IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

DAVID HAEG, Applicant, vs. STATE OF ALASKA, Respondent.	)	CASE NO. 3KN-10-1295 CI

ORDER ON MOTIONS TO SUPPLEMENT PCR

This order addresses the pending motions to supplement by David Haeg ("Haeg") to supplement his PCR application.

HAEG'S PCR CLAIMS

The original Haeg PCR filing is a 19-page application. Haeg has filed motions to supplement that original PCR Application:

1) Motion to Supplement PCR Application with Claim and Evidence, filed January 20, 2011 (Docket #89);
2) Motion to Supplement PCR Application with Evidence, filed February 11, 2011 (Docket #96);
3) Motion to Supplement Haeg's PCR Application with the Alaska Bar Association's March 1, 2011, Letter for Marla Greenstein and the Alaska Bar Association's March 1, 2011, Letter to David Haeg, filed March 7, 2011 (Docket #102); and
4) Motion to Supplement PCR Application with Claims and Evidence, filed April 21, 2011 (Docket #114).

1. In the first motion to supplement PCR, Haeg requests leave to supplement his PCR Application in seven numbered respects including the claim that his conviction is not valid because Alaska Commission of Judicial Conduct ("ACJC") investigator Marla

Greenstein allegedly falsified her investigation to cover up Trooper Gibbens' chauffeuring of Judge Murphy; and that his conviction is not valid because a conspiracy existed between Judge Murphy, Trooper Gibbens, and ACJC Investigator Greenstein to cover up what Haeg alleges was judicial misconduct.

The court has plenary power in a PCR proceeding to address judicial misconduct. The claim that ACJC Greenstein falsified her investigation is too attenuated and long after the fact of the 2005 jury conviction and the sentencing of Haeg. Haeg has been permitted to depose the trial judge and the Trooper. No challenge to the ACJC investigator or her investigation will be permitted in this PCR proceeding. The first Haeg motion to supplement is denied.

2. In the second motion to supplement PCR, Haeg provides ACJC documentation and his complaint to the Alaska Bar Association ("ABA") against Investigator Marla Greenstein. The ABA apparently accepted Haeg's grievance complaint against Greenstein, but deferred investigating the complaint until these PCR proceedings have concluded. Haeg asks that the letters from the ABA be made part of the PCR record. The court finds that to whatever extent information was attached to the Haeg motion to supplement that information is therefore part of the court file. That finding does not mean that the information is admissible or relevant to any issue in the PCR proceeding, nor does the finding mean that any such information is not relevant or potentially admissible. Attaching a document to a motion does not mean that the document is admitted evidence for the truth of facts addressed therein. In accordance with the court denial of the first Haeg motion to supplement, the court will not entertain as part of the Haeg PCR any issue regarding what the ACJC or ABA did or did not do. To the extent that the second Haeg motion to supplement is to add new PCR

claims, it is denied. To the extent that the motion attaches new documents and new information pertaining to existing claims, that information is now part of the court file.

3. In the third motion to supplement PCR, Haeg requests that his PCR application be supplemented with additional evidence, namely Alaska Bar Association letters to Marla Greenstein and to David Haeg. As with the disposition of the second motion to supplement, to the extent the third motion to supplement attaches new documents and new information pertaining to existing claims, that information is now part of the court file. To the extent the third Haeg motion to supplement is to add new PCR claims, it is denied.

4. In the fourth motion to supplement Haeg alleges the conduct and representations of prosecutor Andrew Peterson constitute prosecutorial misconduct. He requests that his PCR application be supplemented to include the prosecutorial misconduct claims and that the record in this case include the prosecutor's court filings and arguments in the underlying criminal proceeding regarding the seized plane. Some types of prosecutorial misconduct may be raised in a PCR proceeding and some may not.

