

# DID STATE MISCONDUCT RESULT IN A SOUTHEAST CITIZEN SERVING A LIFE SENTENCE FOR A CRIME THAT NEVER OCCURRED?

By David Ignell<sup>1</sup>

## 1. Introduction

Martin Luther King, Jr., wrote “Injustice anywhere is a threat to justice everywhere...Whatever affects one directly, affects all indirectly...We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people.”

I need to speak up about a disturbing injustice that unfolded in Juneau 10 years ago and continues today. Thomas Jack Jr., of Hoonah should not have been arrested on February 23, 2009 for the charge of sexual assault of a minor. He should not have been indicted by the grand jury on February 27, 2009 of 21 counts which were subsequently reduced to 7 counts by a second grand jury on October 23, 2009. He should not have been tried in Juneau on February 1, 2010, a trial that lasted several days and resulted in a hung jury. He should not have been retried on July 10, 2010, another trial that lasted several days and this time resulted in a conviction. Mr. Jack should not have been sentenced to 50 years in prison where he has now languished for almost 10 years. His family should not have had their name tarnished and a lifetime of financial savings wiped out trying to fight off the State’s unwarranted and blind aggression. This 2019 holiday season Mr. Jack should be at home with his family, not alone in a jail cell at Lemon Creek.

Last winter a friend heard I was doing some volunteer work for the California Innocence Project and told me of a prisoner at Lemon Creek who many people believe is innocent. That prisoner was Mr. Jack and it turned out the alleged crimes occurred in Hoonah where I maintain a home. I spoke with some trusted friends there and no one thought Mr. Jack was guilty of the crimes he was convicted of. Those who knew Mr. Jack well had only good things to say about him. To some people, Mr. Jack’s case represents the proverbial ‘tip of the iceberg’ when it comes to the criminal justice system for Alaska Natives.

This summer I investigated Mr. Jack’s case and wrote a 60-page detailed report based on my review of several volumes of court files and two boxes of documents provided to me by Mr. Jack’s family. I analyzed thousands of pages of trial and grand jury transcripts, law enforcement and State agency records, interviews, court pleadings, orders and correspondence. This paper summarizes that report.

## 2. Overview of Mr. Jack’s Wrongful Conviction and the State’s Reaction Ten Years Later.

The State of Alaska arrested Mr. Jack solely upon the ever-changing allegations of a 12 year old girl in foster care who was worried she might be pregnant (I’ll refer to her as ‘Katie’, not her real name). Halfway through Mr. Jack’s first trial, the judge admitted to the attorneys, “Without a doubt there are inconsistencies, numerous inconsistencies in [Katie’s] testimony”. Towards the end of the first trial the judge repeated this admission, “And, you know, the defense is absolutely correct, that the various statements given by [Katie] have been inconsistent with each other. And there are a lot of inconsistencies between them. And her statements have varied substantially in a lot of respects.”

Katie and her younger sister were in the State’s foster care system and had bounced around various homes the previous few years including the home of Mr. Jack and his wife. When Katie raised her

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<sup>1</sup> Mr. Ignell is a graduate of Juneau-Douglas High School and the University of San Diego Law School. Comments can be sent to him at [ignelldave@gmail.com](mailto:ignelldave@gmail.com).

allegations in mid-January, 2009, the girls had been out of the Jacks' home for over two months and were settled into a new home. After the transfer, Katie had begun exhibiting some suggestive behavior at school that the new foster parents apparently allowed. If this behavior had resulted in a pregnancy, Katie may have perceived that blaming Mr. Jack was the only way to stay in Hoonah and not be separated from her sister. Even if she wasn't pregnant, Katie may have perceived that blaming her sexual activity on Mr. Jack was the only way for the girls to remain in the new, less restrictive home and avoid being transferred to an undesired home. Either way, a scared 12-year old foster kid had plenty of incentive to lie.

Indeed, Katie later admitted she had lied. The day after Mr. Jack was arrested, Katie approached a trusted teacher after class and said the rumors about her and Mr. Jack having sex weren't true. A week later Katie told her social worker she had a dream that everything she had said about Mr. Jack was a lie. Katie then told a close friend that the allegations were not true. Why was the State so eager to listen to an outlandish story produced under significant stress and perhaps manipulation but completely ignored her admissions to those she trusted?

Making matters worse for the State's conduct, there was no corroborating evidence that Katie's ever-changing allegations had any semblance of truth. There was no physical evidence that a crime had been committed -- no condoms, condom wrappers, or semen stains -- all which would have existed in abundance if the allegations were true. There were no witnesses corroborating Katie's allegations of rape occurring in her bed on a nightly basis during the entire month of October 2008, up to three hours at a time. Katie's sister and foster mother were in the house the entire time, but their testimony directly contradicted Katie's allegations.

Mr. Jack didn't have a criminal record, didn't have a problem with alcohol or drugs, and had no complaints about his sexual behavior. For more than one year the State's social workers had visited Katie on a regular basis in his home and hadn't observed anything unusual. After leaving the Jacks' home in early November 2008, Katie had told the social worker that Mr. Jack had never done anything inappropriate to her.

Where the conduct of the State really becomes troublesome is the manner in which its officers disregarded the truth. The State first ignored and then avoided gathering additional evidence that cleared Mr. Jack. The State violated Mr. Jack's right to privacy by obtaining, without probable cause, a Glass warrant enabling them to secretly record 4 hours of conversation with Mr. Jack. When Mr. Jack didn't tell them what they wanted to hear, the State illegally arrested him and then twisted his words around to implicate his guilt and obtain the grand jury indictments. At the two grand jury hearings, the State intentionally and illegally withheld a substantial amount of exonerating evidence from the jurors. There's even evidence suggesting the State manipulated Katie into lying before the first grand jury, withholding from her the fact that she wasn't pregnant until after she had testified under oath.

