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IN THE COURT OF APPEALS FOR THE STATE OF ALASKA
IN ANCHORAGE, ALASKA

DAVID HAEG )
)
Appellant, )
)
vs. )
)
STATE OF AK, )
)
Appellee. )
)
_____ )
Appellate Court No.: A-09455
District Court No. 4MC-S04-024 Cr.

**Appellant's Opening Brief in Appeal**
**From McGrath District Court, Judge Margaret Murphy**

VRA CERTIFICATION. I certify that this document & 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 of 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 & disclosure of the information was ordered by the court.

Filed in the Ak Court of Appeals
February ____, 2007

By: _____
Deputy Clerk

**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**

**Cases**

**Cases**

**Cases**



**Constitutional Provisions & Statutes**



**Court Rules**



**Miscellaneous Authorities**

## JURISDICTIONAL STATEMENT

Appellant Haeg appeals from the September 30, 2005 final judgment issued by McGrath Judge M. Murphy. This Court has appellate jurisdiction under AS 22.07.020(c) & Ak Appellate Rule 217.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

The overwhelming issue for review is judicial system corruption & whether this court will afford Haeg his vested & written right for post conviction relief to expose & correct it. The trial/district court has refused to accept an application from Haeg for a PCR proceeding claiming ineffective assistance of counsel (IAOC), vindictive/malicious prosecution, &/or judicial conduct. The undeniable right of Haeg to apply for this proceeding is clear according to Ak Rule of Criminal Procedure 35.1.

The record before & during trial has little of the abundant evidence of this fundamental breakdown in justice. The only record where these constitutional issues are substantially presented are in Haeg's representation hearing of 8/15/06. Haeg does not wish to proceed in the Court of Appeals on the issues above with this extremely limited record. Haeg wishes to stay this appeal pending outcome of a PCR procedure – during which he could supplement the record with the mountain of evidence that is not yet on the record. At present this court is Haeg's only hope

in requiring the trial/district court to accept the constitutionally guaranteed application for PCR that they have refused to accept. Haeg does not know if it is purposely being done but the effect of this Court of Appeals to not order [as they have refused to do] the trial/district court to accept an application, combined with the trial/district court's refusal to accept an application, is to effectively leave Haeg without the PCR procedure the Ak Rules of Court, Criminal Rule 35.1 guarantee him. This in turn violates Haeg's constitutional right to equal protection under law.

Haeg will show & argue what evidence there is on the record to prove to this court the injustices that have occurred to him can only be exposed through a comprehensive and constitutionally guaranteed PCR proceeding. These issues, none of which Haeg has dared state as points on appeal, are plain error pure & simple. The reason why Haeg has not dared to amend the points of appeal given to this court by Attorney Chuck Robinson (who Haeg has proof was representing interests in conflict with his own) is that if he had done so he would be procedurally barred from bringing up these same points in PCR where, instead of a nearly nonexistent record, he would have the opportunity to create the record with the mountain of evidence he has compiled over the last 3 years. Haeg is in a catch 22 situation - he cannot afford to allow this appeal to fail because no one would then be able to

order the lower court to accept an application for PCR. Yet Haeg cannot argue the issues he wishes to argue in this court because the record is not suitable.

**Main Point of Appeal meant to fail by Chuck Robinson:**

1. Did the trial court err in failing to dismiss the information in this case because the court lacked subject-matter jurisdiction to proceed with the case where information is unsupported by oath or affirmation before judge or magistrate?

This was Robinson's primary tactic in Haeg's entire case. The other points of appeal were deleted because they mostly hinged on this first point & so Haeg could have more room to argue the plain error in his case. Robinson's other points were clearly shown to be frivolous by the State's opposition & the courts denial on them.

**STATEMENT OF THE CASE**

Trial court record (R.), especially that made during representation hearing of 8/15/06 (Rep.), positively proves a gross & fundamental breakdown in justice because **(A)** all Haeg's attorneys actively conspired/colluded to represent interests in direct opposition to Haeg's interests (the State prosecutions interests & their own to keep this covered up); **(B)** the aggressive State prosecution took full, complete, unethical, & illegal advantage of this during a very political case; & **(C)** the courts have failed & refused to provide Haeg any remedy for these

violations of his vested & written procedural, statutory, & constitutional rights to expose & correct this gross & fundamental breakdown in justice.

**ARGUMENT**

**(A)** All of Haeg's attorneys actively conspired/colluded to represent interests in direct opposition to Haeg's interests (the State prosecutions & their own to keep this covered up). This directly violated Haeg's constitutional right to effective assistance of counsel: **(1)** Attorney Brent Cole (Cole) intentionally, deliberately, & maliciously sold Haeg out to the State prosecutor Scot Leaders (Leaders) & State Trooper Brett Gibbens (Gibbens). First Cole failed to tell Haeg that constitutional due process required an entire "ensemble" of procedural rights before the State could seize & deprive Haeg & his wife of their property used to provide a livelihood for their family. (Rep.) The State failed to provide a single one of this entire "ensemble" which is guaranteed by the Ak Supreme Court in:

> *Waiste v. State*, 10 P.3d 1141: Waiste & the State agree that the Due Process Clause of the Ak Constitution requires a prompt postseizure hearing upon the seizure of a fishing boat potentially subject to forfeiture. This court's dicta, however, & the persuasive weight of federal law, both suggest that the Due Process Clause of the Ak Constitution should require no more than a prompt postseizure hearing. An ensemble of procedural rules bounds the State's discretion to seize vessels & limits the risk & duration of harmful errors.

> *F/V American Eagle v. State*, 620 P.2d 657. When the seized property is used by its owner in earning a livelihood, notice & an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent.

These violations severely crippled Haeg and his wife's ability to provide for their family for years before Haeg was convicted or charged – violating all constitutional due process.

