COPY

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID HEAG,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11349

Trial Court No. 3KN-10-01295 CI

APPEAL FROM THE SUPERIOR COURT
JUDICIAL DISTRICT AT KENAI
THE HONORABLE CARL BAUMAN, JUDGE

BRIEF OF APPELLEE

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

Mary A. Gilson (8611113)
Assistant Attorney General
Office of Special Prosecutions
and Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
907-269-6250

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AUTHORITIES RELIED UPON

Alaska Statute 12.72.010(a)(9) provides:

> (9) that the applicant was not afforded effective assistance of counsel at trial or on direct appeal.

Alaska Statute 12.72.020(a)(2) provides:

> (a) A claim may not be brought under AS 12.72.010 or the Alaska Rules of Criminal Procedure if
> (1) the claim is based on the admission or exclusion of evidence at trial or on the ground that the sentence is excessive;
> (2) the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction;

Alaska Statute 12.72.020(a)(2) provides:

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> (2) the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction;

Alaska Statute 22.20.020 provides:

> (a) A judicial officer may not act in a matter in which
> (1) the judicial officer is a party;
> (2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;
> (3) the judicial officer is a material witness;
> (4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;
> (5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;
> (6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;

(7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;
(8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;
(9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.
(b) A judicial officer shall disclose, on the record, a reason for disqualification specified in (a) of this section at the commencement of a matter in which the judicial officer participates. The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.
(c) If a judicial officer is disqualified on the officer's own motion or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge.

Alaska Rule of Criminal Procedure. 35.1(f)(3) provides:

(f) Pleadings and Judgment on Pleadings.

(1) The state shall file an answer or a motion within 45 days of service of an original, amended, or supplemental application filed by counsel or by an applicant who elects to proceed without counsel, or of a notice of intent to proceed on the original application under (e)(2)(A) of this rule. The applicant shall have 30 days to file an opposition, and the state shall have 15 days to file a reply. The motion, opposition, and reply may be supported by affidavit. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for

pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering a pro se application the court shall consider substance and disregard defects of form, but a pro se applicant will be held to the same burden of proof and persuasion as an applicant proceeding with counsel. If the application is not accompanied by the record of the proceedings challenged therein, the respondent may file with its answer the record or portions thereof that are material to the questions raised in the application.

Code of Judicial Conduct Canon 3(c)(1) provides:

C. Administrative Responsibilities

(1) A judge shall maintain proffesional competence in judicial administration, and should cooperate with other judges and court staff in the administration of court buisness. A judge shall dilligently discharge the judge's administrative responsibilities without bias or prejudice.*

STATEMENT OF ISSUES

A. State's Cross-Appeal Issue.

In his post-conviction relief application, Haeg claimed that there was either judicial bias, or an appearance of judicial bias, during his sentencing proceedings. Did Judge Bauman err when he vacated Haeg's sentence and granted him summary disposition on this claim, ruling that two acknowledged contacts between Judge Murphy and Trooper Gibbens – Trooper Gibbens retrieving a Diet Coke for Judge Murphy from an office in the building, and giving her a ride from court after the sentencing was completed – were sufficient to establish an appearance of judicial bias?

B. Haeg's Issues On Appeal.

Did the superior court err in denying Haeg's motion to disqualify Judge Bauman from Haeg's post-conviction relief case?

Haeg's post-conviction relief application raised numerous claims of ineffective assistance of counsel including: failure to raise an issue of judicial bias or the appearance of bias, failure to enforce an alleged plea agreement, failure to argue immunity, failure to argue an entrapment defense, failure to challenge the search warrants, raising an unsuccessful subject matter defense, failure to present a particular witness at sentencing, and ineffective assistance on appeal. Did the superior court err when it dismissed claims on the ground that Haeg had failed to present a prima facie case showing that he was entitled to relief?

STANDARDS OF REVIEW

This Court independently reviews whether AS 12.72.020(a)(2) bars Haeg's claims that there was either bias on the part of Judge Murphy, or an appearance of judicial bias, at his sentencing and trial, or any of his other claims that he could have raised on appeal. *See Turney v. State*, 936 P.2d 533, 538 (Alaska 1997).

When, like in Haeg's case, no motion is made in the trial court raising the issue of judicial bias or appearance of bias, the Alaska Supreme Court has indicated that the appellate court should resolve the issue under an abuse of discretion standard. *Greenway v. Heathcott*, 294 P.3d 1056, 1062-36 & n. 7 (Alaska 2013) (noting that it would be odd to apply the less-deferential *de novo* standard of review, rather than the abuse of discretion standard, if an appellant raised no claim of bias in the trial court). Under an abuse of discretion standard, the appellate court considers whether an appearance of bias arose in light of the objective facts and a judge will not be found to have abused her discretion in failing to sua sponte recuse herself unless "it is plain that a fair-minded person could not rationally come to that conclusion on the basis of the known facts." *See Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979) (discussing the abuse of discretion standard in the context of reviewing a trial court's denial of a recusal motion).

Judge Bauman's denial of Haeg's disqualification motion and his conclusion that he could be fair and impartial in Haeg's post-conviction relief case, and Judge Moran's determination that Judge Bauman could be fair and impartial, are accorded great deference; an appellate court will not reverse the judge's decision that he

can remain impartial in a matter unless it is plain that a fair-minded person could not rationally come to that conclusion on the basis of the known facts. *Phillips v State*, 271 P.3d 457, 464, 467 (Alaska App. 2012) (internal quotations and citations omitted).

The superior court's findings of fact are reviewed for clear error but its legal conclusions are reviewed independently. *Hensel v. State*, 604 P.2d 222, 235 n. 55 (Alaska 1979).

STATEMENT OF THE CASE

The State's cross-appeal challenges Judge Bauman's summary disposition in Haeg's favor of Haeg's claim of an appearance of judicial bias with regard to his sentencing. Judge Bauman ruled that two acknowledged contacts between the judge who presided over Haeg's trial and sentencing, Judge Margaret Murphy, and Trooper Brett Gibbens – who investigated Haeg's case and was a witness for the State at both Haeg's trial and the sentencing – were sufficient to establish an appearance of bias. [R. 2753-56, 2759].

The superior court should have summarily ruled in the State's favor not Haeg's. Haeg's claim was statutorily barred, and he did not establish a prima facie case of ineffective assistance of counsel with regard to his claim of judicial bias. Further, the two acknowledged contacts were insufficient to establish an appearance of judicial bias, and the additional alleged contacts were insufficient to establish a prima facie case of an appearance of judicial bias.

Haeg's brief includes conclusory allegations towards a number of individuals and organizations on a wide range of issues outside the scope of this proceeding. [*See* At. Br. 49-55] The State has responded to those issues within the scope of Haeg's challenge to the superior court's summary disposition of his claims for post-conviction relief.

Haeg's Underlying Offenses. Haeg was a licensed master big game guide operating in game management unit 19. *Haeg v. State*, No. A-9455/10015, 2008 WL

4181532 at *2 (Alaska App., September 10, 2008 (unpublished). In early March 2004 Haeg and his co-defendant Tony Zellers received permits allowing them to participate in a wolf-control program near McGrath. *Id.* The program applied only to wolves in unit 19D-East, which was located inside unit 19D. *Id.* Within unit 19D-East, participants in the program were allowed to kill wolves by shooting them from an airborne aircraft or by landing the aircraft, exiting it, and immediately shooting them. *Id.* Participants were required to separately identify and seal the hides of all wolves taken under the program and to report the locations where the wolves were killed.[1] *Id.* Alaska State Trooper Brett Gibbens, among others, was notified whenever wolves were taken under the program and one of his duties was to verify where the wolves were killed. *Id.* Shortly after Haeg and Zellers received their permit, Gibbens was notified that they had reported taking three gray wolves in the area of Lone Mountain near the Big River. *Id.* This kill site was within unit 19D-East, but Gibbens suspected the information was inaccurate. *Id.*

Gibbens inspected the reported kill site and found wolf tracks but no kill site. *Haeg*, 2008 WL 4181532 at *2. Gibbens recalled that the day of the reported wolf kills he had see Haeg's distinctive airplane flying outside of and away from unit 19D-East. *Id.* Ten days after Gibbens discovered that there was no kill site near the location Haeg and Zellers had reported, he met with the men when they were in McGrath to seal the three wolf hides. *Id.* Gibbens noticed that Haeg's plane's skis and over-sized tail

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[1] Sealing is a process in which the hide is examined, recorded, and a tag or seal is affixed.

wheel would leave a distinctive track when it landed in snow. *Id.* Gibbens and Zellers discussed the weapons and shotgun ammunition Zellers was using to shoot the wolves, a relatively new variety of buckshot. *Id.* During this meeting Haeg admitted he knew the boundaries of the area he was allowed to take wolves under the predator control program. *Id.*

Several days after he met with Haeg and Zellers, while flying his own airplane up the Swift River, Gibbens discovered four sites where it appeared wolves had been killed from the air. *Haeg*, 2008 WL 4181532 at *3. All of these kill sites were well outside unit 19D-East. *Id.* It appeared that an airplane had landed near the kill sites and that someone had gotten out of the airplane, approached the wolf carcasses, and hauled them back to the plane. *Id.* Gibbens recognized that the airplane tracks were similar to Haeg's airplanes' distinctive ski and tail wheel arrangement. *Id.* Upon more thorough investigation of the kill sites, Gibbens and other troopers found shotgun pellets consistent with the type of buckshot Haeg and Zellers were using. They also found a spent .233 cartridge stamped with ".223 Rem-Wolf." *Id.*

Gibbens obtained a search warrant for Haeg's airplane and for his lodge at Trophy Lake. *Haeg*, 2008 WL 4181532 at *3. At the lodge, the troopers found six wolf carcasses, which they seized. *Id.* There was evidence that the wolves had recently been skinned; the airplane tracks leading up to the front of the lodge matched the tracks from the kill sites; there were rifle magazines loaded with ammunition stamped with ".223

Rem-Wolf." *Id.* Gibbens later performed a necropsy on each carcass which indicated all six wolves had been shot from the air. *Id.*

Based on the evidence found at the lodge additional search warrants were issued, including one for Haeg's residence. *Haeg*, 2008 WL 4181532 at *3. While searching Haeg's residence, the troopers seized Haeg's airplane along with two guns and ammunition. *Id.* Evidence uncovered during the search of Haeg's residence and lodge indicated that Haeg owned the traps and snares found at a site on Swift River Island. *Id.* at *4. When Gibbens later investigated this site after the snaring and trapping seasons had ended, he saw two wolverines caught in snares, the remains of two wolves in the snares, and that the traps were set and catching game. *Id.* at *3-4.

