IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID S. HAEG,)
)
Applicant,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
)

Case No. 4MC-09-00005 CI
In Connection w/4MC-04-024 CR

MOTION TO DISMISS APPLICATION FOR POST-CONVICTION RELIEF

VRA CERTIFICATION
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim 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 and disclosure of the information was ordered by the court.

COMES NOW the State of Alaska (hereinafter "State"), by and through its undersigned Assistant Attorney General, Andrew Peterson, and pursuant to Criminal Rule 35.1(f)(3) hereby moves this Court for dismissal of David S. Haeg's (hereinafter "Haeg" or "Applicant") Application for Post-Conviction Relief for the reasons stated below. For purposes of a factual summary, the State will rely upon the facts and proceedings statement set forth by the Court of Appeals decision in Haeg v. State, 2008 WL 4181532 (Alaska App. 2008). See Exh. A.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

Jones, 759 P.2d at 568 –569. The defendant bears the burden of rebutting the presumption of competence. As the Court of Appeals has observed, "[w]e have repeatedly held that a defendant asserting ineffective assistance of counsel must provide the court with an affidavit from the former attorney, addressing the various claims of ineffective representation, or must explain why such an affidavit can not be obtained." Peterson v. State, 988 P.2d 109, 113 (Alaska App. 1999)(citations omitted).

Haeg's real complaint in this case is with the law as it was applied to him. Haeg does not believe that the law allowed for him to be convicted under the guide statutes due to the fact that he was not guiding at the time of his offense. The Court of Appeals, however, soundly rejected this claim. See Exh. A, p. 6. Moreover, Haeg Haeg fails to account for the fact that he took the stand and admitted to killing all of the wolves outside of the predator control zone. This admission on the stand by itself is sufficient to uphold Haeg's conviction and deny this application. Consequently, Haeg is unable to rebut the presumption of competence attached to counsels' representations. Therefore, his application is fatally flawed and should be dismissed. Lott v. State, 836 P.2d 371 (Alaska App. 1992).

In addition, decisions of trial counsel are not to be the subject of "second guessing" in a post conviction relief matter. Risher, 523 P.2d at 424. The decisions are to be judged at the time they were made, not in hindsight. Id.; Brown v. State, 602 P.2d 221 (Alaska 1979). It is not enough to have a better idea than trial counsel. Tucker, 892 P.2d at 835. As the court observed in Tucker, Tucker was obligated to prove, not that his trial counsel could have done things better, but that no competent attorney

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

would have done things as badly as his trial counsel did. Id. Even if trial counsel's actions in retrospect seem to be mistaken or unproductive, they are virtually immune from subsequent challenge if they were minimally competent. Id.

Under the circumstances of this case, the court will see that counsels for Haeg provided effective competent representation. Attorney Brent Cole negotiated a far better resolution to Haeg's case than was ultimately imposed at sentencing following trial. Robinson also was successful in getting at least two counts dismissed. See Exh. A, p. 4. That another counsel can postulate a different strategy with hindsight does not amount to ineffective assistance of counsel. Tucker, 832 P.2d at 835.

I. Application Deficient – No Affidavits Of "Ineffective" Counsel Responding To Allegations In The Petition

In evaluating a trial or appellate counsel's conduct, the court is to apply a strong presumption of competence and presume that counsel's actions were motivated by sound tactical decisions.[1] If a counsel's actions were taken for tactical or strategic reasons, "they will be virtually immune from subsequent challenge, even if, in hindsight, the tactic or strategy appears to be mistaken or unproductive."[2] If an application for post-conviction relief fails to allege facts ruling out the possibility of a sound tactical choice, the application fails to make a *prima facie* case.[3]

The Court of Appeals of Alaska has repeatedly and consistently stated:

[1] Santillana v. State, 2002 WL 24486, *1 (Alaska App. 2002)
[2] Id.(citing State v. Jones, 759 P.2d 558, 568 (Alaska App. 1988).
[3] Id.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

> [A]n affidavit from the attorney in the underlying criminal case is an essential component of a prima facie case for post-conviction relief that alleges ineffective assistance of counsel. Without the required affidavit (or an explanation of why an affidavit cannot be obtained), the superior court may dismiss the application for failing to plead a prima facie case.[4]

Haeg failed to file any affidavit of any of the counsel supporting his allegatons that any/or all were ineffective. Rather, Haeg's affidavit merely states that he has no affidavits as the attorneys refused to provide them when asked. The affidavits provided do not aid Haeg in establishing his *prima facie* case of ineffective assistance of counsel. Consequently, this court should first order Haeg to specifically allege the acts of ineffective assistance by each trial attorney and his appellate attorney and then order each trial attorney and Haeg's appellate counsel to file an affidavit in this matter similar to that in Jones.[5]

II. Haeg Failed To Cite To The Record In Support Of His Allegations Of Ineffective Assistance of Counsel

Haeg fails to cite specifically to the instances which he believes resulted in ineffective assistance of counsel, but rather leaves this Court and the State guessing at what if any of the allegations in Part B, section 2 apply to his claims. Haeg sets forth 57 paragraphs of alleged violations that support his grounds for relief. Without citations to which ones actually support his claim for ineffective assistance of counsel, the State and

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 302
ANCHORAGE, ALASKA 99501
(907) 269-6250

[4] Puisis v. State, 2003 WL 22800620 (Alaska App. 2003); See also Tall v. State, 25 P.3d 704, 708 (Alaska App. 2001); Knix v. State, 2001 WL 959589, *4 (Alaska App. 2001); Tanner v. State, 2000 WL 1593662, *1 (Alaska App. 2000); Peterson v. State, 988 P.2d 109, 114 (Alaska App. 1999).

this Court are left to merely guess which paragraphs apply to which claims. Without more precise pleadings, Haeg's application for post conviction relief must be dismissed.[6]

III. Haeg's Allegations Of Ineffective Assistance of Counsel, Even If Accepted On The Limited Information Provided In The Pleadings, Are Tactical Decisions By Counsel And Not Subject To Claims Of Ineffective Assistance.

None of the claims of ineffective assistance of counsel allege any actions by trial counsel or appellate counsel that were not tactical decisions. Haeg appears to takes issue with Cole's decisions and trial strategy as set forth in paragraph G, H M, T, and V. Haeg next appears to argue that Robinson's was ineffective in paragraph's W, Y, CC, EE, FF, GG, HH, II, KK, LL, MM, and NN, QQ. Haeg's argument appears to be that by not pursuing every non-frivolous[7] motion, argument or appellate issue, his trial counsel was ineffective.

This type of argument was squarely rejected in Steffensen v. State.[8] In Steffensen, the court cited to State v. Jones and United States v. DeCoster to reiterate the responsibilities of counsel to pursue various claims:

> Given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might cheerfully log in many hours looking for the legal equivalent

---

[5] State v. Jones, 759 P.2d at 570 (noting that the trial court ordered trial counsel to file affidavits in the PCR matter).

[6] Fajeriak v. State, 520 P.2d 795, 806 (Alaska 1974).

[7] The state does not concede that any of the objections Haeg wanted his trial counsel or appellate counsel to make were not frivolous. Based on the limited amount of information about the types of motions alluded to in the petition, the State believes that these motions would have been frivolous.

[8] 837 P.2d 1123, 1126 (Alaska App. 1992).

