25]

Then AS 12.40.100 further details:

> "(a) The indictment must be direct and certain as it regards
> (1) the party charged;
> (2) the crime charged; and
> (3) the particular circumstances of the crime charged when they are necessary to constitute a complete crime.
> (b) The statement of the facts constituting the offense must be in ordinary and concise language, without repetition, and in a manner that will enable a person of common understanding to know what is intended.[26]

D. Bill of Particulars

Then in regards to a bill of particulars, Criminal Rule 7(f) states that "[t]he court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court

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[24] Alaska R. Crim. P. 6(d).
[25] Alaska R. Crim. P. 7(c)(1)-(2).
[26] AS § 12.40.100(a)-(b).

may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires."[27]

The Alaska Supreme Court addressed the appropriate use for a bill of particulars in *Lupro v. State*.[28] In *Lupro*, the Court held "[t]he purpose of a bill of particulars is to inform the defendant of the nature of the charges against him so that he may prepare a defense, to avoid prejudicial surprise at trial and to protect against a second prosecution for the same offense."[29] The Court continued on to state "[t]he sole question is whether adequate knowledge of the charge was provided. It is not necessary that such knowledge be contained in the indictment if it was provided in some other form."[30]

More importantly though, the United States Supreme Court has held that "it is a settled rule that a bill of particulars cannot save an invalid indictment."[31]

E. Grand Jury Instructions

It is the duty of the prosecutor to advise the grand jury about their duties, to instruct the grand jurors on the law to be applied, to question witnesses and bring forth evidence in support of an indictment, and to prepare the indictment in a written form which complies with the law.[32] The prosecutor holds a unique position in grand jury proceedings. As officer of state, it is prosecutor's duty to be an advocate. In that role, he must exert his best efforts to prosecute successfully those who have violated the criminal law. On the other hand, as an officer of the court, he is required to act as grand jury's legal advisor, to aid but not to interfere in its determination of probability of guilt.[33]

When a grand jury considers an indictment, the evidence presented to the grand jury must be sufficient to warrant a conviction of the defendant when all the evidence

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[27] Alaska R. Crim. P. 7(f).
[28] *Lupro v. State*, 603 P.2d 468 (Alaska 1979).
[29] *Lupro v. State*, 603 P.2d 468, 472 (Alaska 1979) (citing *United States v. Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1972)).
[30] *Lupro v. State*, 603 P.2d 468, 472 (Alaska 1979).
[31] *Russell v. United States*, 369 U.S. 749, 770 (1962); *See* also *United States v. Tomasetta*, 429 F.2d 978, 980 (1st Cir. 1970); *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976).
[32] AS 12.40.070; Alaska R. Crim. P. 6(i).
[33] Alaska R. Crim. P. 6(i); Coleman v. State, 553 P.2d 40, 47 (Alaska 1976).

taken together, unexplained or uncontradicted, is sufficient to persuade reasonable minded persons that conviction of the charge is warranted.[34] In the Rules of Criminal Procedure, this is referred to as the "sufficiency of evidence."[35] "When the grand jury has reason to believe that other available evidence will explain away the charge, it shall order such evidence to be produced and for that purpose may require the prosecuting attorney to subpoena witnesses."[36] However, the grand jury cannot find an indictment based on a statement of a grand juror, unless that grand juror is sworn and examined as a witness.[37] Overall, the evidence standard relating to a grand jury is the sufficiency of evidence standard.

F. Admissible Evidence / Stern Test

Evidence which would be admissible at trial is admissible in grand jury proceedings.[38] Similarly, evidence which would not be admissible at trial is not permitted in grand jury proceedings, with certain limited exceptions.

The Rules Criminal Procedure specifically discuss the admissibility of evidence. Criminal Rule 6(s) states:

> (1) Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Except as stated in subparagraphs (2), (3), and (6), hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.
> (2) In a prosecution for an offense under AS 11.41.410-11.41.458, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child who is the victim of the offense may be admitted into evidence before the grand jury if
> (i) the circumstances of the statement indicate its reliability;
> (ii) the child is under 10 years of age when the hearsay evidence is sought to be admitted;
> (iii) additional evidence is introduced to corroborate the statement; and

[34] Alaska R. Crim. P. 6(r); *State v. Parks*, 437 P.2d 642, 644 (Alaska 1968).
[35] Alaska R. Crim. P. 6(r).
[36] Alaska R. Crim. P. 6(r).
[37] Alaska R. Crim. P. 6(r).
[38] Alaska R. Crim. P. 6(s).

(iv) the child testifies at the grand jury proceeding or the child will be available to testify at trial.
(3) Hearsay evidence related to the offense, not otherwise admissible, may be admitted into evidence before the grand jury if
(i) the individual presenting the hearsay evidence is a peace officer involved in the investigation; and
(ii) the hearsay evidence consists of the statement and observations made by another peace officer in the course of an investigation; and
(iii) additional evidence is introduced to corroborate the statement.
(4) If the testimony presented by a peace officer under paragraph (3) of this section is inaccurate because of intentional, grossly negligent, or negligent misstatements or omissions, then the court shall dismiss an indictment resulting from the testimony if the defendant shows that the inaccuracy prejudices substantial rights of the defendant.
(5) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion.
(6) When a prior conviction is an element of an offense, hearsay evidence received through the Alaska Public Safety Information Network or from other government agencies of prior convictions may be presented to the grand jury.[39]

