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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**

**FOURTH JUDICIAL DISTRICT**

STATE OF ALASKA, )

 Plaintiff )

 )

v. )

 )

STEVEN HARRIS DOWNS )

 Defendant )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ )

Case No.: 4FA-19-00504CR

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or a witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

**DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL, OR,**

**IN THE ALTERNATIVE, FOR NEW TRIAL [RULES 29 AND 33]**

Now comes the Defendant, Steven H. Downs, by and through undersigned counsel, and states the following:

**Introduction**

Following a jury trial that lasted several weeks, Defendant was convicted of Murder in the First Degree and Sexual Assault in the First Degree.

 At the end of the State’s presentation of its case in chief, the defense moved for a judgment of acquittal. The motion was denied by the Court.

 Rule 29(b) of the Alaska Rules of Criminal Procedure allows for the renewal of a motion for judgment of acquittal within five (5) days of a jury’s verdict.

 Rule 33(c) of the Alaska Rules of Criminal Procedure allows the Defendant, in the interest of justice, to seek a new trial within five (5) days of a jury’s verdict.

 The Defendant has timely filed this motion.

**Factual and Legal Argument**

 During the trial, the State engaged in serious prosecutorial misconduct, perjured testimony, and other wrongful behavior, warranting that the Defendant’s convictions be vacated and dismissed, or, in the alternative, that the Court grant a new trial.

 **1. The lead investigator engaged in perjured and otherwise**

**untruthful testimony.**

 **a. Detective Randel McPherron’s perjured and other**

 **substantive untruthful testimony under oath.**

One of the key witnesses for the state was Katherine deSchweinitz Lee, the former girlfriend of Defendant Steven Downs. During the trial, Ms. Lee testified that she recalled that the Defendant owned a gun during the timeframe that S.S. was murdered. At a prior pretrial hearing on February 4, 2021, Ms. Lee testified that she recanted her prior statements about the Defendant’s ownership of guns.

 During cross-examination at trial, lead investigator Randel McPherron testified, *inter alia*, that he “went to the bathroom” during that part of Ms. Lee’s prior testimony. He furthermore testified that he had not been made aware of the substantive detail of Ms. Lee recantation by the prosecutors.

 Mr. McPherron’s brazen false testimony comes on the heels of other serious misconduct of the lead investigator. The H&R .22 pistol seized from Steven’s home in Maine was obviously important evidence in the State’s case. Investigator McPherron’s testimony that he “did not have enough information” and “did not have the time” to investigate the 2015 purchase of the gun from Sherman Varney does not pass the straightface test. Mr. McPherron also previously made substantive false statements, under oath, in search warrant affidavits submitted to the Court, falsely misrepresenting that a student named Brian Kowalski had indicated that Steven had owned a gun at the time of the homicide.

 **b. Knowingly presenting untruthful/perjured testimony**

 **is a serious violation of the Alaska Rules of**

 **Professional Conduct.**

Rule 3.3 of the Alaska Rules of Professional Conduct provides:

“(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to

correct a false statement of material fact or law previously made

to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling

jurisdiction known to the lawyer to be directly adverse to the position

of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the

lawyer's client, or a witness called by the lawyer has offered material

evidence and the lawyer comes to know of its falsity, the lawyer shall

take reasonable and timely remedial measures, including, if

necessary, disclosure to the tribunal. A lawyer may refuse to offer

evidence, other than the testimony of a defendant in a criminal matter,

that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding

and who knows that a person, including the lawyer's client, intends

to engage, is engaging, or has engaged in criminal or fraudulent

conduct related to the proceeding shall take reasonable and timely

remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the

conclusion of the proceeding, and apply even if compliance requires

disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all

material facts known to the lawyer that are necessary to enable the

tribunal to make an informed decision, whether or not the facts are

adverse to the lawyer's position.”

 The State’s presentation of certain untruthful witness testimony, especially that of Investigator McPherron, constitutes a violation of Rules 3(a)(3) and 3(b).