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

> of a needle in a haystack. A millionaire might retain counsel to leave not a single stone unturned. However, a defendant is not entitled to perfection but to basic fairness. In the real world, expenditure of time and effort is dependent on a reasonable indication of materiality.[9]

Haeg would like to be able to try his case several times to see which tactics work best. Haeg is not entitled to such an indulgence. This Court should dismiss Haeg's ineffective assistance claim because his counsels' tactical decisions cannot be grounds for a petition for post conviction relief.[10]

Haeg's claims of ineffective assistance with respect to tactical decisions have been found to be insufficient to make a *prima facie* case of post conviction relief in Valcarcel v. State.[11] There, the Court of Appeals pointed out that "the decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." These decisions are not one of the four fundamental decisions that are ultimately up to the client.[12]

IV. Ineffective Assistance of Appellate Attorney Osterman

Haeg alleges his appellate attorney was ineffective because Osterman refused to allow Haeg to assist in writing the appeal and allegedly Osterman's fee

[9] Id.
[10] See also Henry v. State, 1998 WL 820226, *2 (Alaska App. 1998).
[11] 2003 WL 22351613 (Alaska App. 2003)
[12] Id.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

structure changed. Haeg does not allege how any of Osterman's alleged acts impacted his appeal given that he was allowed to represent himself and given all the time he needed to file his appeal. Haeg again fails to establish a *prima facie* case that his appellate attorney acted incompetently.

V. Haeg Fails to Allege Specifically how his Conviction and Sentence Resulted in a Violation of U.S. and State Constitutions

Haeg's petition is governed by Criminal Rule 35.1 and AS 12.72.010-040. Pursuant to AS 12.72.040, Haeg has the burden to prove all factual assertions by clear and convincing evidence. Haeg offered nothing to support the claim in his petition that his conviction and sentence violated the U.S. and State constitutions. In fact, Haeg's claims of sentencing errors or constitutional violations were repeatedly rejected by the Court of Appeals. See Exh. A. For example, the Court of Appeals specifically rejected Haeg's claim that the State's amended information was only possible due to statements he made during settlement negotiations. Rather, the Court of Appeals held that there was sufficient probable cause for the charges without Haeg's statements. See Exh. A, p. 6.

Haeg's pleadings fail to specify exactly how he believes his conviction and/or sentence resulted in a violation of the U.S. or State Constitutions. This failure on Haeg's part leaves the State guessing, like it did above, at what exactly is his alleged violation. At a minimum, this Court should order Haeg to be more specific in his

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

allegations so that the State is not forced to speculate with respect to how Haeg's constitutional rights were allegedly violated.

VI. Haeg's Final Claim is that Evidence Exists Which Requires Vacating His Sentence in the Interest of Justice

In an application for post conviction relief, an applicant asserting newly discovered evidence must establish the same facts as a defendant moving for a new trial under Criminal Rule 33. Lewis v. State, 901 P.2d 448 (Alaska App. 1995).

Under Criminal Rule 33, the defendant must establish that the evidence is newly discovered, establish facts demonstrating diligence in pursuing the evidence and claim, establish that the evidence is not merely cumulative or impeaching, establish that the newly discovered evidence is material and establish that the newly discovered evidence would probably produce an acquittal. State v. Salinas, 362 P.2d 298 (Alaska 1961); Rank v. State, 382 P.2d 760 (Alaska 1963); Charles v. State, 780 P.2d 377 (Alaska App. 1989).

Haeg advances nothing that begins to suggest he is entitled to relief under this standard. In fact, the State has no idea what "new evidence" Haeg is referring to and thus once again is put in the unenviable position of merely guessing what Haeg is referring to in his pleadings. That being said, there is nothing in Haeg's pleadings that comes close to newly discovered evidence justifying a new trial or negating the testimony of Haeg himself who admitted killing all of the wolves outside of the predatory control permit area. See Exh. A, p. 6.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

Defendant's application for a new trial is also barred by AS 12.72.020(1),(2) and (5). AS 12.72.020(1) bars claims based on the admission or exclusion of evidence at trial. Haeg is asserting that evidence of material fact exists which was not previously presented which justifies vacating his sentence. Therefore, his claim is barred.

Further, AS 12.72.020(2) prohibits claims for relief if "the claim was or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction". The Court of Appeals addressed all of Haeg's claims with the exception of his claim for ineffective assistance of counsel. For example, the Court of Appeals denied Haeg's claim related to the alleged perjury of Trooper Gibbens in his search warrant affidavit or that Trooper Gibbens committed perjury at trial. See Exh. A, pp. 4-6. The Court of Appeals decided the issue on its merits and upheld the trial court's ruling with respect to every aspect of Haeg's case.[13] Thus, Haeg is barred and estopped from re-raising these claims as a basis for post conviction relief. Thus, Haeg's application should be summarily dismissed.

VII. The Specific Facts Alleged in Support of Haeg's Claim For Relief Were Previously Addressed by The Court of Appeals

Haeg's PCR application contains 57 paragraphs of information that allegedly support one of the three alleged grounds of relief. Most of these issues were previously raised during Haeg's appeal and rejected by the Court of Appeals which

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

again makes it impossible to figure out what specific factual allegations support Haeg's claim for post conviction relief.

1. Paragraphs B-D and BB allege that the State falsified the wolf kill evidence and locations. The Court of Appeals dealt with this issue repeatedly. See Exh. A, pp. 4-6 and 9.

2. Paragraphs E-F and KK allege that the State failed to tell Haeg he could bond out his plane or to give him a hearing within days if not hours. The Court of Appeals addressed this issue exactly on point. See Exh. A, pp. 10-13.

3. Paragraphs H-K, N, Q, R-S, U-V, X. AA, DD and YY all deal with statements made by Zellars and Haeg in relation to plea agreements. The Court of Appeals dealt with this issue in detail and ruled that Haeg failed to show that plain error occurred and that the State did not offer Haeg's pretrial statement during its case-in-chief or during its rebuttal case. Additionally, the Court of Appeals noted that Zellers testified for the State and that his testimony along with that of Trooper Gibbens was sufficient to convict Haeg. See Exh. A, p. 6.

4. Paragraph Z. deals with a combination of Haeg's claim that the State falsified the locations of the wolf kills and that he could not

[13] The only modification by the Court of Appeals with respect to Haeg's sentence was to direct the trial court to change the judgment to reflect that Haeg's Big Game Guide's License was suspended for five years as opposed to revoked for five years. See Exh. A, pp. 9-10.

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 303
ANCHORAGE, ALASKA 99501
(907) 269-6250

be prosecuted for guiding violations. Again, the Court of Appeals ruled against Haeg on both of these issues during his underlying criminal appeal. See Exh. A, pp. 4-6.

5. Paragraph JJ deals with Haeg's claim that the State falsely argued that Haeg was killing wolves with the intent to eliminate them within his guide use area. The Court of Appeals specifically found that there was sufficient evidence to support this proposition. See Exh. A, p.9.

With the above issues and/or allegations eliminated from consideration in Haeg's application, there is nothing left for consideration other than Haeg's displeasure with the tactical decisions of his counsel and his disagreement with how the Court of Appeals allowed him to be convicted under the guiding statutes when he was not in fact guiding. For these reasons, Haeg's application should be dismissed.