Haeg specifically alleges that Peterson filed a request for hearing to set a remand date for Haeg to serve his jail sentence – and Haeg alleges this is violated Appellate Rule 206(a)(1), which Haeg reads to require a stay of imprisonment if an appeal is taken and the defendant is released pending appeal. Haeg says that based on Peterson's erroneous advice, Haeg served 35 days in jail. There is also an issue that Peterson "said the State would oppose electronic monitoring," which allegedly enforced Woodmancy's erroneous belief that electronic monitoring was inappropriate in Haeg's case (when Haeg believes it was under 33.30.065). Haeg also believes that Peterson engaged in prosecutorial misconduct when he filed Motions with Magistrate Woodmancy so the State could get the plane. Finally, Haeg

argues that Peterson failed to inform the court that at the state's request the license suspension had been stayed during appeal which effectively turned Haeg's 5 year suspension into a 9 year suspension while his appeal was pending.

In Lockuk v. State, 2011 WL 5027060, a claim of prosecutorial misconduct, that the prosecutor had threatened three witnesses, was heard by the superior court in Dillingham in an evidentiary hearing in a PCR case. In another case, Wilson v. State, 244 P.3d 535 (Alaska App. 2010), the defendant filed for PCR on the basis that he received ineffective assistance of counsel because defense counsel was ineffective in responding to prosecutorial misconduct. The superior court judge dismissed the PCR application for failure to state a prima facie case and the court of appeals reversed.

On the one hand the alleged prosecutorial misconduct occurred after the jury conviction of Haeg in 2005. On the other hand the plane seizure is one of the primary subjects for which Haeg seeks relief in this PCR proceeding.

The court finds that the alleged prosecutorial misconduct regarding the request for remand while the appeal was pending and the opposition to electronic monitoring by DOC are too attenuated and after the fact to merit inclusion in this PCR proceeding. The fourth motion to supplement his PCR in that regard is denied.

The fourth motion to supplement his PCR with that regard to alleged prosecutorial misconduct regarding the seized plane is granted.

CONCLUSION AND ORDER

Based on the foregoing findings and rulings the State will have 20 days to respond to the alleged prosecutorial misconduct claim regarding the seized plane permitted above as a supplement to the Haeg PCR application.

Dated at Kenai, Alaska, this 3rd day of January, 2012.

Carl Bauman
SUPERIOR COURT JUDGE

CERTIFICATION OF DISTRIBUTION

I certify that a copy of the foregoing was mailed to the following at their addresses of record:

Haeg, Peterson, Flanigan

1-3-12 Roberts
Date Clerk

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

DAVID HAEG, Applicant, vs. STATE OF ALASKA, Respondent.	)	CASE NO. 3KN-10-1295 CI

ORDER ON MOTION TO DISMISS

David Haeg ("Haeg") was convicted by a jury in 2005 in 4MC-04-024CR of five counts of unlawful acts by a guide for same day airborne hunting of wolves, two counts of unlawful possession of game, one count of unsworn falsification, and one count of trapping wolverines in a closed season. Haeg appealed. In Haeg v. State, 2008 WL 4181532 (Alaska App. 2008), the Court of Appeals affirmed Haeg's convictions, but found that his guide license was suspended, not revoked. Haeg's appeals/petitions for review to the Alaska Supreme Court and the United States Supreme Court were denied.

Haeg filed an Application for Post-Conviction Relief ("PCR") in November 2008. Haeg's guide license was fully reinstated pursuant to an order of this court on July 5, 2011. Four motions to supplement the PCR application are pending. The State filed a Motion to Dismiss Application for Post-Conviction Relief on March 10, 2010 (the "Motion to Dismiss"). Haeg filed an Opposition to the Motion to Dismiss on March 19, 2010 (the "Opposition"). The State did not file a reply, but later filed a Notice of Supplemental

Authority to which Haeg filed an opposition. The purpose of this order is to resolve the Motion to Dismiss.

