

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

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

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Ak Bar Case No.: 2006F007

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

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

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**REPLY BRIEF OF APPELLANT**

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Filed in the Supreme Court of  
 The State of Alaska, this \_\_\_\_  
 day of May 2008.

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David S. Haeg, Pro Se Appellant

Marilyn May, Clerk  
 Appellate Courts

By: \_\_\_\_\_  
 Deputy Clerk

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## **COLE'S APPELLEE BRIEF FAILS TO REFUTE HAEG'S CLAMS**

**1. Cole claims that factual determinations cannot be appealed & Haeg failed to provide evidence of affirmative wrongdoing.** [Ap.Br.1].

This is irrefutably false. [See AS 09.43.120 & At.Br.22, 23, 59-66, 70, & 75-78].

**2. Cole claims Haeg's interview could not be used against Haeg & it was unclear if Haeg's statement was used.** [Ap.Br.4-5].

Yet this interview was used as the State's primary evidence against Haeg. [At.Br.5-7, 11, 27, 28, 65-69, 78; Tr.75-76, 83-89, 214, 247; Ex.5-6, 433-464, 475, 477, 491, 683].

**3. Cole claims "in August through October the parties discussed a number of different scenarios to resolve the case. On November 4, 2004 the State filed an information & requested an arraignment/change of plea/sentencing which was scheduled for November 9, 2004 in McGrath."** [Ap.Br.4].

Cole's own itemized billings, however, prove the plea agreement (PA) was finalized on *August 27, 2004* [Ex.424-25] & prove *he* scheduled the November 9, 2004 arraignment/change of plea/sentencing on *September 15, 2004*. [Ex.3].

**4. Cole claims Haeg, through his 2<sup>nd</sup> attorney, could have filed motions to dismiss charges, suppress evidence, & to suppress Haeg's statement.** [Ap.Br.5 & 15].

Cole admits ineffective representation – entitling Haeg to a refund.

**5. Cole claims that Robinson agreed Cole's subpoenaed testimony would be detrimental to Haeg & that Cole did not have to appear in person.** [Ap.Br.6].

Recordings of Robinson prove this false. [At.Br.18;Tr.286-87,Ex.707-09,731-40].

**6. Cole claims Haeg has no proof of corruption, bias, partiality, collusion, & conspiracy of panel members.** [Ap.Br.6].

This is false. [At.Br.1-2, 17-24, 59-64, 75-76].

**7. Cole claims, “It is unclear from Haeg’s brief why he does not believe the State agreed with Cole’s assertions in the letter to Leaders.” [Ap.Br.11].**

Haeg’s brief claims the State, *in every information filed against Haeg (including the 2 that were filed while Cole was representing Haeg – and one that he went to trial on), specifically used Haeg’s “immunized” statement, made when Haeg was “king for a day”, against Haeg*; claims Haeg’s “immunized” statement made when Haeg was “king for a day” was used to obtain Zellers’s cooperation & testimony against Haeg at trial [Tr.75, 83-84, 214]; claims Fitzgerald, on open record, *stated that there was no immunity for the statements & that this was proved by the State’s use of them “for whatever it was goanna do with that information and as is demonstrated they used it to charge additional charges against both Mr. Zellers & Mr. Haeg”* [Ex.683]; claims the State *used Haeg’s immunized statement to obtain physical evidence against Haeg* [Tr.247 & Ex.683]; & claims *taped* conversations between Haeg & Cole, made when Cole was still representing Haeg, irrefutably prove the falsehood. [Ex.475-477].

**8. Cole claims Haeg fired Cole “shortly after the charges were filed” & that Cole did not have to file motions because Haeg fired Cole & Cole could not file any motions after he was fired. [Ap.Br.9, 11-12].**

Cole represented Haeg for a *month* after charges (using immunized statements) were filed in violation of the PA (which Haeg asked to be enforced) and for *9 months* after the State used perjury to seize Haeg’s property. [Ex.433-64]. Not *once* did Cole ever indicate to ignorant Haeg a “motion” could be filed to stop all of this malicious/vindictive prosecution. [Tr.61, 102, 104-105, 117, 321; Ex.433-464, 475-535].

**9. Cole claims the State could use Zellers’s testimony against Haeg because “Haeg’s limited immunity did not insulate him from his co-defendants**



cooperation with the State at trial through his testimony”; that Haeg failed to demonstrate that Cole or Fitzgerald perjured themselves by testifying about their understanding of the “limited protection their clients received by cooperating & giving a voluntary statement” [Ap.Br.12]; that “Perjury is not simply a misstatement or an incorrect statement. People can & do see & hear things differently. Having a different recollection – does not make a statement a lie”; & Haeg’s arguments of perjury are unfounded & unsupported. [Ap.Br.14].