After searching Haeg's residence, the troopers executed another search warrant and seized nine wolf hides from a business in Anchorage. *Haeg*, 2008 WL 4181532 at *4. Eight hides showed that the wolves had been shot with a shotgun, and most had damage indicating they had been shot from the air. *Id.* Trooper Gibbens concluded that the sealing certificates had been falsified, that all nine wolves had been shot from an airplane outside of unit 19D-East, and that Haeg and Zellers were in unlawful possession of the hides. *Id.*

Sometime after Gibbens completed this investigation, the State entered separate plea negotiations with Haeg and Zellers. *Haeg*, 2008 WL 4181532 *4. The plea negotiations with Haeg and his attorney at the time, Brent Cole, broke down, but the State reached an agreement with Zellers. *Id.* Among other things, Zellers agreed to plead to

two consolidated counts of violating AS 8.54.720(a)(8)(A) (unlawful acts by a guide), and to testify against Haeg. *Id.* Haeg was charged with five counts of unlawful acts by a guide: hunting wolves same day airborne; two counts of unlawful possession of game, and one count each of: unsworn falsification; trapping wolverine in closed season, snaring wolves in a closed season, and failure to salvage game. *See id.* at *5.

Trial Proceedings. Haeg's jury trial was held in McGrath. McGrath is a community of 358 people with no public transportation. *See http://www.city-data.come/city/McGrath-Alaska* (accessed 10/10/13). [R. 2751] The office shared by the VPSO and the troopers is in the same building as the court room. [Rob. Depo. 78] Due to the limited available facilities, Judge Murphy was storing some Diet Coke in the VSPO/trooper office. [R. 2519, 2523]

Haeg, now represented by attorney Arthur Robinson, testified in his own defense. He corroborated the testimony of Trooper Gibbens and Zellers; he admitted that he and Zellers had taken nine wolves; Haeg flew the plane and Zellers shot the wolves from the plane. [Trial Tr. 759-60, 846, 770, 857, 772, 865] Haeg admitted that he knew (or in one instance should have known) that he had taken the nine wolves outside of unit 19D-East, the predator control area authorized under his permit. [Trial Tr. 787-88, 826, 890] *Haeg*, 2008 WL 4181532 at *4. He admitted he was guilty of same-day airborne shooting of wolves. [Trial Tr. 827, 890-91] He also admitted he had provided false GPS coordinates on the sealing certificates for the first three wolves he had taken – to make it seem like the kills were in unit 19D-East. [Trial Tr. 763, 836 851] In addition, he

admitted he had violated the conditions of his predator control permit, but his conduct was consistent with the intent of predator control. [Trial Tr. 787-88] He further admitted he had unlawfully possessed the nine wolves, but he claimed the wolf kills were justified because he was trying to "bring back a healthy moose population." [Trial Tr. 787, 858] He denied responsibility for snaring wolves out of season, but admitted he was responsible for the leg traps that were still catching game after the leg trap season had closed. *Haeg*, 2008 WL 4181532 at *4-5.

Haeg was convicted of five counts of unlawful acts by a guide: hunting wolves same day airborne[2]; two counts of unlawful possession of game[3]; one count of unsworn falsification[4]; and one count of trapping wolverine in a closed season.[5] *Haeg*, 2008 WL 4181532 at *1.

Sentencing. For each of the five counts of same-day airborne hunting, the court imposed 5 days to serve with 55 days suspended plus fines and surcharges. [R. 2556-59] Haeg's license was revoked for five years, and seven years' probation was imposed. [*See id.*] Haeg was ordered to forfeit the airplane he used to commit the offenses, the guns, and the animal hides. *Haeg*, 2008 WL4181532 at *14.

Direct Appeal. This Court affirmed Haeg's convictions in September 2008. *Haeg*, 2008 WL 4181532 at *1. This Court however concluded that the district court

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2 AS 8.54.720(a)(15) & 5 AAC 92.085(8).
3 5 AAC 92.140(a).
4 AS 11.56.210(a)(2).
5 5 AAC 84.270(14).

meant to suspend rather than revoke Haeg's guide license, and directed the district court to modify Haeg's judgment to reflect that his guide license was suspended for five years. *Id.* This Court also addressed Haeg's appeal of the denial of his pro se post-conviction motion for return of the property the State seized during its criminal investigation and to suppress its use as evidence at his trial. *Id.* at *12-*13. This Court held that the property seizure had not violated Haeg's due process rights, and that he was not entitled to suppression of the evidence. *Id.* at *13.

Post-Conviction Relief Proceedings. Haeg filed a pro-se application for post-conviction relief on November 30, 2009. [R. 2 *ff.*, 2763 *ff.*] Haeg's post-conviction relief claims alleged his counsel were ineffective in numerous ways including: failing to raise an entrapment defense, failure to challenge the search warrants, failure to challenge the seizure of his property, failure to argue that Haeg had immunity from prosecution, and to challenge the State's alleged use of Haeg's statements at trial, failure to enforce an alleged plea agreement, presentation of an unsuccessful defense, failure to present a certain witness at sentencing, failure to challenge the apparent bias of Judge Murphy at trial and sentencing, and ineffective assistance of appellate counsel. [*See* R. 2 *ff.*].

Haeg moved to have Judge Murphy disqualified from presiding over his post-conviction relief application. [R. 523 *ff.*, 1714-46] The judge denied Haeg's request; the matter was referred to Superior Court Judge Stephanie Joannides for review and she granted Haeg's disqualification motion. [R. 670-76, 1406 *ff.*] Haeg's case was

reassigned to Judge Carl Bauman. [*See* R. 2725] Haeg ultimately decided to represent himself in his post-conviction relief action. [*See* Tr. 3-147, 318-41, R. 2726]

Judge Bauman dismissed Haeg's claim that attorney Mark Osterman was ineffective in Haeg's appeal. [R. 2226] And he dismissed Haeg's claims that his conviction and sentence violated the federal and Alaska constitutions, finding that these claims were actually claims that Haeg's counsel was ineffective. [R. 2224, 2227] Judge Bauman allowed Haeg to supplement his claims that his attorneys Cole and Robinson were ineffective, and his claim that his sentence was improper by virtue of improper contact between Judge Murphy and Trooper Gibbens. [R. 2227] Haeg then unsuccessfully moved to disqualify Judge Bauman. [R. 1995-99, 2179 *ff.*, 2050-57]

Eventually, Haeg supplemented his claims, [*See* R. 1898-1982, 2531-2726, 2726] With one exception, Judge Bauman granted summary disposition in favor of the State, dismissing Haeg's claims of ineffective assistance of counsel and of judicial bias or the appearance of judicial bias during his trial, for failure to make a prima facie showing that he was entitled to relief. [R. 2729-59] Regarding Haeg's claim of bias, or the appearance of bias during his sentencing, the court granted Haeg summary disposition and determined that Haeg's sentence should vacated due to an appearance of judicial impropriety arising out of two acknowledged contacts between Judge Murphy and Trooper Gibbens. [R. 2753-56, 2759] Haeg's appeal and the State's cross-appeal followed.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN SUMMARILY VACATING HAEG'S SENTENCE DUE TO THE APPEARANCE OF JUDICIAL BIAS AT SENTENCING.

The superior court erred in summarily determining that there was an appearance of judicial bias at sentencing, based on two acknowledged contacts between Judge Murphy and Trooper Gibbens, for four reasons: (1) a stand-alone claim is statutorily barred because it could have been raised on appeal, (2) there is no prima facie showing that Haeg's counsel was ineffective in failing to raise this issue, (3) the two acknowledged contacts are insufficient to show bias, and (4) the acknowledged contacts and the additional alleged contacts are not a prima facie showing of appearance of bias. The State, not Haeg, was entitled to summary adjudication.