THE SCOPE OF POST-CONVICTION RELIEF IN ALASKA

PCR proceedings are governed by AS 12.72.010 – 040 and Alaska Criminal Rule 35.1. The scope of a PCR action is not unlimited. A defendant is barred from raising a post-conviction relief claim that was raised or could have been raised by direct appeal. AS 12.72.020(a)(2). Collateral estoppel and res judicata apply in PCR proceedings. Brown v. State, 803 P.2d 887 (Alaska 1990). An issue that is litigated in a criminal prosecution and addressed on the merits on appeal is outside of the scope of relief and may be dismissed. Id.

With regard to allegations that a defendant received ineffective assistance of counsel, the standard is whether the counsel performed at least as well as a lawyer with ordinary training and skill in criminal law and conscientiously protected the client's interest, un-deflected by conflict of interest considerations. See Risher v. State, 523 P.2d 421 (Alaska 1974). A PCR claim of ineffective assistance of counsel can require an evidentiary hearing to determine whether the standard adopted in Risher was met by counsel's performance. See Wood v. Endell, 702 P.2d 248 (Alaska 1985). However, counsel are presumed competent, and the PCR applicant has the burden to rebut that presumption. To prevail on a PCR based on ineffective assistance of counsel, the applicant must not only meet the first test in the Risher case, but must also meet the second test. The Risher court explained that the first prong requires the accused to prove that the performance of trial counsel fell below an objective standard:

> Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations.
>
> ...

> Secondly, there must be a showing that the lack of competency contributed to the conviction. If the first burden [the burden of proving deficient performance] has been met, all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome.

Risher v. State, 523 P.2d at 424-25. See also State v. Jones, 759 P.2d 558, 567-68 (Alaska App. 1988).

To prevail on a claim of ineffective assistance of appellate counsel, the Court of Appeals explained, in an unpublished and therefore not-precedent decision, that the standards in the Risher case and Burton v. State, 180 P.2d 964 (Alaska App. 2008) would apply, as follows:

> To prevail in her claim that she received ineffective assistance of counsel on appeal, Slwooko must show that her appellate attorney argued her case incompetently, and that there is a reasonable possibility that she was prejudiced by her attorney's incompetence. Here, Slwooko claims that evidence of a witness's inconsistent statements must be supported by some type of special corroboration—and that it was incompetent for her appellate attorney to fail to include this argument in his opening brief. But even if we assume that it was incompetent for Slwooko's appellate attorney to fail to include this argument in his opening brief, Slwooko has failed to demonstrate that she was prejudiced by her attorney's purported lapse (*i.e.*, prejudiced by the fact that her appellate attorney waited until his reply brief to raise this argument) — because, as a claim of error, this "special corroboration" argument has no merit.

Slwooko v. State, 2011 WL 1998370, 2 (Alaska App. 2011) (footnote 7, a citation to Risher and Burton, omitted). In the Burton case the Court of Appeals addressed, inter alia, the standard for finding plain error:

> Under Alaska law, an error to which no objection was preserved in the trial court will qualify as "plain error" only if (1) the error "was so obvious that it should have been noticed by the trial court *sua sponte* " (*i.e.*, the error should have been apparent to any competent judge or lawyer); (2) the attorney representing the party who now claims error had no apparent tactical reason for failing to object; and (3) the error was so prejudicial to the fairness of the proceedings that failure to correct it would perpetuate manifest injustice.

Burton v. State, 180 P.3d at 968 (footnotes omitted).

THE COURT OF APPEALS DECISION

The Court of Appeals decision speaks for itself, but a review of the key rulings follows to help determine the issues that were raised on appeal. The Court of Appeals decision addressed two appeals by Haeg. In the first appeal, Case No. A-9455, Haeg alleged use by the State of perjured testimony for search warrants, improper charges, improper use of statements made by him during plea negotiations, and ineffective assistance of counsel. He also alleged the district court errors detailed below. In the second appeal, Case No. A-10015, Haeg challenged the denial of his post-trial motion to suppress evidence used at the trial which the State had seized during its investigation, and for return of the property.

