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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT ANIAK

DAVID HAEG	)
	)
	)
vs.	)
	) Search Warrants: 4MC-04-001SW,
	) 4MC-04-002SW, 4MC-04-003SW,
STATE OF ALASKA,	) 3KN-04-81SW, & 4MC-04-004SW
	)
	) Appellate Court No.: A-09455
_____	) Court No. 4MC-S04-00024 Cr.

MOTION FOR RETURN OF PROPERTY
& TO SUPPRESS EVIDENCE

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

COMES NOW Pro Se Appellant, DAVID HAEG, in the above referenced search warrants and/or case numbers & hereby files the following motion for return of property & to suppress evidence in accordance with *Alaska Rules of Criminal Procedure Rule No. 37(c):*

> "A person aggrieved by an unlawful search & 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 & to suppress for use as evidence anything so obtained on the ground that the property was illegally seized."

David and Jackie Haeg respectfully request the return of their property and to suppress for use as evidence because the State failed to comply with constitutional due process during the seizure, deprivation, and forfeiture of their property – which

was used as the primary means of making a livelihood. In addition, the criminal forfeiture statutes that authorize forfeiture in Fish and Game cases are unconstitutional as written and as applied in David and Jackie's case because they lack standards to comply with due process – which also renders the seizure, deprivation, and forfeiture void. The included appendix contains a list of all property requested to be returned and suppressed as evidence.

On 2/5/07 the Alaska Court of Appeals remanded Haeg's trial court case #4MC-04-024Cr/Court of Appeals Case #A-09455 for:

> "The limited purpose of allowing Haeg to file a motion for the return of his property which the State seized in connection with this case. The District Court has the jurisdicition to conduct any proceedings necessary to decide this motion."

FACTS

On 3/1/04 master big game hunting guide David Haeg [pilot] and registered big game hunting guide Tony Zellers (Zellers) [gunner] were issued permit #12 to take wolves Same Day Airborne using aircraft as part of an approved Wolf Control Program in Game Management Unit 19D. The written laws for program conduct is specifically distinct from hunting, guiding, and/or game methods and means restrictions. See *5 AAC 92.039.*

Starting on 3/29/04, utilizing affidavits that contained intentional, misleading, & highly prejudicial perjury, Trooper Brett Gibbens (Gibbens) applied to the Aniak District Court for several search warrants that were used to seize property owned & used by David & Jackie Haeg to provide guided big game hunts and flightseeing trips. These endeavors provided both Jackie and David's entire livelihood for their family of 4 and the property seized was the primary equipment used for this. The seizure totally ended the entire flightseeing business.

The perjury Gibbens testified to on the search warrant affidavits was that he had found evidence of wolves taken Same Day Airborne in Game Management Unit 19C and that the Haeg's big game hunting lodge where David is licensed to guide is in Game Management Unit 19C. Gibbens own GPS coordinates, however, placed the sites in Game Management Unit 19D, the Game Management Unit where the aerial Wolf Control Program was being conducted by taking wolves Same Day Airborne (for which David had a permit) and where Haeg was not licensed to guide. Gibbens report states, "Based on my experience, there is a clear economic incentive for Haeg and Zellers to eliminate or reduce predators from this area, which could potentially increase numbers of trophy animals for them to harvest with clients" – leading anyone to believe this was a case that had nothing to do with the Wolf Control Program and everything to do with a big game hunting guide making money with clients. Wolf Control Permits (*5 AAC 92.039*) provided for violations that were intentionlly separate from big game guiding or hunting violations. The difference in potential penalties for a guide like David are stunning – as potential violations of the Wolf Control Program could not affect David's guide license upon which both he and Jackie depend to make a livelihood for their family of 4. On 3/27/04 - 3/29/04 Gibbens seized property that was owned & used by David & Jackie Haeg to provide a livelihood. On 4/1/04 - 4/3/04 other law enforcement personel, including Alaska State Trooper Seargent Glenn Godfrey (Godfrey), utilizing search warrants & affidavits provided and perjured by Gibbens, seized more property owned by David & Jackie Haeg. The property seized was the primary property by which both David and Jackie Haeg provide a livelihood for their family. During the property seizure of 4/2/04 David asked Godfrey, "When can I get my plane

back? I have clients coming in tomorrow and I have to set up bear camp." Godfrey told David, "Never". (taped by Godfrey)

Not one affidavit or warrant filed in David's case gave justification for the deprivation or notice the State wished to forfeit any of the David or Jackie's property. No hearing to contest the ex parte seizure and deprivation was given to David or Jackie, and no one gave David or Jackie notice they had the right to a hearing to contest the ex parte seizure and deprivation – let alone a hearing "in days if not hours" before the deprivation harmed David or Jackie. No one gave David and Jackie notice they had a right to ask to bond the property out so they could continue making a livelihood.