CONCLUSION

Haeg's Petition for Post-Conviction Relief should be dismissed. Haeg's application should be dismissed because he failed to plead and prove a *prima facie* case - he has not submitted affidavits from his trial or appellate counsel; he failed to demonstrate that either his trial or appellate counsel were ineffective; he failed to cite to the record to support his allegations; his claims of ineffective assistance challenge tactical decisions made by his attorneys are not subject to ineffective assistance claims; he presents claims that have not been and cannot be supported by any available

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501
(907) 269-6250

evidence; he presents claims that were already addressed by the Court of Appeal and he produced no new evidence which would allow for a new trial. Additionally, Haeg testified at trial that all of the wolves were killed outside of the predator control boundary.

Lastly, it is impossible to discern from the pleadings what information supports which of Haeg's claims. Most of the specific facts offered by Haeg have already been addressed by the Court of Appeals and the remainder is completely insufficient to meet his burden of establishing a prima facie claim justifying this court not dismissing his application.

DATED at Anchorage, Alaska this 23rd day of February 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: _____
Andrew Peterson
Assistant Attorney General
ABA #0601002

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 303
ANCHORAGE, ALASKA 99501
(907) 269-6250

X mailed ... mailed
___hand delivered ... caused to be hand delivered
___faxed
to the following attorney/parties of record:
David Haeg

Sherry Cowan 3-3-10
Signature Date

Not Reported in P.3d, 2008 WL 4181532 (Alaska App.)
(Cite as: 2008 WL 4181532 (Alaska App.))

HOnly the Westlaw citation is currently available.

NOTICE: UNPUBLISHED OPINION

NOTICEMemorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding precedent for any proposition of law.

Court of Appeals of Alaska.
David S. HAEG, Appellant,
v.
STATE of Alaska, Appellee.
No. A-9455/10015.

Sept. 10, 2008.
Rehearing Denied Sept. 26, 2008.

Appeal from the District Court, Fourth Judicial District, McGrath, Margaret L. Murphy, Judge, and David Woodmancy, Magistrate.
David Haeg, pro se, Soldotna

A. Andrew Peterson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for the Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

MEMORANDUM OPINION AND JUDGMENT

COATS, Chief Judge.

*1 David S. Haeg was convicted of five counts of unlawful acts by a guide: hunting wolves same day airborne; [FN1] two counts of unlawful possession of game; [FN2] one count of unsworn falsification; [FN3] and one count of trapping wolverine in a closed season.[FN4] Haeg appeals these convictions in Case No. A-9455

FN1. AS 8.54.720(a)(15) & 5 AAC 92.085(8).

FN2.5 AAC 92.140(a).

FN3.AS 11.56.210(a)(2).

FN4.5 AAC 84.270(14).

While this appeal was pending, Haeg asked the district court to suppress the evidence used during his trial that the State had seized from him during its criminal investigation and to have the property returned to him. The district court denied the motion, and Haeg appeals this decision in Case No. A-10015.

In Case No. A-9455, Haeg primarily argues that the State used perjured testimony to obtain search warrants and that he should not have been charged as a guide for hunting wolves same day airborne-first, because he was not guiding at the time, and second, because he was not hunting at the time. He also argues that the prosecutor violated Alaska Evidence Rule 410 by using statements that Haeg made during the parties' failed plea negotiations. And he asserts that his attorneys provided ineffective assistance of counsel.

In addition, Haeg claims that the district court committed various errors during the course of the proceedings. In particular, he contends that the district court (1) failed to inquire into the failed plea negotiations, (2) failed to rule on a motion protesting the State's use of **Haeg's** statement made during plea negotiations as the basis for the charges, (3) made prejudicial rulings concerning **Haeg's** defense that he was not "hunting," (4) failed to instruct the jury that **Haeg's** co-defendant, Tony Zellers, was required by his plea agreement to testify against **Haeg**, (5) unfairly required **Haeg** to abide by a term of the failed plea agreement, (6) failed to force his first attorney to appear at **Haeg's** sentencing proceeding, and (7) when imposing sentence, erroneously identified the location where the majority of the wolves were taken. In a separate claim, he contends that the district court erred by revoking his guide license instead of suspending it.

EXHIBIT A
Page 1 of 13

Exh. A

Not Reported in P.3d, 2008 WL 4181532 (Alaska App.)
(Cite as: 2008 WL 4181532 (Alaska App.))

In Case No. A-10015, Haeg asserts that the district court erred when it denied his post-conviction motion to suppress the evidence that the State had seized from him during its criminal investigation and to return the property to him. He also contends that AS 12.35.020, AS 12.35.025, AS 16.05.190, and AS 16.05.195 (criminal seizure and forfeiture statutes) are unconstitutional because these statutes do not require the government to inform defendants in a criminal case that they have the right to contest the seizure of their property.

For the reasons explained here, we affirm Haeg's convictions. But we conclude that the district court meant to suspend rather than to revoke his guide license. Therefore we direct the district court to modify Haeg's judgment to reflect that Haeg's guide license was suspended for five years.

Facts and proceedings

***2** Haeg was a licensed master big game guide operating in game management unit 19. In early March 2004, he and Zellers received permits allowing them to participate in a predator control program near McGrath.

The predator control program applied to wolves in game management unit 19D-East, which was located inside unit 19D. Within unit 19D-East, participants in the program were allowed to kill wolves by shooting them from an airborne aircraft or by landing the aircraft, exiting it, and immediately shooting them. [FN5] The purpose of the program was to increase the numbers of moose in unit 19D-East by decreasing the number of wolves preying on them. In March 2004, unit 19D-East was the only unit where this type of predator control was permitted.

FN5. *See* 5 AAC 92.039(h)(1), (3).

To help the Department of Fish and Game monitor the progress of the predator control program, the participants were required to separately identify and seal the hides of all wolves taken under the program and to report the locations where the wolves were killed. Alaska State Trooper Brett Gibbens, among others, was notified whenever wolves were taken under the program. One of his duties was to verify the locations where the wolves were reportedly killed.

Soon after Haeg and Zellers received their permit, they reported that on March 6, 2004, they had taken three gray wolves in the area of Lone Mountain near the Big River. When Gibbens was notified of this report, he suspected that the information was inaccurate. The coordinates that Haeg and Zellers gave placed the kill site just within unit 19D-East. But Gibbens knew that the wolves in the pack then frequenting that area were predominately black, with only two that might be considered gray.

On March 11, 2004, Gibbens inspected the reported kill site. He found wolf tracks but no kill site near the reported location. In addition to this discrepancy, Gibbens recalled that on the day of the reported kills, when he was off-duty, he had seen Haeg's distinctive airplane. The airplane was a mile or two outside of unit 19D-East and was flying away from that unit. To Gibbens, it appeared that the pilot was following a fresh wolf track.

On March 21, Gibbens met and spoke to Haeg and Zellers when they returned to McGrath to seal the three wolf hides. While Haeg refueled his airplane, Gibbens and Haeg talked about the airplane's skis and its oversized tail wheel. Gibbens noticed that the airplane's skis and its oversized tail wheel would leave a distinctive track when it landed in snow. Gibbens and Zellers discussed the weapons and the shotgun ammunition that Zellers was using to shoot the wolves. This ammunition was a relatively new variety of buckshot. During this meeting, Haeg said that he knew the boundaries of the area where he was allowed to take wolves under the predator control program.

On March 26, while flying his airplane, Gibbens spotted wolf tracks from a large pack of wolves on the Swift River. He also saw where another airplane had landed to examine the track and determine the wolves' direction of travel. Because his airplane was low on fuel, Gibbens continued home. The next day, he returned to investigate. From the air, he confirmed that the area was not a trap site or kill site. He then followed the wolf tracks up the Swift River and found where wolves had killed a moose on an island in the river. The island was covered with heavy brush and had numerous wolf trails. Gibbens saw that someone had set snares and leg traps on the island.