Zellers & Fitzgerald testified Zellers cooperation was a fruit of Haeg’s statement – precluding the use of Zellers’s testimony against Haeg. [Tr.75-84, 214]. Cole & Fitzgerald testified that Haeg had “king for a day” immunity that protected Haeg’s statement from being used “*for any purpose whatsoever*”. [Tr.181-182, 283-285]. Cole’s recorded statements while he was still Haeg’s attorney & Fitzgerald’s statements during Zellers’s sentencing prove they *knew* there was no immunity whatsoever –irrefutably proven by all the informations which used the statements as probable cause. [Ex.475, 477, 493, 495, 683]. Cole & Fitzgerald’s sworn testimony otherwise is irrefutable perjury. *Haeg relies almost exclusively on actual tape recordings & Court records at the time in question – tapes & records that irrefutably prove Cole & Fitzgerald’s known & intentional perjury to the panel.* [Ex.475-535, 683]. As shown in this reply & in Haeg’s opening brief Haeg’s claims of perjury are overwhelmingly founded & supported. [At.Br.2-25, 27-29, 31-38, 57-74, 77-80 & 83-84].

**10. Cole claims none of his or Fitzgerald’s testimony could possibly constitute “fraud” as required by the statute.** [Ap.Br.15-16].

Both Cole & Fitzgerald, while under oath, affirmatively misled the panel to get a decision favorable to Cole & unfavorable to Haeg – the very definition of fraud. Cole & Fitzgerald worked together to accomplish this – the very definition of conspiracy – another description of fraud.

**11. Cole claims Haeg argued it was “perjury or fraud” that Cole never informed Haeg of Haeg’s right to recover his aircraft. [Ap.Br.16].**

Haeg argued it was perjury & fraud that Cole lied to the panel, while under oath, that it was not possible to obtain the return of Haeg’s aircraft when it most certainly is possible. [Ap.Br.1, 3-5, 7, 18, 20, 24, 38-59, 71-73, 77; Ex. 479-86, 489, 505-07, 511, 513-14, 518, 524, 533, 535; *Waiste v. State*].

**12. Cole claims Haeg’s argument that he was entitled to prompt notice of a hearing when he was deprived of property is “not legally correct”. [Ap.Br.17-18].**

Overwhelming case law & principles provide absolute proof that *after property is seized prompt notice of a hearing is required by due process*. Cole is affirmatively misleading this Court – as he did Haeg, the panel (while under oath), & the Superior Court. [See opening brief case law & *AS 28.05.131*].

**13. Cole claims Haeg failed to raise the issue or argue that the decision & award violated the U.S. & Alaska Constitutions & thus abandoned it. [Ap.Br.21].**

This is false. [See all record but especially At.Br. ii, 2, 23, 24, 74, 75].

### **COLE’S & FITZGERALD’S PERJURY TO PANEL**

#### **ISSUE #1 - COLE’S SWORN TESTIMONY TO THE PANEL THAT HAEG HAD IMMUNITY FOR THE STATEMENT HE GAVE TO THE PROSECUTION FOR A PLEA AGREEMENT:**

COLE: “He [Prosecutor Leaders] & I agreed before this [before Haeg gave a statement] that it [Haeg’s statement] wasn’t goanna be used. That it was just goanna be ... a ‘king for a day’ or a immunity statement.” [Tr.283].

METZGER: “You had the deal where Mr. Haeg’s statement couldn’t be used against Mr. Haeg.”

COLE: “Right.” [Tr.285. See also Tr.248-49, 252-53, 284-86.]

## **ISSUE #1 - Facts:**

11/11/04 - Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: "I don't know have you seen all the crap hitting the newspapers etc. etc. I assume?"

COLE: "Well yeah."

HAEG: "Um & is that you know at the time we gave our – our statements & stuff *is that – uh - proper for them to do to release all that stuff?* I mean is that how it goes or what?"

COLE: "Yep." [Ex.475].

HAEG: "*Why did we tell the State everything then if they're just goanna use it against us? Why did we do that?*"

COLE: "*We wanted to mitigate the damages.*" [Ex.477].

1/13/05 – Fitzgerald on record testimony at Zellers's sentencing:

FITZGERALD: "*[H]ad it not been for the cooperation, frankly of both Mr. Zellers & Mr. Haeg, there would have been additional holes in the case & my understanding is that their cooperation provided information to the State concerning at least 5 of the 9 wolves at issue. [T]he fact of the matter is [they] provided the information & frankly the government was free to do whatever it was goanna do with that information & as is demonstrated they used it to charge additional charges against both Mr. Zellers & Mr. Haeg.*" [Ex.683].

The State *specifically* used Haeg's statements, unopposed by Cole, as the only probable cause for most of the charges against Haeg & as primary probable cause for the rest in all informations – including the one violating the PA & went to trial on. [Ex.433-464]. It was used to obtain evidence & the main witness against Haeg. [Tr.75-76, 83-84, 214, 247.]

