E M E R G E N C Y

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IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

DAVID HAEG Appellant, vs. STATE OF ALASKA, Appellee.	) Case No.: A-09455

Trial Court Case #4MC-S04-024 Cr.

EMERGENCY MOTION FOR RETURN OF PROPERTY & TO SUPPRESS EVIDENCE

I certify this document and its attachments do not contain the (1) name of victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

COMES NOW Pro Se Appellant, DAVID HAEG, in the above referenced case and hereby files the following emergency motion for return of property & to suppress evidence in accordance with *Alaska Rules of Appellate Procedure Rule No. 504(d)(f)* and 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."
>
> See also *Waiste v. State*: "...Criminal Rule 37(c) hearing, in which a property owner can contest the basis for a seizure."[1];

[1] See *Waiste v. State*, 10 P.3d 1141 (Alaska 2000).

Haeg and his wife have had property, which they use as the primary means to provide a livelihood, seized, held, and forfeited in direct violation of the due process clauses of the Alaska and the U.S. constitutions. This property was seized in March and April of 2004 and neither David or Jackie Haeg have ever been given their due process rights in the years since, even though the Alaska Supreme Court ruled they had to be provided "notice and an unconditioned opportunity to contest the state's reasons for seizing the property ... within days, if not hours"[2]. David and Jackie Haeg need a decision in hand by November 16, 2006 or a decision delivered to the Evidence Custodian of the Alaska State Troopers at 5700 E. Tudor Road, Anchorage, AK 99507-1225, phone number (907)269-5761 by 1:00 p.m. November 17, 2006. On November 17, 2006 David and Jackie Haeg will be driving from their home in Soldotna to Anchorage to effect possession of their property, which was seized, held, and forfeited in clear violation of law, rule, and constitution. Every day that David and Jackie Haeg are illegally deprived of this property causes them irreparable harm by directly affecting their ability to provide a livelihood for their two daughters.

All grounds advanced in support of this motion were submitted to the trial court and the first of several motions were filed on July 18, 2006. Assistant Attorney General Roger Rom (Rom) opposed Haeg's motion on September 22, 2006. The trial

[2] See F/V American Eagle v. State, 10 P.3d 1141 (Alaska 1980)

court subsequently refused to rule upon the motion. Rom was called and talked to on 10/30/06 about this emergency motion being filed with this court. He expressed he will oppose this motion and wants an opportunity to do so although in essence Rom has already responded to this motion, although not to this court, through his opposition to motion and request for evidentiary hearing and oral argument (a copy of which is included for this courts review).

In Rom's opposition he entirely misses the point. The point is not that Haeg is trying to exert what Rom calls a "waived" right to challenge evidence according to *Rule 12(b)(3)* – even though Haeg can and will do this later through the rubric of ineffective assistance of counsel, he had good cause, and it was plain error. The point (by law and constitution) is that when **property** (even though the State may claim it is "evidence") is seized, especially when the **property** seized is used to provide a livelihood, an "ensemble of procedural rules bounds the State's discretion...and limits the risks and duration of harmful errors"(Alaska Supreme Court).[3] The Alaska Supreme Court has held this ensemble includes that "[T]he 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. When the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest

[3] See *Waiste v. State* 10 P.3d 1141 (Alaska 2000).

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 is urgent."[4]

Neither Haeg nor his wife Jackie, who both owned the seized property and both used it as the primary means to earn a livelihood, were **ever** given any of these procedures. In not being given these procedures both Haeg and his wife were harmed immeasurably.

There are no debatable issues of fact as Haeg has described in the Motion for Summary Judgment, Motion for Emergency Hearing, and Reply to Opposition and request for Evidentiary Hearing and Oral Argument and included supporting affidavits – which the District Court has also failed to rule upon.

Haeg also points out a further Alaska Supreme Court holding in *F/V American Eagle v. State*, "As a general rule, forfeitures are disfavored by law, and thus forfeiture statutes should be strictly construed against the government". The State failed to follow **any** of the "ensemble of procedural rules" specifically required. They never gave Haeg or his wife any of the constitutional guarantees specifically mandated by both the Alaska Supreme Court and the U.S. Supreme Court.

The specific written requirements in Alaska to comply with these rulings are found in the *Alaska Rules of Civil Procedure* – as property seizures and forfeitures, although of "quasi-criminal

[4] See *F/V American Eagle v. State*, 10 P.3d 1141 (Alaska 1980).

nature"[5], are "civil in form". In fact there is no mention at all of the due process requirements for seizing and forfeiting property in the *Alaska Rules of Criminal Procedure* although Alaska Statutes **authorize** property seizures and forfeitures in Fish and Game criminal prosecutions under:

> *AS 16.05.190*: "[Property] seized under the provisions of this chapter or a regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any."
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> *AS 16.05.195*: "[Property] used in or in aid of a violation of this title or AS 08.54, or regulation adopted under this title or AS 08.54, may be forfeited to the state. (1) upon conviction of the offender in a criminal proceeding of a violation of this title or AS 08.54 in a court of competent jurisdiction; or (2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or AS 08.54 or a regulation adopted under this title or AS 08.54".

