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Submitted 10/12/06

IN THE DISTRICT COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT MCGRATH

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

Appellate Court Case #A-09455.

MOTION FOR SUMMARY JUDGMENT, MOTION FOR EMERGENCY HEARING, & REPLY TO OPPOSITION TO MOTION & REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT

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 Defendant, DAVID HAEG, in the above referenced case, & hereby requests summary judgment on Motion for Return of Property and to Suppress Evidence according to Civil Rule 56, requests an Emergency Hearing according to Civil Rule 89(n), and replies to the Opposition to Defendant's Motion and Request for Evidentiary Hearing and Oral Argument.

Prosecutor Rom's (Rom) rational in this opposition is absolutely fantastic. Rom would like this court to believe that since the State prosecution intentionally **failed** in its constitutional duty, under both the Alaska and Federal constitutions, to give Haeg the notice and unconditioned opportunity for a hearing it was Haeg's fault he didn't ask for, and thus waived his right to, this hearing.[1] It must be patently

[1] See *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980) "Due Process requirements. – The standards of due process under the Alaska & federal constitutions require that a deprivation of property be accompanied by notice &

obvious to everyone that the reason for such a strict requirement of the State to give everyone notice and an unconditioned opportunity for a hearing is that a layman uneducated in legal procedures may not know this "unconditioned opportunity" for a hearing is available. The State took Haeg's right to a hearing away from him by subterfuge and by breaking two constitutions. How can Haeg's failure to ask for a hearing after this unbelievable action by the State be in any way considered a waiver? This logic is absolutely the most outrageous thing Haeg has ever seen. This error is plain error and not only plain error it is unbelievable error and this court must take notice or this fundamental breakdown in justice will be allowed to continue. Haeg will continue to be illegally deprived of property he uses to provide a livelihood for his family.

Rom would like to contend that this court has "limited jurisdiction." Haeg has talked to Lori Wade, Chief Deputy Clerk of the Alaska Court of Appeals, and she has stated on remand the court to which the case has been remanded has every right, duty, and obligation to act upon motions made during remand. Also Haeg has an absolute right to an "emergency"[2] hearing at "any time" in this matter including the production of evidence and questioning of witnesses. The Alaska Court of Appeals is unable to provide for such a forum and can only look at that which has already been placed on the record. Even after Haeg's case is remanded back to the Court of Appeals this court must still provide Haeg with a hearing. You cannot ask for a hearing from a court that cannot provide it.

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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 & 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 & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); Lee v. Thorton, 538 F.2d 27 (2d Cir. 1976)."

[2]Civil Rule 89(n).

Haeg notes with interest that the U.S. Supreme Court in *U.S. v. James Daniel Good Real Property,* 510 U.S. 43 (1993) stated:

> "Finally, the suggestion that this one claimant 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."[3]

In Haeg's case not only were the procedures used by the State unconstitutional but the search warrants themselves that authorized the seizures were illegal and unconstitutionally issued upon intentionally misleading perjury.

> *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."
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> *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."
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> *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."
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> *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-

[3] See 510 U.S. at 62.

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."

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."

U.S. v. Markey, 131 F.Supp.2d 316, D.Conn.,2001. To demonstrate recklessness in making of false statements in search warrant affidavit, as required to support *Franks* hearing, defendant must show that officer in fact entertained serious doubts as to truth of his allegations; fact finder may infer reckless disregard from circumstances evincing obvious reasons to doubt veracity of allegations. *Franks* hearing is required only as to false search warrant affidavit statement made by, or reckless disregard which is that of, affiant; no right to hearing exists when challenge is to information provided by informant or other source. Good faith exception to exclusionary rule does not apply where: (1) issuing magistrate has been knowingly misled.

State v. Malkin, 722 P.2d 943 (Ak. 1986). "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."

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."

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."

U.S. v. Thomas, 489 F.2d 664 (1973). "Search warrant affidavits containing misrepresentations made with intent to deceive magistrate are invalid whether or not the error is material to showing probable cause, but if the misrepresentations were made unintentionally, the affidavits are invalid only if the erroneous statement is material to establishing probable cause."

The Seminal U.S. Supreme Court case of, *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. 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.

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.
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> As Justice Brandeis, dissenting, said in *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928): "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.[4]

Since the search warrants were illegal the seizures from them were illegal, forcing the State to hide the fact there was a hearing required by two constitutions that would expose this fraud. It is no wonder Rom now maintains there can never be a hearing on this matter. It is obvious the State would never wish a hearing, which would prove that their knowing, intentional, malicious, and plain error is so blatant.

In quoting *Alaska Criminal Rule 12(e)* Rom fails to mention that although a "failure by the defendant to raise defenses or

[4]*See also appendix #1* U.S. v. Thomas, 489 F.2d 664, (C.A.5.La.,1973); U.S. v. Stanert, 762 F.2d 775, (C.A.9.Cal.,1985); U.S. v. Luna, 525 F.2d 4, (C.A.6.Mich.,1975); State v. Groff, 323 N.W.2d 204, (Iowa,1982); State v. Byrd, 568 So.2d 554, (La.,1990); U.S. v. Hunt, 496 F.2d 888, (C.A.5.Tex.,1974); U.S. v. Lee, 540 F.2d 1205, C.A.4 (Md.,1976).

objections or to make requests which must be made prior to trial, at the time set by the court pursuant to section (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but **the court for cause shown may grant relief from the waiver**." Haeg believes that the State **failing** to adhere to their constitutional duty to inform Haeg of his "unconditioned opportunity" for a hearing may constitute such cause for relief in Haeg's failure to ask for such a hearing.