## **ISSUE #1 - Discussion:**

It is absolutely irrefutable Haeg had no immunity for his statement & that it could be & was used against Haeg, & that Cole knew this at the time – making his subsequent

sworn testimony otherwise to the panel known & intentional perjury.

**ISSUE #2 - KEVIN FITZGERALD'S PERJURY & CONSPIRACY AT THE ALASKA BAR ASSOCIATION TO COLLABORATE COLE'S TESTIMONY:**

COLE: "Do you recall talking to me about you - *our understanding of our client going in – clients going in & giving statements to the officers in this case?*"

FITZGERALD: "Well I can tell you my clear understanding from having talked to Mr. Leaders & I will represent here as an officer of the Court & Mr. Leaders indicated that -uh- my client Mr. Zellers was goanna be given immunity that there was nothing about that interview *which I characterize as a 'king for a day' – there was nothing about that interview that could be used against Mr. Zellers.*" [Tr.181-182].

HAEG: "Did you ever ask Mr. Cole if Tony Zellers & David Haeg's test – or -uh- -um- interviews could be used against them if the negotiations failed?"

FITZGERALD: "*I believe that there was a deal between Mr. Leaders & myself & Mr. Zellers that it wouldn't be used.*"

SHAW: "The question was about Mr. Cole's in questions with respect for Mr. Haeg. Can you answer that question?"

FITZGERALD: "I – *I can't believe that Mr. Cole believed anything different than I – I did.*" [Tr.219-220].

**ISSUE #2 - Zeller's Sworn Testimony to Panel:**

ZELLERS: "*But the whole thing is with us cooperating -uh- we were actually charged with what we said additional at that -uh- that meeting...*" [Tr.84].

**ISSUE #2 – Facts:**

At Tony Zellers's sentencing on 1/13/05, prior to his sworn testimony to the panel, Kevin Fitzgerald made the following on record testimony to Judge Murphy:

FITZGERALD: "*[H]ad it not been for the cooperation, frankly of both Mr. Zellers & Mr. Haeg, there would have been additional holes in the case & my understanding is that their cooperation provided information to the State concerning at least 5 of the 9 wolves at issue. [T]he fact of the matter is [they] provided the information & frankly the government was free to do whatever it was goanna do with that information & as is demonstrated they used it to charge additional charges against both Mr. Zellers & Mr. Haeg.*"

[Ex.683].

**ISSUE #2 – Discussion:**

It is absolutely irrefutable that there was no immunity for either Zellers or Haeg’s statement & that Fitzgerald knew this at the time – making his subsequent sworn testimony otherwise to the panel known & intentional perjury &, as he did this to collaborate Cole’s perjury, felony conspiracy.

**ISSUE #3 - COLE’S SWORN TESTIMONY TO THE PANEL THAT WHILE HE WAS HAEG’S ATTORNEY HE HAD TOLD HAEG & WITNESSES HE COULD “FILE A MOTION” TO ENFORCE THE PA:**

COLE: “*We talked about filing a motion to require the State to bring the original charges. I talked about that with him & I said to him ‘why – yes I could do that David but then I'm goanna have to say that I had a discussion with Scot Leaders & he said 'x' & he said 'x' so now if I'm right what's – where are we – where's this goanna get us? He's goanna oppose that & he's goanna say 'I didn't say that'. So now you're goanna have two attorneys fighting each other but even more important even if he says 'ok you can have open sentencing now there – all deals off’ & I'm arguing for 5 years. What could I do?’*” [Tr.275].

COLE: “*You could file – if you thought that you had an agreement in place, & we discussed this, you could file a motion to enforce the agreement that was in place & submit an affidavit & I told you that you could do that in your case – that I would do in this case, if you wanted. It was goanna cost you a lot more money & where was it goanna get us?’*” [Tr.298. *See also* Tr. 268, 275-277, 298-301, 311, 313-320, 323-324].

**ISSUE #3 - Haeg’s Sworn Testimony to Panel:**

HAEG: “*When I asked Mr. Cole at this time how Assistant Attorney General Scot Leaders could break the deal only hours before we were supposed to conclude at McGrath he stated quote ‘that's the way it is’ & quote ‘the only thing I can do is talk to Prosecutor Leaders boss, a women I used to work with’.*” [Tr.28].

HAEG: “*When I insisted that Brent Cole try to enforce the Rule 11 Agreement he stated quote, ‘I can't force Leaders to do anything because after you are finished I still have to be able to make deals with him’.*”

[Tr.29. See also Tr.75; 87-88, 95, 102, 104–105, 106; 110-111; 117, 125, 125-127].

HAEG: “*Mr. Cole's statements that he told me that we could file a motion to enforce the Rule 11 Agreement is absolutely fantastic. The evidence against him is stunning. Himself on tape, himself in signed letters, & multiple witnesses who have testified before you under oath, he has not one single leg to stand upon. The same exact thing is true about him telling me the deal was going to be broke before we all arrived from around the U.S. on November 8<sup>th</sup>, 2004. The evidence again is overwhelming. Mr. Cole is lying to you, under oath, to cover his unbelievably malicious actions against me while I was paying him.*” [Tr.353. See also Tr.379-380].

