IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

DAVID HAEG,

Appellant,

VS.

STATE OF ALASKA,

Appellee.

Case No.: A-09455

Trial Court No. 4MC-04-24 CR.

CERTIFICATE OF SERVICE AND TYPEFACE

I, Sherry M. Matsuno state that I am employed by the Alaska Department of Law, Criminal Division Central Office, and that on February 8, 2008, I mailed a copy of APPELLEE'S BRIEF AND EXCERPT OF RECORD in the above-titled case to:

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IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

DAVID HAEG,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	
STATE OF ALASKA,	)	
	)	Court of Appeals No. A-09455
	)	
	)	
Appellee.	)	
	)	

Case No. 4MC-04-24 CR

APPEAL FROM THE DISTRICT COURT
FOURTH JUDICIAL DISTRICT AT MCGRATH
MARGARET MURPHY, JUDGE

BRIEF OF APPELLEE

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February_____, 2008
MARILYN MAY, CLERK
APPELLATE COURTS

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Deputy Clerk

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

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AS 08.54.720. Unlawful Acts.

(a) It is unlawful for a

(1) Person who is licensed under this chapter to knowingly fail to promptly report to the Department of Public Safety, division of fish and wildlife protection, and in no event later than 20 days, a violation of a state game, guiding, or transportation services statute or regulation that the person reasonably believes was committed by a client or an employee of the person;

(2) Person who is licensed under this chapter to intentionally obstruct or hinder or attempt to obstruct or hinder lawful hunting engaged in by a person who is not a client of the person;

(3) Class-A assistant guide or an assistant guide to knowingly guide a hunt except while employed and supervised by a registered guide;

(4) person who holds any class of guide license to knowingly enter or remain on private land without prior authorization during the course of providing big game hunting services;

(5) Registered guide to knowingly engage in providing big game hunting services outside of

(A) A game management unit for which the registered guide is certified; or

(B) A use area for which the registered guide is registered under AS 08.54.750 unless the registration requirement for the area has been suspended by the Department of Fish and Game;

(6) Person to knowingly guide without having a current registered guide, class-A assistant guide, or assistant guide license and hunting license in actual possession;

(7) Registered guide to knowingly fail to comply with AS 08.54.610(e);

(8) Person who is licensed under this chapter to knowingly

(A) Commit or aid in the commission of a violation of this chapter, a regulation adopted under this chapter, or a state game statute or regulation; or

(B) Permit the commission of a violation of this chapter, a regulation adopted under this chapter, or a state game statute or regulation that the person knows or reasonably believes is being or will be committed without

(i) Attempting to prevent it, short of using force; and

(ii) Reporting the violation;

(9) Person without a current registered guide license to knowingly guide, advertise as a registered guide, or represent to be a registered guide;

(10) Person without a current master guide license to knowingly advertise as, or represent to be, a master guide;

(11) Person without a current registered guide license to knowingly outfit a big game hunt, advertise as an outfitter of big game hunts, or represent to be an outfitter of big game hunts;

(12) Person to knowingly provide transportation services to big game hunters without holding a current registered guide license or transporter license;
(13) Person without a current transporter license to knowingly advertise as, or represent to be, a transporter;
(14) Class-A assistant guide or an assistant guide to knowingly contract to guide or outfit a hunt;
(15) Person licensed under this chapter to knowingly violate a state statute or regulation prohibiting waste of a wild food animal or hunting on the same day airborne;

AS 12.35.020. Grounds for Issuance.
A search warrant may be issued if the judicial officer reasonably believes any of the following:
(1) That the property was stolen or embezzled;
(2) That the property was used as a means of committing a crime;
(3) That the property is in the possession of a person who intends to use it as the means of committing a crime, or in possession of another to whom the person may have delivered it for the purpose of concealing it or preventing its being discovered;
(4) That the property constitutes evidence of a particular crime or tends to show that a certain person has committed a particular crime;
(5) That either reasonable legislative or administrative standards for conducting a routine or area inspection with regard to air pollution are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle.

AS 12.35.025. Seizure of Property.
(a) Property described in AS 12.35.020 may be taken on a warrant from
(1) A house or other place in which it is concealed or may be found;
(2) The possession of the person by whom it was stolen, embezzled, or used in the commission of a crime;
(3) A person who is in possession of the property;
(4) The possession of a person to whom the property has been delivered for the purpose of concealing it or preventing its being discovered, or from a house or other place occupied by that person or under that person's control.
(b) When property is seized under this chapter, the peace officer taking the property shall give to the person from whom or from whose premises the property was taken a copy of the warrant, a copy of the supporting affidavit, and a receipt for the property taken, or shall leave the copies and the receipt at the place from which the property was taken.
(c) The return of the warrant to the court shall be made promptly and shall be accompanied by a written inventory of the property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or

premises the property was taken, if they are present, or in the presence of at least one other person as a witness.
(d) The inventory required by (c) of this section shall be signed by the peace officer under penalty of perjury under AS 09.63.020. The judge or magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

AS 12.72.030. Filing of Application for Post-Conviction Relief.
An application for post-conviction relief shall be filed with the clerk at the court location where the underlying criminal case is filed.