An indictment based on inadmissible evidence is generally invalid.[40] However, The Alaska Supreme Court has held "hearsay evidence may rationally establish facts and therefore may be sufficient evidence to justify the findings of an indictment by a grand jury"[41] at least in certain circumstances. Therefore, if there was sufficient admissible evidence to support the indictment, then the consideration of inadmissible evidence may be considered harmless error.[42]

The Alaska Court of Appeals adopted a test in *Stern v. State*[43] that directs the superior court when considering insufficient or improper evidence. The *Stern* Test is:

> The superior court first subtracts the improper evidence from the total case heard by the grand jury and determines whether the remaining evidence would be legally sufficient to support the indictment. If the remaining evidence is legally sufficient, the court then assesses the degree to which the improper evidence might have unfairly prejudiced the grand jury's consideration of the case. The question the court must ask itself is whether,

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[39] Alaska R. Crim. P. 6(s).
[40] *Wassillie v. State*, 411 P.3d 595, 608-09 (Alaska 2018) (citing *Adams v. State*, 598 P.2d 503, 509 (Alaska 1979)).
[41] *State v. Parks*, 437 P.2d 642, 645 (Alaska 1968); *see* also *Taggard*, 500 P.2d at 243.
[42] *Wassillie v. State*, 411 P.3d 595, 609 (Alaska 2018).
[43] *Stern v. State*, 827 P.2d 442 (Alaska Ct. App. 1992).

> even though the remaining admissible evidence is legally sufficient to support an indictment, the probative force of that admissible evidence was so weak and the unfair prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict.[44]

In sum, when it appears that inadmissible evidence was used to support an indictment, it must be dismissed unless the court determines both that there was sufficient admissible evidence to support the indictment, and the inadmissible evidence did not unfairly prejudice the grand jury's decision.

V. DISCUSSION

As discussed in the introduction, Judge Murphy urges four different grounds for dismissing the indictment. While both the State and Judge Murphy acknowledge and agree that any one ground is sufficient for the Court to dismiss the indictment, Judge Murphy asks the Court to consider all four grounds because of the importance of the issues involved, and for purposes of any appellate record. Therefore, the Court will address each argument in turn.

A. The Grand Jury Lacked a Quorum

The requirement of a quorum for the grand jury to act is absolute. At oral argument, the Independent Prosecutor all but conceded the grand jury lacked a quorum when it voted on the indictment.

The Alaska Constitution explicitly requires that "[t]he grand jury shall consist of *at least twelve* citizens, a majority of whom concurring may return an indictment."[45] This quorum requirement is reiterated in AS § 12.40.020, which also states that "[t]he grand jury consists of *not less than 12* nor more than 18 members."[46] Further, Criminal Rule 6(d) also states that "[t]he grand jury shall consist of *not less than 12* nor more than 18

[44] *Stern v. State*, 827 P.2d 442, 445-46 (Alaska Ct. App. 1992).
[45] Alaska Const. art. I, § 8 (emphasis added).
[46] AS § 12.40.020 (emphasis added).

members."[47] Therefore, a grand jury *must* consist of *at least* 12 grand jurors. Here, the grand jury only had 11 grand jurors when the indictment was returned.

Judge Murphy argued the indictment is invalid because there was no quorum when the indictment was returned. The Independent Prosecutor argued that there was a quorum when all the evidence was presented and when the initial recommendation to indict occurred on April 7, 2023. However, at oral argument, the Independent Prosecutor conceded that there was not a quorum present when the indictment he had drafted was presented for consideration by the grand jury on April 27, 2023, or when the indictment was actually returned on April 28, 2023. Further, he also conceded that if the Court agrees with any one of Judge Murphy's arguments, dismissal would be required. Thus, notwithstanding his creative effort to save the indictment, the Independent Prosecutor essentially conceded this case should be dismissed based on the lack of quorum.

No case has been presented to this Court which specifically addresses whether the absence of a quorum when an indictment is finally approved may save an indictment if a quorum is present when all the evidence is considered. This is likely because the minimum quorum of not less than 12 persons is required by the Constitution, Alaska Statutes and carried over into the Court rules.

Still, there are illustrative cases which aid the Court's analysis. For example, in *Sanford v. State*,[48] the Alaska Court of Appeals examined the Constitutional requirement in Article I, section 8 of the Alaska Constitution. That section provides, in pertinent part, that the "grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment."[49] In *Sanford*, the Court was faced with deciding "how many grand jurors must concur if the court swears in and instructs eighteen grand jurors but only twelve actually hear the evidence and deliberate in a particular case?"[50] Because the Constitution does not explicitly answer the question, Criminal Rule 6(n)(1) requires a majority of the grand jurors sworn in, not just a majority of the jurors who deliberate on

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[47] Alaska R. Crim. P. 6(d) (emphasis added).
[48] 24 P.3d 1263 (Alaska. App. 2001).
[49] Alaska Const. art. I, § 8.
[50] *Sanford*, 24 P.3d at 1264.

the case, to indict a defendant for a crime. The State challenged the Criminal Rule arguing it was unconstitutional and contrary to Article I, section 8. The Court of Appeals disagreed, and held the rule was constitutional. Turning to the facts of the *Sanford* case, the Court noted that 18 grand jurors had been sworn in, but only 12 were present when the indictment was returned. After noting that meant only seven (7) grand jurors would be needed to vote for the indictment in the State's view, the Court rejected that approach. With 18 grand jurors having been sworn, that meant that ten (10) would be required to vote in favor of the indictment for a true bill, instead of seven.

Sanford, and by extension Criminal Rule 6(n)(1) helps to illustrate the policy underlying the constitutional *minimum* number of grand jurors. In this case, although the bare minimum 12 persons were present for the presentation of evidence, less than the minimum number were present when the vote was taken to indict Judge Murphy.