Haeg contended in the Court of Appeals that the trial court:

(1) failed to inquire into the failed plea negotiations,

(2) failed to rule on a motion protesting the State's use of Haeg's statement made during plea negotiations as the basis for the charges,

(3) made prejudicial rulings concerning Haeg's defense that he was not "hunting,"

(4) failed to instruct the jury that Haeg's co-defendant, Tony Zellers, was required by his plea agreement to testify against Haeg,

(5) unfairly required Haeg to abide by a term of the failed plea agreement,

(6) failed to force his first attorney to appear at Haeg's sentencing proceeding, and

(7) when imposing sentence, erroneously identified the location where the majority of the wolves were taken.

Other than the change from revocation to suspension of the guide license, the Court of Appeals affirmed the district court rulings, actions, and failures to act challenged by Haeg in the seven numbered paragraphs above and also affirmed against his claim that the State used perjury testimony by Trooper Gibbens to get search warrants.

A. The Haeg claim that the State used perjured testimony:

The Court of Appeals found Haeg did not challenge the search warrant affidavit prior to trial, so that claim was forfeited.

B. The Haeg claim that he could not be convicted of unlawful acts by a guide, hunting wolves same day airborne:

The Court of Appeals concluded that Haeg was arguing in part that Gibbens' allegedly perjured affidavit was an improper basis for which to charge Haeg with unlawful acts as a guide. The Court ruled against Haeg with regard to what his permit allowed, where the wolves were shot, and what the term "hunting" entails under the predator control program and Alaska law.

C. The Haeg claim that he was not guiding when he and Zellers were taking wolves:

The Court of Appeals noted that Gibbens retracted part of his testimony during cross examination, and clarified that the wolves were killed in unit 19D, not in unit 19D-East. The Court also noted that Haeg admitted that none of the wolves was killed in unit 19D-East. No error was found.

D. The Haeg claim that the prosecutor violated Evidence Rule 410:

Haeg argued the State violated Evidence Rule 410 by using a statement he made during failed plea negotiations to charge him with crimes more serious than he initially faced. The Court of Appeals ruled Haeg did not litigate this issue in the district court and therefore had to show plain error to prevail on that point on appeal. The Court commented that "[o]ne of the components of plain error is proof that the asserted error manifestly prejudiced the defendant."

The Court concluded that the initial and amended charges were supported by a probable cause statement that set out Gibbens' investigation and a summation of the statements made by Haeg and Zellers. Thus, even if Haeg's statements were removed from the charging document, the remaining evidence from Gibbens and Zellers would still support the charges against Haeg. The State had discretion to file the more serious charges. The Court concluded that even if the State had not used his statements to support the information, Haeg would still have faced charges that he committed unlawful acts by a guide, hunting same day airborne. The Court therefore concluded Haeg had not shown that the error he asserts manifestly prejudiced him, and therefore did not show that plain error occurred.

The Court found that Haeg did not raise at trial the issue that the State used his interview to convict him. The Court wrote that the record shows that the State did not offer Haeg's pre-trial statement during its case-in-chief or during its rebuttal case. The Court noted that Zellers testified for the State and that his testimony, with Gibbens' testimony, was sufficient to support Haeg's convictions. The Court wrote that in his own testimony, Haeg admitted that he had committed all but two of the charged offenses, and he was acquitted on those two. The Court said Haeg testified that he was a licensed guide, that he had taken the wolves same day airborne, that he knew that he was acting outside the predator control program area, that he and Zellers had falsified the sealing certificates, that they had unlawfully possessed game, and that his leg traps were still catching game after the season had closed. Haeg did not show plain error.

E. The Haeg claim that his attorneys were ineffective:

The Court of Appeals ruled that Haeg's claim of ineffective assistance of counsel must be raised in the trial court in an application for post-conviction relief under Alaska Criminal Rule 35.1.

F. The Haeg claim (# 1) that the district court erred by failing to inquire about plea negotiations:

The Court of Appeals concluded there is no requirement that a trial court in a criminal case, without a motion or request from the parties, must ask why plea negotiations failed.