It was weeks after seizure David and Jackie hired an attorney – because they were trying to deal with clients without their business property.

On 6/11/04 David gave an interview to Gibbens and prosecutor Scot Leaders (Leaders) during plea negotiations. During this interview David tells Gibbens and Leaders that the evidence Gibbens found was in the Wolf Control Program Unit (19D) and not in Unit 19C where David is licensed to guide. During this interview Gibbens states, "Killing wolves in 19D wouldn't specifically and necessarily directly benefited your businesses"

On 6/23/04 Zellers gives an interview to Gibbens and Leaders during plea negotiations. Gibbens questions Zellers where the evidence was, "Right in the heart of your guide area there? Cause that is pretty centrally located in the country you guys hunt right?" Zellers tells Gibbens and Leaders that the evidence found was in Game Management Unit 19D where he and David cannot guide. Zellers also tells Gibbens and Leaders where

he and David can guide and where the Haeg's lodge is located in Game Management Unit 19C.

On 11/4/04, or over 7 months **after** seizing David and Jackie's property, David is charged by information. On 11/8/04, or just 4 days later and just 5 hours before the plea agreement was to be concluded the State files an amended information with the most severe charges a big game guide can face – violating the rule 11 plea agreement yet still using David's statements made during plea negotiations. No notice of an intent or statute authorizing property forfeiture was included in any of the informations filed. No charges were ever filed against Jackie.

At David's trial of 7/26/05 – 7/29/05 (which happened because the State broke the rule 11 plea agreement and forced him to trial - still using his statements made during plea negotiations) Gibbens, in response to Leaders questions, states under oath and on the witness stand the evidence he found was in Game Management Unit 19C. Leaders accepted this perjury from Gibbens in front of Haeg's judge and jury. David is found guilty of hunting Same Day Airborne – the most severe charges a hunting guide can be found guilty of.

On 9/29/05, or exactly 1 and 1/2 years from when David and Jackie's property was seized, David is given an unbelievable sentence with a 5 year revocation of his guide license (in addition to the year he and Jackie had already given up for the Rule 11 plea agreement the State broke), including forfeiting most of David and Jackie's property, with Judge Murphy specifically citing the falsehood knowingly perpetuated by Gibbens and Leaders as cause for this, "since the majority if not all the wolves were taken in 19C - where you [Haeg] were hunting." On 8/5/06 Gibbens writes a letter to Trooper Bear (at

David's request of Bear) candidly admitting all the evidence found was in Game Management Unit 19D.

In over 3 years neither David nor Jackie have ever been given their constitutional right to notice of a hearing to contest the deprivation of property, been actually provided the hearing to contest the deprivation, or been presented justification or notice of the case against their property so a defense could be prepared. They were never even notified they could bond the property out. All this was supposed to happen "in days if not hours" of the property seizure according to constitutional due process – so that the determination could be made before the deprivation harmed David and/or Jackie.

In over 3 years the State has not even returned to David and/or Jackie the property still held by the State and never forfeited – even though David & Jackie have asked repeatedly for this

The property David & Jackie Haeg are being deprived of in violation of established constitutional due process is the primary means by which both of them provide the only livelihood they have for their family of 4. The deprivation has harmed David & Jackie Haeg incredibly. Much of the property seized was Jackie's alone and virtually all the rest she had joint ownership – including the airplane.

The State never filed a civil in rem forfeiture proceeding against any of the property.

Motions David and Jackie Haeg have filed for the return of property and to suppress as evidence after realizing the constitutional violations are as follows: 7/17/06 Motion for Return of Property & Suppress as Evidence filed in the Kenai Court, 7/25/06 Motion for Return of Property & Suppress as Evidence filed in the McGrath Court, 8/21/06 Motion for

Reconsideration filed in the Kenai Court, 8/21/06 Motion for Reconsideration filed in the McGrath Court, 9/14/06 Addendum to Motion for Return of Property & to Suppress Evidence filed in the Kenai Court, 10/14/06 Motion for Expedited Consideration filed in the Kenai Court for David Haeg, 10/14/06 Motion for Expedited Consideration filed in the Kenai Court for Jackie Haeg, 10/16/06 Motion for Return of Property & to Suppress Evidence filed in the Kenai Court for David Haeg, 10/16/06 Motion for Return of Property & to Suppress Evidence filed in the Kenai Court for Jackie Haeg, 11/6/06 Emergency Motion for Return of Property & to Suppress Evidence filed in the Court of Appeals, 11/9/06 Motion for Return of Property & to Suppress Evidence filed in the Kenai Court for David Haeg, 11/9/06 Motion for Return of Property & to Suppress Evidence filed in the Kenai Court for Jackie Haeg, 11/27/06 Motion for Reconsideration filed in the Court of Appeals, & 1/5/07 Motion for Ruling filed in the Court of Appeals.