The judge presiding over Mr. Jack's case not only allowed these constitutional violations to stand, he appears to have added a few more during the trials. Several questionable rulings by the judge allowed the State to survive a dismissal of the case prior to trial and an acquittal at the first trial. At the second trial, the judge strengthened the State's hand by forcing a trial date that left Mr. Jack's new attorney unprepared. The judge then played a very active role in selecting the jury that ultimately convicted Mr. Jack, privately questioning and then excusing 20 potential jurors, including most of the minorities called.

At trial, the jury heard compelling evidence from four witnesses that substantiated Mr. Jack's claims of innocence. Mr. Jack's wife testified he was by her side the entire time that the alleged acts were said to

have occurred. She also testified that the girls had slept together in the same bed the entire month of October. Katie's sister directly contradicted important elements of Katie's story while corroborating Mrs. Jack's testimony. Katie's trusted teacher and a good friend each testified about Katie's confessions to them. These witnesses held up well during the State's cross-examination. The jury even heard Katie admit she told the social worker about her dream in which everything she said about Mr. Jack was a lie.

All of this critical testimony in Mr. Jack's favor was completely disregarded by those jurors who voted "guilty" in both trials. These jurors had been instructed they could not convict Mr. Jack if there was any reasonable doubt regarding the allegations. Katie's ever-changing story should have on its own triggered that reasonable doubt. Yet Mr. Jack had all this other evidence in his favor that created additional reasonable doubt and clearly mandated a "not guilty" vote and an outright acquittal of all charges.

What went wrong? Was it of significance that these four important witnesses in Mr. Jack's favor were all Alaska Native women from Hoonah? Was their testimony disregarded because of racial or gender bias? Did their being from a "village" contribute to that bias?

I'm deeply disturbed by the actions of the State entities responsible for Mr. Jack's wrongful conviction -- the Office of Children Services ("OCS"), Alaska State Troopers ("AST"), District Attorney's Office ("DAO") and the Alaska Court System ("ACS"). The collective actions of these State government bodies support the notion that a systemic problem exists within Alaska's criminal justice system. In Mr. Jack's case, these entities had each other's back and covered for glaring errors along the way. The separation of power crucial for preserving a healthy democracy failed and an egregious injustice resulted.

I sent my 60-page report to the offices of the Attorney General, and later to the Governor and the Chief Justice of the Alaska Supreme Court -- I wanted to avoid making a public spectacle of Mr. Jack's case and hoped that those people currently in charge of these State entities would take corrective action. They didn't. The only substantive response received was from a high ranking official in the Attorney General's office who said that he reviewed my materials and felt that Mr. Jack had been afforded due process. I also circulated my 60-page report to five individuals from those State entities that were directly involved in the actions that led to Mr. Jack's conviction. None of them responded.

I hope that after reading this summary you will join me in requesting Mr. Jack's immediate release from prison. Ask yourself if this is the type of due process that you would want if you were falsely accused of a heinous crime that could take away your freedom for the rest of your life. I am doubtful that the Alaska judicial system will correct itself anytime soon and believe a governor pardon for innocence is appropriate.

Mr. Jack has been described by those who know him best as an extremely good and caring man who was widely respected in Hoonah. If the freedom and reputation of a solid Southeast citizen can be taken away by substantially inconsistent allegations of a single person that are also contradicted by consistent statements of several different people closest to the situation then we have a severe problem in our justice system and any of us can wind up being the next victim of a gross injustice.

3. Tracing Back the Path of a Lie: Conflict with the Biological Family Leads to a Less Restrictive Home and a Custody Dispute Which Leads to a Pregnancy Scare.

In the summer of 2007, the OCS placed Katie (age 10) and her sister (age 9) in the home of Mr. Jack and his wife in Hoonah with the ultimate goal of adoption. Mr. and Mrs. Jack were in their early 30's and had married a couple years earlier. They wanted to raise a family but so far had been unable to have children

of their own. They both had good jobs, Mr. Jack was the local power plant operator and Mrs. Jack worked for Hoonah Indian Association. They attended church a few times a week and didn't drink, smoke, or use drugs. Mr. Jack was known by local law enforcement as a "pretty good guy" and the elders in the village knew of him as a very giving person who provided them with food and firewood through lean times.

OCS personnel from Juneau traveled to Hoonah once a month to visit the bonding family in their home and to have one on one sessions with the girls. The first year was a remarkable success culminating in Katie and her sister each being named Student of the Month in the Hoonah school. The girls were doing much better with the Jacks in Hoonah than they had done previously in Anchorage and Juneau. By the spring both girls looked forward to their adoption by the Jacks.

During the 2008 summer an auto accident and a separate illness/death in Mrs. Jack's family caused her unexpected hardship and stress. In September 2008 an unauthorized visit with the girls by their biological mother disrupted the adoption proceedings and evolved into a bitter dispute between the Jacks and an adult member of the biological family (I'll refer to this adult as 'Chris', not their real name). The dispute centered on visitation rights and occurrences within Chris' home that visits would expose the girls to. Chris lodged a complaint with OCS against the Jacks citing the federal Indian Child Welfare Act ("ICWA"). OCS sided with Mr. and Mrs. Jack and supported them while trying to diffuse the situation with Chris.