### **ISSUE #3 – Facts:**

11/11/04 – Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: “What I guess what I was getting at is – um - why uh & I you know I've been stewing about all this stuff because we in good faith flew Tony up here, took my kids out of school, had my - you know - my wife & I come up there get hotels all this stuff & *it really gripes me that we didn't get to pursue what we had to pursue & is it I know you said that the only person we could bitch to is Leaders or Leaders boss* [Ex.479].

HAEG: “*If I wanted to complain – or you complain I mean - did you ever contact Leaders boss or ever get in touch with her?*”

COLE: “*I left a message. I haven't been in touch.*” [Ex.484. See also Ex.513-14].

### **ISSUE #3 – Discussion:**

It is absolutely irrefutable Cole had told Haeg, *at the very time in question, the only thing Haeg could do to enforce the PA was “complain to Leaders’s boss.”* – making Cole’s testimony to the panel that while he was Haeg’s attorney he told Haeg that a “motion” could be filed to enforce the PA to be known & intentional perjury.

**ISSUE #4 - COLE’S SWORN TESTIMONY TO PANEL THERE NEVER WAS AN “OPEN SENTENCE” PA THAT WAS TO BE FINALIZED IN MCGRATH ON 11/9/04:**

HAEG: “Ok do you agree that on November 8<sup>th</sup> indeed myself & more then several witnesses – I believe there were – well I don't know – I think there was 8 in our entire party. Some of them flying in from –uh- Illinois. *Do you agree that we all came there as you say in preparation for arrangement – arraignment & change of plea scheduled to occur McGrath the next day?* Do you agree that that's what happened?”

COLE: “I – I don't know what your intention was. I know what my intention was. I know what this says.”

HAEG: “Ok explain to me again what your intention was.”

COLE: “My intention was that we were goanna fly to McGrath to do the deal for 1 to 3 years.”

HAEG: “Ok yep. I...”

COLE: “And all the other terms were fixed.”

HAEG: “Oh ok. Ok.”

COLE: “*It was not that you were going to go open sentence.*” [Tr.342. See also 352, 23-24, 55, 69, 101-02, 104-06, 110, 114, 117, 128-31].

#### **ISSUE #4 – Facts:**

11/11/04 - Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: “*Didn't before we came up there didn't I say that I would like to go open sentencing?*”

COLE: “And I told you - you should think about.”

HAEG: “*And that's when you contacted Leaders & said you told him...*”

COLE: “*You wanted to go open sentencing.*” [Ex.481].

HAEG: “And after we had invested a lot of time, effort, & money, committed to that venture to settle it because my life is getting eaten up by worry among other things & I had great expectations to leave *McGrath* either without a license for 5 years, & no airplane, & going to jail for 6 months & a \$200,000 fine or something a little less. Um – no – nothing to do with you. *I knew the judge was the one goanna be deciding that* but all that was taken away from me at the last minute that agreement. Do you agree with that? Or I mean not at the last minute but whatever it was – well beyond when we could have changed anything & saved all the money in hotel & airfares & etc., etc., etc.”

COLE: “*The thing that was taken away was the option to go open sentencing total.* [Ex.481-482. See also 479-80].

11/22/04 – Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: "Um have you run it by Leaders that I'm thinking about going to a jury trial?"

COLE: "Yep."

HAEG: "What does he say about that – 'great'?"

COLE: "I don't have good client control. He can't believe that I would do that. And I just say, 'well...'"

HAEG: "Ok."

COLE: " '...*he wanted to go open sentencing* - yeah I know I don't understand it but'." [Ex.524-525].

1/4/05 – Tape-recorded conversation between Malatesta & Cole just 1 month after

Cole was still representing Haeg:

MALATESTA: "Yeah an *open sentencing* you know where you agreed & then they - the State backed out. He was telling me something about he had to bring witnesses in & all & then the State backed..."

COLE: "*Going to go to be arraigned at an open sentencing, yes.*"

MALATESTA: "And why did they back out?"

COLE: "*They didn't back out they changed the deal.*"

MALATESTA: "Well that's basically backing out, right?" [Ex.531].

COLE: "So then I went out to Dillingham on Thursday & on Friday – no *the following Monday David was coming in to do the sentencing*. Was it Thursday – yeah it was Thurs – was it Friday – Friday morning I went out to Dillingham. Thursday they filed the complaint against him, Friday morning – maybe it was Thursday he called me & said – we were talking & he said, 'If David is – is not – *he goes I'm not willing to do totally open sentencing with those deals*'."

MALATESTA: "So he changed his mind?"

COLE: "Right."

MALATESTA: "Ok that's a problem for him is what I'm driving at."

COLE: "Well." ...

MALATESTA: "I am – I have been listening. Go ahead."