Rom states, "It is irrelevant whether the defendant personally assented to the attorney's tactical decision not to seek suppression". It was nearly two weeks from the time which Haeg's property, used to provide a livelihood for his family, was seized to the time he hired his first attorney. When Haeg is guaranteed notice and an unconditioned opportunity for a hearing "within days, if not hours"[5] how does his obtaining an attorney nearly two weeks **after** the seizure have any bearing on the States plain error in not providing notice of the right to a hearing? In addition Haeg has diligently looked for the law, which Rom refers to, that the constitutional "notice and unconditioned opportunity" for a hearing will **not** be supplied if a defendant has an attorney. Haeg would like to point out that in official Alaska Bar Association proceedings, while Haeg's first attorney Brent Cole was sworn under oath, Cole testified that the State **never** provided **any** notice or opportunity, let alone an unconditioned opportunity, for a hearing to contest the seizure of Haeg's property, which was being used at the time in providing a livelihood for his family.

Rom cites *Beltz v. State, 895 P.2d 513* in his rational that Haeg "assented" to his attorney's "tactical" decision not to seek suppression. Rom "tactically" leaves out that the Court of Appeals held that if Beltz had asserted that his attorney acted

[5] 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."

incompetently, or there was a showing of good cause for the defendant's failure to ask for a suppression hearing, or his claim was under the rubric of plan error that Beltz could have been held to not have waived his right to suppression. Haeg stands firmly upon all three exceptions:

1. Haeg uncompromisingly asserts that his first attorney, Brent Cole, was not only incompetent but was actively conspiring with prosecutor Leaders to sabotage his case to help the State convict Haeg and sentence him severely.

2. Haeg has much more than good cause for his failure to seek a suppression hearing - he was never notified of his right to a suppression hearing - even though the State had an absolute duty under two constitutions to do so.

3. The error that has resulted is plain error - straight and simple. Haeg's constitutional rights to due process and against unreasonable searches and seizures were violated by blatant perjury on search warrant affidavits in addition to the procedural constitutional violations in not being given notice and an unconditioned opportunity for a hearing.

The State never provided notice before risk of injury that Haeg had a right to a hearing to contest the State's reasons for seizure and possession. Never was Haeg given anything in the way of a civil or criminal complaint or notice of forfeiture. The U.S. Government ensures compliance of this constitutional mandate with the following rules:

> *Rule 7(c)(2)*: "**No judgment of forfeiture may be entered in a criminal proceedings unless the** indictment or the **information provides notice that the defendant has an interest in property that is subject to forfeiture** in accordance with the applicable statute."
>
> *Rule 32.2(a)*: "A court **must not enter a judgment of forfeiture in a criminal proceeding unless indictment or information contains notice to the defendant that the government will seek the forfeiture** of property as part of any sentence in accordance with the applicable statute."

None of the affidavits, warrants, or **three** informations filed in Haeg's case contained any notice whatsoever that the State wished or intended to forfeit any of Haeg's property.

The Alaska Constitution's Due Process Clause allows the State, when it has probable cause to think that a boat has been used in a fishing violation, to seize the boat without prior notice or an adversarial 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.[6]

Haeg can see no difference between the seizure of his airplane, which was being used **at the time** to provide for the livelihood of his family, and Waiste's fishing boat. Both were needed to provide virtually the entire income for their respective families during a short "open season". In Waiste's case "the State **agree[s]** that the Due Process Clause of the Alaska Constitution **requires** a prompt post seizure hearing upon the seizure of a fishing boat potentially subject to forfeiture." Haeg stands on the ground that you could substitute "fishing boat" with "aircraft" when that aircraft is used by a big game guide as the primary means of conducting his business, which, like Waiste's fishing boat, is similarly situated.

> The Supreme Court of Alaska continues it's opinion in *Waiste v. State* with the following: "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**."

Haeg is shocked that Rom not only argues Haeg should be denied any postseizure hearing let alone a prompt postseizure hearing but that he can be denied the notice of a hearing that

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

is his constitutional right. How does Rom's argument fit in with the Alaska Supreme Court's holding along with the State Prosecutions holding that **a prompt postseizure hearing is the process due both under general constitutional principles** and under the Alaska Supreme Court precedents on fishing boat seizures?

Haeg feels the Supreme Court of Alaska's continued observations in Waiste are also appropriate:

> 1. "Waiste argues at length that Alaska law does not require physical seizure of a fishing boat to give a court jurisdiction to forfeit it. The State, moreover, has implicitly conceded the issue; its brief says nothing about *in rem* jurisdiction. The State notes instead that, when it seized the boat, it charged Waiste with a crime, and that, had he been convicted, the court could have ordered an *in personam* forfeiture of the boat as part of his sentence. *In personam* forfeiture, the State argues, citing our opinion in *Rubino v. State,* requires "prior seizure of the items." That is incorrect. In *Rubino,* the State did not contest Rubino's claim that the *in personam* forfeiture of his drift-net was invalid because the State had never seized the net. *Rubino* thus establishes no rule of law on the point. The State cites, and our research reveals, no authority for the rule that it asserts, namely that seizure of items is required for *in personam* forfeitures."[7]

In Haeg's case the State never charged him until 8 months **after** the seizure of his property and was not brought to trial until another 9 months had passed and was not sentenced for another 2 months – bringing the total amount of time Haeg was illegally deprived of his property before it was illegally forfeited to 19 months. In that entire time the State continued to deprive Haeg of his property that was used to provide the entire livelihood for his family. It did not need to be seized for the State to obtain jurisdiction to forfeit it. The State was able to illegally deprive Haeg of his primary means of income and thus financially break Haeg before sentencing. The

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

whole rational behind all this is that there must be no mistakes when someone is deprived in how they put food in their family's mouth. Look at what has happened in Haeg's case and you will see how important these hearings are.

