TEXT OF CASELAW PRINCIPALLY RELIED UPON

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970): "Such, then, is the character of these outrages -- numerous, repeated, continued from month to month and year to year, extending over many States; all similar in their character, aimed at a similar class of citizens; all palliated or excused or justified or absolutely denied by the same class of men. Not like the local outbreaks sometimes appearing in particular districts, where a mob or a band of regulators may for a time commit crimes and defy the law, but having every mark and attribute of a systematic, persistent, well defined organization, with a fixed purpose, with a regular plan of action." "The development of this condition of affairs was not the work of a day, or even of a year. It could not be, in the nature of things; it must be slow; one fact to be piled on another, week after week, year after year. . . ." "Such occurrences show that there is a pre-concerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception." Cong.Globe, 42d Cong., 1st Sess., 458-459.

"[T]he chief complaint is not that the laws of the State are unequal, but that, even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." *Id.* at App. 153.

Armstrong v. Manzo, 380 U.S. 545, 552 (1965) the U.S. Supreme Court held: *"Only 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'* The Due Process Clause demands no less in this case."

Arnold v. State, 685 P.2d 1261 Alaska App.,1984. In order to render "effective assistance" during a plea, counsel must be familiar with the facts of the case and the applicable law so that he can fully advise the defendant of the options available to him. The commentary to ABA Defense Standard § 4.1 at 226-27 is particularly helpful: The lawyer's duty to investigate is not discharged by the accused's admission of guilt to him or by his stated desire to enter a guilty plea. The accused's belief that he is guilty in fact may often not coincide with the elements which must be proved in order to establish guilt in law. In many criminal cases the real issue is not whether the defendant performed the act in question but whether he had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to his intent in determining his criminal liability or responsibility .... The basis for evaluation of these possibilities is the lawyer's factual investigation for which the accused's own conclusions are not a substitute. The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt *in law,* not in some moral sense. An accused

may feel a sense of guilt but his subjective or emotional evaluation is not relevant; an essential function of the advocate is to make a detached professional appraisal independent of a client's belief either that he is or is not guilty.

Atchak v. State, 640 P.2d 135 (Ak 1981): "Determining the strength of the appearance of prosecutorial vindictiveness is a process which involves, first, an inquiry as to the prosecution's "stake" in deterring the exercise of the specific right asserted by defendant, and, second, scrutiny of the state's conduct for a connection between assertion of a right by defendant and an increase or threatened increase in charges by the state. … Here, as in United States v. Velsicol Chemical Corp., a specific threat was made to increase charges against Atchak should he pursue his motion. Assuming the validity of the state's argument that Kimoktoak constituted an intervening change in law, the state was entitled to reevaluate its earlier dismissal of manslaughter charges against Atchak. But this fact could not entitle the state to use its authority to reconsider its charge as a club with which to pummel Atchak into submission. The state's perceived need to reevaluate its earlier charging decision in light of Kimoktoak simply could not justify the communication to Atchak's counsel of a specific threat to increase charges in the event the motion to dismiss was pursued. (O)nce a prosecutor exercises his discretion to bring certain charges against the defendant, neither he nor his successor may, without explanation, increase the number of or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights. … As stated in United States v. Ruesga-Martinez, 534 F.2d at 1369 (footnotes and citations omitted; emphasis in original): Pearce and Blackledge ... establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. Hence, the mere appearance of vindictiveness is enough to place the burden on the prosecution. We note that previous cases have invoked the Pearce/Blackledge doctrine despite affirmative findings of a lack of malice or improper motivation on the part of the prosecution. See, e.g., United States v. Groves, 571 F.2d at 453; United States v. Ruesga-Martinez, 534 F.2d at 1369-70. The Alaska Supreme Court has consistently held that courts should not hesitate to reverse a conviction when a substantial flaw in the underlying indictment is found, regardless of the strength of the evidence against the accused or the fairness of the trial leading to the conviction. Keith v. State, 612 P.2d 977, 980-81 (Alaska 1980); Adams v. State, 598 P.2d 503, 510 (Alaska 1979)."

Beltz v. State, 895 P.2d 513 (Ak. 1995): "Beltz's petition for post-conviction relief did not assert that his attorney acted incompetently by failing to attack the voluntariness of Beltz's statements to Hall. Beltz did, however, argue that the suppression issue should not be viewed as waived. Beltz asserted that it was his attorney's decision not to attack the voluntariness of Beltz's statements to Trooper Hall, and that his attorney failed to obtain Beltz's personal assent to this decision. Therefore, Beltz concluded, he never personally waived his right to seek suppression of his interview with Hall."

Berger v. U.S., 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314 (1935): "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Boddie v. Connecticut, 401 U.S. 371 (1971) the U.S. Supreme Court held: "Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and *denial of a defendant's full access to that process raises grave problems for its legitimacy.*

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process *must be given a meaningful opportunity to be heard.* Early in our jurisprudence, this Court voiced the doctrine that *"[w]herever one is assailed in his person or his property, there he may defend,*" *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). See *Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that *"due process of law signifies a right to be heard in one's defense," Hovey v. Elliott*, supra, at 417, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although "[m]any controversies [401 U.S. 371, 378] have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306 (1950), *"there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."* Id., at 313.

Brock v. Roadway Express, 481 U.S. 252 (1987) the U.S. Supreme Court held that: 'When there are factual disputes that pertain to the validity of a deprivation, due process "require[s] more than a simple opportunity to argue or deny." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 552 (1985) (BRENNAN, J., concurring in part and dissenting in part). *Predeprivation procedures must provide "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable*

grounds to believe that the charges . . . are true and support the proposed action." Id., at 545-546 (emphasis added). When, as here, the disputed question central to the deprivation is factual, and when, as here, *there is no assurance that adequate final process will be prompt*, predeprivation procedures are unreliable if they do not give the employer *"an opportunity to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [its] own behalf.'"*

The adequacy of predeprivation procedures is in significant part a function of the speed with which a post-deprivation or final determination is made. Previously the Court has recognized that *"the duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." Mackey v. Montrym, 443 U.S. 1, 12 (1979). See also Loudermill, supra, at 547 ("At some point, a delay in the post-termination hearing would become a constitutional violation").'*

Burford v. State, 515 P2d 382 (Ak. 1973) Op. No. 954: "Denial of a constitutional right, in the normal case, will affect substantial rights and give rise to plain error. However, be harmless beyond a reasonable doubt, the rights of an accused are not prejudiced and the requirements of plain error have not been met."

Closson v. State, 812 P.2d 966 (Ak. 1991): "When government claims that defendant has breached immunity or plea bargain agreement, burden is on government to prove, by a preponderance of the evidence, that substantial breach has occurred. … Where State breached promise of confidentiality contained in immunity agreement, defendant was entitled to specific performance; fundamental fairness dictated that State be held to strict compliance." "[i]mmunity agreements are contractual in nature and general principles of contract law apply to the resolution of disputes concerning their enforcement and breach." 784 P.2d at 664 (citing *United States v. Irvine,* 756 F.2d 708, 710-11 (9th Cir.1985); *United States v. Carrillo,* 709 F.2d 35, 36 n. 1 (9th Cir.1983); *United States v. Brown,* 801 F.2d 352, 354 (8th Cir.1986)). The court of appeals also properly cautioned that "[a]lthough the analogy between immunity agreements and ordinary contracts is useful, immunity agreements are subject to constitutional restraints, foremost of which is the due process clause's overriding guarantee of fundamental fairness to the accused." *Closson,* 784 P.2d at 665 (citing *Surina v. Buckalew,* 629 P.2d 969, 975 (Alaska 1981)). … When the government claims that the defendant has breached an immunity or plea bargain agreement, the burden is on the government to prove, by a preponderance of the evidence, that a substantial breach occurred. *United States v. Gonzalez-Sanchez,* 825 F.2d 572, 578 (1st Cir.1987), *cert. denied, sub nom. Latorre v. United States,* 484 U.S. 989, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987); Annotation, *Necessity and Sufficiency, in Federal Prosecution, of Hearing and Proof with Respect to Accused's Violation of Plea Bargain Permitting Prosecution on Bargained Charges,* 89 A.L.R.Fed. 753 (1988); Note, *The Standard of Proof Necessary to Establish that a Defendant has Materially Breached a*