COLE: "So I said - he said, '*If he will forfeit the plane he can have open sentencing*'. [Ex.533. See also 534-535].

#### **ISSUE #4 – Discussion:**

Over & over in the recordings of Cole while he was still Haeg's attorney Cole admits an "open sentence" PA was to be finalized in McGrath on November 9, 2004.

This is even clearer in the recordings of Cole & Malatesta that were made just after Haeg



fired Cole. It is irrefutable Cole knew there was an “open sentence” PA that was to be finalized on November 9, 2004 in McGrath & that Leaders reneged at the last minute – making Cole’s sworn testimony otherwise to the panel known & intentional perjury.

**ISSUE #5 - COLE’S SWORN TESTIMONY TO THE PANEL THAT HAEG DID NOT WANT TO ENFORCE THE “OPEN SENTENCE” PA BECAUSE OF THE RISK OF A 5-YEAR LICENSE SUSPENSION:**

COLE: “I can't remember exactly what was said. I just said, ‘These are you options’. I explained them time & time again. But I always told you ‘*if you do this you have to be willing to accept that you're goanna lose your license for 5 years, if you lose, is that a risk you're willing to take?*’ *I never heard you say that ‘yes it is – I want to take that risk’.* [Tr.300-01].

COLE: “You did not tell me, ‘Brent, I want you to file this. I don't care about anything else.’ We specifically talked about this. I specifically told you this. So –uh- *every time we talked, you ultimately said, ‘You're right, I don't think I want to lose my license for 5 years’.*”

HAEG: “Can I direct the panel's attention to some evidence?” [Tr.311].

**ISSUE #5 – Facts:**

11/11/04 - Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: “Yeah I agree – you know - that is – that's the absolute truth & I - you said I was crazy to do anything different.”

COLE: “*That's because you are goanna lose your license for 5 years.*”

HAEG: “*Well I was willing to take that chance.*” [Ex.480-81].

HAEG: “And after we had invested a lot of time, effort, & money, committed to that venture to settle it because my life is getting eaten up by worry among other things & I had great expectations to leave McGrath *either without a license for 5 years, & no airplane, & going to jail for 6 months & a \$200,000 fine or something a little less. Um – no – nothing to do with you. I knew the judge was the one goanna be deciding that but all that was taken away from me at the last minute that agreement. Do you agree with that? Or I mean not at the last minute but whatever it was – well beyond when we could have changed anything & saved all the money in hotel & airfares & etc., etc., etc.*”

COLE: “The thing that was taken away was the option to go open

sentencing total.” [Ex.482. See also Ex.484].

**ISSUE #5 – Discussion:**

Haeg *told* Cole, at the very time in question, while Cole was still representing Haeg, that he wanted the open sentencing PA at *any* cost – *even specifically at the risk of a 5-year license loss*. It is absolutely irrefutable Cole knew, at the time, Haeg wanted the open sentence PA enforced at *any* cost, *including risking a 5-year license loss* – making Cole’s sworn testimony otherwise to the panel known & intentional perjury.

**ISSUE #6 - COLE’S SWORN TESTIMONY TO THE PANEL THAT HAEG DIDN’T WANT OPEN SENTENCING & HAEG HAD ACCEPTED AN “OPTION” OTHER THEN “OPEN SENTENCE”:**

COLE: “...‘a minimum year – the plane is up for...’ ‘yes’ ‘the judge to decide. That is what I wanted at the time & that is still what I want. Because I feel that they personally took it...’”

HAEG: “*Now I may be stupid because I’m not an attorney but Mr. Cole do you feel that when someone says, ‘that’s what I wanted at the time & that is still what I want’ – they said yes?*”

COLE: “*No I don’t, David.*” [Tr.321-322].

HAEG: “*And you are while under oath & on record here before the Alaska Bar Association goanna tell me that when I tell you ‘that is what I wanted at the time & that is still what I want’ that I said, ‘no’?*”

COLE: “*I’m goanna tell you that if you read this whole thing it doesn’t say ‘I want you to reject every offer & go in & do whatever we have to do to get this original deal’ David that’s what I’m goanna tell you. If you read this from front cover to back you will not get that sense.*”

HAEG: “*So when I tell you ‘well to me they weren’t viable options’ that – that – that means that there were options that were viable - is that what you’re telling me?*”

COLE: “*I can’t speak for what you were thinking, David. You were not half of the time rational in my mind.*” [Tr.323-324].

HAEG: “*Ok -um- ok what you’re saying is that the deal that we were supposed to go out to McGrath [for] was not for open sentencing?*”

COLE: “*No it was not.*” [Tr.332].

HAEG: Ok do you agree that on November 8<sup>th</sup> indeed myself & more then several witnesses – I believe there were – well I don't know – I think there was 8 in our entire party. Some of them flying in from –uh- Illinois. Do you agree that we all came there as you say in preparation for arrangement – arraignment & change of plea scheduled to occur McGrath the next day? Do you agree that that's what happened?