In the fall of 2008, Katie was just shy of her 12<sup>th</sup> birthday and attracting a lot of attention from boys at school. Some kids were beginning to pressure Katie into doing things that weren't appropriate. Mr. and Mrs. Jack tried to protect Katie from this element and restricted her from going to places where they felt responsible adult supervision was lacking. Mr. Jack had to go down to the school to talk to an older boy that was hanging around Katie a lot. The OCS records indicate that Katie had lied to the Jacks on occasion and her behavior was causing them additional concern.

On September 24, 2008 the increasing stress with the biological family and raising two pre-teens caused Mrs. Jack to request OCS to remove the girls from her home. The crisis was soon diffused and two days later the primary OCS social worker wrote the Court Appointed Special Advocate ("CASA") for the girls saying, "[Mr. Jack] is very attentive to all of the girls. Boy, he is in a hard place, all of those girls wanting his attention. However, he is a very calm and thoughtful man and stands firm when he needs to. He told [Mrs. Jack] that he would not choose between them because they were a family and he is facilitating getting her help. They are a young and very naïve couple that need a lot of support. They are not raising babes with a clean slate, and these are their first children." (emphasis added).

On October 1, 2008 Chris went over the head of the OCS social worker, writing a letter to the girls' Guardian Ad Litem ("GAL") and criticizing the social worker for non-responsiveness. This letter resulted in a meeting between OCS personnel in Juneau followed by a formal letter to Chris stating the OCS social worker would begin facilitating visits between Chris and the girls. In mid-October 2008, the social worker, the CASA and the GAL all traveled to Hoonah to visit with Chris and facilitate a visit.

On the morning of November 5, 2008, an incident occurred within the Jacks' home that upset Mrs. Jack and caused her to request once again that the girls be removed. Their house had a single bathroom and both Mr. and Mrs. Jack were using the bathroom to get ready for work while Katie was showering to get ready for school. Mrs. Jack left the bathroom for a few seconds and during that time Mr. Jack finished using the toilet and pulled back the shower curtain to tell Katie he was going to flush so she wouldn't get scalded. Katie screamed about the same time that Mrs. Jack walked back in.

OCS put the girls in another home that night and the next day the social worker flew out to Hoonah to talk with Katie and Mr. and Mrs. Jack. Katie said that nothing like that had happened before and Mrs. Jack said she wasn't concerned anything else had happened. Mr. Jack expressed significant remorse for making a stupid mistake and said he should have waited to use the bathroom while Katie was taking a shower. The social worker decided to keep the girls in the new home on a temporary basis while Mrs. Jack recovered from the stress and allowed the Jacks to have visitation rights with them.

On the weekend of November 8 and 9, the Jacks spent significant time with the girls and Mrs. Jack was ready for the girls to come back home permanently. On the night of the 9th the couple had a long phone call with the CASA talking about overcoming the challenges they faced raising the girls. The CASA felt the Jacks were sincere and summarized the call in a two-page email to the OCS social worker the next morning. Unbeknownst to the Jacks or the CASA, the girls would not be back in their home again.

On November 14, 2008 the OCS social worker unilaterally decided to cut off visits between the Jacks and the girls. Chris then escalated the attacks on OCS and between November 20-24 wrote three more letters. The first complained that OCS had instructed the temporary custodian not to allow the girls in Chris' home; Chris re-asserted that keeping the girls away from their biological family was in violation of the ICWA and accused OCS of trying to destroy an Indian family. On November 21, the OCS social worker met with Chris in Hoonah yet afterwards Chris wrote a second letter complaining about the "show" the girls put on for the social worker. On November 24, Chris wrote a third letter demanding immediate and permanent custody. On December 2, 2008, the OCS informed Mr. and Mrs. Jack that the girls' placement with them had been permanently terminated.

OCS continued to keep the girls in the temporary home while inviting Chris to apply for custody, an invitation that seems to be solely for appearances. According to OCS records, the social worker talked Katie and her sister into leaving the temporary home for a few days and traveling to Juneau during Christmas break to visit members of their biological family, including Chris who was staying at a friend's house. The social worker said the girls could not stay with Chris at night but then found out afterwards that Chris had ignored that restriction. According to OCS records, Katie did not enjoy certain aspects of that stay and continued to voice concerns regarding visits with Chris over the next several months. The tension between Chris and OCS over the ICWA complaints is unmistakable; OCS was likely taking actions in its own best interests and documenting the file in a manner that supported their decisions. Indeed, several months later, the temporary home would become the girls' permanent home.

On January 11, 2009 Chris directly contacted the GAL once again, this time saying that Katie had told her that months earlier Mr. Jack had come into her room at night to ask for an extra hug and then touched her all over her body. It took OCS a few days to get Katie over to Juneau for an interview with law enforcement present. By then Katie had spoken to a few different people about the allegations (including Chris and the new foster parent), something that OCS believed should not occur.

When Katie arrived in Juneau on January 16 for an interview the allegations had grown significantly to include attempted rape and rape on an almost nightly basis in Katie's bed for the entire month of October 2008. The OCS worker later said, "This is the bad part, [Chris] totally pressured [Katie] and questioned her and wanted to know what had happened." On February 2, 2009, Chris wrote the OCS social worker, complaining about being completely ignored since reporting the allegations and expressing concern that OCS would leave the girls in the temporary home. Chris said time was of the essence -- referring to the custody issue, not the allegations.

Katie's allegations in January 2009 directly contradicted what she had told the OCS social worker on November 6, 2008. Her November statement was consistent with observations of the OCS worker who visited the girls in the Jacks' home on a monthly basis and the CASA who also didn't notice any behavior by Katie suggesting she was being sexually assaulted and felt that the girls had a "safe and secure environment" within the home of Mr. and Mrs. Jack. The allegations also were inconsistent with what the social worker, the GAL and the CASA personally observed in mid- October 2008 during their visit to Hoonah – the same time period Katie later alleged the nightly assaults had occurred. When asked in January about her November statement, Katie claimed she had lied.