Plea Agreement, 55 Fordham L.Rev. 1059 (1987). A finding of breach will be upheld unless clearly erroneous. *Gonzalez-Sanchez,* 825 F.2d at 579. [FN5] … "[A] definite and unconditional repudiation of the contract by a party thereto, communicated to the other, is a breach of the contract, creating an immediate right of action and other legal effects, even though it takes place long before the time prescribed for the promised performance...." *Holiday Inns of America, Inc. v. Peck,* 520 P.2d 87, 89 n. 3 (Alaska 1974) (quoting Corbin on Contracts, § 959 (1951)). … In *Surina v. Buckalew,* 629 P.2d 969 (Alaska 1981), we confronted the situation where a witness made a self-incriminating statement in reliance on the prosecution's promise of immunity. We stated that when the prosecution breaches an immunity agreement, the promisee is entitled to rescission, which "should have the effect of placing the individual in the same position he would have been in had he not engaged in the agreement." *Id.* at 975 n. 14. However, because of the inherent impossibility of rescinding an incriminating statement, we noted that "the alternative remedies of 'rescission' and 'specific performance' will collapse into one, in most cases." *Id.* Where an accused relies on a promise of immunity to perform an action that benefits the state, this individual too will not be able to "rescind" his or her actions. Therefore, we believe that the remedy of specific performance is equally applicable to Closson's situation, whether viewed as a remedy for a breach or for an anticipatory breach. [FN13] … In the plea bargaining arena, the United States Supreme Court has held that states should be held to strict compliance with their promises. In *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) … Many courts consider the defendant's detrimental reliance as the gravamen of whether it would be unfair to allow the prosecution to withdraw from a plea agreement. *See* Annotation, *Right of Prosecutor to Withdraw From Plea Bargain Prior to Entry of Plea,* 16 A.L.R.4th 1089, 1094-1100 (1982).

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) the U.S. Supreme Court held: *"[A] judgment entered without notice or service is constitutionally infirm....*Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, *'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'"*

Counselman* v. *Hitchcock (1892) 142 US 547, 564; *Kastigar* v. *United States* (1972) 406 US 441, 460 ["This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead' also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."]; *People* v. *Campbell* (1982) 137 Cal.App.3d 867, 873, fn.4.

Cruse v. State, 584 P.2d 1141, (Ak. 1978) in the Supreme Court of Alaska: "Constitutional protection against warrantless invasions of privacy is endangered by concealment of relevant facts from district court issuing search warrant, as search warrants issue ex parte, & issuing court must rely upon trustworthiness of affidavit before it."

Cuyler v. Sullivan, 446 U.S. 335 (1980): [E]xperience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. In Glasser v. United States, for example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and *failed to resist the presentation of arguably inadmissible evidence*. Id., at 72-75. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." Id., at 75. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76. Thus, *a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.* Because it is the simultaneous representation of conflicting interests against which the Sixth Amendment protects a defendant, he need go no further than to show the existence of an actual conflict. *An actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney.* Moreover, a showing that an actual conflict adversely affected counsel's performance is not only unnecessary, it is often an impossible task. As the Court emphasized in Holloway:*"[I]n a case of joint representation of conflicting interests the evil - it bears repeating - is in what the advocate finds himself compelled to refrain from doing* . . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. *And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."* 435 U.S., at 490-491 (emphasis in original).

Daly* v. *Superior Court (1977) 19 Cal.3d 132, 145 ["It is true that use and derivative use immunity, unlike transactional immunity, does not purport to interfere with any prosecution based on evidence which is not derived directly or indirectly from the immunized testimony. But the very existence of such testimony may present serious problems of *proving* its complete independence from evidence introduced in the criminal proceeding."].

Elkins v. U.S., 364 U.S. 206 (1960) "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all

unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. ". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts [364 U.S. 206, 210] of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. 383, 391 -393. the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in `the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U.S. 25, 27 -28. The Court has subsequently found frequent occasion to reiterate this statement from Wolf. See Stefanelli v. Minard, 342 U.S. 117, 119 ; Irvine v. California, 347 U.S. 128, 132 ; Frank v. Maryland, 359 U.S. 360, 362 -363. "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about [364 U.S. 206, 218] which courts do nothing, and about which we never hear.

"Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." Brinegar v. United States, 338 U.S. 160, 181 (dissenting opinion). taken between the Government as prosecutor and the Government as judge." 277 U.S., at 470 . (Dissenting opinion.) "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to

declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." 277 U.S., at 485 . This basic principle was accepted by the Court in McNabb v. United States, 318 U.S. 332 . There it was held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." 318 U.S., at 345 . Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold. The Director of the Federal Bureau of Investigation has written as follows:

"One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

"Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide [364 U.S. 206, 219] for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every duly constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods.

"Complete protection of civil rights should be a primary concern of every officer. These rights are basic in the law and our obligation to uphold it leaves no room for any other course of action. Although the great majority in our profession have long since adopted that policy, we cannot yet be entirely proud of our record. Incidents which give justification to charges of civil rights violations by law enforcement officers still occur. . . . This state of affairs ought to be taken as a challenge to all of us. Every progressive police administrator and officer must do everything in his power to bring about such an improvement that our conduct and our record will conclusively prove each of these charges to be false." FBI Law Enforcement Bulletin.

Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972) the Supreme Court of Alaska held: "Bradley issued the writ pursuant to AS09.40.010 and Civil Rule 89 *without providing notice of hearing to Etheredge.* Justice Stewart in *Fuentes v. Shevin*, 407 U.S. 67, in writing for the majority, said in part: "For more than a century the central meaning of procedural due process has been clear: *'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' ...*

It is equally fundamental that the right to notice and an opportunity to be heard *'must be granted at a meaningful time and in a meaningful manner.'"*

Faretta v. California, 422 U.S. 806 (1975), "A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interest of the state and the defendant are necessarily in opposition."

Fuentes v. Shevin, 92 S. Ct. 1983, 407 U.S. 67 "[M]ore importantly, on the occasions when the common law did allow prejudgment seizure by state power, *it provided some kind of notice and opportunity to be heard to the party then in possession of the property*, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.
For more than a century the central meaning of procedural due process has been clear: *"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."* Baldwin v. Hale, 1 Wall. 223, 233.

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For *when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.* It has long been recognized that: "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And *n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."*

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But *no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." Stanley v. Illinois*, 405 U.S. 645, 647.

This is no new principle of constitutional law. *The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.* Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, *opportunity for that hearing must be provided before the deprivation at issue takes effect.* E. g., *Bell v. Burson*, 402 U.S. 535, 542; *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Goldberg v. Kelly*, 397 U.S. 254; *Armstrong v. Manzo*, 380 U.S., at 551; *Mullane v. Central Hanover Tr. Co*., supra, at 313; Opp *Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *United States v. Illinois Central R. Co.,* 291 U.S. 457, 463; *Londoner v. City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551.

"That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticu*t, supra, at 378-379 (emphasis in original).

But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. *The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.* *"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

[I]f an applicant for the writ knows that he is dealing with an uneducated, uninformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property -- however unwarranted -- may go unchallenged, and the applicant may feel that he can act with impunity.

The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain *a recovery bond*, even if they know of the possibility. *Appellant Fuentes says that in her case she was never told*

that she could recover the stove and stereo and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather than holding them for three days.