Similarly, in *Friedmann v. State*,[51] the Court of Appeals was faced with the ramifications of a mid-trial discharge of jurors leaving the trial with an insufficient number of jurors (12) to complete the trial. The Court first examined the trial court's determination that Criminal Rule 27(d)(3) permitted a "do over" regardless of whether the defendant consented to the action.[52] The Court of Appeals disagreed, and noted that discharge of the jury midtrial still amounted to a "mistrial" for double jeopardy purposes. Once the jury is empaneled and sworn to try the case, a defendant is entitled to have their case decided by the original jury.[53] Therefore, unless the defendant consents to the judge's action (i.e., declaration of a mistrial), or there was a manifest necessity for stopping the trial short of the verdict, further prosecution of the defendant was barred by the constitutional protections against double jeopardy.[54]

While double jeopardy is not yet implicated in this case, the reasoning of *Friedmann* is nonetheless illustrative. In this case, 12 grand jurors heard the evidence presented, but one left the state and refused to continue before the final vote to indict

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[51] 172 P.3d 831 (Alaska App. 2007).
[52] *Friedmann*, 172 P.3d at 833.
[53] *Friedmann*, 172 P.3d at 836.
[54] *Friedmann*, 172 P.3d at 836.

Judge Murphy. Just as in *Friedmann*, Judge Murphy is entitled to have the full originally empaneled grand jury determine whether to indict.

Further, despite his creative procedural arguments to this Court, it is clear in the record that the Independent Prosecutor recognized the absolute requirement for a quorum. He specifically told the grand jury on several occasions that they could not act unless they had twelve grand jurors present. "[A]ccording to our Constitution, if there's under 12 [grand jurors] they – you can't do anything."[55] Similarly, "if there's 11 or less, then you guys – your actions don't have any legal effect because the constitution requires that they're 12."[56]

Judge Murphy posits that the Independent Prosecutor came up with his creative procedural argument as a way to placate an obviously disappointed grand juror when it became clear the 12th juror would not return.[57] At that point, the grand jury had been working for many months. So, the Prosecutor came up with his alternative argument that what remained was simply a ministerial or administrative process:

> If I don't include – I think another way to frame your question is that if I have a draft report that you finalize we're in the same problem with whatever vote, we only have 11. And so I'm going to take the position based upon your decision this morning that what we are doing here is just adminsterial [sic] process.
>
> In other words, there's no new evidence presented, there's no new instructions of law that you're receiving. You're basically approving what you've already decided. That's the position I'm going to take. And we'll see how that works.[58]

At the time, the Prosecutor was musing about whether the grand jury could issue an investigation report given the lack of quorum. However, the Prosecutor's theory of ministerial action carried over to the next day when the indictment was considered. At that time, the grand jury still lacked its twelfth member.[59] He continued:

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[55] GJ Tr. 530.
[56] GJ Tr. 950.
[57] *See* Murphy *Motion to Dismiss* at p18; GJ Tr. p1074-1075.
[58] GJ Tr. 1089-1091.
[59] GJ Tr. 1100-01.

> Upon reflection, I think it's important to remind you that you already voted. All 12 of you had considered the potential for an indictment of Judge Murphy on April 7th. . . But I don't think you need to take another vote because you've already done that. And I think it would give us a better chance of this indictment actually going forward . . .. So again like yesterday largely what is being done today is just evaluating the written documents to make sure it reflects the previous vote to the grand jury.[60]

And thus, the die was cast. Recognizing the absence of the 12th juror and therefore the required quorum was likely fatal to any action by the grand jury, the Prosecutor came up with a creative solution. But there is simply no legal basis to distinguish an arguably ministerial act of the grand jury from any other act by the grand jury. The Constitution, the statute, and the Court rule are all eminently clear: a grand jury in Alaska must have *at least* 12 persons to act.

It is undisputed there was no quorum when the indictment was returned. This Court is not persuaded by the Independent Prosecutor's argument that the indictment should be valid because there were 12 jurors that considered the evidence. Each step in a grand jury process is significant. Simply because 12 grand jurors were present when evidence was presented, or the possibility of an indictment considered, does not mean the final outcome was predetermined. Upon reading the language of the document, a grand juror might have changed their mind. Certainly, one grand juror changed his mind about his willingness to participate. So too did the Prosecutor apparently change his mind about whether the grand jury might act in some fashion with less than 12 jurors. Under the circumstances, the Court is not persuaded there should be an exception for "ministerial acts."

This Court finds the indictment against Judge Murphy was invalid based on the lack of a quorum. The indictment was returned on April 28, 2023 at a time when it is undisputed there were only 11 grand jurors in attendance. As both parties have conceded, there must be a minimum of 12 jurors when an indictment is returned for it to be a valid indictment. That was not the case here. Therefore, because there was not a quorum, the indictment is invalid.

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[60] GJ Tr. 1100-01.

The Independent Prosecutor stated that reasonable efforts were made to contact the grand juror and have them continue with the grand jury proceedings; however, these attempts were unsuccessful and the grand juror has refused to participate in any further proceedings. The grand jury then proceeded with only 11 grand jurors. The Independent Prosecutor expressed clear concern with the loss of the twelfth grand juror, but nonetheless proceeded with the grand jury proceedings. This was an error. The grand jury lacked a quorum and any proceedings after April 7, 2023[61] were improper.

Therefore, the *Motion to Dismiss Indictment* is granted based on the lack of a quorum. In the alternative, the Court will analyze the other three arguments.