AS 16.05.190. Seizure and Disposition of Equipment.
Guns, traps, nets, fishing tackle, boats, aircraft, automobiles or other vehicles, sleds, and other paraphernalia used in or in aid of a violation of this chapter or a regulation of the department may be seized under a valid search, and all fish and game, or parts of fish and game, or nests or eggs of birds, taken, transported, or possessed contrary to the provisions of this chapter or a regulation of the department shall be seized by any peace officer designated in AS 16.05.150. Upon conviction of the offender or upon judgment of the court having jurisdiction that the item was taken, transported, or possessed in violation of this chapter or a regulation of the department, all fish and game, or parts of them are forfeited to the state and shall be disposed of as directed by the court. If sold, the proceeds of the sale shall be transmitted to the proper state officer for deposit in the general fund. Guns, traps, nets, fishing tackle, boats, aircraft, or other vehicles, sleds, and other paraphernalia seized under the provisions of this chapter or a regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any.

AS 16.05.195. Forfeiture of Equipment.
(a) Guns, traps, nets, fishing gear, vessels, aircraft, other motor vehicles, sleds, and other paraphernalia or gear used in or in aid of a violation of this title or AS 08.54, or regulation adopted under this title or AS 08.54, and all fish and game or parts of fish and game or nests or eggs of birds taken, transported, or possessed contrary to the provisions of this title or AS 08.54, or regulation adopted under this title or AS 08.54, may be forfeited to the state
(1) Upon conviction of the offender in a criminal proceeding of a violation of this title or AS 08.54 in a court of competent jurisdiction; or
(2) Upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or AS 08.54 or a regulation adopted under this title or AS 08.54.
(b) Items specified in (a) of this section may be forfeited under this section regardless of whether they were seized before instituting the forfeiture action.

(c) An action for forfeiture under this section may be joined with an alternative action for damages brought by the state to recover damages for the value of fish and game or parts of them or nests or eggs of birds taken, transported, or possessed contrary to the provisions of this title or a regulation adopted under it.
(d) It is no defense that the person who had the item specified in (a) of this section in possession at the time of its use and seizure has not been convicted or acquitted in a criminal proceeding resulting from or arising out of its use.
(e) Forfeiture may not be made of an item subsequently sold to an innocent purchaser in good faith. The burden of proof as to whether the purchaser purchased the item innocently and in good faith shall be on the purchaser.
(f) An item forfeited under this section shall be disposed of at the discretion of the department. Before the department disposes of an aircraft it shall consider transfer of ownership of the aircraft to the Alaska Wing, Civil Air Patrol.

AS 22.05.010. Jurisdiction.
(a) The Supreme Court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.
(b) Appeal to the Supreme Court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240.

AS 22.05.015. Transfer of Appellate Cases.
(a) The Supreme Court may transfer to the court of appeals for decision a case pending before the Supreme Court if the case is within the jurisdiction of the court of appeals.
(b) The Supreme Court may take jurisdiction of a case pending before the court of appeals if the court of appeals certifies to the supreme court that the case involves a significant question of law under the Constitution of the United States or under the constitution of the state or involves an issue of substantial public interest that should be determined by the supreme court.

AS 22.07.020. Jurisdiction.
(a) The Court Of Appeals has appellate jurisdiction in actions and proceedings commenced in the superior court involving
(1) Criminal prosecution;
(2) Post-conviction relief;
(3) Matters under AS 47.12, including waiver of jurisdiction over a minor under AS 47.12.100 ;
(4) Extradition;
(5) Habeas Corpus;
(6) Probation and parole; and
(7) Bail.

(b) Except as limited in AS 12.55.120, the court of appeals has jurisdiction to hear appeals of unsuspended sentences of imprisonment exceeding two years for a felony offense or 120 days for a misdemeanor offense imposed by the superior court on the grounds that the sentence is excessive, or a sentence of any length on the grounds that it is too lenient. The Court Of Appeals, in the exercise of this jurisdiction, may modify the sentence as provided by law and the state constitution.
(c) The court of appeals has jurisdiction to review (1) a final decision of the district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus, or bail; and (2) the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense. In this subsection, "final decision" means a decision or order, other than dismissal by consent of all parties that closes a matter in the district court.