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, *one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois*, 405 U.S. 645, 656.

[T]he aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an opportunity to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. *And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.* Indeed, in the civil no less than the criminal area, "courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393.

***F/V American Eagle v. State*,** 620 P.2d 657 (Alaska, 1980) the Supreme Court of Alaska: "*The seizure was pursuant to AS 16.05.190-.195...[P]rior to the state's filing of a formal civil complaint for forfeiture...the owners negotiated the release of the vessel and its gear to local fishing by entering into a voluntary stipulation of a bond with the state...*The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *Etheredge v. Bradley*, 502 P.2d 146 (Alaska 1972). *Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). *However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton*, 538 F.2d 27 (2d Cir. 1976).

Although civil in form, forfeiture actions are basically criminal in nature. Graybill v. State, 545 P.2d 629, 631 (Alaska 1976). As a general rule, *forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government. One Cocktail Glass v. State*, 565 P.2d 1265, 1268-69 (Alaska 1977)."

Gerstein v. Pugh, 420 U.S. 103 (1975) and ***Albrecht v. U.S***., 273 U.S. 1, 8 (1927): "As the affidavits on which the warrant issued had not been properly verified, the arrest was in violation of the clause in the Fourth Amendment, which declares that 'no warrants shall issue but upon probable cause, supported by oath or affirmation.' See Ex parte Burford, 3 Cranch, 448, 453; United States v. Michalski (D. C.) 265 F. 839. But it does not follow that, because the arrest was illegal, the information was or became void. The information was filed by leave of court. Despite some practice and statements to the contrary, it may be accepted as settled that leave must be obtained, and that, before granting leave, the court must, in some way, satisfy itself that there is probable cause for the prosecution. This is done sometimes by a verification of the information, and frequently by annexing affidavits thereto. But these are not the only means by which a court may become satisfied that probable cause for the prosecution exists. *The United States attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office, and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information.* See Weeks v. United States (C. C. A.) 216 F. 292, 302, L. R. A. 1918B, 651, Ann. Cas. 1917C, 524.

The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Compare Ex parte Bain, 121 U.S. 1, 7 S. Ct. 781. But a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made. *Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance.* That a defendant may be brought before the court by a summons, without an arrest, is shown by the practice in prosecutions against corporations which are necessarily commenced by a summons. Here, the court had jurisdiction of the subject-matter; and the persons named as defendants were within its territorial jurisdiction. The judgment assailed would clearly have been good, if the objection had not been taken until after the verdict."

Giglio v. United States, 405 U.S. 150 (1972)Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. *Held:* Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled, and constitutes a violation of due process, requiring a new trial. P P. 153-155. *Reversed and remanded.*

Giles v. Maryland, 386 U.S. 66, 17L. Ed. 2d 737, 87 S. Ct. 793 (1967): "The Court reiterated 'the principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicate in any concept of ordered liberty…"

Goldberg v. Kelly, 397 U.S. 254 (1970) the U.S. Supreme Court held: "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). *The hearing must be "at a meaningful time and in a meaningful manner... and in an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments in evidence.* Often, that basic justice right will require an attorney. Since in almost every setting, where important decisions turn on a question of fact, *due process requires an opportunity to confront and cross-examine adverse witnesses*." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient *have timely and adequate notice detailing the reasons for a [397 U.S. 254, 268] proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.* E. g., *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93 -94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103 -104 (1963). What we said in [397 U.S. 254, 270] *Greene v. McElroy*, 360 U.S. 474, 496 -497 (1959), is particularly pertinent here: "Certain principles have remained relatively immutable in our jurisprudence. *One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, *it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment ... This Court has been zealous to protect these rights from erosion.* It has spoken out not only in criminal cases, ... but also in all types of cases where administrative ... actions were under scrutiny."

Goss v. Lopez, 419 U.S. 565 (1975) the U.S. Supreme Court held: "Appellee Ohio public high school students, who had been suspended from school for misconduct for up to 10 days without a hearing, brought a class action against appellant school officials seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order enjoining the officials to remove the references to the suspensions from the

students' records. A three-judge District Court declared that appellees were denied due process of law in violation of the Fourteenth Amendment because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," *and that the statute and implementing regulations were unconstitutional,* and granted the requested injunction. Held:

1. Students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment. Pp. 572-576.

A 10-day suspension from school is not de minimis and may not be imposed in complete disregard of the Due Process [419 U.S. 565, 566] Clause. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary. Pp. 575-576.

Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but *if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as practicable.* Pp. 577-584. 372 F. Supp. 1279, affirmed.

Mullane v. Central Hanover Trust Co., 339 U.S. 306 [419 U.S. 565, 579] (1950), a case often invoked by later opinions, said that:

"[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id., at 313. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), *a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." Mullane v. Central Hanover Trust Co.*, supra, at 314. See also Armstrong v. Manzo, 380 U.S. 545, 550 (1965); *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 -169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

"Parties whose rights are to be affected are entitled to be heard; and *in order that they may enjoy that right they must first be notified.* Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." U.S. Supreme Court ***Baldwin v. Hale***, 68 U.S. 223 (1863).

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments [419 U.S. 565, 584] about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. *Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.* Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is Affirmed." "In its judgment, the court stated that the statute is unconstitutional in that it provides "for suspension . . . without first affording the student due process of law." (Emphasis supplied.) However, the language of the judgment must be read in light of the language in the opinion which expressly contemplates that *under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly."*

***Gustafson v. State*,** 854 P.2d 751, (Ak.,1993) in the Court of Appeals of Alaska: "Prosecutors and police officers applying for a warrant owe a duty of candor to the court; they may neither attempt to mislead the magistrate nor recklessly misrepresent facts material to the magistrate's decision to issue the warrant."

Hammond v. State, 442 P2d 39 (Ak 1968) Op. No 483: "The Supreme Court may consider questions raised for the first time on appeal if necessary to effect substantial justice or prevent the denial of fundamental rights in both criminal and civil cases."

Holloway v. Arkansas, 435 U.S. 475 (1978): "[I]n a case of joint representation of conflicting interests, the evil -- it bears repeating -- is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify

from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but, even with a record of the sentencing hearing available, it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible."

In re Kenneth H. (2000) 80 Cal.App.4th 143 , 95 Cal.Rptr.2d 5: "This appeal presents the question whether a prosecutor can withdraw from a plea agreement before it is submitted to, and approved by, the trial court. Under the circumstances of this case, we conclude that the prosecution could not renege on its plea agreement. As we shall explain, the need for public confidence in the integrity of the prosecutor's office requires the prosecution to abide by its promise if the accused has relied detrimentally upon the agreement. Nevertheless, because a plea agreement requires judicial approval, the trial court is not bound by it.

The question "whether a prosecutor can withdraw from a plea bargain before the bargain is submitted for court approval" recently was addressed in People v. Rhoden (1999) 75 Cal.App.4th 1346, 1351-1352 (Rhoden).) Noting that the question "appears to be an issue of first impression in California courts," Rhoden reviewed cases from other jurisdictions, as well as secondary authority (id. at pp. 1352-1355), and concluded "a prosecutor may withdraw from a plea bargain before a defendant pleads guilty or otherwise detrimentally relies on that bargain." (Id. at p. 1354, italics added.) "`Absent detrimental reliance on the bargain, the defendant has an adequate remedy by being restored to the position he occupied before he entered into the agreement.'" (Id. at p. 1356, quoting State v. Beckes (1980) 100 Wis.2d 1, 7 [300 N.W.2d 871, 874].)

