IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID S. HAEG, Appellant/ Cross-Appellee,	Court of Appeals Nos. A-11349/70 Trial Court No. 3KN-10-1295 CI
v.	MEMORANDUM OPINION
STATE OF ALASKA, Appellee/ Cross-Appellant.	No. 6416 — December 21, 2016

Appeal from the District Court, Third Judicial District, Kenai, Carl Bauman, Judge.

Appearances: David S. Haeg, pro se, Soldotna, for the Appellant/Cross-Appellee. Mary A. Gilson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee /Cross-Appellant.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.*

Judge ALLARD.

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* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska constitution and Administrative Rule 24(d).

Following a jury trial, David S. Haeg was convicted of five counts of unlawful acts by a guide: hunting wolves same-day airborne,[1] two counts of unlawful possession of game,[2] one count of unsworn falsification,[3] and one count of trapping wolverine in a closed season.[4] This Court affirmed Haeg's convictions on direct appeal.[5]

Haeg subsequently filed an application for post-conviction relief in the district court seeking a new trial and/or a new sentencing on various grounds, including judicial bias, judicial corruption, prosecutorial misconduct, wrongdoing by various state officials, and ineffective assistance of counsel by all three of his privately retained attorneys.[6] The State moved to dismiss Haeg's post-conviction relief application for failure to state a *prima facie* case for relief.[7] That is, the State asserted that Haeg's pleadings failed to state a claim for post-conviction relief as a matter of law.[8]

After extensive litigation in which Haeg's pleadings were repeatedly amended and supplemented (but no evidentiary hearing was held), the court dismissed

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[1] AS 08.54.720(a)(15); 5 Alaska Administrative Code (AAC) 92.085(8); *See* 5 AAC 92.990(a)(9).

[2] 5 AAC 92.140(a).

[3] AS 11.56.210(a)(2).

[4] 5 AAC 84.270(14).

[5] *Haeg v. State*, 2008 WL 4181532 (Alaska App. Sept. 10, 2008) (unpublished).

[6] *See* AS 12.72.010; Alaska R. Crim. P. 35.1(a).

[7] *See State v. Jones*, 759 P.2d 558, 565 (Alaska App. 1988) ("When an application for post-conviction relief appears to be deficient on its face, the state, in lieu of responding to its merits, may file a motion to dismiss — the equivalent of a Civil Rule 12(c) motion for judgment on the pleadings."); *see also* Alaska R. Crim. P. 35.1(f)(1).

[8] *Jones*, 759 P.2d at 565.

all but one of Haeg's claims. The remaining claim was based on Haeg's assertion that his trial judge had improper ex parte contact with a prosecution witness (State Trooper Brett Gibbens) during trial and sentencing. Although the parties actively disputed whether the alleged ex parte contacts had actually occurred, the court concluded that this claim could be decided on Haeg's pleadings alone, without an evidentiary hearing. The court ruled that Haeg's pleadings had failed to establish any ground for relief with regard to his trial but that the pleadings had established an appearance of judicial bias with regard to his sentencing as a matter of law. The court therefore vacated Haeg's sentence and scheduled a new sentencing hearing.

Both parties appealed the district court's rulings. Haeg argues that the court erred in dismissing the rest of his claims, arguing that there are material facts in dispute with regard to those claims that should have precluded dismissal on the pleadings alone. The State cross-appeals, arguing that the district court erred in granting Haeg a new sentencing hearing. The State also argues that Haeg's claims of judicial bias and the appearance of judicial bias are procedurally barred because they were not timely raised.

For the reasons explained here, we conclude that it was error for the district court to rule on Haeg's claims of judicial bias and the appearance of judicial bias without first resolving the disputed questions of material fact related to those claims. We therefore reverse the district court's rulings on these claims and remand Haeg's case to the district court for further proceedings. On remand, the court shall also determine whether Haeg has been diligent in timely raising these claims and whether Haeg's trial attorney was ineffective for failing to raise these claims in the trial court proceedings.

We also conclude that a remand is required for additional proceedings with regard to Haeg's claims that his trial attorney was ineffective for (1) failing to enforce what Haeg alleges was an enforceable plea agreement, (2) failing to properly advise

Haeg regarding the strength of his defense; and (3) failing to object to inaccuracies in the trial court's findings at sentencing.

In all other respects, we affirm the district court's dismissal of Haeg's application for post-conviction relief.

Factual Background and Prior Proceedings

The State charged Haeg with a number of game violations for conduct he committed while participating in a wolf predator control program. We described the facts underlying the charges against Haeg in his direct appeal.[9] We summarize them briefly here.

a. The State's investigation

Haeg was a licensed master big game guide operating in game management unit 19-C, near McGrath, Alaska. In March 2004, Haeg and his assistant Tony Zellers had permits allowing them to participate in a wolf predator control program.[10] The predator control program involved wolves in game management unit 19-D East, which was located within unit 19-D. The program allowed participants to kill wolves by shooting them from an airborne aircraft or by landing the aircraft, exiting it, and immediately shooting them. At that time, unit 19-D East was the only unit where this type of predator control was allowed. Special identification, sealing, and reporting requirements applied to wolves killed pursuant to the program. Alaska State Trooper

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[9] *Haeg*, 2008 WL 4181532, at *2-5.

[10] *See* 5 AAC 92.110 (regulations creating the wolf predator control program); 5 AAC 92.039 (requirements for wolf predator control program permit).

Brett Gibbens, among others, was notified whenever a wolf was taken under the program, and one of his duties was to verify the location of the wolf kill site.[11]

Haeg and Zellers reported taking three wolves in game management unit 19-D East. Trooper Gibbens investigated the reported kill area, but found no evidence of killings. He spoke with Haeg, observed distinctive characteristics of Haeg's airplane, and learned the type of weapons and ammunition Haeg and Zellers were using to shoot wolves. During this conversation, Haeg acknowledged that he knew the boundaries of the area where he was allowed to kill wolves under the predator control program.[12]

Trooper Gibbens continued his investigation, ultimately discovering Haeg's distinctive airplane tracks near various kill sites where wolves had been shot from the air and the carcasses had then been loaded onto a plane. All of these kill sites were 40 to 45 miles outside the boundaries of the predator control program in 19-D East.[13]

Trooper Gibbens later obtained search warrants for Haeg's airplane, his lodge, and his residence. Execution of these search warrants led to the discovery of additional hides of wolves also killed outside the boundaries of the predator control program.[14]

After completing its investigation, the State concluded that: (1) Haeg and Zellers had shot nine wolves from an airplane; (2) none of the nine wolves had been killed within the boundaries of the predator control program; (3) the sealing certificates for the wolves had been falsified; and (4) Haeg and Zellers had unlawfully possessed the

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[11] *Haeg*, 2008 WL 4181532, at *2.

[12] *Id.*

[13] *Id.*

[14] *Id.* at *3.

hides. The State also concluded that Haeg had leg traps and snares that were still actively catching game after the relevant seasons had closed.[15]

b. The failed plea negotiations

Both Haeg and Zellers hired private defense attorneys to represent them in their separate plea negotiations with the State. Haeg's first attorney was Brent Cole. During their plea negotiations, Zellers and Haeg each gave a statement to the prosecutor and troopers admitting their illegal conduct.

The State was able to reach a plea agreement with Zellers. As part of the plea agreement, Zellers agreed to plead guilty to two consolidated counts of violating AS 08.54.720(a)(8)(A) (unlawful acts by a guide),[16] and to testify against Haeg if Haeg went to trial.

The State was unable to reach a plea agreement with Haeg for reasons that remain disputed between the parties. (We explain the plea negotiations and the alleged existence of a final enforceable plea agreement in more detail in the section on ineffective assistance of counsel.) Dissatisfied with Cole's performance, Haeg fired Cole and hired a second private attorney, Arthur "Chuck" Robinson, who represented Haeg during the remainder of the pretrial proceedings, as well as at trial and sentencing.

The plea negotiations between Haeg and the State never meaningfully resumed after Robinson was hired. Instead, Robinson filed multiple pretrial motions to dismiss the criminal charges. These motions were denied as meritless by the trial court

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[15] *Id.* at *4.

[16] AS 08.54.720 (a)(8)(A) ("It is unlawful for a person who is licensed under this chapter to knowingly commit or aid in the commission of a violation of this chapter, a regulation adopted under this chapter, or a state or federal wildlife or game statute or regulation.").

and the trial court's rulings were affirmed by this Court in Haeg's direct appeal.[17] (We describe the substance of the motions in the later section on ineffective assistance of counsel.)

Haeg's case then proceeded to trial before then-Magistrate Judge Margaret L. Murphy.

c. Haeg's trial and sentencing

At trial, Trooper Gibbens, Zellers, and Haeg all testified to essentially the same version of events.

In his trial testimony, Haeg admitted that: (1) he and Zellers knew (or, in one instance, should have known) that they were taking the wolves outside the boundaries of the predator control program; (2) he and Zellers intentionally falsified the sealing certificates for the nine wolves; (3) he and Zellers possessed the wolves and hides illegally; and (4) he (Haeg) was responsible for the leg traps that were still catching game after the leg trap season had closed.[18] The only criminal conduct that Haeg denied being responsible for was the out-of-season snares, which he claimed had been turned over to another trapper who was responsible for closing them out when the season ended.[19]

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[17] *See Haeg*, 2008 WL 4181532, at *8-9.

