

**TRANSCRIPT APPENDIX (8)**

MR. COLE: David and I. Ok I - I - what happened is in August I got a fairly significant reduction in the amount of the probation and -uh- there - there wasn't goanna be a guide - a - a - a restriction on his fishing and I think we even agreed to do away with trapping for the amount of time. I - I - there was some small details that - that we were negotiated out...

MS. SHAW: Is that in writing?

MR. COLE: No. But we had talked about and -um- and we had also talked about him getting back some of his items from the forfeiture. And then David called me up -uh- right around the 22<sup>nd</sup> or the 27<sup>th</sup> - you can see -um- that we're talking a lot about sentencing issues right then because it's about a month after the initial offer is made, I've been working on it, -um...

MS. SHAW: Cause we're in September now?

MR. COLE: Yeah we're in September and (pause) I can't remember exactly the - the details but David called me up and said, 'what about if I want to get my Cub back?' and I said 'well the only way I could see that happening is if you go open sentencing in your case' and he said - I said 'but why would you want to do that?' - 'well I want the Cub back' - I said 'David you don't to open yourself up to open sentencing because you run this risk that you'll get 1 - 5 days or' - 'well I want you to ask Scot Leaders if he will agree to allow me to do an open sentencing'. And we had been working off Scot - yeah that's right - we had been working off Scot Leaders proposal in August and made some modifications to that and I called up Scot Leaders -um- and I said 'hey Scot -um- look you guys are goanna file this complaint as it is with the 11 counts - I know it sounds crazy but what if my client doesn't want to do a negotiated deal like we're talking about - negotiate all the terms of the deal

or almost all of them -um- what if just wants to go open sentencing?' and Scot said in his conversation to be initially 'yes that's ok' which is what I expected. I mean I was a DA and - and David brings out this point you know that I was mad later on but it was exactly what I expected. I mean if you're a DA what difference does it make whether you get a negotiated deal or if you get an open sentencing - I mean if a judge imposes a sentence what do you care. It shouldn't be any problem. -Um- a week later... MS. SHAW: Now did you ask them that question of Mr. Leaders as a 'what if?'

MR. COLE: Yes - I said 'what if he wants to' he said 'that's ok'.

MS. SHAW: Ok - this was not a deal?

MR. COLE: No he just said that's ok'.

MS. SHAW: It was a 'what if'?

MR. COLE: Yeah it's a 'what if'. **We didn't put that in writing. A week later - about a week later he called me up, we were talking about something else, and he said 'hey -um- if you want to do open sentencing I'm going to change the charges...'** and what you have to do is look at the difference between the information and the amended information and that is the unlawful acts by a guide -um- get changed from A8(a) to A15 and the difference is that if you plead to A15 the judge has to impose at least a 3 year license revocation - under A8 it's only 1 year. **So what Scot Leaders was doing was saying 'if I've got to go through a hearing on whether I'm goanna get your plane - totally open sentence - then your clients goanna do 3 - 3 years' and I go 'that's BS Scot I mean come on - now what are you doing here - what difference does it make to you - you're goanna get this plane - you know it - we were just - give us the opportunity to go argue for it'. He just said 'that's what I'm**

goanna do'. Now for David to stand in here and 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...

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

MR. COLE: That if he wanted to go open sentencing they were goanna change the charges and that he would be facing a minimum of 3 years.

MR. HAEG: What date was that?

MR. COLE: I don't - I don't have a date. It was one of the conversations I had after September twenty or August - let's see - no this is August 27<sup>th</sup> - an opportunity for open sentencing.

MS. SHAW: Had Leaders already given you -um- the information or are you just...

MR. COLE: No. <sup>1</sup>

MS. SHAW: He was just goanna add charges.

MR. COLE: Yeah. He was just goanna change the A8 to A15.

MS. SHAW: Ok.

MR. COLE: -Um- we then -uh- we continued...

MS. SHAW: At this point do you have any hearings set up or is - are you still just talking about charges to be filed?

MR. COLE: We're still talking, charges to be filed, and the hearing ends up getting set up in -um- in - in - you know October's when David goes to see Hernandez - we're - we still even haven't done the arraignment and the arraignment is scheduled to be the 9<sup>th</sup> of November. We are at some point in October - I can't remember when - we're gearing up for this sentencing which I understand is going to be in McGrath, it's goanna be an arraignment/sentencing and I thought that would be the best way to get this done, out of the way, everything in one fell swoop. I didn't want a lot of publicity on it, I didn't

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<sup>1</sup> Tr. Fee Arbitration p.261-262.

want - I wanted David to have to avoid that. -Um- and I understood that it was going to be along the lines the offer that was made by Mr. Leaders in August, it was goanna be focused on - the only thing we had not negotiated was the license rev - suspension slash revocation - whether it was goanna be 1 to 3 years and -um- we had negotiated everything else, as I understood it. <sup>2</sup>