The fact that the court is not bound by a plea agreement entered into by the prosecutor and the accused, and the fact that a plea agreement made by the parties before it is submitted for court approval is akin to an executory contract which does not bind the accused, do not undermine the principle that the prosecutor should be bound by the agreement if the accused has relied detrimentally upon it. The integrity of the office of the prosecutor is implicated because a "`pledge of public faith'" occurs when the prosecution enters into an agreement with an accused. (Butler v. State (1969) 228 So.2d 421, 424.) A court's subsequent approval or disapproval of the plea agreement does not detract from the prosecutorial obligation to uphold "our historical ideals of fair play and the very majesty of our government . . . ." (Id. at p. 425.) The "failure of the [prosecutor] to fulfill [his] promise . . . affects the fairness, integrity, and public reputation of judicial proceedings." (U.S. v. Goldfaden (5th Cir. 1992) 959 F.2d 1324, 1328.)

"'A defendant relies upon a [prosecutor's] plea offer by taking some substantial step or accepting serious risk of an adverse result following acceptance of the plea offer. [Citation.] Detrimental reliance may be demonstrated where the defendant performed

some part of the bargain. [Citation.]. . . .'" (Rhoden, supra, 75 Cal.App.4th at p. 1355, quoting Reed v. Becka (1999) 333 S.C. 676 [511 S.E.2d 396, 403].)

Johnson v. Zerbst, 304 U.S. 458 (1938), the U.S. Supreme Court held: "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951), at 171-172 U.S. Supreme Court, Justice Frankfurter, observed: "Secrecy is not congenial to truth-seeking ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it.* Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done."

Jones v. Barnes, 463 U.S. 745, 751 (1983) & ***Brookhart v. Janis,*** 384 U.S. 1, 3 (1966) ruled it is the defendant, not the attorney, who is captain of the ship: "Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken is correct; rather, the question is whether [the defendant] approved the course."… "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction… And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for individual which is the lifeblood of the law.'" (Quoting *People v. Malkin*, 250 N. Y. I85, 350-51 (1970) Brennan, J. concurring).

Kastigar* v. *United States (1972) 406 US 441, 453 ["(Use and derivative use immunity) prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

Keith v. State 612 P.2d 977 Alaska, 1980. (W)e unerringly refuse to admit evidence of prior criminal acts which has no purpose except to infer a propensity or disposition to commit crime. When such evidence reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk. (citations omitted) Reversed and Remanded for new trial.

Lewis v. State, 9 P.3d 1028, (Ak.,2000) in the Court of Appeals of Alaska: "Once defendant has shown that specific statements in affidavit supporting search warrant are false, together with statement of reasons in support of assertion of falsehood, burden then shifts to State to show that statements were not intentionally or recklessly made."

Mabry v. Johnson, 467 U.S. 504 (1984): Under the contractual doctrine of detrimental reliance or promissory estoppel, detrimental reliance on a promise is treated as if it were

consideration; the effect is to estop the offeror from revoking his proposal. This solves the problems that otherwise would occur if the offeror were permitted to revoke his offer after the offeree had partially performed or substantially changed his position to his detriment in reliance on the offer. In the plea bargaining context, the doctrine of detrimental reliance would fully vindicate the rights of the accused and cure any unfairness resulting from the government's ability to revoke its nonbinding unilateral offer. See Goodrich, 493 F.2d at 393.

An example of detrimental reliance might be a defendant's cooperation with law enforcement officials by testifying or providing valuable information, or by making restitution to victims. If the government has bargained for such actions, in return for which it would receive a guilty plea and recommend a light sentence or dismissal of other charges, and if the defendant has cooperated in reliance on the bargain, the circumstances may be such that the government should not thereafter be permitted to renege on the concessions it has offered to induce the defendant's actions. See United States v. Carrillo, 709 F.2d 35, 37 (9th Cir. 1983); State v. Brockman, 277 Md. 687, 357 A.2d 376 (1976); State v. Kuchenreuther, 218 N.W.2d 621 (Iowa 1974).

In some instances, the reliance may be less active. For example, a defendant might be induced by a plea proposal to neglect preparation for his defense; in such a case, the mere passage of time without trial preparation might constitute detrimental reliance. Moreover, a due process claim might be made out upon a showing that the government's conduct in the plea bargaining negotiations was motivated by bad faith or an attempt to gain undue advantage over the defendant. Cf. United States v. Goodwin, 457 U.S. 368 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

A defendant assisted by competent counsel is not without recourse in the face of what he considers a manipulative use of the plea bargaining system. It is a "simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his constitutional right to stand trial." Goodwin, 457 U.S. at 378. A defendant may always elect to exercise the right which the prosecutor wishes him to abandon -- he can go to trial.

Perhaps there could be cases in which manipulative offers and withdrawals of plea proposals would so prejudice the defendant's rights as to violate due process. In such instances, the courts are able to fashion appropriate remedies, perhaps including specific performance of a withdrawn proposal.

Mapp v. Ohio, 367 U.S. 643 (1961), the seminal U.S. Supreme Court held that, "[A]ll evidence obtained by searches & seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state. Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used

against the Federal Government. Only last year the court itself recognized that the purpose of the exclusionary rule "is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." If the fruits of an unconstitutional search had been inadmissible in both state & federal courts, this inducement to evasion would have been sooner eliminated. There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N. Y., at 21, 150 N. E., at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration - the imperative of judicial integrity." *Elkins v. U.S.*, 364 U.S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

***Marbury v. Madison*,** 5 U.S. 137 (1803) Mr. Chief Justice Marshall stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.

[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

Martin v. State, 517 P2d 1399 (Ak 1974) Op. No. 991: "Denial of a constitutional right affects substantial rights. Plain error requiring reversal will be deemed present unless the defect is harmless beyond a reasonable doubt."

Mathews v. Eldridge, 424 U.S. 319 (1976) the U.S. Supreme Court held: "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The *"right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."*

McLaughlin v. State, 818 P.2d 683, (Ak.,1991) in the Court of Appeals of Alaska: "Search warrant based on inaccurate or incomplete information may be invalidated only when misstatements or omissions that led to its issuance were either intentionally or recklessly made."

Memphis Light, Gas & Water Div. V. Craft, 436 U.S. 1 (1978) the U.S. Supreme Court held: "Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, *was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections"* to their bills. *Mullane v. Central Hanover Trust Co*., supra, at 314. *The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.*

Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law. The judgment of the Court of Appeals is affirmed."

Mesarosh v. U.S., 352 U.S. 1 (1956) the U.S. Supreme Court held: "[T]he dignity of the U.S. Government will not permit the conviction of any person on tainted testimony; this conviction is tainted; and justice requires that petitioners be accorded a new trial. Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. U.S.*, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' *Communist Party v. Subversive*

Activities Control Board, 351 U.S. 115, 124. The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

Monroe v. Pape, 365 U.S. 167 (1961): "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."

". . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down, and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons."

"The outrages committed upon loyal men there are under the forms of law."

"If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet, in its judicial tribunals, one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or, if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

"Plausibly and sophistically, it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment." "But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization, not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples."

Mooney v. Holohan, 294 U.S. 103 (1935) the U.S. Supreme Court held: "Requirement of 'due process' is not satisfied by mere notice and hearing if state, through prosecuting officers acting on state's behalf, has contrived conviction through pretense of trial which in truth is used as means of depriving defendant of liberty through deliberate deception of court and jury by presentation of testimony known to be perjured, and in such case state's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process."

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) the U.S. Supreme Court set the standard for notice: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality *is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections* ... The notice must be of such a nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance...But when notice is a person's due, process which is a mere gesture is not due process."

Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. *This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.*

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. *'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee*, 243 U.S. 90, 91."

Murphy* v. *Waterfront Commission of New York (1964) 378 US 52, 79 ["(W)e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him . . . (T)o implement this constitutional rule . . . the Federal

Government must be prohibited from making any such use of compelled testimony and its fruits."]; *Nelson* v. *Municipal Court* (1972) 28 Cal.App.3d 889.