[18] *Id.* at *4.

[19] *Id.* at *5.

The jury subsequently convicted Haeg of the criminal offenses that he had directly admitted in his testimony, acquitting him of one count of snaring wolves in a closed season and one count of failure to salvage game.[20]

At sentencing, the judge imposed a composite sentence of 35 days to serve and a composite fine of $6,000. The judge also ordered forfeiture of the animal hides and the guns and ammunition used to kill the wolves, as well as forfeiture of Haeg's airplane. In addition, the judge ordered Haeg's guiding license suspended for 5 years and placed Haeg on informal probation for 7 years.

d. Haeg's direct appeal

Following sentencing, Robinson filed a notice of appeal on Haeg's behalf. A short time later, Haeg fired Robinson and retained a third attorney, Mark Osterman, to represent him on appeal. Haeg became dissatisfied with Osterman's work and fired Osterman prior to the filing of the opening brief. At this point, Haeg chose to waive his right to counsel and decided to represent himself, filing his own pro se appellate briefs and motions before this Court.

In his pro se appeal, Haeg raised many of the same arguments that he would later raise in his application for post-conviction relief.[21] This Court issued its decision affirming Haeg's convictions and sentence (with one minor sentencing correction) on

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[20] *Id.*

[21] *Id.*

September 8, 2008.[22] Haeg filed a petition for hearing of our decision to the Alaska Supreme Court, which was denied.

e. Haeg's application for post-conviction relief

Pursuant to Alaska Criminal Rule 35.1 and AS 12.72.010, Haeg filed an application for post-conviction relief in the district court, alleging various violations of his constitutional rights and seeking reversal of his convictions or, in the alternative, a new sentencing hearing.

Haeg's claims for post-conviction relief included: (1) allegations that his trial judge (Judge Murphy) had improper ex parte contact with a prosecution witness (Trooper Gibbens) throughout Haeg's trial and sentencing, creating an appearance of judicial bias warranting reversal of his convictions and a new trial or a new sentencing before a different judge; (2) allegations that his first attorney (Cole) was ineffective in failing to file various pretrial motions and failing to enforce what Haeg claims was a final enforceable plea agreement; (3) allegations that his second attorney (Robinson) was ineffective in (a) failing to move to enforce what Haeg claimed was a final enforceable plea agreement; (b) failing to enforce what Haeg claims was "transactional immunity" that had been granted to him based on his pretrial statement to the State; (c) failing to file a motion to suppress based on what Haeg alleges were intentional misrepresentations in the search warrant application; (d) failing to raise an entrapment defense; (e) incompetently advising Haeg that he had a meritorious subject-matter jurisdictional defense; (f) advising Haeg to testify at trial; and (g) failing to correct various

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[22] On appeal, we concluded that the district court had intended to "suspend" rather than "revoke" Haeg's license because a "revocation" that lasts for a specified period of time is actually a suspension. *See id.* at *11.

misstatements by the State at sentencing; (4) allegations that his third attorney (Osterman) was ineffective and that his incompetence forced Haeg to waive his right to counsel and to represent himself on appeal; (5) allegations that the State blackmailed his attorneys; (6) allegations that the State knowingly suborned perjury at trial and at sentencing and engaged in other malfeasance; and (7) allegations that virtually all of the judicial officers and all of the state agencies involved in Haeg's case are corrupt.

The Alaska Public Defender Agency was initially appointed to represent Haeg in his post-conviction relief case. However, Haeg was unhappy with the amount of time it would take the Agency to litigate his case and he therefore chose to waive his right to court-appointed counsel and decided to represent himself in his post-conviction relief proceedings.

The State requested that Haeg's post-conviction case be assigned to his original trial judge, Judge Murphy, who was now a district court judge in Homer. This request was granted in accordance with settled law and general practice.[23]

f. Haeg's motion to disqualify Judge Murphy as the judge in the post-conviction proceeding

Haeg subsequently moved to disqualify Judge Murphy from his post-conviction relief case, arguing that it was improper for the judge to preside over

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[23] For purposes of judicial continuity, economy, and efficiency, post-conviction cases are generally assigned to the trial judge who presided over the trial, unless there is good cause to disqualify the judge from these later proceedings. *See Plyler v. State*, 10 P.3d 1173, 1176 (Alaska App. 2000). Other jurisdictions follow similar rules when assigning their post-conviction relief cases. *See, e.g., Thomas v. State*, 808 S.W.2d 364, 366 (Mo. 1991); *Falcon v. State*, 570 N.W.2d 719, 721-23 (N.D. 1997).

proceedings in which the propriety of her conduct was going to be actively litigated.[24] Judge Murphy denied the motion, concluding that she could be fair and impartial, notwithstanding Haeg's claims of judicial misconduct against her.

Superior Court Judge *pro tem* Stephanie Joannides was assigned pursuant to AS 22.20.020(c) to review Judge Murphy's denial of the disqualification motion.[25]

In support of his motion to disqualify Judge Murphy, Haeg submitted six affidavits from family members and acquaintances, each of whom stated that they had personally seen Judge Murphy arriving and leaving the courthouse in the company of Trooper Gibbens, the trooper who conducted the investigation against Haeg and who was one of the State's main witnesses against Haeg at his trial. Haeg's witnesses claimed that this conduct occurred multiple times a day during Haeg's trial and sentencing. These witnesses further claimed that they never saw Judge Murphy enter or leave the courthouse alone or in the company of anyone other than Trooper Gibbens.

In response, the State submitted its own competing affidavits from the trooper and the judge denying that any improper ex parte contact or communication had occurred. The judge also directly denied Haeg's allegation that she had used the trooper as her "personal chauffeur" during Haeg's trial and sentencing. Her affidavit stated that

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[24] *See* AS 22.20.020(a)(3) (disqualification required if judge will be material witness in the proceedings); *see also* Alaska Code Jud. Conduct Canon 3(E)(1)(c)(iv) (providing that a judge should disqualify herself if she knows that she "is likely to be a material witness in the proceeding").

[25] Under Alaska law, when a judge denies a motion to recuse, the judge's decision is automatically subject to immediate review by the next highest court. *See* AS 22.20.020(c) (providing that "[i]f 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 one and only time" she used the trooper for transportation was after Haeg's sentencing was already complete.

After reviewing the competing affidavits submitted by the parties, Judge Joannides concluded that it would raise an appearance of impropriety for Judge Murphy to preside over the post-conviction proceedings. Judge Joannides based this decision on her conclusion that the post-conviction proceedings would likely involve active litigation of the nature and extent of the judge's contacts with the trooper — litigation in which the judge potentially would be called as a witness.[26] Judge Joannides made clear, however, that she was not ruling on the underlying merits of Haeg's judicial bias claims. Nor was she expressing any opinion about the propriety of Judge Murphy's past actions or the credibility of Haeg's allegations. As her order explained, "such a ruling would require an evidentiary hearing that is best held in the post-conviction relief proceeding itself."

After Judge Joannides granted Haeg's request to disqualify Judge Murphy, Haeg's case was assigned to Superior Court Judge Carl Bauman, sitting as a district court judge.[27] After extensive litigation on Haeg's various claims, Judge Bauman ultimately disposed of Haeg's post-conviction claims on the pleadings, without holding the evidentiary hearing contemplated by Judge Joannides's order.

In his final order, Judge Bauman dismissed all of Haeg's claims for failure to state a *prima facie* case for relief, with the exception of the claim that the judge's conduct at sentencing created an appearance of judicial bias. With regard to that claim,

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[26] *See* AS 22.20.020(a)(3); *see also* Alaska Code Jud. Conduct Canon 3(E)(1)(c)(iv); Alaska Evid. R. 605 ("The judge presiding at the trial may not testify in that trial as a witness.").

[27] *See* Alaska Admin. R. 24(e) ("When a superior court judge hears a matter that is pending in the district court, that judge sits as a district court judge, and a specific assignment to the district court is not required.").

Judge Bauman concluded that the conduct that the judge admitted (*i.e.*, the ride with the trooper after sentencing was over) was sufficient to create an appearance of judicial bias at sentencing. Judge Bauman therefore vacated Haeg's sentence and scheduled a new sentencing hearing in front of a different judge.

This appeal and cross-appeal then followed.

Standard of Review and Overview of How This Decision is Structured

Because Judge Bauman resolved all of Haeg's claims on the pleadings without holding an evidentiary hearing, our review of his various rulings is de novo.[28] That is, we are required to review Haeg's application for post-conviction relief and all related pleadings and then determine, based on our independent judgment, whether those pleadings state a *prima facie* case for relief on any of the grounds alleged.[29]

For purposes of clarity, we have divided Haeg's claims into three categories: (1) Haeg's allegations of judicial bias and/or the appearance of judicial bias against his trial judge (Judge Murphy); (2) Haeg's allegations of ineffective assistance of counsel against each of his privately retained attorneys (Cole, Robinson, and Osterman); and (3) Haeg's allegations of prosecutorial misconduct, state agency malfeasance, and wide-spread corruption within the judiciary.