B. The Indictment did not allege perjury with any specificity as required by Criminal Rule 7(c)(1) and AS 12.40.100

The indictment failed the requirements of Criminal Rule 7(c) and AS 12.40.100 by failing to detail the particular circumstances that lead to the indictment of the crime. In relevant part, Criminal Rule 7(c) states "[t]he indictment or the information shall be a plain, concise and *definite written statement of the essential facts constituting the offense charge*."[62] Additionally, AS 12.40.100 requires that an indictment:

> must be direct and certain as is regards (1) the party charged; (2) the crime charged; and (3) the particular circumstances of the crime charged when they are necessary to constitute a complete crime. (b) The statement of the facts constituting the offense must be in ordinary and concise language, without repetition, and in a manner that will enable a person of common understanding to know what is intended.[63]

In this case, the indictment in full says:

> That on or about November 3, 2022, at or near Homer in the Third Judicial District, State of Alaska, Margaret Murphy committed the crime of perjury. All of which is a class B felony offense being contrary to and in violation of AS 11.56.200, and against the peace and dignity of the State of Alaska.[64]

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[61] April 7, 2023 was the last time the grand jury had quorum. The twelfth grand juror disappeared between April 7, 2023 and April 26, 2023.
[62] Alaska R. Crim. P. 7(c)(1) (emphasis added).
[63] AS § 12.40.100(a)-(b).
[64] April 28, 2023 Indictment.

Judge Murphy argues that the indictment does not meet the qualifications of specificity. As she notes in her *Motion*, Judge Murphy's testimony, though brief, covered a number of different topics.[65] She was asked about her career, experience and when she retired; she was asked about her assignment to cover the David Haeg trial, certain aspects of the trial, including where she stayed and how she got to and from the Courthouse. She was asked about a co-defendant's change of plea and subsequent testimony against David Haeg, as well as about the sentencing of David Haeg. Judge Murphy was questioned about Mr. Haeg's lawyers, a certain item of supposed evidence that Mr. Haeg alleged had gone missing, as well as his allegations that his lawyers failed him or were out to get him. She was also questioned about a judicial conduct investigation and its potential outcome.

All in all, Judge Murphy's brief testimony on November 3, 2022 covered a range of topics and events, almost all of which had occurred more than 15 years prior. Yet, the indictment mentions none of the specific events or occurrences that Judge Murphy was questioned about. In fact, the indictment's single line of text contains no specification of facts – essential or otherwise. It recites the date of her testimony (November 3, 2022) and the location (Homer, Alaska), but is otherwise simply bare. In fact, it is nothing more than a statement of the crime charged – perjury.

Perjury is a crime with specific elements. "A person commits the crime of perjury if the person makes a false sworn statement which the person does not believe to be true."[66] Therefore, the State must prove three things beyond a reasonable doubt in order to convict Judge Murphy of perjury. First, it must prove she knowingly made a sworn statement; second, the statement must have been false; third, the State must show that Judge Murphy did not believe her sworn statement was true when she made it.

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[65] Murphy *Motion to Dismiss* at pp10-11; GJ Tr. pp 626-636.
[66] AS 11.56.200(a).

In *Adkins v. State*, the Alaska Supreme Court dismissed an indictment that merely tracked the statutory language of the offense charged, but otherwise "failed to apprise the [defendant] of the specific crime he is supposed to have intended to commit."[67]

While no Alaska case has specifically addressed the *Adkins* specificity requirement in a perjury case, other courts have done so. For example, in *Russell v. Shelton*,[68] the United States Supreme Court reversed the defendants' convictions where the indictment failed to specify the subject of inquiry that led to the indictment. After tracing the history of the constitutional right to indictment, and the protections it guarantees, the United States Supreme Court described the requirement of specificity:

> It is an elementary principal of criminal pleading, that where the definition of the offense . . . includes generic terms, 'it is not sufficient that the indictment shall charge the offence in the same generic terms as the definition; but it must state the specifics – it must descend into particulars.'[69]

Other state courts have also addressed the need for specificity in a perjury indictment. For example, the Colorado Court of Appeals dismissed an indictment which is in substance very much like the indictment of Judge Murphy. In *People v. Westendorf*,[70] the indictment charged the defendant unlawfully making a false statement in an official proceeding – grand jury testimony – which he did not believe to be true.[71] As the Colorado Court noted,

> Here, the indictment contains no statements which are alleged to have been perjurious. And, the general rule is that a perjury indictment which does not set forth the alleged false statements, either verbatim or in substance, is insufficient to charge the crime.[72]

In this case, the *Murphy* indictment makes no effort to provide specifics. It gives the date of her testimony, and the location, but that's all. It does not alert her to what testimony is allegedly false, nor does it even address the element of intent. Perjury

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[67] *Adkins v. State*, 389 P.2d 915, 917 (Alaska 1964) (overruled on other grounds by *State v. Semancik*, 99 P.3d 538 (Alaska 2004)).
[68] *Russell v. Shelton*, 369 U.S. 749 (1961).
[69] *Russell*, 369 U.S. at 765 (internal citations omitted.)
[70] 542 P2d 1300 (Colo. App. 1975).
[71] *People v. Westendorf*, 542 P2d 1300, 1301 (Colo. App. 1975).
[72] *Westendorf,* 542 P.2d at 1301.

requires more than simply a false statement. The statement must be made *knowingly* false.[73]

Here, the Independent Prosecutor does not argue the indictment is specific enough to pass scrutiny. Instead, he argues a bill of particulars can cure this issue. However, this argument is unsupported by legal authority. While the Alaska Rules of Criminal Procedure provide for a bill of particulars,[74] no Alaska case has ever held that a defective indictment can be cured by a bill of particulars. But other courts, including the United States Supreme Court, have held that a bill of particulars *cannot cure* an invalid indictment.[75]

As the *Russell* Court noted:

> Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.[76]

Similarly, the Colorado Court of Appeals in *Westendorf* specifically held that a bill of particulars could not cure the defective indictment.[77] This Court agrees with the Courts in *Russell* and *Westendorf*. Therefore, the Independent Prosecutor could not submit a bill of particulars in order to cure the indictment if the indictment does not meet the qualifications required in Criminal Rule 7(c) and AS 12.40.100.