AS 22.10.020. Jurisdiction of the Superior Court.
(a) The Superior Court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents. Except for a petition for a protective order under AS 18.66.100 - 18.66.180, an action that falls within the concurrent jurisdiction of the superior court and the district court may not be filed in the superior court, except as provided by rules of the supreme court.
(b) The jurisdiction of the superior court extends over the whole of the state.
(c) The superior court and its judges may issue injunctions, writs of review, mandamus, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction. A writ of habeas corpus may be made returnable before any judge of the superior court.
(d) The superior court has jurisdiction in all matters appealed to it from a subordinate court, or administrative agency when appeal is provided by law, and has jurisdiction over petitions for relief in administrative matters under AS 44.62.305. The hearings on appeal from a final order or judgment of a subordinate court or administrative agency, except an appeal under AS 43.05.242, shall be on the record unless the superior court, in its discretion, grants a trial de novo, in whole or in part. The hearings on appeal from a final order or judgment under AS 43.05.242 shall be on the record.
(e) An appeal to the superior court is a matter of right, but an appeal from a subordinate court may not be taken by the defendant in a criminal case after a plea of guilty, except on the ground that the sentence was excessive. The state's right of appeal in criminal cases is limited by the prohibitions against double jeopardy contained in the United States Constitution and the Alaska Constitution.
(f) An appeal to the superior court may be taken on the ground that an unsuspended sentence of imprisonment exceeding 120 days was excessive and the superior court in the exercise of this jurisdiction has the power to reduce the sentence. The state may appeal a sentence on the ground that it is too lenient. When a sentence is appealed on the ground

that it is too lenient, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.
(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.
(h) [Renumbered as AS 22.10.025 (a)].
(i) The superior court is the court of original jurisdiction over all causes of action arising under the provisions of AS 18.80. A person who is injured or aggrieved by an act, practice, or policy which is prohibited under AS 18.80 may apply to the superior court for relief. The person aggrieved or injured may maintain an action on behalf of that person or on behalf of a class consisting of all persons who are aggrieved or injured by the act, practice, or policy giving rise to the action. In an action brought under this subsection, the court may grant relief as to any act, practice, or policy of the defendant which is prohibited by AS 18.80, regardless of whether each act, practice, or policy, with respect to which relief is granted, directly affects the plaintiff, so long as a class or members of a class of which the plaintiff is a member are or may be aggrieved or injured by the act, practice, or policy. The court may enjoin any act, practice, or policy which is illegal under AS 18.80 and may order any other relief, including the payment of money, that is appropriate.

AS 22.15.240. Appeal.
(a) Either party may appeal a judgment of the district court in a civil action to the superior court.
(b) The defendant may appeal a judgment of conviction given in the district court in a criminal action to the superior court. When the judgment is given on a plea of guilty, an appeal may not be taken by the defendant except on the ground that a sentence of imprisonment of 90 days or more was excessive. The state's right of appeal in criminal cases is limited by the prohibition against double jeopardy contained in the United States Constitution and the Alaska Constitution. The state may also appeal a sentence on the ground that it is too lenient. When a sentence is appealed on the ground that it is too lenient, the court may not increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

ISSUES PRESENTED FOR REVIEW

Haeg raises numerous issues in his brief that are not clearly identified in his statement of issues presented. The state has attempted to identify and list in this section all issues raised in Haeg's brief.

1. Is Haeg's Appeal inadequately briefed?

2. Is Haeg entitled to bring an ineffective assistance of counsel claim for the first time on appeal?

3. Did the Court of Appeals commit err by refusing to afford Haeg a venue for filing his PCR application and/or refusing to rule on Haeg's outstanding motions?

4. Did the Trial court commit error?

5. Is Haeg entitled to the specific relief sought by this motion?

STATEMENT OF THE CASE

Statement of facts

In 2004 the Alaska Department of Fish and Game (ADF&G) issued permits allowing for the killing of wolves from an airplane in game management subunit 19-D east. [Tr. 219, 226-7, 229, 231, 234-237, 520-21] Haeg, a professional hunter, master guide and pilot, applied for and received such a permit. [Tr. 232-33, 745, 789] In March 2004, Haeg and Tony Zellers, both licensed under Title 8 as Alaska Big Game Hunting Guides, took a total of nine wolves outside of game management sub-unit 19D-east. Zellers shot the wolves they encountered from Haeg's private aircraft which Haeg piloted. [Tr. 526-30, 543-4, 551-3, 569, 585-587, 616, 623-4, 643, 772, 827, 839, 847, 849, 852-3]