COLE: I – I don't know what your intention was. I know what my intention was. I know what this says.

HAEG: Ok explain to me again what your intention was.

COLE: My intention was that we were goanna fly to McGrath to do the deal for 1 to 3 years.

HAEG: Ok yep. I...

COLE: *And all the other terms were fixed.*

HAEG: Oh ok. Ok.

COLE: *It was not that you were going to go open sentence.* [Tr.342. See also Tr.263, 270, 317-318, 328-330].

#### **ISSUE #6 – Facts:**

11/11/04 - Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

COLE: *“The thing that was taken away was the option to go open sentencing total. There were other options that were available that would've allow us to go out to McGrath. But to go totally open sentencing...”*

HAEG: *“Well to me they weren't viable options.”* [Ex.482].

11/22/04 – Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: “Um have you run it by Leaders that I'm thinking about going to a jury trial?”

COLE: “Yep.”

HAEG: “What does he say about that – ‘great’?”

COLE: “I don't have good client control. He can't believe that I would do that. And I just say, ‘well...’”

HAEG: “Ok.”

COLE: “ ‘...he wanted to go open sentencing - yeah I know I don't understand it but’.” [Ex.524-525. See also Ex.511, 513-514 & 534].

#### **ISSUE #6 – Discussion:**

It is absolutely irrefutable Haeg wanted open sentencing, never accepted any other “option” then open sentencing & that Cole knew this at the time – making Cole’s sworn testimony otherwise to the panel known & intentional perjury.

**ISSUE #7 - COLE’S SWORN TESTIMONY TO THE PANEL THAT HE HAD TOLD HAEG PRIOR TO NOVEMBER 8, 2004 THAT PROSECUTOR LEADERS WAS GOING TO CHANGE, & THUS BREAK, THE OPEN SENTENCING PA, AND/OR THAT IT WAS “ABOUT A WEEK” FROM WHEN LEADERS ACCEPTED THE OPEN SENTENCING PA TO WHEN PROSECUTOR LEADERS CHANGED HIS MIND:**

COLE: “We didn't put that in writing. *A week later – about a week later* he called me up, we were talking about something else, & he said ‘hey -um- if you want to do open sentencing I’m going to change the charges...’ *Now for David to stand in here & say that he – that I didn't tell him this before he got here is just wrong* – I did tell him over the phone that that was the deal. -Um...”

SHAW: “You're saying that you told him over the phone...”

COLE: “That if he wanted to go open sentencing they were goanna change the charges & that he would be facing a minimum of 3 years.” [Tr.262-263. See also 265].

COLE: “He originally said ‘that's ok with me’ then he called me back & said, ‘I'm not goanna do that. If you do that – if you want that then I'm changing it to A15’ & I said...”

SHAW: “How long was it between when he said...”

COLE: “*A week – about a week.*”

SHAW: “... ‘yes’ & you said ‘no’?”

COLE: “*About a week.*”

SHAW: “*I will write down it was about a week then.* -Um- after he said, ‘yes’ did you ever ace...”

COLE: “Did we change position at all?”

SHAW: “...did he ever accept – did you ever accept it? *On Mr. Haeg's behalf did you say, ‘ok done’?*”

COLE: “*Umm hmm.*” [Tr.277-278. See also Tr.327].

COLE: I – I - I've told you like - like 3 times now *my best recollection is it happened about a week after I inquired about the possibility.* And my notes show that I inquired about the possibility around August 8<sup>th</sup> or August 27<sup>th</sup> or 28<sup>th</sup>. I will tell you my own recollection is that it happened longer – further along in events but for some reason...

SHAW: And *I take it that it is not your recollection that you told Mr. Haeg for the first time about the amended information on the night before the*

*scheduled change of plea?*

COLE: I – I – I told him they had filed the amended information because they didn't file it until...

SHAW: But it – but it's – *it's not your recollection you told him for the first time about this open sentencing amended information on the eve of that change of plea?*

COLE: *No I - I recall telling David prior to that event. It was not – in - in my recollection it was not an issue. [Tr.336-337. See also Tr.374].*

### **ISSUE #7 - Haeg's Sworn Testimony to Panel:**

HAEG: “Ok. *On 11/8/04 I traveled to Anchorage with my wife Jackie, my daughter's Kayla & Cassie, Drew Hilterbrand, Jake Jedlicki, Tom Stepnosky so that we would be ready to fly out on the 8:00 a.m. flight the next morning from Anchorage to McGrath so we could attend the change of plea slash sentencing hearing that was scheduled at 10:00 a.m. the next morning. Tony Zellers was flying in from Illinois & arrived in Anchorage late that afternoon. When we arrived at Mr. Cole's office at 3:00 p.m. for a quote 'sentencing strategy meeting' unquote - he greeted us at the door stating that he had quote 'just received very bad news from Scot Leaders' unquote. Mr. Cole then showed all of us a fax received by his office Marston & Cole dated 11/8/04 at 12:59 p.m. or just 2 hours earlier or before we had arrived at his office. -Um- & I guess I'd like to admit that.*” [Tr.25. See also Tr.27-28, 33-34 & Tr. 87 lines 20-27; 109 line 28, 110 line 19; 117 line 16 – 118 line 15].