Namet v. U.S., 373 U.S. 179 (1963), the Court recognized that even in the absence of an objection, trial error may require reversal of a criminal conviction on either of two theories: (1) that it reflected prosecutorial misconduct, or (2) that it was obviously prejudicial to the accused. Id., at 186-187.

Napue v. Illinois, 360 U.S. 264 (1959) U.S. Supreme Court held: "Conviction obtained through use of false evidence, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go through uncorrected when it appears. Principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

North Carolina v. Pearce, 395 U.S. 711 (1969), Held "The basic Fifth Amendment guarantee against double jeopardy, which is enforceable against the States by the Fourteenth Amendment, *Benton v. Maryland, post,* P. 784, is violated when punishment already exacted for an offense is not fully "credited" in imposing a new sentence for the same offense. P P. 717-719… The Court has held today, in *Benton v. Maryland, post,* P. 784, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction.] And it protects against multiple punishments for the same offense. … *Ex parte Lange,* 18 Wall. 163, 85 U. S. 168: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence." ". . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." We hold that the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence…"

Olmstead v. U.S., 277 U.S. 438, 485 (1928) Justice Brandeis, U.S. Supreme Court, "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, & that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner & to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason & truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, &, to the courts, that judicial integrity so necessary in the true administration of justice. The judgment of the Supreme Court of Ohio is reversed & the cause remanded for further proceedings not inconsistent with this opinion. Reversed & remanded."

People* v. *Campbell (1982) 137 Cal.App.3d 867, 873 ["An immunity must give protection equivalent to that which attends the refusal to testify about matters which incriminate."].

People v. Rhoden (1999) 75 Cal.App.4th 1346. Detrimental reliance may be shown where the defendant performed some part of the bargain.

***Perkins v. City of West Covina*,** 113 F.3d 1004 (9th Cir. 1999) the U.S. Court of Appeals, Ninth Circuit held: Due process notice "must be of such nature as reasonably to convey the required information." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). *The "notice" left at Perkins' home simply informed him that his home had been searched by the West Covina police department, with the date of the search warrant and the issuing judge and court, the date of the search, a list of the property seized, and the names and telephone numbers of several officers of the police department to contact for "more information." The issue is whether due process required more: that the police notify Perkins of the availability of a judicial remedy should he wish to claim his property, and provide some guidance for invoking that remedy.*

The Supreme Court faced a similar issue in *Memphis Light.* The plaintiffs, who were subject to multiple billing by the utility company, were unable to clear up the disputed charges despite visits to the company's offices, and their gas and electric service was terminated several times. The company had a procedure for the resolution of disputed bills, 436 U.S. at 6 n. 4, 98 S.Ct. at 1558 n. 4, but the notice of termination sent to the plaintiffs simply stated that payment was overdue and service would be cut off by a certain date; *"No mention was made of a procedure for the disposition of a disputed claim." Id. at 13, 98 S.Ct. at 1562. The Court held that the notice was insufficient to satisfy due process:*

[The] notification procedure, while adequate to apprise the [plaintiffs] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. Mullane v. Central Hanover Trust Co., supra, at 314 [70 S.Ct. at 657]. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.

Here, the notice left at Perkins' home did not mention the availability of any procedure for protesting the seizure of his property, let alone the existence of a formal judicial procedure for obtaining return... The notice was "skeletal," like the notice that the Memphis Light court found unconstitutional. Id. at 15 n. 15, 98 S.Ct. at 1563 n. 15.

The city charges Perkins with the responsibility for his own confusion. It cites his failure to persist and to unearth the proper remedy and the method of its invocation.

The "situation demands" written notice of how to retrieve the property. *See Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1357 (Alaska 1974) (due process requires that written notice to legally unsophisticated and indigent defendants be more substantial, detailed, and easily understood).* We find the written notice given by the West Covina Police Department was constitutionally inadequate.

[W]hen there is no opportunity for predeprivation notice or hearing, the necessity of adequate postdeprivation notice of the means of securing the return of property is at least as compelling.

The remaining issue is what notice was due in this case. To identify the specific dictates of due process, we must consider (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such an interest through the procedures used, and the value of additional safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976). The private interest in this case is in the possession and use of personal property, surely a significant interest. *The risk of erroneous deprivation, especially in the emergency situations often underlying search warrants, is substantial. By contrast, the administrative and fiscal burden of providing adequate written notice is slight.* The city already leaves a standard form of "notice" at the premises searched. The only burden involved is the formulation of constitutionally adequate wording by including the relevant information on the notice.

[T]he notice must inform the recipient 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.

Because *we find the notice given Perkins did not meet the requirements of due process*, we reverse the summary judgment in favor of the city and remand to the district court for the grant of summary judgment to Perkins on this issue, and for such further proceedings as may be necessary.

Powell v. Alabama, 287 U.S. 67 (1932) the United States Supreme Court held: "It never has been doubted by this court, or any other so far as we know, that *notice and hearing are preliminary steps essential to passing of an enforceable judgment,* and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law."

Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999). Counsel further testified that, when petitioner pled guilty, she did not believe he had the ability to force the State to honor the original plea agreement. Counsel testified she was unaware of the existence of Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999), when she represented petitioner. She stated, at the time she represented petitioner, she believed the only remedy would be to vacate the plea and proceed to trial. She testified that, had she been aware of Reed, she would have raised it to the solicitor and the plea judge. Did the PCR court err by finding defense counsel was not ineffective for failing to attempt to specifically enforce his plea agreement?

This exception is stated as: Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining. Reed, 333 S.C. at 688, 511 S.E.2d at 402; *see also* State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001)[2] (enforcement of an agreement not to prosecute is subject to two conditions: (1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on the promise). Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding.[3] Reed, 333 S.C. at 688, 511 S.E.2d at 402-403. For example, a defendant who provides beneficial information to law enforcement can be said to have relied to his detriment. *Id.* at 689, 511 S.E.2d at 403. The Reed court adopted the rule that the State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer.

The Court of Appeals properly adopted the detrimental reliance exception.[4] The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. Detrimental reliance may be

demonstrated where the defendant performed some part of the bargain; for example, where the defendant provides beneficial information to law enforcement.

See Reed, *supra* (defendant who provides beneficial information to law enforcement can be said to have relied to his detriment). Petitioner relied on the plea offer to his detriment by taking the substantial step of cooperating with law enforcement, *i.e.* by performing some part of the bargain, before the Solicitor withdrew the plea offer.[6] Accordingly, petitioner could have enforced the oral plea agreement. Petitioner claims counsel rendered ineffective assistance by not having his plea agreement enforced. To prove counsel ineffective when a guilty plea is challenged, petitioner must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered. Hill v. Lockhart, 474 U.S. 52 (1985); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). A defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

Because petitioner could have enforced the plea agreement under the detrimental reliance exception and counsel failed to take this action, counsel failed to render reasonably effective assistance. Accordingly, counsel was ineffective in failing to have the plea agreement enforced based on the detrimental reliance exception. *Cf.* Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (counsel's conduct fell below professional norms for not protecting Jordan's right to enforce the plea agreement, which had not been withdrawn, with the solicitor's office).

Further, counsel's defective performance prejudiced petitioner. Petitioner testified he felt as if he had to plead, even though the agreement had been withdrawn, because if he did not, then he would receive a life sentence if he went to trial. He stated he would not have pled had he realized he had a binding plea agreement. Accordingly, petitioner was prejudiced by counsel's failure to have the plea agreement enforced. REVERSED AND REMANDED.