Haeg admitted at trial to knowing that he was outside of the permit area when he and Zellers killed all nine wolves. [Tr. 762-3, 770-2, 827, 852-3] Haeg further admitted knowing the geographical boundaries of game management subunit 19-D east and that he was not authorized to shoot wolves from his plane outside of this area. [Tr. 762-3, 769-71, 824-26, 839, 849-852, 856-58, 860] Haeg was convicted at jury trial for various misdemeanor offenses alleging violations of Title 8, 11 and regulations promulgated under those statutes. [Tr. 1033-35] Haeg was sentenced on September 30, 2005, by District Court Judge Margaret L. Murphy for the nine counts upon which he was found guilty. [Ex. 106-117]

ARGUMENT

I. HAEG'S APPEAL IS INADEQUATLY BRIEFED

Haeg's brief is deficient to the point of being incomprehensible. The brief does not support Haeg's alleged claims of error, but is largely his stream-of-consciousness complaints about his trial. The brief contains not a single record cite and minimal pertinent legal authority despite this Court ordering Haeg to designate the precise portions of the record that support his claims. [Ex. 128-9,132-3] If the purpose of appellate briefing is to bring together the law and facts in a clear manner so that the court is informed, then Haeg's appellate brief fails utterly in this regard. *See Tuttle v. State*, 65 P.3d 884, 887 & n.6 (Alaska App. 2002) (finding argument inadequately briefed and noting in connection with this that the primary purpose of appellate briefs is to "bring together the relevant law and facts in a clear and concise manner so the court is fully informed"). The brief is also in violation of too many provisions of Appellate Rule 212 to name.

Neither the state nor this Court should be required to guess at the arguments Haeg is making. Given the condition of Haeg's briefing, it is highly speculative that the arguments this Court and the state can discern are the ones that Haeg even intended to raise. Nor should this Court or the state be required to wade through over 1,454 pages of record and countless hours of cassette tapes to figure out the proceedings below. With such a record, simple matters such as figuring out whether Haeg has preserved his current arguments – which can affect this court's standard of review – becomes a Herculean task.

"Courts should not save a litigant from his choice of lawyer, including when a litigant chooses himself as legal representative." *Bauman v. State, Div. Of Family & Youth Servs.*, 768 P.2d 1097, 1099 (Alaska 1989). Although *pro se* litigants are understandably allowed more leeway in their appellate briefing, they must be held to a minimum standard and can be found to have inadequately briefed issues. The Alaska Supreme Court has repeatedly held so in cases where the appellant was *pro se*. *See, e.g., A.H. v. W.P.*, 896 P.2d 240, 243 (Alaska 1995) (finding the majority of 56 issues raised by *pro se* appellant to be inadequately briefed and therefore waived on appeal). S*ee also Wyatt v. Wyatt*, 65 P.3d 825, 832 & n.25 (Alaska 2003); *Prentzel v. State, Dep't of Pub. Safety*, 53 P.3d 587, 596 & n.51 (Alaska 2002); *Brady v. State*, 965 P.2d 1, 20 & n.71 (Alaska 1998). So, too, should this Court in this case.

II. HAEG IS NOT ENTITLED TO RAISE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON APPEAL

Haeg raises ineffective assistance of counsel claims against all three of his attorneys based on his belief that they conspired against him. [At.Br. 1-14] Haeg asks this Court to stay this appeal so that he might supplement the trial court record with his post-conviction relief proceedings. [At.Br. 1-2]

Haeg should not be allowed to raise the issue of ineffective assistance of counsel for the first time on appeal. In the absence of plain error, Haeg must file a motion for post-conviction relief prior to presenting these issues to this Court. *See Barry v. State,* 675 P.2d 1292, 1295 (Alaska App. 1984) (holding that in absence of plain error,

all ineffective assistance of counsel claims must be argued in a motion for a new trial before the trial judge or in a motion for post-conviction relief before the court of appeals will entertain such claims).

