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

| | |
|---|---|
| DAVID S. HAEG | ) |
| | ) |
| Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| BRENT R. COLE, | ) Supreme Court No.: S-12771 |
| | ) Trial Court Case #3KN-06-844 CI |
| Appellee. | ) |
| | ) |

Ak Bar Case No.: 2006F007

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APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT KENAI
THE HONORABLE HAROLD BROWN PRESIDING

From a final judgment of the Alaska Bar Association
Fee Arbitration Panel
Third Judicial District at Anchorage
Nancy Shaw, Panel Chair/Attorney
Yale Metzger, Attorney
Robyn Johnson, Public Member

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# BRIEF OF APPELLANT

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By: _____
David S. Haeg

Filed in the Supreme Court
of the State of Alaska at Anchorage
on this ____ day of _____, 2007.

_____

Deputy Clerk

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions**

## Alaska Statutes



## Alaska Administrative Codes



## Court Rules

## TEXT OF STATUTES, ALASKA ADMINISTRATIVE CODES, CONSTITUTIONAL PROVISIONS, U.S. CODES, AK RULES OF PROFESSIONAL CONDUCT, U.S. ATTORNEY RULES, AND COURT RULES PRINCIPALLY RELIED UPON

## STATUTES

**AS 09.43.020. Proceedings to Compel or Stay Arbitration**. (a) On application of a party showing an agreement described in AS 09.43.010, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue and if the agreement is found to exist shall order arbitration. (b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. The issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the stay ordered if no agreement is found to exist. If found for the opposing party, the court shall order the parties to proceed to arbitration. (c) If an issue subject to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under (a) of this section, the application shall be made in that court. Otherwise the application may be made in any court of competent jurisdiction. (d) An action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application for the order has been made under this section or, if the issue is severable, the stay may be with respect to the issue only. (e) An order for arbitration may not be refused on the ground that the claim in issue lacks merit or because a fault or ground for the claims sought to be arbitrated has not been shown.

**AS 09.43.050. Hearing. Unless otherwise provided by the agreement**, (1) …the arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause or upon their own motion, may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date; the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a properly notified party to appear; (2) the parties are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing;

**AS 09.43.120. Vacating An Award.** (a) On application of a party, the court shall vacate an award if (1) the award was procured by fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of a party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown for postponement or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of AS 09.43.050 , as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and

the issue was not adversely determined in proceedings under AS 09.43.020 and the party did not participate in the arbitration hearing without raising the objection. … (c) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant. However, if the application is predicated upon corruption, fraud, or other undue means by either the opposing party or an arbitrator, it shall be made within 90 days after the grounds are known or should have been known. (d) In vacating the award on grounds other than those stated in (a)(5) of this section the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence of a provision in the agreement, by the court in accordance with AS 09.43.030 … (e) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

**AS 12.36.020. Return of Property.** (a) A law enforcement agency may (1) not return property in its custody to the owner or the agent of the owner if (A) the property is in custody in connection with a children's court proceeding, a criminal proceeding, or an official investigation of a crime; or (B) the property in custody is subject to forfeiture under the laws of the (i) state; or (ii) United States, and the United States has commenced forfeiture proceedings against the property or has requested the transfer of the property for the commencement of forfeiture proceedings; and (2) with the approval of the court, transfer the property to another state or federal law enforcement agency for forfeiture proceedings by that agency; the court having jurisdiction shall grant the approval under this paragraph if the property (A) will be retained within the jurisdiction of the court by the agency to which the property is being transferred; or (B) is (i) not needed as evidence; or (ii) needed as evidence, and the property is fungible or …the prosecuting attorney may release the property to the owner upon presentation of satisfactory proof of ownership.

**AS 22.15.060. Criminal Jurisdiction**. (a) The district court has jurisdiction (1) of the following crimes: (A) a misdemeanor, unless otherwise provided in this chapter; (B) a violation of an ordinance of a political subdivision; (C) a violation of AS 04.16.050 or AS 11.76.105 ; (2) to provide post-conviction relief under the Alaska Rules of Criminal Procedure, if the conviction occurred in the district court. (b) Insofar as the criminal jurisdiction of the district courts and the superior court is the same, such jurisdiction is concurrent.

**AS Title 16 Fish & Game:** Chapter 5. Fish & Game Code; Chapter 35. Predatory Animals; Chapter 50. Guides & Outfitters.

## ALASKA ADMINISTRATIVE CODES

**5 AAC 92.039**: Permit for taking wolves using aircraft... (h) In accordance with AS 16.05.783, the methods & means authorized in a permit issued under this section are *independent of all other methods & means restrictions in AS 16 & this title.*

## CONSTITUTIONAL PROVISIONS

**The United States Constitution:**

**Amendment IV-** "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,"

**Amendment V** – "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

**Amendment VI** – "In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

**Amendment XIV - Section 1**. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

* * *

**The Constitution of the State of Alaska:**

**Section 1.7 - Due Process.** – "No person shall be deprived of life, liberty, or property, without due process of law."

**Section 1.9 - Jeopardy and Self-Incrimination** – "No person shall be compelled in any criminal proceeding to be a witness against himself."

**Section 1.11 - Rights of Accused** – "In all criminal prosecutions, the accused shall have the right to informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

**Section 1.14 - Searches and Seizures** – "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation,"

## U.S. CODES

**Title 18, Section 241. Conspiracy Against Rights**: This statute makes it unlawful for two or more persons to conspire to injure, oppress, threaten, or intimidate any person of any state, territory or district in the free exercise or enjoyment of any right or privilege secured to him/her by the Constitution or the laws of the United States, (or because of his/her having exercised the same). It further makes it unlawful for two or more persons to go in disguise on the highway or on the premises of another with the intent to prevent or hinder his/her free exercise or enjoyment of any rights so secured. Punishment varies from a fine or imprisonment of up to ten years, or both; and if death results, or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years, or for life, or may be sentenced to death.

**Title 18, Section 242. Deprivation of Rights Under Color of Law**: This statute makes it a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S. This law further prohibits a person acting under color of law, statute, ordinance, regulation or custom to willfully subject or cause to be subjected any person to different punishments, pains, or penalties, than those prescribed for punishment of citizens on account of such person being an alien or by reason of his/her color or race. Acts under "color of any law" include acts not only done by federal, state, or local officials within the bounds or limits of their lawful authority, but also acts done without and beyond the bounds of their lawful authority; provided that, in order for unlawful acts of any official to be done under "color of any law," the unlawful acts must be done while such official is purporting or pretending to act in the performance of his/her official duties. This definition includes, in addition to law enforcement officials, individuals such as Mayors, Council persons, Judges, Nursing Home Proprietors, Security Guards, etc., persons who are bound by laws, statutes ordinances, or customs. Punishment varies from a fine or imprisonment of up to one year, or both, and if bodily injury results or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined or imprisoned up to ten years or both, and if death results, or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

**Title 28 Section 1343. Civil Rights and Elective Franchise:** (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs

mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**Title 42, Section 1981.** (a) **Statement of equal rights**: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) "Make and enforce contracts" defined -For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) Protection against impairment - The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

**Title 42, Section 14141. Pattern and Practice**: This civil statute was a provision within the Crime Control Act of 1994 and makes it unlawful for any governmental authority, or agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. Whenever the Attorney General has reasonable cause to believe that a violation has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

**Title 42, Section 1983. Civil action for deprivation of rights**: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

**Title 42, Section 1985. Conspiracy to interfere with civil rights**: (1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any

office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties; (2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

## ALASKA RULES OF PROFESSIONAL CONDUCT

**Rule 1.2(a) Scope of Representation**. A lawyer **shall** abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and **shall** consult with the client as to the means by which they are to be pursued.

**Rule 1.4(a) Communication**. A lawyer **shall** keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information.

**Rule 1.4(b) Communication**. A lawyer **shall** explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Rule 1.7. Conflict of Interest: General Rule.** (b) A lawyer **shall not** represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or **by the lawyer's own interests**, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and the client consents after consultation.

**Rule 1.7 Conflict of Interest: General Rule. Loyalty is an essential element in the lawyer's relationship to a client**. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation.

**Rule 1.16. Declining or Terminating Representation**. (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law;

**Rule 3.1. Meritorious Claims and Contentions.**

**Rule 3.3. Candor Toward the Tribunal.**

**Rule 4.1. Truthfulness in Statements to Others.** In the course of representing a client a lawyer **shall not knowingly**: (a) make a false statement of material fact or law to a third person; or

**Rule 8.4. Misconduct**. It is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

**Rule 9.1. Definitions.**

(a) **"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances**. (b) "Client" denotes a person, public officer, or corporation, association, other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services. (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in

question. (d) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10. **(e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information. (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.** (g) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, negotiation or other particular matter involving a specific party or parties. (h) "Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation. **(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. (j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.** (k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question. **(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance. (SCO 1123 effective July 15, 1993)**

## U.S. ATTORNEY RULES USAM TITLE 9 (Witness Immunity)

**718 Derivative Use Immunity**.…The Supreme Court upheld the statute in *Kastigar v. United States*, 406 U.S. 441 (1972). In so doing, the Court underscored the prohibition against the government's derivative use of immunized testimony in a prosecution of the witness. The Court reaffirmed the burden of proof that, under *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), must be borne by the government to establish that its evidence is based on independent, legitimate sources: This burden of proof, which we affirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. Kastigar, supra, at 460.

**719 Informal Immunity Distinguished From Formal Immunity**: … The principles of contract law apply in determining the scope of informal immunity. *United States v. Plummer*, 941 F.2d 799, 802 (9th Cir. 1991); …*United States v. Camp*, 72 F.3d 759 (9th Cir. 1996) Grants of informal immunity that do not expressly prohibit the government's derivative use of the witness's testimony will be construed to prohibit such derivative use. Plummer, supra.

**724 Expiration of Authority to Compel:** The letter of authority specifically extends the authorization to compel the witness to testify to any ancillary proceeding. This is intended to cover the witness's testimony at a trial or trials following his or her immunized testimony before a grand jury, thus avoiding the necessity of a second application…

**725 Use of Immunized Testimony by Sentencing Court:** If the witness for whom immunity has been authorized is awaiting sentencing, the prosecutor should ensure that the substance of the witness's compelled testimony is not disclosed to the sentencing judge unless the witness indicates that he or she does not object. This is intended to avoid a claim by the witness that his or her sentence was adversely influenced by the immunized testimony.

**726 Steps to Avoid Taint:** Prosecution of a witness using evidence independent of his or her immunized testimony will require the government to meet its burden under *Kastigar*, *supra*, of proving that the evidence it intends to use is not tainted by the witness's immunized testimony. In order to ensure that the government will be able to meet this burden, prosecutors should take the following precautions in the case of a witness who may possibly be prosecuted for an offense about which the witness may be questioned during his/her compelled testimony:

1. Before the witness testifies, prepare for the file a signed and dated memorandum summarizing the existing evidence against the witness and the date(s) and source(s) of such evidence;
2. Ensure that the witness's immunized testimony is recorded verbatim and thereafter maintained in a secure location to which access is documented; and
3. Maintain a record of the date(s) and source(s) of any evidence relating to the witness obtained after the witness has testified pursuant to the immunity order.

## ACGOV - IMMUNITY

Immunity operates on the theory that a witness who suffers no adverse legal consequences from testifying is, necessarily, not incriminated by such testimony. See *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873 ["An immunity must give protection equivalent to that which attends the refusal to testify about matters which incriminate."].

**USE IMMUNITY** - "Use immunity" essentially prohibits the prosecution from using the witnesses testimony against him in any criminal proceeding.

The most common type of "use" immunity is known as "use and derivative use immunity." See *Kastigar* v. *United States* (1972) 406 US 441, 453 ["(Use and derivative use immunity) prohibits the prosecutorial authorities from using the compelled testimony

in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."; *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 872 ["'Use' immunity protects a witness only against the actual use of his compelled testimony and its fruits . . . "; *People* v. *Hunter* (1989) 49 Cal.3d 957, 973, fn.4; *People v. Cooke* (1993) 16 Cal.App.4th 1361, 1366 ["Use immunity does not afford protection against prosecution, but merely prevents a prosecutor from using the immunized testimony against the witness."]. NOTE**:** A witness who has been granted "use and derivative use" immunity can be compelled to give testimony concerning the subjects covered by the immunity because such this type of immunity sufficiently protects the witness against self-incrimination. See *Kastigar* v. *United States* (1972) 406 US 441, 453 ["We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."]; *People* v. *Cooke* (1993) 16 Cal.App.4th 1361, 1366 ["Use immunity provides sufficient protection to overcome a Fifth Amendment claim of privilege."].

[I]t prevents the use of the witness's testimony to locate physical evidence linking him to a crime, obtain investigatory leads, or "search out other testimony to be used in evidence against him." See *Counselman* v. *Hitchcock* (1892) 142 US 547, 564; *Kastigar* v. *United States* (1972) 406 US 441, 460 ["This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead' also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."]; *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873, fn.4. As the Court of Appeal explained, "'Use immunity' precludes punishment for the compelled disclosures by cutting the causal link between the incriminating testimony and its use through the exclusion of the compelled testimony or any evidence derives from it. It operates as an exclusionary rule." *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873-4; ["(T)he privilege forbids compelled disclosures which could serve as a 'link in a chain' of evidence tending to establish guilt of a criminal offense . . ."]; *People* v. *Quartermain* (1977) 16 Cal.4th 600, 616-20. NOTES: Immunized statement not admissible for impeachment: A witness's statement obtained under a grant of use immunity cannot be used to impeach the witness if he is charged with a crime and if his testimony at his trial is inconsistent with his immunized testimony. See *New Jersey* v. *Portash* (1979) 440 US 450. Use of non-evidentiary information: It is not clear whether, or to what extent, the prosecution can be non-evidentiary information that was obtained as the result of use immunity. Examples of non-evidentiary information would include information that helps the prosecution explain evidence that had been unintelligible; information that "may expose as significant facts once thought irrelevant (or vice versa); information indication which witnesses to call and in what order; information used to develop opening and closing arguments. See *U.S.* v. *North* (D.C. Cir. 1990) 910 F.2d 843, 857-8. In any event, the Court of Appeal has ruled that the correct "test" for determining the scope of use immunity is whether the "defendant could be tried as if he had not made the immunized statement." *People* v. *Gwillim* (1990) 223 Cal.App.3d 1254, 1270. For example, if the

witness tells officers that several rings stolen in a jewelry store robbery are buried in his back yard, both the witness's statement and the rings that were discovered as the result of the statement cannot be used as evidence against the witness.

**NEGOTIATED IMMUNITY AGREEMENTS** - Immunity agreements are often negotiated between the prosecution and witness as part of a plea or sentence bargain. For example, the witness may be a co-defendant in the case but, because of his minor role in the crime, lack of criminal history, or other considerations, it is decided to grant him immunity or a reduced sentence.

**Determine the nature of the witness's testimony** - There is, however, a procedure to protect the interests of both sides. The law provides that all information transmitted by the witness to a prosecutor for purposes of exploring a grant of immunity is automatically given use and derivative use immunity.

**Combined state and federal use immunity:** The United States Supreme Court has ruled that a witness who testifies under a grant of immunity in a state court is automatically granted use and derivative use immunity in federal courts to the extent that the witness's testimony incriminates him in a federal crime. See *Murphy* v. *Waterfront Commission of New York* (1964) 378 US 52, 79 ["(W)e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him . . . (T)o implement this constitutional rule . . . the Federal Government must be prohibited from making any such use of compelled testimony and its fruits."]; *Nelson* v. *Municipal Court* (1972) 28 Cal.App.3d 889.

**Isolating immunized testimony:** If a person who has been given use and derivative use immunity is subsequently charged with the crime under investigation or a related crime, the prosecution may be required to prove--by a preponderance of the evidence-that all of the evidence that was used against the person at a preliminary hearing or grand jury proceeding, or which the prosecution seeks to present at trial, was not obtained as the result of the immunized testimony. In other words, the prosecution must prove "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

For example, the testimony of prosecution witnesses could be reduced to writing, tape recorded, or video taped before the immunized testimony was given. This should enable the prosecution to prove that such testimony was, in fact, independent of the immunized testimony.

Another idea is to isolate the immunized testimony by making sure that all investigators and prosecutors who were involved in obtaining such testimony have nothing to do with

any subsequent investigation or prosecution of the immunized witness. These investigators and prosecutors should conduct themselves in a manner that would allow them to testify that they never spoke with the immunized witness, they were not present when other officers or prosecutors spoke with the immunized witness, that they were not told what the immunized witness testified to, they had not seen any transcripts of the immunized witness's testimony, they had not read any reports in which such testimony was mentioned, and they had not talked to anyone about the content of such testimony.

*Kastigar* v. *United States* (1972) 406 US 441, 446. U.S. v. Bernal-Obeso (9th Cir. 1993) 989 F.2d 331, 334-5.

*People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873 ["An immunity must give protection equivalent to that which attends the refusal to testify about matters which incriminate."].

*Kastigar* v. *United States* (1972) 406 US 441, 453 ["(Use and derivative use immunity) prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

*Counselman* v. *Hitchcock* (1892) 142 US 547, 564; *Kastigar* v. *United States* (1972) 406 US 441, 460 ["This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead' also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."]; *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873, fn.4.

*Prudhomme* v. *Superior Court* (1970) 2 Cal.3d 320, 326 ["(T)he privilege forbids compelled disclosures which could serve as a 'link in a chain' of evidence tending to establish guilt of a criminal offense . . ."]

In any event, the Court of Appeal has ruled that the correct "test" for determining the scope of use immunity is whether the "defendant could be tried as if he had not made the immunized statement." *People* v. *Gwillim* (1990) 223 Cal.App.3d 1254, 1270.

*People* v. *Morris* (1991) 53 Cal.3d 152, 191; NOTES: The existence of an immunity agreement or plea agreement with a prosecution witness, and the circumstances surrounding the agreement, are "highly relevant" to the issue of witness's motivation for testifying and the witness's credibility. See *People* v. *Allen* (1986) 42 Cal.3d 1222, 1255. The determination of whether the witness testified truthfully should be made by the court, not the prosecution.