EXHIBIT A
Page 2 of 13

Not Reported in P.3d, 2008 WL 4181532 (Alaska App.)
(Cite as: 2008 WL 4181532 (Alaska App.))

*3 Gibbens followed the wolf tracks further upriver. About a half mile away from the moose kill, he saw where a wolf had been killed. It looked like the wolf had been shot from the air, and there was a set of airplane tracks that had taxied over the wolf kill site. He continued to follow the wolf tracks up the Swift River and found three more places where wolves had been shot from the air. He saw evidence that the wolf carcasses had been picked up and placed in an airplane, and he saw a staging area nearby where the airplane had landed several times.

These kill sites were all about forty to fifty-five miles from the nearest boundary of unit 19D-East. There was no evidence near these sites of snaring or trapping, nor of any ground transportation like a snow machine. Rather, the evidence indicated that an airplane had landed near the kill sites and that someone had gotten out of the airplane, approached the wolf carcasses, and hauled them back to the airplane. The airplane tracks at the kill sites and at the staging area appeared to be the same. Gibbens recognized that they were similar to Haeg's airplane's distinctive ski and tail wheel arrangement.

With the help of other troopers, Gibbens more thoroughly investigated the kill sites. The troopers found shotgun pellets that were consistent with the type of buckshot Haeg and Zellers were using. They also found a spent .223 cartridge stamped with ".223 Rem-Wolf" At the staging area, they found where a carcass had been placed in the snow.

After finding this evidence, Gibbens applied for and obtained a search warrant for Haeg's airplane and for his lodge at Trophy Lake. The lodge was listed as Haeg's base of operations for the predator control program and was not far away. The lodge was located in unit 19C.

At the lodge, the troopers found wolf carcasses, evidence that the wolves had been recently skinned, and rifle magazines loaded with ammunition stamped with ".223 Rem-Wolf." Gibbens also saw airplane ski tracks leading up to the front of the lodge that matched the tracks from the kill sites and the staging area. Troopers seized six carcasses from the lodge. Gibbens later performed a necropsy on each carcass. The necropsies indicated that all six wolves had been shot from the air with a shotgun.

Other evidence found during the search indicated that the leg traps set around the moose kill on the Swift River island belonged to Haeg. On April 2, Gibbens found that six of those leg traps were still set and catching game even though leg trap season for wolves and wolverines had ended. He also saw that two wolverines were caught in nearby snares. The season for taking wolverines with traps or snares had ended March 31.

Based on the evidence found during the search of the lodge, additional search warrants were issued, including one for Haeg's residence in Soldotna. While searching Haeg's residence, troopers seized a 12 gauge shotgun and a .223 caliber rifle along with magazines, spent casings, and ammunition. The .223 ammunition seized was stamped with ".223 Rem-Wolf." The troopers also seized Haeg's airplane.

*4 Evidence seized at the residence indicated that the snares set around the moose kill on the Swift River belonged to Haeg. Gibbens later went back to the Swift River moose kill site after the snare season for wolf ended and found that the snares were still active and catching game. The remains of two wolves were in these snares.

Later, executing one of the search warrants obtained after searching Haeg's residence, troopers seized nine wolf hides from a business in Anchorage. These hides had been dropped off by Zellers. Eight of the nine hides clearly showed that the wolves had been shot with a shotgun. Of these eight hides, many had damage indicating that the wolves had been shot from the air But despite this evidence, only three of the hides had been sealed under the predator control program. According to the sealing certificates-and despite evidence to the contrary-Haeg and Zellers claimed that the remaining six hides had not been shot from an airplane. Rather, when sealing these six hides, Haeg and Zellers reported that they had killed the wolves in unit 16B by shooting them from the ground and transporting them with snowmobiles.

After completing this investigation, Gibbens concluded that the nine wolves had been shot from an airplane, that none had been taken in unit 19D-East, that the sealing certificates had been falsified, and that Haeg and Zellers had unlawfully possessed the hides. He also concluded that the relevant leg traps

and the snares belonged to Haeg and that they were still actively catching game after the relevant leg trap and the snare seasons had closed.

Sometime after Gibbens completed his investigation, the State entered separate plea negotiations with Haeg and Zellers. The negotiations with Haeg broke down, but the State reached a plea agreement with Zellers. Among other things, Zellers was required to enter a plea for two consolidated counts of violating AS 8.54.720(a)(8)(A), unlawful acts by a guide. He was also required to testify against Haeg.

In April 2005, Haeg moved to dismiss the information. Among other things, he argued that the State could not charge him for hunting wolves same day airborne because his predator control permit allowed him to do so, even if only in unit 19D-East. In a written decision, District Court Judge Margaret L. Murphy rejected Haeg's arguments and denied the motion.

A jury trial began July 26, 2005, with Judge Murphy presiding. Among others, Gibbens, Zellers, and Haeg testified. The gist of Gibbens's testimony is set out in the preceding paragraphs. This testimony was corroborated not only by Zellers, but by Haeg himself.

Haeg testified that he was a licensed guide. He conceded that he and Zellers knew (or, in one instance, should have known) that they were taking the wolves outside of unit 19D-East, that they had intentionally falsified the sealing certificates for all nine wolves, and that they had possessed the wolves and hides illegally. He also admitted that he was responsible for the leg traps that were still catching game after the leg trap season had closed.

***5** But in his defense against the hunting charges, Haeg testified that he was not unlawfully "hunting" the wolves, but was only violating his predator control permit. Haeg denied responsibility for snaring wolves out of season and explained that the snares had been turned over to another trapper who was supposed to close them out when the season ended.

The jury found Haeg guilty of all five counts of unlawful acts by a guide: hunting wolves same day airborne; two counts of unlawful possession of game; one count of unsworn falsification; and of one count of trapping wolverines in a closed season. The jury found Haeg not guilty of one count of snaring wolves in a closed season [FN6] and of failure to salvage game.[FN7]

FN6. 5 AAC 84.270(13).

FN7. 5 AAC 92.220(a)(1).

At sentencing, Judge Murphy ordered Haeg to forfeit the nine wolf hides, a wolverine hide, the airplane, and the guns and ammunition used to take the wolves. She also revoked Haeg's guiding license for five years. This appeal followed.

While this appeal was pending, Haeg filed a motion requesting this court to order the State to return to him the property that had been seized during the criminal investigation. We remanded the case for the limited purpose of allowing the district court to resolve **Haeg's** motion. Relying on Criminal Rule 37, **Haeg** asked the district court to suppress the evidence seized during the investigation and to return the property to him. Magistrate David Woodmancy denied **Haeg's** motion. **Haeg** appeals this decision.

Another of **Haeg's** motions asks this court to modify part of his sentence. **Haeg** asserts that Judge Murphy erred when she revoked his guide license instead of suspending it.

Discussion

***Haeg's** appeal in No. A-9455*

***Haeg's** claim that the State used perjured testimony*

Haeg contends that Trooper Gibbens intentionally made false statements in his search warrant affidavit. In particular, **Haeg** claims that Gibbens lied when he said in his affidavit that he found evidence in unit 19C that **Haeg** had taken wolves. But **Haeg** did not challenge the search warrant affidavit prior to trial. Because of this, his claim is forfeited.[FN8] And, under *Moreau v. State*,[FN9] he is barred from bringing this claim on appeal, even as a matter of plain error.[FN10]

FN8. *See* Alaska R. Crim. P. 12(b) and (e).