Next Cole tells Haeg the misleading, intentional, & highly prejudicial perjury on the search warrant affidavits "didn't matter". Trooper Brett Gibbens (Gibbens) stated on the affidavits that the evidence he had found was in Unit 19C [where Haeg was licensed to guide & where Haeg's guiding lodge was located]. (R. & Rep.) In fact the evidence that Gibbens found was in Unit 19D – the same unit in which the Wolf Control Program (WCP) was occurring (& for which Haeg had a permit) & in which Haeg has never been licensed to guide. The WCP had specific penalties for violating it. These penalties were specifically separate from any game violations, were relatively minor, & thus could not affect Haeg's guide license. The difference in punishment between WCP violations & the violation Haeg was charged & convicted of [same day airborne hunting of big game as a guide] are almost incomprehensible. The intent of this perjury was proven because Haeg told Gibbens & Leaders about the perjury during an interview he gave them for a plea agreement, they recorded it being told to

them & yet they persisted in this subornation of perjury & perjury afterward at Haeg's trial (which happened after they broke the plea agreement for which Haeg gave them the interview). Not only did this perjury mislead the judge into issuing a search warrant, it mislead her & the jury into believing the case was about a same day airborne big game guiding violation instead of a WCP violation. The misled judge even specifically stated at sentencing that the perjury was the reason for the very severe sentence Haeg received. If this perjury had been pointed out the evidence would have no doubt been suppressed. The Ak cases that prove this are:

> *McLaughlin v. State*, 818 P.2d 683, (Ak.,1991): Search warrant based on inaccurate or incomplete information may be invalidated only when misstatements or omissions that led to its issuance were either intentionally or recklessly made. *Lewis v. State*, 9 P.3d 1028. (Ak.2000): Once defendant has shown that specific statements in affidavit supporting search warrant are false, together with statement of reasons in support of assertion of falsehood, burden then shifts to state to show that statements were not intentionally or recklessly made. *Gustafson v. State*, 854 P.2d 751, (Ak.,1993), *State v. Davenport*, 510 P.2d 78, (Ak.,1973), *State v. Malkin*, 722 P.2d 943 (Ak. 1986), *Stavenjord v. State*, 2003 WL1589519, (Ak.,2003). See also *Mapp v. Ohio*, 367 U.S. 643 (1961) [the federal case that require states to supress illegally obtained evidence]; *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928); *People v. Reagan*, 235 N.W.2d 581, 587 (Mich. S.Ct. 1975); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *U.S. v. Hunt*, 496 F.2d 888; *U.S. v. Thomas*, 489 F.2d 664 (1973).

Cole has Haeg give the prosecution a 5 hour taped interview for a plea agreement (during which Haeg tells Leaders & Gibbens

of the perjury on the SWA's) & has Haeg & his wife give up an entire years income in reliance upon the same rule 11 plea agreement – then, when the prosecution breaks the plea agreement only 5 business hours before it was supposed to be completed (by filing an amended information changing the charges agreed to & already filed to far harsher ones) Cole tells Haeg & many witnesses when they demand something be done, "that's the way it is" & "there's nothing I can do about it except call Leaders' boss". This is after Haeg & his wife had relied on the agreement for nearly 3 months & had already cancelled a whole years guiding season for the plea agreement & most of that season had already passed. In addition Cole tells Haeg there was nothing he could do about the prosecution using all of Haeg's statements, made during the plea negotiations, as the only probable cause to file over half of the charges, including all of new & never agreed to very severe charges. (R., Rep., & all 3 informations filed) These acts, lies, & misrepresentations violated Haeg's constitutional rights of due process, against self-incrimination, and to effective assistance of counsel. In addition Evidence Rule 410 was directly & unarguably violated. The cases that prove this are:

> *Smith v. State*, 717 P.2d 402 (1986): "The fact that Smith was legally entitled to persist in his plea of innocence is, in our view, determinative of his claim of ineffective assistance of counsel. Prior to his change of plea, Smith specifically asked his counsel

> if he was obligated to change his plea. Smith's question obviously related to his legal rights, not to his ethical duties. We are particularly troubled by the apparent failure of both Smith's counsel & counsel for the state to disclose the substance of the negotiated plea agreement to the trial court during Smith's change of plea hearing. Similarly disturbing is the failure of Smith's counsel to disclose to the court the fact that Smith had expressed qualms about following through with this agreement. *State v. Scott*, 602 N.W. 2d 296, (Wis. Ct. App. 1999), "Counsel ineffective for failing to move to compel the state to comply with pretrial agreement & failing to advise the defendant of this option". *In re Kenneth H.,* 80 Cal.App.4th 143 *James Mabry, Commissioner, Arkansas Department of Correction, Petitioner v. George Johnson* No. 83-328, *U.S. v. Roberts*, 187 U.S. App. D.C.90,570 F.2d 999(1977).

After Haeg fired Cole Haeg went as far as to subpoena Cole to his sentencing so Cole could explain all of these actions in representing Haeg. Haeg paid for the subpoena to be delivered, paid for witness fees, paid for airline tickets, paid for hotel rooms in McGrath, & Cole failed to appear to testify. Haeg's attorney at the time, Robinson, said after Haeg complained, "Brent[Cole] is not relevant to your guilt." Haeg told Robinson, "Brent would have been relevant to my sentence & you know it." (Rep.) As shown above Haeg tried as hard as he could to put before the court that he had a rule 11 plea agreement upon he & his wife gave up an entire years income & upon which he gave the prosecution a 5 hour interview - which they used as probable cause for well over half the charges in all 3 informations they filed - even after they broke the rule 11 plea agreement. All

Haeg's attorneys & the State prosecution did everything they could to successfully keep this immense detrimental reliance on the rule 11 plea agreement away from the courts attention. Unbelievably to this date they have still been mostly successful in doing so. How can this fact, which has many witnesses & a mountain of proof, be reconciled with the Smith decision above – in which the court stated "it was disturbing" that both defense counsel & State counsel failed to disclose a plea agreement which the defendant was concerned about to the court?

Haeg filed for Fee Arbitration with Cole & during these proceedings Cole perjured himself on 17 different occasions. This perjury was proved by tape recordings Haeg made secretly of Cole after the rule 11 plea agreement was broken by the State. (Rep.)

**(2)** Attorney Chuck Robinson (Robinson) intentionally, deliberately, & maliciously sold Haeg out to the State prosecution & Cole – no doubt in part of the conspiracy/collusion to keep the State, Cole's, & Robinson's crime/malpractice/IAOC from being discovered. (Rep.) Robinson told Haeg there was no way to enforce the "fuzzy" plea agreement that was broken by the State while Cole was representing Haeg. Robinson recommended going to trial on the severe charges because he had a "tactic" that would "no doubt win". This tactic was that the information, since it was not sworn to, deprived the court of jurisdiction.