We now address each category in turn.

I. Haeg's Claims of Judicial Bias and/or the Appearance of Judicial Bias Related to His Trial Judge

a. Haeg's allegations

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[28] *Burton v. State*, 180 P.3d 964, 974 (Alaska App. 2008); *see Jones*, 759 P.2d at 565.

[29] *See Burton*, 180 P.3d at 974 & n.14.

Haeg alleges that his trial judge (Judge Murphy) engaged in multiple improper ex parte contacts with Trooper Gibbens during Haeg's trial and sentencing, creating what Haeg alleges was an appearance of judicial bias in favor of the State that requires reversal of Haeg's convictions and a new trial before a different judge.

Specifically, Haeg alleges that: (1) Judge Murphy regularly accepted rides from Trooper Gibbens at the beginning and end of each trial day as well as during various breaks in the trial day; (2) the judge accepted rides from Trooper Gibbens during and after Haeg's sentencing; and (3) the judge was seen eating meals with Trooper Gibbens during Haeg's trial.

In support of these allegations, Haeg submitted six affidavits from himself, his wife, and four acquaintances. All six witnesses reported personally observing the judge arriving or leaving with Trooper Gibbens and also reported that they never saw the judge arrive or depart the courthouse alone or with anyone other than Trooper Gibbens.

None of the six witnesses reported hearing any improper ex parte communications between the judge and the trooper about Haeg's case. Nor did they report actually witnessing Trooper Gibbens and Judge Murphy eating meals with each other.[30] However, the implication of their affidavits is that the ex parte conduct between the trooper and the judge was so extensive that "the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence [was] impaired,"[31] given the importance of

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[30] Haeg claims that he has evidence that the judge was seen eating meals with the trooper but we were unable to find any affidavits or other evidentiary support for this claim in the four boxes of documents that we reviewed for this appeal.

[31] *See State v. Dussault*, 245 P.3d 436, 442 (Alaska App. 2011) (quoting Alaska Code Jud. Conduct Canon 2(A) cmt.).

Trooper Gibbens's role in the criminal investigation against Haeg, his testimony against Haeg at trial, and his extended testimony about Haeg's character at sentencing.

As further support for his claim that the judge acted in a manner that created an appearance of bias, Haeg also attached a portion of his sentencing transcript in which the following exchange took place:

> *Defense Attorney (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 some ... .
>
> *Defense Attorney*: 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.
>
> *Defense Attorney*: All right.
>
> *Gibbens*: Well, yeah.
>
> *Defense Attorney*: You've been commandeered.
>
> *Prosecutor*: As long as there's no issue of ...
>
> *Defense Attorney*: 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.
>
> *Defense Attorney*: You've been commandeered.
>
> *Court*: He's just going to drive me over there to get some Diet Coke and we'll be back.
>
> *Defense Attorney*: All right.

Haeg asserts that this exchange shows that Judge Murphy viewed Trooper Gibbens as her "personal chauffeur," thus further supporting Haeg's allegations that the multiple ex parte contacts occurred.

In response to Haeg's allegations, the State submitted its own competing affidavits from Judge Murphy and Trooper Gibbens.

In her affidavit, Judge Murphy denied that she had accepted any rides from Trooper Gibbens during Haeg's trial or sentencing. According to Judge Murphy, the "one and only time" that Trooper Gibbens gave her a ride was after Haeg's sentencing was already over. She stated that Haeg's sentencing was not over until 1 a.m. and the walk to her hotel would have taken her past several open bars; she therefore asked Trooper Gibbens to give her a ride for personal safety reasons.

Judge Murphy recalled the on-the-record exchange about "commandeering" Trooper Gibbens to take her to the store, but she stated that the ride to the store never occurred because Trooper Gibbens instead brought her one of the Diet Cokes that she had stored at the courthouse. In addition, she pointed out that the transcript showed she had specifically reassured the parties that there would be no ex parte communication about the case. She also pointed out that Haeg's attorney had no objection to her request for a ride from the trooper.

For his part, Trooper Gibbens could not specifically remember giving Judge Murphy a ride at any time during Haeg's trial or sentencing. But he stated in his affidavit that, as a general matter, he frequently gave rides in McGrath to whoever needed them because there was no public transportation. Trooper Gibbens denied ever having a meal or an ex parte discussion about Haeg's case with Judge Murphy.

b. Relevant law

Under AS 22.20.020(a)(9), a judge is required to disqualify herself from a proceeding if the judge "feels that, for any reason, a fair and impartial decision cannot be given." Canon 3(E)(1) of the Alaska Code of Judicial Conduct likewise requires a judge to disqualify herself in any case where her impartiality "might reasonably be questioned."[32]

Although the statute and the Judicial Code prohibit similar conduct, they apply in different contexts.[33] The statute prescribes a judge's legal responsibilities and is enforced during the course of the court proceedings (such as the post-conviction relief proceedings at issue here).[34] In contrast, the Code prescribes a judge's ethical duties and is enforced by the Alaska Judicial Conduct Commission through separate judicial disciplinary proceedings in response to an ethics complaint brought against the judge.[35]

In *Phillips v. State*, this Court addressed the apparent discrepancy between the Code and the statute and noted that the Code requires disqualification based on an appearance of impropriety while the statute seemingly does not.[36] In *Phillips*, we assumed, without directly deciding, that a criminal defendant would nevertheless be

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[32] *See also* Alaska Code Jud. Conduct Canon 2(A) ("In all activities, a judge shall ... avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary.").

[33] *See Wasserman v. Bartholomew*, 923 P.2d 806, 815 (Alaska 1996) ("The canon and the statute set different standards and apply in different situations. ... However, we have relied upon the canon to interpret the statute.").

[34] *See Wasserman*, 923 P.2d at 815; *Phillips v. State*, 271 P.3d 457, 465 (Alaska App. 2012).

[35] *See Wasserman*, 923 P.2d at 815; *Phillips*, 271 P.3d at 465.

[36] 271 P.3d at 463-67.

entitled to relief under AS 22.20.020(a)(9) if the defendant could show an objective appearance of judicial bias, even in the absence of proof of actual bias.[37] This same assumption governs our current analysis in Haeg's case.

We note, however, that Haeg's case is unusual because Haeg's claim of judicial bias or the appearance of judicial bias is being raised for the first time in an application for post-conviction relief. Haeg did not file a motion to recuse Judge Murphy in the trial court proceedings, nor was there any objection on the record to her purported ex parte contacts with Trooper Gibbens.

A year after *Phillips* was decided, the Alaska Supreme Court released *Greenway v. Heathcott*.[38] *Greenway* involved a litigant who, like Haeg, raised questions of judicial bias only *after* the proceedings were complete.[39]

In *Greenway*, the supreme court questioned whether the appellant's failure to preserve the judicial bias claim made her claims unreviewable on appeal. The court noted that "[i]t is not obvious what must be done to preserve for review a claim of judicial bias, if, as here, there has been no motion for recusal, disqualification, or new trial alleging judicial bias or the appearance of bias."[40] The court in *Greenway* also questioned what standard of review should apply to these untimely claims.[41]

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[37] *Id.* at 466-67.

[38] 294 P.3d at 1063.

[39] *Id.*

[40] *Id.*

[41] *See Greenway*, 294 P.3d at 1062-63. Because the court ultimately determined that Greenway's judicial bias claims were meritless, the court did not directly answer either of these questions. Instead, the court simply assumed without deciding that the claims were properly before them on appeal, reviewing them under both an abuse of discretion and a de

(continued...)

This court has likewise consistently held that "[w]hen a [defendant] believes that an error requires ... extraordinary relief ... the [defendant] must ask the trial judge to take action when action is still possible."[42] A defendant should not be allowed to "take a gambler's risk and complain only if the cards [fall] the wrong way."[43]

Haeg's failure to timely raise these claims until his application for post-conviction relief therefore raises a question of whether his claims have been properly preserved for review.

c. The State's arguments that Haeg's claims are procedurally barred

In its cross-appeal, the State argues that Haeg's claims of judicial bias and the appearance of judicial bias are procedurally barred under AS 12.72.020(a)(2) because Haeg did not timely raise these claims in the original trial court proceedings or in his direct appeal.

Alaska Statute 12.72.020(a)(2) precludes a criminal defendant from raising a claim for post-conviction relief if the defendant could have previously raised the claim on direct appeal or during the original trial court proceedings.

Here, Haeg's own affidavit shows that he was aware of the purported basis for these claims during the trial court proceedings. Likewise, the record is clear that

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[41] (...continued)
novo standard of review. *Id.*

[42] *Allen v. State*, 51 P.3d 949, 953 (Alaska App. 2002); *see also Lampley v. Anchorage*, 159 P.3d 515, 526-27 (Alaska App. 2007); *Turpin v. State*, 890 P.2d 1128, 1130 (Alaska App. 1995).

[43] *Owens v. State*, 613 P.2d 259, 261 (Alaska 1980) (quoting *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967), *opinion after remand*, 409 F.2d 1083 (10th Cir. 1968)).

Haeg's trial attorney never objected to the judge's conduct and never filed a motion to recuse the judge based on this alleged misconduct. Indeed, when given an opportunity during sentencing to object to the judge "commandeering" the trooper to drive her to the store, Haeg's attorney specifically waived any objection, asserting that he saw "no problem" with the judge's actions.