A. Facts.

In his supplemental post-conviction relief application Haeg claimed that Judge Murphy was biased because she had improper contacts with Trooper Gibbens by riding with him to and from the court proceedings during Haeg's trial and sentencing. [R. 32-33] Haeg then moved to disqualify Judge Murphy from presiding over his post-conviction relief action alleging that she was biased against him based on four grounds: (1) she had presided over his criminal trial, (2) during a break in his sentencing hearing, she had (without any objection from Haeg's attorney) asked Trooper Gibbens to take her to the store, (3) a letter Haeg wrote having to do with his entrapment defense was missing

from his court file, and (4) Haeg had filed a complaint against her with the Alaska Commission on Judicial Conduct (ACJC) [R. 523-24, 532-48, 717-18, 721-26, 2511]

During Superior Court Judge Stephanie Joannides' review of the matter, (*see* AS 22.20.020(c) (providing that when a judge denies disqualification, the issue shall be reviewed by another judge of the next higher level of court)), Haeg supplemented his request for disqualification with his own affidavit and affidavits from several other individuals asserting that Trooper Gibbens had given Judge Murphy numerous rides to and from court during Haeg's trial and sentencing in 2005. [R. 523, 573-85]

Judge Joannides determined that it did not appear that the letter Haeg claimed was missing from the file was ever received by the court, and she found that no impropriety could be attributed to Judge Murphy. [R. 1066-67, 3046-47][6] She also explained that there was no impropriety in Judge Murphy having presided over Haeg's criminal trial. [R. 3047-48] Judge Joannides did not resolve Haeg's concerns about the ACJC investigation. [R. 1409] In supplemental orders, she simply forwarded to the

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[6] The 17-page letter, "David Haeg's Wolf Statement," is in the record at [R. 475-91 and 532-48] Haeg asserts in his brief that his letter was removed from the trial court record. [At. Br. 4, 16, 40] But he fails to show Judge Joannides' findings were clearly erroneous and this Court should disregard his assertions. *Hensel*, 604 P.2d at 235 n. 55 (holding the trial court's findings of fact will not be overturned unless they are clearly erroneous).

ACJC the paperwork Haeg had filed. [R. 791-96, 1270-1323 (*Orders*, August 27, 2010, March 25, 2011, April 8, 2011)][7]

Judge Joannides determined that Judge Murphy's request for a ride from Trooper Gibbens during the sentencing hearing, to which Haeg's attorney assented, did not itself amount to an appearance of bias.[8] [R. 1409] She stated that she was making no

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[7] In January 2007, the ACJC dismissed Haeg's complaint against Judge Murphy. [*See* R. 2187] In his brief Haeg makes conclusory allegations that the ACJC investigator falsified her investigation. [At. Br 43, 49] He apparently filed a complaint against the investigator with the Alaska Bar Association (ABA). [*See* R. 2207] Haeg fails to provide any authority for the proposition that either the ACJC investigation or his complaint to the ABA are issues within the scope of this proceeding. Judge Bauman correctly ruled that these proceedings are too attenuated and too long after the fact of Haeg's 2005 conviction and sentence. [R. 2207]

[8] The transcript of the September 29, 2005 sentencing hearing reflects that the following colloquy occurred:

Robinson: Before we get going again, I think we're going to need about a 10 - minute break.

Court: At least, I have to get to the store because I need to get some
Robinson: So why don't we take long enough to go to the store and...
Court: get some Diet Coke. And I'm going to commandeer Trooper Gibbens and his vehicle to take me because I don't have any transportation.
Robinson: All Right.
Gibbens: Well, Yeah.
Robinson: You've been commandeered.
Leaders: As long as there's no issue of...
Robinson: Oh, no, no, I don't have any problem.
Court: Yeah, I'm just telling you that I – I can tell you I'm not going to talk about the case.
Robinson: You've been commandeered.
Court: He's just going to drive me over there to get some Diet Coke and we'll be back.
Robinson: All right.

[R. 2511]

determination as to whether Judge Murphy's contacts with Trooper Gibbens "were inappropriate and/or occurred during the trial as well as sentencing" as these issues were "best left for review within the PCR proceedings[.]" [R. 1409] But she granted Haeg's motion to disqualify Judge Murphy from his post-conviction relief action "due to concerns over the appearance of impropriety." [R. 1410] She based her ruling on her conclusion that the affidavits Haeg submitted "raised questions [of fact]" over the extent of Judge Murphy's contact with Trooper Gibbens and therefore raised "a sufficient appearance of impropriety" with respect to Judge Murphy presiding over the post-conviction relief proceeding, a proceeding that might have to resolve those facts. [*See* R. 1409] She issued a supplemental order two days later reiterating that her order did not resolve any allegations of impropriety.[9] [R. 791-92]

After Haeg's post-conviction relief case was reassigned to Judge Carl Bauman, he gave Haeg an opportunity to present additional information on his claim of improper contact between Judge Murphy and Trooper Gibbens; Haeg resubmitted the same affidavits he had previously filed. [R. 2531 *ff.*] In his affidavit Haeg stated that during his trial and sentencing he saw Judge Murphy arrive at court every day with

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[9] Judge Joannides' ruling on Haeg's disqualification motion – that there was an appearance of bias sufficient to disqualify Judge Murphy from Haeg's post-conviction relief action – is not determinative of whether Haeg's sentence should be vacated due to an appearance of bias. Judge Joannides did not address any post-conviction relief procedure, nor evaluate Haeg's sentencing proceedings. Haeg incorrectly states in his brief that Judge Joannides ordered that an evidentiary hearing must be held. [At. Br. 41-42]

Trooper Gibbens in a white pick-up truck, and leave with the trooper in the truck during breaks and at the end of the day. [R. 575] Haeg's wife Jackie stated in her affidavit that she saw this same contract during Haeg's trial. [R. 578] Haeg also submitted affidavits from several other individuals: Zellers stated he had seen Judge Murphy being "shuttled" in by Trooper Gibbens during Haeg's sentencing and on the day that he (Zellers) testified at Haeg's trial; Tom Stepnosky, Wendell Jones, and Drew Hilterbrand all stated that they had attended Haeg's sentencing and had personally seen Judge Murphy arrive at court in a white pick-up truck driven by Trooper Gibbens, leave and return with Trooper Gibbens in the same truck during breaks, and then leave with him after sentencing. [R. 494-95, 501-02, 580, 582-85] In his brief Haeg asserts that Judge Murphy ate meals with Trooper Gibbens, but the record contains no affidavits stating that occurred. [At. Br. 36, 45]

In response to Haeg's pleading, the State submitted the affidavits of both Trooper Gibbens and Judge Murphy. [R. 2316-18, 2518-23] Judge Murphy acknowledged two incidents of contact with Trooper Gibbens: (1) she rode with him from the court house *after* Haeg's sentencing, and (2) he retrieved Diet Coke for her from where she had stored it with one of the Village Safety Police Officers (VSPO). [R. 2522-23] Regarding the second contact, the judge explained that, as indicated on the sentencing hearing transcript, she had asked Trooper Gibbens for a ride to the store during a break, but they ended up not leaving the building. [R. 2522-23] Trooper Gibbens could not remember whether he had given Judge Murphy a ride, but stated it was very possible he had done so because he frequently gave rides to whoever needed them.

[R. 2519] He remembered retrieving some Diet Coke for the judge at some point from where she had stored it in the office the troopers shared with the VSPO. [R. 2519] Both Judge Murphy and Trooper Gibbens stated they never ate meals together nor discussed the case. [R. 2522-2519]

The superior court granted summary disposition in favor of Haeg's claim that there was an appearance of bias; Judge Bauman ruled that he did not need to resolve the dispute over the number of contacts between Judge Murphy and Trooper Gibbens because the two acknowledged contacts were sufficient to establish an appearance of impropriety and required Haeg's sentence to be vacated. [R. 2753-56] The court also held that Haeg had not made a prima facie showing that Judge Murphy and Trooper Gibbens discussed the case, exchanged notes during the proceedings, or that the judge had engaged in an independent investigation of the case. [R. 2750]

B. The State, Not Haeg, Was Entitled To Summary Disposition On Haeg's Claim Of Judicial Bias Or The Appearance Of Bias During Sentencing Because Haeg's Claim Was Statutorily Barred.

Alaska Statute 12.72.020(a)(2) precludes a post-conviction relief claim if the claim was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction. *Pomeroy v. State*, 258 P.3d 125, 131 (Alaska App. 2011) (noting that a defendant cannot use post-conviction relief as a method for raising claims that could have been raised on direct appeal); *see also Fajeriak v. State*, 520 P.2d 795, 803 (Alaska 1974) (holding that a post-conviction action claim of improper jury selection was barred when not raised at trial).

Here, Haeg's affidavit alleges that during his sentencing he saw Trooper Gibbens giving Judge Murphy rides to and from the court every day. [R. 575] Thus, Haeg was well aware of the contacts he alleges are improper at the time they occurred. Haeg's attorney could have moved to disqualify Judge Murphy and for a new sentencing hearing in front of a different judge, and/or the issue could have been pursued in Haeg's direct appeal. *See* AS 22.20.020(c) (setting out procedures for disqualification); *see also Oscolea v. State, No.7* A-11186, 2013 WL 2489585 at *3 (Alaska App., June 5, 2013) (unpublished) (noting that under AS 22.20.020 a party must file a motion in the trial court to disqualify the judge if the judge does not disqualify herself *sua sponte*, but holding, in a direct appeal, that the defendant could raise the issue of appearance of judicial bias for the first time because the procedure was not clear under the statute). Haeg's attorney did not move to disqualify Judge Murphy. In his *pro se* direct appeal Haeg did not bring to this Court's attention any claim of judicial bias, but he certainly could have done so. *See Haeg*, 2008 WL 4181532 at *10-11.