*Murphy* v. *Waterfront Commission of New York* (1964) 378 US 52, 79 ["(W)e hold the constitutional rule to be that a state witness may not be compelled to give testimony

which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him . . . (T)o implement this constitutional rule . . . the Federal Government must be prohibited from making any such use of compelled testimony and its fruits."]; *Nelson* v. *Municipal Court* (1972) 28 Cal.App.3d 889.

*Daly* v. *Superior Court* (1977) 19 Cal.3d 132, 145 ["It is true that use and derivative use immunity, unlike transactional immunity, does not purport to interfere with any prosecution based on evidence which is not derived directly or indirectly from the immunized testimony. But the very existence of such testimony may present serious problems of proving its complete independence from evidence introduced in the criminal proceeding."].

## COURT RULES

**Alaska Appellate Rule 202. Judgments from Which Appeal May Be Taken**. (a) An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010.

**Alaska Bar Rule 40(q)(3). Procedure**. (q) Decision of the Arbitrator or Arbitration Panel. (3) the findings of the arbitrator or panel on all issues and questions submitted which are necessary to resolve the dispute.

**Alaska Rules of Evidence Rule 410. Inadmissibility of Plea Discussions in Other Proceedings**. (a) Evidence of a plea of guilty or nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements or agreements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the government or an accused person who made the plea or offer if: (i) A plea discussion does not result in a plea of guilty or nolo contendere, or (ii) A plea of guilty or nolo contendere is not accepted or is withdrawn, or (iii) Judgment on a plea of guilty or nolo contendere is reversed on direct or collateral review. (b) This rule shall not apply to (1) the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas when offered in subsequent proceedings as prior inconsistent statements, and (2) proceedings by a defendant to attack or enforce a plea agreement.

## INTRODUCTION

This is an appeal to the Alaska Supreme Court by pro se appellant David Haeg from the 6/15/07 Superior Court decision of David's appeal of the 8/25/06 decision and award, made after a 4-day fee arbitration proceeding David brought against attorney Brent Cole (Cole). The Supreme Court of Alaska has jurisdiction under Appellate Rule 202(a).

## ISSUES PRESENTED FOR REVIEW

1. The decision and award was procured by fraud.

2. There was corruption in the arbitrators.

3. There was evident partiality by the arbitrators.

4. The arbitrators exceeded their powers, including but not limited to: awarding judgments not submitted, imposing time limits, and excluding evidence.

5. The decision and award did not address the issues presented, including but not limited to: Cole lying to appellant to affirmatively deny rights and protection under rule, statue, and constitution; Cole perjuring himself to the panel; appellant's request for Cole to be prosecuted for such perjury; Cole affirmatively misleading the panel; Cole's collusion and/or conspiracy with other attorneys, including the State Assistant Attorney General prosecuting Haeg; and Cole failing to respond to a subpoena for which he had been served along with an airline ticket and witness expenses.

6. There is no referral to discipline counsel.

7. The decision and award is completely foreign to the evidence presented with the panel ignoring the compelling and irrefutable evidence presented to them.

8. The decision and award are not in compliance of *Alaska Rules of Professional Conduct* or *Alaska Rules of Attorney Fee Dispute Resolution required by Rule 40(q).*

9. A large part of the Official Record of these proceedings is missing.

10. Judge Brown exhibited bias, partiality, and corruption.

11. The decision and award are in violation of both the United States and Alaska State constitutions.

## FACTS

While licensed for, and participating in, the Wolf Control Program, big game hunting guide David Haeg was prosecuted by the State of Alaska for the game violation of a hunting guide hunting big game (wolves) same day airborne – the most severe charges a hunting guide can face. Ex. 5-6, 20. To support these hunting guide charges Prosecutor Scot Leaders and Trooper Brett Gibbens claimed on the search warrant affidavits that the evidence found of taking wolves same day airborne was in a Game Management Unit (GMU) in which David was licensed to guide (GMU 19C) and in which David had a lodge for conducting guided big game hunts. Ex. 11. The evidence was in fact in the GMU in which the Wolf Control Program was taking place (GMU 19D) and in which David was not licensed to guide. Ex. 16 and Tr. 16, 120, 146, 163-4, 169. Violations of the Wolf Control Program are clearly and intentionally separate from any game, hunting, or guide violations. Ex. 20. When David told Cole about the fact the evidence was found in the Wolf Control Program GMU and not where he can guide Cole stated, “It doesn’t matter”, never told David he could ask to have all evidence suppressed

because of this, and never pointed this perjury out to the judge. Tr. 11, 16, 120, 163, 165 and Ex. 4. Cole never investigated and never found out violations of the Wolf Control Program were intentionally separate from game, hunting, or guiding violations and thus could not affect David and his wife Jackie's guide business. Tr. 46, 61, 279, 378. At the time in question (winter) there were no guided hunts being conducted and the WCP was active. Using warrants supported by affidavits containing the perjury the evidence was found in the GMU in which David was licensed to guide, the State seized, deprived, and eventually forfeited David and Jackie's property (including their airplane), which was the primary means to provide their livelihood. Ex. 2 & Tr. 20, 256, 347 & Motion for Return of Property and to Suppress as Evidence, the State's Opposition, and David's reply. The State failed to promptly inform David, Jackie, and/or Cole (who was hired weeks after the seizure) "within days if not hours of seizure" that they had the right to a hearing to contest the seizure; prompt notice of the case or intent for forfeiture or prompt notice David or Jackie could seek to bond the property out. Ex. 23, Tr. 348-51, See Cole's brief [See also *F/V American Eagle v. State*, 30 620 P.2d 657, 667 (Alaska 1980) and *Waiste v. State*, 10P.3d 1141 (Alaska 2000) and other caselaw concerning return of property]. The State did not provide a statute, authority, justification, or intent for deprivation and/or forfeiture in any warrant, charge, or information ever filed in David's case. Ex. 5-6, 11. Cole never told David of these protections and/or never investigated and found out these were violations of established constitutional and procedural due process that would require all the property to be permanently returned and not used as evidence. Cole failed to tell David the statutes authorizing deprivation and forfeiture was unconstitutional as

written and as applied in David's case. Cole first tried to claim that the State was not required to provide any of this clearly established constitutional due process and then, when cornered by David into admitting this was false, tried to blame David by stating, "David, the time to make that decision was in April – you were almost comatose because you were so depressed about the State walking in and taking all this stuff." Tr. 346 – 351. Cole had already admitted he had failed to tell David he could do this, "Did we discuss a motion to suppress - no I really didn't think we did because I never thought it was a good option." Tr. 274. Cole never told David he could seek to bond his plane out after David had told him how important it was to get the plane back, stating, "You never asked to bond it out" and then when David asked if he would have had to actually *ask* to bond it out, stating, "I don't think you can get it back when it was subject to a search warrant." Tr. 346. Cole states, "You always had an interest in getting your plane back." And then, just a couple of sentences later states, "I don't remember you telling me I want to try and get it [the plane] out of there." Tr. 346. This is also proven to be proven perjury by nearly everything in both the secret recordings and in the fee arbitration testimony by Cole himself. There were numerous discussions in which David demanded they get the plane back. Ex. 3, 17-18 and Tr. 10, 21, 23, 25, 101-2, 129, 222.

While he was David's attorney Cole told David that the State "demanded" he cooperate or they would file felony Lacy Act charges (transportation of illegally taken game across State lines). Tr. 244. Cole testified at fee arbitration, however, he could see no theory because nothing crossed State lines. Tr. 244. The State "demanded" that David give an interview as part of the cooperation required. Tr. 13, 16, 47, 48, 50, 99, 243, 245,

285, 351, and Ex. 1.

During this 5-hour "interview" David told Leaders and Trooper Gibbens the evidence they claimed was found in GMU 19C where he guided was in fact in GMU 19D, the GMU in which the Wolf Control Program was taking place. Leaders and Gibbens recorded themselves being told this. Tr. 146-147.

Cole told David for the "open sentencing" plea agreement David had to quit conducting guided hunts for 1 to 3 years and that David and Jackie should immediately cancel the first years hunters. Tr. 18, 67, 154, 251.

After the plea agreement had been in place for months, the first guiding season given up was already over, 5 witnesses had been flown in from as far away as Illinois, and just 5 business hours before the "open sentence" plea agreement was to be finalized before the judge in McGrath the morning of November 9, 2004, prosecutor Leaders filed an amended information changing the charges agreed to in the plea agreement to charges far more severe the afternoon of November 8, 2004. Ex. 6 and 19 and Tr. 10, 87, 110, 117.

Cole told David and all the witnesses flown in he "just received the bad news" on November 8, 2004 and then showed them a fax dated November 8, 2004 1:00 p.m. of the amended information from Leaders greatly increasing the severity of the charges. Ex. 7 and Tr. 25, 87, 109-10, 117. Yet Cole's own letter to David of July 6, 2005 proved he had known Leaders was going to increase the severity of the charges days before the witnesses were flown in on November 8, 2004. Ex. 7

Both the original information and the amended information utilized David's

statements, made during the "interview", as the only probable cause for most the charges and as primary probable cause for all the rest. Ex. 5 and 6.

When David asked over and over what could be done to enforce the agreement upon which so much detrimental reliance had been placed Cole told him and all the witnesses, "The only thing I can do is call Leaders boss, a women I worked with when I was a prosecutor." Tr. 28, 87, 106, 110-11, 117 and Ex. 17.

Cole then talked to Leaders and presented several different proposals to David, all more severe, - which David rejected. Tr. 57-58, 105-6, 114, 124-5. David again asked what could be done to enforce the original agreement and Cole said, "I can't piss Leaders off because I still have to make deals with him after you're finished." Tr. 29, 33, 95, 380.

Cole cancelled the trip to McGrath by stating, "We can't go out there and plead to these new charges." Tr. 28, 58, 124. David was arraigned on the amended information telephonically without Cole or Leaders saying a word about the broken plea agreement David wanted to be enforced because of all David had done for it. Ex. 4.

David talked to his business attorney Dale Dolifka (Dolifka) about what happened and Dolifka told David something was not right. Tr. 378. Because of this David started secretly tape-recording his conversations with Cole. Ex. 17-19 and Tr. 29, 281, 314, 378. These recordings provide absolute proof that there was a "open sentencing" plea agreement; that David had relied on the plea agreement to his immense detriment; that David asked what could be done to enforce the plea agreement; that Cole said the only thing was to "call Leaders boss"; that he told Cole that he wanted the plea agreement enforced at any cost both money wise or sentence wise; that he asked Cole how the State

could use his statements against him after they broke the plea agreement – including issuing them to the media; that he didn't understand how he could be charged with guiding crimes; that he wanted to oppose the prosecution in any way possible; that he never accepted any plea agreement other than the original one; and that he wanted to know all possible ways to get his airplane back. Ex. 3, 17-18 and Tr. 10, 21, 23, 25, 101-2, 129, 222.

These same recordings provide absolute proof that Cole lied to David abut his rights and protections under law, rule, and constitution and failed to inform David of any rights or protections to the above gross prosecutorial violations – even when it was crystal clear David wished to know them. These same recordings also provide absolute proof that Cole did not do and was not willing to do anything to advocate for David that would jeopardize his "deal" making ability with the prosecution. Tr. 29, 33, 95, 380.

David fired Cole about a month after Leaders broke the plea agreement. David did this because he felt Leaders and Cole were trying to extort more and more for the same plea agreement that had already been paid for in full and if David did give more for the same agreement there would be no guarantee the State would not again take what was agreed and then ask for more – as had already happened. Tr. 57, 72, 95.

David then hired attorney Chuck Robinson and investigator Joe Malatesta. Malatesta secretly taped a conversation with Cole discussing what happened to the "open sentence" plea agreement. Ex. 19. This recording provides absolute proof there was an "open sentence" plea agreement; that Leaders broke it or "reneged" at the last minute to get more from David; that Cole failed to enforce the agreement or tell David that it could

be enforced; that both David and Cole were unhappy about Leaders breaking the plea agreement; that David never agreed to any other plea agreement than the "open sentence" one; and that "One thing that the DA (Leaders) did back out on though is originally he said same counts that he was facing that are in that note that he sent to me 'open sentence'".

Robinson told David everything that happened while Cole was David's attorney was "water under the bridge", that everything was "between Cole and Leaders" and "there is nothing I can do." Ex. 26, 27, 34 and Tr. 33. Robinson recommended going to trial, not putting on any evidence, and to not ever inform the court about the plea agreement or everything David had done for it. Ex. 26, 27, 34 and Tr. 154, 381. Robinson told David he had a "tactic" that because the State had not supplied an affidavit when they filed the information the court failed to obtain "jurisdiction" over him. Robinson told David no one must tell the court there was a plea agreement or all David had done for it because this would admit the court's "jurisdiction" over him. Ex. 26, 24, & 34.

David asked Cole to write a letter documenting that Leaders had broken the plea agreement by filing far harsher charges after David had relied on the agreement to his great detriment. Ex. 7. Cole would not write this letter until he had the transcript of the recorded conversation between himself and investigator Malatesta. Ex. 7. This letter, written by Cole, proves that there was a plea agreement. The letter then claims that the first information was filed in the middle of October 2004. The first information was actually filed November 4, 2004. Ex. 5. Then Cole claims David asked for "open

sentencing" after the middle of November and after the information was filed. Cole's detailed billing, made at the time in question, proves David asked for "open sentencing" months earlier on August 27, 2004. Ex. 3. The letter documents that Leaders accepted the "open sentencing" plea agreement. The letter then claims "a week later [Leaders changed his mind]…I believe this happened on or about November 5, 2004." "A week later" than August 27 (which is when the billing statement documents Leaders being asked about "open sentencing") is September 3, 2004 – or two (2) months earlier (after the whole guiding season had been given up). Virtually all David and Jackie's guide season that they gave up would have happened during September and October of 2004. With no "open sentencing" agreement during September and October, as Cole tries to claim, it would be more difficult to prove "detrimental reliance" upon it. If there was an "open sentencing" agreement during September and October, as Cole's own billings prove, detrimental reliance requiring enforcement of the plea agreement is overwhelming. The letter states that Cole told David on November 8, 2004 that Leaders was going to break the "open sentencing" plea agreement, even though the letter admits he had known this since November 5, 2004 and knew David was flying in numerous witnesses from as far away as Illinois on November 8, 2004 in reliance on the "open sentencing" plea agreement. The letter states a "new agreement" was reached on the night of November 8, 2004. The secret recordings of Cole by both David and Malatesta & witness testimony prove this is false and that David never accepted a "new agreement". Ex. 7, 17-19 Tr. 58, 87, 114, 116, & 117. If David accepted a "new agreement" it would negate Coles obligation to seek enforcement of the "open sentencing" plea agreement, upon which so

much had been placed. David lost at trial to the worst charges a hunting guide could face - same day airborne hunting as a guide. To do so Leaders suborned the perjury from Trooper Gibbens (known to both because they taped themselves being told this during both David's and Zellers' interviews) in front of David's judge and jury that the evidence was found in GMU 19C, where David was licensed to guide hunts so they could convict David of guiding violations:

> *Napue v. Illinois*, 360 U.S. 264 (1959) U.S. Supreme Court held: "Conviction obtained through use of false evidence, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go through uncorrected when it appears. Principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."
>
> *Mooney v. Holohan*, 294 U.S. 103 (1935) the U.S. Supreme Court held: "Requirement of 'due process' is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured, and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process."
>
> *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928) Justice Brandeis, U.S. Supreme Court, "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, & that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to

> remain an empty promise. Because it is enforceable in the same manner & to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason & truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, &, to the courts, that judicial integrity so necessary in the true administration of justice. The judgment of the Supreme Court of Ohio is reversed & the cause remanded for further proceedings not inconsistent with this opinion. Reversed & remanded."
>
> *Mesarosh v. U.S.*, 352 U.S. 1 (1956) the U.S. Supreme Court held: "[T]he dignity of the U.S. Government will not permit the conviction of any person on tainted testimony; this conviction is tainted; and justice requires that petitioners be accorded a new trial. Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. U.S.*, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124. The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

All David's statements, made for the broken plea agreement and corrupted by the perjury, were used against him, violating the constitutional right against self-incrimination, due process, and *Alaska Rules of Evidence 410*. Ex. 5-6.

In the months between conviction and being sentenced David researched Robinsons "tactic" and found it non-existent. The last time an information had to be

supported by an affidavit to provide jurisdiction was in two 1909 cases – *Salter v. State*, 2 Okla. Crim. 464, 479, 102 P. 719 (1909) and *Ex parte Flowers 1909* OK CR 69 101 P. 860 2 Okl.Cr. 430.

> *Alaska Rules of Criminal Procedure Rule 7(c)* specifically states, "Defects of form [in informations] do not invalidate" and "[The information] shall be signed by the prosecuting attorney." Rule 7(a) states, "Any information may be filed without leave of court."

No mention of an affidavit being required is made anywhere in Alaska Criminal Rule 7 – "Indictment and Information".

After David pointed this out, Robinson came up with two "fresher" cases, *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *Albrecht v. U.S.*, 273 U.S. 1, 8 (1927):

> "As the affidavits on which the warrant issued had not been properly verified, the arrest was in violation of the clause in the Fourth Amendment, which declares that 'no warrants shall issue but upon probable cause, supported by oath or affirmation.' See Ex parte Burford, 3 Cranch, 448, 453; United States v. Michalski (D. C.) 265 F. 839. But it does not follow that, because the arrest was illegal, the information was or became void. The information was filed by leave of court. Despite some practice and statements to the contrary, it may be accepted as settled that leave must be obtained, and that, before granting leave, the court must, in some way, satisfy itself that there is probable cause for the prosecution. This is done sometimes by a verification of the information, and frequently by annexing affidavits thereto. But these are not the only means by which a court may become satisfied that probable cause for the prosecution exists. *The United States attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office, and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information*. See Weeks v. United States (C. C. A.) 216 F. 292, 302, L. R. A. 1918B, 651, Ann. Cas. 1917C, 524.
>
> The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Compare Ex parte Bain, 121 U.S. 1, 7 S. Ct. 781. But a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in

> which it was made. *Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance.* That a defendant may be brought before the court by a summons, without an arrest, is shown by the practice in prosecutions against corporations which are necessarily commenced by a summons. Here, the court had jurisdiction of the subject-matter; and the persons named as defendants were within its territorial jurisdiction. The judgment assailed would clearly have been good, if the objection had not been taken until after the verdict."