Haeg argues that his attorney was ineffective for failing to object to the trial judge's actions. He also asserts that he was diligent in informing his attorney of the trial court's alleged actions and in requesting that the attorney seek recusal of the judge.

The State points out that Haeg represented himself in his direct appeal and that he is therefore solely responsible for his failure to raise these claims in his direct appeal. But we disagree with the State's assumption that these claims could have been litigated on direct appeal. As our subsequent discussion of these claims makes clear, Haeg's case is somewhat unique because there are conflicting affidavits regarding the nature of the ex parte contact, and these conflicting affidavits required both supplementation of the record and an evidentiary hearing — neither of which would have been available to Haeg on direct appeal.

We therefore conclude that Haeg is entitled to litigate his claims of judicial bias and the appearance of judicial bias in his post-conviction relief action, provided that he is able to show: (1) that he was diligent in raising his concerns with his attorney and informing the attorney of the extent of the alleged ex parte contacts; and (2) that his attorney was ineffective for failing to file either a motion to disqualify the trial judge or a motion for a new trial based on Haeg's allegations. To prove ineffectiveness in this context, Haeg must show not only that his attorney had no valid reason for his inaction,

but also that the motion would have resulted in either a new trial or a new sentencing hearing in front of a different judge.[44]

d. Resolution of Haeg's claims of judicial bias and the appearance of judicial bias requires a remand to the district court for an evidentiary hearing

The State also argues that, even if Haeg's claims are not procedurally barred, they are without merit as a matter of law. The State bases this argument on a formal ethics opinion that was issued by the Alaska Commission on Judicial Conduct after the Commission dismissed Haeg's ethics complaint against Judge Murphy.

In addition to filing an application for post-conviction relief seeking a new trial and/or a new sentencing, Haeg also filed an ethics complaint against Judge Murphy with the Alaska Commission on Judicial Conduct.[45] The Commission investigated Haeg's complaint and later dismissed it as lacking probable cause. The Commission subsequently issued a formal ethics opinion, based loosely on the facts of Haeg's case. The opinion was intended to provide future guidance to other judicial officers who may be faced with similar circumstances.[46]

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[44] *See Steffensen v. State*, 837 P.2d 1123, 1127 (Alaska App. 1992); *State v. Jones*, 759 P.2d 558, 569-70 (Alaska App. 1988).

[45] The Commission is an independent disciplinary body made up of public members appointed by the governor and judicial members elected by the bench. It is tasked with overseeing the conduct of judicial officers in Alaska and enforcing the Alaska Code of Judicial Conduct, the legal authority that governs a judge's ethical obligations under Alaska law. *See* AS 22.30.011(d).

[46] *See* Alaska Comm. on Jud. Conduct R. 6(C) ("The purpose of the Formal Ethics Opinion is to guide judicial conduct. These opinions may not identify the judge or otherwise violate the Commission's obligation to maintain the confidentiality of its proceedings.").

In its formal ethics opinion, the Commission concluded that it was *not* a breach of the Judicial Code of Conduct for a judge to accept a ride from law enforcement in a rural area where public transportation was unavailable, provided that there was no communication about any pending case.[47] The district court later relied on this formal ethics opinion as controlling authority when the court dismissed Haeg's judicial bias claims with regards to Judge Murphy's alleged conduct at trial.

Haeg argues that the district court's reliance on the formal ethics opinion was error. We agree. Because the Commission is an administrative disciplinary body, the role of the complainant in the Commission's proceedings is limited. The complainant is not a party to the Commission's proceedings, and the complainant does not have any power to direct the Commission's investigation or to request formal findings by the Commission.[48] Moreover, the ethics opinion is intended as guidance for judges in similar situations. It does not address the specific circumstances of Haeg's case; nor does it account for the competing affidavits that have been filed in this case.

Thus, although the Commission's investigation of Haeg's complaint may provide relevant information for a court tasked with deciding Haeg's post-conviction

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[47] Alaska Comm. on Jud. Conduct, Formal Ethics Op. #025, www.acjc.alaska.gov/-formalethicsopinions.html ("A judicial officer who accepted rides from law enforcement while on duty in a small village without any form of public transportation did not violate the Code of Judicial Conduct where no ex parte communication concerning the pending criminal matter occurred. The circumstances in rural Alaska often create a need for accommodations that would not be suitable if there were other alternatives. Where these accommodations include assistance by law enforcement officers, great care should be given to avoiding any discussion of official matters while outside the courtroom. The best practice would be to disclose the special needs and accommodations on the record at the beginning of the relevant court proceedings to avoid the appearance of impropriety questions.").

[48] *See* http://acjc.alaska.gov/operations.html (explaining complainant's limited role in the Commission's procedures and proceedings).

relief claims, the Commission's resolution of Haeg's ethics complaint is not binding on the court. This would be true even if the Commission had found Haeg's ethics complaint to be well-founded. The Commission's purpose is to investigate and recommend disciplinary sanctions for judges who have been found to have violated the judicial canons. It does not have the authority to grant legal relief to an individual complainant who has been harmed by the judge's alleged misconduct. Instead, that legal remedy must be pursued through the courts.

We therefore agree with Haeg that he is entitled to litigate his judicial bias claims in his post-conviction action notwithstanding the Commission's resolution of his complaint. We also agree with Haeg that a remand is necessary to resolve the material issues of fact that clearly exist with regard to those claims. Thus, if Haeg presents a *prima facie* case that he has been diligent in timely raising these claims, and that his attorney was ineffective for failing to raise them in the trial court proceedings, then Haeg is entitled to an evidentiary hearing. In that hearing, Haeg can present his witnesses and any other evidence that he has to support his claim that Judge Murphy engaged in ex parte contacts with Trooper Gibbens to such an extent that "the judge's participation would lead reasonable people to question the fairness of the proceedings."[49]

II. Haeg's Ineffective Assistance of Counsel Claims

During the course of his criminal case, Haeg was represented by three different defense attorneys (Cole, Robinson, and Osterman), each of whom he privately retained and then fired when he became unhappy with their performance. In his

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[49] *Keller v. State*, 84 P.3d 1010, 1012 (Alaska App. 2004).

application for post-conviction relief, Haeg claims that he received ineffective assistance of counsel from all three of his attorneys.

The district court dismissed the claims against all three attorneys, concluding that Haeg's pleadings had failed to present a *prima facie* case of ineffectiveness on any of his claims.

To present a *prima facie* case of ineffective assistance of counsel, a defendant must plead facts that, if true, demonstrate (1) that his attorney's performance fell below the objective standard of minimal competence in criminal law and (2) that there is a reasonable possibility that the incompetent performance contributed to the outcome.[50] In particular, the defendant's pleadings must contain assertions which, if true, rebut the presumption that the attorney performed competently and that the attorney's actions were motivated by sound tactical considerations.[51]

Having independently reviewed the pleadings in this case, we agree with the district court that Haeg's pleadings fail to state a *prima facie* case for relief with regard to his first attorney, who represented him during the plea negotiations and was fired after those plea negotiations broke down. We also agree with the district court that Haeg's pleadings fail to state a *prima facie* case for relief with regard to his third attorney, who was hired to represent Haeg on appeal but who was fired before the opening brief was filed.

We disagree, however, with the district court's dismissal of Haeg's claims against his second attorney, the attorney who represented Haeg at trial and at sentencing and who is purported to have told Haeg that he had a "strong" subject-matter

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[50] *See State v. Jones*, 759 P.2d 558, 567-68 (Alaska App. 1988); *see also Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

[51] *See Jones*, 759 P.2d at 569.

jurisdictional defense. Because there are material issues of fact in dispute regarding many of the claims against this attorney, we conclude that it was error for the court to dismiss these claims on the pleadings alone.

a. Haeg's ineffective assistance of counsel claims against his first attorney (Brent Cole)

Haeg's first attorney in this case was Brent Cole. Haeg hired Cole to represent him in plea negotiations with the State shortly after the State's investigation had concluded that Haeg and Zellers had illegally shot nine wolves same day airborne outside the boundaries of the permitted predator control program.

According to Cole, Haeg's primary concern at the time was to try to minimize the effect of his illegal actions on his guide license (which was his livelihood) and to try to retain his airplane (which had been seized and was potentially subject to forfeiture based on these crimes).[52]

Cole therefore advised Haeg that the best way to minimize his criminal exposure was to cooperate with the State. Based on Cole's advice, Haeg met with the prosecutor (Assistant District Attorney Scot Leaders) and provided a statement in which he identified all of the wolf kill sites. Haeg also admitted that, with one exception, he and Zellers had knowingly taken the wolves outside the boundaries of the predator control program. (Zellers, who was represented by a different private criminal defense attorney, gave a similar statement to the prosecutor during his plea negotiations.)