MR. COLE: Scot Leaders had already filed the information when I was at the airport, Friday morning, he handed me the amended information. And I said, 'what are you doing?' He goes 'well this is in case he wants to do open sentencing on - like we talked about.' I'm like (exhales) 'you now whatever I can't - I can't force you to file a charge the way you want'... <sup>3</sup>

MR. COLE: 'I mean I - I would just tell you I had had bad experiences with open sentencing and the last thing I wanted David to do was go into any place open sentencing but David comes to the office on Monday - he brings everybody there - we are planning on going out - I handed him - I think I told him this is you know here's the deal'. **I just disagree with David when I said - when he says I never told him before. I did tell him before that Leaders had informed me that if he wanted to go open sentencing they were goanna to change the charges and it was goanna require a 3 year loss of license.** I said it's not fair - I don't like it - but **I don't have any discretion over what the prosecutor files as charges.** And I said - and I have my notes here - we went through and talked about it - the options that he had with the group of people in there. I don't know how many people there were - there was a number of people and we talked what his options were and he was unhappy about the

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<sup>2</sup> Tr. Fee Arbitration p.263.

<sup>3</sup> Tr. Fee Arbitration p.264.

position he was being put in and I kept saying you know we went over this

MS. SHAW: What's...

MR. COLE: **why can't I have my deal open sentencing on the original amended info - or original complaint?**

MS. SHAW: Got yah.

MR. COLE: They - that was - that was the deal - if he - if we were willing to forfeit the airplane we could get open sentencing then - that's what he told me. If we were willing to forfeit the airplane we could get open sentencing on the original deal but he'd be facing a 1-year minimum. <sup>4</sup>

MR. COLE: I thought his 4<sup>th</sup> option was file a lawsuit compelling the State to agree David to plead to the 1<sup>st</sup> information without having to forfeit the airplane. I mean that was another thing.

MS. SHAW: What was your assessment on whether that had really been a deal?

MR. COLE: I didn't think it might have been a deal. You mean that - that particular option right there?

MS. SHAW: That option, the open sentencing option, to the first.

MR. COLE: To that - to the first one with the agreement to the PA12 with a - with a forfeiture of the PA12?

MS. SHAW: That's our - that's our what if conversation, right?

MR. COLE: Yep that's - well we talked about - I made a mistake - when - when Leaders called me back he said 'if you want to do open sentencing, total open sentencing, then I'm changing it to A15' and I said 'well that's goanna kick him up to 3 years and he goes yeah that's just the deal'. I go 'well

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<sup>4</sup> Tr. Fee Arbitration p.266.

come on can't he do open sentencing just on the fir - the amended one?' He said, 'The only way he gets open sentencing, on that one, is if he agrees to forfeit the aircraft.' So he could do the first in - in - the first information either under our negotiated deal or under an open sentencing if he agreed to forfeit the PA12 or he could do open sentencing under the amended information which required a 3 year suspension.

MS. SHAW: So am I correct in figuring the conversation went that there - in this fashion there was a proposal from you...

MR. COLE: I said what if he wants...

MS. SHAW: ...open sentencing...

MR. COLE: Yeah what if he wants to go open sentencing?

MS. SHAW: ... and - and Cole - and -um- Leaders made a counter offer - kind of set out 2 different options?

MR. COLE: **He originally said 'that's ok with me' then he called me back and said, 'I'm not goanna do that. If you do that - if you want that then I'm changing it to A15' and I said...**

MS. SHAW: **How long was it between when he said...**

MR. COLE: **A week - about a week.**

MS. SHAW: ... yes and you said no?

MR. COLE: About a week.

MS. SHAW: I will write down it was about a week then. -Um- after he said, 'yes' did you ever ace...

MR. COLE: Did we change position at all?

MS. SHAW: ...did he ever accept - did you ever accept it?  
**On Mr. Haeg's behalf did you say, 'ok done'?**

MR. COLE: **Umm hmm.**

MS. SHAW: Then you said 'what if' and he said 'yes'...

MR. COLE: **And then I called David back.**

MS. SHAW: ... but it wasn't firmed up then?

MR. COLE: Right, why would I - I - I would have been hard pressed to tell my client to do that. I just - I - I - to this day I can't imagine doing that. This fifth... <sup>5</sup>

MR. COLE: I told you before the hearing that they were not going to allow you to plead open sentence to the first charges and go - and be able to get your plane back. You knew that before the hearing, ok. When we got at the hearing we discussed all of your options, the day before the hearing when we met. I laid all 4 of them out. We weren't particularly happy - I wasn't particularly happy but I felt and I still feel (pause-tape change)...

MR. HAEG: Go ahead.

MR. COLE: ...that it was in - not - it was not in your best interest and I told you that. Then we renegotiated the deal on Monday night before the hearing. As a result of that negotiation you agreed that we weren't goanna have to have a sentencing.<sup>6</sup>

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<sup>5</sup> Tr. Fee Arbitration p. 276-278.

<sup>6</sup> Tr. Fee Arbitration p. 318.