Thus, although authorized as an additional punishment for a criminal conviction, a property seizure and forfeiture [attachment], even when ancillary [secondary] to a criminal proceeding, must follow civil rules. In Alaska forfeiture of seized property is obtained through the remedy of **attachment**. This is the only method published in Alaska:

> *Alaska Rules of Criminal Procedure Rule 54*: Process – "Process issued in all criminal actions in the superior court shall be issued, and return thereon made, in the manner prescribed by **Rule 4, Rules of Civil Procedure**."
>
> *Alaska Rules of Civil Procedure Rule 4:* "(c) *Methods of Service - Appointments to Serve Process* - (3) **Special appointments for the service of all process**

[5] See *Graybill v. State*, 545 P.2d 629 (Alaska 1976).

relating to remedies for the seizure of persons or **property pursuant to Rule 64** or for the service of process to enforce a judgment by writ of execution shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant, and such appointment may be made subject to such conditions as appear proper in the discretion of the Commissioner for the protection of the public. A person so appointed must secure the assistance of a peace officer for the completion of process in each case in which the person may encounter physical resistance or obstruction to the service of process."

Alaska Rules of Civil Procedure Rule 64: "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law existing at the time the remedy is sought. **The remedies thus available include** arrest, **attachment**, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, **however designated and regardless of whether by law the remedy is ancillary to an action** or must be obtained by an independent action."

Alaska Rules of Civil Procedure Rule 89: *Attachment* "(b) *Motion and Affidavit for Attachment.* The plaintiff **shall file a motion with the court requesting the writ of attachment**, together with an affidavit showing... (m) *Ex Parte Attachments.* The court may issue a writ of attachment in an ex parte proceeding based upon the plaintiff's motion, affidavit, and undertaking only in the following extraordinary situations: (1) *When Defendant Non-Resident.* In an action upon an express or implied contract against a defendant not residing in the state, the court may issue an ex parte writ of attachment only when necessary to establish jurisdiction in the court. To establish necessity, the plaintiff must demonstrate that personal jurisdiction over the defendant is not readily obtainable under AS 09.05.015. (2) *Imminence of Defendant Avoiding Legal Obligations.* 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 states in the affidavit specific facts sufficient to support a judicial finding of one of the following circumstances: (i) The defendant is fleeing, or about

to flee, the jurisdiction of the court; or (ii) The defendant is concealing the defendant's whereabouts; or (iii) The defendant is causing, or about to cause, the defendant's property to be removed beyond the limits of the state; or (iv) The defendant is concealing, or about to conceal, convey or encumber property in order to escape the defendant's legal obligations; or (v) The defendant is otherwise disposing, or about to dispose, of property in a manner so as to defraud the defendant's creditors, including the plaintiff. (3) *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**. (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, 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**...

(p) *Duration and Vacation of Writs of Attachment Issued Pursuant to Hearing.* A writ of attachment issued pursuant to a hearing provided for in section (c) of this rule shall unless sooner released or

> discharged, cease to be of any force or effect and the property attached **shall be released from the operation of the writ at the expiration of six (6) months from the date of the issuance of the writ unless a notice of readiness for trial is filed or a judgment is entered against the defendant in the action in which the writ was issued**, in which case the writ shall continue in effect until released or vacated after judgment as provided in these rules. However, upon motion of the plaintiff, made not less than ten (10) nor more than sixty (60) days before the expiration of such period of six (6) months, and upon notice of not less than five (5) days to the defendant, the court in which the action is pending may, by order filed prior to the expiration of the period, extend the duration of the writ for an additional period or periods as the court may direct, if the court is satisfied that the failure to file the notice of readiness is due to the dilatoriness of the defendant and was not caused by any action of the plaintiff. The order may be extended from time to time in the manner herein prescribed."

The state never obtained a writ of attachment [forfeiture] as required by rule, never served such writ upon Haeg as required by rule, never gave Haeg his "constitutionally guaranteed" notice, never gave Haeg his "constitutionally guaranteed" hearing "within in days if not hours" in 930 days let alone within the constitutinally mandated seven (7) business days, never applied for an extension within two and one half (2½) years let alone the mandated six (6) months as required by rule from time of seizure to time of notice of readyness of trial or to time of judgement, and never gave him his right to an "emergency hearing", even after he asked for it, as required by rule. Jackie Haeg was denied these same constitutionally guaranteed procedures.