G. The Haeg claim (# 2) that the trial court failed to rule on an outstanding motion:

The Court of Appeals denied the Haeg claim that the trial judge failed to rule on a motion "protesting the State's use" of the statement Haeg claims he gave during plea negotiations because Haeg did not file a motion to dismiss based on a State violation of Evidence Rule 410. The Court found that Haeg alluded in his reply on his motion to dismiss on other grounds to "another piece of information that needs to be addressed." The Court of Appeals ruled that a trial court can properly disregard an issue that is first raised in a reply to an opposition.

H. The Haeg claim (# 3) that the district court prejudiced his defense:

The Court found no factual or legal basis for the Haeg claim that his defense was prejudiced by trial court rulings on his permit and on hunting. The Court concluded that the trial judge rulings permitted Haeg to present evidence that he was acting in accord with his permit and argue that he was not "hunting," which points the Court noted he argued at length to the jury.

I. The Haeg claim (# 4) that the district court failed to give a required jury instruction:

The Court of Appeals ruled that the trial judge was not required on her own to instruct the jury that Zeller's plea agreement required him to testify against Haeg. Because Haeg did not request an instruction on point, he did not preserve the issue for appeal.

J. The Haeg claim (# 5) that the district court held him to a term of the failed plea agreement:

After a review of the record, including recordings, the Court of Appeals disagreed with the contention by Haeg that the trial judge held him to a term of the failed plea agreement. The Court wrote that the State is allowed to put on evidence at sentencing of a defendant's uncharged offenses even if the defendant objects. Here, the State, irrespective of the failed plea agreement, attempted to show that Haeg had committed an uncharged offense. The State was entitled to do so. The Court noted the judge found that the State did not prove Haeg committed the uncharged offense, and did not consider it when imposing sentence.

K. The Haeg claim (# 6) that the district court erred by not ordering a defense witness to appear at sentencing:

Haeg subpoenaed his first attorney to appear at the sentencing, but the attorney did not show. Because Haeg did not ask the trial court to enforce the subpoena or seek any other relief, his claim of error was waived.

L. The Haeg claim (# 7) that the district court erred when it found that most of the wolves were taken in unit 19C:

The errors asserted by Haeg over where the wolves were killed versus trial court comments at sentencing about where they were killed were addressed and resolved against Haeg by the Court of Appeals. The Court further concluded that the trial court did not

commit clear error when she found that Haeg had illegally killed wolves for his own commercial benefit.

M. The Issues Resolved in Case No. A-10015:

On remand during the appeal the district court ruled on the Haeg arguments that (a) his constitutional rights were violated by the seizure of his property without notice of his right to contest the seizure and (b) the seizure statutes are unconstitutional. The Court of Appeals affirmed the district court decision not to return the property that was ordered forfeited at the sentencing. The forfeited property consisted of the airplane and the firearms that Haeg and Zellers used when taking the wolves, the wolf hides, and a wolverine hide.

Haeg relied in part on a Ninth Circuit decision that due process requires an individualized notice of right to contest when police seize property. The Alaska Court of Appeals found that the United States Supreme Court reversed that Ninth Circuit decision and rejected its imposition of an individualized notice of right to contest forfeiture requirement. City of West Covina v. Perkins, 525 U.S. 234 (1999). The Court of Appeals quoted rulings by the U.S. Supreme Court in the City of West Covina case:

> [W]hen police lawfully seize property for a criminal investigation, the federal due process clause does not require the police to provide the owner with notice of state-law remedies. "[S]tate-law remedies ... are established by published, generally available state statutes and case law." Once a property owner has been notified that his property has been seized, "he can turn to these public sources to learn about the remedial procedures available to him." "[N]o rationale justifies requiring individualized notice of state-law remedies." The "entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."

The Court of Appeals found no violation of federal or State of Alaska constitutional provisions because Haeg was present when the police seized his property and because Criminal Rule 37 provides a post-seizure procedure for an owner to seek return of

their property. The Court ruled there is no right to be separately informed of the right to contest the seizure of property. For similar reasons, the Court rejected Haeg's attack on the constitutionality of Alaska's seizure and forfeiture statutes, adding that Haeg's motion to suppress was waived because he failed to file it prior to trial. The Court further concluded that Haeg provided the district court no grounds for overturning the sentencing judge's decision to forfeit property related to Haeg's hunting violations.