In *Grinols v. State*, this Court observed that under some circumstances strict application of *res judicata* in a post-conviction relief action, might perpetuate manifest injustice and thus violate due process – for example when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Grinols v. State*, 10 P.3d 600, 615 (Alaska App. 2000) *aff'd in part by Grinols v. State*, 74 P.3d 889 (Alaska 2003).

First, Haeg's case is not a case in which the conduct of which he complains probably resulted in the conviction of one who is actually innocent. Haeg testified at trial and admitted the conduct underlying his convictions. *See Haeg,* 2008 WL 4181532 at *4. Second, taking all Haeg's assertions of fact as true, the rides Trooper Gibbens allegedly gave Judge Murphy to and from the court proceedings do not amount to a situation perpetuating manifest injustice.

Alaska Statute 22.20.020, pertaining to disqualifying a judicial officer for cause, provides guidance as to what sort of situation might qualify as manifest injustice. Subsection (a) of the statute lists several circumstances which disqualify a judge from acting in a matter. Subsection (b) lists which of those circumstances can be waived by a party if no objection is raised. Three of the disqualifying circumstances listed in subsection (a) are *not* included in subsection (b)'s list of grounds that can be waived: (1) the judge is a party to the case, (2) the judge is a material witness, and (3) the judge or the judge's spouse or child has a direct financial interest in the matter. Arguably then, if one of these three circumstances occurred in a case, the defendant might not be barred from raising the issue of judicial bias for the first time in a post-conviction relief action. But Haeg's claim that Trooper Gibbens improperly gave rides to Judge Murphy does not remotely involve any of those grounds, and thus can be waived.

A claim of judicial bias is not one that can be raised at any time if the claim of bias stems from conduct known to the party when it occurred. In *Cook v. State*, 36 P.3d 710, 726 (Alaska App. 2001), Cook moved to disqualify the trial judge on the

ground that the judge's intervention during the defense cross-examination of the stalking victim demonstrated bias, or the reasonable appearance of bias. *Id.* at 726. The motion to disqualify was denied and on appeal Cook raised an additional claim that the judge had engaged in "a continuing course of conduct that demonstrated an apparent bias against Mr. Cook[.]" *Id.* This Court held the additional claim of judicial bias was not preserved. *Id.* Courts in several other states have also held a claim of judicial bias must be preserved. *Terry v. White*, 288 S.W. 3d 194, 199 (Ark. 2008) (holding that claims of judicial bias and appearance of bias are not preserved for direct appeal when the issue is not raised in the trial court); *Commonwealth v. Goodman*, 311 A.2d 652, 654 (Pa. 1973) (same); *see also Dematteo v. Dematteo*, 575 A.2d 243, 248 (Conn. App. Ct., 1990) (holding that the issue of judicial disqualification for impropriety is waived if not timely raised, and that the trial court did not err in denying the motion for recusal when the defendant filed the motion seven years after the actions claimed to be improper occurred). There is no basis to allow Haeg to raise a claim of judicial bias for the first time several years after the fact. The trial court should have granted summary disposition to the State.

C. Haeg Failed To Establish A Prima Facie Case That His Trial Attorney's Failure To Object To Judge Murphy's Contacts With Trooper Gibbens Was Ineffective Assistance Of Counsel.

Haeg claimed in his post-conviction relief application that his attorney was ineffective for failing to object to the contacts between Judge Murphy and Trooper Gibbens. [R. 33] This claim is not barred. *See* AS 12.72.010(9) (providing that a post-conviction relief claim may be brought on the ground that the defendant was not afforded

effective assistance of counsel). But Haeg's counsel was not ineffective, and thus his conduct does not preclude summary disposition for the State.

To show ineffective assistance of counsel, Haeg had to show, first, that his attorney's conduct fell below the minimal rang of competence required of a lawyer with "ordinary training and skill in the criminal law," and, second, that this lack of competency contributed to his conviction. *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974). In determining whether counsel provided ineffective assistance, courts "apply a strong presumption of competence. An integral component of the presumption of competence is the further presumption that trial counsel's actions were motivated by sound tactical considerations." *State v. Jones,* 759 P.2d 558, 559 (Alaska App. 1988). In order to overcome this presumption, Haeg must allege facts and present evidence ruling out the possibility of a tactical reason to explain his counsel's conduct. *Id.*; *see also Steffenson v. State*, 837 P.2d 1123, 1127 (Alaska App. 1992). Without evidence negating a tactical choice by counsel, the presumption of competence remains unrebutted and precludes a finding of ineffective assistance. *Jones*, 759 P.2d at 569. If the record discloses that the attorney did make a tactical choice, Haeg must show that the tactic was unreasonable; that is, one that no reasonably competent attorney would have adopted under the circumstances. *Id.* at 569-70. Further, conduct of counsel must have contributed to the defendant's eventual conviction. *Id.* at 573.

Because the State moved to dismiss Haeg's petition based on pleadings alone, the trial court was obliged to treat all of the well-pleaded assertions of fact in

Haeg's petition as true, and then decide whether these assertions of fact (if ultimately proved) would entitled Haeg to post-conviction relief – that is, whether Haeg had established a prima facie case for relief on his claims. *LaBrake v. State*, 152 P.3d 474, 480 & n.5 (Alaska App. 2007).

Here, Haeg's trial attorney, Robinson, was aware of two contacts between Judge Murphy and Trooper Gibbens -- he was present when Judge Murphy, on the record, asked Trooper Gibbens to give her a ride during a break in the sentencing hearing, and he also recalled seeing Trooper Gibbens give Judge Murphy a ride on one other occasion. [Rob. Depo. Tr. 78-80][10] Robinson explained he did not object to the rides because he did not think the judge would be influenced in the case. [Rob. Depo. Tr. 78] He explained that McGrath was a small town, that he knew the troopers, the magistrate, and the court personnel "hang out together," and that the trooper station was located in the courthouse. [Rob. Depo. Tr. 78] Robinson's failure to object to the rides was tactical, and Haeg fails to show that in the context of the small town of McGrath no reasonably competent attorney would have taken the same tact.

Further, in order to establish a prima facie case that Robinson was ineffective based on the additional alleged facts, Haeg must establish that he communicated his version of events to Robinson. *See Steffensen* 837 P.2d at 1126 (holding that the defendant failed to establish a prima facie case for post-conviction relief

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[10] Robinson's Deposition begins at [R. 3109]. Cole's Deposition begins on [R. 3191]

based on his claim that his attorney was ineffective in not filing a suppression motion when the defendant failed to state in his affidavit that he had told his attorney his version of events, or that they had no opportunity to discuss the issue); *see also Arnett v. State*, 938 P.2d 1079, 1082 (Alaska 1997) (holding post-conviction relief application properly dismissed when defendant claimed counsel was ineffective for failing to call a witness, but made no claim that he informed his counsel the witness might have relevant testimony, or advance facts indicating counsel should have learned on her own about the witness's potential usefulness).

The affidavits Haeg submitted allege many more contacts between Trooper Gibbens and Judge Murphy than the two of which Robinson was aware. But Haeg's affidavit does not allege that he talked to Robinson at the time about these alleged contacts between Judge Murphy and Trooper Gibbens. [R. 573-77] And the only evidence in the record that touches on the issue shows that Haeg did not do so until years later. During Robinson's September 9, 2011 deposition the State's attorney asked Robinson if he recalled incidents of Judge Murphy receiving a ride from Trooper Gibbens during the trial. [Rob. Depo. Tr. 79] Robinson said he recalled seeing Judge Murphy get in a car once with Trooper Gibbens but he did not remember when that was and he did not object to it. [Rob. Depo. Tr. 79-80] Later in the deposition Haeg asked Robinson if he remembered, "talking to me about you remembering Trooper [Gibbens] chauffeuring Judge Murphy during my trial." [Rob. Depo. Tr. 196] Robinson responded that he remembered one time seeing Judge Murphy in a car driving away with Trooper

Gibbens, but he did not recall when and that he did not know how the judge got back and forth to court. [Rob. Depo. Tr. 197] He then clarified that the conversation he had with Haeg about "chauffeuring," was not during the trial or sentencing, but "earlier this year [2011]." [Rob. Depo. at 199]

Haeg's failure to inform Robinson of the daily contacts he allegedly observed between Trooper Gibbens and Judge Murphy until years after they occurred is fatal to his claim that Robison was ineffective in not objecting to the contacts. Robinson cannot be ineffective regarding a matter of which he was not informed. *Steffensen*, 837 P.2d at 1126; *Arnett v. State*, 938 P.2d at 1082.

D. The Acknowledged Contacts Were Insufficient To Establish An Appearance Of Bias.

Even if Haeg's claims of judicial bias and the appearance of bias were not statutorily barred, Judge Bauman erred in summarily determining that the two contacts acknowledged by Judge Murphy were sufficient appearance of judicial bias to vacate Haeg's sentence. [R. 2725] Summary disposition on a claim in a post-conviction relief action is only appropriate when based on material undisputed facts a party is entitled to relief. Alaska R. Crim. P. 35.1(f)(3) (providing for post-conviction relief procedures).