David researched these and they proved beyond any doubt an information did not have to be supported by an affidavit to provide the court with jurisdiction – because David had voluntarily appeared he had submitted himself to personal jurisdiction of the court. See above. When David pointed this out Robinson stated, "the court may have personal jurisdiction but they would not have subject-matter jurisdiction." Ex. 26, 27, 34.

David researched this and found the only thing the court needed to obtain subject-matter jurisdiction was that he be charged with a misdemeanor crime in the judicial district in which the crime was alleged to have happened – which is exactly what happened. See *AS 22.15.060.* David also asked Robinson what was to keep the State from claiming there had been a plea agreement to defeat Robinson's "tactic" the court did not have jurisdiction and Robinson could not answer.

Because of all this David absolutely demanded Cole be forced to appear in McGrath in person so, "I can look Cole in the eye as I get sold out." Tr. 149 and Ex. 26, 27, 34. David typed up 56 questions that he demanded Robinson ask Cole at the sentencing. Ex. 9 and Tr. 34, 36-40, 151-153. The questions were about all David had done for a plea agreement Leaders had broken and how Cole had said nothing could be done to enforce it. Ex. 9 and Tr. 34, 36, 151-152. David paid for a subpoena, paid to

have it served, paid for witness fees, bought a plane ticket to McGrath for Cole, paid for a hotel room for Cole, and then Cole never showed up in McGrath to testify. Ex. 37 & Tr. 11, 34, 76, 111, 118-19, 149-50, 287. This violated David's constitutional rights to a compulsory process to witnesses in his favor and to due process.

Robinson then never told the judge David had cooperated with the prosecution from the beginning, of the existence of the plea agreement Leaders broke by filing far harsher charges in an amended complaint just 5 hours before it was to be concluded, that Leaders got and used David's statement from the promise of this plea agreement, or that David and Jackie had given up a whole years guiding for the broken plea agreement and the year given was already past and that the plea agreement charges, for which David had already paid in full, were far less severe. Tr. 11, 19, 32-34, 67, 117-18.

David was sentenced to a revocation of his guide license for 5 years, nearly 2 years in jail, $19,500.00 fine, and forfeiture of nearly $100,000.00 in property - in addition to the year of guiding given up for the plea agreement – of which no one told the judge about. The judge cited the very perjury Leaders and Gibbens used to convict David as justification for the sentence – "because most in not all the wolves were taken were Haeg hunts." Robinson never objected. Since David was sentenced a 1:30 in the morning and had been up for 30 hours straight at the time he didn't realize what had happened. Robinson immediately told David that David could not appeal the sentence. 7/31/06 Motion to Supplement the Record.

After David was sentenced he found a letter Cole had wrote Robinson stating, "I don't plan on being available to testify at David's sentencing." Ex. 37. David confronted

Robinson about Cole not showing up and Robinson referred David to Cole's letter as the reason and that because "Cole wasn't relevant to your guilt" Cole didn't have to appear in response to the subpoena. Robinson could not respond when David claimed "he would have been relevant to my sentence and you know it" (Remember Cole was subpened to David's sentencing). Ex. 26, 27, & 34. Cole has stated under oath Robinson told him he didn't have to appear. Tr. 286 & 287. After David was sentenced Trooper Gibbens wrote a letter to Trooper Lieutenant Steve Bear (at David's request) admitting *all* evidence of where the wolves were killed was in GMU 19D in which the Wolf Control Program (WCP) was taking place – in direct opposition to his oath and testimony the evidence was in GMU 19C on all the search warrant affidavits and in his testimony to David's judge and jury. Ex. 11, 16 & Tr. 16, 64, 146-7, 163-4, 168-9.

> *Gibbens*: "Lt. Bear, I received the fax you forwarded to me with five sets of GPS coordinates circled from my case report involving case number 04-23593. I found that the coordinates were those of kill sites #1- #4, and of an additional location which was the first set of suspicious ski tracks I had seen. … I have once again plotted the coordinates and confirmed what we have all talked about many times now, that these five coordinates are within Game Management unit 19D." (The WCP was being conducted in GMU 19D and David was licensed to guide in GMU 19C).

David fired Robinson and filed fee arbitration against Cole. Many witnesses testified to the arbitrators who were present when Cole told David on November 8, 2004 "there is nothing I can do except call Leaders boss" after Cole was asked over and over how to enforce the plea agreement. All these witnesses testified Cole made the statement, "there is nothing I can do except call Leaders boss, a women I worked with when I was a prosecutor." Tr. 87, 106, 110-11, 117. Witnesses testified Cole never told any of them he "could file a motion to enforce the plea agreement." Tr. 102, 105, 111, 117, 353. The

secret recordings David made of Cole just after Leaders broke the agreement also prove that Cole never said he could file a motion and that the only remedy was "calling Leaders boss". Ex. 17 & Tr. 28, 87, 106, 110-11, 117. All witnesses testified Cole told them on November 8, 2004, "I just received bad news" and then showed them a fax from Leaders dated November 8, 2004 1 PM of an amended information changing the charges to far more severe ones. Tr. 87, 109-11, 117 & Ex. 6. Witnesses testified that Cole said the perjury changing the location of the evidence "didn't matter". Tr. 87. Witnesses testified this perjury was material. Tr. 163-65, 227, 228. Witnesses testified Cole never told David he could seek to suppress evidence. Tr. 16, 87. Cole admitted never telling David this. Tr. 274. Witnesses testified Cole never told David or found out the Wolf Control Program was intentionally isolated from game, hunting, and/or guiding violations. Tr. 16 & 46. Witnesses testified this was material. Tr. 46 Witnesses and Cole himself testified Cole said the Governor was going to make an example of David by bringing "substantial pressure brought to bear on either the prosecution or the Judge with regard to a very serious sentence". Tr. 185 & 237. Witnesses testified Cole stated, "I can't piss off Leaders because after your done I still have to be able to make deals with him." Tr. 95. Witnesses testified David had absolutely demanded Robinson subpoena Cole so he could testify at David's sentencing in person about all David had done for the plea agreement Leaders had broken. Tr. 76, 111, 118-19, 149. Witnesses testified David had paid for all of them to travel to Anchorage on November 8, 2004 and so they could fly to McGrath on the morning of November 9, 2004 to testify for David's plea agreement. Tr. 74, 81-82, 87, 95, 109. Witnesses testified this was an "open sentence" agreement. Tr. 102, 105,

129. Witnesses testified this "open sentencing' plea agreement was in place for months. Tr. 102. Witnesses testified that David had placed immense detrimental reliance upon this "open sentence" plea agreement. Tr. 18-20, 32-33, 117, 315, 379. Witnesses testified David never agreed to any other plea agreement on either November 8 or 9, 2004. Tr. 27-28, 72, 87, 110-11, 117. Witnesses testified Cole had told all of them they could not go to McGrath because Leaders had broke the deal. Tr. 113. Witnesses testified Cole did nothing to keep Leaders from using David's statements after Leaders broke the plea agreement. Tr. 19 & Ex. 17. Witnesses testified, when cross-examined by Cole, that David never said he didn't want the plea agreement to be enforced because it would cost too much Tr. 105, 298, 300, or because he was afraid of the sentence that could be imposed during "open sentencing". Tr. 313 & Ex. 17 p. 10.

Cole committed perjury to the arbitrators when he testified under oath that he told David & all the witnesses, when he was still David's attorney, "I can file a motion to enforce the plea agreement." Tr. 268, 298-99, 320 Ex. 17, 18, & 19. Cole committed perjury to the arbitrators when he testified under oath that David did not want to enforce the agreement because it would cost too much. Tr. 298. Ex. 17 & 18. Cole committed perjury to the arbitrators when he testified under oath that David did not want to enforce the plea agreement because he was afraid of the sentence that could be imposed under "open sentencing". Tr. 300-1 Ex. 17 & 18.. Cole committed perjury to the arbitrators when he testified under oath that the plea agreement that was supposed to be finalized in McGrath on November 9, 2004 was not "open sentence". Tr. 318, 332, 338, 341-2. Ex. 17, 18, & 19. Cole committed perjury to the arbitrators when he testified under oath that

there never was a plea agreement. Tr. 322 & 327. Ex. 17, 18, & 19. Cole committed perjury when he testified David accepted "options" other than open sentencing. Tr. 323-24 & Ex. 17, 18, & 19. Cole committed perjury to the arbitrators when he testified under oath that he had told David prior to November 8, 2004 that Leaders was going to "change" or break the plea agreement. Tr. 262, 327-8, 330 Ex. 7, 17, 18, & 19. Cole committed perjury to the arbitrators when he testified under oath that the "open sentencing" plea agreement was made months after August 27, 2004. Tr. 261-2. Ex. 17, 18, & 19. Proof of this perjury is found in the secret recordings of Cole while he was still David's attorney & his own itemized billings. Ex. 3, 17, 18, & 19. Cole committed perjury to the arbitrators when he testified under oath that David had an "immunity agreement" before David gave the 5 hour interview to Leaders & Gibbens. Tr. 252, 283 & Ex. 5, 6, 17, 18, & 33. Cole committed perjury to the arbitrators when he testified under oath that Robinson told him he didn't have to appear in McGrath to testify at David's sentencing. Tr. 286-287 & Ex. 37. Cole committed perjury to the arbitrators & the Superior Court when he testified that the State did not have to offer David a complete "ensemble of procedural protections" "within days if not hours of seizure" - including a hearing to contest, opportunity to bond, & notice, case, & intent to forfeit when they deprived him of property used to provide his family's livelihood. Tr. 348-9. Cole testified under oath three different times he had "wrote off" the money still owed David according to his itemized billings. Tr. 13, 233, 273.

The arbitrators refused to admit evidence from David Tr. 357 & Ex. 26, 27, 28, 30, 34, 38, 40, 42 & four motions to supplement the record; stopped his cross-examination of

Cole when Cole was being forced into admitting perjury Tr. 221, 323-4, 326; limited David on time to put on his case Tr. 310-11, 326; and advocated and/or showed evident partiality for Cole. Tr. 295-296, 298, 281, 324. Cole's, one witness, attorney Kevin Fitzgerald, committed perjury to support Cole when he testified David's codefendant, Tony Zellers, had an immunity agreement for Zellers interview. This is proven beyond any doubt whatsoever by Fitzgerald's on record statements during Zellers sentencing hearing. Ex. 33. That neither David nor Zellers had immunity agreements before their interviews is also positively proven by the fact all informations filed in the case specifically relied upon both David and Zellers statements as the only probable cause for most of the charges and as probable cause for all the rest – with no objection from either Cole or Fitzgerald.

During a taped conversation immediately after the 4 days arbitration David asked for a copy of the tapes made by the Alaska Bar Association and was informed nearly one-third of the tapes, including tapes in which attorneys Cole and Fitzgerald were perjuring themselves, were blank. During a taped conversation David asked to see the sign-in log to see if Cole or Fitzgerald entered the Bar office immediately after each days arbitration and was refused. During a taped conversation David asked the Bar to supplement the record with his tapes (made with 3 tape recorders) and this was refused. The arbitrators issued the current decision that is chilling in its complete lack of support and denial of the mountain of irrefutable evidence detrimental to Cole. David immediately called the chair Nancy Shaw to express his disbelief. When asked, Shaw refused to tell David who wrote the decision – even though she signed the decision 13 days prior to the other 2 arbitrators

and her signature had the only date typed and not hand written. During a taped conversation when asked, chair Shaw twice refused to tell David if she had any reservations about the decision and award.

The decision and award failed to address the most important issues presented: Cole's lying to David and the other witnesses to intentionally deprive David of his rights and protections under law and constitution; Cole's perjury to the arbitrators to cover this up; Cole's failure to seek enforcement of the plea agreement; Cole's failure to show up and/or testify when subpoenaed; and Cole's failure to tell David that he could seek to suppress evidence, that he was entitled to seek the return of his property used to provide a livelihood, that Wolf Control Program violations were intentionally separate from guiding violations, that he could seek enforcement of the plea agreement, that he had the right to an immunity agreement before giving a statement, and that he could seek to keep Leaders from using his statements after the plea agreement was broken.

The arbitrators falsely claim that David did not offer evidence of the points on which the search warrant application was defective; that the plea agreement was made in October; that the plea agreement was *not* "open sentencing"; that David agreed to forfeit the PA-12 aircraft; that Cole asked Leaders to reconsider breaking the plea agreement; that a new agreement satisfactory to David was reached in the evening of November 8, 2004; that everyone went out to dinner on November 8, 2004 to "celebrate" this new agreement; and that because Robinson did not file motions to enforce David's rights and protections it meant Cole did not have to do so either. See decision and award.

The arbitrators make the argument that since David's sentence after trial was

worse than the plea agreement supposedly agreed to in the evening of November 8, 2004 that Cole is absolved from blame for his actions. They make no mention of the fact that Cole was responsible for David being convicted of guide violations and on evidence that was perjury and should have been suppressed – precluding any conviction whatsoever; or that the *maximum* penalty allowed for the "open sentence" plea agreement charges were far less than the sentence David was given; that the prosecution utilized David's statements in direct violation of David's rights; that David had already given up a whole years income for the plea agreement Leaders broke; that the sentencing judge was never told of any of this and of the fact she stated on the record she was basing her sentence on the perjury known to the prosecution; that Cole refused to comply with a subpoena so she would not be told this; or that all David's property was seized, deprived, and forfeited in direct violation of constitutional and procedural due process. After all this the arbitrators found no evidence Cole owed David a refund – or that he should be disciplined.

The arbitrators then award *Cole* $2689.19. The issue of David possibly owing money to Cole was never presented to the arbitrators (in either the agreement to arbitrate or in any subsequent pleading or discussion). David was never given notice that he had to contest this issue, and thus David never knew he should contest this issue. The irrefutable proof there was no issue to contest is that Cole testified repeatedly to the arbitrators under oath that he had "wrote off" any money still outstanding. Tr. 13, 233, & 273. The two attorney arbitrators even stated on the record the only subject at issue was the money *already paid* by David. Chair Shaw: "It just means the only subject here is the fee itself." - Mr. Metzger: "The fee that you've [David] already paid." Tr. 291. The arbitrators

awarded *Cole* money that David never had the constitutional notice was an issue he had to contest. If a party never claims the money is an issue, "writes off" the money before fee arbitration, & while under oath at fee arbitration testifies the money has been "written off", the money is not an issue in dispute at the fee arbitration.

The arbitrators found no basis for referral of Cole to discipline counsel – which must be done for a violation of the Alaska Rules of Professional Conduct, felony crimes, &/or depriving someone of constitutional rights.

During oral argument before the Superior Court Cole's sole defense was that, "There was nothing I could do because David was guilty." Guilty of *what*? The Wolf Control Program regulations alone would have isolated David from any guiding, hunting, or game charges – so his guide license & only way to provide for his family could not be affected.

In siding with Cole the Superior Court never addresses the most important issues David presented – stating the court "cannot reassess evidence presented before the panel or the credibility of the witnesses." Yet this is only true if the appellate claims error – even gross error. David did not claim error, even gross error. David claimed corruption, fraud, & other affirmative wrongdoing by parties to the arbitration – requiring a reassessment of the evidence & witnesses. If evidence & witnesses can never be reassessed, even for affirmative wrongdoing, there would be no way to reverse decisions & awards because of fraud, perjury, etc. See *Alaska State Housing. Authority. v. Riley Pleas, Inc*. 586 P.2d 1244 (Alaska 1978). Maybe this is the intent of the Superior Court.

## STANDARD OF REVIEW ON APPEAL

Appeals of Alaska Bar Association fee arbitrations are governed by *AS 09.43.120(a)* Vacating An Award (a) On application of a party, the court shall vacate an award if (1) the award was procured by fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of a party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown for postponement or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of *AS 09.43.050*, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement & the issue was not adversely determined in proceedings under *AS 09.43.020* & the party did not participate in the arbitration hearing without raising the objection.

## LEGAL ARGUMENTS

### 1. SUMMARY

Attorney Cole never advocated for his client David Haeg in any way whatsoever & misled & lied to David to deprive David of his constitutional rights. Cole admitted this was to protect his "deal" making ability with the State. This, in direct effect, helped the prosecution to convict David of crimes for which he was not guilty – with Cole even admitting the conflict of interest that he "can't piss Leaders off" by advocating for David. The arbitration panel, made up of two attorneys & a public person (who, unknown to David was a full-time court employee), corruptly & intentionally ignored overwhelming evidence to issue a decision & award favorable to Cole. Cole didn't show any knowledge of the laws concerning David's case in either Cole's brief and during oral arguments

before the Superior Court. Tr. 127, 234, 348, & Cole's brief; failed to inform David of any of his legal rights & protections so David could know & decide whether or not to exercise them Ex. 17, 18, 19, 37 & Tr. 28, 87, 106, 110-11, 117, 348; failed to exercise any of David's legal rights & protections Ex. 17, 18, 19, 37 & Tr. 28, 87, 106, 110-11, 117, 348, & lied to David & others to hide these legal rights & protections from David. Ex. 17, 18, 19, 37 & Tr. 28, 87, 106, 110-11, 117, 348. It is irrefutable that Cole was required to inform David of or provide these legal protections – effectively abdicating his duty as David's loyal advocate & effectively joining the prosecution to convict David. See Rules of Professional Conduct. During the Fee Arbitration in which David asked that Cole be required to return his money & pay for subsequent expenses Cole perjured himself numerous times to cover up the fact he never told David of his legal rights & protections; failed to exercise any of David's legal rights & protections; & lied to David & others to hide these legal rights & protections from David. It was proven to the arbitrators beyond any doubt David wished to exercise all of his legal rights & protections & had told Cole so. Ex. 17, 18, 19, 37 & Tr. 28, 87, 106, 110-11, 117, 348. All this misconduct by Cole was clearly presented to the arbitrators who corruptly ignored the overwhelming evidence presented them. The arbitrators also exhibited partiality, exceeded their powers, excluded evidence, imposed time limits, failed to comply with the *Alaska Rules of Attorney Fee Dispute Resolution 40(q)*, & failed to recommend Cole to disciplinary counsel. The Superior Court did nearly the same.