N. Other "potential" claims by Haeg on appeal:

The Court of Appeals observed that Haeg's briefs and other pleadings were sometimes difficult to understand, and noted that he may have intended to raise other claims besides the ones discussed above. The Court ruled that to the extent Haeg was attempting to raise other claims in his briefs or in any of his other pleadings, those claims were inadequately briefed.

HAEG'S PCR CLAIMS

Haeg advances three basic theories for post-conviction relief under AS 12.72.010:

1) Ineffective assistance of counsel under AS 12.72.010(9);
2) Constitutional violations of his rights under AS 12.72.010(1); and
3) Newly discovered evidence under AS 12.72.010(4).

STATE'S MOTION TO DISMISS

In its Motion to Dismiss the State argues that Haeg failed to plead a prima facie case for ineffective assistance of counsel or any other grounds that would justify relief. The State contends defense counsel are presumed to have acted competently and the defendant bears the burden of rebutting that presumption. Here, the State claims, Haeg failed to obtain supportive affidavits of his former counsel and failed to explain why he could not. Affidavits addressing ineffective assistance of counsel have been held to be essential components of a

prima facie case for post-conviction relief. In addition, the State argues Haeg failed to cite to the record to support his allegations of ineffective assistance of counsel and did not show that the decisions of his counsel were anything more than tactical decisions, which are not sufficient to support relief. Further, the State contends Haeg failed to allege specifically how his conviction and sentence violate the U.S. and Alaska Constitutions, and did not specifically identify his newly discovered evidence. Finally, the State contends the Court of Appeals already addressed the facts and claims raised in the Haeg PCR application.

In his Opposition Haeg attempted to clarify his claims.

1. **The Ineffective Assistance of Counsel Claims:**

Haeg claims that he was poorly served by attorneys Cole, Robinson, and Osterman. Claims for ineffective assistance of counsel are within the permissible scope of a PCR proceeding.

The State argues Haeg has failed to plead a *prima facie* case because Haeg failed to provide affidavits from the allegedly ineffective attorneys in which the attorneys address the claims of ineffective assistance. This is an essential component of a *prima facie* case for ineffective assistance of counsel. Without the required affidavit or an explanation why it cannot be obtained, the court may dismiss a PCR application. Haeg claimed in his PCR application that the attorneys refused to provide affidavits of ineffective assistance of counsel when asked. Haeg asks to subpoena the attorneys to respond to his ineffective assistance of counsel claims.

Haeg has three basic claims for which he would like to have each former attorney respond: (1) that the decisions the attorney made were not based on sound tactical choices;

(2) that there were existing and un-waived conflicts of interest; and (3) that the attorneys erroneously advised Haeg on the law.

The State contends the attorneys made tactical decisions, which are not subject to claims of ineffective assistance. If counsel's actions or failures to act were done for tactical or strategic reasons, "they will be virtually immune from subsequent challenge, even if, in hindsight, the tactic or strategy appears to be mistaken or unproductive." State v. Jones, 759 P.2d 558, 569 (Alaska App. 1998). Haeg argues that tactics are not the basis of his ineffective assistance of counsel claims. He says his counsel had conflicts of interest that affected the representation. And he claims counsel erroneously informed him of the law.

Given the Court of Appeals decision, Haeg must reconcile his ineffective assistance of counsel claims with the fact that he took the stand at trial and admitted to killing wolves outside the predator control zone. His admissions provide a basis to uphold his conviction, regardless of the conduct of his counsel. It is not enough for Haeg to assert that a different strategy may have been more effective in hindsight. Haeg must make a prima facie showing, just as any other PCR applicant alleging ineffective assistance of counsel must meet, that both standards of Risher are met. Haeg has not yet done so. Haeg would like the court to conduct a hearing and require his former counsel to be present to address the issues. That approach would relieve Haeg of his obligation to present a prima facie case before a hearing is justified.