> 2. "*Preventing continued illegal use.* It was the ultimate forfeiture that would "prevent continued illicit use of the property," not the marginal additional period the State would retain the property if a court granted a seizure following an *ex parte* hearing, rather than requiring notice and an adversarial hearing before granting it. *Immediate* seizure only served the interests in gaining jurisdiction and preventing flight."
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> "As Waiste notes, the State's own policy in commercial fishing seizures of negotiating the release of vessels and allowing the owners to resume fishing--and its willingness in this case to delay Waiste's trial until after the fishing season--make quite implausible any suggestion that preventing continued violations is its immediate aim in seizing fishing boats *before* any hearing."[8]
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> "Even if *ex parte* seizures might serve an interest in preventing continued illegal fishing, they do so but slightly: proceeding *ex parte* only prevents continued illegal use for the brief time between when the State seizes a boat *ex parte* and when it could do so after a hearing. It thus seems unlikely, and the State has certainly not shown, that *ex parte* seizures contribute meaningfully to preventing continued illegal use of fishing boats."
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> 3."*Avoiding the burden of a hearing.* The State alludes to the "extensive preseizure inquiry" that Waiste's proposed rule would require. But given the conceded requirement of a prompt postseizure hearing on the same issues, in the same forum, "within days, if not hours," [t]he 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 interest in avoiding that slight burden is not significant." Also in Good it states: "Requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden. **A claimant is already entitled**

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

to an adversary hearing before a final judgment of forfeiture."[9]

4. "O*ther interests.* The State notes that the warrant under which it seized the boat also authorized it to seize evidence of crime, and that fishing violators could, if they received notice before the State seized their boats, hide or destroy such evidence. But as Waiste cogently notes, this argument is plainly fallacious; nothing bars the State from simultaneously executing a warrant to search for evidence and fruits of a fishing violation, seizing and safeguarding any such evidence, and **notifying the boat's possessors that it has filed a forfeiture action and that the court will be holding a hearing on the State's request to seize the boat before the forfeiture**."

5. "*Summary.* The State's only significant interest in proceeding *ex parte* is thus to avoid the risk of owners removing or concealing their boats upon receiving notice of a seizure hearing."

6. "*The private interest.* 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.**"[10]

Haeg would like to note that he was in the air flying the property and airplane, which were his primary source of income, to get ready for clients who were arriving **the next morning** when Flight Service called him on the radio at the request of the State prosecution so they could illegally seize and illegally retain his property and plane for **nineteen months**.[11] The spring guiding season is **six weeks** long.

7. "*The reduction in the risk of erroneous deprivation.* The State similarly does not dispute that a preseizure hearing will significantly reduce the risk of an erroneous seizure. As *Good* noted, "[t]he practice of *ex parte* seizure ... creates an unacceptable risk of error." Indeed, for the State to argue otherwise in

[9] See Good, 510 U.S. at 59, 114 S.Ct.492.
[10] See *Waiste v. State*, 10 P.3d 1141 (Alaska 2000)
[11] See court record & Trooper Godfrey's report

> this case would be to risk looking foolish, given AAG Nelson's significant error in thinking Big Creek a salmon-spawning stream. It is not surprising that the magistrate who issued the seizure warrant did not, in an *ex parte* hearing, happen to notice and correct that error *sua sponte.* 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."[12]

It is not surprising in Haeg's case that Magistrate Murphy did not notice and correct the perjury of Trooper Gibbens during the ex parte issuance of the seizure warrants. She would have had to plot out the GPS coordinates and why should she when Trooper Gibbens swore, under penalty of perjury, that they were correct and also swore that he was highly experienced with the area – including hunting and trapping personally in the area. It was understandable Magistrate Murphy would rely on this professional Troopers affidavits and not know he had lied so he could claim the sites he investigated were in the Game Management Unit where Haeg guides for a livelihood and not in the Game Management Unit where Haeg was **asked** by the State to help conduct the Wolf Control Program and where Haeg has **never** been licensed to guide. Trooper Gibbens claims were nearly 20 miles off and all the sites he investigated were in fact even closer to a **third** Game Management Unit than to the one Haeg guided in. Haeg asks this – how likely is it that a highly experienced Trooper would be "accidentally" off by almost 20 miles and two GMU's in the only direction possible so to claim the conduct he alleges of Haeg was to benefit Haeg's guiding operation? How likely is it he would still be "mistaken" **after** he **and** prosecutor Scot Leaders **recorded** two people, one a Master

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

Alaskan Big Game Guide and the other a retired U.S. Airforce F-15 pilot and instructor, telling them the sworn affidavits in which Trooper Gibbens claimed this were absolutely false? How likely is it Trooper Gibbens would then **subsequently** testify, again under penalty of perjury but now **in front of a judge and jury**, to the very same lies, when asked by prosecutor Leaders? How likely would it be that prosecutor Leaders would **accept** this perjury as the truth, **knowing full well** it is perjury? How likely is it that Judge Murphy would then use the perjury that the sites investigated were in Haeg's guide area to justify, on the official court record, an extremely harsh sentence? How likely is it that Trooper Gibbens, only **after** Haeg has been convicted and sentenced, now wholeheartedly and unabashedly agrees, **in writing**, that **none** of the sites he investigated were in the Game Management Unit that Haeg guides in, as he had testified they were under oath? To say that Haeg is concerned would be the understatement of Haeg's life - when **everything** Haeg and his wife have built together is wrapped up in the lodge, business, airplane, and other property that has been illegally taken from them by a conspiracy between Troopers, prosecutors, and Haeg's own attorneys.

Could the rational of the U.S. Supreme Court in *Good* possibly be correct – that the hundreds of thousands of dollars that the State Troopers and prosecutors have stripped from Haeg and his family to be placed in the State's coffers be the motivation for their illegal conduct? Did the State need a nice new plane to supplement their tired and aging fleet? Or did several overworked and underpaid Troopers and prosecutors need a nationally publicized case to justify well-deserved and overdue promotions?

Haeg is curious where the "ensemble of procedural rules" is that "bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors" that the Alaska Supreme Court refers to. Haeg has yet to discover any rules that the

State prosecution, according to prosecutors Leaders and Rom, cannot throw in the trash at will. Haeg is curious what good this "ensemble" is that the Alaska Supreme Court touts when it is nothing more than window dressing for the prosecution to ignore.