## 2. ANALYSIS

### A. The decision and award was procured by fraud.

Cole and his one witness, attorney Kevin Fitzgerald, affirmatively misled and committed perjury to the arbitrators. The most blatant example of both Cole and Fitzgerald's perjury is where they both testify under oath that David and Zellers (whom Fitzgerald represented) had immunity agreements before giving statements to the prosecution. Tr. 181-2, 187, 194, 252, 283. See:

> *Kastigar* v. *United States* (1972) 406 US 441, 453 "(Use and derivative use immunity) prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."
>
> *U.S. Attorney Rules USAM Title 9* (Witness Immunity): 718 Derivative Use Immunity.…The Supreme Court upheld the statute in *Kastigar v. United States*, 406 U.S. 441 (1972). In so doing, the Court underscored the prohibition against the government's derivative use of immunized testimony in a prosecution of the witness. The Court reaffirmed the burden of proof that, under Murphy v. Waterfront Commission, 378 U.S. 52 (1964), must be borne by the government to establish that its evidence is based on independent, legitimate sources: This burden of proof, which we affirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar*, supra, at 460. 719 Informal Immunity Distinguished From Formal Immunity: … The principles of contract law apply in determining the scope of informal immunity. United States v. Plummer, 941 F.2d 799, 802 (9th Cir. 1991); …*United States v. Camp*, 72 F.3d 759 (9th Cir. 1996) Grants of informal immunity that do not expressly prohibit the government's derivative use of the witness's testimony will be construed to prohibit such derivative use. *Plummer*, supra. 726 Steps to Avoid Taint: Prosecution of a witness using evidence independent of his or her immunized testimony will require the government to meet its burden under *Kastigar*, *supra*, of proving that the evidence it intends to use is not tainted by the witness's immunized testimony. In order to ensure that the government will be able to meet this burden, prosecutors should take the following precautions in the case of a witness who may possibly be

prosecuted for an offense about which the witness may be questioned during his/her compelled testimony: 1. Before the witness testifies, prepare for the file a signed and dated memorandum summarizing the existing evidence against the witness and the date(s) and source(s) of such evidence; 2. Ensure that the witness's immunized testimony is recorded verbatim and thereafter maintained in a secure location to which access is documented; and 3. Maintain a record of the date(s) and source(s) of any evidence relating to the witness obtained after the witness has testified pursuant to the immunity order."

*ACGOV*: "Immunity operates on the theory that a witness who suffers no adverse legal consequences from testifying is, necessarily, not incriminated by such testimony. See *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873 ["An immunity must give protection equivalent to that which attends the refusal to testify about matters which incriminate."]. NEGOTIATED IMMUNITY AGREEMENTS: Immunity agreements are often negotiated between the prosecution and witness as part of a plea or sentence bargain. For example, the witness may be a co-defendant in the case but, because of his minor role in the crime, lack of criminal history, or other considerations, it is decided to grant him immunity or a reduced sentence. Isolating immunized testimony: If a person who has been given use and derivative use immunity is subsequently charged with the crime under investigation or a related crime, the prosecution may be required to prove--by a preponderance of the evidence-that all of the evidence that was used against the person at a preliminary hearing or grand jury proceeding, or which the prosecution seeks to present at trial, was not obtained as the result of the immunized testimony. In other words, the prosecution must prove "that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." For example, the testimony of prosecution witnesses could be reduced to writing, tape recorded, or video taped before the immunized testimony was given. This should enable the prosecution to prove that such testimony was, in fact, independent of the immunized testimony. Another idea is to isolate the immunized testimony by making sure that all investigators and prosecutors who were involved in obtaining such testimony have nothing to do with any subsequent investigation or prosecution of the immunized witness. These investigators and prosecutors should conduct themselves in a manner that would allow them to testify that they never spoke with the immunized witness, they were not present when other officers or prosecutors spoke with the immunized witness, that they were not told what the immunized witness testified to, they had not seen any transcripts of the immunized witness's testimony, they had not read any reports in which such testimony was mentioned, and they had not talked to anyone about the content of such testimony."

Leaders unchallenged actions in using both David and Zellers statements against them in all 3 informations filed is positive proof there was no immunity agreement. Fitzgerald's testimony on the record at Zellers sentencing, however, is the most chilling proof there was never an immunity agreement for either David or Zellers – and that both Fitzgerald and Cole knew there was no immunity agreement – proving their testimony otherwise to be perjury. Ex. 5, 6, 17, 18, & 33.

> **FITZGERALD**: "… had it not been for the cooperation, frankly of both Mr. Zellers and Mr. Haeg, –uh- there would have been additional holes in the case and my understanding is that their cooperation provided information to the State concerning at least 5 of the 9 wolves at issue. Um so I – I think that certainly with regard the Chaney Criteria rehabilitation – um- as we frequently say in this line of business "actions speak louder than words" and a lot of people can "talk the talk but the walk the walk is something different" and from the very get go Mr. Zellers has walked the walk here, he's provided information, frankly information at that point that was –uh- provided in the context of hopeful plea negotiations but –uh- the fact of the matter is he provided the information and frankly the government was free to do whatever it was goanna do with that - that information and as is demonstrated they used it to –uh- charge additional charges against both Mr. Zellers and Mr. Haeg." Ex 33-Fitzgerald's testimony at Zellers sentencing.

> **DAVE**: "Have you seen all the crap hitting the newspapers etc. etc.?" **COLE**: "Well yeah." **DAVE**: "We gave our statements and stuff – is that proper for them to release all that stuff?" **COLE:** "Yep." [Ex. 17 – secret recording while Cole was still David's attorney.]

In addition, when plea negotiations failed *Evidence Rule 410* and the constitutional right against self-incrimination required David's and Zeller's statements be suppressed – which both Cole and Fitzgerald also failed to do. In addition, both Zellers and Fitzgerald testified Zellers statement and testimony resulted from David giving his statement which means it could not be used against David – which Cole also failed to do

and, like all other times, failed to inform David he had this right. Tr. 75 & 214. Even more unbelievable is that the State relied almost entirely on Zellers testimony against David at David's trial (corrupted by the perjury moving the evidence) – another gross violation of David's immunity agreement.

Further perjury by Cole while testifying at fee arbitration (and then where the proof proving this perjury is found) is as follows: Cole testified he told David he could file a motion to enforce the "open sentencing" plea agreement when he was still David's attorney. Tr. 102, 105, 111, 117& Ex. 17 & 18:

> **DAVE:** "I've been stewing about all this stuff because we *in good faith* flew Tony up here, took my kids out of school, had my - you know - my wife and I come up there get hotels all this stuff and it really gripes me that we didn't get to pursue what we had to pursue and is it *I know you said that the only person we could bitch to is Leaders or Leaders boss.* I mean I bit my tongue when the judge – when we were talking – I mean I was scared to death of course I wasn't thinking real straight but could it – is it – it doesn't do any good to bitch to the judge say, "hey we did all this *on good faith with the State and then they just pulled the rug out from under us after we you know essentially spent another $2000 dollars or $3000 dollars just to have people come from Illinois and everything else and they just roop right out from under us.* Is that the way the..." **BRENT:** "They didn't - I don't understand why you say that. We had 4 options on Monday night and we went through every one of the options." **DAVE:** "Well we couldn't have – we didn't have..." **BRENT:** "Two of them would have allowed you to go out and be sentenced on Tuesday." **DAVE:** "Not with the agreement that we'd had for the last 2 weeks though. That's what I'm saying is that agreement was..." **BRENT:** "I mean if you had gotten that agreement David ok lets assume you got it." **DAVE:** "Yep." **DAVE:** "I mean you don't remember telling me that uh – ok let me just think and put my words very – as clear as I can say - as I can – that this was all about the airplane and that..." **BRENT:** "I said that - I remember saying that." **DAVE:** "And that there was a very good chance I would get to keep my..." **BRENT:** "I said they must have <u>thought</u> there was a chance. *Cause they changed the rules.*" **DAVE:** "Um – if – if *I wanted to – uh – to complain – or you complain I mean - did you ever contact Leaders boss or ever get in touch*

*with her?*" **BRENT:** "*I left a message. I haven't been in touch."* Ex. 17 - secret recording of Cole while Cole was still David's attorney. See:

United States v. Goodrich, 493 F.2d 390, 393 (9th Cir. 1974) (emphasis added) "when the prosecution makes a 'deal' within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance."

Smith v. State, 717 P.2d 402 (Alaska 1986) Court of Appeals: "*The fact that Smith was legally entitled to persist in his plea of innocence is, in our view, determinative of his claim of ineffective assistance of counsel.* Prior to his change of plea, Smith specifically asked his counsel if he was obligated to change his plea. Smith's question obviously related to his legal rights, not to his ethical duties. Smith's attorney replied that he considered Smith to be bound by the agreement. Both parties agree--and, indeed, the trial court expressly found--that Smith proceeded to enter a plea of no contest in the belief that he was, in fact, obligated to do so.

*We believe it self-evident that an indispensable component of the guarantee of effective assistance of counsel is the accused's right to be advised of basic procedural rights, particularly when the accused seeks such advice by specific inquiry. Without knowing what rights are provided under law, the accused may well be unable to understand available legal options and may consequently be incapable of making informed decisions. See, e.g., Arnold v. State,* 685 P.2d 1261, 1267 (Alaska App.1984).

Smith's counsel may understandably have considered himself foreclosed as a matter of both personal integrity and professional ethics from giving Smith any advice that would encourage him to renege on the agreement. To the extent that this precluded Smith's counsel from fully advising his client of the options legally open to him, however, the concern of Smith's counsel with his own ethical and moral dilemma was squarely at odds with his duty to "conscientiously protect his client's interest, undeflected by conflicting considerations." *Risher v. State,* 523 P.2d at 424.

*We are particularly troubled by the apparent failure of both Smith's counsel and counsel for the state to disclose the substance of the negotiated plea agreement to the trial court during Smith's change of plea hearing. Similarly disturbing is the failure of Smith's counsel to disclose to the court the fact that Smith had expressed qualms about following through with this agreement.* Even in the absence of withdrawal by defense counsel, such disclosures would at least have enabled the trial court to inquire on the record into Smith's understanding of the agreement and to give appropriate

advice concerning the extent to which the agreement limited Smith's procedural options"

*In re Kenneth H.* (2000) 80 Cal.App.4th 143 , 95 Cal.Rptr.2d 5: "This appeal presents the question whether a prosecutor can withdraw from a plea agreement before it is submitted to, and approved by, the trial court. At issue is an agreement that the prosecutor would move to dismiss this juvenile delinquency proceeding if the minor agreed to take a polygraph examination and passed it, and the minor further agreed to admit the charge as a misdemeanor if he failed the polygraph test. After the minor paid for and passed the test, the prosecutor refused to move for dismissal. Under the circumstances of this case, we conclude that the prosecution could not renege on its plea agreement. As we shall explain, the need for public confidence in the integrity of the prosecutor's office requires the prosecution to abide by its promise if the accused has relied detrimentally upon the agreement. Nevertheless, because a plea agreement requires judicial approval, the trial court is not bound by it.

The question "whether a prosecutor can withdraw from a plea bargain before the bargain is submitted for court approval" recently was addressed in People v. Rhoden (1999) 75 Cal.App.4th 1346, 1351-1352 (Rhoden).) Noting that the question "appears to be an issue of first impression in California courts," Rhoden reviewed cases from other jurisdictions, as well as secondary authority (id. at pp. 1352-1355), and concluded "a prosecutor may withdraw from a plea bargain before a defendant pleads guilty or otherwise detrimentally relies on that bargain." (Id. at p. 1354, italics added.) "`Absent detrimental reliance on the bargain, the defendant has an adequate remedy by being restored to the position he occupied before he entered into the agreement.'" (Id. at p. 1356, quoting State v. Beckes (1980) 100 Wis.2d 1, 7 [300 N.W.2d 871, 874].)

The fact that the court is not bound by a plea agreement entered into by the prosecutor and the accused, and the fact that a plea agreement made by the parties before it is submitted for court approval is akin to an executory contract which does not bind the accused, do not undermine the principle that the prosecutor should be bound by the agreement if the accused has relied detrimentally upon it. The integrity of the office of the prosecutor is implicated because a "`pledge of public faith'" occurs when the prosecution enters into an agreement with an accused. (Butler v. State (1969) 228 So.2d 421, 424.) A court's subsequent approval or disapproval of the plea agreement does not detract from the prosecutorial obligation to uphold "our historical ideals of fair play and the very majesty of our government . . . ." (Id. at p. 425.) The "failure of the [prosecutor] to fulfill [his] promise . . . affects the fairness, integrity, and public reputation of judicial proceedings."

(U.S. v. Goldfaden (5th Cir. 1992) 959 F.2d 1324, 1328.)

> "'A defendant relies upon a [prosecutor's] plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer. [Citation.] Detrimental reliance may be demonstrated where the defendant performed some part of the bargain. [Citation.]. . . .'" (Rhoden, supra, 75 Cal.App.4th at p. 1355, quoting Reed v. Becka (1999) 333 S.C. 676 [511 S.E.2d 396, 403].);

See also the Supreme Court case of ***Mabry v. Johnson***, 467 U.S. 504 (1984).

David had given the prosecution a 5-hour interview and given up an entire years income from both he and Jackie (1 million gross), not even including the flying in of multiple witnesses from as far away as Illinois, for the plea agreement the State broke by changing the charges at the last minute to far more severe ones so they could extort more from David for the same exact agreement.

Cole testified David did not want to enforce the "open sentencing" plea agreement. Tr. 298 & Ex. 17 & 18.

> **BRENT:** "I mean I – you know I've got to deal with these people but if you tell me, "that's the deal I want and I'm not stopping until I get it", I'm goanna send you a letter saying this is absolutely in my mind crazy but I will do it if you tell me." **DAVE:** "Well I'm not happy that they took away my opportunity that I thought we had set away from me." **BRENT:** "Ok tell me right now is that what you want me to do? Do you want to go back and take the risk when now you've got things in place?" **DAVE:** "You mean go back to the original agreement where it's one year..." **BRENT:** "Yes – a minimum 1 year." **DAVE:** "Minimum 1 year – the plane is up for..." **BRENT:** "Yes." **DAVE:** "The judge to decide. *That is what I wanted at the time and that is still what I want.* Because I feel that they mal..." **BRENT:** "Ok." **DAVE:** "*I personally feel that they maliciously took that away from me*." **BRENT:** "*Ok.*" [Ex. 17 – secret recording of Cole while Cole was still Cole's attorney.]

Cole testified that the plea agreement always included the forfeiture of David's plane. Tr. 373 & Ex. 17, 18, & 19.

**DAVE:** "I mean you don't remember telling me that uh – ok let me just think and put my words very – as clear as I can say – as I can – that this was all about the airplane and that..." **COLE:** "I said that – I remember saying that." **DAVE:** "And that there was a very good chance I would get to keep my..." **COLE:** "I said they must have thought there was a chance. *Cause they changed the rules.*" **DAVE:** "And after we had invested a lot of time, effort, and money, committed to that venture to settle it because my life is getting eaten up by worry among other things and I had great expectations to leave McGrath either without a license for 5 years, and no airplane, and going to jail for 6 months and a $200,000 fine or something a little less. Um – no – nothing to do with you. I knew the judge was the one goanna be deciding that but all that was taken away from me at the last minute that agreement. Do you agree with that? Or I mean not at the last minute but whatever it was – well beyond when we could have changed anything and saved all the money in hotel and airfares and etc., etc., etc." **COLE:** "The thing that was taken away was the option to go open sentencing total. There were other options that were available that would've allow us to go out to McGrath. But to go totally open sentencing..." **DAVE:** "Well to me they weren't viable options." **COLE:** "*The only thing that was different was the loss of the plane.*" **DAVE:** "Yep and – and is that – is that ethical for them to do say, *'yep you give us the plane and you can – you can have your day in front of the judge'*. Is that how the game is played all the time?" **COLE:** "Yep." **DAVE:** "Um legal way to do it?" **COLE:** "They have discretion, yep. … I mean I – you know I've got to deal with these people but if you tell me, "that's the deal I want and I'm not stopping until I get it", I'm goanna send you a letter saying this is absolutely in my mind crazy but I will do it if you tell me." **DAVE:** "Well I'm not happy that they took away my opportunity that I thought we had set away from me." **COLE:** "Ok tell me right now is that what you want me to do? Do you want to go back and take the risk when now you've got things in place?" **DAVE:** "You mean go back to the original agreement where it's one year..." **COLE:** "Yes – a minimum 1 year." **DAVE:** "Minimum 1 year – the plane is up for..." **COLE:** "Yes." **DAVE:** "... the judge to decide. That is what I wanted at the time and that is still what I want. Because I feel that they mal..." **COLE:** "Ok." **DAVE:** "I personally feel that they maliciously took that away from me." **COLE:** "Ok." [Ex. 17 – secret recording of Cole while Cole was still Cole's attorney.]

**COLE: "**And we said, 'Can he plead to the same counts and just do an open sentencing?' And Leaders was like 'I don't know why he'd want to do that but yeah ok.'" **MALATESTA: "**Ok that's important to me." **COLE: "**Ok." **MALATESTA:** "That's what I needed to know." **COLE:**

**“**But listen.” **MALATESTA:** “I’m listening.” **COLE: “**So then I went out to Dillingham on Thursday and on Friday – no the following Monday David was coming in to do the sentencing. Was it Thursday – yeah it was Thurs – was it Friday – Friday morning I went out to Dillingham. Thursday they filed the complaint against him, Friday morning – maybe it was Thursday he called me and said – we were talking and he said, ‘If David is – is not – he goes I’m not willing to do totally open sentencing with those deals.’” **MALATESTA:** “So he changed his mind?” **COLE: “**Right.” **MALATESTA: “**Ok that’s a problem for him is what I’m driving at.” **COLE: “**Well.” **MALATESTA: “**If you guys verbally had a – had a...” **COLE: “**Maybe it isn’t. You got to – you got to think this through, ok?” **MALATESTA:** “Ok **–** I’m trying but I – if you had an agreement tele ...” **COLE: “**Just – just listen for a second.” **MALATESTA:** “I am – I have been listening. Go ahead.” **COLE: “**So I said - he said, ‘*If he will forfeit the plane he can have open sentencing.*’” **MALATESTA: “**Ok – I'm still with you.” **COLE:** "*If he is unwilling to forfeit the plane and we have to have to have a hearing about that then I'm goanna file an amended information charging him with AS 08 54 720 A 15". Which makes him lose his license for a minimum 3 years.*” **MALATESTA:** “I gotcha – I'm still with you.” **COLE:** "And I said, ‘*Hey you know that doesn't make sense to me’*. And he said, *‘Well that's the way its goanna be*’. And I said, ‘Ok’. … One thing that the DA did back out on though is originally he said same counts that he was facing that are in that note that he sent to me open sentencing.” **MALATESTA: “**And that's the point that I'm interested in.” **COLE: “**Right.” **MALATESTA:** “And he backed out.” **COLE: “**Then he changed that. But everything else was the same.” **MALATESTA:** “Sounds *(indecipherable)”* **COLE: “**We wanted a full deal you know to argue everything but just the sentencing I mean just how long he lost his license that was there.” **MALATESTA:** “Yeah and that's important.” **COLE: “**And if he wanted to give up his plane he could completely open sentencing.” **MALATESTA:** “Ok.” **COLE: “**But the only thing *the DA said is "if he is not goanna give up his plane then I'm going to change this from 720A08 to 720A15*" which he did the very next morning anyway.” **MALATESTA:** “Yeah so he backed out of the agreement. I mean guess what I'm hearing from you I just want to recap...” **COLE: “**Yep.” **MALATESTA:** “Make sure I don't mix it up. You had an agreement regardless of what all the parameters were you had an agreement with opening…” **COLE: “**the options” **MALATESTA:** “Right all the options you had an agreement with an open sentence and basically the DA backed out.” **COLE: “**Right.” **MALATESTA: “**That's all I need to know.” [Ex. 19 - secret recording of Cole just after David fired Cole.]