Alaska Statute 22.20.020(a)(9) requires a judge to disqualify herself from participating "in a matter in which the judicial officer feels that for any reason a fair and impartial decision cannot be given." Under Canon 3(C)(1) of the Code of Judicial Conduct, a judge "should disqualify [her]self in a proceeding in which [her] impartiality

might reasonably be questioned." This Court has held that Alaska law mandates disqualification of a judge when circumstances give rise to a reasonable appearance of bias. *Phillips,* 271 P.3d at 466-67; *Perotti v. State*, 806 P.2d 325, 327 (Alaska App. 1991). Where the appearance of bias is involved, as opposed to actual bias, a greater showing is required to remove a judge from the case. *Amidon*, 604 P.2d at 577 (affirming a trial court's denial of a recusal motion).

Objectively viewed in context, the two acknowledged contacts between Judge Murphy and Trooper Gibbens did not amount to an appearance of impropriety. The first acknowledged contact is that Trooper Gibbens went to get Diet Coke for the judge from an office in the building during a break in Haeg's sentencing hearing. [R. 2519, 2523] The second acknowledged contact is that Judge Murphy got a ride from Trooper Gibbens after Haeg's sentencing hearing had ended. [R. 2522-23]

Trooper Gibben's retrieval of the beverage from the office was incidental. Judge Murphy did on the record during sentencing ask the Trooper for a ride to store, even though he did not give her a ride on that occasion. [R. 2511] But in a very small community with no public transportation this does not give rise to an appearance of bias. Haeg's attorney affirmatively assented to the conduct. [R. 2211] Judge Murphy assured everyone on the record that she and the trooper would not talk about the case. [R. 2211]

Nor does the fact Judge Murphy accepted a ride from Trooper Gibbens after Haeg's sentencing give rise to an appearance of bias. First, Haeg's proceedings had ended. Second, there was no public transportation, it was late at night, cold and snowing,

and the judge was going to have to walk past two open bars. [R.2522] The superior court was concerned because Judge Murphy had personal safety concerns and relied on Trooper Gibbens for protection. [R. 2756] But Judge Murphy's safety concerns had nothing to do with Haeg. [R.2522]

In ruling that these two contacts gave rise to an appearance, the superior court also observed that Judge Murphy misspoke at Haeg's sentencing when she stated that "the majority if not all the wolves were taken in 19-C" (an area in which Haeg guided moose hunts). [R. 2754] The wolves were actually taken in unit 19-D, outside of unit 19-D East, but not in unit 19-C. *See Haeg*, 2008 WL 4181532 at *10. Judge Murphy's confusion about where the wolves were taken may reflect poor memory, but is not an appearance of bias. This Court already concluded that Judge Murphy did not clearly err when she found that Haeg had killed wolves for his own commercial benefit because Haeg's own testimony at trial supported that finding. *Haeg*, 2008 WL 4181532 at *10. [*See also* Trial Tr. 794-95]

The superior court also noted that Trooper Gibbens' trial testimony contributed to the appearance of bias because it included considerable attention to the airplane Haeg had used in committing his offenses and Judge Murphy ultimately ordered Haeg to forfeit the plane to the State as part of his sentence. [*See* R. 2756] But Trooper Gibbens had to describe the plane's unique features in order to explain how he recognized that the airplane tracks near the wolf kill sites outside of unit 19D-East were from Haeg's plane. [*See* R. 2271-73, 2275, 2280-81, 2284, 2288]

Finally, the superior court thought that Judge Murphy's sentencing comments contributed to an appearance of bias because she neither made detailed findings on Haeg's credibility, nor addressed his arguments that he took the wolves to benefit the local subsistence moose hunter/users and to bolster the results of the wolf predator control program. [R. 2755-56] But Judge Murphy did adequately address these points. She did not question Haeg's credibility and thus there was no need for detailed findings. [*See* R. 2554 *ff.*] Haeg had confessed at trial to taking the wolves outside of the permitted area, and his asserted justification for doing so was not in dispute. Judge Murphy specifically recognized that Haeg was someone who "really doesn't believe they've done anything wrong." [R. 2555] She acknowledged Haeg's position that "mismanagement" justified his actions, and she believed he did not understand at the time of he committed the offenses how serious the consequences could be. [R. 2555-56]

Moreover, Judge Murphy's other remarks at sentencing dispel any suggestion of an appearance of bias. Judge Murphy flatly rejected the State's attempt to prove that Haeg had previously engaged in moose hunting out of season; the State called Trooper Gibbens as a witness in attempting to prove that incident. [R. 2522 *ff.*, 2554] And when Haeg's attorney challenged the trooper's testimony during cross-examination, and Trooper Gibbens asserted to the court, "[y]our Honor my credibility has been established," Judge Murphy immediately responded "I'm the one that determines credibility here today." [R. 2537] Further, when on cross-examination Haeg's attorney challenged Gibbens' assertions during direct testimony that simply suspending or

revoking Haeg's guiding license would not be effective to prohibit him from engaging in guiding activities, Judge Murphy listened for a time and then interjected that she would decide what the court could do in sentencing and that Trooper Gibbens' opinion "quite frankly on that issue does not matter to me." [R. 2539] Finally, Haeg's sentence for his offense, 60 days with five days suspended for each count of airborne hunting, was well within the statutory maximum of one year for each offense. [R. 2556] *See* AS 8.54.720(d).

Contrary to Judge Bauman's conclusion, the two acknowledged contacts do not create an appearance of judicial bias. Judge Murphy did not abuse her discretion in failing to sua sponte recuse herself from Haeg's sentencing. (In the context of reviewing a trial court's denial of a recusal motion, this court has applied a *de novo* standard of review to the question of whether the circumstances create a reasonable appearance of bias. *Phillips*, 271 P.3d at 468. That is, instead of adhering to the rule that there is no appearance of bias unless a fair-minded person could not rationally come to that conclusion; the court reviews the facts *de novo* and determines as a matter of law whether there is a reasonable appearance of judicial bias. *Id.* at 468. *De novo* review should not apply here because Haeg made no recusal motion in the trial court. Regardless, under either standard of review the acknowledged contacts do not amount to an appearance of judicial bias.)

E. The State Was Entitled To Summary Disposition Because The Additional Alleged Contacts Are Insufficient To Establish A Prima Facie Case Of Judicial Bias Or The Appearance of Bias.

As described, Haeg submitted affidavits alleging additional contacts between Trooper Gibbens and Judge Murphy – additional rides provided by Trooper Gibbens to Judge Murphy to and from court. [R. 573-77] Taking these assertions of fact to be true, the additional rides do not make a prima facie showing of appearance of judicial bias. As Judge Bauman noted, the rides were a matter of convenience and necessity. [R. 2751] As previously explained, McGrath is a small town with no public transportation, Judge Murphy's sentencing remarks dispelled any appearance of bias, and there are no affidavits in the record asserting that the judge and the trooper ate meals together, discussed the case, or engaged in any other contact other than Trooper Gibbens giving Judge Murphy rides. The State was entitled to summary disposition on Haeg's claim of judicial bias, or the appearance of bias.

If this Court determines that Haeg's claim is not statutorily barred, and that the alleged additional contacts are sufficient to establish a prima facie case of an appearance of judicial bias, then an evidentiary hearing is necessary so that Haeg can develop his claim and the State can contest it. *See Jones*, 759 P.2d at 566 (a hearing is required when, upon completion of the discovery and summary disposition phase, genuine issues of material fact remain to be resolved).

II. THE SUPERIOR COURT CORRECTLY DENIED HAEG'S DISQUALIFICATION MOTION REGARDING JUDGE BAUMAN.

Haeg moved to recuse Judge Bauman, claiming that the judge's rulings showed he was biased against Haeg. [*See* R. 2179-2203, 2013-2033] Judge Bauman denied Haeg's motion and the matter was referred to superior court Judge Anna Moran for review. [R. 1995-99, 2050-57]

Judge Moran found that Haeg had not made a showing that Judge Bauman was biased. [R. 1999] She remanded the matter to Judge Bauman to consider whether he felt he could be fair and impartial in light of the complaints Haeg had filed against him with the Alaska State Troopers and the Alaska Commission of Judicial Conduct. [R. 1999; *see also* R. 2038 (Haeg's complaint to the troopers), and R. 2040 (letter from Alaska Commission on Judicial Conduct to Haeg dismissing his complaint against Judge Bauman)] Judge Bauman determined that he could be fair and impartial notwithstanding Haeg's filing of reports and complaints. [Appendix A (*Notice in Response To Order By Judge Moran*, March 14, 2012)]

Alaska Statute 22.20.020(a)(9) requires recusal if a judge feels that for any reason a fair and impartial decision cannot be given. *Peterson v. Swarthout*, 214 P.3d 332, 339 (Alaska 2009). When a party seeks a judge's recusal for bias, they must show that, "the judge's actions were the result of personal bias developed from a nonjudical source." *Id.* That is, a party must show that the judge's opinion on the merits of the case stems from some source other than what the judge learned from his participation in the

case. *See State v. City of Anchorage*, 513 P.2d 1104, 1112-13 (Alaska 1973), *overruled on other grounds by State v. Alex*, 646 P.2d 203, 208 n.4 (Alaska 1982).