The above rules desribe the procedure Alaska has to seize and forfeit someones property while guaranteeing them their

constitutional rights. It is in addition to the process for seizing evidence.[6]

> "[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'."[7]

The obvious reason the State did not afford Haeg his constitutional right to a hearing in the first place is he would have no doubt prevailed upon the merits and ended any further prosecution. **All** the search warrants were based upon intentionally misleading and unbelievably prejudicial perjury, this would have been exposed during a hearing, and this would have ended any criminal prosecution.

Trooper Gibbens testified on the search warrant affidavits, under penalty of perjury, that the suspicious sites he investigated were in Unit 19C, and that Haeg's lodge, that he "used for guided hunts" and that "there is a clear economic incentive for Haeg... to eliminate or reduce predators from this area, which could potentially increase numbers of trophy animals for them to harvest with clients", was in 19C (leading everyone, including the judge issuing the search warrants, to believe Haeg was a suspect and that the suspicious sites involved a big game guiding violation and had nothing to do with the Wolf Control Program). In fact all the sites that Trooper Gibbens

[6] See *Waiste v. State* 10 P.3d 1141 (Alaska 2000).
[7] See *Peralta v Heights Medical Center, Inc*., 485 U.S. 80,87 (1988) & *Coe v Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

investigated were in Unit 19D, the unit which the Wolf Control Program was being conducted and where Haeg had never hunted, guided, or ever been licensed to guide. Trooper Gibbens and Prosecutor Scot Leaders **taped** Haeg telling them this during the interview Haeg gave them for the Rule 11 Plea Agreement. Then, after Prosecutor Leaders broke the agreement and forced Haeg to trial on big game guiding charges rather than some Wolf Control Program violation (a conviction of which could not affect Haeg's guide business), he asked for and accepted sworn testimony from Trooper Gibbens in front of Haeg's judge and jury that sites he investigated were in GMU 19C. Then Judge Murphy uses this continued perjury to justify Haeg's unbelievably harsh sentence of taking his business away for six (**6) years** and his business property forever, saying it was because, "the majority if not all the wolves were taken in 19C ... where [Haeg was] hunting." Even more unbelievable is when Haeg filed a complaint of this continuous perjury that harmed his family unbelievably, with the entire Trooper chain of command from the Governor on down, they had Department of Law prosecutors do the "investigation". Prosecutors Roger Rom and James Fayette ruled: "to convict Trooper Gibbens of perjury, a jury would have to believe that [Haeg was] truthful when [he] told [Gibbens] where [he] thought the kill sites were located." (It is very interesting that Roger Rom is the one representing the State against Haeg in his appeal and Trooper Gibbens is his main witness against Haeg) After this "investigation" Haeg tried for a long time to get anyone in

authority to confirm his statements that were recorded by Trooper Gibbens and finally asked Lieutenant Steve Bear of the Soldotna detachment of the Alaska State Troopers to determine in which GMU all the GPS coordinates were located that Trooper Gibbens himself recorded. Lieutenant Bear subsequently received a memo **from Trooper Gibbens** himself that **ALL the sites he investigated were in game management unit 19D**. Haeg would like to commend Lieutenant Bear for his help when no one else was willing.

If State prosecutors, to convict Trooper Gibbens of perjury, need to convince a jury that Haeg believed he was truthful when he told Trooper Gibbens the sites were in Unit 19D don't you think that a memo from Trooper Gibbens himself, confirming this, and directly contradicting his sworn search warrant affidavits and his sworn testimony before Haeg's judge and jury, which led to a illegal conviction along with a draconian sentence, would suffice? Would anyone agree that the reason for Rom and Fayette's refusal to prosecute Trooper Gibbens for Class B felony perjury against Haeg is this would not only make the Troopers and State prosecution look bad but that also Haeg's conviction would have to be reversed? Several people who witnessed these crimes even called Rom and Fayette to give their accounts and they were **never called back** during this entire "investigation" of Trooper Gibbens actions by Rom or Fayette.

> *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."

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."

Cruse v. State, 584 P.2d 1141, (Ak.,1978). "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."

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."

State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003). "An error in admitting or excluding evidence in a criminal trial, whether of a constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt."[8]

U.S. Supreme Court in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "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."