Risher v. State 523 P.2d 421 Alaska (1974): Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and *must conscientiously protect his client's interest, undeflected by conflicting consideration.*

Smith v. State, 717 P.2d 402 (Alaska 1986) Court of Appeals: "*The fact that Smith was legally entitled to persist in his plea of innocence is, in our view, determinative of his claim of ineffective assistance of counsel.* Prior to his change of plea, Smith specifically asked his counsel if he was obligated to change his plea. Smith's question obviously related to his legal rights, not to his ethical duties. Smith's attorney replied that he considered Smith to be bound by the agreement. Both parties agree--and, indeed, the trial

court expressly found--that Smith proceeded to enter a plea of no contest in the belief that he was, in fact, obligated to do so.

We believe it self-evident that an indispensable component of the guarantee of effective assistance of counsel is the accused's right to be advised of basic procedural rights, particularly when the accused seeks such advice by specific inquiry. Without knowing what rights are provided under law, the accused may well be unable to understand available legal options and may consequently be incapable of making informed decisions. See, e.g., Arnold v. State, 685 P.2d 1261, 1267 (Alaska App.1984).

Smith's counsel may understandably have considered himself foreclosed as a matter of both personal integrity and professional ethics from giving Smith any advice that would encourage him to renege on the agreement. To the extent that this precluded Smith's counsel from fully advising his client of the options legally open to him, however, the concern of Smith's counsel with his own ethical and moral dilemma was squarely at odds with his duty to "conscientiously protect his client's interest, undeflected by conflicting considerations." *Risher v. State,* 523 P.2d at 424.

We are particularly troubled by the apparent failure of both Smith's counsel and counsel for the state to disclose the substance of the negotiated plea agreement to the trial court during Smith's change of plea hearing. Similarly disturbing is the failure of Smith's counsel to disclose to the court the fact that Smith had expressed qualms about following through with this agreement. Even in the absence of withdrawal by defense counsel, such disclosures would at least have enabled the trial court to inquire on the record into Smith's understanding of the agreement and to give appropriate advice concerning the extent to which the agreement limited Smith's procedural options”

Sniadach v. Family Finance Corp. 395 U.S. 337 (1969) the U.S. Supreme Court held: "Wisconsin's prejudgment garnishment of wages procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process... *in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.*

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. As stated by Congressman Reuss: *"The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."*

The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning [395 U.S. 337, 342] family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.
Apart from special situations, some of which are referred to in this Court's opinion, see ante, at 339, I think that *due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court.* See, e. g., *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152 -153 (1941); *U.S. v. Illinois Cent. R. Co.,* 291 U.S. 457, 463 (1934); *Londoner v. City & County of Denver*, 210 U.S. 373, 385 -386 (1908). *"The 'property' of which petitioner has been deprived is the use of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as de minimis, she must be accorded the usual requisites of procedural due process: notice and a prior hearing."*

State v. Beckes, 100 Wis.2d 1, 6,300 N.W.2d 871, 874 (Ct. App. 1980).The law is clear that the concept of fundamental fairness prohibits the government from breaching an agreement which induced a person to take action otherwise detrimental to himself or herself in reliance on the agreement. Beckes then goes on to state that without detrimental reliance on the agreement, the individual has an adequate remedy by being restored to the position that he or she occupied before entering into the agreement. Id. at 7, 300 N.W.2d at 874.

State v. Davenport, 510 P.2d 78, (Ak.,1973) in the Supreme Court of Alaska: "State & federal constitutional requirement that warrants issue only upon a showing of probable cause contains the implied mandate that the factual representations in the affidavit be truthful."

State v. F/V Baranof 677 P.2d 1245 (Alaska, 1984) the Supreme Court of Alaska held: "On May 9, 1981, officers of the Alaska State Division of Fish & Wildlife Protection seized the F/V Baranof in Dutch Harbor, Alaska under authority of a search and seizure warrant issued on May 7, 1981. On May 11, 1981, the State of Alaska filed a civil complaint *in rem* (the vessel itself being the only named defendant) in superior court for the forfeiture of the F/V Baranof pursuant to *AS 16.05.195*, alleging unlawful harvest, transportation, and possession of king crab in 1979 and 1980. On May 12, 1981, the State filed a motion for publication of notice to owners and other interested parties, which was granted on May 14, 1981. Negotiations for release of the vessel were commenced

immediately, and on May 27, 1981, the ship was released under a Special Release Agreement.

PROCEDURAL DUE PROCESS - The Baranof's final contention is that its due process rights under the United States and Alaska constitutions were violated. *It argues that the forfeiture statute under which the vessel was seized, AS 16.05.195, is constitutionally defective in that it does not provide a hearing either prior to or immediately after the seizure of property. Since we hold that the owners of the Baranof were in fact afforded procedural due process, we need not reach the question of the constitutionality of AS 16.05.195. See Jennings v. Mahoney,* 404 U.S. 25, 92 S.Ct. 180, 30 L.Ed.2d 146 (1971); *F/V American Eagle v. State,* 620 P.2d 657, 667 (Alaska 1980), *appeal dismissed,* 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284 (1982). Due process does not require notice or a hearing prior to seizure by government officials of property allegedly used in an illicit activity. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *American Eagle,* 620 P.2d at 666. However, *when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent. Stypmann v. City and County of San Francisco,* 557 F.2d 1338 (9th Cir.1977); *Lee v. Thorton,* 538 F.2d 27 (2d Cir.1976). *American Eagle,* 620 P.2d at 666-67. We believe the present case is analogous to *American Eagle,* 620 P.2d at 666-68, where we upheld the seizure of a king crab fishing vessel. As in *American Eagle,* the seizure of the Baranof was authorized by a judicially approved warrant issued upon probable cause pursuant to *Criminal Rule 37. Id.* at 667. The owners had "an immediate and unqualified right to contest the state's justification for the seizure under Criminal Rule 37(c)." *Id. "Rather than avail themselves of this opportunity, the owners negotiated the release of the vessel...." Id.* Finally, in the present case, the State filed a civil complaint on the next working day following the seizure, and the owners were promptly notified."

State v. Jones 759 P.2d 558 Alaska App.,1988: "Jones also filed a direct appeal challenging his conviction & sentence on unrelated grounds. The appeal was stayed pending resolution of the post-conviction procedure." … The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.... [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. Of course, a mistake made out of ignorance rather than from strategy cannot later be validated as being tactically defensible. *See*

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2588-89, 91 L.Ed.2d 305 (1986); *Arnold v. State,* 685 P.2d 1261, 1265-67 (Alaska App.1984).

State v. Malkin, 722 P.2d 943 (Ak. 1986) in the Supreme Court of Alaska: "Search warrant must be invalidated, & evidence seized pursuant thereto & must be suppressed, whenever supporting affidavit contains intentional misstatements, even though remainder of affidavit provides probable cause for warrant."

State v. Scott, 602 N.W.2d 296 (Wis. Ct. App. 1999): Counsel ineffective for failing to move to compel the state to comply with pretrial agreement and failing to advise the defendant of this option. See also *Smith v. State*, supra.

State v. Sexton, 709 A.2d 288 (N.J. Super. CT. App. Div. 1998): "Court found both prosecutorial misconduct and ineffective assistance which created the 'real potential for an unjust result'."

Strickland v. Washington, 466 U.S. 668 (1984) *Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense*. See, e. g., *Geders v. United States*, 425 U.S. 80 (1976) Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." … Counsel's function is to assist the defendant, and hence *counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.* From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties *to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.* In short, *inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions,* just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States v. Decoster*, supra, at 372-373, 624 F.2d.