The Independent Prosecutor also relies on *Lupro v. State*[78] in his argument. However, *Lupro* is not analogous to the circumstances here because there was not a

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[73] AS 11.56.240.
[74] Alaska R. Crim. P. 7(f).
[75] *Russell v. United States*, 369 U.S. 749, 770 (1962) emphasis added); *See* also *United States v. Tomasetta*, 429 F.2d 978, 980 (1st Cir. 1970); *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976).
[76] *Russell v. U.S.*, 369 U.S. at 769.
[77] *Westendorf*, 542 P.2d at 1301.
[78] *Lupro v. State*, 603 P.2d 468 (Alaska 1979).

question about whether the indictment was invalid in *Lupro*. In *Lupro*, the Court held "Lupro had adequate forewarning of what the state intended to prove at trial" because "[t]he bases for the claims made by the state were clear from the grand jury testimony. We believe that Lupro had adequate forewarning of what the state intended to prove at trial."[79] But here, the question is not whether Judge Murphy had notice, but rather it is whether the indictment was valid. Therefore, *Lupro* is distinguishable.

In this Court's view, the indictment fails to meet the criteria in Criminal Rule 7(c) and AS 12.40.100. The indictment lacks a "plain, concise and definite written statement of the essential facts constituting the offense charged."[80] Nor does the indictment state the "particular circumstances of the crime charged."[81] It does not identify what specific testimony by Judge Murphy is alleged to be false. It does not even identify the topics. Indeed, the Independent Prosecutor makes no effort to argue that the indictment meets the required criteria. Instead, he argues that a bill of particulars can cure the lack of specificity. This circular argument is not persuasive. Several courts which have considered the Prosecutor's argument, including those which have examined it in the context of a perjury charge, have rejected it.

In summary, the indictment here lacks the required specificity. The Independent Prosecutor does not argue otherwise. Because the indictment does not meet the requirements of Criminal Rule 7(c) and AS 12.40.100, a bill of particulars cannot cure this indictment. Regardless, this Court already found that the indictment was invalid based on the lack of quorum, a bill of particulars would not be able to cure the invalid indictment.

Consequently, the *Motion to Dismiss Indictment* is also granted based on the lack of specificity as required by Criminal Rule 7(c)(1) and AS 12.40.100.

C. The Prosecutor Provided the Grand Jury with the Wrong Jury Instructions

In order for any grand jury to issue a criminal indictment, it must be given proper instructions on the law. This includes proper instruction on the amount, or sufficiency of

[79] *Lupro v. State*, 603 P.2d 468, 472 (Alaska 1979).
[80] Alaska R. Crim. P. 7(c)(1).
[81] AS § 12.40.100(a)(3).

the evidence needed to support an indictment. The sufficiency of evidence standard is provided in Criminal Rule 6(r).

"The grand jury shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant."[82] This is the sufficiency of evidence standard that applies for the grand jury to issue an indictment.

Judge Murphy argues that the Independent Prosecutor gave the wrong instruction on the standard for evidence presented to the grand jury. She notes that he provided the grand jury with a "substantial evidence standard", but incorrectly described it as less than a preponderance of evidence. Further, Judge Murphy contends that when the indictment was actually presented for consideration, no further instructions were given. The Independent Prosecutor never gave the correct indictment standard. Nor did he provide the grand jury with the definition of "knowingly."[83] Judge Murphy contends the grand jury was never informed that they could not indict if they found Judge Murphy's testimony was literally true. Additionally, the grand jury was not required to identify the alleged false testimony and how it was false.

Conversely, the Independent Prosecutor admits he failed to provide the grand jury with the correct instruction for an indictment. However, he argues the grand jurors had previously served as "regular" grand jurors. Therefore, according to the Prosecutor's argument, the grand jury had prior experience and knowledge of the correct standard. The Independent Prosecutor argues the Court should not dismiss the indictment just because the instructions given applied to an investigation report, not a criminal indictment.

In the Court's view, both parties acknowledge the correct standard for the grand jury to consider an indictment. That point is undisputed. Nor is there any dispute that a grand jury must be properly instructed in order to issue an indictment. The confusion lays in the fact that the grand jury was initially convened as an investigative grand jury to consider a matter of "public safety and welfare."[84] It was not convened to consider criminal

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[82] Alaska R. Crim. P. 6(r) (emphasis added).
[83] As discussed in more detail in the previous section, the crime of perjury includes an element of intent. The Defendant's false statement must have been made knowingly.
[84] Alaska R. Crim. P. 6.1.

charges. As he initially described it for the grand jury, they were only authorized to issue a "report", not an indictment.[85]

He described his role, and the standard of evidence to be applied as follows:

> I'm working on your behalf to express your will and your decisions. And then the judge at the end would determine whether or not the decisions made and that are reflected in your report, if they're supported by substantial evidence. That's the standard that's lower than beyond a reasonable doubt, it's lower than a preponderance of the evidence, it's a fairly low standard. *It's not the same standard that you would apply at regular grand jury proceedings.* So, that's something to keep in mind that we're not required – you're not required to find evidence that would likely lead to the conviction of anyone, you have to believe there's substantial evidence to support the findings that you make.[86]

The instruction quoted above – lower than a preponderance – does not reflect the correct standard for a criminal indictment. It is true the Prosecutor was discussing an investigation report when he made this comment, but he later made similar comments even after the grand jury began discussing the *possibility* of an indictment.[87] Ultimately, any instructions given by the Prosecutor regarding the preparation of an investigation report are irrelevant to the instructions they needed regarding the indictment. If anything, the earlier instructions would be hopelessly confusing, and legally incorrect, for a grand jury actually considering whether to issue an indictment. Therefore, the Court looks to whether the grand jury was ever given proper instructions for a criminal indictment. The simple answer is no. The grand jury was never given the correct standard for an indictment under Criminal Rule 6(r). The Independent Prosecutor concedes this point.

But the Court must still address the Independent Prosecutor's argument that the indictment should not be dismissed because the grand jurors had previously served as "regular" grand jurors (considering criminal indictments) and were properly instructed at that time. This argument has no legal basis. Just because the grand jurors had experience and knowledge as "regulars" does not mean they were properly instructed. First, this

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[85] GJ Tr. 403.
[86] GJ Tr. 407 (emphasis added)
[87] GJ Tr. p998, 1009-1011. On January 31, 2023 when these comments were made, the Prosecutor instructed that they could only recommend an indictment in their report.

Court has no record to look to in order to make any determination whether they received correct instruction. Second, even if the Court were to accept the premise that prior experience could be considered, it would not cure the later mis-instruction. While the Alaska Supreme Court has previously recognized that misinformation in a grand jury proceeding may be cured by later correct and clear instruction, that is simply not what transpired in this case.[88] Instead, the Independent Prosecutor failed to give the grand jury any proper instructions regarding the indictment. In short, a grand juror's prior experience does not cure the lack of instructions given to *this* grand jury. The Independent Prosecutor should have provided the grand jury with the correct standard for the indictment as defined in Criminal Rule 6(r). His failure to do so is fatal to *this* indictment.

The *Motion to Dismiss Indictment* is therefore granted on this alternative basis that the grand jury received the wrong jury instructions from the Independent Prosecutor.

D. Admissible Evidence and the *Stern* Test

Judge Murphy's final argument is that the grand jury proceedings in this case were hopelessly tainted with inadmissible hearsay, conjecture and grievance allegations by David Haeg. She asserts that the Prosecutor regularly admonished the grand jury that it would not be deciding whether to issue an indictment charging someone with a crime.[89] As a result, Judge Murphy argues the rules of evidence were abandoned, and the Prosecutor allowed mountains of irrelevant and highly prejudicial evidence to be considered.[90]

The law about what evidence a grand jury may consider is well settled, and strict.[91] An indictment based on inadmissible evidence is considered invalid unless there is

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[88] *See Coleman v. State*, 553 P.2d 40, 49 (Alaska 1976) (Prosecutor's improper comments in summation were cured by later clear and firm instruction on the burden of proof.)
[89] Murphy *Motion to Dismiss* at p32; *See* also, GJ Tr. 93.
[90] Murphy *Motion to Dismiss* at p32.
[91] Criminal Rule 6(s) discusses the admissibility of evidence in a grand jury proceeding. It states in part: "Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Except as stated in subparagraphs (2), (3), and (6), hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record." Alaska R. Crim. P. 6(s)(1).

sufficient independent, admissible evidence to substantiate the indictment.[92] The Alaska Supreme Court explained the rule this way in *Wassillie*:[93]

> Alaska's atypically strict evidentiary standards for grand jury proceedings reflect the constitutional framers' concerns about prosecutors' control over what the grand jury hears. The State's presentation of evidence to the grand jury is generally limited to that "which would be legally admissible at trial," although "[i]n appropriate cases, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial." Alaska Rule of Criminal Procedure 6(r)(1) addresses hearsay specifically, instructing that "hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction" unless the hearsay falls into one of three enumerated exceptions. An indictment based upon inadmissible evidence is considered invalid; but if sufficient admissible evidence was presented to the grand jury for it to indict, then the presentation of inadmissible evidence is harmless error.[94]

The law is similarly well settled when inadmissible or improper evidence is presented to the grand jury. When a grand jury has heard improper evidence, the court must conduct a two-part analysis, known as the *Stern* test.[95] In the *Stern* test:

> The superior court first subtracts the improper evidence from the total case heard by the grand jury and determines whether the remaining evidence would be legally sufficient to support the indictment. If the remaining evidence is legally sufficient, the court then assesses the degree to which the improper evidence might have unfairly prejudiced the grand jury's consideration of the case. The question the court must ask itself is whether, even though the remaining admissible evidence is legally sufficient to support an indictment, the probative force of that admissible evidence was so weak and the unfair prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict.[96]

Judge Murphy argues the admitted evidence was inadmissible under the Rules of Evidence, and highly prejudicial, which therefore fails the *Stern* test. She further contends the majority of the evidence is hearsay and Mr. Haeg's "testimony", in particular, was improperly introduced without any compelling reasons. Additionally, Judge Murphy