The limited record on appeal does not establish plain error. Haeg's own counsel, after reviewing the file on appeal, testified that there was no conspiracy against Haeg. [Rep. Hearing, 8/15/06; Tape No. 4AK-06-46A; counter no. 355-400] Haeg's counsel further testified that any suggestion of ineffective assistance is explained by inaction of the client. *See id.* Haeg's failure to establish plain error means that his ineffective assistance of counsel claim must be raised in a motion for post-conviction relief. *See Barry, supra.*

III. THE COURT OF APPEALS HAS NOT IMPROPERLY REFUSED ANY OF HAEG'S REQUESTS.

Haeg asks this Court for authority to file a motion for post-conviction relief ("PCR"). [At.Br. 1-2] Haeg is entitled to file a PCR application with the trial court in McGrath. *See* AS 12.72.030 (provides that an application for post conviction relief shall be filed at the court location where the underlying criminal case is filed); see also [Ex 125-7, 136-9]

Haeg now asks for a second time, that this Court stay his appeal pending the outcome of his PCR application. [At.Br. 17] This Court previously denied Haeg's request to supplement the trial court record with PCR proceedings. [Ex. 125-7] In denying Haeg's request, this Court noted that the law allows for "Haeg to pursue an

appeal and a petition for post-conviction relief at the same time." [Ex. 126] Haeg has failed to cite any case law or evidence that would justify this Court changing its previous ruling.

Haeg's requests this Court rule on all outstanding motions. [At.Br. 18] Haeg's request is improper because there are no motions properly before this Court. *See* Rules of Appellate Proc. 503(c) (requiring that originals of all motions be filed with the clerk). Moreover, the State has no idea which motions Haeg is referring to when he requests ruling on "outstanding motions."

IV. THE TRIAL COURT DID NOT COMMIT ERROR.

A. Introduction

Haeg alleges nine claims of error committed by the trial court in his appeal.

B. Standard of Review

Claims of error not objected to at trial are reviewable only for plain error. *See Kosbruk v. State*, 820 P.2d 1082, 1085 (Alaska App. 1991); *citing Bodine v. State*, 737 P.2d 1072, 1074 (Alaska App. 1987) "A plain error is one that would be apparent to a competent judge or attorney without objection." *Massey v. State*, 771 P.2d 453, 453 (Alaska App. 1989); *see also Dimmick v. State*, 449 P.2d 774, 776 (Alaska 1969); *Hammonds v. State*, 442 P.2d 39, 43 (Alaska 1968) This Court should only fine plain error where a mistake is substantially prejudicial and did not result from a tactical defense

decision. *See Monroe v. State*, 847 P.2d 84, 87 (Alaska App. 1993); *see also Massey*, 771 P.2d at 453.

This Court should deny review of the alleged errors even if they constitute plain error. Haeg's counsels' failure to raise alleged trial court errors amounts to an intelligent waiver and does not constitute plain error. *See Hammonds*, 442 P.2d at 43 (appellant's counsel made knowing and voluntary waiver of right against self-incrimination and therefore cannot raise issue on appeal); *but see Raphael v. State*, 994 P.2d 1004 (Alaska 2000) (holding that the plain error committed by the trial court could be raised for the first time on appeal because it was unclear if attorney was sufficiently aware of violation).

C. Legal Arguments

Haeg's first claim that Judge Murphy committed error when she did not inquire about the failed Rule 11 agreement is without merit. [At.Br. 16] The record on appeal is devoid of any objection by Haeg's counsel to the Rule 11 agreement being violated.[1] Haeg's counsel waived reading of the information and advisement of rights and entered a plea of not guilty to the second amended information. [Tr. 28] Haeg's counsel acknowledged the State has the discretion to make charging decisions and never

[1] This issue was raised for the first time during Haeg's representation hearing. Haeg's counsel had no personal knowledge of the failed plea agreement. [Rep Hearing 8/15/06, Tape 4AK-06-46A, Counter No. 355-660]

raised the issue of the failed Rule 11 agreement which he called "fuzzy." [Tr. 930, 932; At.Br. 9]

Haeg's second claim is that Judge Murphy committed error by failing to rule on a motion that was pending on May 6, 2005. [At.Br. 16] Haeg's motion to dismiss the information was the only motion pending at the time. [Ex. 9-45, 61-72] The court issued a written ruling dated May 9, 2005. [Ex. 73-80] Both the motion and reply were utterly devoid of a request by Haeg that the State be barred from using his statements at trial that were made during plea negotiations. [Ex. 9-32, 61-72] Moreover, Haeg's counsel never raised the issue prior to the conclusion of the trial.

Haeg's third claim is that Judge Murphy committed error by making inconsistent rulings. [At.Br. 16] Haeg claims that Judge Murphy's ruling on May 9, 2005 denying his motion to dismiss was inconsistent with her grant of the state's protective order on May 25, 2005. [At.Br. 16, Ex. 73-80] Haeg acknowledges that his counsel never raised this issue with the trial court. [At.Br. 16] Therefore this Court should consider the issue waived.

In denying Haeg's motion to dismiss, Judge Murphy ruled that Haeg could defend against the same day airborne charges by showing that he was operating within the boundaries of the predator control program in accordance with the permit issued. Judge Murphy determined that where Haeg killed the wolves was an issue of fact for the jury to decide. [Ex. 79]; *See also Taylor v. Interior Enterprises, Inc.*, 471 P.2d 404, 407

(Alaska 1970) (providing that an issue is one of fact when there is room for a difference of opinion among reasonable men).