What changed? The social worker said "kinda how all this came up" was Katie's concern that she might be pregnant. This concern substantiated all of the protective measures the Jacks had taken when Katie was under their care and it also supported Mr. Jack's view that the girls had too much leniency in the new foster home resulting in Katie's sexually suggestive behavior at school. As discussed earlier, Katie may have perceived that whether she was pregnant or not, the only way the girls could remain in the new home and perhaps even together in Hoonah would be to blame Mr. Jack for her sexual activity. Because of Chris' ICWA complaints and the custody dispute, it's possible that the OCS, Chris, and the new foster home each also perceived it was most advantageous for them to blame Katie's sexual activity on Mr. Jack.

A Chronological Summary of Several Problems Seen with the State's Conduct in Mr. Jack's Arrest, Indictment, and Conviction.

- a. The AST conducted a very limited investigation which turned up only exonerating evidence. The AST arrested Mr. Jack anyway.

The AST began investigating the case on February 5, 2009, about three weeks after the allegations surfaced. By then Katie had already been interviewed at the Juneau Child Advocacy Center ("CAC") and a medical doctor had examined her. Prior to arresting Mr. Jack, the only witness the AST tried to interview was Katie's younger sister, who on February 17, repeatedly contradicted several important aspects of the allegations. Katie's sister stated several times she didn't think anything had happened between Mr. Jack and Katie. She said at night the girls usually slept in the same bed together. At one point, Katie's sister stated six successive times that Katie was never alone with Mr. Jack. This repetitive questioning suggests the State knew they had a serious problem with the truth of Katie's allegations prior to Mr. Jack's arrest.

Instead of interviewing other witnesses or visiting the scene of the alleged crime to look for physical evidence, the AST focused all its efforts on trying to trap Mr. Jack into making a confession. After the interview of Katie's sister, they secretly recorded 3 hours of conversation between the social worker and Mr. Jack. The social worker fed Mr. Jack a "theme" that Katie felt she had been touched by him inappropriately and OCS wanted his help in understanding what happened so they could get her appropriate counseling. The social worker didn't tell Mr. Jack the allegations consisted of heinous intentional acts including penile penetration of the vagina and the anus, ejaculation and condom use. Throughout the recordings, Mr. Jack struggled to recall any instance over the past year and a half in which he might have touched Katie improperly. He told the social worker he had been very careful with the girls and had told them to tell him if they ever felt inappropriately touched.

Throughout the three hours of recorded conversations Mr. Jack couldn't think of an instance when he might have touched Katie inappropriately. He told the social worker that there was never any intentional or knowing improper touching; if he ever did touch her inappropriately, it was coincidental. He also

corroborated what Katie's sister had told investigators – that he and Katie didn't have much alone time – the sister was always with them. Yet when Mr. Jack asked what Katie's sister had said, the social worker lied to Mr. Jack, telling him she hadn't said anything. This lie added to Mr. Jack's confusion and bewilderment.

Having failed to obtain a confession from Mr. Jack through the social worker, the AST made one last ditch effort with the lead investigator on February 23, 2009. In another secretly recorded conversation, the investigator eventually became more direct about the allegations and Mr. Jack increased his denials. In 40 pages of recorded transcript Mr. Jack made at least 14 denials, culminating in, "How many more ways I can say 'no'." The investigator told Mr. Jack that he hadn't said what the investigator wanted him to say but arrested Mr. Jack anyway. It was an unlawful arrest without probable cause.

- b. Prior to Mr. Jack's arrest the AST failed to interview any of the adults who were most knowledgeable of the conditions in the Jacks' home where the alleged crimes took place.

In an unwarranted departure from established law enforcement protocol, the AST made no attempt to interview Mrs. Jack. Katie had said Mrs. Jack was in her bedroom a few feet away at all times the alleged sexual assaults occurred. Katie alleged that Mr. Jack would scramble out of her bed and somehow make it to the living room unnoticed when he heard Mrs. Jack get up. Did the AST not want to interview this crucial witness because she might further expose Katie's allegations as a terrible lie and produce more exonerating evidence that would destroy the DAO's ability to obtain an indictment from the grand jury?

Additional clues to the State's motives can be found in the AST's timing in interviewing two other adults familiar with the family interactions. The AST waited until the day after the second grand jury indictment (eight months after the arrest) to interview by phone the Jacks' pastor in Hoonah who was very close to the family and was directly involved in helping them deal with the stressful situations they were facing. Like the interview of Katie's sister, the AST seemed hopeful of obtaining incriminating testimony from the pastor but was wary that the interview could also backfire on them, producing even more exculpatory evidence that the DAO would be legally obligated to present to the grand jury. A transcript of the phone interview was not found but the lead investigator later admitted that the pastor "pretty much came out and said he didn't think anything happened."

The other AST interview conducted shortly after the second grand jury indictment and eight months after the arrest was of the girls' CASA who had started working with the girls before they were placed with the Jacks. Again, the apparent motive of the AST in waiting nine months to interview this witness was to hopefully gain corroborating evidence for use at trial while avoiding further exculpatory evidence for the grand jury. Sure enough, in the interview the CASA said 1) he didn't notice any behavior by Katie suggesting the allegations were true, 2) Katie had never told him that anything bad occurred, and 3) it was his observation that Mr. and Mrs. Jack gave Katie and her sister a safe and secure environment.