Robinson told Haeg that it would be best if he did not put on any evidence at trial, that it would be just a waste of money & that the Court of Appeals would step in before the trial was over to dismiss the case against Haeg. (Rep.) Haeg continued to ask Robinson how he could do so much for a plea agreement that the State didn't honor. Robinson finally had Haeg fill out an affidavit & included an explanation that Haeg's statements, made during plea negotiations, should not be used against Haeg. Robinson included this to the court in his 5/16/05 reply to the State's Opposition to Dismiss. (Aff. 5/6/05 & R. & Rep.) After Haeg was sentenced he researched Robinson's "no doubt" tactic that the court did not have jurisdiction & he was shocked to find it nonexistent. The last time Robinson's tactic had succeeded was in two 1909 cases – *Salter v. State*, 2 Okla. Crim. 464, 479, 102 P.719, 725 (1909), & *Ex parte Flowers* 1909 OK CR 69, 2 OKL.Cr.430, 101 P.860. Since then not swearing to an information has been held as harmless error. Robinson, when this was pointed out to him, stated that two "fresher" cases supported his tactic – *Gernstein v. Pugh*, 420 U.S. 103 (1975) & *Albrecht v. U.S.*, 273 U.S. 1 (1927). Haeg looked at these two cases & found they didn't support the "tactic" at all – in fact they established absolutely the State did indeed have jurisdiction. Robinson, when this was pointed out to him replied, "they might have personal jurisdiction but they would not have subject-matter

jurisdiction". It was after Haeg researched this & found that there was absolutely no doubt the State had subject-matter jurisdiction (*AS 22.15.060*) and that there were multiple plain error constitutional violations being concealed from him, that he fired Robinson. (R. & Rep.) It is also extremely chilling to Haeg that Robinson had told him "for the tactic the court didn't have jurisdiction to win you must never tell the court you gave up so much for the broken rule 11 plea agreement – if you do you will be admitting to the court they had jurisdiction over you". When Haeg later asked Robinson what was to keep the prosecution from bringing up the Rule 11 plea agreement to defeat Robinson's "tactic" Robinson could not answer. When Haeg then asked if they had already done so to "enhance" Haeg's sentence Robinson could not respond. (R. & Rep.)

**(3)** Attorney Mark Osterman (Osterman) intentionally, deliberately, & maliciously sold Haeg out to the State prosecution, Cole, & Robinson – no doubt in part of the conspiracy /collusion to keep the State, Cole's, & Robinson's crime/malpractice/IAOC from being discovered. Osterman first tells Haeg, "The sellout is the biggest I have ever seen – you didn't know they were going to load the dice so they would always win – Leaders stomped on your head with boots on & at the same time your attorneys allowed him to commit these violations – Robinsons points on appeal are no good - we will get your

conviction reversed & be able to file a malpractice lawsuit - I need $12,000.00 to do your entire appeal because I charge $3000.00 to $5000.00 per point on appeal". Then, after a month has gone by Osterman tells Haeg, "I can't do anything because it will affect the lives & livelihoods of your first attorneys – Robinson's points are good – we need to hide your best arguments until your reply brief - I need another $28,000.00 because I charge $8000.00 per point on appeal". Because of the problems Haeg had with his first attorneys every one of these conversations with Osterman is recorded. (R. & Rep.)

**(4)** Ineffective assistance of counsel by all three of Haeg's attorneys. The above conduct by any or all 3 of Haeg's attorneys meet any and/or all of the 4 major tests in Alaska for ineffective assistance of counsel:

> *Risher v. State*, 523 P.2d 421, Ak 1974; *Strickland v. Washington*, 466 U.S. 668 (1984): Counsel's function is to assist the defendant, & hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant & on information supplied by the defendant. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.
>
> *Cuyler v. Sullivan*, 446 U.S. 335 (1980): Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation

need not demonstrate prejudice [446 U.S. 335, 350] in order to obtain relief. See Holloway, supra, at 487-491. As the Court emphasized in Holloway: "[I]n a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing ... may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. & to assess the impact of a conflict of interests on the attorney's options, tactics, & decisions in plea negotiations would be virtually impossible." 435 U.S., at 490 -491 (emphasis in original).

*U.S. v. Cronic*, 466 U.S. 648 (1984): "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." See also Jones v. Barnes, 463 U.S. 745, 758 (1983) (BRENNAN, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court". U.S. v. Agurs, 427 U.S., at 110 (prosecutorial misconduct should be evaluated not on the basis of culpability but by its effect on the fairness of the trial).

**(B)** The aggressive State prosecution took full, complete, unethical, & illegal advantage of Haeg's attorney's conflicts of interest during a very political case, (R. & Rep.). **(1)** Gibbens committed intentional, misleading, & highly prejudicial perjury on the search warrant affidavits (SWA) to make sure Magistrate Murphy issued a search warrant's, & to change the case from a

possible Wolf Control Program (WCP) violation to a possible same say airborne big game guiding case. (R. & Rep.) After Gibbens & Leaders **taped** themselves being told about this perjury they continued to attest it was the truth during **sworn** trial testimony before Haeg's judge & jury. (R. & Rep.) Gibbens also lied to the judge that he did not know why Haeg had not guided for a whole year when that had been an explicit condition of the plea agreement the state broke. (R.) **(2)** Leaders, in direct violation of the entire "ensemble" guaranteed by constitutional due process, illegally deprived Haeg & his wife of their property that they used to provide a livelihood;[1] threatened Haeg with other unlawful prosecution in order to deprive Haeg of his constitutional right against self-incrimination; utilized the ruse of a plea agreement to also illegally deprive Haeg of his constitutional right & Evidence Rule 410 right against self incrimination – along with illegally depriving Haeg & his wife of their right to provide a living for their family for an entire year; violated due process by making the determination the plea agreement was broken by Haeg instead of letting the court determine who had done this – and in deciding what Haeg would have to pay for this nonexistent violation; suborned & accepted known, misleading, & highly prejudicial perjury from

Gibbens while Gibbens was testifying under oath before Haeg's judge & jury; & violated due process by falsely claiming Haeg broke the plea agreement so he could illegally enhance Haeg's sentence after trial. (R., Rep., & 8/24/05 status hearing). The following cases prove these violations:

> *Mooney v. Holohan*, 294 U.S. 732: Requirement of "due process" is not satisfied by mere notice & hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court & jury by presentation of testimony known to be perjured, & in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process.
> *Napue v. People*, 360 U.S. 264, 79 S.Ct. 1173. Conviction obtained through of false testimony, known to be such by representatives of the State, is a denial of due process, & there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears. *Mesarosh V. U.S.*, 352 U.S. 1 (1956)
>
> *Giles v. Maryland*, 386 U.S. 66; *Atchak v. State*, 640 P.2d 135 (Ak 1981); *U.S. v. Velsicol Chem. Corp.*, 498 F. Supp. 1255 (D.D.C. 1980); *Berger v. U.S.*,295 U.S. 78; *Stone v. Cupp*, 592 P.2d 104; *Closson v. State* 812 P.2d 966; *U.S. v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991); *Stolt-Nielsen, S.A. v. U.S.*, 442 F.3d 177; *U.S. v. Cantu*, 185 F.3d 298 (5th Cir. 1999); *U.S. v. Castaneda*; 162 F.3d 832; *Cabral v. Hannigan*, 5 F.Supp.2d 957; *U.S. v. Lua*, 990 F.Supp. 704; *U.S. v. Chiu*, 109 F.3d 624; *U.S. v. Dudden*, 65 F.3d 1461; *U.S. v. Crawford*, 20 F.3d 933; *U.S. v. Wiley*, 997 F.2d 378; *U.S. v. Ayers*, 825 F.Supp. 33; *U.S. v. Smith*, 976 F.2d 861; *U.S. v. Pinter*, 971 F.2d 554; *State v. Sexton*, 709 A.2d 288.

**(C)** The courts have failed & refused to provide Haeg a remedy for these violations of his vested & written procedural,

statutory, & constitutional rights. Haeg has a constitution right to expose & correct this gross & fundamental breakdown in justice. **(1)** Judge Margaret Murphy failed to inquire why the State filed an amended information just 5 business hours before the arraignment, sentencing, Rule 11 plea agreement hearing that was scheduled to take place on 11/9/04 (R.); Murphy failed to inquire why the arraignment, sentencing, Rule 11 plea agreement hearing didn't take place as scheduled and/or why or who had broken it and if either the State or Haeg was prejudiced (R.); Murphy failed to notice &/or rule on Haeg's motion & affidavit of 5/6/05 protesting the State's use of his statements that were made during plea negotiations (R.); Murphy first rules **against** Haeg on 5/9/05 – stating "if Haeg was acting in accordance with a [WCP] permit then that would be a defense to the [hunting] charges but that would be a **factual** issue to be decided at trial." Then Murphy rules **for** the State on 5/25/05 [stating on this date she had already ruled on 5/18/05 on this issue when in fact she hadn't] when they request a protection order to prohibit Haeg from arguing he was **not** hunting because "that is a **legal** issue for me to decide." These two rulings are in exact opposition to each other & both are extremely prejudicial to Haeg – yet Haeg's attorneys never point this out – even after Haeg expresses his disbelief (R.); Murphy failed to take any action when she was apprized, in writing on 8/25/06, of Cole's refusal

to testify (about his representation of Haeg & all Haeg had done for the plea agreement the State had broke) in response to a subpoena – & not one of Haeg's subsequent attorneys brought this up even though Haeg insisted they do so (R. & Appendix); Murphy never gave the required jury instruction that Tony Zellers (Zellers) was testifying against Haeg because he was required to for his plea agreement – & not one of Haeg's attorneys brought this up even though Haeg insisted they do so. (R.); Murphy agrees Haeg should continue to pay for the rule 11 plea agreement the State broke without giving Haeg anything he bargained for (8/24/05 Status hearing); & at sentencing Murphy utilizes the perjury that "since the majority if not all the wolves were taken in 19C – the area where you were hunting" as the reason for Haeg's severe sentence. (R., & Rep.)

**(2)** Trial court Magistrate Woodmancy (Woodmancy) refuses to accept an application for Post Conviction Relief Procedure from Haeg – stating Haeg must file the request with the Court of Appeals – even after it is explained that the rules state it cannot be filed in the Court of Appeals. This effectively denied Haeg his constitutional right to equal protection under law – as the right to file an application for PCR is clearly spelled out in Criminal Rule 35.1. (Rep.)

**(3)** The Court of Appeals has refused to stay Haeg's appeal pending PCR – in total opposition to the courts prior ruling in

the seminal case of *State v. Jones*, 759 P.2d 558 & in accordance to American Bar Association Standard 22-2.2 – prejudicing Haeg greatly. Even more unbelievable is the Court of Appeals refusal to issue an order requiring the district/trial court to accept Haeg's constitutional right to file an application for PCR. Because of the district courts refusal to accept an application & the Court of Appeals refusal to order them to accept an application Haeg is effectively denied this constitutional right (Rep.).

Equally disturbing is the Court of Appeals refusal to rule on many of Haeg's motions for many months. (R.)

In summation Haeg respectfully requests this court carefully consider *Criminal Rule 47* – Harmless Error and Plain Error. Even more importantly Haeg asks this court carefully consider all the case & decisions under the *Annotations to Criminal Rule 47*. These are stunning when compared to what has happened to Haeg. Of a special importance is this continuing refrain in numerous cases:

> "If an error affects substantial rights & is obviously prejudicial, it may be noticed although not brought to the attention of the court."

How can it possibly be that not one court Haeg has been to so far is willing to consider that Haeg had innumerable procedural, statutory, and constitutional rights violated; that

Haeg specifically asked about how to exercise these rights; and that Haeg's own attorneys lied to him to hide these rights?

Haw can these courts continue to ignore that Haeg and his family paid for a Rule 11 plea agreement with nearly everything they had in life and it was all taken away without it ever being considered or noticed by any judge, even during Haeg's sentencing?

> Haeg will present this perversion of justice to the United States Supreme Court if it is the last thing he does in life.

**SHORT CONCLUSION STATING PRECISE RELIEF SOUGHT**

1. Haeg, because the issues above involve a significant question of law under both constitutions (corruption in the judicial system) & are of immense public interest, hereby respectfully asks this Court of Appeals immediately certify this case to the Ak Supreme Court under AS 22.05.015 (b).

2. If this Court of Appeals refuses to immediately certify this case to the Ak Supreme Court Haeg respectfully requests this court to promptly rule on all Haeg's outstanding motions, many of which have not been ruled on for over 3 months.

3. Haeg again respectfully asks this Court of Appeals to stay his appeal pending a post-conviction relief procedure claiming ineffective assistance of counsel, vindictive/malicious prosecution, & judicial misconduct.

4. Haeg again respectfully asks this Court of Appeals to order the district court, preferably in Kenai, to accept an application for post-conviction relief.