On May 25, 2005, Judge Murphy granted the state's protective order prohibiting Haeg from arguing that he could not be convicted of a "hunting" violation. Haeg intended to argue that he was conducting predator control and thus was not subject to other state laws such as same day airborne which is predicated on "hunting." [Tr. 36-51] Judge Murphy explained that the definition of "hunting" was a legal definition for the court to decide and that it was therefore not appropriate to argue this issue to the jury. [Tr. 36-38, 48-49; Tape 4AK-05-21B, 250-338] [2]

Judge Murphy allowed Haeg to argue that predator control was not considered to be "hunting" for purposes of making a case that Haeg did not "knowingly" violate the same day airborne statute. [Tr. 110, 112, 250-338, 653-4, 696-7, 1008-1010; Tape 4AK-05-21B, 250-338] Consequently, Haeg is unable to demonstrate any prejudice as a result of Judge Murphy's ruling and this Court should therefore deny his claim. *See Beltz v. State*, 895 P.2d 513, 517 (Alaska App. 1995).

Haeg's fourth claim is that Judge Murphy committed error by failing to require attorney Brent Cole – his former defense counsel – to testify at Haeg's sentencing. [At.Br. 16-17] Prior to sentencing, Haeg's attorney provided a copy of a letter from Cole, Haeg's first attorney, which informed the court that Cole was not available for the sentencing hearing scheduled for September 1, 2005. [Ex. 102-104; Arraignment 11/9/04; Tape 4MC-04-09B, counter No. 460-520] Haeg's sentencing,

however, was continued until September 29, 2005. [Ex. 105] Haeg's attorney never raised the issue of Cole's absence with the court. Nor did his attorney ever request permission for Cole to testify telephonically. In fact, it appears that Haeg's attorney decided that Cole's presence was irrelevant. [At.Br. 8][2]

Haeg's fifth claim is that Judge Murphy committed error by refusing to give the "jury instruction that Tony Zellers ... was testifying against Haeg because he was required to for his plea agreement...." [At.Br. 17] Haeg admits that his attorney did not ask for such an instruction, which results in waiver of the issue on appeal and does not result in plain error. [At.Br. 17]; *See Robinson v. State*, 593 P.2d 621, 624 (Alaska 1979) (holding that the failure of the court to give a jury instruction that was not requested does not result in plain error).[3]

Haeg's sixth claim is that Judge Murphy committed error at a post conviction status hearing by making an inappropriate statement. [At.Br. 17] The comment Haeg complains of are not heard on the audio tapes of the hearings. [Status Hearing 8/24/05 Tape 4AK-05-36B, Counter No. 464; Status Hearing 8/25/05 Tape 4AK-05-37A, Counter No. 0-50] Haeg fails to prove that the alleged comment was made or demonstrate any prejudice to him as a result of the alleged comment. Moreover, this issue was not raised with the trial court.

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[2] It is factually irrelevant that Haeg might have wanted Cole to be present as his attorney waived this issue by failing to raise it with the trial court. *See Beltz* at 519.

Haeg's seventh claim of trial court error is that Judge Murphy based Haeg's severe sentence upon untrue testimony. [At.Br. 17] Haeg specifically refers to Judge Murphy's statement that "since a majority, if not all of the wolves taken were in 19-C." [At.Br. 17, Tr. 1437][4] Haeg admitted that all of the wolves were killed outside the predatory control boundary and at least three of the wolves were killed in 19-C. [At.Br. 418, 539-44, 549-53, 623, 758-63, 828-31] Consequently, Judge Murphy appropriately considered the issues of deterrence, community condemnation and rehabilitation when passing sentence. [Tr. 1440] If Haeg is trying to claim that his sentence is illegal, he must first file a motion under Criminal Rule 35(a) with the trial court. [Ex. 134]

Haeg's eighth claim of trial court error is that Judge Murphy failed to dismiss the information because the court lacked subject matter jurisdiction. This Court should not consider this issue on appeal. Haeg failed to brief this issue for the Court and cites to no authority supporting the claim. Regardless, Haeg's claim is made moot by the fact that the second amended information was filed under oath. [Ex. 51]

Haeg's final claim of trial court error is that Magistrate Woodmancy refused to accept a PCR application from Haeg. [At.Br. 17] This argument is without

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(. . . footnote continued)

[3] In *Robinson*, the Supreme Court noted that the trial court had given a general instruction regarding bias. *See id.* Judge Murphy also gave a similar general instruction pertaining to bias. [Ex. 92-3]

[4] Haeg suggests that it is important for purposes of his conviction in which game management subunit he was hunting because he was a registered big game guide in subunit 19-C. Haeg's argument is without merit. Alaska Statute 08.54.720(a) (15)

(footnote continued . . .)

merit. Woodmancy expressly told Haeg that he could file a PCR application once he had *pro se* status. [Rep. Hearing – 8/15/06; Tape No. 4AK-06-45B, Counter No. 450-694; Ex 118-123].