Besides Mrs. Jack, the AST also inexplicably failed to interview the trusted school teacher who Katie had singled out to confess that the rumors about Mr. Jack and her weren't true. The AST failed to interview any other family members or friends close to the situation, including a blood relative of Katie who felt that someone was coaching Katie to lie. The AST didn't bother to enter the Jacks' home where all the alleged events took place until 9 months had elapsed and another family had moved into the house. Did they not bother to search the house earlier because they knew no crime had been committed?

It's reasonable to expect the AST to have spent a significant time in Hoonah investigating a serious felony said to have occurred there on a nightly basis for over a month's time. Especially one that could result in the alleged perpetrator spending the rest of his life in prison. It's certainly reasonable to expect the AST to visit the alleged crime scene and look for physical evidence, interview witnesses, sit down face to face with local law enforcement, etc. The AST didn't do any of that. The log notes of the lead investigator indicate that he spent a total of 5 minutes in Hoonah prior to arresting Mr. Jack. On February 12, 2009, he flew over from Juneau to pick up a video of Katie's CAC interview and her medical exam records. The Hoonah police chief delivered those items to him at the airport and he took off back to Juneau.

c. Katie confessed to a teacher. The OCS ignored it and the DAO 'misfiled' the evidence.

On February 24, 2009, the day after Mr. Jack's arrest, Katie went up to a teacher after class and told her the rumors about her having sex with Mr. Jack were not true. The teacher said that Katie then touched her hand, looked her in the eye, and repeated that the rumors weren't true. As a mandatory reporter under Alaska law, the teacher reported Katie's confession to the school counselor who told her that Katie didn't know what she was talking about. The teacher then went to the school superintendent who basically told her that the matter was none of her business. Feeling uneasy about the reaction of these other school employees, the teacher documented the encounter in a letter that found its way to both the OCS and the DAO before the first grand jury indictment on February 27. Neither agency followed up on this letter and it wasn't given to Mr. Jack's attorney until almost a year later after the first trial had begun. The DAO's excuse for not turning it over earlier was that they had misfiled the letter.

This delay was critical. Had Mr. Jack's attorney known about the DAO's possession of this letter before the first grand jury hearing it would have been impossible for the judge to later deny a Motion to Dismiss the Case filed before the first trial. The letter documented a confession by Katie that her allegations were not true. It was important exculpatory evidence that would have blown up the State's ability to obtain a grand jury indictment. The State's failure to timely turn over the letter to Mr. Jack's attorney is known as a Brady violation of Mr. Jack's constitutional rights under the Fifth and Fourteenth Amendments.

The failure of the OCS to follow-up with the contents of this letter is further evidence the State had no interest in the truth. The OCS social worker had acknowledged to Mr. Jack towards the end of her recorded call on February 18 that if Katie was lying, "we've got bigger issues going on. If she's lying and making up this kind of stuff, that's a bigger issue..." The letter from the counselor a week later should have been a huge red flag that Katie was indeed lying. The failure of OCS to address this "bigger issue" suggests a reckless disregard not only for the truth, but also serving Katie's best interests.

d. The evidence submitted by the DAO to the first grand jury appears to have been heavily staged and perhaps manipulated.

The first grand jury hearing on February 27, 2009 has the appearance of being heavily scripted by the DAO in order to obtain an illegal indictment. On Friday afternoon at 1:30pm, the DAO began by reading the 21 counts and related statutory definitions. Finally, at page 23 of a 49 page transcript the DAO called Katie as its first witness. After a few inaudible responses the clerk told Katie to turn away from the jurors and look directly at the DAO. Katie didn't provide any narrative describing the alleged sexual assaults; she mostly replied "yeah", "no", or did not audibly respond to the DAO's extremely leading questions. When Katie was finished (at page 34 of the transcript) she was whisked away to Bartlett Memorial for a pregnancy test at 3:08 pm which was reported negative at 3:20 pm.



The State already knew that Katie wasn't pregnant. At trial, the OCS social worker testified that she had known by February 17, 2009 that Katie wasn't pregnant. The Hoonah school teacher also testified that on February 24, 2009 the school counselor told her that Katie wasn't pregnant. Why take a young girl to the hospital on February 27 for a pregnancy test when the result is already known? More importantly, why keep a stressed-out 12 year old girl on pins and needles for 10 days before telling her that she isn't pregnant. Did Katie's handlers and/or the State intentionally put her under false stress to extract the testimony they needed to indict Mr. Jack?

- e. At both grand jury hearings, the OCS social worker did not accurately testify to the content of the Glass Warrant recordings.

The only other witness the DAO presented to the grand juries was the OCS social worker who at the first hearing was allowed to phone in from Hoonah, despite living and working in Juneau. At both hearings the social worker testified about the Glass Warrant recordings but did not portray them accurately. A main theme of the State was that Mr. Jack had not "adamantly denied" the heinous allegations just read to the grand jury, failing to mention that during those recordings, Mr. Jack was not aware of the specific allegations. The social worker would later admit that even the lead investigator felt the questions asked of Mr. Jack during the recorded interview were not specific enough for the admission they wanted.

The OCS social worker also failed to tell the grand jurors that Mr. Jack consistently denied any intentional touching:

- when the social worker first mentioned 'intimate touching', Mr. Jack immediately said no;
- when the social worker said Katie thought Mr. Jack's hand gone over her chest, he immediately said, "Oh, no. No."; and
- Mr. Jack was very clear that if he "did touch her in any kind of wrong way or anything you know, it was just coincidental" and later, "But no, I would never do anything on purpose like that."