FN9. 588 P.2d 275 (Alaska 1978).

EXHIBIT A
Page 4 of 13

FN10. *Id.* at 279-80.

In *Moreau*, the Alaska Supreme Court acknowledged that it was "clear that a false affidavit in support of a search warrant can, in appropriate circumstances, nullify the warrant." [FN11] But the court went on to rule that "[w]hile we do not state that search and seizure issues are incapable of plain error analysis, we believe that the exclusionary rule which requires the suppression of illegally obtained evidence is usually not appropriately raised for the first time on appeal." [FN12] The court explained that the exclusionary rule "is a prophylactic device to curb improper police conduct and to protect the integrity of the judicial process. Thus, justice does not generally require that it be applied on appeal where it is not urged at trial [.]" [FN13] In light of *Moreau*, Haeg cannot pursue this claim.

FN11. *Id.* at 279.

FN12. *Id.* at 280 (footnote omitted).

FN13. *Id.*

Why we conclude that Haeg could be convicted of unlawful acts by a guide: hunting wolves same day airborne

***6** In a related argument, Haeg contends that it was Gibbens's perjured affidavit that allowed the State to charge Haeg with unlawful acts as a guide. In Haeg's view, had Gibbens's affidavit stated that the wolves were killed in unit 19D, instead of unit 19C, then the State could only charge him with violating his predator control permit.

But Haeg misrepresents what his permit allowed. The record shows that Haeg was permitted to take wolves

Haeg further contends that even if he did kill wolves beyond the authority granted by his predator control permit, he was not engaged in the "hunting" of wolves-and, thus, he did not violate any statute or regulation that prohibits same-day airborne hunting.

This argument is mistaken. Under the definition codified in AS 16.05.940(21), the term "hunting" is not confined to the killing of animals for food or sport. Rather, "hunting" is defined as "[any] taking of game under AS 16.05-AS 16.40 and the regulations adopted under those chapters [of the Alaska Statutes]." The term "taking of game" includes more than simply the killing of game. As defined in AS 16.05.940(34), "take" means the "taking, pursuing, hunting, ... disturbing, capturing, or killing [of] game," as well as any attempt to engage in these acts.

The predator control program that Haeg participated in was established under 5 AAC 92.110-125; these regulations were adopted by the Board of Game under Title 16, Chapter 5. Thus, Haeg's chasing and killing of wolves under this predator control program constituted "hunting" under Alaska law. And because Haeg's acts of chasing and killing wolves were not authorized under the terms of his predator control permit, these acts constituted unlawful hunting. Under Alaska law (specifically, AS 16.05.920(a)), *all* taking of game is unlawful unless it is permitted by AS 16.05-AS 16.40, AS 41.14, or a regulation adopted under those chapters of the Alaska Statutes.[FN14]

FN14. *See State v. Eluska*, 724 P.2d 514, 515 (Alaska 1986); *Jones v. State*, 936 P.2d 1263, 1266 (Alaska App.1997).

For these reasons, Haeg could lawfully be convicted of violating AS 08.54.720(a)(15), the statute that

regulation prohibiting same-day airborne hunting.

*7 Haeg suggests that he was convicted of the hunting offenses because Gibbens lied when he testified that some wolves were killed in unit 19C. But Gibbens retracted this testimony during cross examination, clarifying that the wolves were killed in unit 19D but not in unit 19D-East. As already noted, **Haeg** admitted that none of the wolves was killed in unit 19D-East.

Haeg also asserts that Gibbens lied by testifying at sentencing that he did not know why **Haeg** had not guided for an entire year. **Haeg** argues that this alleged testimony was perjury because Gibbens-according to **Haeg**-was aware that part of the failed plea agreement required **Haeg** to give up guiding for a year. But because **Haeg** did not litigate the terms of the failed plea agreement in the district court, there are no factual findings supporting **Haeg's** claim. Furthermore, **Haeg** had the opportunity to refute any testimony Gibbens gave during the sentencing proceedings, and it was up to Judge Murphy to determine whether Gibbens was credible.

***Haeg's** claim that the prosecutor violated Evidence Rule 410*

Haeg claims that the State violated Evidence Rule 410 by using a statement he made during failed plea negotiations to charge him with crimes more serious than he had initially faced. But **Haeg** did not litigate this issue in the district court. Because he did not preserve this claim of error below, **Haeg** now has to show plain error .[FN15] As we have explained in the past, "[o]ne of the components of plain error is proof that the asserted error manifestly prejudiced the defendant." [FN16]

FN15.*See* Wettanen v. Cowper, 749 P.2d 362, 364 (Alaska 1988) (issues and arguments not raised below are considered waived on appeal absent plain error); *see also* John v. State, 35 P.3d 53, 63 (Alaska App.2001) (where record reflected no lower court ruling on appellant's Evidence Rule 410 claim, appellate court declined to address it).

FN16.*Baker v. State*, 22 P.3d 493, 501 (Alaska App.2001); *see also* Crutchfield v. State, 627 P.2d 196, 198 (Alaska 1980) ("[A]n alleged error is reviewable as plain error only if it raises a substantial and important question and is obviously prejudicial.").

In this case, the State filed an initial information and then amended it twice. Each version of the information was supported by a probable cause statement that set out Gibbens's investigation and a summation of the statements made by Haeg and Zellers. Thus, even had Haeg's statements been removed from the charging document, the remaining evidence from Gibbens and Zellers would still support the charges against Haeg.[FN17] And even though the State initially charged Haeg with less serious charges, the State had the discretion to file more serious charges.[FN18] In other words, even if the State had not used his statements to support the information, Haeg would still have faced charges that he committed unlawful acts by a guide, hunting same day airborne. Because Haeg has not shown that the error he asserts manifestly prejudiced him, he has not shown that plain error occurred.

FN17.*Cf.* State v. McDonald, 872 P.2d 627, 638 (Alaska App.1994) (If inadmissible evidence is presented to a grand jury, "the indictment will be vitiated only 'if the remaining evidence was insufficient to support [the] indictment or the improper evidence was likely to have had an overriding influence on the grand jury's decision.' " (quoting *Boggess v. State*, 783 P.2d 1173, 1176 (Alaska App.1989) (alteration in *McDonald*)).

FN18.*See State v. District Court*, 53 P.3d 629, 633 (Alaska App.2002) (The State "[has] the discretion to decide whether to bring charges against a person who has broken the law and, if so, to decide what those charges will be.").

Haeg also suggests that the State used his interview to convict him. But Haeg did not raise this issue at trial, nor does the record support this conclusion. The record shows that the State did not offer Haeg's pretrial statement during its case-in-chief or during its rebuttal case. In addition, Zellers testified for the State and his testimony, along with Gibbens's, was sufficient to support Haeg's convictions. Finally, in

EXHIBIT A
Page 6 of 13

his own testimony, Haeg admitted that he had committed all but two of the charged offenses (and he was acquitted of those two). As we explained earlier in this decision, Haeg testified that he was a licensed guide, that he had taken the wolves same day airborne, that he knew that he was acting outside the predator control program area, that he and Zellers had falsified the sealing certificates, that they had unlawfully possessed game, and that his leg traps were still catching game after the season had closed. Haeg has not shown that plain error occurred.