All courts have refused to rule on the merits of any of these motions in all this time – with both the district court and Court of Appeals stating at the same time they could not do so because the other court had jurisdiction. David and Jackie finally told the Court of Appeals that since no court would rule on the merits they would physically go obtain the return of their property on 3/31/07 (or exactly 3 years since they were deprived of their property in direct violation of constitutional due process) – which apparently was enough to convince the Court of Appeals to remand this issue so it can be resolved on the merits without physical confrontation.

ARGUMENT

1. HEARING, NOTICE OF HEARING, NOTICE OF INTENT TO FORFEIT, AND CASE FOR FORFEITURE.

David and Jackie Haeg had an absolute right to a hearing and/or notice of a hearing to contest the State's reasons for seizing, depriving and/or forfeiting their property, used as their primary means to provide a livelihood, "in days if not hours" – including the opportunity to bond it out prior to judgment, according to all U.S. and Alaska Supreme Court constitutional due process guarantees. This hearing and/or notice of hearing was to be given before the ex parte property deprivation substantially harmed David or Jackie. In addition they were to be given notice before the hearing that the State wished to forfeit their property and to be given the charges authorizing this - including the State's justification for doing so – in order that they would know what and how to oppose. It is equally clear that David and Jackie Haeg were denied any and/or all of this guaranteed constitutional due process.

Waiste v. State, 10 P.3d 1141 (Alaska 2000) the Supreme Court of Alaska held in an ex parte seizure of a fishing boat subject to forfeiture during a criminal prosecution that:

> **"This court's dicta, however, and the persuasive weight of federal law, both suggest that the Due Process Clause of the Alaska Constitution should require no more than a prompt postseizure hearing... Waiste and the State agree that the Due Process Clause of the Alaska Constitution requires a prompt postseizure hearing upon the seizure of a fishing boat potentially subject to forfeiture**... The State argues that a prompt postseizure hearing is the only process due, both under general constitutional principles and under this court's precedents on fishing-boat seizures, whose comments were not dicta...But **given the conceded requirement of a prompt postseizure hearing on the same issues, in the same forum, 'within**

days, if not hours' the only burden that the State avoids by proceeding ex parte is the burden of having to show its justification for a seizure a few days or hours earlier... The State does not discuss the private interest at stake, and Waiste is plainly right that it is significant: even a few days' lost fishing during a three-week salmon run is serious, and due process mandates heightened solicitude when someone is deprived of her or his primary source of income...

As Justice Frankfurter observed,'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss **notice of the case against him and opportunity to meet it**." As the Good Court noted, moreover, the protection of an adversary hearing 'is of particular importance [in forfeiture cases], where the Government has a direct pecuniary interest in the outcome.'

An ensemble of procedural rules bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors. **The rules include the need to show probable cause to think a vessel forfeitable in an ex parte hearing before a neutral magistrate, to allow release of the vessel on bond, and to afford a prompt postseizure hearing.** That ensemble is undeniably less effective than a prior, adversarial hearing in protecting fishers from the significant harm of the erronious seizure and detention of a fishing boat... **That the State was not seizing the boat only for the section .190 criminal proceeding is apparent from the record. The search warrant affidavit envices the State's dual purpose in seizing the boat, citing both section .190 and section .195 as justification for the seizure... Waiste argues in his opening brief that the forfeiture statute is facially unconstitutional because it lacks standards for forfeiture actions, but - as the State noted in its brief, and Waiste did not contest in his reply - he waived this claim by failing to raise it below**.

F/V American Eagle v. State, 620 P.2d 657 (Alaska, 1980) the Supreme Court of Alaska:

"**The seizure was pursuant to AS 16.05.190-.195...[P]rior to the state's filing of a formal civil complaint for forfeiture...the owners negotiated the release of the vessel and its gear to local fishing by entering into a voluntary stipulation of a bond with the state**...

The standards of due process under the Alaska and federal constitutions require that a deprivation of property be accompanied by notice and opportunity for hearing at a meaningful time to minimize possible injury. *Etheredge v. Bradley*, 502 P.2d 146 (Alaska 1972). **Where property allegedly used in an illicit act is confiscated by government officials pending a forfeiture action, no notice or hearing is necessary prior to the seizure**. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). **However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent**. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); *Lee v. Thorton*, 538 F.2d 27 (2d Cir. 1976).