V. HAEG HAS FAILED TO DEMONSTRATE ANY EVIDENCE OF PROSECUTORIAL MISCONDUCT.

A. Introduction

Haeg raises what appears to be a claim of vindictive or malicious prosecution. He alleges that the State's prosecutor took "full, complete, unethical, & illegal advantage of his attorney's conflicts of interest during a very political case." [At.Br. 13] Haeg makes a generalized claim of misconduct. But, he fails to cite to the record or in any way establish a valid claim of misconduct. Moreover, Haeg never raised the issue of misconduct with the trial court.

B. Standard of Review

Because Haeg never raised the issue of prosecutorial misconduct in the trial court, this Court should apply the plain error standard outlined above. *See Garroutte v. State*, 508 P.2d 1190, 1191 (Alaska 1973) (holding prosecutorial misconduct not objected to during trial reviewed only for plain error)

(. . . footnote continued)
prohibits the knowing violation of any state statute or regulation prohibiting same day airborne irrespective of guide use area.

C. Legal Arguments

Haeg claims that Trooper Gibbens committed perjury on the search warrant applications and that Prosecutor Leaders perpetuated the perjury at trial. [At.Br. 13-14] Haeg is presumably referring to Trooper Gibbens' reference to game management "subunit 19-C" in paragraph five of the search warrant affidavit. [Ex. 3] Both Trooper Gibbens and Zellers testified that at least three of the wolves were killed in game management subunit 19-C. [Tr. 326-31, 337-40, 344-46, 418, 420-21, 595-96] [5] Gibbens' and Zellers' testimonies are consistent with each other, and constitute strong evidence against Haeg's claim of perjury. But, Haeg waived any right to challenge deficiencies in the search warrants, because he failing to bring a pre-trial motion on the subject. *See* Criminal Rules 12(e) and 37(c). Therefore his claim is barred now.

Haeg makes a number of unsupported allegations against the State's prosecutor. The bulk of his claims allege that the prosecutor illegally deprived Haeg of his property. [At.Br. 14] Haeg also raises the related claims that Alaska Statutes 12.35.020., 12.35.025, 16.05.190 and 16.05.195 are all unconstitutional on their face and as applied to Haeg. [At.Br. 14; Ex. 138-42, 145] Haeg's argument is based solely on the grounds that he was not afforded notice and an opportunity for a post-seizure hearing with respect to his seized property. [At.Br. 4-5]5

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[5] Haeg does not challenge the State's ability to seize his plane. Even if he did, the Alaska Supreme Court has already held that the Alaska Constitution's Due Process Clause is not violated when the state seizes property based on probable cause that it is being used in the furtherance a crime. *See unpublished opinion of Waiste v. State*, 10

(footnote continued . . .)

Haeg's allegation that he was denied an opportunity for a post-seizure hearing to challenge the search warrant and/or to bond out his property that was seized is untrue. Haeg had an immediate and unqualified right to a post-seizure hearing. *See Waiste v. State*, 10 P.3d 1141, 1145, 1147 n.29 (Alaska 2000) (seizure and forfeiture statutes do not violate the Alaska Constitution's Due Process Clause and noting that as a post seizure hearing is available under Criminal Rule 37(c); *see also Baranof v. Alaska*, 677 P.2d 1245, 1255-56 (Alaska 1984); *F/V American Eagle v. State*, 620 P.2d 657, 667 (Alaska 1980).

Criminal Rule 37(c) expressly authorizes persons aggrieved by unlawful search and seizure to file a motion for return of property. *See id; see also* Alaska R. Crim. P. 37(c) Haeg was served with the search warrant and thus had notice that the State had seized his property pursuant to a validly executed warrant. [Tr. 137-8, 156-161, 370-1, 378][6]; *see also F/V American Eagle*, 620 P.2d at 667. There was no due process violation with respect to the seizure of Haeg's property because the law provided him with the option of a post-seizure hearing. *See Waiste*, 10 P.3d at 1152. It is irrelevant that Haeg waited until July 8, 2005 to file a motion to bond out his property. [Ex. 81-91][7]

(. . . footnote continued)
P.3d at 1145; *see also Saltz v. State*, 1987 WL 1357220 (Alaska App. 1987) *overruled on other grounds* (finding no due process or equal protection violations based on forfeiture of plane under AS 16.05.195(a) which was used in game violations).