### **ISSUE #7 – Facts:**

11/11/04 - Tape-recorded conversation between Cole & Haeg while Cole was still representing Haeg.

HAEG: “And after we had invested a lot of time, effort, & money, committed to that venture to settle it because my life is getting eaten up by worry among other things & I had great expectations to leave McGrath either without a license for 5 years, & no airplane, & going to jail for 6 months & a \$200,000 fine or something a little less. Um – no – nothing to do with you. I knew the judge was the one goanna be deciding that *but all that was taken away from me at the last minute that agreement. Do you agree with that? Or I mean not at the last minute but whatever it was – well beyond when we could have changed anything & saved all the money in hotel & airfares & etc., etc., etc.*”

COLE: “*The thing that was taken away was the option to go open sentencing total. There were other options that were available that would've*

allow us to go out to McGrath. But to go totally open sentencing”

HAEG: “Well to me they weren't viable options.”

COLE: “The only thing that was different was the loss of the plane.”...

HAEG: “Ok um let me just go through my little deals here. Um - like I said when Magistrate Murphy was on the phone would it have been appropriate or could I have – could I have said, ‘hey judge before you leave could I put in my 2 cents worth *that I came with the understanding this was the deal & then they pulled that rug out from underneath my feet*’. *Could I have done that at that time?*”

COLE: “Um - she would have – if it would be – she would have cautioned you & told you before you say anything you're represented by an attorney anything you say can, will be used against you, you should speak with your attorneys advice. If you continued to insist she probably would have listened & that would have been the end of it.” [Ex.481-482].

*[W]hat I feel when they pulled the rug out from under us when we all showed up in your office & you said, "uh Dave I got something to tell you" I feel they poked you in the eye.*”

COLE: “*They did & I'm still burning about it.*” [Ex.488. See also Ex. 490.]

1/4/05 – Tape-recorded conversation between Malatesta & Cole just 1 month after

Cole was still representing Haeg:

COLE: So then I went out to Dillingham on Thursday & on Friday – no *the following Monday David was coming in to do the sentencing*. Was it Thursday – yeah it was Thurs – was it Friday – Friday morning I went out to Dillingham. *Thursday they filed the complaint against him, Friday morning – maybe it was Thursday he called me & said – we were talking & he said, ‘If David is – is not – he goes I'm not willing to do totally open sentencing with those deals’*.

MALATESTA: *So he changed his mind?*

COLE: *Right.* [Ex.532-533].

7/6/05 Letter from Cole to Haeg:

“Sometime after that, you inquired about whether you could simply plead ‘open sentence’ to the filed charges so that you could argue against the forfeiture of your aircraft. I indicated that I would make that inquiry of Mr. Leaders which I did. He initially did not have a problem with this. About a week later, however, I received a telephone call from him which indicated that he was amenable to allowing you to plead "open" sentencing but he was going to change the information to require the minimum three-year license revocation. *I believe this happened on or about November 5, 2004.* I

traveled with Mr. Leaders to Dillingham on November 6, 2004, for two fish & game sentencing hearings involving guides & I was given the amended information at that time.”

*“On Monday, November 8, 2004, you, your family & several witnesses came to our office to meet in preparation for the arraignment & change of plea scheduled to occur in McGrath the next day. It was at that time I informed you of Mr. Leaders' decision & outlined your legal options.”* [Ex.465-466].

### **ISSUE #7 – Discussion:**

It is absolutely irrefutable that it was either November 4, 2004 (Thursday) or November 5, 2004 (Friday) that Cole first learned the open sentence PA was going to be broken & it is absolutely irrefutable that Cole first told Haeg this on November 8, 2004 – making Cole’s sworn testimony to the panel that he had told Haeg weeks or months before November 8, 2004 that the open sentencing PA was going to be broken to be known & intentional perjury. It is absolutely irrefutable that Prosecutor Leaders accepted the open sentencing PA on August 27, 2004 (Ex.424-Cole’s billing statement) & Haeg depended on it until Cole told him on November 8, 2004 the State was renegeing (a period of 73 days – during which Haeg’s September & October \$1 million guide season was given up in reliance of it) & that Cole knew this – making Cole’s sworn testimony to the panel that this PA was only in place for “a week” to be known & intentional perjury.

### **CONCLUSION**

It is irrefutable a finalized “open sentence” PA was made & accepted by both Haeg & Prosecutor Leaders on August 27, 2004. [Ex.424 – Cole’s August 27, 2004 itemized billing “conference with opposing counsel regarding plea agreement & opportunity for open sentencing].