Haeg wonders just how a judge or magistrate can make a "neutral" determination of "probable cause" when the Troopers can lie and perjure themselves at will to the judge or magistrate in an "*ex parte*", or one-sided hearing. Haeg wishes he could testify at such a one-sided hearing or even a two-sided hearing. But, as Rom so appropriately and succinctly points out, Haeg "waived" this opportunity because he apparently "forgot to ask for it". Maybe the constitutional "notice" Haeg received of his "unconditioned opportunity" for such participation in a hearing was sent from the State prosecution's crystal ball to Haeg's crystal ball and Haeg's crystal ball had bad reception due to overcast skies. Or maybe Haeg forgot to take his crystal ball with as he was out trying to rustle up some grub for his wife and two kids, ages 3 and 6, because his primary means of doing so had been illegally taken away from him through perjury and a 12 member strong multi-jurisdictional assault team in body armor complete with air cover provided by a million-dollar French A-Star helicopter. More likely Leaders and Rom thought it appropriate to require Haeg to guess he might find his constitutionally guaranteed "notice" to his "unconditioned opportunity" for a hearing in "days if not hours" in the hundreds of thousands of pages of law. Leaders and Rom probably figured Haeg must have lots of spare time after the State prosecution had relieved Haeg of the tools he depended on to put food on the table.

Haeg is curious why the Alaska Supreme Court makes such a big deal out of the fact that the search warrant affidavit in Waiste, because it cited the statutes under which the State can forfeit a vessel, justified seizure. Haeg can prove absolutely

that the State doesn't need to provide any such notice by warrant, affidavit, hearing, or any notice whatsoever of their right or intent to forfeit property before they can justify seizure and possession for years. Haeg can prove the State can even commit intentional and blatantly misleading perjury to obtain the multiple search warrants required. Haeg wonders why the State even bothers to obtain perjured search warrants before seizing, retaining, and forfeiting property that Alaskan citizens use to provide a livelihood for their families. Haeg wagers the State could double their revenue intake if they dispensed with such unneeded and time-consuming formalities as perjured affidavits or illegal warrants.

Haeg thinks the Alaska State Troopers and prosecutors must have took this 1990 memo to heart, in which the U.S. Attorney General urged an increase in forfeitures: "We must significantly increase production to reach our budget target. Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine public confidence in our budget projections. **Every** effort must be made to increase forfeiture income during the remaining three months of 1990."

Haeg also wonders why the Alaska Supreme Court would think the State prosecution must allow release of a vessel on bond. **Sixteen months** into the illegal seizure Haeg attempted to bond his aircraft out thru motion **after** paying for a very expensive **certified** appraisal. Prosecutor Leaders opposed this motion, stating under penalty of perjury that if Judge Murphy let Haeg bond the plane out she would be "usurping executive authority."[13] Magistrate Murphy was so taken with this opposition she didn't even bother to issue a ruling on Haeg's motion, even after Haeg had to formally ask her to do so, in absolute and complete

[13] See court record

compliance with Rule 42(h), which states, "the court **SHALL** rule promptly on **ALL** motions".

Again Haeg wonders where the "ensemble of procedural rules" that "bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors" is that the Alaska Supreme Court seems so proud of. Haeg looks and keeps on looking but can't seem to find this "ensemble" anywhere. Haeg thinks it must be true what **ALL** Haeg's attorneys (paid nearly $80,000.00) have told him – "perjury by Troopers and prosecutors don't matter".

> 8. "Where the object seized is capable of use in non-prohibited activity, the party seizing the object **must** file a libel in rem against the object and prove by the weight of evidence that the object was an implement of gambling in the context in which it was seized. This is necessary in order to perfect the seizure and forfeiture. It is the same type of procedure followed in admiralty practice where a ship is treated as a person for purpose of suit. Because the forfeiture action is a action in rem, separate from any criminal action brought in conjunction with the seizure, no prior conviction of the alleged owner is needed to sustain the action, and it can be maintained where the owner has been acquitted of the crime charged."[14]

Haeg wonders why the Alaska Supreme Court would think that the party seizing an object **must** file a libel in rem against an object if the object can be used in non-prohibited activity so that seizure and forfeiture can be perfected. According to prosecutors Leaders and Rom it is certainly not so – any object can be seized and forfeited without anything filed against it.

As a general rule, **forfeitures are disfavored by law**, and thus **forfeiture statutes should be strictly construed against the government.**[15] Also, in *Mullane v. Central Hanover Bank*, 339 U.S. 306, (1950), the U.S. Supreme Court set the standard for notice:

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[14] See *U.S. v. Three Thousand Two Hundred Thirty-Six Dollars,* 167 F.Supp. 495, 497-98 (D.Alaska 1958).
[15] See *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980) & *One Cocktail Glass v. State*, 565 P.2d 1265 (Alaska 1977).

> "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**."

The U.S. Supreme Court has held that **it is unconstitutional to require a litigant who has not received notice to file a verified answer in order to vacate a default judgment**:

> **"[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."** *Coe v Armour Fertilizer Works*, 237 U.S. 413 (1915). *Peralta v Heights Medical Center, Inc.,* 485 U.S. 80 (1988)."

How can Rom claim Haeg has no standing to require the State prosecution return of illegally taken property when the U.S, Supreme Court absolutely holds the otherwise? **Especially since if Haeg would have been provided due process in the first place his property, used to provide a livelihood, could never have been taken?**

> U.S. Supreme Court Justice Harlan, concurring in *Sniadach v. Family Finance Corp*., 395 U.S. 337 (1969) stated, "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."[16]

The Supreme Court of Alaska in *Etheredge v. Bradley,* 502 P.2d 146 Alaska 1972 quoted the U.S. Supreme Court in *Sniadach* "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.**"[17]

The Supreme Court of Alaska also mentioned the U.S. Supreme Court decision in *Goldberg v. Kelly*, "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.'"[18]

Justice Steward in, *Fuentes v. Shevlin*, 407 U.S. 67, said, "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.'..."**[19]

Constitutional implications of the quasi-criminal nature of forfeitures

All forfeiture actions, whether they are denominated "civil" or "criminal" forfeitures, are "quasi-criminal" in nature, and therefore require many of the constitutional procedural safeguards guaranteed to defendants in criminal cases.

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[16] See, e. g., *Mullane v. Central Hanover Trust Co*., 339 U.S. 306, 313 (1950).
[17] *Sniadach v. Family Fin. Corp*., 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349, 354 (1969)
[18] *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287, 296 (1970)
[19] *Fuentes v. Shevlin*, 407 U.S. 67, 92 S.Ct. at 1989, 32 L.Ed.2d at 564.