Cole testified that there never was an "open sentencing" plea agreement. Tr. 322, 327 & Ex. 17, 18, & 19.

> **DAVE: "**Didn't before we came up there didn't I say that I would like to go open sentencing?" **BRENT: "**And I told you - you should think about. "**DAVE: "**And that's when you contacted Leaders and said you told him..." **BRENT: "**You wanted to go open sentencing." **DAVE: "**Yep and that's when everything got changed?" **BRENT: "**And I – and I - and I was shaking my head at that time." **DAVE: "**Well I understand..." **BRENT: "**I don't believe that you would – I can't rationally…" [Ex. 17 - secret recording of Cole while Cole was still David's attorney.]
>
> **HAEG: "**Yep but you know it I also remember why didn't – why didn't Leaders let us go out to McGrath when it was eleven counts and let the judge decide that?" **COLE: "**I don't know why he didn't do that. That pisses me off. He just –he has caused me to have to sit here and explain this to you 25 times he did it because he wanted to be a dick and it pisses me off. It caused me so much problems in my dealing with you and I as much told him." **HAEG: "**Yep." **COLE: "**It pisses me off. He has no concept of what it has done to your and my relationship." [Ex. 18 - secret recording of Cole while Cole was still David's attorney.]
>
> **MALATESTA: "**Did you have any agreements with the State where you know sentencing was open? That you folks agreed to and then the State backed out?" **COLE: "**Well I – I that's a difficult question. The State gave us a number of options on a number of different occasions and I've gone through all that with David on a number of occasions. You mean a straight open sentencing?" **MALATESTA: "**Yeah an open sentencing you know where you agreed and then they - the State backed out. He was telling me something about he had to bring witnesses in and all and then the State backed..." **COLE: "***Going to go to be arraigned at an open sentencing, yes.*" **MALATESTA: "**And why did they back out?" **COLE:** "*They didn't back out they changed the deal.*" **MALATESTA: "**Well that's basically backing out, right?" **MALATESTA: "**But you still had an agreement telephonically with the DA?" **COLE: "**And we said, 'Can he plead to the same counts and just do an open sentencing?' And Leaders was like 'I don't know why he'd want to do that but yeah ok.'" **MALATESTA: "**Ok that's important to me." **COLE: "**Ok. … *One thing that the DA did back out on though is originally he said same counts that he was facing that are in that note that he sent to me open sentencing.*" **MALATESTA:** And that's the point that I'm interested in." **COLE: "**Right." **MALATESTA:** "And he backed out." **COLE: "**Then he changed that. But everything else

was the same." **MALATESTA:** "Make sure I don't mix it up. You had an agreement regardless of what all the parameters were you had an agreement with opening…" **COLE: "…** the options." **MALATESTA:** "Right all the options *you had an agreement with an open sentence and basically the DA backed out*." **COLE: "***Right.*" **MALATESTA: "**That's all I need to know." [Ex. 19 - secret recording of Cole just after David fired Cole.]

Cole testified that David accepted a plea agreement or "option" other then "open sentencing". Tr. 323, 342 & Cole's brief & Ex. 17, 18, & 19.

**DAVE: "**And in my perspective we had an agreement like for 2 weeks and I made all the arrangements to in good faith go to McGrath. You follow me so far?" **BRENT: "**Yeah." **DAVE: "**And after we had invested a lot of time, effort, and money, committed to that venture to settle it because my life is getting eaten up by worry among other things and I had great expectations to leave McGrath either without a license for 5 years, and no airplane, and going to jail for 6 months and a $200,000 fine or something a little less. Um – no – nothing to do with you. I knew the judge was the one goanna be deciding that but all that was taken away from me at the last minute that agreement. Do you agree with that? Or I mean not at the last minute but whatever it was – well beyond when we could have changed anything and saved all the money in hotel and airfares and etc., etc., etc." **BRENT: "**The thing that was taken away was the option to go open sentencing total. There were other options that were available that would've allow us to go out to McGrath. But to go totally open sentencing" **DAVE: "***Well to me they weren't viable options."* **BRENT: "**The only thing that was different was the loss of the plane." **DAVE: "**Yep and – and is that – *is that ethical for them to do say, 'yep you give us the plane and you can – you can have your day in front of the judge'. Is that how the game is played all the time?"* **BRENT: "***Yep."* **DAVE: "**Um *legal way to do it?"* **BRENT: "***They have discretion, yep."* [Ex. 17 - secret recording of Cole while Cole was still David's attorney.]

**COLE:** "Then – then on Monday afternoon we reached another deal. (*Long pause*) And *that deal was what I thought David was goanna be willing to plea to* and that's why we didn't go to McGrath the next day is because we had to get it approved – we had to get the ok from the Division of Occupational Licensing." **MALATESTA: "**Ok - but the whole crust of this thing is you did a good job for him, you got him an agreement, and the DA backed out." **COLE: "**If you guys want to look at it that way yeah you can... Well the only thing he [Leaders] backed out on was what he would – whether it would be a minimum 3 years. If it was open – if David agreed to

forfeit his plane he – he didn't back out of that deal." [Ex. 19 - secret recording of Cole just after David fired Cole.]

Cole testified that David should have been charged and found guilty of hunting, guiding, or game violations (see Cole's brief & Tr. 297); that the "open sentencing" plea agreement was in place for only days Tr. 336 & Ex. 7, 17, 18, & 19; that he told David far in advance of November 8, 2004 that Leaders was going to break the "open sentencing" plea agreement Tr. 337, 340 & Ex. 7, 17, & 18.

**DAVE: "**Well – um – alls it was is you had said once to me that hey we can't totally go bonkers because I have to live with these guys you know after you're gone and blown away, and out guiding again hopefully, or retired in Mexico I'm still here dealing with these guys on a daily basis and..." **BRENT: "**Well I deal on my word – you're right." **DAVE: "**And you know and I appreciate that – because if you have a good relationship with them you can get probably more stuff done than if you don't have a good relationship but what I feel when they pulled the rug out from under us *when we all showed up in your office and you said, "uh Dave I got something to tell you" I feel they poked you in the eye*." **BRENT: "***They did and I'm still burning about it."* **DAVE: "**So you know what they would have filed still had the old charges in it. It just had a cover letter stating different ones and is that – I mean it just seems to me like it's unprofessional." **BRENT: "**The amended information changed the first five counts." **DAVE: "**No they still say uh – 08 inside the body when it says…" **BRENT: "**Well that's because he probably did a poor job doing it." **DAVE: "**That's what I'm saying it's very unprofessional. You know I just look through it and I'm like 'huh they forgot to change all of them in the body of the document'. Um I just – in other words he knew – *I mean he was planning on that all along and then 'voop' last minute* – you know." **BRENT:** "*I don't think he was planning on it - but anyway*." **DAVE:** "*Well we were. I was.*" **BRENT:** "*Right."* **DAVE:** "*I don't know if anybody else was but I sure was. Otherwise I wouldn't have taken my kids out of school and flown Tony up here.*" **BRENT:** "*Mm hmm.*" [Ex. 17 - secret recording of Cole while Cole was still David's attorney.]

That Cole did not have to appear in McGrath in person to testify about how he had represented David and all David had done for the "open sentencing" plea agreement

the State broke Tr. 286-287 & Ex. 37 & constitutional right to compel witnesses; and that since David was “guilty” there was nothing he could do and that the evidence obtained through the perjured search warrants, which moved the evidence found from the Wolf Control GMU to David’s guiding GMU so David could be prosecuted for guiding crimes, could not be suppressed. Tr. 236. See:

> *Lewis v. State*, 9 P.3d 1028, (Ak.,2000) in the Court of Appeals of Alaska: "Once defendant has shown that specific statements in affidavit supporting search warrant are false, together with statement of reasons in support of assertion of falsehood, burden then shifts to State to show that statements were not intentionally or recklessly made."; *McLaughlin v. State*, 818 P.2d 683, (Ak.,1991) in the Court of Appeals of Alaska: "Search warrant based on inaccurate or incomplete information may be invalidated only when misstatements or omissions that led to its issuance were either intentionally or recklessly made."; *U.S. v. Hunt*, 496 F.2d 888 (5th 1974) in the 5th Circuit Court of Appeals: "If affiant intentionally makes false statements to mislead judicial officer on application for search warrant, falsehoods render warrant invalid whether or not statements are material to establishing probable cause."; *Gustafson v. State*, 854 P.2d 751, (Ak.,1993) in the Court of Appeals of Alaska: "Prosecutors and police officers applying for a warrant owe a duty of candor to the court; they may neither attempt to mislead the magistrate nor recklessly misrepresent facts material to the magistrate's decision to issue the warrant."; *State v. Malkin*, 722 P.2d 943 (Ak. 1986) in the Supreme Court of Alaska: "Search warrant must be invalidated, & evidence seized pursuant thereto & must be suppressed, whenever supporting affidavit contains intentional misstatements, even though remainder of affidavit provides probable cause for warrant."; *Cruse v. State*, 584 P.2d 1141, (Ak. 1978) in the Supreme Court of Alaska: "Constitutional protection against warrantless invasions of privacy is endangered by concealment of relevant facts from district court issuing search warrant, as search warrants issue ex parte, & issuing court must rely upon trustworthiness of affidavit before it."; *State v. Davenport*, 510 P.2d 78, (Ak.,1973) in the Supreme Court of Alaska: "State & federal constitutional requirement that warrants issue only upon a showing of probable cause contains the implied mandate that the factual representations in the affidavit be truthful."; *Mapp v. Ohio*, 367 U.S. 643 (1961), the seminal U.S. Supreme Court held that, "[A]ll evidence obtained by searches & seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state. Since the Fourth Amendment's right of privacy has been declared enforceable against the States through

> the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Only last year the court itself recognized that the purpose of the exclusionary rule "is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." If the fruits of an unconstitutional search had been inadmissible in both state & federal courts, this inducement to evasion would have been sooner eliminated. There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N. Y., at 21, 150 N. E., at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration - the imperative of judicial integrity." *Elkins v. U.S.*, 364 U.S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."; State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003) in the Nebraska Supreme Court: "An error in admitting or excluding evidence in a criminal trial, whether of a constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt."

Further perjury and fraud by Cole is where he claims the State was not required to provide the procedural due process of prompt notice of an opportunity to contest, prompt notice of the intent to forfeit, prompt notice of the case for forfeiture, and prompt notice of the statutes authorizing forfeiture when they seized and deprived David of property he used as the primary means to provide a livelihood. Tr. 346-351. See:

> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) the U.S. Supreme Court held: *"Only 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'* The Due Process Clause demands no less in this case."
>
> *Boddie v. Connecticut*, 401 U.S. 371 (1971) the U.S. Supreme Court held: "Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. But the successful invocation of this governmental power by plaintiffs has often created serious problems for

defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and *denial of a defendant's full access to that process raises grave problems for its legitimacy.*

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process *must be given a meaningful opportunity to be heard.* Early in our jurisprudence, this Court voiced the doctrine that *"[w]herever one is assailed in his person or his property, there he may defend,*" *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). See *Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that *"due process of law signifies a right to be heard in one's defense," Hovey v. Elliott*, supra, at 417, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although "[m]any controversies [401 U.S. 371, 378] have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306 (1950), *"there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."* Id., at 313.

Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

*Brock v. Roadway Express*, 481 U.S. 252 (1987) the U.S. Supreme Court held that: 'When there are factual disputes that pertain to the validity of a deprivation, due process "require[s] more than a simple opportunity to argue or deny." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 552 (1985) (BRENNAN, J., concurring in part and dissenting in part). *Predeprivation procedures must provide "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges . . . are true and support the proposed action."* Id., at 545-546 (emphasis added). When, as here, the disputed question central to the deprivation is factual, and when, as here, *there is no assurance that adequate final process will be prompt*, predeprivation procedures are unreliable if they do not give the employer *"an opportunity*

*to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [its] own behalf.'"*

The adequacy of predeprivation procedures is in significant part a function of the speed with which a post-deprivation or final determination is made. Previously the Court has recognized that *"the duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." Mackey v. Montrym, 443 U.S. 1, 12 (1979). See also Loudermill, supra, at 547 ("At some point, a delay in the post-termination hearing would become a constitutional violation").'*

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) the U.S. Supreme Court held: *"[A] judgment entered without notice or service is constitutionally infirm....*Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, *'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'"*

Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972) the Supreme Court of Alaska held: "Bradley issued the writ pursuant to AS09.40.010 and Civil Rule 89 *without providing notice of hearing to Etheredge.* Justice Stewart in *Fuentes v. Shevin*, 407 U.S. 67, in writing for the majority, said in part: "For more than a century the central meaning of procedural due process has been clear: *'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' ...* It is equally fundamental that the right to notice and an opportunity to be heard *'must be granted at a meaningful time and in a meaningful manner.'"*

Fuentes v. Shevin, 92 S. Ct. 1983, 407 U.S. 67 the United States Supreme Court held: "[M]ore importantly, on the occasions when the common law did allow prejudgment seizure by state power, *it provided some kind of notice and opportunity to be heard to the party then in possession of the property*, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.

For more than a century the central meaning of procedural due process has been clear: *"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."* Baldwin v. Hale, 1 Wall. 223, 233.

*The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions.* The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For *when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.* It has long been recognized that: "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And *n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."*

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But *no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." Stanley v. Illinois*, 405 U.S. 645, 647.

This is no new principle of constitutional law. *The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.* Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, *opportunity for that hearing must be provided before the deprivation at issue takes effect.* E. g., *Bell v. Burson*, 402 U.S. 535, 542; *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Goldberg v. Kelly*, 397 U.S. 254; *Armstrong v. Manzo*, 380 U.S., at 551; *Mullane v. Central Hanover Tr. Co.*, supra, at 313; Opp *Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *United States v. Illinois Central R. Co.,* 291 U.S. 457, 463; *Londoner v. City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551.

"That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticu*t, supra, at 378-379 (emphasis in original).
The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. *The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.*

*"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

*[I]f an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a*

*summary seizure of property -- however unwarranted -- may go unchallenged, and the applicant may feel that he can act with impunity.*

The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. *Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo* and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather than holding them for three days.

A prior hearing always imposes some costs in time, effort, and expense, and *it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right.* See *Bell v. Burson*, supra, at 540-541; *Goldberg v. Kelly*, supra, at 261.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, *one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois*, 405 U.S. 645, 656.

[T]he aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an opportunity to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. *And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.* Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393.

*F/V American Eagle v. State*, 620 P.2d 657 (Alaska, 1980) the Supreme Court of Alaska: "*The seizure was pursuant to AS 16.05.190-.195...[P]rior to the state's filing of a formal civil complaint for forfeiture...the owners negotiated the release of the vessel and its gear to local fishing by entering into a voluntary stipulation of a bond with the state...*The standards of due process under the Alaska and federal constitutions require that a deprivation

of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *Etheredge v. Bradley*, 502 P.2d 146 (Alaska 1972). *Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). *However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton*, 538 F.2d 27 (2d Cir. 1976).

*Although civil in form, forfeiture actions are basically criminal in nature. Graybill v. State*, 545 P.2d 629, 631 (Alaska 1976). As a general rule, *forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government. One Cocktail Glass v. State*, 565 P.2d 1265, 1268-69 (Alaska 1977)."

Goldberg v. Kelly, 397 U.S. 254 (1970) the U.S. Supreme Court held: "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). *The hearing must be "at a meaningful time and in a meaningful manner... and in an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments in evidence.* Often, that basic justice right will require an attorney. Since in almost every setting, where important decisions turn on a question of fact, *due process requires an opportunity to confront and cross-examine adverse witnesses*." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient *have timely and adequate notice detailing the reasons for a [397 U.S. 254, 268] proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.* E. g., *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93 -94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103 -104 (1963). What we said in [397 U.S. 254, 270] *Greene v. McElroy*, 360 U.S. 474, 496 -497 (1959), is

particularly pertinent here: "Certain principles have remained relatively immutable in our jurisprudence. *One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment ... This Court has been zealous to protect these rights from erosion.* It has spoken out not only in criminal cases, ... but also in all types of cases where administrative ... actions were under scrutiny."

*Goss v. Lopez*, 419 U.S. 565 (1975) the U.S. Supreme Court held: "Appellee Ohio public high school students, who had been suspended from school for misconduct for up to 10 days without a hearing, brought a class action against appellant school officials seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order enjoining the officials to remove the references to the suspensions from the students' records. A three-judge District Court declared that appellees were denied due process of law in violation of the Fourteenth Amendment because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," *and that the statute and implementing regulations were unconstitutional,* and granted the requested injunction. Held:

1. Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment. Pp. 572-576.

(a) Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred, and must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause, and that may not be taken away for misconduct without observing minimum procedures required by that Clause. Pp. 573-574.

(b) Since misconduct charges if sustained and recorded could seriously damage the students' reputation as well as interfere with later educational and employment opportunities, the State's claimed right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the Due Process Clause's prohibition against arbitrary deprivation of liberty. Pp. 574-575.

