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IN THE DISTRICT COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA Plaintiff, vs. David HAEG, Defendant.	Case No.: 4MC-S04-024 Cr.

Appellate Court Case #A-09455.

MOTION FOR RETURN OF PROPERTY & TO SUPPRESS EVIDENCE

COMES NOW Defendant, DAVID HAEG, in the above referenced case, and hereby files the following motion for return of property & to suppress evidence in accordance with Alaska Rules of Criminal Procedure Rule No. 37(c):

"A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized."

1. Trooper Gibbens committed intentionally misleading perjury on all search warrant affidavits to obtain all search warrants - stating on the search warrant affidavits that the suspicious sites he was investigating were in Unit 19C - (*See Exhibit(s)* #1, #5, #8). Yet according to Trooper Gibbens own GPS

coordinates & map all of the suspicious sites are located in Unit 19D - the same unit in which the Wolf Control Program was being conducted - & not in Unit 19C as Trooper Gibbens states and in which he states my lodge is located (*See Exhibit(s) #2 & #3*). Further evidence of Trooper Gibbens malicious intention to deceive the magistrate is proved by the fact that during two separate interviews that he conducted & taped he was told that the suspicious sites were in Unit 19D & not in Unit 19C (*See Exhibit #4*). After being told this Trooper Gibbens, while under oath & before a jury, again stated sites he investigated were in Unit 19C. (*See Exhibit #4*). This proves that Trooper Gibbens intentionally misled not only the magistrate issuing the search warrants but also tried to mislead the jury & magistrate/judge deciding guilt. The Wolf Control Program took place in Unit 19D & even Unit 19A is closer to the sites that Trooper Gibbens had on his map and GPS coordinates for than Unit 19C where my lodge is located. There is no doubt that Gibbens, by stating under penalty of perjury that the sites he found were in Unit 19C, the same unit as my lodge, was more likely to receive search warrants for my lodge than if he stated they were not in the same GMU as my lodge - not even taking into account that there was even a third GMU that was closer to the sites or that the sites were in the same GMU as the Wolf Control Program.

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

See *Stavenjord v. State*, 2003 WL1589519, (Ak.,2003). "In evaluating a defendant's claim that an application for a search warrant included material misstatements or omissions, a non-material omission or misstatement, one on which probable cause does not hinge, requires suppression only when the court finds a deliberate attempt to mislead the magistrate."

See *U.S. v. Hunt*, 496 F.2d 888, C.A.5.Tex.,1974. 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.

See *Lewis v. State*, 9 P.3d 1028. (Ak.,2000). "Once defendant has shown that specific statements in affidavit supporting search warrant are false, together with statement of reasons in support of assertion of falsehood, burden then shifts to State to show that statements were not intentionally or recklessly made." "If a false statement in affidavit in support of a search warrant was intentionally made, then the search warrant is invalidated." "A non-material omission or misstatement in an affidavit in support of search warrant-one on which probable cause does not hinge-requires suppression only when the court finds a deliberate attempt to mislead the magistrate."

See *Gustafson v. State*, 854 P.2d 751, (Ak.,1993). "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."

See *State v. Davenport*, 510 P.2d 78, (Ak.,1973). "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."

See *People v. Reagan*, 235 N.W.2d 581, 587 (Mich. S.Ct. 1975). "The gravamen of our holding is that, law enforcement processes are committed to civilized courses of action. When mistakes of significant proportion are made, it is better that the consequences be suffered than that civilized standards be sacrificed." See also *Mapp v. Ohio*, 367 U.S. 643 (1961).)

2. In addition the State failed to give notice & an unconditioned opportunity to contest the State's reasons for seizing the property within days, if not hours - & thus violated

my rights to due process. The Due Process Clause of the Fifth Amendment of the United States Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

See *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980) "[W]hen the seized property is used by its owner in earning a livelihood, notice & an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent." – As a general rule, forfeitures are disfavored by the law, & thus forfeiture statutes should be strictly construed against the government. *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 543, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *State v. F/V Baranof*, 677 P.2d 1245; *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton*, 538 F.2d 27 (2d Cir.1976).

See *Waiste v. State*, 10 P.3d 1141 (Alaska 2000). As the U.S. Supreme Court held "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him & opportunity to meet it." As the Good Court noted, moreover, the protection of an adversary hearing "is of particular importance [in forfeiture cases], where the Government has a direct pecuniary interest in the outcome." Waiste also citing *Fuentes v. Shevin*, 407 U.S. 67, 91, 93, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

See *Harmelin v. Michigan*, 501 U.S. 957 (1991), U.S. Supreme Court Justice Scalia stated "[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit".

See *U.S. v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (1992) "We continue to be enormously troubled by the government's increasing & virtually unchecked use of the civil forfeiture statutes & the disregard for due process that is buried in those statutes."

See *U.S. v. One Parcel of Property*, 964 F.2d 814, 818 (1992) "[W]e are troubled by the government's view that any property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."

See *Etheredge v. Bradley,* 502 P.2d 146, 153 (Alaska 1972) noting lack of "any mechanism for review of the necessity and justification for the seizure by a responsible government official". The Supreme Court stated "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice & a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principals of due process." - There the Supreme Court was concerned with the hardship created by a procedure which deprived the debtor of his means of existence. - "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, . . . 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

In *Goldberg v. Kelly*, 397 U.S. 254 (1970) the Court held that the . . . hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed [forfeiture]"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decision maker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) Justice Stewart, in writing for the U.S. Supreme Court 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.' . . ."