[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them.... The [case], though technically a civil proceeding, is in substance and effect a criminal one.... As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution.

One 1958 Plymouth Sedan v Commonwealth of Pennsylvania, 380 U.S. 693, 697-98 (1965), quoting *Boyd v U.S.*, 116 U.S. 616, 633-34 (1886).

In addition to the Fourth Amendment's search and seizure clause, the U.S. Supreme Court has extended several other constitutional rights recognized in criminal cases to all forfeiture actions-civil or criminal.

These include: the Fifth Amendment's privilege against self-incrimination, *U.S. v U.S. Coin & Currency*, 401 U.S. 715 (1971); and the Sixth Amendment's speedy trial guarantee, which has been read in through the Fifth Amendment's due process clause. *U.S. v. $8,850*, 461 U.S. 555 (1983).

The police power permits the taking of life, liberty and property, but only with due process of law. At a minimum, like statutes imposing criminal penalties, forfeiture statutes must be strictly construed in favor of the claimant. Forfeiture statutes should be construed "in a manner favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation." *District of Columbia v. One 1981 Datsun 200SX*, 115 D. Wash. L. Rptr. 645 (April 2, 1987) (D.C. Super. Ct., Burgess, J.), quoting *State v. 1979 Pontiac Trans Am*, 98 N.J. 474, 487 A.2d 722, 726 (1985).

Constitutional defenses: suppression of evidence

Although not technically a defense, winning a suppression motion often makes it difficult to impossible for the government to prevail at trial. In forfeiture cases the Fourth Amendment may be used to suppress evidence in the same manner as it is used in

criminal cases. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965). The entire body of search and seizure law is applicable.

Denial of speedy trial

In *U.S. v. $8,850*, 461 U.S. 555 (1983), the U.S. Supreme Court held that the four factor balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972), used to determine when delay of the trial in criminal cases violates the accused's rights to a speedy trial, is the test to be used in determining when delay in forfeiture cases violates the Due Process clause. The four factors set out by *Barker v Wingo* and $8850 are: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." $8850 at 565.

Although the delay challenged in $8850 was the delay between the seizure and the filing of a forfeiture complaint, it has been held that the *Barker v Wingo* factors also apply to delay between the filing of the action and the trial.

To require prompt filing of a forfeiture action but allow indefinite postponement of the trial would reduce the filing requirement to a nullity. Under the Barker test, which we think applies to the holding of the forfeiture trial as well as to the filing of the action, there is a due process violation at some point.

U.S. v. Banco Cafetero Panama, 797 R2d 1154 (2d Cir. 1986).

[T]here has been no uniformity in deciding what constitutes a reasonable length of time. Delays of five months, *U.S. v One 1973 Buick Riviera*, 560 F. 2d 897 (8th Cir. 1977), and nine months, *U.S. v One 1972 Wood, 19 Foot Custom Boat*, 501 R2d 1327, 1329 (5th Cir. 1974) have been deemed reasonable. **Generally a majority of the circuits have held that a delay of more than one year is unreasonable**. States Marine Lines, Inc. v Schultz, 498 F .2d 1146 (4th Cir. 1974)

A number of federal circuits have imposed a requirement of a post-restraining order probable cause hearing in order to preserve the constitutionality of the statute. In *U.S. v Crozier*, 674 F2d 1293 (9th Cir.

1982) **the Ninth Circuit vacated an ex pane restraining order, holding that**

Even when exigent circumstances permit an ex pane restraining order, the government may not wait until trial to produce adequate grounds for forfeiture.

Post-seizure probable cause determinations

The amount of process "due" under the Due Process Clause increases with the severity of the deprivation. Numerous law review articles in recent years have argued that the denial of a right to a post-seizure probable cause hearing is unconstitutional. See Strafer, End-Running the Fourth Amendment: Forfeiture Seizures of Real Property Under Admiralty Process, 25 Amer. Crim. L. Rev. 59 (1987); Note, Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?, 57 St. Johns L. Rev. 776-804 (Summer 1983); Kandaras, Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Sei zure Hearing, 34 Southwestern L.J. 925 (1981).

Lack of notice

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. See Seguin v Eide, 720 F2d 1046 (9th Cir. 1983), on remand after judgment vacated, 462 U.S.1101,103 S. Ct. 2446 (1983); Wiren v Eide, 542 F2d 757 (9th Cir. 1976). Menkarell v. Bureau of Narcotics, 463 F2d 88 (3rd Cir. 1972); Jaekel v U.S., 304 F Supp. 993 (S.D.N.Y 1969); Glup v U.S., 523 F2d 557, 560 (8th Cir. 1975).

In the past there was some authority for the proposition that, even when claimants are deprived of due process by forfeiture of their property without notice, they have to show that they have a meritorious defense in order to get relief. See, e.g., Cepulonis v U.S., 543 F. Supp. 451 (E.D.N.Y 1982) (where claimant was deprived of due process for failure to receive notice of forfeiture, he was only entitled to nominal damages where he could not show he had a meritorious defense.) However, that case was overruled by the Supreme Court in Peralta v Heights Medical Center, Inc., 485 U.S. 80, (1988). Peralta held that:

> [I]t is not denied by appellee that under our cases, a judgment entered without notice or service is constitutionally infirm.
>
> The Texas courts nevertheless held, as appellee urged them to do, that to have the judgment set aside, appellant was required to show that he had a meritorious defense, apparently on the ground that without a defense, the same judgment would again be entered on retrial and hence appellant had suffered no harm from the judgement entered without notice. But this reasoning is untenable. As appellant asserts, had he been given notice of the suit, he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than suffer it being sold at a constable's auction.
>
> 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." Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S. Ct. 625, 629, 59 L. Ed. 1027 (1915). As we observed 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.** Peralta, supra, 108 U.S. at 898-99, 900.