As part of the plea negotiations with Haeg, the State agreed to hold off filing any criminal charges and to allow Haeg to complete his spring 2004 guided bear

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[52] *See* AS 08.54.720(f)(3) & (4).

hunts.[53] The State also agreed that it would file charges under AS 08.54.720(a)(8)(A), which limited Haeg's possible license suspension to 3 years maximum, rather than AS 08.54.720(a)(15), which required a mandatory license suspension of at least 3 years and also included the possibility of a permanent revocation of Haeg's guiding license.[54]

According to Cole, the plea negotiations were going well, and an arraignment/change of plea/sentencing hearing date was set for November 8, 2004. Cole asserts that, when this date was set, the only remaining point of contention was whether Haeg would agree to the forfeiture of his airplane as part of the plea agreement. Haeg apparently wanted to leave this part of his sentence open so that he could argue against the forfeiture at the sentencing hearing. According to Cole, however, the State was insistent that the forfeiture of an airplane be included as part of the agreement.[55]

On the eve of the scheduled hearing, Cole notified the prosecutor that Haeg was still unwilling to agree to any plea agreement that included the forfeiture of the airplane as one of its bargained-for terms. The prosecutor became concerned that Haeg intended to go to the next day's hearing and to plead guilty to the reduced charges even though the State viewed these reduced charges as conditional on Haeg's acceptance of

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[53] According to Haeg, the State also agreed to retroactively credit Haeg for the time he voluntarily gave up guiding during the plea negotiations. According to the prosecutor's affidavit, the offer for retroactive credit was later withdrawn after the plea negotiations broke down and Cole was fired.

[54] *See* AS 08.54.720(a)(8), (a)(15), (f)(1), and (f)(3).

[55] According to Cole, the State was willing to consider the forfeiture of Haeg's other airplane in lieu of the more distinctive airplane used in the wolf shootings. It is not clear from the current record whether Haeg and the State agree that the substitution was permitted or whether the parties could have reached an agreement with this substitution in place.

the larger bargained-for exchange.[56] To prevent this from happening, the prosecutor filed an amended complaint charging both Haeg and Zellers with the more serious misdemeanor charges under AS 08.54.720(a)(15).

Cole asserts that the prosecutor contacted him to explain the amended complaint and the higher charges, and that the prosecutor emphasized that the State was still willing to accept Haeg's plea to the lesser charges if Haeg was willing to agree to the forfeiture of the airplane as one of the express terms of the agreement.[57]

According to Cole's later deposition, Cole accepted the prosecutor's explanations and continued to believe that the parties would still be able to come to a mutually acceptable resolution on the lesser charges. Cole also believed that even if the plea agreement left the forfeiture of Haeg's airplane to the sentencing judge's discretion, it was still highly likely that the judge would order the forfeiture of the airplane. Cole therefore believed that continuing negotiations with the State remained Haeg's best option.

However, Haeg viewed things very differently. Haeg believed that the parties *had* reached a final enforceable plea agreement "on or about November 1," which is why the arraignment/change of plea hearing was scheduled. According to Haeg, this final enforceable plea agreement permitted Haeg to plead guilty to the lesser charges under AS 08.54.720(a)(8) and left sentencing and the forfeiture of the airplane to the discretion of the sentencing judge.

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[56] *Cf. United States v. Goodwin*, 457 U.S. 368, 384 (1982) (holding that a prosecutor does not violate a defendant's due process by engaging in plea negotiations in which more serious criminal charges are a possible consequence of a failure to reach agreement); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (same).

[57] *See Goodwin*, 457 U.S. at 384; *Bordenkircher*, 434 U.S. at 364-65.

Because Haeg believed that the State had breached what Haeg viewed as a final enforceable plea agreement, Haeg wanted Cole to move to enforce this purported final plea agreement. When Cole failed to do so, Haeg fired Cole and hired Robinson in his place.

In his application for post-conviction relief, Haeg asserts that Cole's refusal to ask the court to enforce the purportedly final enforceable plea agreement constitutes ineffective assistance of counsel.

To establish a *prima facie* case for this claim, Haeg's pleadings needed to offer facts which, if proved, would show that no competent attorney would have failed to know that Haeg already had an enforceable plea agreement, and that no competent attorney would have failed to file a motion to enforce this agreement under those circumstances.[58] Haeg also needed to show that he was prejudiced by his attorney's failure to file this motion.[59]

We agree with the district court that Haeg's pleadings fail to set forth a *prima facie* case of ineffectiveness under this test. Cole's position was that Haeg would lose his airplane at an open sentencing and that it was therefore better to continue to negotiate with the State to achieve the best resolution possible for Haeg. Although Haeg may have disagreed with this position, he has not shown it was an incompetent position under the circumstances.[60] We note that Haeg did ultimately lose his airplane at the open sentencing that occurred after his trial.

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[58] *See State v. Steffensen*, 902 P.2d 340, 341-42 (Alaska App. 1995).

[59] *Id.*

[60] *See Burton v. State*, 180 P.3d 964, 974 (Alaska App. 2008).

More importantly, because Haeg fired Cole, Cole was no longer in a position to renew plea negotiations with the State and obtain the benefits that Haeg wanted. Instead, the responsibility for obtaining any benefits from the plea negotiations that had occurred fell to Haeg's new attorney, Chuck Robinson.

Haeg also claims that Cole was ineffective for failing to file various pretrial motions that Haeg claims would have been meritorious. But, as the district court recognized in its order dismissing this claim, it was reasonable for Cole not to file pretrial motions while the parties were engaged in ongoing plea negotiations over the criminal charges, particularly because the criminal charges remained unfiled for most of Cole's representation of Haeg. Again, Haeg may disagree with this decision now. But the question for purposes of post-conviction relief is not whether another attorney might have acted differently, but whether no competent attorney would have made the strategic decision that Cole did.[61] We conclude that Haeg's assertion of fact on this matter, even if ultimately proved, would not establish that Cole's decision was outside the range of competency. We therefore agree with the district court that these additional claims of ineffectiveness against Cole fail to set forth a *prima facie* case with respect to Cole's alleged incompetence and were therefore properly dismissed on Haeg's pleadings.

b. Haeg's ineffective assistance of counsel claims against his second attorney (Robinson)

1. Haeg's claims of ineffectiveness against Robinson related to the plea negotiations in his case

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[61] *Id.*

As just explained, Haeg fired Cole and hired Robinson because Cole refused to file a motion to enforce what Haeg believed was a final enforceable plea agreement. However, after talking to Cole, Robinson decided that the parties never reached a final enforceable plea agreement, and Robinson therefore took no action to enforce the agreement either.

Robinson also apparently decided that it was pointless to renew plea negotiations with the State. In his later deposition, Robinson asserted that he made this decision because it was clear that Haeg no longer trusted the State and because Robinson did not believe that the parties would ever be able to reach an agreement regarding the forfeiture of Haeg's airplane.

Robinson also appears to have based his decision not to renew negotiations on his belief that Haeg had a "strong" subject-matter jurisdictional defense to the charges. Robinson believed that the district court never obtained subject-matter jurisdiction over Haeg's case because the original criminal complaint was not signed under oath.[62] According to Haeg, Robinson advised him that this defense was so strong that there was no need to pursue any other defense or to continue plea negotiations with the State.

Robinson, in fact, filed a motion to dismiss Haeg's case based on this subject-matter jurisdictional defense. This motion was denied for lack of legal merit and also because it was moot: in the interim, the State had corrected this pleading deficiency.

In his application for post-conviction relief, Haeg asserts that Robinson was ineffective for pursuing this jurisdictional defense and for advising Haeg that he had a

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[62] *See* Alaska R. Crim. P. 5(d).

"strong" defense. Haeg also asserts that Robinson was ineffective for failing to move to enforce what Haeg contends was a final enforceable plea agreement between the parties.

The district court dismissed both claims for failure to state a *prima facie* case of ineffective assistance of counsel. The court based its decision on its finding that there was no enforceable final plea agreement, and on its conclusion that Haeg could not have been prejudiced by Robinson's filing of a meritless motion to dismiss.

The district court's "finding" that there was no enforceable plea agreement is highly problematic given the procedural posture of this litigation. As Haeg points out, whether there was an enforceable final agreement remains a disputed question of fact. Moreover, although Cole, Robinson, and the State assert that there was no enforceable agreement that Haeg was willing to accept, there is evidence in the record that suggests that one may have existed — namely, the scheduling of the November 9 change of plea hearing and the "sentencing materials" that Cole submitted to the court on November 8.[63]

In addition, although we agree with the district court that Haeg was not prejudiced by the filing of the meritless subject-matter jurisdiction motion to dismiss, it remains unclear whether Haeg was prejudiced by Robinson's assessment of the strength of this meritless defense. If Haeg can show that Robinson's assessment of this defense was incompetently optimistic, and that Haeg would have continued plea negotiations with the State but for this incompetent advice, then Haeg may be entitled to post-conviction relief on this claim.[64] We note that to prevail on such a claim Haeg must

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[63] These sentencing materials allegedly included Haeg's "Wolf Statement." We address Haeg's claim that the "Wolf Statement" was removed from the court's file in the next section.

[64] *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376, 1384, 182 L Ed. 2d 398, 80 U.S.L.W. 4244 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1409, 182 L. Ed.2d 379, 80 U.S.L.W. 4253 (continued...)

show, at a minimum, that his refusal to continue plea negotiations with the State was a result of Robinson's poor legal advice, not a result of his own distrust of the State or his unwillingness to compromise on the issue of the forfeiture of his airplane.