[6] Haeg never challenged the validity of the warrant pre-trial and thus is limited to raising arguments of plain error on appeal.

[7] The state filed an opposition on July 21, 2005. [Ex. 85-91]. Haeg was convicted on July 28, 2005 and sentenced on September 29, 2005, and apparently no ruling was
(footnote continued . . .)

Haeg next makes a rambling claim about the prosecutor's violation of his right against self incrimination and Alaska Evidence Rule 410. [At.Br. 14] Presumably, Haeg again refers to the failed Rule 11 agreement. But, once again, Haeg never raised this issue with the trial court prior to the conclusion of trial. There is absolutely no record on this issue for this Court to review. The State previously argued that this issue was waived by Haeg's failure to raise it with the trial court. Moreover, Haeg was represented by counsel at all times prior to his conviction, including having counsel present during the interview in question. [At.Br. 6] This Court should refrain from speculating as to the basis for Haegs' counsels' actions. This Court will only find plain error where a mistake is substantially prejudicial and did not result from a tactical decision. *See Monroe*, 847 P.2d at 87; *see also Massey*, 771 P.2d at 453.

VI. HAEG IS NOT ENTITLED TO THE SPECIFIC RELIEF SOUGHT BY THIS MOTION.

A. Haeg is not entitled to have his appeal immediately certified to the Alaska Supreme Court.

Haeg asks that this Court immediately certify his appeal to the Alaska Supreme Court under AS 22.05.015(b). [At.Br. 19] AS 22.05.010(b) provides that "[a]ppeal to the supreme court is a matter of right only in those actions and proceedings

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from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240." Alaska Statute 22.07.020(c) provides that "[t]he court of appeals has jurisdiction to review (1) a final decision of the district court in an action or proceeding involving criminal prosecution...." Haeg must therefore wait until this Court issues a final decision before he files an application for review with the Alaska Supreme Court.

B. Haeg is not entitled to have this Court rule on outstanding motions

For the reasons previously stated above in section III of the State's brief, this Court should deny Haeg's requested relief.

C. Haeg is not entitled to a stay of this appeal pending the outcome of his post conviction relief application.

For the reasons previously stated above in section III of the State's brief, this Court should deny Haeg's requested relief.

D. Haeg is not entitled to file his post conviction relief application in the Kenai District Court.

Haeg's request is governed by prior order of this Court. This Court previously informed Haeg that he must file his motion with the trial court in McGrath, or seek leave from the trial court to file his motion in Kenai. *See* Alaska R. Crim. P. 35.1(c) (directing that post conviction pleadings need to be filed "at the court location where the underlying conviction is filed); [Ex. 124-127] Haeg has done neither and this Court should deny Haeg's second request.

E. Haeg has no legal basis for asking this Court to stay the revocation and/or suspension of his guide license.

Haeg again asks that this Court stay the revocation and/or suspension of his guide license pending the outcome of his appeal and/or his PCR application. This Court informed Haeg that his request for a stay of his license suspension must first be presented to the trial court. [Ex. 126]; *see also* Alaska R. App. P. 206(a) (4). Despite the clear direction provided by this Court, Haeg once again asks for the same relief without first raising this issue with the trial court. Consequently, this Court should deny Haeg's request to stay the revocation and/or suspension of his guide license.

F. Haeg failed to establish a claim for ineffective assistance of counsel and malicious/vindictive prosecution.

For the reasons previously stated above in sections II and V of the State's brief, this Court should deny Haeg's requested relief.

G. Haeg renews his demand for oral argument, a public hearing and permission to videotape the proceedings.

This Court has already ruled on this point. This Court issued an order dated March 23, 2007, which provided that Haeg is entitled to oral argument under Alaska Appellate Rule 505(a)(2). This Court ordered that the proceeding will be public as defined in Alaska Administrative Rule 21(a). This Court, however, denied Haeg's request to videotape the proceedings. [Ex. 130-131]

CONCLUSION

Haeg is not entitled to any of the relief requested by his appeal other than oral arguments on the limited issues that are properly before this Court. Haeg has presented no evidence of plain error which would justify this Court reviewing the issues raised by Haeg for the first time on appeal. Therefore, this Court should deny Haeg's motion in its entirety with the exception of his request for oral arguments which was previously granted.

Dated this ___ day of February 8, 2008.

TALIS COLBERG
ATTORNEY GENERAL

By: 
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