Haeg has exhaustively researched the procedure for criminal forfeiture in Alaska and has arrived at the following:

1. There is no mention of any forfeiture proceeding in the Alaska Rules of Criminal Procedure, as there are in the Federal Rules of Criminal Procedure. For reference the pertinent federal rules are as follows:

> **Rule 32.2. Criminal Forfeiture (a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture**

of property as part of any sentence in accordance with the applicable statute.

(b) Entering a Preliminary Order of Forfeiture.

(1) In General. **As soon as practicable** after **a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted,** on any count in an **indictment** or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. **If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or,** if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

2. Rule 54, Alaska Rules of Criminal Procedure states: "Process 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." (Rule 1, District Court Rules of Criminal Procedure states: "Wherever practicable the Rules of Criminal Procedure shall apply to criminal actions within the jurisdiction of the district courts." [No reference whatsoever to forfeiture])

3. Rule 4, Alaska Rules of Civil Procedure states, in pertinent part: " Process.

(a) **Summons - Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it to the plaintiff or the plaintiff's attorney, who shall cause the summons and a copy of the complaint to be served in accordance with this rule. Upon request of the plaintiff separate or additional summonses shall issue against any defendants.

(b) **Summons - Form.**

(1) The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or the plaintiff's name and address if the plaintiff is unrepresented. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in judgment by default against the defendant for the relief demanded in the complaint. The summons must also notify the defendant that the defendant has a duty to inform the court and all other parties, in writing, of the defendant's or defendant's attorney's current mailing address and telephone number, and to inform the court and all other parties of any changes, as set out in Civil Rule 5(i).

(2) The summons must be on the current version of the summons form developed by the administrative director or a duplicate of the court form. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it conforms to the current version of the court form.

(c) **Methods of Service - Appointments to Serve Process - Definition of Peace Officer.**

(1) Service of all process shall be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail.

(2) A subpoena may be served as provided in Rule 45 without special appointment.

(3) **Special appointments for the service of all process 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.

Rule 64, Alaska Rules of Civil Procedure states: Seizure of Person or Property.

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.** (Adopted by SCO 5 October 9, 1959)

Rule 89, Alaska Rules of Civil Procedure states: Attachment.

(a) **Prejudgment Attachment; Availability.** After a civil action is commenced, the plaintiff may apply to the court to have the property of the defendant attached under AS 09.40.010 -- .110 as security for satisfaction of a judgment that may be recovered. The court may issue the writ of attachment in accordance with the provisions of this rule. However, no writ may be issued unless the plaintiff has provided a written undertaking with sufficient sureties as ordered by the court.

Any party bringing a claim against another party may utilize prejudgment attachment procedures and is considered a plaintiff for purposes of this rule.

(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:

(1) That the action is one upon an express or implied contract for the payment of money, and the facts and circumstances relating thereto; and

(2) That the sum for which the attachment is asked is an existing debt due and owing from the defendant to the plaintiff, over and above all legal setoffs and counterclaims, and the facts and circumstances relating thereto; and

(3) That the payment of such debt has not been secured by any mortgage, lien or pledge upon real or personal property, or if so secured, that the value of the security (specifying its value) is insufficient to satisfy any judgment that may be recovered by the plaintiff in the action; and

(4) That the attachment is not sought nor the action prosecuted to hinder, delay, or defraud any other creditor of the defendant; and

(5) That the plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors, or, if any such proceeding has been terminated, that the claim of the plaintiff was not discharged in such proceeding.

(c) **Notice of Motion; Pre-Attachment Hearing.** Except as section (m) provides, the court may issue the writ of attachment only after:

(1) The defendant is served with notice of the motion and a copy of the affidavit; and

(2) The defendant is given an opportunity for a judicial hearing to determine the necessity of and justification for the prejudgment attachment of the property. The hearing shall be held not less than three (3), nor more than seven (7) business days (exclusive of Saturdays, Sundays and legal holidays) after the service of the notice of motion upon the defendant.

(3) The hearing shall be held before the court on the days specified and shall take precedence over all other matters not of a similar nature pending on that day. If the defendant does not appear at the hearing, in person or by counsel, the court, without taking further evidence, shall immediately order the prejudgment attachment of the property. The hearing shall be conducted in conformity with Civil Rule 77, except where the provisions of Rule 77 conflict with the specific requirements of the instant rule, in which case, the requirements of the instant rule shall control.

(d) **Hearing; Burden of Proof.** At the hearing the court shall require the plaintiff to establish by a

preponderance of the evidence the probable validity of the plaintiff's claim for relief in the action and the absence of any reasonable probability that a successful defense can be asserted by the defendant.

(e) **Issuance of Writ.** If at the hearing the court finds that the plaintiff has met his burden of proof set forth in section (d) of this rule, the court shall order that a writ of attachment be issued unless the defendant posts security as provided in section (j). The writ shall be directed to a peace officer and shall require the peace officer to attach and safely keep property of the defendant not exempt from execution sufficient to satisfy the plaintiff's demand (the amount of which shall be stated in conformity with the complaint), together with costs and expenses. Several writs may be issued at the same time and delivered to different peace officers, provided the total amount of the several writs does not exceed the plaintiff's claim. Additional writs may be issued where previous writs have been returned unexecuted, or executed in an amount insufficient to satisfy the full amount of the plaintiff's claim.

(f) **Execution of Writ.** The peace officer shall execute the writ without delay, as follows:

(1) Real property shall be attached by leaving a certified copy of the writ with the occupant of such property, or if there be no occupant, then in a conspicuous place on such property.

(2) Personal property capable of manual delivery to the peace officer, and not in the possession of a third party, shall be attached by the peace officer by taking it into custody.

(3) Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of same, or if it be a debt, then with the debtor.

(g) **New or Additional Undertaking.** The court at any time may require the giving of a new or additional undertaking to protect the interests of the defendant, the peace officer, or any party who intervenes, if good reason is shown that a new or additional bond is necessary.

(h) **Sureties on Undertaking.** The qualifications of sureties and their justification shall be as prescribed by these rules.