U.S. Supreme Court in *Sniadach v. Family Finance Corp*., 395 U.S. 337 (1969). "[D]ue 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 [defendant] before he can be deprived of his property

[8] See *McLaughlin v. State*, 818 P.2d 683, (Ak.,1991). *Stavenjord v. State*, 2003 WL1589519, (Ak.,2003). *U.S. v. Hunt*, 496 F.2d 888, C.A.5.Tex.,1974. *U.S. v. Markey*, 131 F.Supp.2d 316, D.Conn.,2001, *State v. Malkin*, 722 P.2d 943 (Ak. 1986), *People v. Reagan*, 235 N.W.2d 581, 587 (Mich. S.Ct. 1975), *U.S. v. Thomas*, 489 F.2d 664 (1973), and the Seminal U.S. Supreme Court case, *Mapp v. Ohio*, 367 U.S. 643 (1961) [held that all evidence obtained by searches & seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a State court].

> or its unrestricted use. I think this is the thrust of the past cases in this Court [U.S. Supreme Court]."
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> U.S. Supreme Court in *Wiren v Eide*, 542 F2d 757 (9th Cir. 1976)."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."
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> Alaska Supreme Court in *Etheredge v. Bradley,* 502 P.2d 146 Alaska 1972. "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing ... this prejudgment garnishment procedure violates the fundamental principles of due process."

Haeg's property, used to put food in the mouths of his wife (Jackie) and two daughters (Kayla, age eight (8) and Cassie, age five (5)), was seized, held, and forfeited without any regard whatsoever for the constitutional safties protecting the right of every U.S. and Alaskan citizen to provide a livelihood for their family. Again Haeg would like to ask where is the "ensemble of procedural rules" that "bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors" that the Alaska Supreme Court has ruled protects citizens against unecessary or illegal seizures and/or forfeitures.[9]

Haeg would like to point out that *Criminal Rule 37(c)* provides the right, **in the court in the judicial district which the property was seized or which the property may be used, to contest the seizure of property**, **anytime** after the seizure, no matter why it was seized, and that it is a right **independent** of any criminal proceeding. The district courts and state prosecutor Rom, from what little they have given Haeg, seem to think this

[9] See *Waiste v. State*, 10 P.3d 1141 (Alaska 2000).

right was waived or not needed to be complied with something to do with Haeg's criminal case. This is obviously wrong. The whole point of this "ensemble of procedural rules" is to protect the use of your property, **especially** when it is seized under the "ruse" that it is "only" evidence and **especially** when it is seized via ex parte affidavits of a single individual Trooper who may be overzealous in his request that will put deprive someone of property used to provide a livelihood. He may be so overzealous he is even willing to commit perjury. Haeg would like to point out property owned by his wife was also seized and forfeited without anyone asking her if she had an objection or providing an opportunity to object. Haeg would like to point out the state seized and deprived him of his property for eight (8) months before ever charging him. The state prosecution no doubt relished the fact that Haeg was being financially devasted during this entire time. It would put them in a far superior position if Haeg was already bankrupt **before** even being charged. Even if they **never** filed charges they could count it as a sweet victory.

Maybe with this new-found law enforcement tactic the Troopers will be able to bypass trials entirely – if they think someone is doing something wrong (or maybe someone they just don't like) they can just seize all of the persons property that they use to make a livelihood, bankrupt them, destroy their dreams, and they will just go out and commit suicide.

Since state and the court lost jurisdiction to seize, hold or forfeit David and/or Jackie Haeg's property or to use it as

evidence, for the following reasons: the state did not obtain a writ for the seizure and subsequent forfeiture; the state did not give timely notice it intended to forfeit David and/or Jackie Haeg's property; the state didn't provide David and/or Jackie Haeg with a hearing within 7 days of seizing their property; the state did not get anything waiving this hearing, in writing or otherwise; David and/or Jackie Haeg did not consent in writing to an additional extension of time to the ex parte seizure and deprivation; because there was no notice of readiness for trial or judgment entered within six (6) months of seizure and because there was no motion filed before the expiration of six (6) months extending this time period; David and Jackie Haeg respectfully request this court to grant this emergency motion and order the State of Alaska to release their property and suppress evidence. Haeg respectfully asks for an order in his hand before November 16, 2006 or delivered to the Evidence Custodian of the Alaska State Troopers at 5700 E. Tudor Road, Anchorage, AK 99507-1225, phone (907) 269-5761, returning his and his wifes property and suppress evidence.

This emergency motion is supported by the accompaning memorandum, documents and affidavits from David and Jackie Haeg.

RESPECTFULLY SUBMITTED this ____ day of _____, 2006.

_____

David S. Haeg, Pro Se Appellant

I HEREBY CERTIFY that a copy of the

foregoing was served on:

Roger B. Rom, Asst. Attorney General
310 K. Street, Suite 308
Anchorage, AK 99501 907-269-6250
by hand on _____.

By: _____