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[92] *Frink v. State*, 597 P.2d 154, 163 (Alaska 1979); *Wassillie v. State*, 411 P.3d 595, 608 (Alaska 2018).
[93] *Wassillie v. State*, 411 P.3d 595 (Alaska 2018).
[94] *Wassillie*, 411 P.3d at 608-609.
[95] *Stern v. State*, 827 P.2d 442 (Alaska Ct. App. 1992).
[96] *Stern*, 827 P.2d at 445-46.

argues that the initial prosecutor stated that she was unsure if Mr. Haeg's "binders" of documents were admissible evidence. Judge Murphy is not at all unsure, and she argues forcefully that the majority of the evidence presented was *not* admissible. Overall, Judge Murphy argues the prosecution in this case took a back seat, and effectively abdicated its role as the only professional legal advisor allowed to participate in a grand jury proceeding. She argues the Court should dismiss the indictment as the great majority of the evidence was not admissible, and this inadmissible evidence unfairly prejudiced the grand jury's decision.

In response, the Independent Prosecutor argues that his instructions to the grand jury about the evidence once he took over effectively eliminate any concern under *Stern*. First, he states he "made it clear" that the grand jury "could only receive admissible evidence" from September 16, 2022 through April 7, 2023.[97] The Independent Prosecutor argues that evidence before September 16, 2022 was only introduced to allow the grand jury to determine whether or not to open an investigation. Second, he argues that the admissibility of the evidence introduced before September 16, 2022 is therefore a moot issue because of the later instructions he provided to the grand jury.

In her *Reply*, Judge Murphy argues that the Independent Prosecutor's viewpoint would effectively eviscerate the evidentiary standard of Criminal Rule 6(s). She also notes that Mr. Haeg was allowed to present his own self-serving opinions about what the law should be, and to present reams of inflammatory and generally inadmissible materials for the grand jury to consider, all in the guise of "testimony." She reiterates that the evidence does not meet the standard set out in *Stern* and the Court should dismiss the indictment.

Here, the Court agrees that the Independent Prosecutor's jury instructions when he took over the case do not cure the problem. As outlined in detail in the motion papers, the grand jury convened in this case on July 8, 2022. The prosecutor at the time reported that a grand juror serving on a different panel in March, 2022 had been approached by David Haeg, and that Mr. Haeg had supplied that grand juror with an "information packet" alleging wide ranging corruption and criminal conduct by numerous people involved in

[97] Plaintiff's *Opposition* at 9.

Mr. Haeg's various cases.[98] That grand juror, T.H., was then brought in to give testimony. T.H. testified that her previous grand jury panel had been approached – off record – by a group of picketers asking "if we'd be willing to hear their case."[99] In addition, the prosecutor provided the grand jury with a tranche of documents – all provided by David Haeg in three binders.[100] "These are all documents that are related to the prosecution of Mr. Haeg, either the underlying prosecution case, appellate cases, what we call postconviction relief cases, or other allegations he's made."[101] The binders, containing approximately 1,500 pages of documents were all made available to the grand jury for their consideration.[102] As described by Judge Murphy, the binders contain "multiple levels of hearsay, mostly involving Mr. Haeg's baseless conjecture and self-serving recitations of fact, his own unchecked, unsophisticated, and unsupported legal conclusions, and hundreds of pages from Mr. Haeg's previous cases and related grievances wherein he raised dozens of sweeping accusations of corruption and other malfeasance."[103]

Against this backdrop, the Court must determine whether or not there was improper evidence. Then if the evidence was improper, the Court must look to the *Stern* test.[104] The *Stern* test requires the Court to first subtract the improper evidence, and then engage in a two-part analysis. The Court must then determine if the remaining evidence is legally sufficient to support the indictment. If it is, then the Court must ask whether the improper evidence might have unfairly prejudiced the grand jury's consideration of the case. "The question the court must ask itself is whether, even though the remaining admissible evidence is legally sufficient to support an indictment, the probative force of that admissible evidence was so weak and the unfair prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury's decision to indict."[105]

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[98] Murphy *Motion to Dismiss* at p28; GJ Tr. 12, 18-20.
[99] GJ Tr. 40-41.
[100] GJ Tr. 39.
[101] GJ Tr. 36-37.
[102] GJ Tr. 43, GJ Ex. 1.
[103] Murphy *Motion to Dismiss* at p30.
[104] *Stern v. State*, 827 P.2d 442, 445-46 (Alaska Ct. App. 1992).
[105] *Stern v. State*, 827 P.2d 442, 445-46 (Alaska Ct. App. 1992).

First, there is no question the grand jury was provided with improper evidence. Mr. Haeg's three binders are replete with inadmissible hearsay, and speculation which would not be allowed at a trial. Further, Mr. Haeg's "testimony" was essentially a freeform lecture by Mr. Haeg to the grand jury in which he outlined his grievances about lawyers, judges and other public officials, his theories about corruption and the legal system, and his own personal view about what the law should be.[106] Much of Mr. Haeg's testimony to the grand jury came during its' pre-investigative phase, and the Prosecutor said they could hear his testimony with more flexibility at that point.[107] In fact, the Prosecutor even told Mr. Haeg in her introduction that she was going to "allow a little bit more of a free rein even if it doesn't strictly comply with the rules of evidence."[108] Mr. Haeg took full advantage and his testimony on August 2, 2022 went on for approximately four hours.