(i) **Return by Peace Officer.** The peace officer shall note upon the writ of attachment the date of its receipt. When the writ has been executed, the peace officer shall promptly return it to the clerk with the officer's proceedings endorsed thereon, including a full inventory of any property attached. If the writ cannot be executed, the peace officer shall promptly return it to the clerk stating thereon the reasons why it could not be executed.

(j) **Defendant's Security.** No writ of attachment may issue, or the peace officer shall redeliver to the defendant any property seized pursuant to the hearing, when the defendant provides a written undertaking with sufficient sureties as ordered by the court. The court may take into account a defendant's indigency, and may, in its discretion, permit the defendant to establish security by means other than the posting of bonds or the provision of a written undertaking. Such alternative means may include an installment payment arrangement or any other mechanism which the court deems just.

(k) **Wages of Defendant.** No part of the defendant's wages shall be attached prior to entry of final judgment except as permitted under 15 U.S.C. § 1673, AS 09.38.030 -- 09.38.050, AS 09.38.065 and AS 09.40.030.

(l) **Garnishee Proceedings.**

(1) *Order of Appearance -- Service.* When a person is ordered to appear before the court to be examined as to any property or debt held by the person belonging to a defendant, such person shall be known as the garnishee. The order shall state the time and place where the garnishee is to appear, shall be served upon the garnishee and return of service made in the manner provided for service of summons and return thereof in Rule 4.

(2) *Failure to Appear -- Default.* When a garnishee fails to appear in compliance with the order, the court on motion may compel the garnishee to do so.

(3) *Discovery.* After entry of the order mentioned in subsection (1), plaintiff may utilize the rules of discovery under the supervision of the court with respect to all matters relating to property of the defendant believed to be in the possession of the garnishee. The consequences of the garnishee's failure or refusal to make discovery shall be governed by these rules.

(4) *Trial of Issues of Fact.* Issues of fact arising between the plaintiff and the garnishee shall be resolved and disposed of in accordance with these rules as in the case of issues of fact arising between plaintiff and defendant. Witnesses, including the defendant and garnishee, may be required to appear and testify as upon the trial of an action.

(5) *Judgment Against Garnishee.* If it shall be found that the garnishee, at the time of service of the writ of attachment and notice, had any property of the defendant liable to attachment beyond the amount admitted in the garnishee's statement, or in any amount if a statement is not furnished, judgment may be entered against the garnishee for the value of such property in money. At any time before judgment, the garnishee may be discharged from liability by delivering, paying or transferring the property to the peace officer.

(6) *Order Restraining Garnishee.* At the time of the application by plaintiff for the order provided for in subsection (1), and at any time thereafter and prior to the entry of judgment against the garnishee, the court may enter an order restraining the garnishee from paying, transferring, or in any manner disposing of or injuring any of the property of the defendant alleged by the plaintiff to be in the garnishee's possession or control, or owing by the garnishee to the defendant. Disobedience of such order may be punished as a contempt.

(7) *Execution.* Execution may issue upon a judgment against a garnishee as upon a judgment between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner.

(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.**

(o) **Discharge of Attachment Where Perishable Goods Have Been Sold.** Whenever the defendant shall have appeared in the action, the defendant may apply to the court for an order to discharge the attachment on perishable goods which have been sold. If the order be granted, the peace officer shall deliver to the defendant all proceeds of sales of perishable goods, upon the giving by the defendant of the undertaking provided for in section (j).

(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.
>
> (q) The administrative director may adopt alternative procedures from those set out in this rule in order to allow electronic executions pursuant to Civil Rule 69(h).
>
> (Amended by SCO 49 effective January 1, 1963; by SCO 156 effective December 8, 1972; by SCO 417 effective August 1, 1980; by SCOs 635, 636 and 637 effective September 15, 1985; by SCO 820 effective August 1, 1987; by SCO 853 effective January 15, 1988; by SCO 1135 effective July 15, 1993; and by SCO 1153 effective July 15, 1994). **Cross References**: (b) **CROSS REFERENCES:** AS 09.40.010, (k) **CROSS REFERENCES:** AS 09.40.010, (m) (1) **CROSS REFERENCES:** AS 09.40.060, (n) (1) **CROSS REFERENCES:** AS 09.40.010, (p) **CROSS REFERENCE:** AS 09.40.070.

The validity of the forgoing mandate in Civil 89 in relation to forfeitures is born out in the Alaska Supreme Court holding in *F/V American Eagle v. State* 620 P.2d 657 Alaska, 1980.

> "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."[20]
>
> Since constitutional due process demands notice and an unconditioned opportunity to contest the state's reasons for seizing property used by its owner in earning a livelihood "within days, if not hours" it follows that there must be rules describing this

[20] *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton*, 538 F.2d 27 (2d Cir. 1976).

procedure. Civil Rule 89 describes such procedure in exact detail:

> 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.

Haeg's airplane and property that he was using at the very time to provide a livelihood for his wife and two daughters was seized via a search warrant supported by a perjured search warrant affidavit on April 1, 2004. Haeg subseqently found out other property, also used to provide for a livelihood for his family, had been seized on March 29, 2004.

Haeg never received copies of the plaintiff's affidavit, motion and undertaking, and order that were **required** to be given at the same time as the ex parte writ of attachment.

Haeg never voluntarily, knowingly, and intelligently waived his **constitutional** right to a hearing either verbally or in writing. In fact Haeg asked Trooper Glen Godfrey, documented in Trooper Godfrey's official report: "when can I get my plane back because I have clients coming in tomorrow". Trooper Godfrey replied: "you will never get your plane back"

The ex parte attachment of property, used by Haeg to provide a livelihood for his family, that by law was valid for **no more than seven (7) business days**, lasted for approximately one point five (1.5) **years** or approximately five hundred forty

(540) days. At no time during these approximately five hundred forty (540) days did Haeg ever waive, either verbally or in writing, his **constitutional** right to a hearing to contest the states reasons for ex parte attachment. At no time did Haeg, either verbally or in writing, ever extend the nonexistent waiver of his constitutional right to a hearing to contest the state's reasons for ex parte attachment.