A judge's ruling against a party, even an incorrect ruling, is not evidence of judicial bias. *Peterson*, 214 P.3d at 339 & n. 20 (citing cases). Here, as Judge Moran pointed out, most of Haeg's allegations that Judge Bauman was biased against him stem from Judge Bauman's rulings in his case, and the fact that Haeg had filed complaints against the judge with the Alaska State Troopers and the Alaska Commission on Judicial Conduct (ACJC). [*See* R. 1995, 2179-2203, 2013-2033] Throughout his brief Haeg complains about Judge Bauman's rulings, primarily the judge's denial of his request for an evidentiary hearing, but does not point to any evidence showing that Judge Bauman actually harbored personal bias against him. [At. Br. 32-33, 36, 38, 41, 47-48]

The fact that Haeg has filed complaints about Judge Bauman in other forums does not mean Judge Bauman must recuse himself for bias. *See Denardo v. Maassen*, 200 P.3d 305, 311 & n. 28 (Alaska 2009) (holding disqualification is not required simply because a party is separately suing the judge in the judge's official capacity or based on the judge's performance of official duties, as long as the judge reasonably believes he or she can be fair and impartial; there must be specific evidence of actual bias or the appearance of bias). Judge Bauman determined that Haeg's complaints to the troopers and the ACJC did not affect his ability to be impartial. [App. A]

In his brief, Haeg claims that Judge Bauman "pre[-]dated his decisions. [At. Br. 48] But Haeg does not explain what he means, nor does he point to any evidence

of this. [At. Br. 48] Moreover, Judge Bauman's orders are dated the day he signed them. [*See* R. 2035-37, 2047-79, 2210, 2227, 2759, 2530] Haeg also complains that the order denying his January 10, 2011 request for a hearing was unduly delayed. [At. Br. 33] He provides no legal authority holding this is evidence of bias. And in any case, Judge Moran explained in her order why the ruling was timely, i.e., within the six-month period for resolving the motion. [R. 1996-98]

Both Judge Bauman and Judge Moran correctly recognized that an assigned judge has an obligation to *not* disqualify himself or herself from a case when there is no occasion to do so. [R. 2051, 1996] *See also Phillips*, 271 P.3d at 468. Because there was no reason for Judge Bauman to disqualify himself, he appropriately denied Haeg's disqualification motion and not abuse his discretion in doing so.

III. THE SUPERIOR COURT CORRECTLY RULED THAT HAEG FAILED TO ESTABLISH A PRIMA FACIE CASE ON ANY OF HIS OTHER CLAIMS FOR POST-CONVICTION RELIEF.

A. Haeg's Claim That The Alleged Contacts Between Judge Murphy And Trooper Gibbens During His Trial Affected His Conviction Lacks Merit.

Haeg argues that he was entitled to an evidentiary hearing on his claim of improper contact between Judge Murphy and Trooper Gibbens during his trial. [*See* At. Br. 40, 42] The contacts that he alleged occurred during his trial are Trooper Gibbens giving Judge Murphy rides to and from the trial proceedings. [R. 573-81] In his brief

Haeg alleges the judge and the trooper ate meals together, but there are no affidavits or other evidence stating that this occurred. [At. Br. 36, 40]

1. Haeg's Claim Of Improper Contacts Between Judge Murphy and Trooper Gibbens Is Barred Under AS 12.72.020(a)(2).

Haeg made no claim during his trial that Judge Murphy should be disqualified for bias or the appearance of bias because of the alleged incidents of Trooper Gibbens providing her transportation. When Haeg, acting pro se, brought his direct appeal of his conviction, he challenged many aspects of his trial and sentencing but he did not argue that Judge Murphy should have been disqualified from his trial for bias. *Haeg*, 2008 WL 4181532. Based on Haeg's affidavit, he was well aware of the conduct he now claims was improper at the time it allegedly occurred. He has statutorily waived any claim that there was judicial bias or the appearance of bias during his trial because he could have raised the issue in his direct appeal. AS 12.72.020(a)(2). The State incorporates the arguments made in its cross-appeal on this point.

As noted in the State's cross-appeal, in *Grinols* this Court observed that under some circumstances strict application of res judicata in a post-conviction relief action, barring a defendant from relitigating issues that could have been raised on direct appeal, might perpetuate manifest injustice and thus violate due process – for example when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Grinols*, 10 P.3d 600 at 615. Again, Haeg's claim of improper conduct allegedly occurring during his trial does not come within this exception. Haeg

admitted at trial to the conduct resulting in his conviction. This Court previously determined that Haeg's admissions during his own trial testimony were sufficient to convict him. *See Haeg*, 2008 WL 4181532 at *7 (noting that Haeg admitted at trial that he had committed all the offenses of which he was convicted). Haeg's case was tried by a jury, not Judge Murphy. There are no affidavits alleging that the jury was aware of the alleged contacts between Judge Murphy and Trooper Gibbens. Judge Bauman correctly determined that Haeg failed to make a prima facie showing that any appearance of bias contributed to his conviction. [R. 2752]

Further, as Judge Bauman noted, Haeg did not submit affidavits alleging facts showing that Judge Murphy and Trooper Gibbens had discussed his case or engaged in any actual impropriety regarding his case. [R. 2750] As Judge Bauman observed, taking Haeg's affidavits as true they show contacts that "appear to be a matter of convenience and necessity in the absence of public transportation." [R. 2751]

2. Haeg Made No Prima Facie Showing His Trial Counsel Was Ineffective With Regard To The Alleged Contacts.

Nor did Haeg make a prima facie showing that his counsel provided ineffective assistance with regard to the alleged contacts between Judge Murphy and Trooper Gibbens during his trial – for the same reason he failed to establish a prima facie case of ineffective assistance with regard to the alleged contacts during his sentencing. As previously explained, to establish a prima facie case for post-conviction relief based on ineffective assistance of counsel, the defendant's pleading must establish that he

communicated his version of events to his attorney, or that his attorney refused him any reasonable opportunity to do so. *See Steffensen* 837 P.2d at 1126.

Haeg's affidavit regarding the alleged transportation Trooper Gibbens provided Judge Murphy during trial fails to state he informed his trial counsel about these multiple alleged rides at any point during the trial or sentencing. [R. 573-77] As previously discussed, he did not talk to Robinson about these alleged incidents until years later. [Rob. Depo. 197] Haeg's failure to inform Robinson during the trial of the daily contact he allegedly observed between Trooper Gibbens and Judge Murphy is fatal to his claim Robison was ineffective in not objecting to the contacts. Robinson cannot be faulted for not raising an issue of which he was not informed. *Steffensen*, 837 P.2d at 1126; *Arnett v. State*, 938 P.2d at 1082.

Further, even if Robinson's observation – of Trooper Gibbens giving one ride away from the court house to Judge Murphy – was made during the trial, Haeg still failed to make a prima facie showing that Robinson was ineffective for failing to move to disqualify Judge Murphy. To survive a motion to dismiss his post-conviction relief claim, Haeg had to convince the court that the attorney's reasons for failing to act were completely invalid. *See Steffensen*, 837 P.2d at 1127. As explained in the State's cross-appeal, Robinson was not concerned with Trooper Gibbens giving Judge Murphy a ride, and in the context of the small town of McGrath his lack of concern was reasonable. [Rob. Depo. 78, 80] Finally, Haeg must also make a specific factual showing that Robinson's failure to disqualify Judge Murphy from his trial actually contributed to his

conviction. *Jones*, 759 P.2d at 567-68, 572. The contacts Haeg complains of did not contribute to his conviction; he confessed to all the conduct underlying his convictions, and there are no facts presented showing the jury was aware of the alleged contacts.

B. Haeg's Attorneys Did Not Provide Him Ineffective Assistance Re. An Entrapment Defense.

Haeg claimed in his post-conviction relief application that State Board of Game member Ted Spraker induced Haeg to violate the law because he allegedly told Haeg he should take wolves outside the permitted area and then claim that they were taken within it. [R. 8-10] Haeg argued that his attorneys were ineffective for failing to raise an entrapment defense. [*Id.*] In a thorough discussion, the trial court explained why Haeg failed to present a prima facie case that his attorneys were ineffective in failing to advise him of an entrapment defense – because, as a matter of law, Haeg had no entrapment defense. [R. 2730-35]

Entrapment is an affirmative defense to prosecution and it requires conduct on the part of a public law enforcement official, or a person working in cooperation with the official, that is a substantial factor in inducing the defendant to commit the offense. *See State v. Yi*, 85 P.3d 469, 473 (Alaska App. 2004) (Mannheimer J. & Stewart J. concurring) (discussing the definition of entrapment); *Bachlet v. State*, 941 P.2d 200, 206-07 (Alaska App. 1997) (same).

Here, the superior court explained that Haeg failed to present any evidence that Spraker was a law enforcement official or was working with law enforcement

officials to entrap Haeg. [R. 2734-35] In his brief Haeg asserts generally that "the State" told him to take wolves "wherever they could be found." [At. Br. 3, 4, 6, 8, 10 12, 23, 35, 43] He relies on Trooper Gibbens' testimony concerning the trooper's communications with Department of Fish and Game employee Toby Boudreau. [At. Br. 43 (citing to R. 2270)] But Haeg's claim is that Spraker, not Boudreau, told him to kill wolves outside unit 19D-East. [*See* R. 8-9] Further, Spraker was not employed by the State when he was a member of the State Board of Game, and he was not a law enforcement official. [R. 2367] And Haeg presented no evidence Spraker was working with state law enforcement to induce Haeg to commit his offenses.