We therefore conclude that it was error for the court to dismiss these claims based solely on the pleadings. Accordingly, we reverse the court's dismissal of these claims for failure to state a *prima facie* case for relief and we remand this case to the district court for further proceedings on these claims consistent with Alaska Criminal Rule 35.1(f) and (g).

On remand, Haeg should be given the opportunity to file a pleading stating with particularity the terms of the final enforceable plea agreement that he claims existed. Haeg should also be required to specify with particularity the legal advice he received from Robinson about whether to accept any of the State's plea offers and whether, but for Robinson's advice, he would have accepted any of these offers. The State should then be required to file a formal answer to these claims. If there are material facts in dispute regarding the existence of an enforceable plea agreement or Haeg's willingness to renew plea negotiations and accept the State's plea offer, the court should hold an evidentiary hearing to resolve these material issues of disputed fact.[65]

2. Haeg's other claims of ineffectiveness against Robinson

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[64] (...continued)
(2012); *Gaylord v. United States*, 829 F.3d 500, 506 (7th Cir. 2016); *Fulton v. Graham*, 802 F.3d 257, 266 (2d Cir. 2015); *United States v. Bui*, 795 F.3d 363, 367 (3d Cir. 2015); *Barnes v. Hammer*, 765 F.3d 810, 814 (8th Cir. 2014); *People v. Williams*, 54 N.E. 3d 934, 940-41 (Ill. App. 2016); *Commonwealth v. Marinho*, 981 N.E.2d 648, 656 (Mass. 2013).

[65] *See* Alaska R. Crim. P. 35.1(g).

Haeg alleges that Robinson was also ineffective for: (1) failing to file what Haeg alleges would have been a meritorious pretrial motion to suppress; (2) failing to raise what Haeg alleges would have been a meritorious entrapment defense; (3) failing to object to the State's purported violation of Alaska Evidence Rule 410; (4) advising Haeg to testify at trial; (5) failing to enforce what Haeg claims was a grant of "transactional immunity"; (6) failing to call Brent Cole as a witness at Haeg's sentencing hearing; and (7) failing to correct various alleged factual misrepresentations by the State at Haeg's sentencing.

The district court dismissed all of these claims for failure to state a *prima facie* case for relief under the *Risher* test. We agree with the court's dismissal of the first six claims, but conclude that further proceedings are required on the last claim.

i. The motion to suppress that Haeg believes should have been filed

Haeg alleges that Robinson was ineffective for failing to file a pretrial motion to suppress the search warrant based on what Haeg claims were intentional misrepresentations by Trooper Gibbens regarding the location of the wolf kill sites.

Haeg is correct that Trooper Gibbens's search warrant application misidentifies the location of the wolf kill sites. The application states that the wolves were killed in Game Management Unit 19-C rather than Game Management Unit 19-D.

But, as the district court correctly noted, this misstatement was not material to the magistrate's probable cause determination.[66] Haeg does not dispute that the wolves were found outside the boundaries of the wolf predator control program, which

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[66] *State v. Malkin*, 722 P.2d 943, 946 n.6 (Alaska 1986); *see Lewis v. State*, 862 P.2d 181, 186 (Alaska App. 1993).

was limited to Game Management Unit 19-D East. Correction of the trooper's misidentification of the exact location of the kill sites would not have affected the issuance of the search warrants.[67]

Although Alaska law is clear that a search warrant will normally not be invalidated based on a non-material misstatement or omission in the search warrant application, there is an exception to this rule if the court finds "a deliberate attempt to mislead" the judge issuing the warrant.[68]

Haeg asserts that a "deliberate intent to mislead" would have been found in his case. He contends that Trooper Gibbens knew that the wolves were found in 19-D and that he fraudulently claimed that they were found in 19-C because he wanted to make it look as though Haeg killed the wolves for his own commercial interests. (Game Management Unit 19-C is where Haeg works as a professional guide.) As support for his claim that the trooper's misstatement was intentional rather than merely negligent or reckless, Haeg points to the fact that, at trial, Trooper Gibbens initially testified that the wolf kill sites were found in 19-C. (We note that Trooper Gibbens later corrected himself when challenged about the location on cross-examination.)

To establish a *prima facie* case of ineffective assistance of counsel on this claim, Haeg's pleadings needed to offer facts which, if proved, would show that no competent attorney would have failed to file a motion to suppress under these circumstances.[69] But whether an attorney acted incompetently must be assessed based

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[67] *Malkin*, 722 P.2d at 946.

[68] *Id.* at 946 n.6.

[69] *See State v. Steffensen*, 902 P.2d 340, 341-42 (Alaska App. 1995).

on the information known to the attorney at the time.[70] Here, Robinson knew that the trooper's search warrant application had misidentified the game management unit where the wolf kill sites were found, but he did not know that the trooper would continue to misidentify the kill sites in later proceedings. Robinson also knew that the misstatement was immaterial to the issuance of the search warrant and that the determination of probable cause did not rest on whether the wolves were killed in game management unit 19-C or 19-D; all that mattered was that they were not killed within the boundaries of the predator control program. Given these circumstances, we agree with the district court that Haeg's pleadings failed to state a *prima facie* case of ineffective assistance of counsel on this claim.

ii. Haeg's alleged entrapment defense

Haeg alleges that Robinson was ineffective for failing to raise an entrapment defense in his case — a defense that Haeg believes constituted a "complete defense" to all of the criminal charges in his case.

Haeg's entrapment claim is based on his assertion that he was induced by Alaska Board of Game member Ted Spraker to kill as many wolves as possible, regardless of the game management unit in which they were located, and to report these kills as though they were taken in Game Management Unit 19-D East — that is, within the boundaries of the wolf predator control program.

Haeg alleges that this inducement occurred at the February 2004 Board of Game meeting where various board members expressed their concern that the wolf predator control program was not working and not enough wolves were being taken.

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[70] *See Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004); *State v. Jones*, 759 P.2d 558, 569-70 (Alaska App. 1988).

Haeg also asserts that there was wide-spread concern expressed that the wolf predator control program, which was controversial, would be shut down unless more wolves were taken.

After the meeting was over, Haeg claims that Spraker told him privately that he should take as many wolves as he could, so as to ensure that the program was a success. Haeg also claims that Spraker told him that if he and Zellers ended up shooting wolves outside the permitted area, they should just report the kills as though they were taken inside the area. Haeg claims that he left the February meeting "feeling immense pressure from all sides to kill wolves."

At his deposition in the post-conviction case, Robinson stated that he investigated these allegations prior to trial and spoke to Spraker about Haeg's claims. According to Robinson, Spraker denied making these statements. Spraker later testified as a defense witness at Haeg's trial and was asked about the purpose of the wolf predator control program and the problems it was facing, but he was not asked about Haeg's allegations against him because Robinson was concerned that Spraker's version of events would directly contradict Haeg's.

The record also indicates that both Cole and Robinson informed Haeg that he did not have an entrapment defense under the law, even assuming that he could prove the alleged conversation with Spraker took place as he claimed it did.

Cole and Robinson are correct: even if the conversation with Spraker occurred as Haeg asserted, Haeg would not have an entrapment defense. Entrapment is an affirmative defense under Alaska law — one which is tried to the judge prior to trial rather than to a jury.[71] To establish the defense of entrapment, a defendant must establish

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[71] Alaska Statute 11.81.450, Alaska's entrapment statute, states:

(continued...)

that (1) a public law enforcement official (or a person working in cooperation with a public law enforcement official), in order to obtain evidence of the commission of a crime, induces the defendant to commit crimes he would not have otherwise committed, and (2) the law enforcement official's "conduct fell below an acceptable standard for the fair and honorable administration of justice."[72]

(We note that in his briefing Haeg mistakenly relies on the Ninth Circuit's standard for entrapment under federal law to analyze his claim. The Ninth Circuit's standard differs from Alaska's standard in that it requires only inducement by a government agent. By contrast, Alaska's standard requires inducement by a law enforcement officer.[73])

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[71] (...continued)

> In any prosecution for an offense, it is an affirmative defense that, in order to obtain evidence of the commission of an offense, a public law enforcement official or a person working in cooperation with the official induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an average person, other than one who is ready and willing, to commit the offense. Inducement or persuasion which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit does not constitute entrapment.

[72] *Pascu v. State*, 577 P.2d 1064, 1066-67 (Alaska 1978) ("(U)nlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense."); *see also Grossman v. State*, 457 P.2d 226, 227 (Alaska 1969).

[73] *Compare United States v. Busby*, 780 F.2d 804, 806 (9th Cir. 1986), *with State v. Yi*, 85 P.3d 469, 473 (Alaska App. 2004) (Mannheimer, J., concurring).

Here, there was no evidence that Spraker qualified as a "law enforcement official" or that he was working in cooperation with law enforcement officials.[74] Nor is there any evidence that Spraker encouraged Haeg to kill wolves illegally in an attempt to gain evidence against Haeg.