(c) A 10-day suspension from school is not de minimis and may not be imposed in complete disregard of the Due Process [419 U.S. 565, 566] Clause. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. Pp. 575-576.

2. Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but *if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as practicable.* Pp. 577-584. 372 F. Supp. 1279, affirmed.

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for *in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest* [419 U.S. 565, 576] at stake." *Board of Regents v. Roth*, supra, at 570-571. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Boddie v. Connecticut*, 401 U.S. 371, 378 -379 (1971); *Board of Regents v. Roth*, supra, at 570 n. 8. A

10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S., at 481. We turn to that question, fully [419 U.S. 565, 578] realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

There are certain bench marks to guide us, however. *Mullane v. Central Hanover Trust Co*., 339 U.S. 306 [419 U.S. 565, 579] (1950), a case often invoked by later opinions, said that:

"[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), *a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." Mullane v. Central Hanover Trust Co*., supra, at 314. See also Armstrong v. Manzo, 380 U.S. 545, 550 (1965); *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 -169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

"Parties whose rights are to be affected are entitled to be heard; and *in order that they may enjoy that right they must first be notified.* Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." U.S. Supreme Court *Baldwin v. Hale*, 68 U.S. 223 (1863).

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against

erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments [419 U.S. 565, 584] about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. *Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.* Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.
*The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is Affirmed."* "In its judgment, the court stated that the statute is unconstitutional in that it provides "for suspension . . . without first affording the student due process of law." (Emphasis supplied.) However, the language of the judgment must be read in light of the language in the opinion which expressly contemplates that *under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly."*

Johnston v. Zerbst, 304 U.S. 458 (1938), the U.S. Supreme Court held: "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951), at 171-172 U.S. Supreme Court, Justice Frankfurter, observed: "Secrecy is not congenial to truth-seeking ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it.* Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done."

Mathews v. Eldridge, 424 U.S. 319 (1976) the U.S. Supreme Court held: "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The *"right to be heard before being condemned to suffer grievous loss of*

*any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."*

*Marbury v. Madison*, 5 U.S. 137 (1803) Mr. Chief Justice Marshall stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.

[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

*Memphis Light, Gas & Water Div. V. Craft*, 436 U.S. 1 (1978) the U.S. Supreme Court held: "Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, *was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections"* to their bills. *Mullane v. Central Hanover Trust Co*., supra, at 314. *The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing."* Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.

Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law. The judgment of the Court of Appeals is affirmed."

*Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) the U.S. Supreme Court set the standard for notice: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ... The notice must be of such a nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance...But when notice is a person's due, process which is a mere gesture is not due process."

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. *This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.*

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. *'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee*, 243 U.S. 90, 91."

*Perkins v. City of West Covina*, 113 F.3d 1004 (9th Cir. 1999) the U.S. Court of Appeals, Ninth Circuit held: Due process notice "must be of such nature as reasonably to convey the required information." *Mullane v.*

*Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). *The "notice" left at Perkins' home simply informed him that his home had been searched by the West Covina police department, with the date of the search warrant and the issuing judge and court, the date of the search, a list of the property seized, and the names and telephone numbers of several officers of the police department to contact for "more information." The issue is whether due process required more: that the police notify Perkins of the availability of a judicial remedy should he wish to claim his property, and provide some guidance for invoking that remedy.*

The Supreme Court faced a similar issue in *Memphis Light.* The plaintiffs, who were subject to multiple billing by the utility company, were unable to clear up the disputed charges despite visits to the company's offices, and their gas and electric service was terminated several times. The company had a procedure for the resolution of disputed bills, 436 U.S. at 6 n. 4, 98 S.Ct. at 1558 n. 4, but the notice of termination sent to the plaintiffs simply stated that payment was overdue and service would be cut off by a certain date; *"No mention was made of a procedure for the disposition of a disputed claim." Id. at 13, 98 S.Ct. at 1562. The Court held that the notice was insufficient to satisfy due process:*

*[The] notification procedure, while adequate to apprise the [plaintiffs] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. Mullane v. Central Hanover Trust Co., supra, at 314 [70 S.Ct. at 657]. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.*

*Here, the notice left at Perkins' home did not mention the availability of any procedure for protesting the seizure of his property, let alone the existence of a formal judicial procedure for obtaining return... The notice was "skeletal," like the notice that the Memphis Light court found unconstitutional. Id.* at 15 n. 15, 98 S.Ct. at 1563 n. 15.

The city charges Perkins with the responsibility for his own confusion. It cites his failure to persist and to unearth the proper remedy and the method of its invocation.

The "situation demands" written notice of how to retrieve the property. *See Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1357 (Alaska 1974) (due process requires that written notice to legally unsophisticated and indigent defendants be more substantial, detailed, and easily understood).* We find the written notice given by the West Covina Police Department was constitutionally inadequate.

*[W]hen there is no opportunity for predeprivation notice or hearing, the necessity of adequate postdeprivation notice of the means of securing the return of property is at least as compelling.*

The remaining issue is what notice was due in this case. To identify the specific dictates of due process, we must consider (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such an interest through the procedures used, and the value of additional safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976). The private interest in this case is in the possession and use of personal property, surely a significant interest. *The risk of erroneous deprivation, especially in the emergency situations often underlying search warrants, is substantial. By contrast, the administrative and fiscal burden of providing adequate written notice is slight.* The city already leaves a standard form of "notice" at the premises searched. The only burden involved is the formulation of constitutionally adequate wording by including the relevant information on the notice.

*[T]he notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court.*

Because *we find the notice given Perkins did not meet the requirements of due process*, we reverse the summary judgment in favor of the city and remand to the district court for the grant of summary judgment to Perkins on this issue, and for such further proceedings as may be necessary.

Powell v. Alabama, 287 U.S. 67 (1932) the United States Supreme Court held: "It never has been doubted by this court, or any other so far as we know, that *notice and hearing are preliminary steps essential to passing of an enforceable judgment,* and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law."

*Sniadach v. Family Finance Corp*. 395 U.S. 337 (1969) the U.S. Supreme Court held: "Wisconsin's prejudgment garnishment of wages procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process... *in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.*

In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, 371 U.S. 208, 212) within the meaning of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. As stated by Congressman Reuss: *"The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."*

*The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning [395 U.S. 337, 342] family to the wall.* Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

Apart from special situations, some of which are referred to in this Court's opinion, see ante, at 339, I think that *due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court.* See, e. g., *Mullane v. Central Hanover Trust Co*., 339 U.S. 306, 313 (1950); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152 -153 (1941); *U.S. v. Illinois Cent. R. Co.,* 291 U.S. 457, 463 (1934); *Londoner v. City & County of Denver*, 210 U.S. 373, 385 -386 (1908). *"The 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized*

*as de minimis, she must be accorded the usual requisites of procedural due process: notice and a prior hearing."*

State v. F/V Baranof 677 P.2d 1245 (Alaska, 1984) the Supreme Court of Alaska held: "On May 9, 1981, officers of the Alaska State Division of Fish & Wildlife Protection seized the F/V Baranof in Dutch Harbor, Alaska under authority of a search and seizure warrant issued on May 7, 1981. On May 11, 1981, the State of Alaska filed a civil complaint *in rem* (the vessel itself being the only named defendant) in superior court for the forfeiture of the F/V Baranof pursuant to *AS 16.05.195*, alleging unlawful harvest, transportation, and possession of king crab in 1979 and 1980. On May 12, 1981, the State filed a motion for publication of notice to owners and other interested parties, which was granted on May 14, 1981. Negotiations for release of the vessel were commenced immediately, and on May 27, 1981, the ship was released under a Special Release Agreement.

PROCEDURAL DUE PROCESS - The Baranof's final contention is that its due process rights under the United States and Alaska constitutions were violated. *It argues that the forfeiture statute under which the vessel was seized, AS 16.05.195, is constitutionally defective in that it does not provide a hearing either prior to or immediately after the seizure of property. Since we hold that the owners of the Baranof were in fact afforded procedural due process, we need not reach the question of the constitutionality of AS 16.05.195. See Jennings v. Mahoney,* 404 U.S. 25, 92 S.Ct. 180, 30 L.Ed.2d 146 (1971); *F/V American Eagle v. State,* 620 P.2d 657, 667 (Alaska 1980), *appeal dismissed,* 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284 (1982).

Due process does not require notice or a hearing prior to seizure by government officials of property allegedly used in an illicit activity. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *American Eagle,* 620 P.2d at 666. However, *when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco,* 557 F.2d 1338 (9th Cir.1977); *Lee v. Thorton,* 538 F.2d 27 (2d Cir.1976). *American Eagle,* 620 P.2d at 666-67. We believe the present case is analogous to *American Eagle,* 620 P.2d at 666-68, where we upheld the seizure of a king crab fishing vessel. As in *American Eagle,* the seizure of the Baranof was authorized by a judicially approved warrant issued upon probable cause pursuant to *Criminal Rule 37. Id.* at 667. The owners had "an immediate and unqualified right to contest the state's justification for the seizure under

Criminal Rule 37(c)." *Id. "Rather than avail themselves of this opportunity, the owners negotiated the release of the vessel...." Id.* Finally, in the present case, the State filed a civil complaint on the next working day following the seizure, and the owners were promptly notified."

*U.S. v. Hall*, 521 F.2d 406 (9th Cir. 06/18/1975) the U.S. 9th Circuit Court of Appeals held: "Indicted for smuggling ... Hall waived his right to a trial by jury and proceeded to trial before the district judge. Hall was convicted and sentenced to imprisonment for one year. The indictment against Hall alleged that: Merchandise introduced into the U.S. in violation of this section, or the value thereof, . . . shall be forfeited to the U.S. …Our consideration of the whole record leads us to the conclusion that *the court's actions, taken together, deprived Hall of the mandatory notice to which he was entitled and the concomitant opportunity to defend against a forfeiture.* The judgment of conviction is vacated, and, upon remand, the indictment will be dismissed."

*U.S. v. James Daniel Good Real Property* 510 U.S. 43 (1993) the U.S. Supreme Court held: "The court was unanimous in holding that the seizure of Good's property, without prior notice and a hearing, violated the Due Process Clause. The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.' Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. … The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the individual. *Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property ...*" *Fuentes* v. *Shevin*, 407 U. S., at 80-81.

We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in "'extraordinary situations where some valid governmental interest is at stake *that justifies postponing the hearing until after the event*.'" *Id.,* at 82 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971)); *U.S.* v. *$8,850*, 461 U. S., at 562, n. 12. … "[F]airness can rarely be obtained by secret, one sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it." Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring) (footnotes omitted).

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. *That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding.* See *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (opinion of Scalia, J.) (slip op., at 19, n. 9) "[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit". … Requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden. *A claimant is already entitled to an adversary hearing before a final judgment of forfeiture. Finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case.*

U.S. v Seifuddin, 820 F.2d 1074, 1076 (9th Cir. 1987) the U.S. 9th Circuit Court of Appeals held: "'Criminal' forfeitures are subject to all the constitutional and statutory procedural safeguards available under criminal law. The forfeiture case and the criminal case are tried together. *The forfeiture counts must be included in the indictment of the defendant,* which means the grand jury must find a basis for the forfeiture. At trial, the burden of proof is beyond a reasonable doubt."

Waiste v. State, 10 P.3d 1141 (Alaska 2000) the Supreme Court of Alaska held in an ex parte seizure of a fishing boat subject to forfeiture during a criminal prosecution that: *"This court's dicta, however, and the persuasive weight of federal law, both suggest that the Due Process Clause of the Alaska Constitution should require no more than a prompt postseizure hearing... Waiste and the State agree that the Due Process Clause of the Alaska Constitution requires a prompt postseizure hearing upon the seizure of a fishing boat potentially subject to forfeiture...* The State argues that a prompt postseizure hearing is the only process due, both under general constitutional principles and under this court's precedents on fishing-boat seizures, whose comments were not dicta...But *given the conceded requirement of a prompt postseizure hearing on the same issues, in the same forum, 'within days, if not hours' the only burden that the State avoids by proceeding ex parte is the burden of having to show its justification for a seizure a few days or hours earlier...* The State does not discuss the private interest at stake, and Waiste is plainly right that it is significant: even a few days' lost fishing during a three-week salmon run is serious, and *due process mandates heightened solicitude when someone is deprived of her or his primary source of income...*

> As Justice Frankfurter observed,'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it."* As the Good Court noted, moreover, the protection of an adversary hearing 'is of particular importance [in forfeiture cases], where the Government has a direct pecuniary interest in the outcome.'
>
> An ensemble of procedural rules bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors. *The rules include the need to show probable cause to think a vessel forfeitable in an ex parte hearing before a neutral magistrate, to allow release of the vessel on bond, and to afford a prompt postseizure hearing.* That ensemble is undeniably less effective than a prior, adversarial hearing in protecting fishers from the significant harm of the erronious seizure and detention of a fishing boat... *That the State was not seizing the boat only for the section .190 criminal proceeding is apparent from the record. The search warrant affidavit envices the State's dual purpose in seizing the boat, citing both section .190 and section .195 as justification for the seizure... Waiste argues in his opening brief that the forfeiture statute is facially unconstitutional because it lacks standards for forfeiture actions, but - as the State noted in its brief, and Waiste did not contest in his reply - he waived this claim by failing to raise it below.*
>
> Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976) the U.S. 9th Circuit Court of Appeals held: *"Where the property was forfeited without constitutionally adequate notice to the claimant, the courts must provide relief, either by vacating the default judgment, or by allowing a collateral suit... Once seizure is accomplished, the justifications for postponement enumerated in Calero-Toledo evaporate, see 416 U.S. at 679-680, and due process requires that notice and opportunity for some form of hearing be accorded swiftly, and, in any event, prior to forfeiture."*

Cole admits the State never even offered him a hearing to ask for the return of David's property - when David hired him weeks after the seizure. Cole tries to justify this unconstitutional State conduct by claiming the State was not required to offer a hearing. Tr. 347 - 351.

Then Cole claims the State did not even have to provide an opportunity to bond

when they deprived David of his property that he used to provide a livelihood. It is a stunning display of Cole's misrepresentation and sellout of David where Cole admits that even though David always wanted to get his plane back he never told David that he could try to bond it out. Then, when it is shown this is Cole's irrefutable duty, Cole makes the statement: "David, the time to make that decision was in April – you were almost comatose because you were so depressed about the State walking in and taking all this stuff." How can Cole, who was hired by David because of David's ignorance of the law, possibly make this statement? Cole blames ignorant and "comatose" David for not making decisions of what rights to exercise when Cole admits he failed to tell David of these rights and in fact lied to David about these same rights. Tr. 346-351 & Ex. 17 & 18. See: *Waiste v. State*, 10 P.3d 1141 (Alaska 2000) supra, *F/V American Eagle v. State*, 620 P.2d 657 (Alaska, 1980) supra, *State v. F/V Baranof* 677 P.2d 1245 (Alaska, 1984) supra.

While Cole was representing David the State deprived David of his primary means of providing a livelihood for eight months (8) months before David was charged. The State then continued to deprive David of his primary means to provide a livelihood for his family of four (4) for an additional nine (9) *more* months before David's' prosecution was finished – 17 months total – *all without any notice of a hearing in which David could protest the property deprivation (by exposing the perjury used to frame David for guiding crimes), to even ask to bond the property out, or of even the State's intent to seek forfeiture (see Federal Rules of Criminal Procedure 7 & 32.2) and/or even of the statutes authorizing deprivation or forfeiture(which Cole failed to tell David were*

*unconstitutional because they lack standards to comply with constitutional due process).* David and his family were almost bankrupt by the time charges were filed.

**B. There was Corruption in the Arbitrators.**

The decision and award by the arbitrators is chilling in its complete lack of support by the record or reference to the mountain of irrefutable evidence against Cole presented to them. See decision & award. The arbitrators fail to address the issues presented. The issues presented but not addressed as required by *Bar Rule 40(q)(3*):

The arbitrators make false statements in the decision and award. False statements and where in the transcripts and exhibits they are proven false are as follows:

"Mr. Haeg did not offer evidence of the points on which the search warrant application was defective … or that the misstatement was material." Tr. 145 – 174.

"By October, a plea agreement had been firmed up … terms of the sentence were fixed, including forfeiture of the PA-12 aircraft." Tr. 34, 50-51, 114, 129, 131, 132, & Ex. 17, 18, 19. *Irrefutable* proof the arbitrators and Cole knew this was false is in the middle of page 3 of the decision and award. "In a recorded telephone conversation on January 9, 2005 Ex. 19, p. 6, Mr. Cole recalled the prosecutor's change of heart somewhat differently. On that date he said the prosecutor had threatened to amend the charges *unless* Mr. Haeg agreed to the forfeiture of the PA-12 aircraft."

"[I]n the evening hours of November 8, they eventually reached a new agreement." Tr. 114, 125, 128-29, 313-314, 321 & Ex.17, 18, 19.

"Mr. Cole, Mr. Haeg, and Mr. Haeg's witnesses went out to dinner together after the re-negotiated deal was made with the prosecutor to *celebrate* the disposition of the

case." Tr. 113, 125, 317

The arbitrators finally state that there are "two measures of the merits of Mr. Cole's services to David … the plea agreement that Mr. Cole presented to Mr. Haeg on November 8 was plainly more favorable to Mr. Haeg than "open sentencing" turned out to be…" and "Mr. Haeg argues that Mr. Cole should have moved to suppress the evidence taken pursuant to the search warrants and should have moved for specific performance of an 'open sentencing' agreement. But no evidence was presented that Mr. Haeg's second lawyer filed such motions."

David never received the "open sentence" plea agreement *(with the 1 – 3 year limit on the guide license suspension)* so how could the arbitrators possibly make this statement? The *maximum sentence* that could be imposed in the "open sentence" plea agreement charges was *less* than what was imposed on David after *trial* on the charges Leaders had amended. No one, not Cole nor Robinson, ever told the judge that sentenced David that he had cooperated with the prosecution from the very beginning; that violations of the Wolf Control Program were intentionally isolated from hunting, guiding, or game violations [*5 AAC 92.039 & AS Title 16 Fish and Game*]; that the prosecution had illegally made a Wolf Control Program case into a hunting guide case by falsely claiming the evidence they found was in the GMU where David guided instead of in the GMU where the Wolf Control Program was taking place; that David and Jackie had *already* given up a *whole year* of guiding for a plea agreement the prosecution broke at the last minute; Tr. 11, 19, 32-34, 67, 117-18, Cole admitting David had done this; that the prosecutions *case-in-chief* was illegally based on David's statements made during

plea negotiations (*Alaska Rules of Evidence Rule 410* & constitutional right against self incrimination); & that the justification given on the record for David's sentence "since the majority if not all the wolves were taken in 19C [where David was licensed to guide hunts & had a hunting lodge] ... to kill the wolves in the area where you were hunting" was the very perjury the prosecution used to make a Wolf Control Program case into a guided hunting case and frame David for the same.