Stolt-Nielsen, 442 F.3d 177: "Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation, and immunity agreements—to the extent the agreements require defendants to sacrifice constitutional rights. *See, e.g., Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *United States v. Hodge,* 412 F.3d 479, 485 (3d Cir.2005) ("The government must adhere strictly to the terms of the bargains it strikes with defendants. Because defendants entering pleas forfeit a number of constitutional rights, courts are compelled to scrutinize closely the promise made by the government in order to determine whether it has been performed." (citation and internal quotation marks omitted)). … Because a party surrenders valuable constitutional rights when entering into an immunity agreement, a court must carefully scrutinize the agreement to determine whether the government has

performed; in doing so, court must strictly construe the agreement against the government.

Stypmann v. City and County of San Francisco, 557 F.2d 1338 (9th Cir. 1977), "Loss of the use and enjoyment of a car deprives the owner of a property interest that may be taken from him only in accordance with the Due Process Clause. … Seizure of property without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause. … Nor is the statute saved by the San Francisco ordinance. A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. Lee v. Thornton, supra, 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances,22 held that due process required action on a petition for rescission or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours."

Surina v. Buckalew, 629 P.2d 969 (Alaska 1981): "Use and derivative use immunity prohibits only the use of the compelled testimony and its fruits against the defendant; thus, the witness may still be prosecuted for crimes referred to in the compelled testimony, as long as the subsequent prosecution is based entirely on independently obtained evidence. … For we are of the view that, as a matter of both federal and state due process, a prosecutor's promise of immunity made in return for a surrender of the privilege against self-incrimination is binding on the prosecution. … Modern notions of due process have belied the notion that a prosecutor may invoke his discretion to evade promises made to a defendant or potential defendant as part of an agreement or bargain. In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). … Even if this principle should eventually prove not to be the rule under federal law, we hold it to be the rule as a matter of due process under the Alaska Constitution art. I, s 7. That being the case, a defendant or witness does have more to rely upon than merely the "grace or favor" of the prosecutor; our courts stand ready to recognize and give effect to a prosecutorial promise of immunity made part of an agreement where proven, whether authorized by statute or not, and to allow the defendant some redress for prosecutorial reneging."

U.S. v. Bernard 625 F.2d 854, 857 (9th Cir. 1980) In United States v. Davis, 9 Cir., 1971, 439 F.2d 1105, we held that refusal to give special instructions on the testimony of an accomplice when that testimony is important to the case can be prejudicial error.

U.S. v. Cantu, 185 F.3d 298 (5th Cir. 1999): "Due process concerns preclude the government from unilaterally nullifying the agreements where, as here, the government believes the defendant is in breach. See id. Prior to prosecuting the defendant, the government must prove to the court by a preponderance of the evidence that the defendant breached the agreement in a manner sufficiently material to warrant recission."

U.S. v. Castaneda, 162 F.3d 832 C.A.5.Tex, 1998: "When the government believes that a defendant has breached the terms of a nonprosecution agreement and wishes to be relieved of performing its part of the bargain--here, refraining from prosecuting the defendant--due process prevents the government from making this determination and nullifying the agreement unilaterally. Instead, the government must prove to the court by a preponderance[21] of the evidence that (1) the defendant breached the agreement, and (2) the breach is sufficiently material to warrant rescission."

***U.S. v. Cronic*,** 466 U.S. 648 (1984): The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "*is best discovered by powerful statements on both sides of the question.*" This dictum describes the unique strength of our system of criminal justice. *"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York*, 422 U.S. 853, 862 (1975).Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses [466 U.S. 648, 657] its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: *"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), cert. denied sub nom. *Sielaff v. Williams*, 423 U.S. 876 (1975). No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "`would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing *Smith v. Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

"More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process that has been constitutionalized in the Sixth and Fourteenth Amendments." 422 U.S., at 857. See also *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (BRENNAN, J., dissenting) ("To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court"); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, *an indispensable element of the effective performance of [defense counsel's] responsibilities*

is the ability to act independently of the Government and to oppose it in adversary litigation").

U.S. v. Frady, 456 U.S. 152 (1982): "Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice. By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so "plain" the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. The Rule thus reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed. … The Court declares that the plain-error Rule, Fed. Rule Crim. Proc. 52(b), was intended for use only on direct appeal and is "out of place" when the prisoner is collaterally attacking his conviction. Ante, at 164. But the power to notice plain error at any stage of a criminal proceeding is fundamental to the courts' obligation to correct substantial miscarriages of justice. That obligation qualifies what the Court characterizes as our entitlement to presume that the defendant has been fairly and finally convicted. Ibid.

The Court correctly points out, ante, at 163, n. 13, that Rule 52(b) was merely a restatement of existing law. The role of the plain-error doctrine has always been to empower courts, especially in criminal cases, to correct errors that seriously affect the "fairness, integrity or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160 (1936). Significantly, although some of the Rules of Criminal Procedure appear under headings such as "Preliminary Proceedings," "Trial," or "Appeal," Rule 52(b) is one of the "General Provisions" of the Rules, applicable to all stages of all criminal proceedings in federal courts. See Fed. Rule Crim. Proc. 1.

The Rule has been relied upon to correct errors that may have seriously prejudiced a possibly innocent defendant, see, e. g., United States v. Mann, 557 F.2d 1211, 1215-1216 (CA5 1977), and errors that severely undermine the integrity of the judicial proceeding, see e. g., United States v. Vaughan, 443 F.2d 92, 94-95 (CA2 1971). The plain-error Rule mitigates the harsh impact of the adversarial system, under which the defendant is generally bound by the conduct of his lawyer, by providing relief in exceptional cases despite the lawyer's failure to object at trial. The Rule thus "has a salutary effect on the prosecution's conduct of the trial. If the intelligent prosecutor wishes to guard against the possibility of reversible error, he cannot rely on the incompetence or inexperience of his adversary but, on the contrary, must often intervene to protect the defendant from the mistakes of counsel." 8B J. Moore, Moore's Federal Practice 52.02 2. (1981).

I certainly agree with the Court of Appeals that '[a] clear miscarriage of justice has occurred if [respondent] was guilty of manslaughter and is now serving the penalty for murder.' 204 U.S. App. D. C. 234, 240, 636 F.2d 506, 512 (1980)."

U.S. v. Garcia, 519 F.2d 1343 (9th Circuit 1975): "Accused individuals who enter into plea bargaining agreements surrender several valuable Constitutional rights. See Santobello v. New York, 404 U.S. 257, 264, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (Douglas, J., concurring). Similarly, by entering into the deferred prosecution agreement, Garcia waived his valuable right to a speedy trial. In Santobello, the Supreme Court held that when a prosecutor makes a promise which serves as consideration or inducement for a guilty plea, the promise must be fulfilled. 404 U.S. at 262, 92 S.Ct. 495. More broadly, our court has written that ". . . when the prosecution makes a 'deal' within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance." United States v. Goodrich, 493 F.2d 390, 393 (9th Cir. 1974). Here, these principles are fully applicable to the deferred prosecution agreement between the Government and Garcia. The indictment upon which Garcia's convictions are based was obtained in violation of the express terms of the agreement and is therefore invalid. The upholding of the Government's integrity allows for no other conclusion."

U.S.* v. *Goldfaden (5th Cir. 1992) 959 F.2d 1324, 1328.The fact that the court is not bound by a plea agreement entered into by the prosecutor and the accused, and the fact that a plea agreement made by the parties before it is submitted for court approval is akin to an executory contract which does not bind the accused, does not undermine the principle that the prosecutor should be bound by the agreement if the accused has relied detrimentally upon it. The integrity of the office of the prosecutor is implicated because a "'pledge of public faith'" occurs when the prosecution enters into an agreement with an accused. (Butler v. State (1969) 228 So.2d 421, 424.) A court's subsequent approval or disapproval of the plea agreement does not detract from the prosecutorial obligation to uphold "our historical ideals of fair play and the very majesty of our government . . . ." (*Id*. at p. 425.) The "failure of the [prosecutor] to fulfill [his] promise . . . affects the fairness, integrity, and public reputation of judicial proceedings." (*U.S.* v. *Goldfaden* (5th Cir. 1992) 959 F.2d 1324, 1328.)