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. The Supreme Court noted that the relative weight of property interests interfered with by prejudgment remedies is relevant to the form of notice and hearing. - *Sniadach v. Family Fin.Corp*. 395 U.S. 337, 342, 89 S.Ct. 1820.

See *U.S. v. James Daniel Good*, 510 U.S. 43 (1993). Finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, & 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. Justice Kennedy wrote in the majority opinion: "[Protection provided by an adversary hearing] is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target: "We must significantly increase production to reach our budget target." Interestingly, in the previous bulletin Acting Deputy Attorney Edward Dennis, Jr. advised all U.S. Attorneys that they "will be expected to divert personnel from other activities," including the Criminal Division if necessary, in order to fully prepare all forfeiture cases for judicial action. Obviously, the risk of erroneous deprivation is great in a hearing at which only the plaintiff seeking financial gain is present.

Moreover, the availability of a procedure by which the defendant may secure the release of his property by posting his own bond, *AS 09.40.110*, does not cure the defect of a summary deprivation. The defendant would be deprived of security necessary to post bond.

In the U.S. Supreme Court in *Connally v. General Construction Co*., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 held "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning & differ as its application violates the first essential of due process law."

2005 - 2006 Alaska Rules of Civil Procedure, Civil Rule #89 governs due process notice in forfeiture proceedings, "(m)(4) *The Government as Plaintiff.* The court may issue an ex parte writ of attachment when the motion for such writ is made by a government agency (state or federal), provided the government-plaintiff demonstrates that such ex parte writ is necessary to protect an important governmental or general public interest. (n) Execution, Duration, and Vacation of Ex Parte Writs of Attachment. When the peace officer executes an ex parte writ of attachment, the peace officer shall at the same time serve on the defendant copies of the plaintiff's affidavit, motion and undertaking, and the order. **No ex parte attachment shall be valid for more than seven (7) business days (exclusive of Saturdays,**

Sundays, and legal holidays), unless the defendant waives the right to a pre-attachment hearing in accordance with subsection (m) (3) of this rule [*Defendant's Waiver of Right to Pre-Attachment Hearing.* The court may issue an ex parte writ of attachment if the plaintiff establishes the probable validity of the plaintiff's claim for relief in the main action, and if the plaintiff accompanies the affidavit and motion with a document signed by the defendant voluntarily, knowingly and intelligently waiving the constitutional right to a hearing before prejudgment attachment of the property.], or unless the defendant consents in writing to an additional extension of time for the duration of the ex parte attachment, or the attachment is extended, after hearing, pursuant to section (e) of this rule. **The defendant may at any time after service of the writ request an emergency hearing at which the defendant may refute the special need for the attachment and validity of the plaintiff's claim for relief in the main action."**

I was never provided any notice and I was never provided a hearing in the over 2 years since my plane & other equipment, which is absolutely vital to my only means for providing for my family, was seized. Seargent Glenn Godfrey of the Alaska State Troopers in his official report even documented that I asked him "When can I get my plane back? I have clients coming in tomorrow & I have to set up bear camp."(see exhibit?) No one ever asked if I wished to waive my right to a hearing under Rule 89 **as was required by due pcocess**. I was intentionally & maliciously deprived of my due process rights. As punishment to the sytem so that these gross constituional violations do not occur again I hereby humbly request that all of the equipment seized & held in violtion of my due process rights be returned immediately & in the same condition as when it was seized.

"When the government violates a defendant's due process rights, dismissal of the case against the defendant with prejudice is a potential remedy." - *See* *State v. Simpson*, 946 P.2d 890.

"[The claimant's] right to a [timely] forfeiture proceeding . . . satisfies any due process right with respect to [forfeited property]" *Windsor v. McVeigh*, 93 U.S. 274, 279 (1876).

3. All of the equipment & evidence seized in the above case was seized while it was being used to prepare for my bear-guiding season in which clients arrived in two days. Because of the loss of this equipment I was unable to service my clients properly - leading to serious financial harm to my family & myself.

4. David Haeg requests a court order to return all evidence & equipment seized from the fruits of all search warrants, including but not limited to: 12 gauge Benelli Shotgun U233343; Ruger .223 Rifle 195-08482 with scope; 6 pairs bunny boots; all paperwork from office; Kodak Camera I2266311; Olympus Camera #987753; Iridium Satellite Phone (Motorola 9500); all snares & traps; Rand McNally Atlas of Alaska & all other maps; ADF&G Permit; all permit applications; all oil; oil samples; all cord/rope; PA-12 (Tail #4011M) Super Cruiser & electronic equipment in plane including 2 David Clark Headsets & panel mounted Garmin GPS 100; all magazines; ammo with casings; pellets; all photos & videos taken; CD-R copy of Haeg's website; CD disk(s); all mini DV video tape; all audio tape; sealing certificates; crime lab report; all lab results; all tail wheel & ski impressions; all parts of all animal carcasses; all skulls; all wolf hides; hair; paper towels; blood & swabs. (*See Exhibit(s)* #1, #6, #7, #8, #9, & #10)

5. I, David Haeg, humbly ask this court to grant this motion for return of property & to suppress evidence or to convene a hearing for sworn testimony upon this matter, which involve violations of my Constitutional Rights.

This motion is supported by the attached Affidavit of Defendant.

RESPECTFULLY SUBMITTED this _____ day of _____, 2006.

Defendant,

_____

David S. Haeg

I HEREBY CERTIFY that a copy of the foregoing was served on the District Attorney's Office, in person on _____

By: _____