Robinson, David's second attorney, stated he *couldn't* file motions to fix what Cole had failed to do – so how can what Robinson *didn't* do mean Cole didn't have to do it either? In his brief to the Superior Court Cole admits Robinson couldn't file motions. Robinson claims it was *Cole's* actions that hamstrung him and Robinson could do nothing to fix it. Ex. 26, 27, 34 & 40 and Cole's Superior Court brief.

**C. There was Evident Partiality by the Arbitrators.**

The arbitrators refused to let David testify about what Robinson had said but allowed Cole to do so. Tr. 90, 283, 285, 286-287, & Ex. 26 & 27.

The arbitrators saved Cole each time he was being forced to admit he was committing perjury. Tr. 221, 323-4, 326. David specifically objected to arbitrator Metzger testifying in favor of Cole. Tr. 381. Arbitrators limited David on time. Tr. 310-11, 137, 214, 229, 296, 326.

**D. The Arbitrators Exceeded their Powers.**

The arbitrators awarded *Cole* $2689.19 when Cole never submitted a grievance about this or anything else to the arbitrators or David. Arbitrators who award on grievances not submitted exceed their powers. In *Sea Star Stevedore Co. v. International*

*Union of Operating Engineers, Local 302* 769 P.2d 428 (Alaska 1989) the Supreme Court held:

> "an arbitrator does not have the power to reach the merits of a grievance not submitted to him." "The power of arbitrators are confined to those conferred by the arbitration agreement. Where the parties have clearly agreed to arbitrate only those 'disputes arising in connection with this contract' a particular claim is not arbitrable if it is nowhere mentioned in the contract. If all fair and reasonable minds would agree that the construction of the contract made by the arbitrators was not possible under a fair interpretation of the contract, then the court would be bound to vacate or refuse to confirm the award" University of Alaska v. Modern Constr., Inc., 522 P.2d 1132 (Alaska 1974).

The arbitration agreement did not include David giving more money to Cole. Cole testified 3 times under oath to the arbitrators that he had "wrote off" any money outstanding on his itemized billings and the arbitrators even themselves stated the arbitration was *only* about the money David had *already* paid. Tr. 13, 233, 273. Without the constitutionally guaranteed notice and opportunity to contest a judgment is invalid. See the overwhelming caselaw requiring notice and opportunity to contest above.

The arbitrators refused to admit or hear evidence material to David's case. Tr. 357 and Ex. 26, 27, 28, 30, 34, 38, 40, 42 & four motions to supplement the record. The arbitrators allowed Cole to talk of his conversations with Robinson without ruling it was hearsay yet would rule it was hearsay when David wished to do so - even taped conversations with Robinson. Tr. 90, 354, 357, 362, 366 & Ex. 26, 27, 34, 40. The arbitrators also placed strict time limits on David, which severely harmed his ability to put on his case (almost all of which were imposed off record & when nothing was recorded). Tr. 353.

**E. The decision and award did not address the issues presented, including**

**but not limited to: Cole lying to appellant to affirmatively deny rights and protection under rule, statue, and constitution; Cole perjuring himself to the panel; appellant's request for Cole to be prosecuted for such perjury; Cole affirmatively misleading the panel; Cole's collusion and/or conspiracy with other attorneys, including the State Assistant Attorney General prosecuting Haeg; and Cole failing to respond to a subpoena for which he had been served along with an airline ticket and witness expenses.**

Neither the fee arbitration panel nor Judge Brown effectively addressed David's issues of Cole's above actions which were proven by the evidence, testimony, and cross examination presented at fee arbitration and in the briefs filed in Superior Court. The arbitration panel gave no justification and the Superior Court ruled it "cannot reassess the evidence presented before the panel or the credibility of the witnesses." This lack of review by the Superior Court eliminated any possibility of determining the decision and award of the panel was a product of intentional fraud through perjury and intentional misrepresentation.

**F. There is no referral to discipline counsel.**

Neither the fee arbitration panel nor Judge Brown referred Cole to discipline counsel or other authorities as the included violations of two constitutions, the *Rules of Professional Conduct*, and law require. The proof that Cole perjured himself numerous times, as shown above, is beyond any doubt whatsoever. The proof he intentionally deprived David of his constitutional rights is proved beyond any doubt. The proof Cole conspired with Fitzgerald and Robinson to obstruct justice and to deprive David of his

constitutional rights is proved beyond any doubt.

**G. The decision and award is completely foreign to the evidence presented with the panel ignoring the compelling and irrefutable evidence presented to them.**

As shown by the facts the decision and award are in complete denial of the overwhelming evidence and witness testimony presented. The evidence supports virtually none of Cole's claims while a virtual mountain of evidence supports David's claims.

**H. The decision and award are not in compliance of *Alaska Rules of Professional Conduct* or *Alaska Rules of Attorney Fee Dispute Resolution required by Rule 40(q).***

As shown Cole violated a great many Alaska Rules of Professional Conduct. Rules he violated are as follows: *Rule 1.2(a) Scope of Representation; Rule 1.4(a) Communication; Rule 1.4(b) Communication; Rule 1.7. Conflict of Interest: General Rule; Rule 1.7 Conflict of Interest: General Rule. Loyalty is an essential element in the lawyer's relationship to a client; Rule 1.16. Declining or Terminating Representation; Rule 3.1. Meritorious Claims and Contentions; Rule 3.3. Candor Toward the Tribunal; Rule 4.1. Truthfulness in Statements to Others; and Rule 8.4. Misconduct*.

In addition the arbitrators failed to include the following provisions of Rule 40(q) of the *Alaska Rules of Attorney Fee Dispute Resolution*: (1), (2), and (3):

> (q) Decision of the Arbitrator or Arbitration Panel. (1) a preliminary statement reciting the jurisdictional facts, including that a hearing was held upon proper notice to all parties and that the parties were given the opportunity to testify, cross-examine witnesses, and present evidence; (2) a brief statement of the dispute; (3) the findings of the arbitrator or panel on all issues and questions submitted which are necessary to resolve the dispute;

### I. A large part of the Official Record of these proceedings is missing.

After the fee arbitration was concluded a great portion of the tapes making up official record were claimed to be blank and the Alaska Bar Association refused to reconstruct the record with the tapes David made with 3 of his own tape recorders.

### J. Judge Brown exhibited bias, partiality, and corruption.

Cole, in both his brief and oral arguments to Superior Court Judge Brown, claims that he could not do anything to advocate for David because David was guilty of game, hunting, and/or guide crimes. See Cole's Superior Court brief. Yet David's brief clearly showed Wolf Control Program violations are intentionally separate from hunting, guiding, or game violations and the State used known perjury to frame David for these crimes. See *5 AAC 92.039 & AS Title 16 Fish & Game:*

> *5 AAC 92.039*: Permit for taking wolves using aircraft... (h) In accordance with AS 16.05.783, the methods & means authorized in a permit issued under this section are **independent of all other methods & means restrictions in AS 16 & this title**.
>
> *AS Title 16 Fish & Game*: Chapter 5. **Fish & Game Code**; Chapter 35. **Predatory Animals**; Chapter 50. **Guides & Outfitters;**

Cole had an absolute duty to utilize the laws to minimize the impact on David – even if David was indeed guilty of something. Cole had duty to inform the court of a plea agreement David had given so much for – especially when the State violated it by charging far harsher charges never agreed to after irreplaceable detrimental reliance had been placed upon it. Cole had a duty to inform the court when the State used David's statements, given during plea negotiations and corrupted by the perjury, for their entire case against David.

Yet Cole did absolutely nothing when the prosecution illegally changed a possible WCP violation (or minor speed bump in David & Jackie's life) into a certain hunting guide case (which destroyed David & Jackie's life) through the use of known and irrefutable perjury – the State's own GPS coordinates themselves prove the perjury. Cole didn't even find it fit to inform David of these protections – and lied to David and others about these rights – also a gross violation of the *Rules of Professional Conduct*. Cole even admits he failed to tell David this. Cole: "did we discuss motion to suppress – no I really didn't think we did because I never felt that was a good option." Tr. 274. Good idea for whom? *Cole or David*?

Cole states in his brief numerous times David cannot appeal anything "since it is based on a factual determination". See Cole's Superior Court brief. Yet *AS 09.43.120* irrefutably supports David's right to appeal every issue presented to this court if they are a result of fraud and/or corruption. Perjury to obtain a decision in your favor is fraud.

On page 3 of Cole's Superior Court brief Cole states David said he "could not lose his guide license for 5 years because of these violations of Alaska's Laws." Yet the *tape* of David and Cole, while Cole was *still* David's attorney, prove this is perjury – along with proving his same oral testimony to the arbitrators was also perjury. Ex. 17.

On page 4 of Cole's Superior Court brief Cole states he "*later* confirmed in a letter to Leaders that [David's] statements could not be used against Haeg." Yet *every* information filed used the statements as the *only* probable cause for *most* of the charges. Ex. 5 & 6. Also on page 4 of Cole's Superior Court brief Cole states, "*On November 4, 2004*, the State filed an information and an arraignment/change of plea/sentencing was

scheduled for November 9, 2004 in McGrath." Yet Cole's own itemized billing statements, made at the time in question, prove the November 9, 2004 hearing was scheduled on *October 15, 2004*. Ex. 3. On page 4/5 of Cole's Superior Court brief Cole states that both informations used David's statements to set forth his criminal activity. How can this be if David had the immunity agreement Cole testified to under oath to the arbitrators and cited just 2 paragraphs earlier on page 4? Immunity agreements mean the statements cannot be used in any way against the person who has immunity – so how could David's statements have been used against him in every information filed? How could Zellers be used against David when both Zellers and Fitzgerald testified the reason Zellers cooperated was because of David's cooperation? What happened to David's protection under *Evidence Rule 410* and the constitutional rights to due process, equal protection of law, and against self-incrimination when the State broke the plea agreement yet still used David's statement made for the plea agreement? Tr. 252, 283 & Ex. 5, 6, 33.

On page 5 of Cole's Superior Court brief Cole states, "Prior to the arraignment/sentencing, and on the evening of November 8, 2004, the parties reached an understanding on all the terms of a sentence that would be imposed on Haeg." What attorney in their right mind would schedule a sentencing before a sentence was agreed upon, spend enormous sums of money on it, and then let the prosecutor change the charges just *hours* before the sentencing? It is obvious why Cole is claiming the November 9, 2004 hearing was scheduled on November 4, 2004 instead of months earlier – if it was scheduled earlier there had to have been a sentence agreed upon – and

if their was any detrimental reliance place upon it (David had placed nearly one million dollars in reliance on his deal by canceling his guide season – which was already past when he was supposed to get his end of the bargain) constitutional due process would have demanded the agreement be upheld.

Cole states, "Because further approval was needed, the parties cancelled the change of plea/sentencing portion of the hearing." Why would Cole *buy a plane ticket to McGrath*, for the November 9 sentencing hearing, have David fly in multiple witnesses on November 8, 2004 from as far away as Illinois for the hearing in McGrath, have David give up a whole years income, *and not have the approval needed*? The answer is simple – the Division of Occupational Licensing had already granted the approval of not taking further action on David's guide license then what the court took. Ex. 17, 18, 19. At the time Cole told David and all the witnesses flown in that since Leaders had changed the charges they could not go out to McGrath and plead to the new charges. Tr. 113. Cole's claim approval was needed is to provide a reason, other than the State breaking David's constitutional rights, for not going to McGrath on November 9 as scheduled and to hide his failure to force Leaders to go through with the "open sentencing" plea agreement in which David's plane was not required to be given up. These are the real reasons no one went to McGrath. Ex. 17, 18, 19. All else is to cover up Cole's sell out of David so the State could frame him. Tr. 29, 33, 95, 380 & Ex. 17, 18. Even more convincing is that if a court imposes sanctions on a license Occupational Licensing cannot take further action. Tr. 58, 242

Cole states, "It is unclear whether Haeg's statement was used in the State's case

in chief." How can it possibly be unclear when *every* charging document ever filed specifically cited David's and Zellers' statements as the only probable cause for over half the charges filed and as primary probable cause for all the rest? David's statement *was* the State's case. Without it they could have filed less then *half* the charges. Tr. 75-76 & Ex. 5 & 6. In addition both Zellers and Fitzgerald testified that David's statements to the prosecution was the reason Zellers cooperated. Tr. 75, 83, 214. The State then made an agreement with Zellers so Zellers testified against David at David's trial. How can Cole possibly claim David's statement wasn't used in the State's "case in chief" and claim this is true under penalty of perjury?

On page 5 of Cole's Superior Court brief Cole admits, "Haeg requested Robinson file a motion to enforce a Criminal Rule ("CR") 11 agreement but Robinson stated he could not do so." In other words Cole had David give up a 5 hour interview, a whole years of David and Jackie's combined income, and fly in multiple witnesses for an agreement that *neither* Cole nor Robinson, paid over $50,000.00 to protect David's interests, would even try to enforce – even though constitutional due process demanded this.

On page 6 of Cole's Superior Court brief Cole states Robinson agreed Cole didn't have to show up. In a taped conversation Robinson tells David the reason Cole didn't appear in person to testify in response to the subpoena and airplane ticket was explained in Cole's letter to him stating, "I don't intend on being available to testify." Ex. 37. Robinson then states, "Cole didn't show up because he wasn't relevant to your guilt". When David said Cole would have been relevant to his sentence and that Robinson knew

this, Robinson could not respond. Even more chilling is that Robinson made these statements when Cole was subpoenaed to David's *sentencing* and not to David's *trial*. This irrefutably broke David's constitutional right to a compulsory process for witnesses in his favor and proves a conspiracy between Cole and Robinson to do so.

On page 10 of Cole's Superior Court brief Cole claims David's arguments contain no proof of fraud or corruption so the Superior Court could not review them. As shown there is overwhelming evidence of fraud and corruption. Cole claims, "whether Cole should have advised Haeg to move to enforce any agreement or should have done so was moot because Haeg fired Cole and hired Robinson." In other words Cole admits his service was so defective David had to fire him and hire someone else to do the job – entitling David to a return of the money he had paid and was cost by Cole – which is what the fee arbitration was all about. This claim also admits Cole never advised David he could move to enforce any agreement – proving Cole's sworn testimony that he had done so was perjury.

On page 11 of Cole's Superior Court brief Cole states "Haeg next argues he was prejudiced by the failure of Cole to advise Haeg of a plea agreement that *never existed*." A mountain of irrefutable evidence, much by Cole's own mouth and hand, proves there was an "open sentence" plea agreement. Cole's own letters and itemized billings back up the secret recordings of Cole – all proving this is chilling perjury. Entire transcript & Ex. 3, 7, 17, 18, 19.

On page 3 of the decision and award even the arbitrators admit the existence of an "open sentence" plea agreement.

On page 12 of Cole's Superior Court brief Cole states, "Cole determined that Haeg had little to no defense to the several hunting violations which could lead to Haeg losing his guide license and business for five years, an outcome Haeg repeatedly refused to accept." Cole continues to ignore the fact that WCP violations were *intentionally* isolated from hunting violations (see *5 AAC 92.039 & AS Title 16 Fish & Game*); that the evidence was in the WCP GMU and not in the GMU in which David was licensed to be a hunting guide; that the State used known and irrefutably provable perjury to move the evidence to David's guiding GMU so he could be charged with guiding violations; that procedural due process violations in the deprivation of David and Jackie's property required the return and suppression as evidence of all property seized; and that he failed to find or exercise these irrefutable protections. The secret recordings of Cole very specifically prove beyond any doubt David was entirely willing to risk losing his guide license for 5 years – proving this written statement of Cole's, which is supported by affidavit, is irrefutable perjury. Ex. 17 & 18.

Cole states David's demand to go to trial to get a "complete acquittal … resulted in him losing his right to be a guide for five years which now forms the basis for his anger against Cole and the system." It was *Robinson* who said to go to trial because he could not file a motion to enforce the plea agreement. David's anger is because neither Cole nor Robinson told him he was constitutionally entitled to not have the State's case based on devastating perjury, to have notice and opportunity to contest when he and Jackie's business property was deprived, was entitled to file a motion to seek to enforce the "open sentence" plea agreement, was entitled to not have his statements used against

him, and was entitled to have Cole testify in response about all this pursuant to a subpoena and airline ticket. When you pay over $50,000.00 for advice of your rights and the people you pay knowingly, intentionally, and maliciously fail to tell what you need to know, and then lie and conspire to hide your rights, costing you and your family everything you worked your whole life to obtain, anger and an unstoppable determination for justice is the direct result.

On page 15 of Cole's Superior Court brief Cole states that David's argument, that he was entitled to seek the return of his business property, is "not legally correct." As shown by the overwhelming caselaw above this proved to be further misrepresentation and/or perjury to the court by Cole. Cole cites *AS 12.36.020* – which he claims "precludes the return of seized property if the property is in custody in connection with an official investigation of a crime or is subject to the forfeiture laws of the state." This statute states: "A *law enforcement agency* may not return property…" See *AS 12.36.020.* It has nothing to do with a court returning property. To leave the decision in law enforcement hands would violate constitutional due process which guarantees an *opportunity*, "within days if not hours" to protest *to the court* the deprivation of property or even just *opportunity* to bond the property out so the defendant can *ask* to continue making a livelihood until charged, tried, and/or sentenced. Anything less is summary judgment by the prosecution – meaning you are punished without the constitutionally guaranteed right to notice and opportunity to contest. See:

> *Waiste v. State*, 10 P.3d 1141 (Alaska 2000), *F/V American Eagle v. State*, 620 P.2d 657, 667 (Alaska 1980); *State v. F/V Baranof* 677 P.2d 1245 (Alaska, 1984); *Perkins v. City of West Covina*, 113 F.3d 1004 (9th Cir.