***U.S. v. Goodrich*,** 493 F.2d 390, 393 (9th Cir. 1974) (emphasis added) "when the prosecution makes a 'deal' within its authority and the defendant relies on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance."

***U.S. v. Hall*,** 521 F.2d 406 (9th Cir. 06/18/1975) the U.S. 9th Circuit Court of Appeals held: "Indicted for smuggling ... Hall waived his right to a trial by jury and proceeded to trial before the district judge. Hall was convicted and sentenced to imprisonment for one year. The indictment against Hall alleged that: Merchandise introduced into the U.S. in violation of this section, or the value thereof, . . . shall be forfeited to the U.S. …Our consideration of the whole record leads us to the conclusion that *the court's actions, taken together, deprived Hall of the mandatory notice to which he was entitled and the concomitant opportunity to defend against a forfeiture. The judgment of conviction is vacated, and, upon remand, the indictment will be dismissed."*

U.S. v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984): "Where the waiver of a fundamental constitutional right is at issue, the burden is heavy one because this court must afford the defendant 'every reasonable presumption against waiver.'"

***U.S. v. Hunt*,** 496 F.2d 888 (5th 1974) in the 5th Circuit Court of Appeals: "If affiant intentionally makes false statements to mislead judicial officer on application for search warrant, falsehoods render warrant invalid whether or not statements are material to establishing probable cause."

U.S. v. James Daniel Good Real Property 510 U.S. 43 (1993) the U.S. Supreme Court held: "The court was unanimous in holding that the seizure of Good's property, without prior notice and a hearing, violated the Due Process Clause. The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.' Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property. … The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the individual. *Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property* ..." *Fuentes* v. *Shevin*, 407 U. S., at 80-81.
We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in "'extraordinary situations where some valid governmental interest is at stake *that justifies postponing the hearing until after the event*.'" *Id.*, at 82 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971)); *U.S.* v. *$8,850*, 461 U. S., at 562, n. 12. … "[F]airness can rarely be obtained by secret, one sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it." Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring) (footnotes omitted).

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. *That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding.* See *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (opinion of Scalia, J.) (slip op., at 19, n. 9) "[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit". … Requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden. *A claimant is already entitled to an adversary hearing before a final judgment of forfeiture. Finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock*

proposition: fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case.

U.S. v. Lyons, 670 F.2d 77 (1982): "Any agreement made by Government during negotiations for immunity must be scrupulously performed and kept."

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

U.S. v. Price, 383 U.S. 787 (1966): "We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purposes of intimidating and coercing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to on the part of those who are oppressed. Sir, the time will come when retaliation will be resorted to unless the Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that, by plain and stringent laws, the United States should interpose and preserve the peace and quiet of the community." … "It is, in my judgment, incumbent upon Congress to pass the most stringent legislation on this subject. I believe that we have a perfect right under the Constitution of the United States, not only under these three amendments, but under the general scope and features and spirit of the Constitution itself, to go into any of these States for the purpose of protecting and securing liberty. I admit that, when you go there for the purpose of restraining liberty, you can go only under delegated powers in express terms; but to go into the States for the purpose of securing and protecting the liberty of the citizen and the rights and immunities of American citizenship is in accordance with the spirit and whole object of the formation of the Union and the national Government." … But, sir, individuals may prevent the exercise of the

right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens, by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the fifteenth amendment."

U.S. v. Salemme, 91 F.Supp.2d 141 D. Mass., 1999: "If the government informally promises that statements will not be used against a defendant, it is also precluded from using statements to uncover other incriminating evidence, unless the agreement expressly provides otherwise.

U.S. v Seifuddin, 820 F.2d 1074, 1076 (9th Cir. 1987) the U.S. 9th Circuit Court of Appeals held: "'Criminal' forfeitures are subject to all the constitutional and statutory procedural safeguards available under criminal law. The forfeiture case and the criminal case are tried together. *The forfeiture counts must be included in the indictment of the defendant,* which means the grand jury must find a basis for the forfeiture. At trial, the burden of proof is beyond a reasonable doubt."

U.S. v. Tarrant, 730 F.Supp. 30: "When government believes that defendant has breached terms of pretrial agreement and wishes to rescind its part of bargain, Government may not make determination unilaterally, but must prove to court by preponderance of evidence that defendant materially breached agreement.

Waiste v. State, 10 P.3d 1141 (Alaska 2000) the Supreme Court of Alaska held in an ex parte seizure of a fishing boat subject to forfeiture during a criminal prosecution that: *"This court's dicta, however, and the persuasive weight of federal law, both suggest that the Due Process Clause of the Alaska Constitution should require no more than a prompt postseizure hearing... Waiste and the State agree that the Due Process Clause of the Alaska Constitution requires a prompt postseizure hearing upon the seizure of a fishing boat potentially subject to forfeiture... The State argues that a prompt postseizure hearing is the only process due, both under general constitutional principles and under this court's precedents on fishing-boat seizures,* whose comments were not dicta...But *given the conceded requirement of a prompt postseizure hearing on the same issues, in the same forum, 'within days, if not hours' the only burden that the State avoids by proceeding ex parte is the burden of having to show its justification for a seizure a few days or hours earlier... The State does not discuss the private interest at stake, and Waiste is plainly right that it is significant: even a few days' lost fishing during a three-*

week salmon run is serious, and due process mandates heightened solicitude when someone is deprived of her or his primary source of income...

As Justice Frankfurter observed,'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss *notice of the case against him and opportunity to meet it."* As the Good Court noted, moreover, the protection of an adversary hearing 'is of particular importance [in forfeiture cases], where the Government has a direct pecuniary interest in the outcome.' An ensemble of procedural rules bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors. *The rules include the need to show probable cause to think a vessel forfeitable in an ex parte hearing before a neutral magistrate, to allow release of the vessel on bond, and to afford a prompt postseizure hearing.* That ensemble is undeniably less effective than a prior, adversarial hearing in protecting fishers from the significant harm of the erronious seizure and detention of a fishing boat... *That the State was not seizing the boat only for the section .190 criminal proceeding is apparent from the record. The search warrant affidavit envices the State's dual purpose in seizing the boat, citing both section .190 and section .195 as justification for the seizure... Waiste argues in his opening brief that the forfeiture statute is facially unconstitutional because it lacks standards for forfeiture actions, but - as the State noted in its brief, and Waiste did not contest in his reply - he waived this claim by failing to raise it below.*

Wayrynen v. Class, 586 N.W.2d 499 (S.D. 1998) Counsel ineffective for identifying client to police and having her confess to 15 arson charges without any prior attempt to negotiate a deal with the state. …The Court held that counsel was ineffective for failing to seek a limit on the number of charges filed against the defendant prior to identifying her to the state's attorney and failing to advise the defendant that they should attempt to negotiate prior to identifying her to police and having her confess. Counsel left her only with the alternative of doing nothing or being charged with 15 crimes. Prejudice was established because the state's attorney conceded that, based on the evidence the state had prior to the confession, she would have entertained a plea to limit the number of charges prior to the identification of the defendant. Thus, there is a reasonable probability that the defendant would not have plead guilty to 15 charges and faced 140 years confinement."

Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976) the U.S. 9th Circuit Court of Appeals held: *"Where the property was forfeited without constitutionally adequate notice to the claimant, the courts must provide relief, either by vacating the default judgment, or by allowing a collateral suit... Once seizure is accomplished, the justifications for postponement enumerated in Calero-Toledo evaporate, see 416 U.S. at 679-680, and due process requires that notice and opportunity for some form of hearing be accorded swiftly, and, in any event, prior to forfeiture."*