Finally, entrapment requires a law enforcement official to engage in fundamentally unfair conduct calculated to induce someone to commit a crime, other than a person who was willing. *Yi*, 85 P.3d at 472. Haeg was willing to take wolves outside unit 19D-East; he has never denied that he knew the wolves he killed were outside unit 19D-East.

Because Haeg had no entrapment defense as a matter of law, his attorneys could not be ineffective for failing to pursue that defense and the failure to argue an invalid entrapment defense could not have contributed to Haeg's conviction.

C. Haeg's Attorneys Were Not Ineffective In Advising Him Regarding Immunity.

Haeg and his attorney Cole voluntarily agreed to a taped interview with the Trooper Gibbens and a State prosecutor as part of a plea strategy. [R. 2736, Tr. 318 *ff.*;

Cole Depo. 22, 32-33] In his post-conviction relief application Haeg raised two enmeshed claims alleging immunity – that he had immunity from prosecution after voluntarily giving an interview to the State, and that the State improperly used his interview statements against him. [R. 14-18, 2769-71; *see also* At. Br. 4, 5 42, 54] Neither claim has merit.

The superior court ruled that, as a matter of law, Haeg had no immunity from prosecution and that therefore Haeg failed to make a prima facie showing his attorneys were ineffective for failing to argue immunity. [R. 2735-36] Haeg asserts that the trial court "had to accept Haeg's claims he had immunity [from prosecution]." [At. Br. 42] But in considering a defendant's post-conviction relief claim, the trial court does not have to accept as true the defendant's statements of law, or the defendant's assertions concerning the legal affect of underlying occurrences. *LaBrake*, 152 P.3d at 481.

Haeg is confusing immunity with the limited privilege for statements made during plea negotiations. Under Alaska Rule of Evidence 410(a) statements made in plea negotiations are not admissible at trial if the plea discussion does not result in a plea of guilty or no-contest, or such a plea is rejected or withdrawn. As the trial court noted, the privilege accorded settlement negotiations is not immunity. [R. 2736]

Cole explained in his deposition that the only type of "immunity" Haeg had was that the State could not use Haeg's statements against him when it presented its case in chief at his trial. [Cole Depo. 22, 24, 32-33, 174] After Haeg's interview, Cole confirmed this in a letter to the State prosecutor. [R. 2381-84; Cole Depo. 26] In arguing

he was immune from prosecution, Haeg relies on *State v. Gonzalez*, 853 P.2d 526 (Alaska 1993). [At. Br. 24] *Gonzalez* is inapposite; it addresses the scope of immunity conferred on a witness compelled by the State to testify in a criminal case against another person. *See id.* at 528. [*See also* R. 2735] Here, Haeg voluntarily testified at trial on his own behalf.[11] *See Haeg*, 2008 WL 4181532 at *7.

This Court has already determined that the State did not use Haeg's interview statements when it presented its case in chief. *See Haeg*, 2008 WL 4181532 at *7 (observing the record does not support Haeg's conclusion the State used his statement to convict him). Haeg argues that the State used his statements at trial because at trial State witnesses used the map upon which he had marked wolf kill sites during his interview. [At. Br. 25] He also claims that Robinson was ineffective because he did not object. [*See* At. Br. 26]

The underlying factual basis for Haeg's claims is refuted by the record. At trial the State used a map upon which Trooper Gibbens, not Haeg, had made marks (State Exhibit 25) –Trooper Gibbens' testified at trial that he was the one who had marked the map with the kill sites he found. [R. 2264, 2277-79, 2299-300, 2309, 2313] During his trial testimony Zeller drew the kills sites on the map himself. [R. 2333 *ff.*] Haeg's trial

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[11] Haeg argues claims he had to testify because the State used his interview statements against him at trial, and because he needed to counter Gibbens' "false" testimony. [R. 2771, 2748; At. Br. 40 (#K.), 47 (#A)] But in opening statement, before any State witnesses testified, Robinson informed the jury that Haeg was going to testify to explain "his intent, his purpose for shooting wolves, same day airborne even though he shot them outside the permitted area." [R. 2748 (citing Trial Tr. 112-13)]

(footnote continued . . .)

attorney Robinson was not ineffective for failing to object to the State's use of the map because there was no reason for him to do so.

Haeg also claimed Cole was ineffective because he did not challenge the State's alleged use of Haeg's interview statements in the charging information. [At. Br. 5, 26-27] Haeg failed to overcome the presumption that Cole's failure to challenge the information was tactical, and has not shown the this tactic was one no minimally competent counsel could have used. Cole explained in his deposition that he determined a challenge to the information was not warranted because they were close to reaching a plea agreement, and the State could just amend the charging document in any case. [Cole Depo. 28-29; R. 2737] Nor did Haeg show that Cole's tactic contributed to Haeg's conviction. In his direct appeal, Haeg argued that the State improperly used his statements to charge him with more serious crimes. *Haeg*, 2008 WL 4181532 at *7. This Court held that Haeg had not shown that he was manifestly prejudiced by the charging documents because regardless of the use of Haeg's statements in the information, the remaining evidence from Gibbens and Zellers supported the charges against Haeg. *Id*

(. . . footnote continued)

D. Haeg's Attorneys' Failure To Challenge The Search Warrants Was Not Ineffective Assistance.

In seeking four search warrants against Haeg, Trooper Gibbens mistakenly stated in his affidavits that Haeg took the wolves in the area Haeg guided, unit 19C, when the wolves were actually taken in unit 19D (but still outside of unit 19D-East the only area in which the wolf control program was authorized). [R. 2738, 2742] Haeg argues his attorneys were ineffective for failing to challenge the warrants. [At. Br. 40 (#H), 43 (#E), 44(#K)] But Cole stated in his deposition that he thought there was nothing to be gained by filing a motion to suppress; he was trying to negotiate a plea agreement for Haeg. [Cole Depo. 41] Robinson determined Haeg was unlikely to win a motion to suppress. [Rob. Depo at 13, 135-36, 141] Haeg's attorneys' tactical decisions to not challenge the search warrants were reasonable. Moreover, their failure to challenge the search warrants did not contribute to his conviction.

In Haeg's direct appeal, this Court held Haeg had forfeited any challenge to the search warrant affidavits because he did not challenge them before trial. *Haeg*, 2008 WL 4181532 at *5. This Court also held that Trooper Gibbens' misstatement did not result in Haeg being wrongly charged. *Id.* at *6. In dismissing Haeg's post-conviction relief claim, the superior court ruled that Haeg had not made a prima facie showing that his attorneys' failure to challenge the search warrants contributed to his conviction. [R. 2746, 2748]

The standard for probable cause for a search warrant is whether reliable information was presented in sufficient detail to persuade a reasonably prudent person

that criminal activity, or evidence of criminal activity will be found in the place or person to be searched. *Williams v. State*, 737 P.2d 360, 362 (Alaska App. 1987). If a police officer affiant intentionally makes misstatements to the court then the search warrant will be invalidated regardless of whether probable cause would remain from the affidavit after the misstatements were excised. *See State v. Malkin*, 722 P.2d 943, n.6 (Alaska 1986); *see also Lewis v. State*, 862 P.2d 181, 186-87 (Alaska App. 1993) (holding that for the purpose of the suppression rule announced in *Malkin*, a conscious misstatement in a search warrant application is "intentional" only if it was done in a "deliberate attempt to mislead" the issuing magistrate).

Here, the trial court ruled that Haeg had not established that Trooper Gibbens' characterization of the kill sites as being within unit 19C, as opposed to all being within unit 19D, was material to the issue of probable cause for the search warrants – the salient fact is the wolf kills were outside of unit 19D-East. [R. 2747-48] The court also concluded that even if the reference to unit 19C had been expunged, the remaining portion of the affidavits was enough to establish probable cause to issue the search warrants. [R. 2748]

The superior court in effect determined that there is no reasonable inference that Trooper Gibbens was deliberately trying to mislead the magistrate in order to obtain search warrants. The court explained that there was no dispute between the parties as to where the wolf kill sites were located, or that the sites were all outside of 19D-East, the permitted area. [R. 2740-41] The court observed that Zellers also thought some of the

kill sites were in unit 19C. [R. 2748-49] In short, the superior court ruled that a motion to suppress would not have been successful. Haeg's assertion that a motion to suppress would have "end[ed] prosecution" is therefore incorrect. [At. Br. 44][12] The failure to bring a meritless motion is not ineffective.

E. The Unsuccessful Subject Matter Defense Was Not Ineffective Assistance.

Haeg claimed Robinson was ineffective because the subject matter jurisdiction defense he raised was unsuccessful. [R. 27-28; At. Br. 8] As a legal matter this unsuccessful defense did not affect the outcome of Haeg's case. Subject matter jurisdiction is an issue distinct from the whether Haeg committed the charged offenses. The trial court correctly held Haeg failed to establish a prima facie case of ineffective assistance of counsel because he did not make a prima facie showing that the unsuccessful defense contributed to his conviction. [R. 2757] Haeg asserts that in light of this defense he was told to "stand mute." [At. Br. 8] But this not the case – Haeg testified at trial and admitted the offenses of which he was convicted. *Haeg*, 2008 WL 4811532 at *7.