Mr. Haeg's testimony is in fact teeming with inadmissible hearsay and speculation. At one point, one of the grand jurors pressed Mr. Haeg on whether he had any confirmation for the things he was saying, or any "corroborating evidence."[109] Mr. Haeg's response was telling: "I'm just telling you what I know. Some of the stuff I have evidence on, some of it I don't, but it happened."[110] The grand juror pressed further: "But if there's no evidence, we can't verify that it happened. It's one – it's one person's word against another's."[111] When asked whether it was hearsay, Mr. Haeg said the grand jury could subpoena witnesses, and "you'd just have a bunch of witnesses saying the same thing and it could all be hearsay."[112]

From just this one example – the testimony by David Haeg – there is little doubt that the grand jury was exposed to hours and hours of inadmissible hearsay and speculative testimony that would not be permitted in a trial. Similarly, the documentary exhibits supplied by Mr. Haeg include several hundred pages of inadmissible hearsay. In short, the grand jury was presented with inadmissible evidence.

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[106] GJ Tr. 156- 325.
[107] GJ Tr. 124-125.
[108] GJ Tr. 158.
[109] GJ Tr. 206.
[110] GJ Tr. 207.
[111] GJ Tr. 207 (question by unidentified grand juror to Mr. Haeg.)
[112] GJ Tr. 208.

Next, the Court looks to the second prong of the *Stern* test. That part of the test looks to whether the introduction of otherwise improper evidence is potentially harmless because there was other admissible evidence sufficient to support the indictment and whether the improper evidence unfairly prejudiced the grand jury's decision.

The evidence before the grand jury in this case was presented over the course of several months. It included six days of testimony by 16 witnesses. The transcript covers more than 1,500 pages, and there are several thousand pages of exhibits. This Court agrees with the observation that the transcript, and the exhibits submitted in support of Mr. Haeg's testimony are too lengthy and numerous to list in their entirety. Nonetheless, Judge Murphy's *Motion* includes 25 examples of improper evidence submitted to the grand jury.

Because of the highly unusual nature of the grand jury proceeding in this case, it is impossible to subtract out the "improper evidence" and conduct a traditional *Stern* analysis and determine what's left. From its inception, this grand jury investigation was focused upon allegations and grievances of one man – David Haeg. Once it voted to conduct an investigation, the grand jury was given free range to investigate as it saw fit. Unlike a traditional criminal investigation where the prosecutor would prepare charges in advance, and then present evidence for the grand jury to consider, this case proceeded entirely differently. Instead, the grand jury essentially instructed the Prosecutor what that they wanted, or who they wanted to hear from. The Prosecutor then arranged for testimony, or subpoenas as the case may be.

But through it all, the direction was clear. The grand jury was investigating the allegations of corruption by David Haeg.[113] And Mr. Haeg's accusations were breathtaking in their scope. He made inflammatory and inaccurate accusations against sitting judges, including all of the appellate judges who had heard his various appeals. He asserted there was statewide corruption in the legal system. In addition, Mr. Haeg provided the grand jury with his own unique take on the law, and inaccurate statements

[113] *See* generally the examples and citations to grand jury record at pages 36-44 of Murphy's Motion to Dismiss.

in the form of testimony about the power of any citizen to initiate a grand jury proceeding and the power of the grand jury to investigate whatever it wanted. He even went so far as to advise the grand jury that they should disregard the Prosecutor's advice and instructions. And, he suggested the grand jury could and should disregard the instruction to keep their proceedings secret.

Despite the extraordinary latitude given to the grand jury in this case, and the scope and volume of the evidence they collected in this case, there is very little that can be specifically tied to the allegation of perjury against Judge Murphy. Moreover, without a specific allegation of facts underlying the charge of perjury against Judge Murphy, it is impossible to subtract out the improper evidence for purposes of the Court's *Stern test* analysis, and then determine what's left. Even if that exercise was possible, the Court simply cannot say the remaining "admissible evidence" is legally sufficient to support an indictment. The allegation of perjury is so non-specific that the Court can only speculate what the grand jury was thinking, and that speculation does not give the Court any ability to determine the probative value of any remaining evidence. Finally, it is abundantly clear that the unfair prejudice engendered by the improper evidence was so strong that it is highly likely the improper evidence was the decisive factor in the grand jury's decision to indict Judge Murphy. Therefore, the evidence in this case *fails* the *Stern test.*

The *Motion to Dismiss Indictment* is also granted because the indictment fails the *Stern* test.

VI. CONCLUSION

Overall, the *Motion to Dismiss Indictment* is granted based on all four arguments. First, there was not a quorum when the indictment was returned. Second, the indictment itself lacked specificity as required by law. A bill of particulars cannot cure an invalid indictment. Third, the Independent Prosecutor did not provide the grand jury with the proper jury instruction involving the indictment and thus leading to dismissal. Fourth, the indictment was based on improper and inadmissible evidence, and thus fails the *Stern* test. Each ground asserted independently supports dismissal of the indictment in this case.

VII. ORDER

The *Motion to Dismiss Indictment* is **GRANTED.** This indictment against Judge Murphy is dismissed. The Independent Prosecutor may choose to present the case to the grand jury for a new indictment. The Independent Prosecutor shall have ten (10) days to advise the Court whether he will seek a new indictment of Judge Murphy.[114] If the State does not seek a new indictment, then the case will be dismissed.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27th day of February, 2024.

Thomas A. Matthews
Superior Court Judge

I certify that on 2/27/24 @ 11 a copy of the following was mailed/faxed/hand-delivered to each of the following at their addresses of record.
Clinton Campion
Jeffrey Robinson
Timothy Petumenos

[114] The Court acknowledges the Prosecutor indicated at oral argument on the *Motion to Dismiss* that he did not believe he could locate the missing grand juror in order to re-indict Judge Murphy.