 **2. The State engaged in improper allegations during opening**

**statements and closing arguments.**

**a. The State improperly argued that Defendant had “lied” to**

 **law enforcement during interrogations.**

During her closing arguments, the prosecutor argued that the Defendant had “lied” to the investigating troopers who interrogated him. This is serious prosecutorial misconduct that warrants dismissal of the convictions against Defendant. Alaska precedent is clear: “[I]t is usually improper for the prosecutor to call the defendant a liar….”[[1]](#footnote-1) This was especially the case here, in which the State relied so heavily on the Defendant’s denial that he knew who S.S. was or that he had had any contact with her in 1993.

**b. The State improperly argued that Defendant had a**

 **“propensity” for owning an H&R .22 pistol.**

The defense has argued from the beginning of the case that evidence of Defendant’s H&R .22 pistol was irrelevant and that admission of any such evidence at trial would be highly prejudicial. The defense filed a motion *in limine* to exclude such evidence. That motion was denied, after the State argued that this was the gun that killed S.S.

 The evidence that unfolded at trial ended up magnifying the Defendant’s concerns. From the opening statements through the end of the trial, the State, for the first time in the pendency of this case, began to distance itself from the argument that this was actually the gun used in the homicide. This became even more clear when key witness Nicholas Dazer testified that the gun seized from Mr. Downs did not appear the same gun that he recalled from 1993. Despite this knowledge prior to trial, the State improperly continued to focus evidence on the H&R .22. This was clearly an attempt to convince the jury that Steven had a propensity for ownership of this make and model.

 “Evidence Rule 404(b)(1) codifies the common-law doctrine forbidding the admission of “propensity” evidence. In this context, the phrase “propensity evidence” is legal shorthand; it means: evidence of a person's other bad acts whose sole relevance is to prove the person's character, so that the person's character can then be used as circumstantial evidence that the person acted true to character during the episode being litigated.”[[2]](#footnote-2)

**c. The State improperly attempted to shift the burden of**

**proof to the defendant.**

In its closing argument, the State argued repeatedly that the defendant had presented “no evidence of” various defenses. This was an improper attempt to transfer the burden of proof from the State to the defense.

**3. The State improperly presented other witnesses with the**

**intent of misleading the jury, including, but not limited to, the**

 **following:**

 **a. Katherine Lee.**

The State presented Katherine Lee as a witness. Ms. Lee testified that Steven owned a gun at the time of the murder in 1993. The state presented this and other misleading testimony from Ms. Lee, even though she had previously testified, under oath, that she was recanting such testimony.

 **b. Jerilyn Nelson.**

On the eve of trial, the State notified the defense that it would be presenting Jerilyn Nelson as a witness to testify to recollections that were completely opposite to what she had told law enforcement officers in previous interviews. The defense asked the prosecution not to present such obviously false testimony. In bad faith, the State nonetheless presented Ms. Nelson’s testimony. In the end, Ms. Nelson testified that she had perhaps “imagined” her recollection of a taller man in a hoodie coming out of the bathroom. This was part of the State’s tactics during trial of throwing as much mud against Mr. Downs and hoping as much of it as possible would stick.

 **c. Leighton Lee.**

Mr. Lee was another witness presented in bad faith by the prosecution. On the eve of trial, the prosecution notified the defense that Mr. Lee “had heard” that Steven Downs owned a gun at the time of the murder. This was the first time Mr. Lee was reported to have made any such statement. It was inconsistent with his prior statements to investigators that he had never seen Steven with a gun. It appears that the State, in bad faith, presented Mr. Lee for the sole purpose of attempting to introduce inadmissible hearsay testimony. Such testimony was excluded, and Mr. Lee went on to testify that he personally had not seen Steven with a gun, and that Steven was otherwise a friendly, well-adjusted friend who appeared to have no involvement in the crime.