What Mr. Jack couldn't "adamantly deny" was that he had unknowingly touched Katie in a way that she took offense to. Any loving foster parent in his shoes could not honestly state such a denial. Throughout those recorded conversations, Mr. Jack tried to think back over the past year and a half of any situation in which he might have touched Katie in an improper manner. The only possible circumstances he could think of were during bedtime stories read to the girls, roughhousing, or on a couple occasions when the entire family had fallen asleep watching TV together in the Jacks' master bedroom. But as he worked through these scenarios they didn't make much sense because he had been so careful around the girls. When he asked what Katie's sister had told them, the social worker lied and said the sister hadn't said anything, adding further to Mr. Jack's confusion.

In testifying that Mr. Jack didn't 'adamantly deny' the allegations in the secretly recorded conversations, the social worker also failed to disclose the more than one dozen denials made by Mr. Jack in the fourth hour of recordings when the AST finally became more direct with him about the specific allegations, culminating with his statement, "how many ways I can say 'no'" moments before his arrest.

- f. The DAO clearly violated Alaska law by failing to present substantial exculpatory evidence to both grand juries.

Alaska law requires the DAO to present important exculpatory evidence to the grand jury when seeking an indictment. The DAO clearly violated this law both times they obtained indictments against Mr. Jack.

The teacher's letter in their possession containing Katie's confession was "misfiled" and not brought up or presented to the grand jury. The important contradictions to Katie's story by her own sister were not mentioned to the grand jury. Katie's statements on November 6, 2008 that Mr. Jack hadn't acted inappropriately weren't mentioned nor were her pregnancy concerns and incentive to lie.

As referenced earlier, Mr. Jack's repeated and consistent statements during the Glass Warrant recordings by the OCS worker that he did not knowingly or intentionally touch Katie improperly were not presented to the grand jury. Neither were Mr. Jack's numerous denials to the AST investigator shortly prior to the arrest. Favorable observations of Mr. Jack by the OCS social worker and the CASA around the time the sexual assaults were alleged to have occurred weren't presented to the grand jury. The list goes on, several additional items of exculpatory evidence in favor of Mr. Jack were not presented.

- g. The judge made several questionable rulings prior to and during the first trial that enabled the prosecution to avoid a dismissal of the case and the acquittal of Mr. Jack.

Important documents in the State's possession were not released to Mr. Jack: Prior to the first trial the judge privately screened 1000 pages of documents in the OCS file to determine which ones he would make available to both sides. A little over 100 pages (about 10%) ultimately made it through the judge's screening, some just 3 weeks before trial. Many of the released documents contained redactions.

Missing were notes of critical meetings that took place around the time that the girls were removed from the Jacks' home and placed in the new, non-Native home. Inter-department and agency emails relating to such a high profile case should have been numerous, yet they were largely missing. Internal documents that might have evidenced motives and strategies for addressing the repeated ICWA threats from Chris, the placement of the girls in the new non-Native home, concerns with Katie's suggestive behavior in the new home, and the allegations and investigation against Mr. Jack were all missing.

Making matters more unfair, the DAO already had access to the OCS file through their connection to the social worker. Indeed, at the first trial, the DAO presented a document entitled Chronology [of the girls] that referenced several activities between the crucial dates of September 30, 2008 to December 2, 2008 not covered in the OCS records released to the parties by the judge. Not only did the DAO have sole access to these records but they were able to "summarize" them in ways that benefitted their objectives.

The Motion to Dismiss the Case against Mr. Jack should have been granted: As earlier discussed, Mr. Jack's attorney filed a well taken Motion to Dismiss the Case on grounds that the DAO failed to present exculpatory evidence and presented inadmissible hearsay to the grand juries. The motion did not reference Katie's confession to her teacher presumably because Mr. Jack's attorney was unaware the OCS had received the letter and forwarded it to the DAO. Even without reference to this critical letter, the Motion to Dismiss should have clearly been granted as substantial and important exculpatory evidence was not presented to either grand jury. The judge tried to get around the interview of Katie's sister by saying he was not convinced her testimony would have been "substantially favorable to the defendant." The judge tried to get around all the denials in the Glass Warrant recordings by saying "there is nothing in [those recordings] that would have tended, in and of itself, to negate the defendant's guilt."

I was floored when I read those words for the first time. Ten years later, evidence of the bias that led to Mr. Jack's wrongful conviction was clearly documented in black and white. In the Glass Warrant transcripts Mr. Jack had unequivocally made numerous denials, finally saying in exasperation "how many

ways I can say 'no.'" Yet in the judge's mind none of these denials "tended to negate Mr. Jack's guilt." This undeniable bias, indefensible for a judge but later seconded by the Court of Appeals, permeated Mr. Jack's case and should provoke serious inquiry into Alaska's judicial system.

With respect to the hearsay, the judge agreed that the DAO had presented inadmissible hearsay but ruled it was harmless error given Katie's testimony and that of the social worker regarding the Glass Warrant recordings. The judge went on to say that the strongest evidence behind the indictment was Katie's testimony, while acknowledging in a footnote that it was obtained through leading questions. The judge's ruling was dated January 28, 2010; less than two weeks later the judge would twice admit that Katie's testimony had numerous and substantial inconsistencies!

The judge violated the Confrontation Clause by allowing highly prejudicial double and triple hearsay into evidence despite its highly questionable accuracy: At the first trial and over the extensive objection of Mr. Jack's attorney, the judge allowed the OCS social worker to testify that someone had told a counselor who then told the social worker that Mr. Jack had made a "suicide gesture". This allegation was so nebulous that on November 14 the social worker didn't know when the event was said to have occurred; the social worker opined it could have been the previous weekend (Nov. 8-9 which made no sense because of the positive interaction the Jacks had with the girls that weekend followed by the lengthy conversation with the CASA). At trial, the social worker couldn't recall confronting Mr. Jack with the allegation but was confident they had discussed it in some form. Because Mr. Jack's attorney was not provided notes for OCS meetings with the Jacks after November 6, there was no way to counter the social worker.