(a) The Cole Situation: Absent an PCR affidavit from his former counsel Cole, the burden was on Haeg to show that he made reasonable efforts to obtain the affidavit from Cole but could not. Haeg has alleged that his former counsel refused to provide an affidavit Haeg has not shown the efforts that he made to obtain the affidavit. If attorney Cole has not

been deposed in this case, Haeg will be permitted the additional time set forth below to depose Cole, at the expense of Haeg. The burden remains on Haeg to make a prima facie showing that Cole provided ineffective assistance of counsel, and that the lack of competency contributed to the conviction, with appropriate references to the record.

(b) The Robinson Deposition: Absent an affidavit from his former counsel Robinson, the burden was on Haeg to show that Haeg made reasonable efforts to obtain an affidavit from Robinson and could not. Haeg has made no such showing. However, attorney Robinson was deposed in this case on September 9, 2011. The burden is on Haeg to make a prima facie showing that Robinson provided ineffective assistance of counsel, and that the lack of competency contributed to the conviction, with appropriate references to the record.

(c) The Osterman Affidavit: On September 29, 2011, attorney Mark Osterman submitted an affidavit in this case. He acknowledges in ¶ 1 that he was retained by Haeg to pursue an appeal. He says he was fired by Haeg before a final product could be produced for the appeal. In ¶¶ 5 and 6 of his affidavit Osterman disputes some of the statements in the Haeg PCR, including the fee quoted by Osterman per issue on appeal. Osterman also writes in ¶ 6 that "Mr. Haeg presented himself as a difficult person, one who was intent on wasting as much time of mine as possible and under the circumstances, his fee was based upon the level of difficulty in dealing with him as much as the merits of his case." The upshot of the Osterman affidavit is that he was fired by Haeg before an opening brief on appeal was finalized. Osterman had no pertinent representation of Haeg at the trial or the sentencing. In ¶ 14 Osterman contends his draft brief did not meet Haeg's requirements, that Haeg provided no input into the brief, and that Haeg fired him.

The court finds that Haeg has not met his burden of coming forward with prima facie evidence regarding ineffective assistance of counsel Osterman or that any ineffective advice by Osterman with regard to the appeal contributed to the conviction of Haeg at the trial court level. The court therefore further finds that any PCR claims by Haeg based on alleged ineffective assistance of counsel Osterman are dismissed.

2. <u>The Constitutional Violations Claims:</u>

The State alleges Haeg offered nothing in his PCR Application to support the claim that his conviction and sentence violated the U.S. and Alaska Constitutions. In his Opposition Haeg sets out nine alleged constitutional violations:

1) The right to due process;
2) The right against unreasonable searches and seizures;
3) The right that no warrants shall issue, but on probable cause, supported by oath or affirmation;
4) The right against self-incrimination;
5) The right to compel witness in your favor;
6) The right against double jeopardy;
7) The right to be informed of the nature and cause of the accusation;
8) The right to equal protection under the laws;
9) The right that no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In Haeg's Opposition, after each constitutional claim, Haeg references an alleged error of his attorneys or misinformation provided to Haeg by his attorneys. These claims go to Haeg's ineffective assistance of counsel claims. Haeg does not explain how his conviction or sentence is in violation of the constitution of the United States or the constitution or laws of Alaska. His basic claim is that he was convicted because his counsel was ineffective, and

his constitutional rights were thereby violated. That argument does not form an adequate basis for any of the constitutional claims listed by Haeg.

The constitutional claims are therefore dismissed. Any alleged constitutional violation not previously addressed by the Court of Appeals might come within the Haeg claim of ineffective assistance of counsel.

Forfeiture of equipment used in an offense in violation of AS 8.54 may be forfeited. Forfeiture is a matter of judicial discretion at sentencing and is not mandatory. The continued claim by Haeg that his constitutional rights were violated in the circumstances surrounding the seizure of his airplane was addressed by the Court of Appeals as discussed above, is therefore outside the scope of post-conviction relief, and is hereby dismissed.