It is irrefutable Haeg relied upon this “open sentence” PA until November 8, 2004 or for 2 ½ months. It is irrefutable that it was on this day (just the day before this PA was to be finalized in McGrath on November 9, 2004) that Cole first told Haeg of Prosecutor Leaders decision to change the charges that had already been filed on November 4, 2004 (in accordance with the “open sentencing” PA) to charges that would violate the “open sentencing” PA. [Ex.465 & 533].

It is irrefutable that in the 2 ½ months Haeg relied upon the “open sentence” PA he cancelled an entire years guiding (almost all of which would have occurred in September & October of 2004) at Cole’s suggestion & Prosecutor Leaders approval.

HAEG: “I already gave up a whole years worth of income.”

COLE: “I know that David.”

HAEG: “Doesn't that account for anything?”

COLE: “*Yeah it does – that's – that's what we negotiated.*” [Ex.508. See also Tr. 251-252 & 254-255].

It is irrefutable that Prosecutor Leaders required a statement from Haeg for the PA. “The client had to agree to cooperate & give a truthful statement. That was a condition in discussing this.” [Tr.245. See also 247 & 285].

It is irrefutable Haeg, on November 8, 2004, flew in witnesses from as far away as Illinois for the same “open sentence” PA.

COLE: “I don't think he [Leaders] was planning on it - but anyway.”

HAEG: “Well we were. I was.”

COLE: “Right.”

HAEG: “I don't know if anybody else was but I sure was. Otherwise I wouldn't have taken my kids out of school & *flown Tony up here.*”

COLE: “Mm hmm.” [Ex.490].

It is irrefutable Prosecutor Leaders used Haeg’s statements, made for the PA, as the only probable cause for most of the charges filed against Haeg and as primary



probable cause for the rest – including those he went to trial on. [Ex.433-464].

All ruling caselaw & principles hold that if a defendant relies on a PA to his detriment the government cannot break, change, or renege on it.

[See overwhelming case law in opening brief – especially: Smith v. State, Closson v. State, Reed v. Becka, Stolt-Nielsen, Surina v. Buckalew, Santobello v. New York, U.S. v. Garcia, U.S. v. Goodrich; See also Atchak v. State; Counselman v. Hitchcock; Daly v. Superior Court; In re Kenneth H.; U.S. v. Cantu; U.S. v. Castaneda; U.S. v. Lyons; U.S. v. Salemm; U.S. v. Tarrant supra].

In other words Haeg had a binding PA many times over, the State maliciously broke it at the last minute, & Cole lied to Haeg to deprive him of it – costing Haeg millions of dollars damage, and then Cole committed perjury & felony conspiracy to the panel to conceal this. What is the damage when combined with Cole’s “failure” to inform Haeg that all evidence seized should have been suppressed and returned because of the perjury on all the search warrants (which claimed all evidence was found in the GMU where Haeg was licensed to be a hunting guide – when it was in reality found to be the WCP GMU) [Tr.274]; Cole’s failure to “find out” the WCP intentionally isolated a participant (like Haeg) from *hunting*, *game*, and/or *guiding* charges [Ex. 741-46]; Cole’s claim Haeg did not have to be given notice of an opportunity to contest or even bond when Haeg’s property, used as the primary means to provide his livelihood, was seized [Tr.347-51] (which would have required its return & its suppression as evidence); Cole & Fitzgerald's belief they could not do anything that would jeopardize their relationship with the State prosecution [Tr.29, 33, 95, 104, 117, 200-208, 223-225, 273, 275, 351]; and Cole & Fitzgerald's belief the State was going to “make a huge example” out of Haeg? [Tr.12, 99, 119-120, 179, 185, 192, 237, 276, 294-295, 297, & 373].

Cole never told Haeg the State could not, without justification, file more severe charges having first filed less severe ones – even if there was no detrimental reliance. [See Atchak v. State, Keith v. State; Adams v. State].

Very nearly every constitutional right that guarantees fair proceedings was violated in Haeg’s case. This happened by the prosecutor first maliciously violating the constitutional right to affirmatively prejudice Haeg & then by Cole lying to & misleading Haeg so he would not realize it. The exposure of this “sell out” by an attorney of his own client would result in disbarment & a gross malpractice lawsuit – a compelling reason for Cole to commit perjury & conspire to mislead the panel. This, according to AS 09.43.120, *requires* the decision and award to be vacated.

This reply brief is supported by the accompanying affidavit.

RESPECTFULLY SUBMITTED on this \_\_\_\_\_ day of \_\_\_\_\_ 2008.

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David S. Haeg, Pro Se Appellant

**CERTIFICATE OF SERVICE**

I certify that on the \_\_\_\_ day of \_\_\_\_\_ 2008,  
a copy of the forgoing document by \_\_\_\_ mail, \_\_\_\_ fax,  
or \_\_\_\_ hand-delivered, to the following parties:  
Brent Cole & U.S. Department of Justice

By: \_\_\_\_\_