5. Haeg again respectfully asks this Court of Appeals to stay the revocation/suspension of his guide license pending outcome of his appeal/PCR procedure.

6. Haeg respectfully asks this Court of Appeals, if they decide to take notice &/or action on the innumerable plain errors above, they do nothing that will deprive Haeg of his ability to sue his three attorneys for malpractice & the State for malicious/vindictive prosecution. In other words any reversal ordered must include ineffective assistance of counsel & malicious/vindictive prosecution as reasons.

7. Haeg respectfully asks that oral arguments be ordered, that Haeg be allowed to videotape them, & that the public be allowed to observe.

This brief is supported by the accompanying affidavit. RESPECTFULLY SUBMITTED on this ____ day of February 2007.

**CERTIFICATE OF SERVICE**

I certify that on the ____ day of February 2007, a copy of the forgoing document by ___ mail - party:
Roger B. Rom, Esq., O.S.P.A., 310 K. Street, Suite 403, Anchorage, AK 99501
By:_____

_____

David S. Haeg, Pro Se Appellant

**APPENDIX - CASELAW**

*Waiste v. State*, 10 P.3d 1141: Waiste & the State agree that the Due Process Clause of the Ak Constitution requires a prompt postseizure hearing upon the seizure of a fishing boat potentially subject to forfeiture. The State argues that a prompt postseizure hearing is the only process due, both under general constitutional principles & under this court's precedents on fishing-boat seizures. This court's dicta, however, & the persuasive weight of federal law, both suggest that the Due Process Clause of the Ak Constitution should require no more than a prompt postseizure hearing. But given the conceded requirement of a prompt postseizure hearing on the same issues, in the same forum, "within days, if not hours," the only burden that the State avoids by proceeding ex parte is the burden of having to show its justification for a seizure a few days or hours earlier. The interest in avoiding that slight burden is not significant. The State does not discuss the private interest at stake, & Waiste is plainly right that it is significant: even a few days' lost fishing during a three-week salmon run is serious, & due process mandates heightened solicitude when someone is deprived of her or his primary source of income. But it does not fully remedy the basic flaws in ex parte proceedings. As Justice Frankfurter observed, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him & opportunity to meet it." As the Good Court noted, moreover, the protection of an adversary hearing "is of particular importance [in forfeiture cases], where the Government has a direct pecuniary interest in the outcome." An ensemble of procedural rules bounds the State's discretion to seize vessels & limits the risk & duration of harmful errors. The rules include the need to show probable cause to think a vessel forfeitable in an ex parte hearing before a neutral magistrate, to allow release of the vessel on bond, & to afford a prompt postseizure hearing. That ensemble is undeniably less effective than a prior, adversarial hearing in protecting fishers from the significant harm of the erroneous seizure & detention of a fishing boat. The facts of this case may illustrate that point.

*F/V American Eagle v. State*, 620 P.2d 657. When the seized property is used by its owner in earning a livelihood, notice & an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the

government interest in the seizure is urgent. Stypmann v. City & County of San Francisco, 557 F.2d 1338 (9th Cir. 1977); Lee v. Thorton, 538 F.2d 27 (2d Cir. 1976). See also *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993), *Harmelin v. Michigan*, 501 U. S. 957 (1991), *Etheredge v. Bradley,* 502 P.2d 146, 153 (Ak 1972), *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Fuentes v. Shevin*, 407 U.S. 67, *Sniadach v. Family Fin.Corp*. 395 U.S. 337, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), *Wiren v Eide*, 542 F2d 757 (9th Cir. 1976), *Mullane v. Central Hanover Tr. Co*., 339 U.S. 306 (1950), *Coe v Armour Fertilizer Works,* 237 U.S. 413 (1915), *U.S. v Crozier*, 674 F2d 1293 (9th Cir. 1982).

*McLaughlin v. State*, 818 P.2d 683, (Ak.,1991), *Lewis v. State*, 9 P.3d 1028. (Ak.2000), *Gustafson v. State*, 854 P.2d 751, (Ak.,1993), *State v. Davenport*, 510 P.2d 78, (Ak.,1973), *State v. Malkin*, 722 P.2d 943 (Ak. 1986), *Stavenjord v. State*, 2003 WL1589519, (Ak.,2003). See also *Mapp v. Ohio*, 367 U.S. 643 (1961) [the federal case that require states to supress illegally obtained evidence]; *Olmstead v. U.S*., 277 U.S. 438, 485 (1928); *People v. Reagan*, 235 N.W.2d 581, 587 (Mich. S.Ct. 1975); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003); *U.S. v. Hunt*, 496 F.2d 888; *U.S. v. Thomas,* 489 F.2d 664 (1973).

*Smith v. State*, 717 P.2d 402: "The fact that Smith was legally entitled to persist in his plea of innocence is, in our view, determinative of his claim of ineffective assistance of counsel. Prior to his change of plea, Smith specifically asked his counsel if he was obligated to change his plea. Smith's question obviously related to his legal rights, not to his ethical duties. In *Risher v. State,* 523 P.2d 421 (Ak 1974), the Ak Supreme Court spoke of the right to effective assistance of counsel in the following words: Defense counsel must perform at least as well as a lawyer with ordinary training & skill in the criminal law & must conscientiously protect his client's interest, undeflected by conflicting considerations. *Risher,* 523 P.2d at 424 (footnotes omitted). We believe it self-evident that an indispensable component of the guarantee of effective assistance of counsel is the accused's right to be advised of basic procedural rights, particularly when the accused seeks such advice by specific inquiry. Without knowing what rights are provided under law, the accused may well be unable to understand available legal options & may consequently be incapable of making informed decisions. *See, e.g., Arnold v. State,* 685 P.2d 1261, 1267 (Ak App.1984). Here, Smith's inquiry to his counsel was a request for legal advice concerning the availability of a fundamental procedural right. We believe that the constitutional guarantee of effective assistance of counsel entitled Smith to

an answer explaining the options that were open to him as a matter of law. Instead, Smith's counsel merely told Smith that he was bound by the prior agreement to plead no contest. Smith consequently entered his plea of no contest believing that he was obligated to do so. Smith was entitled to advice concerning his legal rights that was "undeflected by conflicting considerations." *Risher,* 523 P.2d at 424. We are particularly troubled by the apparent failure of both Smith's counsel & counsel for the state to disclose the substance of the negotiated plea agreement to the trial court during Smith's change of plea hearing. Similarly disturbing is the failure of Smith's counsel to disclose to the court the fact that Smith had expressed qualms about following through with this agreement. Even in the absence of withdrawal by defense counsel, such disclosures would at least have enabled the trial court to inquire on the record into Smith's understanding of the agreement & to give appropriate advice concerning the extent to which the agreement limited Smith's procedural options." *State v. Scott,* 602 N.W. 2d 296, (Wis. Ct. App. 1999), "Counsel ineffective for failing to move to compel the state to comply with pretrial agreement & failing to advise the defendant of this option". *In re Kenneth H.,* 80 Cal.App.4th 143, "A defendant relies upon a [prosecutor's] plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer. Detrimental reliance may be demonstrated where the defendant performed some part of the bargain." See also *James Mabry, Commissioner, Arkansas Department of Correction, Petitioner v. George Johnson* No. 83-328, *U.S. v. Roberts*, 187 U.S. App. D.C.90,570 F.2d 999(1977).