Haeg's claim that his attorneys were ineffective

***8** Haeg claims that his attorneys provided ineffective assistance of counsel. We have consistently held that we will not consider claims of ineffective assistance for the first time on appeal because, in most instances, the appellate record is inadequate to allow us to meaningfully assess the competence of the attorney's efforts.[FN19] Haeg's case is typical-that is, the appellate record is inadequate to allow us to meaningfully assess the competence of Haeg's attorneys' efforts. Haeg's claim of ineffective assistance must be raised in the trial court in an application for post-conviction relief under Alaska Criminal Rule 35.1.

FN19. *See* *Tazruk v. State*, 67 P.3d 687, 688 (Alaska App.2003); *Hutchings v. State*, 53 P.3d 1132, 1135 (Alaska App.2002); *Sharp v. State*, 837 P.2d 718, 722 (Alaska App.1992); *Barry v. State*, 675 P.2d 1292, 1295-96 (Alaska App.1984).

Haeg's claim that the district court erred by failing to inquire about plea negotiations

Haeg argues that Judge Murphy should have asked the parties about the failed plea negotiations. If Haeg believed that he had an enforceable plea agreement with the State, he was entitled to ask the district court to enforce it.[FN20] But we are aware of no requirement that a trial court in a criminal case, without a motion or request from the parties, must ask why plea negotiations failed. We conclude that Haeg has not shown that any error occurred.

FN20. *See* *State v. Jones*, 751 P.2d 1379, 1381 (Alaska App.1988).

Haeg's claim that the district court failed to rule on an outstanding motion

Haeg claims that Judge Murphy failed to rule on his motion "protesting the State's use" of the statement Haeg claims he gave during plea negotiations. But Haeg mischaracterizes the motion that was filed seeking dismissal of the charges. Although he moved to dismiss the charges on various grounds, he did not assert that the State had violated Evidence Rule 410. He did not mention this issue until he replied to the State's opposition to his motion to dismiss the information, where he told the court that "[t]here is another piece of information that needs to be addressed."

Judge Murphy was not required to rule on Haeg's new contention. A trial court can properly disregard an issue first raised in a reply to an opposition.[FN21] If Haeg wanted a ruling on this issue, he was obligated to file a new motion asking for one. Because he did not ask for a ruling, he has waived this claim.[FN22]

FN21. *See* *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606, 611 (Alaska 1998) ("The function of a reply memorandum is to respond to the opposition to the primary motion, not to raise new issues or arguments...."); *Alaska State Employees Ass'n v. Alaska Pub. Employees Ass'n*, 813 P.2d 669, 671 n. 6 (Alaska 1991) ("As a matter of fairness, the trial court could not consider an argument raised for the first time in a reply brief.").

FN22. *See* *Stavenjord v. State*, 66 P.3d 762, 767 (Alaska App.2003); *Marino v. State*, 934 P.2d 1321, 1327 (Alaska App.1997).

Haeg's claim that the district court prejudiced his defense

Haeg contends that Judge Murphy made inconsistent rulings about who-the court or the jury-would determine whether Haeg was "hunting" when he took the wolves. But Haeg has not shown that Judge Murphy's rulings prejudiced his defense.

The first ruling that Haeg refers to came when he moved to dismiss the information. There, he argued

EXHIBIT A
Page 7 of 13

that the hunting same day airborne charges were improper because he was acting under the authority of the predator control program. In his view, even though he had taken the wolves outside the area where the predator control program was authorized, the State could only charge him for violating the conditions of the permit. Judge Murphy rejected this argument, noting that the State had charged Haeg for taking wolves outside of the permit area. She explained that Haeg might defend against these charges on the grounds that he was acting in accordance with his permit, but that this was a factual issue that would be decided by the fact finder at trial.

***9** The second ruling that Haeg refers to occurred when Judge Murphy addressed Haeg's pre-trial argument that his permit precluded a conviction for any hunting violations. Judge Murphy found that this was a legal question that she, not the jury, had to decide.

Haeg asserts that Judge Murphy's rulings prejudiced his defense because they prevented him from arguing that he was not hunting. But Judge Murphy allowed Haeg to make this very argument.

At trial, the parties had a lengthy discussion concerning Haeg's desire to tell the jury that he was not "hunting" same day airborne when he took the wolves. Haeg's defense was that his conduct was not "hunting" because he was acting under a permit that allowed predator control. He asserted that the statute defining "predator control" excluded "hunting" and, therefore, "he couldn't have been knowingly violating a hunting law."

Judge Murphy ultimately told Haeg that he could argue to the jury that if the jury found that he was acting in accordance with the permit, then he was not hunting. Consequently, Haeg argued at length during his closing that he was not guilty of hunting same day airborne because his predator control permit allowed him to kill wolves same day airborne. Despite this argument, the jury found Haeg guilty of the hunting charges. Haeg's defense was not prejudiced by Judge Murphy's rulings.

Haeg's claim that the district court failed to give a required jury instruction

Haeg argues that Judge Murphy was required to sua sponte give a jury instruction that Zeller's plea agreement required him to testify against Haeg. But under Criminal Rule 30(b), there are no required jury instructions. Rather, the rule provides that a trial court "shall instruct the jury on all matters of law which it considers necessary for the jury's information in giving their verdict." The rule that required instructing the jury that it should view the testimony of an accomplice with distrust was rescinded in 1975.[FN23] Because Haeg did not request this or a similar instruction, he has not preserved the issue for appeal.[FN24]

FN23. *See Heaps v. State*, 30 P.3d 109, 115 (Alaska App.2001).

FN24. *See* Alaska R.Crim. P. 30(a) (objections to instructions must be raised before the jury retires to deliberate).

Haeg's claim that the district court held him to a term of the failed plea agreement

Haeg claims that Judge Murphy unfairly held him to a term of the failed plea agreement. Haeg asserts that this occurred during an exchange between his attorney and the judge during a post-trial status hearing.

The purpose of this status hearing was to establish a date for sentencing and to determine whether a defense witness would be available. The prosecutor indicated that he intended to call witnesses at sentencing in an effort to prove that Haeg had committed uncharged misconduct-in particular, the prosecutor wanted to show that in 2003 Haeg had been involved in unlawfully taking a moose same day airborne.

When Judge Murphy asked why the State had not charged the moose incident along with the current case, the prosecutor explained that initially, during plea negotiations, the parties had discussed litigating the issue at sentencing. Haeg's attorney then said he did not "know how ... [a discussion of a moose case] could be part of any negotiations to the un-negotiated case." Judge Murphy responded, "Well, it was at one point." Haeg argues that in this exchange, Judge Murphy was forcing Haeg to comply with a term of the failed plea agreement. We disagree.

***10** At sentencing, the State is allowed to put on evidence of a defendant's uncharged offenses even when

the defendant objects.[FN25] A sentencing court may consider this evidence if it is sufficiently verified and the defendant is provided the opportunity to rebut it.[FN26] Here, the record reflects that the State, irrespective of the failed plea agreement, was attempting to show that Haeg had committed an uncharged offense. The State was entitled to do so. We conclude that Judge Murphy did not force Haeg to abide by a term of the failed plea agreement. We note that she later ruled that the State had not proven that Haeg had committed the uncharged offense and she did not consider it when imposing sentence.

FN25. *See Pascoe v. State*, 628 P.2d 547, 549-50 (Alaska 1980) (State allowed at sentencing, over defendant's objection, to put on evidence of defendant's uncharged offenses).