Aside from the ineffective assistance of counsel claims, the other Haeg PCR claim that remains potentially viable as to forfeiture of his plane is his claim of improper contacts between the sentencing judge and Trooper Gibbens.

3. The Newly Discovered Evidence Claim:

Haeg's final PCR claim is that he has newly discovered evidence. In his Opposition, Haeg claims the newly discovered evidence is that he was told by State of Alaska officials that the Wolf Control Program was in jeopardy of termination if more wolves weren't taken. Haeg claims that he was specifically told to take more wolves to ensure the continuation of the Wolf Control Program, and if he took them outside the authorized game management area, he should claim that they were taken from inside the area. Haeg's claim is that he was convicted for the very behavior that State game management officials encouraged and directed him to undertake. For ease of reference this will be characterized herein as the inducement/entrapment defense.

The inducement/entrapment defense asserted by Haeg does not meet the standards of newly discovered evidence under Alaska law. AS 12.72.020(b)(2) provides that the court may hear a claim based on newly discovered evidence **if** the applicant establishes due diligence in presenting the claim and sets out facts supported by admissible evidence that the new facts were (A) not known within (i) 18 months after entry of the judgment of conviction if the claim relates to a conviction; (B) are not cumulative to the evidence presented at trial; (C) are not impeachment evidence; and (D) establish by clear and convincing evidence that the applicant is innocent.

In his Opposition Haeg asserts that he tried repeatedly to have the inducement defense presented at his trial. *A fortiori*, the inducement/entrapment defense was not newly discovered. It was known by Haeg prior to his trial. Haeg claims he told his attorneys prior to trial that he was induced by the state to kill wolves out of the approved game management area. He contends his attorneys did not proceed on that theory at trial because, according to Haeg, his attorneys erroneously believed and informed him that entrapment was not a defense. The subject of not pursuing an inducement/entrapment defense therefore comes within the ineffective assistance of counsel claim, but does not constitute newly discovered evidence and is therefore dismissed as a stand-alone claim.

CONCLUSION AND ORDERS

Based on the pleadings, briefing, and information submitted to the court in this case thus far, the court makes the following findings and orders:

1. The Haeg claim of ineffective assistance of counsel as to Osterman is dismissed given the failure by Haeg to make a prima facie showing of ineffective assistance of counsel as to Osterman, an attorney retained by Haeg for the appeal but terminated by Haeg before filing a brief on appeal.

2. No hearings will be conducted on the ineffective assistance of counsel claims in this case until and unless Haeg makes a prima facie showing of ineffective assistance of counsel by attorney Cole or attorney Robinson.

3. Haeg is given an extension until February 29, 2012, by which to depose Cole (if not already deposed in this case) **and** by which to file a succinct and clear memorandum detailing (a) the alleged ineffective assistance of counsel Cole, with citations to the record and to the deposition, addressing both Risher standards, (b) alleged ineffective assistance of counsel Robinson with citations to the record and to the deposition, addressing both Risher standards, and (c) the Haeg claims that the sentence imposed by Judge Murphy was improper by virtue of alleged improper contact with Trooper Gibbens.

4. The federal and state constitutional law violation claims by Haeg are dismissed.

5. The allegedly newly discovered evidence regarding a defense of inducement or entrapment is not new information and is therefore dismissed. To the extent that Haeg can establish ineffective assistance of counsel regarding the alleged legal advice that an inducement or entrapment defense was not legally viable, that should be detailed by Haeg in his filing under ¶ 3(a) and (b) hereof, with citations to legal authority establishing that such a defense was in fact legally viable.

Dated at Kenai, Alaska, this 3rd day of January, 2012.

Carl Bauman
SUPERIOR COURT JUDGE

CERTIFICATION OF DISTRIBUTION
I certify that a copy of the foregoing was mailed to the following at their addresses of record:
Haeg, Peterson, Flanigan
1-3-12 Date
Roberts Clerk