*Salter v. State*, 2 Okla. Crim. 464, 479, 102 P.719, 725 (1909), & *Ex parte Flowers* 1909 OK CR 69, 2 OKL.Cr.430, 101 P.860. *Gernstein v. Pugh*, 420 U.S. 103 (1975) & *Albrecht v. U.S*., 273 U.S. 1 (1927).

*Risher v. State*, 523 P.2d 421, Ak 1974. The Supreme Court, Boochever, J., held that in order for a defendant to receive effective assistance of counsel, defense counsel must perform at least as well as a lawyer with ordinary training & skill in the criminal law & must conscientiously protect his client's interest, undeflected by conflicting consideration; that in order to establish ineffective assistance of counsel a defendant must show that counsel did not meet that standard & that the ineffective assistance of counsel contributed to the conviction... Because effective assistance embodies the concept of materially aiding in the defense, conduct or omissions which do not somehow contribute to a conviction by their failure to

aid in the defense cannot constitute a constitutional deprivation of assistance of counsel... The absolute deprivation of counsel will be regarded as a constitutional violation per se, & no inquiries will be permitted as to whether the defendant would otherwise have been found guilty... Before reversal will result, there must first be a finding that counsel's conduct either generally throughout the trial or in one or more specific instances did not conform to the standard of competence which we have enunciated. Secondly, there must be a showing that the lack of competency contributed to the conviction. If the first burden has been met, all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome... Before reversal will result, there must first be a finding that counsel's conduct either generally throughout the trial or in one or more specific instances did not conform to the standard of competence which we have enunciated. Secondly, there must be a showing that the lack of competency contributed to the conviction. If the first burden has been met, all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome.

*Strickland v. Washington*, 466 U.S. 668 (1984): A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient &, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 687-696. The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions & informed legal choices can be made only after investigation of options. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies & where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual & substantial disadvantage to the course of his defense." Id., at 1262. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, & hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause & the more particular duties to consult with the defendant on important decisions & to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill

& knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant & on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. & when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See U.S. v. Decoster, supra, at 372-373, 624 F.2d, at 209-210. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" & that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693]. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. U.S. v. Ellison, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we

observed: "[T]he evil...is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations & in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. & to assess the impact of a conflict of interests on the attorney's options, tactics, & decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." Holloway v. Arkansas, 435 U.S. 475, 490 -491 (1978) (emphasis in original).

*Cuyler v. Sullivan*, 446 U.S. 335 (1980) A state criminal trial, a proceeding initiated & conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. If a defendant's retained counsel does not provide the adequate legal assistance guaranteed by the Sixth Amendment, a [446 U.S. 335, 336] serious risk of injustice infects the trial itself. When the State obtains a conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a [446 U.S. 335, 345] distinction between retained & appointed counsel that would deny equal justice to defendants who must choose their own lawyers. Defense counsel have an ethical obligation to avoid conflicting representations & to advise the court promptly when a conflict of interest arises during the course of trial. In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. In Glasser v. U.S., for [446 U.S. 335, 349] example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony

linked Glasser with the crime & failed to resist the presentation of arguably inadmissible evidence. Id., at 72-75. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." Id., at 75. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction. Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76 . Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice [446 U.S. 335, 350] in order to obtain relief. See Holloway, supra, at 487-491. As the Court emphasized in Holloway: "[I]n a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing ... may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. & to assess the impact of a conflict of interests on the attorney's options, tactics, & decisions in plea negotiations would be virtually impossible." 435 U.S., at 490 -491 (emphasis in original). As the Court emphasized in Holloway: "[I]n a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing . . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. & to assess the impact of a conflict of interests on the attorney's options, tactics, & decisions in plea negotiations would be virtually impossible." 435 U.S., at 490 -491 (emphasis in original).

*U.S. v. Cronic*, 466 U.S. 648 (1984): An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person

on trial are secured. Without counsel, the right to a trial itself would be "of little avail, as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[Truth]," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted & the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). It is that "very premise" that underlies & gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." U.S. v. Morrison, 449 U.S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S., at 343. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." U.S. ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876 (1975). Time has not eroded the force of Justice Sutherland's opinion for the Court in Powell v. Alabama, 287 U.S. 45 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent & educated layman has small & sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, & convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill & knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant & illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal

court were arbitrarily to refuse to hear a party by counsel, employed by & appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, &, therefore, of due process in the constitutional sense." Id., at 68-69. See also Jones v. Barnes, 463 U.S. 745, 758 (1983) (BRENNAN, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); Ferri v. Ackerman, 444 U.S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government & to oppose it in adversary litigation"). Ex parte Hawk, 321 U.S. 114, 115-116 (1944) (per curiam). Ineffectiveness is also presumed when counsel "actively represented conflicting interests." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). See Flanagan v. U.S., 465 U.S., at 268. "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." Holloway v. Arkansas, 435 U.S. 475, 489-490 (1978). See also Glasser v. U.S., 315 U.S. 60, 67-77 (1942). U.S. v. Agurs, 427 U.S., at 110 (prosecutorial misconduct should be evaluated not on the basis of culpability but by its effect on the fairness of the trial). Conversely, we have presumed prejudice when counsel labors under an actual conflict of interest, despite the fact that the constraints on counsel in that context are entirely self-imposed. See Cuyler v. Sullivan, 446 U.S. 335 (1980).

*Mesarosh V. U.S.*, 352 U.S. 1 (1956): "Mazzei, by his testimony, has poisoned the water in this reservoir, & the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, & this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. U.S., 318 U.S. 332 . Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124. The government of a strong & free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call

for a reversal of the judgments below with direction to grant the petitioners a new trial."