FN26. *See id.*

Haeg's claim that the district court erred by not ordering a defense witness to appear at sentencing

Haeg claims that Judge Murphy committed error by not ordering his first attorney to testify at Haeg's sentencing proceedings. Although Haeg subpoenaed this attorney, the attorney did not appear. The record shows that at sentencing Haeg did not ask Judge Murphy to enforce the subpoena or seek any other relief. Consequently, this claim of error is waived.

Haeg's claim that the district court erred when it found that most of the wolves were taken in unit 19C

Haeg asserts that Judge Murphy erred when she found that "a majority, if not all of the wolves taken were in [unit]19C." It is true that the evidence did not show that most of the wolves were killed in unit 19C. But taking Judge Murphy's sentencing remarks in context, we conclude that she found that Haeg was taking wolves unlawfully in an effort to benefit his own guiding operations. This finding is supported by the record.

At trial, Haeg testified that he and Zellers knew that they were killing the wolves outside of the permit area. And the evidence at trial showed that they spent little time looking for wolves in unit 19D-East, the permit area around McGrath. Instead, the first wolves were taken about thirty-five miles from Haeg's hunting lodge, which was located in unit 19C. Haeg took at least one animal just ten miles from his hunting grounds. Zellers testified that he and Haeg wanted the game board to include unit 19C in the predator control program.

In addition, Haeg testified that he guided moose hunts in units 19C and 19B. He admitted that they had killed one of the wolves in unit 19B. And although Haeg testified that he did not guide moose hunts on the Swift River where the rest of the wolves were taken, he conceded that some of the moose taken during his guided hunts come from that area. He testified that he could schedule eight or nine moose hunts in a season and that he charged a significant amount of money per person per hunt. He also testified that he and Zellers killed the wolves because they were frustrated that the wolves were killing so many moose.

Based on this record, we conclude that Haeg has not shown that Judge Murphy committed clear error when she found that Haeg was illegally killing wolves for his own commercial benefit.

Why we find that Judge Murphy intended to suspend, not revoke, Haeg's guide license

***11** While this appeal was pending, Haeg filed a motion requesting that we modify the portion of his sentence revoking his guide license. At that time, we indicated that even if Haeg was entitled to any relief, we would not grant it until we decided the appeal. (We also told Haeg that based on his claim that this portion of the sentence was illegal, he could seek immediate relief from the district court. He apparently did not do so.) Although Haeg did not include this issue in his claims of error, we deem the motion a request to amend his points on appeal and resolve it. For the reasons explained here, we conclude that Judge Murphy intended to suspend Haeg's guide license, not to revoke it.

Judge Murphy ordered the guiding license "revoked for five years ." The written judgments reflect the same language. The revocation was part of Haeg's sentence for violating the law and was not a condition of probation.

Under AS 12.55.015(c), Judge Murphy could "invoke

any authority conferred by law to suspend or revoke a license." The authority to suspend or revoke a guiding license is provided in AS 08.54.720(f)(3). In Haeg's case, this statute required Judge Murphy to order the game board to suspend Haeg's guide license for a "specified period of not less than three years, or to permanently revoke [it]." But Judge Murphy combined the two alternatives and ordered the license revoked for five years. Under the authorizing statute, Judge Murphy could either order the license suspended for five years or else revoke it permanently. But the statute did not allow her to revoke it for five years.

Although Judge Murphy had the authority to revoke the license, the circumstances indicate that she meant to suspend it. When Judge Murphy imposed sentence, she was using pre-printed judgments that required her to fill in blank spaces. The judgments have a section where various types of licenses can be "revoked" followed by a blank space for the court to insert the length of the revocation. Judge Murphy wrote "for 5 years" in the blank space. But the option to suspend a license was not offered. Because Judge Murphy wrote "5 years" rather than "permanently," we conclude that she meant to suspend the license for a specified period of time rather than to revoke it permanently. We therefore order the district court to modify the judgments in this case to show that Haeg's guide license was suspended for five years.

Haeg's appeal in Case No. A-10015

While his original appeal was pending, Haeg filed a motion in the district court asking for the return of his property that had been seized by the State. Because his case was on appeal, the district court ruled that it lacked jurisdiction to address Haeg's motions. Haeg then asked this court to order his property released. We remanded the case back to the district court "for the limited purpose of allowing Haeg to file a motion for the return of his property[.]"

Once the case was remanded, Haeg-relying on Alaska Criminal Rule 37-asked the district court to suppress the evidence that had been seized during the criminal investigation and to return the property to him. Haeg argued that the State had violated his fundamental rights by not giving him notice that he had the right to contest the seizure of his property. He also argued that AS 16.05.190 and AS 16 .05.195 were unconstitutional on their face and as applied to him because they did not require the State to provide such notice. Magistrate David Woodmancy ordered some property returned, but otherwise denied Haeg's request. Haeg initially petitioned for review of this decision, but we concluded that he had the right to appeal.

Why we uphold the district court's decision not to suppress evidence or return to Haeg property Judge Murphy had ordered forfeited

***12** Haeg contends that Magistrate Woodmancy erred when he refused to suppress the evidence and to return to him the property the State seized during the criminal investigation of this case. The forfeited property consisted of the airplane and the firearms that Haeg and Zellers used when taking the wolves, the wolf hides, and a wolverine hide.

Haeg contends that he was entitled to have the property suppressed as evidence and returned to him because the State, when it seized the property during the criminal investigation, did not expressly inform him that he had the right to challenge the seizure. He also asserts that the statutes that authorize search and seizure in criminal cases-AS 12.35.020, AS 12.35.025, AS 16.05.190, and AS 16.05.195-are unconstitutional because they do not require the State to provide owners of seized property with notice that they have the right to challenge the seizure. He claims that the federal and state due process clauses require this notice.

To support his claim under the federal due process clause, Haeg relies primarily on the Ninth Circuit's decision in *Perkins v. City of West Covina.*[FN27] In *City of West Covina,* police lawfully searched a home where a murder suspect was renting a room.[FN28] Pursuant to a search warrant, police officers seized property from the home.[FN29] The police provided the landlord, Perkins, with written notice of the search, an inventory of the property seized, and information necessary for him to contact the police investigators.[FN30] But the written notice did not explain the procedures for retrieving his property.[FN31] Although police later told Perkins that he needed to file an appropriate motion in court, Perkins ran into difficulty when he attempted to retrieve his property.[FN32] Ultimately, he filed a civil suit in federal court, alleging a violation of his constitutional rights in that the notice

did not mention he had the right to seek the return of his property.[FN33]

FN27.113 F.3d 1004 (9th Cir.1997), *rev'd*,525 U.S. 234, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999).

FN28.*Id.* at 1006.

FN29.*Id.*

FN30.*Id.* at 1007.

FN31.*Id.*

FN32.*Id.*

FN33.*Id.* at 1007, 1012-13.

The Ninth Circuit ruled that in these circumstances, due process required the government to provide written notice explaining to property owners how to retrieve the property.[FN34] The Ninth Circuit held that, among other things, "the notice must inform the ... [property owner] of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court." [FN35] The notice "also must explain the need for a written motion or request to the court stating why the property should be returned." [FN36]

FN34.*Id.* at 1012-13.

FN35.*Id.* at 1013.

FN36.*Id.*

Relying on the Ninth Circuit's decision, Haeg contends that the federal due process clause required a similar notice when the state troopers seized his property. But in *City of West Covina v. Perkins,*[FN37] the United States Supreme Court reversed the Ninth Circuit's decision and rejected the notice requirement imposed by the Ninth Circuit.[FN38]

FN37.525 U.S. 234, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999).