**4. The defense asserts that it has probable cause to believe that**

 **certain telephonic communications between Defendant and**

 **his attorneys have been illegally monitored by the State.**

Shortly after arrival in Alaska for the trial, undersigned attorneys James Howaniec and Jesse Archer engaged in a lengthy telephone conversation with Steven Downs at the Fairbanks Correctional Center. The conversation entailed a highly sensitive discussion of the facts of the case that included highly confidential discussion of trial strategy.

 Within less than twelve hours following the conversation, the defense received the following unusual email from Assistant Attorney General Christopher Darnall:

“In an abundance of caution, I’m writing to make sure that you’re aware

that Alaska DOC records phone calls made by in-custody inmates.

Sometimes members of DPS review these calls, but they are otherwise

maintained solely by the DOC. Here, I understand that members of DPS

reviewed some of your client’s phone calls and found nothing material

or relevant – in other words, there was nothing of evidentiary value in

the calls that DPS listened to, either inculpatory or exculpatory, and we

do not intend to use any recordings that DOC possesses. Had DPS

discovered anything relevant or material, we would have passed it along.

I hope this isn’t any kind of surprise; it is a fairly routine practice here,

but usually only becomes an issue and/or is discovered if there are

calls that contain substantive statements and/or are relevant. However,

in an abundance of caution, we wanted to advise you of the occurrence.”

 This was a warning that had not been made by the State during the prior three years since Steven was arrested. During that time, Steven has had hundreds of telephone calls with his attorneys. The timing of this odd email raised very serious concerns that phone calls between Mr. Downs and his attorneys were being illegally monitored by the State.

 Following Mr. Darnall’s email, Attorney Archer made several discovery requests to the State for more information pertaining to the securus telephone records from the jail. The responses have been inadequate. Attorney Archer had a subpoena served upon the Fairbanks Correctional Center more than a month ago, seeking more detailed records. That subpoena has been ignored completely by the jail. The defense is filing a separate motion to enforce the subpoena and compel discovery.

 The defense’s alarms became even more urgent during closing arguments, when the prosecutor recited a highly unusually phrased statement that the Defendant had made during the aforementioned telephone conference. The statement could be pure coincidence, but this seems highly unlikely to the defense.

 The defense understands that the above allegations are serious and that it will be required to present convincing evidence of any such illegality. The defense would have withheld this allegation until further evidence is developed, but for the prohibitions of presenting “new evidence” beyond a five-day post-verdict window in Rule 33. The defense is aggressively pursuing telephone records and will have them examined forensically.

**Conclusion**

All of the above misconduct by the prosecution and its lead investigator warrants a mistrial and dismissal of the convictions against the Defendant, or, in the alternative, that a new trial be granted.

Wherefore, Defendant moves that the Court enter a judgment of acquittal, or, in the alternative, grant a new trial.

Dated: February 14, 2022

 /s/ Franklin E. Spaulding

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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing

is being served by email on the following

parties:

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Assistant Attorney General

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/s/ James P. Howaniec 02/14/2022

JAMES P. HOWANIEC Date

Attorney for Defendant

1. *Smith v. State*, 771 P.2d 1374, 1379 (Alaska App. 1989), citing [*United States v. Peyro,* 786 F.2d 826, 831 (8th Cir.1986)](https://scholar.google.com/scholar_case?case=16788982454254651015&q=smith+v.+state+771+P2d+1374&hl=en&as_sdt=10000006&as_vis=1); [*Harris v. United States,* 402 F.2d 656, 657-59 (9th Cir.1968)](https://scholar.google.com/scholar_case?case=9808890996810820657&q=smith+v.+state+771+P2d+1374&hl=en&as_sdt=10000006&as_vis=1); [*Whitherow v. State,* 765 P.2d 1153, 1155 (Nev. 1988)](https://scholar.google.com/scholar_case?case=5688772955923485010&q=smith+v.+state+771+P2d+1374&hl=en&as_sdt=10000006&as_vis=1). [↑](#footnote-ref-1)
2. *Bingaman v. State*, 76 P.3d 398, 403 (Alaska App. 2003), *holding modified by Douglas v. State*, 151 P.3d 495 (Alaska App. 2006). [↑](#footnote-ref-2)