*Mooney v. Holohan*, 294 U.S. 732: Requirement of "due process" is not satisfied by mere notice & hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court & jury by presentation of testimony known to be perjured, & in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process. It is a requirement that cannot be deemed to be satisfied by mere notice & hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court & jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction & imprisonment of a defendant is an inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. & the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers.' Carter v. Texas, 177 U.S. 442, 447 , 20 S.Ct. 687, 689; Rogers v. Alabama, 192 U.S. 226, 231 , 24 S.Ct. 257; Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U.S. 226, 233 , 234 S., 17 S.Ct. 581.

*Napue v. People*, 360 U.S. 264, 79 S.Ct. 1173. Conviction obtained through of false testimony, known to be such by representatives of the State, is a denial of due process, & there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears. The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, &, if it is in any way relevant to the case, the district attorney has the responsibility & duty to correct what he knows to be false & elicit the truth...of guile or a desire to prejudice matters little, for its impact was the same,

preventing, as it did, a trial that could in any real sense be termed fair." Where important witness for the State, in murder prosecution of petitioner, falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State's Attorney had promised witness consideration, & Assistant State's Attorney did nothing to correct false testimony of witness, fact that jury was apprised of other grounds for believing that witness may have had an interest in testifying against petitioner did not turn what was otherwise a tainted trial into a fair one. Where important witness for the State, in murder prosecution of petitioner, falsely testified that witness had received no promise of consideration in return for his testimony, though in fact Assistant State's Attorney had promised witness consideration, & Assistant State's Attorney did nothing to correct false testimony of witness, petitioner was denied due process of law, though jury was apprised of other grounds for believing that witness may have had an interest in testifying against petitioner. In *Niemotko v. Maryland*, 340 U.S. 268, 271 : "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, Mooney v. Holohan, 294 U.S. 103 ; Pyle v. Kansas, 317 U.S. 213 ; Curran v. Delaware, 259 F.2d 707. See New York ex rel. Whitman v. Wilson, 318 U.S. 688 , & White v. Ragen, 324 U.S. 760 . Compare Jones v. Commonwealth, 97 F.2d 335, 338, with In re Sawyer's Petition, 229 F.2d 805, 809. Cf. Mesarosh v. U.S., 352 U.S. 1 . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. Texas, 355 U.S. 28 ; U.S. ex rel. Thompson v. Dye, 221 F.2d 763; U.S. ex rel. Almeida v. Baldi, 195 F.2d 815; U.S. ex rel. Montgomery v. Ragen, 86 F. Supp. 382. See generally annotation. The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness & reliability of a given witness may well be determinative of guilt or innocence, & it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N. Y. 2d 554, 557; 136 N. E. 2d 853, 854-855; 154 N. Y. S. 2d

885, 887: "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter [360 U.S. 264, 270] what its subject, &, if it is in any way relevant to the case, the district attorney has the responsibility & duty to correct what he knows to be false & elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one. As Mr. Justice Schaefer, joined by Chief Justice Davis, rightly put it in his dissenting opinion below, 13 Ill. 2d 566, 571, 150 N. E. 2d 613, 616: "What is overlooked here is that Hamer clearly testified that no one had offered to help him except an unidentified lawyer from the public defender's office."

*Giles v. Maryland*, 386 U.S. 66: "The Court reiterated 'the principal that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty...' Id. supra, at 74.

*Atchak v. State*, 640 P.2d 135 (Ak 1981): Determining the strength of the appearance of prosecutorial vindictiveness is a due process which involves, first, an inquiry as to the prosecution's " stake" in deterring exercise of the specific right asserted by the defendant, &, second, scrutiny of the state's conduct for a connection between assertion of a right by the accused & an increase or threatened increase in charges by the state. Prosecutorial mistake, negligence or misunderstanding will not suffice to rebut a prima facie showing of prosecutorial vindictiveness. It is not appropriate, where apparent vindictiveness would result, to allow the state to alter an initial charging decision which amounted to a calculated risk, rather than an exercise of prosecutorial discretion made for legitimate, strategic reasons. The Ak Supreme Court has consistently held that courts should not hesitate to reverse a conviction when a substantial flaw in the underlying indictment is found, regardless of the strength of the evidence against the accused or the fairness of the trial leading to the conviction. While we realize that prosecutorial independence is a vital consideration involved in all cases dealing with the Pearce/Blackledge rule, our solicitude for the independent discretion of the state diminishes significantly when, in

increasing or threatening to increase a charge, the prosecution simply attempts to alter, without significant intervening circumstances, a fully informed decision which it previously made. As held in Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978) (citation omitted): We recognize that there is a broad ambit to prosecutorial discretion, most of which is not subject to judicial control. But if Blackledge teaches any lesson, it is that a prosecutor's discretion to reindict a defendant is constrained by the due process clause... (O)nce a prosecutor exercises his discretion to bring certain charges against the defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights. As stated in U.S. v. Ruesga-Martinez, 534 F.2d at 1369 (footnotes & citations omitted; emphasis in original): Pearce & Blackledge ... establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. We do not question the prosecutor's authority to bring the felony charges in the first instance, nor do we question the prosecutor's discretion in choosing which charges to bring against a particular defendant. But when, as here, there is a significant possibility that such discretion may have been exercised with a vindictive motive or purpose, the reason for the increase in the gravity of the charges must be made to appear. We do not intend by our opinion to impugn the actual motives of the (prosecution) in any way. But Pearce & Blackledge seek to reduce or eliminate apprehension on the part of an accused that he may be subjected to retaliatory or vindictive punishment by the prosecution only for attempting to exercise his procedural rights. Hence, the mere appearance of vindictiveness is enough to place the burden on the prosecution. We note that previous cases have invoked the Pearce/Blackledge doctrine despite affirmative findings of a lack of malice or improper motivation on the part of the prosecution. See, e.g., U.S. v. Groves, 571 F.2d at 453; U.S. v. Ruesga-Martinez, 534 F.2d at 1369-70.

*U.S. v. Velsicol Chem. Corp.*, 498 F. Supp. 1255 (D.D.C. 1980) The Ninth Circuit has also ruled in a number of situations that the apprehension or appearance of prosecutorial vindictiveness is sufficient to warrant a dismissal when a defendant is thwarted in the exercise of his rights. The "mere appearance of

vindictiveness is enough to place the burden on the prosecution (to show a legitimate motive)." U.S. v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976). Later, in U.S. v. Groves, 571 F.2d 450 (9th Cir. 1978), that court, relying in part on Jamison, ruled that the government bore the "heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive purpose."