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[12] During his direct testimony at trial Trooper Gibbens stated the wolf kill sites were in 19C and 19B. [R.2743, Trial Tr. 418] On cross-examination, the trooper corrected himself and explained the kill sites were in 19D. [*Id.*] In his brief, Haeg appears to argue that the jury could have "used the false locations [19C]" to convict him because the State made it appear he took wolves to benefit his guide business. [Tr. 10, 23] This claim is barred because Haeg failed to raise it on direct appeal. Further, Trooper Gibbens corrected himself in front of the jury, and explained the kill sites were in unit 19D.

(footnote continued . . .)

F. Haeg Did Not Have Ineffective Appellate Counsel.

Haeg complains that Osterman said he would not argue on direct appeal that Cole and Robinson were ineffective. [At. Br. 44] An appellate attorney may be ineffective for failing to raise an issue. *See Lindeman v. State*, 244 P.3d 1151, 1158 (Alaska App. 2011) (discussing the standard for a prima facie case of ineffective assistance of appellate counsel for not raising an issue). Haeg hired Mark Osterman to pursue his direct appeal but fired him before the brief was finalized. [R. 2223] Haeg then proceeded pro se. *See Haeg*, 2008 WL 418532. The trial court correctly found Haeg failed to make a prima facie showing that Osterman provided any ineffective assistance to Haeg. [R. 2226] Osterman can not be faulted for not making arguments on Haeg's behalf to the court of appeals because Haeg fired him before he made any arguments.

G. Haeg's Miscellaneous Claims Lack Merit.

Alleged interference by Assistant District Attorney Andrew Peterson with Cole deposition. Haeg argues Peterson interfered with his ability to completely depose Cole about his representation of Haeg. [At. Br. 26] Haeg raised this claim below, but Judge Bauman did not rule on it. [*See* Tr. 305-06 (April 30, 2012)] Haeg therefore has waived this issue for appeal. *See Stavenjord v. State*, 66 P.3d 762, 767 (Alaska App. 2003); *Marino v. State*, 934 P.2d 1321, 1327 (Alaska App. 1997).

(. . . footnote continued)

Regardless Haeg's claim lacks merit. When Haeg deposed Cole, Cole refused to answer a number of Haeg's questions. [Cole Depo. 5, 9, 19, 20] Peterson also objected to some of Haeg's questions because they were on matters unrelated to Haeg's post-conviction relief claims, and Peterson was concerned that the deposition would exceed six hours.[13] [Cole Depo. 8-9, 150, 162; Tr. 306] Peterson told Haeg multiple times he could call Judge Bauman if he thought Cole was required to answer the questions. [Cole Depo. 5, 9, 19, 20] Haeg chose not to avail himself of this solution.

Cole Not A Witness At Sentencing. Haeg claimed Robinson was ineffective because he did not call Cole as a witness at Haeg's sentencing. [R. 24-25; At. Br. 46] As the superior court explained, whether to call a witness is a tactical decision reserved to the attorney. [R. 2757-58] *See Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004) (explaining that other than the decisions on what plea to enter, whether to waive a jury trial, testify, or take an appeal, the lawyer has the ultimate authority to make decisions governing trial tactics). Haeg asserts Cole's testimony would have proved "Cole/State swindled him out of [a plea agreement] after he paid [gave up a year of guiding] for it." [At. Br. 46] But Robinson did not call Cole as a witness at Haeg's sentencing for a sound tactical reason. Cole's testimony about failed plea negotiations was not relevant to Haeg's sentence, and he did not want Cole subject to cross-examination by the State about his conversations with Haeg. [Cole Depo. 53-55, 119] It was not necessary to

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[13] In the absence of the parties' agreement, a court order would have been required to extend the deposition past six hours. Alaska R. Civ. P. 30(d)(2).

have Cole as a witness in order to inform the court that Haeg had voluntarily given up guiding since the Fall of 2004; both Haeg and his attorney mentioned it at sentencing. [R. 2551, 2553] Haeg fails to overcome the presumption that Robison's tactical decision was reasonable.

Alleged Plea Agreement. Haeg claimed in his post-conviction relief application that there was an enforceable plea agreement. [R. 19-20, 2768-69] A stand-alone claim that there was an enforceable plea agreement is barred because the issue was not raised on appeal. AS 12.72.020(a)(2). Haeg's claim that his counsel were ineffective for failing to enforce a plea agreement also fails.

Judge Bauman found that there was never a plea agreement; Haeg was presented with offers which he chose to reject. [R. 2758] Judge Bauman also found that Haeg had not presented any evidence that either Cole or Robinson failed to communicate a formal plea offer to Haeg, and had advised him not to accept a deal offered by the prosecution. [R. 2758] Haeg's assertion in his brief – that he accepted a plea agreement that required him to give up guiding for one year and did not require him to forfeit his plane. [At. Br. 6] But he points to no evidence in the record that shows this. Moreover, Haeg admitted in his post-conviction relief application that no plea agreement was ever finalized; he concedes he knew Cole was attempting to finalize an agreement in November 2004. [R. 20, 2768 (#P)] That there was never an agreement with the State allowing Haeg to keep his plane and lose guiding privileges for one year is confirmed by Cole's deposition testimony; Cole said that before Haeg's arraignment in November 2004

he thought he had reached an agreement with the State acceptable to Haeg, but nothing was in writing and there were numerous details to finalize, including whether Haeg was to forfeit the plane he had used in committing the offenses. [Cole Depo. 13-15, 175-76] Robinson did not pursue the issue of enforcing the plea agreement because he determined there was never an enforceable agreement. [Rob. Depo. 94-96, 103-04, 106] Neither attorney can be faulted for failing to pursue enforcement of an agreement when there was not an agreement to enforce.[14]

Alleged ineffective assistance due to structural error. Haeg argues that unidentified state government officials, "harmed [and] threatened to harm Haeg's attorneys if they tried to defend Haeg." [At. Br. 38; *see also* At. Br. 53-4; *See* R. 41-45] He asserts as a result he was effectively denied effective assistance of counsel. [*Id.*]

The Supreme Court has recognized three circumstances that give rise to constructive denial of counsel: (1) denial of counsel at a critical stage of the proceeding, (2) if counsel fails entirely to subject the prosecution's case to meaningful adversarial testing, and (3) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *United States v. Cronic*, 466 U.S 648, 659-662, 666 (1984); *Bell v. Cone*, 535 U.S. 685, 695-96 (2002) (citing *Cronic*, 466 U.S. at 659-62). Haeg's allegations fall into the third category. Haeg misrepresents the record

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14 In February 2005, the State made a formal offer that required Haeg to forfeit the plane he had used. [R. 2362 *ff.*] Haeg has never claimed he accepted that offer.

and asserts that Cole and his business attorney Dale Dolifka testified that the State was "threatening and harming private attorneys to obtain convictions." [At. Br. 53] Neither Cole nor Dolifka testified this occurred. [Cole Depo. 36; Tr. 24 *ff.* (August 25, 2010)] Nor did Robinson. [*See* Rob. Depo. 196, 211] Haeg failed to present a prima facie case that he was deprived of effective assistance of counsel because of a structural error.

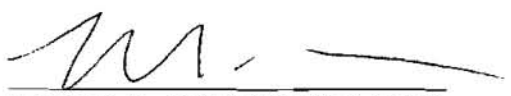
CONCLUSION

For the reasons stated above, this Court should reverse the superior court's grant of summary disposition to Haeg on the claim that there was an appearance of judicial bias at his sentencing, and grant summary disposition to the State. This Court should affirm the superior court's order dismissing Haeg's other claims for post-conviction relief. Haeg's conviction and sentence should be affirmed.

If this Court should determine that Haeg's claim of judicial bias and appearance of bias during his sentencing is not statutorily barred and that the additional alleged contacts show a prima facie case of the appearance of judicial bias, then a remand for an evidentiary hearing on this issue is necessary.

DATED this 17th day of October, 2013.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: 
MARY A. GILSON (8611113)
Assistant Attorney General

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

DAVID HAEG,

Applicant,

vs.

STATE OF ALASKA,

Respondent.

CASE NO. 3KN-10-1295 CI

NOTICE IN RESPONSE TO ORDER BY JUDGE MORAN

The March 12, 2012, Order Regarding Disqualification of Judge Bauman entered in this case pursuant to AS 22.20.020(c) by Judge Moran contains a limited issue remand on whether the undersigned feels he can be fair and impartial in light of the complaints Mr. Haeg has filed with the Alaska State Troopers and the Alaska Commission on Judicial Conduct. The Alaska State Troopers and the Alaska Commission on Judicial Conduct are empowered and authorized to investigate and act on the complaints of citizens, including those of David Haeg regarding the undersigned. I have not been arrested or charged by the Troopers, nor have I received any notification from the Judicial Conduct Commission as a result of Mr. Haeg's reports or complaints, nor do I live in fear of either. I have no personal animosity or problem with the authority of the Troopers or the Judicial Conduct Commission or the exercise by Mr. Haeg of his rights as a citizen. I feel I can be fair and impartial with regard to Mr. Haeg in this case, notwithstanding his filing of reports and complaints.

Dated this 14th day of March, 2012.

CERTIFICATION OF DISTRIBUTION
I certify that a copy of the foregoing was mailed to the following at their addresses of record:
Peterson, Haeg
3-14-12 Roberts
Date Clerk

Carl Bauman
SUPERIOR COURT JUDGE