1999); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Sniadach v. Family Finance Corp*. 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *U.S. v Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987); *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *U.S. v. James Daniel Good Real Property* 510 U.S. 43 (1993); *Brock v. Roadway Express*, 481 U.S. 252 (1987); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123 (1951); *Etheredge v. Bradley*, 502 P.2d 146 (Alaska 1972); *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Fuentes v. Shevin*, 92 S. Ct. 1983, 407 U.S. 67; *Powell v. Alabama*, 287 U.S. 67 (1932); *Johnston v. Zerbst*, 304 U.S. 458 (1938); *Marbury v. Madison*, 5 U.S. 137 (1803); *Memphis Light, Gas & Water Div. V. Craft*, 436 U.S. 1 (1978); *U.S. v. Hall*, 521 F.2d 406 (9th Cir. 06/18/1975); *Goss v. Lopez*, 419 U.S. 565 (1975).

If this "ensemble" is not complied with "within days if not hours" the defendant is entitled to the permanent return of his property – and to suppress it as evidence. See also Motion for Return of Property in the Alaska Court of Appeals.

On page 16 of Cole's Superior Court brief Cole argues that not appearing in McGrath in response to the subpoena and airline ticket did not evidence a breach of duty or loyalty, because he was no longer David's attorney he "owed no duty of loyalty or advocacy." It is another stunning revelation by Cole that he asks the court to agree David's constitutional right to *compel witnesses in his favor* does not apply to him. Ex. 26 & 27.

On page 18 of Cole's Superior Court brief Cole states the issue between the parties was "whether Haeg was required to pay the fees he contracted with Cole to pay." This is false. There was no agreement anywhere, either in writing or verbally, that asked David to pay Cole *more* money. The only issue was whether *Cole* owed David the money David already paid to, and cost by, Cole – not the other way around. See Petition

Fee Arbitration that was filed by David. In his brief Cole admits, in fact, he waived the money, "The fact Cole waived or did not ask for the amount that Haeg refused to pay does not evidence corruption or fraud." What else can it be when the fee arbitration panel awards money David never had his constitutional right to notice and/or opportunity to contest – something not even a court can to do? See overwhelming caselaw for the constitutional requirement of notice and opportunity to contest before a valid judgment can be made.

Cole then makes another misleading claim to the court, "Whether Cole seeks to have this decision confirmed, ***which he does not intend to do***, was a decision that was not before the panel." Cole failed to inform the court *AS 09.43.120(e)* states that if an application to vacate is denied the court *shall* confirm the award.

Judge Brown failed to address or consider any of the above and specifically pointed out perjury and misrepresentations by Cole to him. It was as if it never happened or didn't matter – as if Judge Brown made his decision to side entirely with Cole before he ever received the evidence.

**K. The decision and award are in violation of both the United States and Alaska State constitutions.**

The decision and award violate the constitutional rights of due process and equal protection of the law because the decision and award were obtained and maintained, as specifically shown above, through the perjury, fraud, and corruption of Cole, Fitzgerald, arbitrators, and Judge Brown. In addition, the perjury, fraud, and corruption was to conceal the violation and deprivation of the following constitutional rights:

**Amendment IV**- "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation...*"

**Amendment V** – "*No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*;"

**Amendment VI** – "*In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.*"

**Amendment XIV - Section 1**. "*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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."*

## CONCLUSION

David filed the Fee Arbitration Petition so he could obtain the return of the paid to, and wasted by, Cole's representation that was in complete violation of nearly every Rule of Professional Conduct, nearly every constitutional right, and many criminal laws. Cole himself states on tape the reason for these violations and crimes – he was actively and actually representing his own conflicting interest of protecting his deal making ability with the prosecution instead of advocating for David. To avoid an adverse decision because of the overwhelming evidence against him Cole and his one witness, attorney Fitzgerald, committed fraud by perjuring and misrepresenting themselves to the arbitrators numerous times – instances of which were specifically pointed out in both of David's briefs.

Cole's fellow attorney arbitrators conducted the hearing to affirmatively prejudice

David, instances of which are specifically pointed out in David's briefs. The subsequent decision and award was chilling in the complete lack of evidence to support it, the mountain of evidence against it, and its conspicuous refusal to address the issues presented – instances of which are specifically documented in David's briefs. Also chilling was the affirmative use of proven falsehoods as justification for the decision and award – instances of which are specifically documented in David's briefs. The decision by the Superior Court is also conspicuous in its lack of addressing the issues of substance.

Because of the gross and fundamental breakdown in justice caused by Cole's and the arbitrators affirmative wrong doing, David respectfully asks this court to carefully read all the secret recordings made while Cole was still David's attorney, carefully compare these with all the transcripts of the fee arbitration proceedings, to vacate the decision and award, recommend Cole to disciple authorities to answer for his crimes, and grant the specific relief at the end of David's opening brief in Superior Court.

## FINAL THOUGHTS BY DAVID HAEG

I had an irrefutable and constitutional right to have my attorney tell me of my rights so I could choose the path I wished to follow by using the rights I wished to exercise. I was the one with the constitutional right to decide how I would protect my myself, my wife, our two beautiful daughters, and our livelihood. The U.S. Supreme Court in *Jones v. Barnes*, 463 U.S. 745, 751 (1983) & *Brookhart v. Janis*, 384 U.S. 1, 3 (1966) ruled it is the defendant, not the attorney, who is captain of the ship:

> "Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken is correct; rather, the question is whether [the defendant] approved the course."… "The defendant, and not his lawyer or

> the State, will bear the personal consequences of a conviction… And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for individual which is the lifeblood of the law.'" (Quoting *People v. Malkin*, 250 N. Y. I85, 350-51 (1970) Brennan, J. concurring).

The many specific constitutional rights that would allow me to do so were knowingly, intentionally, and systematically stripped away from me by Cole's incomprehensible policy of not telling me about my rights, lying to me about my rights, and never opposing the State, even when they committed felonies to prosecute me.

Look again at the size and enormity of the fundamental breakdown of justice in my case: (1) the State used perjury on all the search warrant affidavits to not only illegally seize the property my wife and I used as the primary means to provide a livelihood but also to charge guiding crimes so they could illegally frame me for a crime that would take away the hunting guide business we had put our entire life's worth into; (2) the State illegally subjected my wife and I to summary judgment when they failed to provide the procedural due process of prompt notice and hearing to contest the above perjury or even notice we could bond after they deprived us of our property that we used as the primary means of providing a livelihood; (3) when I hire Brent Cole, he not only tell us there is nothing we can do about all this but that we should give up a years guiding and a complete and honest interview with the prosecution for a plea agreement that included confessing to guiding crimes – and never tells me or finds out the law governing the Wolf Control Program specifically precludes charging someone for game, guiding or hunting crimes. See:

> *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991). Government's collaboration with defendant's attorney during investigation

> and prosecution of drug case violated defendant's Fifth and Sixth Amendment rights and required dismissal of the indictment. Counsel advised him to provide some incriminating information as a showing of good faith when the government had not even been aware of the information. [There's more to the horror story, but you get the picture]. The court held that the government's conduct created a conflict of interest between defendant and counsel and the government took advantage of it without alerting the defendant, the court, or even the "oblivious" counsel to the conflicts. "While the government may have no obligation to caution defense counsel against straying from the ethical path, it is not entitled to take advantage of conflicts of interest of which the defendant and the court are unaware." *Id.* at 1519. Moreover, the government here assisted in efforts to hide the conflicts from defendant. "In light of the astonishing facts of this case, it is beyond question that [counsel's] representation of [defendant] was rendered completely ineffectual and that the government was a knowing participant in the circumstances that made the representation ineffectual." *Id.* at 1520;

(4) When the State breaks the plea agreement after the year of guiding given up for the agreement is past, Brent Cole says, in front of numerous witnesses, the only thing we can do is "call Leaders boss" See:

> *State v. Scott*, 602 N.W.2d 296 (Wis. Ct. App. 1999): Counsel ineffective for failing to move to compel the state to comply with pretrial agreement and failing to advise the defendant of this option. See also *Smith v. State*, supra.

(5) When the State uses my interview as the only probable cause for most the charges Brent Cole doesn't do a thing – even though the use of my statement for charges never agreed to is in violation of the plea agreement, *Evidence Rule 410*, and the constitutional right against self-incrimination; (6) when I subpoena Brent Cole to my sentencing to testify in person to 56 typed questions about his representation of me and all I had done for a broken plea agreement, he fails to show up and testify; (7) nobody tells the judge about all I had done in cooperation with the State for the plea agreement – as I had specifically demanded, including that my wife and I had given up a year of

guiding and had given them a 5 hour interview; (8) the judge sentences me to a 5 year revocation of my guide license that was in addition to the year I had already given up – specifically utilizing the same perjury from the prosecution that was also used on the search warrant affidavits and during sworn testimony to my judge and jury; (9) when I bring fee arbitration against Brent Cole both he and Kevin Fitzgerald lie under oath about nearly all this; (10) and when I appeal, the courts do nothing to rectify or even acknowledge the injustice.

Cole testifies I never even got credit for the year of guiding Jackie and I gave up – as "agreed to" with the State. Tr. 251, 254. How can this possibly happen when I demanded Robinson subpoena Cole to testify in person about the year and cooperation we gave up for the agreement, paid to have the subpoena successfully delivered, paid for witness fees, paid for an airline ticket, and paid for a hotel room? Tr. 76, 111, 118-19, 149 & Ex. 37. Why didn't Cole show up to testify about all we had done for the State when it meant so much to my family and I? Why didn't Robinson tell the court? Cole testifies that when a guide is out of business for 5 years it is almost impossible to come back. Tr. 239-40. How more important could his testimony have been to the future of my family when everything we have is in our guide business – especially when I was sentenced to five (5) *more* years of not guiding in addition to the year already given up? Tr. 251.

What is most disturbing about all this is that both Cole and Fitzgerald admit they could not oppose the State – that the State would hold this against them – admitting the adversarial system the United States judicial system uses to produce just results is not

working here in Alaska. Cole states when David asked how to enforce the plea agreement, “I can't piss Leaders off because I have to work with him in the future after you're done” Ex. 17 and Tr. 29, 33, 95, 380. Fitzgerald goes into great detail about how an attorney would never try to enforce any agreement he had made with the State – no matter how much it prejudiced the defendant – because that would make “an enemy out of frankly the last person you want to make an enemy of.” Tr. 197–214.

When you read how the U.S. justice system and U.S. Supreme Court depend entirely on the adversarial system to produce just results you understand exactly how and why my family and I received such an unjust result. Brent Cole never stood up to advocate for us or even to oppose misconduct and crimes by the State to advocate against me because he was afraid to “make an enemy” out of the State – and not be able to “deal” with them in the future. It is more than chilling that the State punishes attorneys for assisting and advocating for their own client’s constitutional rights – thus forcing upon attorneys an interest in direct conflict with that of the clients. This effectively destroys the adversarial system – the State can proceed unopposed – exactly what happened to me. Read carefully the following:

> *U.S. v. Cronic*, 466 U.S. 648 (1984): The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "*is best discovered by powerful statements on both sides of the question.*" This dictum describes the unique strength of our system of criminal justice. *"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."* *Herring v. New York*, 422 U.S. 853, 862 (1975).Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the

prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses [466 U.S. 648, 657] its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: *"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), cert. denied sub nom. *Sielaff v. Williams*, 423 U.S. 876 (1975). No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "`would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing *Smith v. Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

"More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process that has been constitutionalized in the Sixth and Fourteenth Amendments." 422 U.S., at 857. See also *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (BRENNAN, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, *an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation").*

Strickland v. Washington, 466 U.S. 668 (1984) *Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense*. See, e. g., *Geders v. United States*, 425 U.S. 80 (1976) Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." … Counsel's function is to assist the defendant, and hence *counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.* From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties *to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.* In short, *inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions,* just as it may be critical to

a proper assessment of counsel's other litigation decisions. See *United States v. Decoster*, supra, at 372-373, 624 F.2d.

Risher v. State 523 P.2d 421 Alaska (1974): 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 consideration.*

Cuyler v. Sullivan, 446 U.S. 335 (1980): [E]xperience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. In Glasser v. United States, for example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and *failed to resist the presentation of arguably inadmissible evidence*. Id., at 72-75. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." Id., at 75. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76. Thus, *a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.* Because it is the simultaneous representation of conflicting interests against which the Sixth Amendment protects a defendant, he need go no further than to show the existence of an actual conflict. *An actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney.* Moreover, a showing that an actual conflict adversely affected counsel's performance is not only unnecessary, it is often an impossible task.

As the Court emphasized in Holloway:*"[I]n a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing* . . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. *And to assess the impact of a conflict of interests on the attorney's options, tactics,*

*and decisions in plea negotiations would be virtually impossible."* 435 U.S., at 490-491 (emphasis in original).

Cole matter-of–factly admitted representing *actual* interests in direct conflict with mine – *his interest* in not making an "enemy" out of the State and not jeopardizing his ability to "deal" with the State. Ex. 17 & 18. Fitzgerald testified in detail that advocating for a client by seeking enforcement of constitutional rights would make an "enemy" of the State – an *actual* conflict of interest. Tr. 200-201. Both admitted the State and even the Governor himself was "going to bend over backward" for "political reasons" to "make an example " of me. Tr. 99, 179, 192, 237 & 297. That Cole was in a "struggle to serve two masters" cannot seriously be doubted. As the U.S. Supreme Court in Holloway stated, "And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in *plea negotiations* would be virtually impossible." Because of this threat to Cole from the State it really is not surprising he failed to tell me, and lied to me to hide, the ways I could advocate for myself or oppose the State by filing motions to suppress, motions to return my property or even to bond it out, motions to enforce a plea agreement, motions to enforce constitutional rights against self-incrimination, due process, equal protection under law, and *Evidence Rule 410*, and motions of vindictive/malicious/perjurous prosecution. It is no surprise Cole never showed up in response to a subpoena and airline ticket to testify about all I had done to cooperate with the State. All these are specific examples of how Cole was *actually* influenced by his interests that were in direct conflict with mine. Any and/or all of this would mean "advocating" for me - informing the court of "powerful statements" in my defense -

bringing the State's wrath down on *him* for thwarting their admitted intent to "make an example" of me. See:

> *State v. Sexton*, 709 A.2d 288 (N.J. Super. CT. App. Div. 1998): "Court found both prosecutorial misconduct and ineffective assistance which created the 'real potential for an unjust result'."

Not to put too fine a point on it but I will have justice. At any and all cost. If I have to go before the United States Supreme Court and petition them for justice on bended knee in person, as of old, I shall do so. I will not be alone. No State, attorney, arbitrator, or judge is going to take away the life my wife and I built for our daughters with blood, sweat, and tears by sabotaging nearly every constitutional right we possess.

The subsequent conspiracy to cover this up by Fitzgerald, Robinson, and a host of others has aggravated this fundamental breakdown in justice. Anyone who can justify and cover up the sellout of a United States citizen's constitutional rights, paid for with untold lives, is far more misguided then Alaska's legislators thinking it was all right to sell out the public's interest. It was probably the same attitude that caused both breakdowns – that the corruption had become so high-level, widespread, and protected you might as well take advantage of it or at least bow to it since it was obvious one will ever get caught.

I have for quite a while thought if I could just get the enormity and extent of what happened to me and my family in front of a jury they would understand and take action when I can't seem to make any panel or judge understand or take action – no matter how hard I try or how much proof I present. I think it likely the problem I am having is entirely a result of corruption – something juries seem be very interested in at present. In irrefutable evidence of the corruption, I predicted, on the last 3 pages of exhibit 30, in a

*taped* conversation made on 5/19/06 or 3 months *before* a planeload of FBI agents flew up, that the corruption was so bad that the federal government would have to physically send troops from the lower 48 to address it.

The solution presented itself during the last face-to-face meeting with the Department of Justice, at which former Alaska State Troopers, retired United States Airforce Captains, and practicing 30-year Alaskan attorneys all testified about the depth and breadth of the corruption in my case. At the end, when the Department of Justice said they could straighten things out and asked for all past, present, and future documentation, I decided to research the laws they said they would utilize. *U.S. Code, Title 18, Sections 241 and 242* are simple, to the point, and tailored specifically to a criminal solution of my case.

These laws then referenced *U.S. Code, Title 42, Sections 1981, 1983, 1985, 1986, 1988, and 14141* – which supplement a criminal solution of my case with a civil action to award damages for deprivations by anyone under color of law, including judges, of any right, privilege, or immunity secured by the Constitution and laws. Damages for conspiracy to do so are also specifically authorized – including punitive damages. The evidence already in hand for such a case, presented to a jury as yet ignorant of how to assert their constitutional rights and as yet unaware of how easily they are manipulated out of them by Troopers, attorneys, arbitrators, and judges, is compelling to say the least. I, for one, am very interested to know the price such a jury will place upon their family's constitutional rights or even the single right to not have the government and/or the family's own attorney commit felonies against them with immunity.

I will continue to do my uneducated best to effectively present my case and my family's plight to exhaustion in Alaska's courts and to carefully document the process for the appeals beyond Alaska. I expect you will sanction me severely for the defects and lack of coherence in my presentation of my case to you – as all lower courts have. I will continue, as always, to honestly try to comply with the rules, yet still effectively present our case. The one thing I ask in return is that you carefully read the secret recordings of Brent Cole, carefully read the transcript of Zeller's sentencing hearing, carefully read the entire transcript of the fee arbitration proceedings, carefully read all briefs filed in Superior Court, and then, giving careful consideration to my stated desire to know and exercise my rights in spite of my ignorance of them when Brent Cole was representing me, give me and my family an honest and detailed account of why the current decision and award should not be vacated, why Brent Cole should not be required to pay us back for what we paid him, why Brent Cole should not pay for the damages he caused, why Brent Cole should not be recommended to discipline counsel to be disbarred from the practice of law forever, and why Brent Cole should not stand trial for crimes ranging from perjury to conspiracy to obstruction of justice.

This opening brief is supported by the accompanying affidavit.

RESPECTFULLY SUBMITTED on this _____ day of _____ 2007.

_____

David S. Haeg, Pro Se Appellant

**CERTIFICATE OF SERVICE**
I certify that on the ____ day of _____ 2007,
a copy of the forgoing document by ___ mail, ___ fax,
or___ hand-delivered, to the following parties:
Brent Cole & U.S. Department of Justice

By: _____