We note that Haeg does not claim that Spraker misled Haeg into believing that his actions were not illegal. To the contrary, Haeg's claim is that Spraker solicited Haeg to engage in what was known to both of them to be illegal conduct because Spraker allegedly also wanted that illegal conduct to occur. Likewise, Haeg has never claimed that Spraker told him it was legal to take the wolves outside the boundaries of the predator control program; nor has he claimed that Spraker told him that he would be shielded from liability if he did so. Instead, the essence of Spraker's alleged conversation with Haeg was that if Haeg engaged in this illegal conduct, he should cover it up by misreporting the kills as occurring within the predator control program.

Finally, we note that although Zellers and Haeg ultimately admitted to illegally shooting nine wolves from the air, they only followed Spraker's alleged "advice" with regard to three of them. That is, they falsely sealed only three of the nine wolves under the predator control program, and claimed (falsely) that the other six were shot from snowmachines.[75]

To establish a *prima facie* case of ineffective assistance of counsel on this claim, Haeg needed to offer facts that, if proved, would show that no competent attorney

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[74] *See Yi*, 85 P.3d at 473 (Mannheimer, J., concurring) (noting that, under AS 11.81.450, "entrapment is defined as *law enforcement conduct* — 'persuasion or inducement' by law enforcement officers or those working in cooperation with them") (emphasis in original).

[75] *Haeg*, 2008 WL 4181532, at *4.

would have failed to pursue Haeg's purported entrapment defense. We agree with the district court that Haeg's pleadings demonstrate otherwise.

iii. Alleged violations of Evidence Rule 410

Alaska Rule of Evidence 410 promotes the settlement of cases by limiting the use of statements made while negotiating plea agreements.[76] Evidence Rule 410(a)(i) states, in part, that "[e]vidence of ... statements ... made in connection with [an offer to plead guilty or the offer of a plea bargain] ... is not admissible in any civil or criminal action, case or proceeding ... against ... an accused person who made the plea or offer if ... [the] plea discussion does not result in a plea of guilty or nolo contendere."

Haeg alleges that the State used Haeg's statements from the plea negotiations against him in violation of Evidence Rule 410. Haeg alleges, in particular, that the State used his plea negotiations statements to obtain a statement from his co-defendant Zellers, to obtain probable cause for the criminal complaint, and to find and prepare witnesses against Haeg. Haeg also claims that the State used his map markings of the wolf kill sites against him in its case-in-chief at trial. Haeg further alleges that Robinson was ineffective for failing to prevent the State from using Haeg's statements against him in the later proceedings.

Haeg raised many of these same claims in his merit appeal, and we rejected them for the reasons explained in our prior decision.[77] As we explained, "[e]ach version of the information was supported by a probable cause statement that set out Gibbens's investigation and a summation of the statements made by Haeg and Zellers. Thus, even

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[76] *See* Alaska Evid. R. 410 cmt. para. 1.

[77] *Haeg*, 2008 WL 4181532, at *7.

if Haeg's statements had been removed from the charging document, the remaining evidence from Gibbens and Zellers would still support the charges against Haeg."[78]

We note that whether the State used Haeg's kill location marks on the map they used at trial appears to be a disputed question of fact. Haeg claims that the map used at trial was the same map that he marked. But he does not dispute that Zellers also reported the kill site locations to the State, either by confirming Haeg's prior marks or making his own marks. Thus, there was no reason for the State to use Haeg's location marks at trial; they could have used Zeller's marks.

Moreover, even if the map used at trial did include Haeg's marks, Haeg could not have been prejudiced by this use. Although Haeg corrected Gibbens's testimony on the exact location of some of the wolf kill sites, he did not dispute that the wolves were all taken outside the boundaries of the predator control program.

We thus conclude that Haeg has failed to state a *prima facie* case that Robinson was ineffective for failing to enforce the rights Haeg had under Evidence Rule 410.

iv. Haeg's testimony at trial

Haeg asserts that Robinson was ineffective for advising him to testify at trial. But, as the district court ruled, Haeg was not prejudiced by this advice because there was nothing incriminating in his trial testimony that was any different than the incriminating testimony provided by the State's main witnesses, Tony Zellers and Trooper Gibbens.[79]

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[78] *Id.*

[79] *See also Haeg*, 2008 WL 4181532, at *7 (noting that Zeller's testimony for the State, (continued...)

Moreover, Haeg has not alleged (nor is there any evidence to suggest) that Robinson coerced him into testifying or that his decision to take the stand and testify on his own behalf at his trial was anything other than voluntary.

v. Haeg's alleged "transactional immunity"

Haeg argues that the State gave him "transactional immunity" for a June 2004 statement he made to the State and troopers while represented by his first attorney (Cole), and he asserts that Judge Bauman should have reversed his conviction because the State violated that immunity agreement.[80] Haeg did not raise this issue in his merit appeal. Thus, if he could have raised this issue in his merit appeal, he is barred from raising it in his post-conviction relief proceedings.[81] However, we address this issue as a claim that his attorney's failure to raise this issue was ineffective assistance of counsel.

Although Haeg now asserts he had transactional immunity, Judge Bauman was not required to accept Haeg's conclusory assertion. In *LaBrake v. State*,[82] we explained that the rule obliging a court to assume the truth of the non-moving party's assertions of fact does not apply to statements concerning the law or legal aspects of

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[79] (...continued)
"along with Gibbens's [testimony], was sufficient to support Haeg's convictions").

[80] *See State v. Gonzalez*, 853 P.2d 526, 528 (Alaska 1993) (transactional immunity prohibits prosecution of a witness for a crime he or she was compelled to testify about).

[81] *See* AS 12.72.020(a)(2).

[82] 152 P.3d 474 (Alaska App. 2007).

mixed questions of law and fact. More importantly, a court is not required to accept statements that are "patently false or unfounded, based on the existing record."[83]

Here, Haeg's assertion that the State granted him transactional immunity was patently unfounded; the record shows only Haeg's own confusion about the difference between transactional immunity and the limited use immunity provided by Evidence Rule 410. We therefore find no error in Judge Bauman's decision to dismiss this ineffectiveness claim for failure to plead a *prima facie* case.

vi. Robinson's failure to call Cole as a witness at sentencing

At sentencing, Haeg wanted Robinson to call his former attorney Cole as a witness to testify about what Haeg considered to be the State's breach of the prior plea agreement. Haeg also wanted Cole to testify that the State had previously agreed to give Haeg credit for the year that he had voluntarily refrained from guiding during the plea negotiations. Despite Haeg's request, Robinson did not call Cole as a witness.

In his application for post-conviction relief, Haeg asserts that Robinson was ineffective for failing to call Cole as a witness at his sentencing.

The district court rejected this claim for failure to state a *prima facie* case of ineffectiveness, concluding that Robinson's decision not to call Cole for the sentencing hearing was clearly a tactical decision and that Haeg had failed to offer a *prima facie* case that Robinson's decision was unreasonable under the circumstances. The district court noted that, at the time of sentencing, Haeg and Cole were immersed in

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[83] *Id.* at 481.

a contentious fee arbitration case that had not resolved.[84] As Haeg's attorney, Robinson had the authority to decide which witnesses to call at sentencing and his decision not to call Cole was not unreasonable or incompetent under the circumstances.[85] Given this record, we agree with the district court that Haeg has failed to offer a *prima facie* case that Robinson acted incompetently when he made the tactical decision not to call Cole as a witness at sentencing.

vii. Haeg's claim that Robinson was ineffective for failing to correct factual inaccuracies about the location of the kill sites at sentencing

At various points during sentencing, the prosecutor claimed that Haeg had intentionally gone to areas "around where he hunts and guides," and that he did so because he was primarily motivated by his own commercial interests in killing the wolves. The State also argued that Haeg should receive an "enhanced" sentence from what Zellers received because "it's [Haeg's] guiding area, it's his guiding operation that's most directly benefitting."

It was clear from the judge's sentencing remarks that she accepted this explanation of Haeg's motivations. It is also clear that she believed (erroneously) that Haeg had killed most of the wolves in Game Management Unit 19-C, the unit where he guides. The judge began her sentencing remarks with the comment that "there are several things in this case that are extremely disturbing to the court." She then proceeded to emphasize that one of the things that she found most disturbing was that "the majority,

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[84] *See Haeg v. Cole*, 200 P.3d 317 (Alaska 2009).

[85] *See Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004).

if not all of the wolves were taken in 19-C," and that the majority of the wolves were killed right after the Board had denied Haeg's request to expand the wolf predator control program into 19-C.

In his application for post-conviction relief, Haeg asserted that the State had intentionally misled the court into believing that Haeg had killed the wolves in 19-C rather than 19-D. Haeg also argued that Robinson was ineffective for failing to correct the State's misrepresentations and for failing to seek a new sentencing hearing based on the judge's erroneous understanding of the facts.

The record is clear that the judge was mistaken about where exactly the wolves were killed — Haeg killed the wolves in 19-D, not 19-C. The record is unclear, however, whether correction of this mistake would have made a material difference in the judge's understanding of Haeg's motivations or in her sentencing. That is, the record is unclear whether the wolves were killed in an area close enough to where Haeg guided that the difference between the two units was immaterial to the judge's conclusions. The record is also unclear whether, as the State asserted, the wolves that were killed in 19-D were the same wolves that would have otherwise entered 19-C and that Haeg was aware of that fact.