The State needed something sensational to overcome all the discrepancies in Katie's story as well as the adverse testimony of her trusted teacher, her trusted friend, her foster mother and her own sister. The DAO told the judge the hearsay was important to establish "consciousness of guilt". The judge allowed the jury to hear and consider this patently unreliable, inadmissible and highly prejudicial testimony. The judge said the testimony could not be used to establish that Mr. Jack had actually made a suicide gesture but to establish the reason OCS terminated the girls' placement with the Jacks. Despite the judge's "limitation" the DAO basically got what they coveted; they made this incredibly damaging hearsay the centerpiece of an exhibit used in their closing argument to convict Mr. Jack at the second trial.

Not only was the admission of this testimony an egregious violation of the Confrontation Clause of the 6<sup>th</sup> Amendment of the U.S. Constitution but there is significant indication OCS had its own interests in mind when unilaterally terminating the Jacks' visitation rights on November 14, 2008. The social worker had likely grown weary of the additional effort needed to facilitate visits with Chris and deal with Mrs. Jack's stress levels. If OCS was starting to think the new home was a better fit, it was important to prevent the girls from bonding further with the Jacks the upcoming weekend. However, these reasons would fuel Chris' ICWA complaints and demand for custody, especially since OCS was now keeping the girls in a non-Native home. Accordingly, OCS may have felt documenting their file with a "safety concern" to justify their abrupt action late on a Friday afternoon would provide them much better cover against Chris. That OCS would destroy a year and a half long relationship on such a nebulous allegation without further inquiry or prior discussion with Mr. Jack lends substantial credence to this alternative motive.

Refusal to allow the jury to hear that Katie had relationships with boys at school that might account for her pregnancy concern: A very prejudicial ruling by the judge at trial was his refusal to allow Mr. Jack to introduce testimony that would help establish Katie's incentive to lie – for instance, he would not allow the jury to hear that an older boy was hanging around Katie and think this or any other relationship might

account for her pregnancy concerns. The social worker had said Katie's pregnancy concern was the reason "kinda how all this came up" and Mr. Jack had said this boy was the first person that came to his mind. The judge's ruling not only kept Katie's possible motive to lie hidden from the jurors but it also boxed them in if they wanted to give any weight to the DAO's medical expert's testimony that Katie might have incurred an unnatural injury through sexual activity -- the only person they could consider was Mr. Jack.

The judge permitted the DAO to amend the criminal complaint at the close of the first trial: Katie's testimony at the first trial was inconsistent with the testimony she had given to the second grand jury and on which the indictment was based. Before closing arguments, the DAO made a motion to amend the indictment for a second time to match the most recent version the jurors had heard. Mr. Jack's attorney objected strongly to this amendment, saying that the continual changes in Katie's story had been a big part of the defense strategy and they planned on emphasizing the discrepancy in their closing argument. Importantly, this newest discrepancy would show up on paper when the jury took the indictment into the jury room for deliberations. After an extensive discussion with the jury absent taking up 30 pages of transcript, the judge granted the DAO's motion, and allowed the amendment. The amended indictment the jury took into deliberations better matched Katie's testimony they had heard.

- h. The judge's refusal to give Mr. Jack's new attorney adequate time to prepare for the second trial created an unfair trial that resulted in Mr. Jack's conviction.

On April 28, 2010, sixty days before the second trial, Mr. Jack's private attorney withdrew from the case when his family couldn't come up with the significant retainer needed for the second trial. The family had already paid over \$100,000 in legal fees through the first trial and exhausted their life savings including the equity in their parents' home.

In early May the state Office of Public Advocacy ("OPA") located an attorney that was available to try the case in September 2010, but the judge refused to extend the case 3 months and ordered the OPA to find an attorney that could try the case in June. OPA was unsuccessful and the judge issued an unusual order requiring the OPA Director to personally fly down from Anchorage and appear before him the next day. Finally, after substantial difficulty and effort, in late May the OPA finally located a Wasilla attorney to represent Mr. Jack. By now the trial date was a month away.

On June 14 and 15, just two weeks before the scheduled trial Mr. Jack's new attorney appeared before the judge in Juneau and asked for a few additional months to prepare for trial. He had just received the transcripts from the first trial totaling 1100 pages and told the judge it was nearly impossible to prepare for a case of this magnitude in such a short time. The judge admitted, "I was doubtful ... to find a lawyer to take on a [sexual assault of a minor] case and a hung jury on a little more than a month's notice ... I can't force this case to trial to punish a lawyer, when I don't have confidence it would be a fair trial. I do not have sympathy for a lawyer for not investigating how complex the case was."

This crisis was created solely by 1) Mr. Jack's lack of substantial wealth and 2) the judge's refusal to extend the trial date. Yet the judge hung the blame directly on the new attorney for not investigating the complexity of the case before agreeing to represent Mr. Jack. The judge extended the trial date just two weeks to July 10, creating by his own admission and his own doing, an unfair trial.

At the second trial none of the facts changed but the DAO now had another huge advantage going up against a new attorney that wasn't prepared. The full transcripts of the second trial weren't available for

my review but it appears that Mr. Jack's new attorney presented less than half the witnesses in perhaps a third of the time as Mr. Jack's first attorney. The DAO also had an opportunity to polish their presentation and impanel a more favorable jury. The unfair trial resulted in Mr. Jack's conviction.

- i. No Alaska Natives were present on either of the two juries. Did the DAO and/or the judge illegally exclude jurors from the second trial on the basis of race?