Haeg wonders if the Alaska Supreme Court holding of a guaranteed **constitutional** right to a hearing "within days, if not hours" included approximately one point five (1.5) years, approximately five hundred forty (540) days or approximately twelve thousand nine hundred sixty (12,960) hours. Haeg wonders if the Alaska Supreme Court really meant to say: "within **decades**, if not years" because this would then apply to the ex parte attachment of his property, used to provide a livelihood for his family, in his case.

Even if the State prosecution had afforded Haeg with the constitutionally required notice and unconditioned opportunity hearing "within days, if not hours", their ability to continue holding Haeg's property ceased to have any force or effect and the property attached should have been released after six (6) months according to Civil Rule 89(p) - unless a notice of readiness for trial was filed or a judgment was entered against the defendant in the action in which the writ was issued. A notice of readiness for trial was not filed in Haeg's case until approximately twelve (12) months after Haeg's property was illegally seized and a judgment was not entered against Haeg until eighteen (18) months after Haeg's property was illegally seized.

It goes without saying that since the State prosecution never complied with any of the forgoing legal and constitutional requirements they did not file to extend the duration of a writ issued pursuant to a hearing beyond six (6) months - as was available to them under Civil Rule 89 (p).

There is no disputing the fact that the State prosecution did not comply with their absolute obligation to provide Haeg with the constitutionally mandated "notice" and "unconditioned oportunity" for a hearing "within days, if not hours" after seizing property that Haeg was using at the time to provide a livelihood for his family. There is no disputing the fact that the first three (3) search warrant affidavits, which supported the first three (3) search warrants, contained statements that were factually incorrect, highly misleading, and extremely prejudical to Haeg. There is no disputing the evidence obtained from these first three (3) illegal search warrants led to all subsequent search warrants. There is no disputing the fact that both Trooper Gibbens and prosecutor Leaders continued persisting in this perjury **after** it was pointed out to them – proving the knowing and intentional malice of the perjury. There is no disputing the fact that Judge Murphy stated it was because of the prejudice of this perjury for the harsh penalty she sentenced Haeg to. There is no disputing the fact that the perjury would make it more likely for search warrants to be issued, that Haeg would more likely be convicted of a crime he did not commit, and that he would more likely receive a far harsher sentence. There is no disputing the fact that Haeg noticed the perjury on the search warrant affidavits immediately after being given them – so this fact would have been brought up during the hearing. There is no disputing the fact that controlling caselaw and rule requires a hearing or the State prosecution to obtain a written waiver of such hearing, within seven (7) business days. There is no disputing the fact that the State prosecution did not obtain this written waiver from Haeg. There is no disputing the fact that the property seized was used as the primary means to provide a livelihood for Haeg's family of four (4). There is no disputing the fact that Haeg clearly indicated his desire for an immediate hearing when trooper Glen Godfrey recorded Haeg asking him, "When can I get my plane back?

I have clients coming in tomorrow and I have to set up bear camp." There is no disputing the fact that Haeg was using the property seized to provide a livelihood for his family at very moment it was seized. There is no disputing the fact that the illegal deprivation of Haeg's property during the eighteen months before judgment harmed Haeg and his family greatly. There is no disputing the fact that the State prosecution retained Haeg's property longer than six (6) months without the filing of a notice of readyness for trial or a judgment was entered against Haeg. There is no disputing the fact that the State prosecution did not file for an extension, or the required notice of such extension to Haeg, before the first six (6) months expired. There is no disputing the fact that the State prosecution failed to include, in any of the three (3) informations filed in Haeg's case, their intention to forfeit Haeg's property. There is no disputing the fact that a majority of circuit courts have ruled a delay of more than one (1) year between seizure and trial is unreasonable. There is no disputing the fact that the time between the seizure of Haeg's property and his trial was appoximately one point five (1.5) years. There is no disputing the fact that the Ninth (9th) Circuit U.S. Court in U.S. v. Crozier, 674 F2d 1293 (1982) vacated an ex pane restraining order, holding that, "Even when exigent circumstances permit an ex pane restraining order, the government may not wait until trial to produce adequate grounds for forfeiture." There is no disputing the fact that the amount of process "due" under the Due Process Clause increases with the severity of the deprivation. There is no disputing the fact that in *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."[21]

There is no disputing the fact that the 9th Circuit U.S. Court held in *Seguin v Eide*, 720 F2d 1046 (9th Cir. 1983), on remand after judgment vacated, 462 U.S.1101,103 S. Ct. 2446 (1983); *Wiren v Eide*, 542 F2d 757 (9th Cir. 1976) that:

> "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."

There is no disputing the fact that the *U.S. Supreme Court in Peralta v Heights Medical Center, Inc.*, 485 U.S. 80, (1988) held that:

> "[I]t is not denied by appellee that under our cases, 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." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 35 S. Ct. 625, 629, 59 L. Ed. 1027 (1915). As we observed 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."[22]

Based on the forgoing facts, supporting documentation and affidavits, Haeg hereby humbly asks this court for summary judgment in his favor on his motion for Return of Property and to Suppress Evidence. If this court finds there is not enough evidence for such a ruling in Haeg's favor he humbly asks this court to grant an emergency hearing, including subpoenas for

[21] Id. at 314-15.
[22] See Peralta, supra, 108 U.S. at 898-99, 900.

Trooper Brett Gibbens, Trooper Glen Godfrey, Trooper Steve Bear, prosecutor Scot Leaders, and attorney Bent Cole, in accordance with Civil Rule 89(n). Haeg would also humbly ask to be allowed to call witnesses Jackie Haeg, Tom Stepnosky, Wendell Jones, Tony Zellers, and David Haeg.

This motion for summary judgment, motion for emergency hearing, and reply to opposition is supported by an affidavit of David Haeg, an affidavit of Jackie Haeg, and other supporting documents.

RESPECTFULLY SUBMITTED this _____ day of _____, 2006.

Defendant,

_____

David S. Haeg

I HEREBY CERTIFY that a copy of the foregoing was served on Roger Rom, OSPA, by first class mail on _____, 2006

By: _____