We have reviewed Robinson's deposition and we cannot determine whether Robinson ever responded to Haeg's claim that Robinson was ineffective for failing to correct the apparent inaccuracies regarding the location of the kill sites and for failing to move for a new sentencing on that basis. Accordingly, on remand, we direct the district court to have Robinson provide an explanation for why he did not challenge the apparent factual inaccuracies presented at sentencing, especially once it became clear that the judge was relying on these inaccuracies in imposing Haeg's sentence. After Robinson has provided an explanation for his inaction, the court shall determine whether

Haeg has established a *prima facie* case of ineffective assistance of counsel on this claim and shall likewise determine whether further proceedings on this claim are required.

c. Haeg's ineffective assistance of appellate counsel claims against Osterman

As previously explained, Haeg hired Osterman to represent him on appeal shortly after Haeg's notice of appeal was filed. However, Haeg soon became dissatisfied with Osterman's work and fired him before the opening brief was filed. Haeg then proceeded to represent himself in his direct appeal, filing his own pro se appellate briefs and motions with this Court.

In his application for post-conviction relief, Haeg asserted that Osterman prepared a draft brief that fell below the minimal standard of competency expected of an experienced criminal law practitioner. Haeg also submitted recorded transcripts of his conversations with Osterman in which Osterman appeared confused about how many judges sit on the Court of Appeals and how the appellate process works.

The district court dismissed Haeg's claims of ineffective assistance of counsel against Osterman for failure to state a *prima facie* case, concluding that any alleged incompetence by Osterman could not have prejudiced Haeg because Haeg never filed Osterman's brief and instead chose to represent himself in his direct appeal. We agree with this analysis and therefore affirm this ruling.

On appeal, Haeg argues that he *was* prejudiced by Osterman's alleged incompetence because, after paying Cole, Robinson, and Osterman, he did not have any more money to retain a private lawyer in his case. But assuming this was the case, Haeg would then have been eligible for a court-appointed attorney at public expense. In other words, contrary to his current claims, Haeg was not "forced" to represent himself. We

note that Haeg was subsequently appointed public counsel for his post-conviction case upon his showing of indigency, but that he again chose to waive his right to counsel and to represent himself in his post-conviction relief case (as well as in this appeal). We also note that there is nothing in the record to suggest that Haeg's decision to represent himself was anything but knowingly and voluntarily made.

III. Haeg's Claims of Prosecutorial Misconduct and State-Wide Corruption

Haeg alleges that he is the victim of a wide-ranging conspiracy intended to "frame [him] ... [in order to] protect [the] infant wolf control program from program ending scandal." To this end, Haeg claims that the State attorneys responsible for prosecuting his case, Haeg's own attorneys, the Alaska Commission on Judicial Conduct, the Alaska Bar Association, the Alaska Public Defender Agency, and virtually every judge involved in this case have all colluded together in a vast conspiracy against him.

Haeg's allegations are, for the most part, simply unsubstantiated general allegations of wrongdoing without any specificity or support in the record. We therefore agree with the district court's decision to dismiss these claims for failure to state a *prima facie* case for relief. As we explained in *LaBrake v. State*, courts are not required to simply "assume the truth of *pro forma* assertions of the ultimate facts to be proved when these are not supported by specific details."[86]

a. Alleged misconduct related to Haeg's "Wolf Statement"

Haeg alleges that, as part of the conspiracy against him, someone removed his "Wolf Statement" from the court file. As Judge Joannides's order noted, it is not clear that the Wolf Statement was ever made part of the record in the first place. But

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[86] *LaBrake*, 152 P.3d at 481.

even if it was, Haeg has offered no reason to suspect impropriety in its disappearance given the actual content of the Wolf Statement.

In his pleadings, Haeg repeatedly characterizes the statements in the Wolf Statement as "exculpatory evidence." But the Wolf Statement is neither "exculpatory" nor "evidence" in the sense that Haeg means. The Wolf Statement is Haeg's written allocution about why he unlawfully killed the wolves and is a statement that was created by Haeg for presentation to the judge at the change of plea hearing — a hearing that never happened because the plea negotiations broke down. In this statement, Haeg directly admits that he broke the law and he explains why he mistakenly believed that his actions were justified. Haeg ultimately gave a very similar explanation to the judge at sentencing after he was convicted at trial. Accordingly, we agree with the district court that Haeg has failed to offer a *prima facie* case that the loss of the Wolf Statement prejudiced him in this case.

b. Alleged perjury by Trooper Gibbens

Haeg also alleges that the State suborned perjury by Trooper Gibbens at Haeg's trial. To be entitled to a new trial on the basis of the prosecution's use of perjured testimony, the defendant must establish that: (1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is a likelihood that the false testimony could have affected the judgment of the jury.[87] Here, Haeg has provided no support for these serious allegations of perjury and prosecutorial misconduct. Although the record shows that Trooper Gibbens misstated the location of the wolf kill sites in his direct testimony, the record also shows that he corrected himself when the error was pointed out to him on cross-examination.

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[87] *Napue v. Illinois*, 360 U.S. 264, 269-71 (1959).

Moreover, even if Trooper Gibbens had not corrected himself, the misstatement was immaterial to the jury's finding of guilt. That is, it did not matter, for purposes of the jury's verdicts, whether the wolves were killed in game management unit 19-C or 19-D; all that mattered was that the wolves were found outside the boundaries of the predator control program — which Haeg did not dispute at trial and does not dispute now.

However, because the location of the kill sites may have affected the court's sentencing decision and because Haeg's attorney did not object to the misstatements, or seek a new sentencing on this basis, Haeg is entitled to litigate this claim in the context of his attorney's alleged ineffectiveness of counsel at sentencing, as we have already explained.

c. Alleged corruption of the Alaska Judicial Conduct Commission and the Alaska Bar Association

The same absence of prejudice exists with regard to Haeg's claims against the Alaska Judicial Conduct Commission and the Alaska Bar Association. Haeg asserts that these two agencies were "corrupt" in their handling of the ethics complaints that Haeg filed against his trial judge and the prosecutor. But even if these agencies had concluded that the ethics complaints were well-founded and had instituted disciplinary proceedings against the judge and the prosecutor, they would not have had the authority to grant Haeg a new trial or a new sentencing. The authority for such relief is limited to the courts and can only be granted in the context of an application for post-conviction relief.

d. Judge Bauman's alleged corruption

Haeg makes multiple claims of corruption against his post-conviction relief judge, Judge Bauman. But the law is well-settled that adverse rulings, standing alone, do not make a judge biased; nor do they create an appearance of judicial bias, without more.[88] Here, Haeg does not point to anything other than Judge Bauman's adverse rulings against him to support these alleged claims of corruption. We therefore find no merit to these claims.

e. Haeg's other claims

Lastly, we note that Haeg's briefs and pleadings are sometimes difficult to understand, and he may have intended to raise other claims besides the ones we have discussed here. To the extent that Haeg may be attempting to raise other claims in his briefs, we conclude that these claims are inadequately briefed for purposes of appellate review.[89]

Conclusion

We REVERSE the district court's rulings on the appearance of bias issue and remand for further proceedings. On remand, the district court shall give Haeg the opportunity to show that he was diligent in raising this issue with his trial attorney and

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[88] *See Jerry B. v. Sally B.*, 377 P.3d 916, 930 n.50 (Alaska 2016); *Ronny M. v. Nanette H.*, 303 P.3d 392, 409 (Alaska 2013); *LaBrenz v. Burnett*, 218 P.3d 993, 1002 (Alaska 2009); *Crawford v. State*, 337 P.3d 4, 33 (Alaska App. 2014); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994); *Larson v. Palmer*, 515 F.3d 1057, 1067 (9th Cir. 2008); *Gallegos v. Schriro*, 583 F. Supp. 2d 1041, 1058-59 (D. Ariz. 2008).

[89] *See, e.g., A.H. v. W.P.*, 896 P.2d 240, 243-44 (Alaska 1995); *Petersen v. Mutual Life Ins. Co. Of New York*, 803 P.2d 406, 410 (Alaska 1990); *Nason v. State*, 102 P.3d 962, 964 (Alaska App. 2004).

that his attorney had no valid reason for his inactions. The district court should also hold an evidentiary hearing to determine the extent of the ex parte contacts between Judge Murphy and Trooper Gibbens. Based on the evidence presented at that hearing, the court should make factual findings and resolve the claim on the merits.

We REVERSE the district court's dismissal of the question of whether an enforceable plea agreement existed. On remand, the court shall provide the parties the opportunity to litigate the remaining questions regarding whether an enforceable agreement existed and what its terms specifically were. The court shall also provide the opportunity to litigate whether Haeg's second attorney was ineffective for failing to seek enforcement of this purported plea agreement, for providing incompetent advice about the strength of Haeg's defense, and for failing to renew plea negotiations with the State.

Lastly, we REVERSE the district court's dismissal of Haeg's claim of ineffective assistance of counsel against his second attorney at sentencing. On remand, the court shall require Robinson to respond to Haeg's claims regarding his failure to correct the misstatements about the kill site location and shall rule on whether Haeg has presented a *prima facie* case of ineffective assistance of counsel on this claim. If the court determines that Haeg has presented a *prima facie* case on this claim, the court shall then conduct further proceedings on this claim, as needed.

We otherwise AFFIRM the district court's rulings.