Mr. Jack's family reported that there were no Alaska Natives on the juries that heard both trials. This may be the most troubling element of Mr. Jack's conviction considering that roughly 20% of Juneau's population was Alaska Native. The abbreviated court transcripts for the second trial show that several Alaska Natives and other minorities were called up for questioning by the attorneys but later excused by the judge after he took them into his chambers for private and unrecorded questioning. No reason for their excusal appears in the transcripts.

After the first trial, the State knew that Mr. Jack's innocence was backed by credible testimony from Katie's teacher, friend, sister, and former foster mother. The DAO had been unable to discredit them under cross examination at the first trial. These witnesses were unrelated but shared a few common characteristics. All female. All Alaskan Native. All from Hoonah. To gain a conviction did the State seek to exclude from the second jury all minorities and whites perceived to be unbiased?

At the second trial that resulted in Mr. Jack's conviction, approximately 60 potential jurors were called for questioning. In a highly questionable manner, the judge excused one third of those jurors in addition to the 8 that the DAO was permitted to strike. The bottom line was a "white-washed" jury that did not fairly represent the racial diversity of Juneau nor could it be considered a jury of Mr. Jack's "peers" in Hoonah. If the judge or the DAO excluded a single juror on the basis of race, that exclusion would be a clear violation of the U.S. Constitution requiring Mr. Jack's conviction to be thrown out.

- j. The Alaska Court of Appeals upheld the judge's rulings on the strength of testimony with numerous and substantive inconsistencies.

After Mr. Jack's conviction his attorney filed an appeal, which the Court of Appeals sat on for almost four years before issuing a ruling confirming the conviction. The appellate court agreed that some of the testimony presented by the OCS social worker was inadmissible but said overall it was harmless, because of the strength of the other testimony given in the trial, namely Katie's testimony. The same testimony that the trial judge had admitted on two occasions had numerous and substantive inconsistencies was relied on by 3 appellate judges to uphold a wrongful conviction!

#### 4. A Call to Action

The appellate court's ruling is extremely disturbing and supports those who believe there is a systemic problem with the criminal justice system in Alaska. The misdeeds of State agencies that grossly violated Mr. Jack's constitutional rights in multiple instances were laid out before the Court of Appeals in plain sight, but those justices chose to look the other way and upheld Mr. Jack's wrongful conviction.

A quote often attributed to Thomas Jefferson or Edmund Burke reads, "all tyranny needs to gain a foothold is for people of good conscience to remain silent." If you are troubled by the State's conduct and want to speak up against this ongoing miscarriage of justice, please join with me in the following:

- a. Contact the Governor's office and request a pardon for innocence.

The U.S. Supreme Court said in its 1992 Herrera opinion that executive clemency, i.e., a governor's pardon provides the "fail safe" for wrongful convictions in our criminal justice system. Don't let the governor's office try to steer you over to the statutory system for pardons of guilty prisoners that require applicants to go through a parole board and acknowledge guilt and remorse. There's a long-standing precedent under common law for a pardon by the chief executive of a government when a prisoner is innocent. Mr. Dunleavy can be reached through either his chief of staff Ben Stevens at 907-269-7450 and [ben.stevens@alaska.gov](mailto:ben.stevens@alaska.gov) or his director of constituent relations, Angela Hull at 907-465-3500 and [angela.hull@alaska.gov](mailto:angela.hull@alaska.gov). Request immediate corrective action for the State's egregious conduct.

b. Contact the Attorney General.

Request Attorney General Kevin Clarkson to immediately direct the DAO to open settlement negotiations for Mr. Jack's release and fair compensation for his wrongful arrest, conviction and incarceration. An ongoing appeal regarding whether correct sentencing guidelines were followed by the judge should give Mr. Clarkson the authority to do this. Request that Mr. Clarkson's office personally oversee the negotiations to ensure that they are handled in a swift and equitable manner. Mr. Clarkson can be reached at 907-260-5602 and [kevin.clarkson@alaska.gov](mailto:kevin.clarkson@alaska.gov).

c. Contact your elected representatives and vote for those who uphold due process of law.

The separation of powers necessary for the constitutional rights of Alaskan citizens to be preserved by its State government is in jeopardy. An independent judiciary serves a vital function in this balancing of power, but Mr. Jack's case shows that the ACS upheld and perhaps assisted in blatant violations of Mr. Jack's constitutional rights. Enlist the support of your representatives to correct this problem. No issue can be more important to the electorate than preserving due process of law; jobs, education, budgets, permanent fund dividends, etc., mean nothing if your freedom can be wrongfully taken away from you.

5. In Closing

Following this summary is a letter to all Alaskans written by Mr. Jack's oldest sister, speaking to the pain her family has endured these past ten years, especially during the holiday seasons. Please read it.

I want to express my sympathy to Katie. Before she and her sister came into Mr. and Mrs. Jack's home, Katie was dealt a tough hand at a very early age. Her vulnerabilities and fears were manipulated by certain adults who owed a duty to her, and Katie's best interests weren't served, let alone the truth. It is my understanding that Katie, now a young adult, has not returned to Hoonah for a few years and is no longer in touch with girls who were close friends there before she left. I hope that many in the Hoonah community who she knows will seek her out and extend a welcoming hand to her, forgive her for things that were largely out of her control, and give her the comfort she needs to return home again.

Finally, I want to commend the four Alaska Native women from Hoonah who had the courage to step forward 10 years ago and speak up for truth and justice. Your voices were important, they were heard, and they have not been forgotten. Some people in Juneau chose not to listen to you earlier, but hopefully we can change that now, bridge the divide, and begin to heal.