FN38.*Id.*

The Supreme Court ruled that when police lawfully seize property for a criminal investigation, the federal due process clause does not require the police to provide the owner with notice of state-law remedies.[FN39] The Court explained that "state-law remedies ... are established by published, generally available state statutes and case law." [FN40] Once a property owner has been notified that his property has been seized, "he can turn to these public sources to learn about the remedial procedures available to him." [FN41] According to the Court, "no ... rationale justifies requiring individualized notice of state-law remedies." [FN42] The "entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny." [FN43]

FN39.*Id.* at 240, 119 S.Ct. at 681.

FN40.*Id.* at 241, 119 S.Ct. at 681.

FN41.*Id.* at 241, 119 S.Ct. at 681-82.

FN42.*Id.* at 241, 119 S.Ct. at 681.

FN43.*Id.* at 241, 119 S.Ct. at 682 (quoting *Atkins v. Parker*, 472 U.S. 115, 131, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985)).

***13** In other words, federal due process is satisfied if the police give property owners notice that their property has been seized and if state law provides a post-seizure procedure to challenge the seizure and seek the return of the property. In Haeg's case, he received notice that his property was seized, and Alaska Criminal Rule 37 provides for a post-seizure procedure allowing property owners to seek return of their property.[FN44] In light of the Supreme Court's decision in *City of West Covina,* we conclude that Haeg's due process rights under the federal constitution were not violated.

FN44.Alaska R.Crim. P. 37(c) ("[Any] ... person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property[.]").

EXHIBIT A
Page 11 of 13

To support his claim under Alaska's due process clause, Haeg relies primarily on the decisions in *F/V American Eagle v. State*[FN45] and *State v. F/V Baranof*.[FN46] He points out that under these decisions, property owners have "an immediate and unqualified right to contest the [S]tate's justification" when the State seizes their property.[FN47] But nothing in either of these decisions imposes a notice requirement similar to that discussed by the Ninth Circuit in *City of West Covina*. Rather, in both cases, the State provided the property owners notice that their property had been seized.[FN48] This notice and the subsequent opportunity to challenge the seizures under Criminal Rule 37 satisfied due process.[FN49] Here, Haeg had notice of the seizure, which in turn provided him with the opportunity to challenge the seizure of his property.

FN45.620 P.2d 657 (Alaska 1980).

FN46.677 P.2d 1245 (Alaska 1984).

FN47.*F/V American Eagle*, 620 P.2d at 667.

FN48.*See F/V Baranof*, 677 P.2d at 1255-56 (*in rem* forfeiture action holding that due process was provided when owners were notified that property was seized and were given an opportunity to contest the State's reasons for seizing property); *F/V American Eagle*, 620 P.2d at 666-68 (*in rem* forfeiture action).

FN49.*F/V Baranof*, 677 P.2d at 1255-56;*F/V American Eagle*, 620 P.2d at 667.

Conceivably, there might be circumstances where the Alaska due process clause would require the government to take affirmative measures to notify a property owner of the right and the procedure to challenge the seizure of his or her property. But nothing in Haeg's case supports a finding that his due process rights were violated. Haeg was present when the troopers searched his residence in Soldotna and seized an airplane of his, a shotgun, and a rifle. Consequently, he knew that his property had been seized as part of a criminal investigation. In addition, less than two weeks after his property was seized, he retained an attorney. Thus, he had access to legal advice regarding the seizure. Finally, **Haeg**-albeit some months after the seizure-asked the district court to bond out his airplane. Under these circumstances, the fact that the State did not specifically inform **Haeg** that he had the right to challenge the seizure did not infringe his state due process rights.

Based on the record in **Haeg's** case, we conclude that neither the federal nor the state constitutions required the State, after giving **Haeg** notice that his property had been seized, to separately inform him that he had a right to contest the seizure of his property. Because neither **Haeg's** federal nor state due process rights were violated, Magistrate Woodmancy did not err when he denied **Haeg's** post-conviction motion to suppress evidence seized during the criminal investigation. For similar reasons, we reject **Haeg's** attack on the constitutionality of Alaska's seizure and forfeiture statutes, AS 12.35.020, AS 12.35.025, AS 16.05.190, and AS 16.05.195. Furthermore, we note that **Haeg's** motion to suppress was waived because he failed to file it prior to trial.[FN50]

FN50.*See*Alaska R.Crim. P. 37(c); Alaska R.Crim. P. 12(b) and (e).

***14** We also conclude that **Haeg** provided Magistrate Woodmancy no grounds for overturning Judge Murphy's decision to forfeit property related to **Haeg's** hunting violations. **Haeg** argued at sentencing against forfeiture of the airplane. At sentencing, **Haeg's** attorney did not contest the fact that the airplane was the one that **Haeg** and Zellers used when unlawfully taking the wolves, nor did he claim that **Haeg** was not the airplane's owner. Rather, he argued that the airplane should not be forfeited because **Haeg** used the plane "not only for guiding, but ... also ... for part of his economic livelihood of flight seeing, and if ... [the court forfeits] his plane ... he won't even be able to do that.... [M]aybe over the next few years ... he's going to have ... to beef up more work for his flight seeing business, ... [and with the airplane] at least he'd have the means to do it." The attorney emphasized that "if you take his plane ... he'd be out of the guiding business, he'd be out of the flight seeing business, he'll just be out of business. Period. After twenty-one years of an occupation, just it's gone."

Haeg did not object to the forfeiture of the shotgun, the rifle, or the animal hides. The record supports these forfeitures. At trial, Zellers testified that they

EXHIBIT A
Page 12 of 13

had specifically purchased the shotgun to use for the predator control program and that they used it to unlawfully take the wolves. Zellers also testified that the rifle was used to unlawfully take one wolf. And finally, **Haeg** testified that he and Zellers had taken the animal hides unlawfully. Because the record supports Judge Murphy's forfeiture of the property relating to **Haeg's** hunting violations and **Haeg** did not show why the decision to forfeit this property should be overturned, we affirm Magistrate Woodmancy's decision to not return the forfeited property to **Haeg**.

Haeg also claims that Magistrate Woodmancy erred when he resolved **Haeg's** motion to suppress evidence and return of property without an evidentiary hearing. But **Haeg** has not shown that Magistrate Woodmancy abused his discretion. The basis of **Haeg's** post-conviction motion was his assertion that the State, when it seized **Haeg's** property, was required to tell him that he had a right to challenge the seizure. This was a question of law that Magistrate Woodmancy could resolve without an evidentiary hearing. And as we have already explained, the State was not required to notify Haeg that he had a right to challenge the seizure of his property.

Other potential claims

Haeg's briefs and other pleadings are sometimes difficult to understand, and he may have intended to raise other claims besides the ones we have discussed here. To the extent that Haeg may be attempting to raise other claims in his briefs or in any of his other pleadings, we conclude that these claims are inadequately briefed.[FN51]

> FN51. *See Petersen v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990) (issues that are only cursorily briefed are deemed abandoned); *see also A.H. v. W.P.*, 896 P.2d 240, 243-44 (Alaska 1995) (waiving for inadequate briefing majority of fifty-six arguments raised by pro se appellant).

Conclusion

Haeg's convictions are AFFIRMED. The district court shall amend the judgments to reflect that Haeg's guide license was suspended for a period of five years.

Alaska App.,2008.
Haeg v. State
Not Reported in P.3d, 2008 WL 4181532 (Alaska App.)

END OF DOCUMENT

EXHIBIT A
Page 13 of 13