*Berger v. U.S.*,295 U.S. 78, Justice Sutherland best explained the duties & obligations of prosecutors: "The U.S. Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; & whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar & very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness & vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 295 U.S. at 88, 55 S. Ct. at 633. *Donnelly v. Dechristoforo*, 416 U.S. 637: Justice Douglas more figuratively described this same duty: "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws & give those accused of crime a fair trial. 416 U.S. 637, 648-649, 94 S. Ct. 1868, 1874, 40 L. Ed. 2d 431 (1974).

*Stone v. Cupp*, 592 P.2d 104, Failure to scrupulously observe a plea bargain is cause for post-conviction relief even where the sentencing court was uninfluenced by the irregularity, & absent showing that proceedings which occurred prior to sentencing recommendation were affected by the breach, specific performance was the proper remedy, i.e. vacation of sentence, remand for a new sentence before a different circuit judge following a recommendation by the prosecutor consistent with the agreement. Post-conviction court's finding of violation of plea agreement would be upheld if any evidence in the record to support it.

*Closson v. State* 812 P.2d 966: When the government claims that the defendant has breached an immunity or plea bargain agreement, the burden is on the government to prove, by a preponderance of the evidence, that a substantial breach occurred. When State breached promise of confidentiality

contained in immunity agreement, defendant was entitled to specific performance; fundamental fairness dictated that State be held to strict compliance.

*U.S. v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991). Government's collaboration with defendant's attorney during investigation & prosecution of drug case violated defendant's Fifth & Sixth Amendment rights & required dismissal of the indictment. Counsel advised him to provide some incriminating information as a showing of good faith when the government had not even been aware of the information. Ultimately, defendant retained separate counsel. The court held that the government's conduct created a conflict of interest between defendant & counsel & the government took advantage of it without alerting the defendant, the court, or even the "oblivious" counsel to the conflicts. "While the government may have no obligation to caution defense counsel against straying from the ethical path, it is not entitled to take advantage of conflicts of interest of which the defendant & the court are unaware." *Id.* at 1519. Moreover, the government here assisted in efforts to hide the conflicts from defendant. "In light of the astonishing facts of this case, it is beyond question that [counsel's] representation of [defendant] was rendered completely ineffectual & that the government was a knowing participant in the circumstances that made the representation ineffectual." *Id.* at 1520.

*Stolt-Nielsen, S.A. v. U.S.*, 442 F.3d 177: Government must adhere strictly to terms of agreements made with defendants, including plea, cooperation, & immunity agreements, to extent they require defendants to sacrifice constitution rights.

*Stolt-Nielsen, S.A. v. U.S.*, 352 F. Supp. 2d 553: Because a party surrenders valuable constitutional rights when entering into an immunity agreement, a court must carefully scrutinize the agreement to determine whether the government has performed, in doing so, court must strictly construe the agreement against the government.

*U.S. v. Cantu*, 185 F.3d 298 (5th Cir. 1999): Due process concerns preclude the government from unilaterally nullifying a nonprosecution agreement where it believes the defendant is in breach; prior to prosecuting the defendant, the government must prove to the court by a preponderance of the evidence that the defendant breached the agreement in a manner sufficiently material to warrant rescission.

*U.S. v. Castaneda*, 162 F.3d 832: When the government believes that a defendant has breached the terms of a nonprosecution agreement & wishes to be relieved of performing is part of the bargain, the government must prove to the court by a preponderance of the evidence that (1) the defendant breached the agreement, & (2) the breach is sufficiently material to warrant recession.

*Cabral v. Hannigan*, 5 F.Supp.2d 957: Prosecutor's intentional revelation at sentencing of information originally obtained from rape defendant in exchange for immunity from prosecution in earlier unrelated matter breached immunity agreement & violated defendant's Fifth Amendment rights; although agreement did not expressly prohibit use of information provided pursuant thereto at sentencing for subsequent unrelated crime, agreement could be reasonably understood to broadly prohibit use of information in any manner contrary to defendant's rights to due process & against compulsory self-incrimination.

*U.S. v. Lua*, 990 F.Supp. 704: Courts are bound to enforce immunity agreements when defendant has fulfilled his or her side of bargain. In order to dismiss indictment on basis of immunity agreement, court must find that agreement existed between government & defendant, that defendant substantially performed her part of agreement, & that government breached clear terms of agreement.

*U.S. v. Chiu*, 109 F.3d 624: Dismissal of indictment is remedy for breach of contractual immunity agreement.

*U.S. v. Dudden*, 65 F.3d 1461: Where informal immunity agreement extended to subsequent prosecution for conspiracy to distribute methamphetamine, government breached immunity agreement if it either used defendant's immunized statements against defendant directly or if it used statements to help develop prosecution's case against her.

*U.S. v. Crawford*, 20 F.3d 933: Only material breach is sufficient to excuse government of its performance under immunity agreement.

*U.S. v. Wiley*, 997 F.2d 378: Government did not use defendant's statement to formulate additional charges against him in violation of immunity agreement, so that it did not have to prove the new charges were based on evidence that was derived from independent source.

*U.S. v. Ayers*, 825 F.Supp. 33: Agreement on part of defendant to cooperated with government, like plea bargain, is interpreted according to principles of contract law; thus, in deciding whether such agreement has been breached, court must look to what parties to agreement reasonably understood to be its terms.

*U.S. v. Smith*, 976 F.2d 861: In interpreting immunity agreements, as with plea agreements, court considers fact that defendant's underlying contract right is constitutionally based & reflects concerns that differ fundamentally from & run wider than those of commercial contract law.

*U.S. v. Pinter*, 971 F.2d 554: Government breached cooperation agreement in its failure to respond to defendant's motion for reduction of sentence by fully advising district court of his cooperation. Cooperation agreement is analogous to plea bargain &, therefore, same analysis applies to both types of agreements; thus, promises in cooperation agreements, whether directly or indirectly made, must be fulfilled to their fullest extent in furtherance of fair & proper administration of justice.

*State v. Sexton*, 709 A.2d 288: Counsel ineffective – Court found both prosecutorial misconduct & ineffective assistance which created the "real potential for an unjust result."