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

State v. F/V Baranof 677 P.2d 1245 (Alaska, 1984) the Supreme Court of Alaska held:

"**On May 9, 1981, officers of the Alaska State Division of Fish & Wildlife Protection seized the F/V Baranof** in Dutch Harbor, Alaska **under authority of a search and seizure warrant** issued on May 7, 1981. **On May 11, 1981, the State of Alaska filed a civil complaint *in rem* (the vessel itself being the only named defendant) in superior court for the forfeiture of the F/V Baranof pursuant to *AS 16.05.195***, alleging unlawful

harvest, transportation, and possession of king crab in 1979 and 1980. **On May 12, 1981, the State filed a motion for publication of notice to owners and other interested parties**, which was granted on May 14, 1981. **Negotiations for release of the vessel were commenced immediately**, and on May 27, 1981, the ship was released under a Special Release Agreement.

PROCEDURAL DUE PROCESS - The Baranof's final contention is that its due process rights under the United States and Alaska constitutions were violated. **It argues that the forfeiture statute under which the vessel was seized, *AS 16.05.195*, is constitutionally defective in that it does not provide a hearing either prior to or immediately after the seizure of property. Since we hold that the owners of the Baranof were in fact afforded procedural due process, we need not reach the question of the constitutionality of *AS 16.05.195***. *See Jennings v. Mahoney,* 404 U.S. 25, 92 S.Ct. 180, 30 L.Ed.2d 146 (1971); *F/V American Eagle v. State,* 620 P.2d 657, 667 (Alaska 1980), *appeal dismissed,* 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284 (1982).

Due process does not require notice or a hearing prior to seizure by government officials of property allegedly used in an illicit activity. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *American Eagle,* 620 P.2d at 666. **However, when the seized property is used by its owner in earning a livelihood, notice and an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent**. *Stypmann v. City and County of San Francisco,* 557 F.2d 1338 (9th Cir.1977); *Lee v. Thorton,* 538 F.2d 27 (2d Cir.1976). *American Eagle,* 620 P.2d at 666-67. We believe the present case is analogous to *American Eagle,* 620 P.2d at 666-68, where we upheld the seizure of a king crab fishing vessel. As in *American Eagle,* the seizure of the Baranof was authorized by a judicially approved warrant issued upon probable cause pursuant to *Criminal Rule 37*. *Id.* at 667. The owners had "an immediate and unqualified right to contest the state's justification for the

seizure under Criminal Rule 37(c)." *Id.* "Rather than avail themselves of this opportunity, **the owners negotiated the release of the vessel**...." *Id.* Finally, in the present case, **the State filed a civil complaint on the next working day following the seizure, and the owners were promptly notified**."

Department of Fish and Game v. Pinnel, Op. No. 586, 461 P2d 429 (Alaska 1969) the Alaska Supreme Court held:

"A preliminary injunction which is granted **without setting forth the reasons for the issuance of the injunction and without findings of fact and conclusions of law which articulate grounds for the issuance of the preliminary injunction as required by this rule is procedurally defective and will be vacated.**"

Ostrow v. Higgins, Op. No. 3085, 722 P2d 936 (Alaska 1986) the Alaska Supreme Court held:

"A party who initially obtains a temporary restraining order is not entitled to receive its benefits indefinitely by not proceeding to request a preliminary injunction hearing."

Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1999) the U.S. Court of Appeals, Ninth Circuit held:

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

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

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

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

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

The "situation demands" written notice of how to retrieve the property. *See* ***Aguchak v. Montgomery Ward Co.,*** **520 P.2d 1352, 1357 (Alaska 1974) (due process**

requires that written notice to legally unsophisticated and indigent defendants be more substantial, detailed, and easily understood). We find the written notice given by the West Covina Police Department was constitutionally inadequate.

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

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

[T]he notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court.

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

Schneider v. County of San Diego, 28 F.3d 89 (9th Cir.1994), *cert. denied,* 513 U.S. 1155, 115 S.Ct. 1112, 130 L.Ed.2d 1077 (1995) held:

> **"[D]ue process violation where seizure notice did not state that abandoned vehicles would be destroyed."**

Mathews v. Eldridge, 424 U.S. 319 (1976) the U.S. Supreme Court held:

> "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The **"right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."**

The U.S. Supreme Court in ***Mullane v. Central Hanover Bank***, 339 U.S. 306, (1950), set the standard for notice:

> "**An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ... The notice must be of such a nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance...But when notice is a person's due, process which is a mere gesture is not due process**."
>
> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*,

234 U.S. 385, 394. **This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.**

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

Sniadach v. Family Finance Corp. 395 U.S. 337 (1969) the U.S. Supreme Court held:

"Wisconsin's prejudgment garnishment of wages procedure, with its obvious taking of property without notice and prior hearing, violates the fundamental principles of procedural due process... **in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise.**

In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment. We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schroeder v. New York*, 371 U.S. 208, 212) within the meaning of procedural due process.

A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support. As stated by Congressman Reuss:

"The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level."

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

Goldberg v. Kelly, 397 U.S. 254 (1970) the U.S. Supreme Court held:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). **The hearing must be "at a meaningful time and in a meaningful manner... and in an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments in evidence**. Often, that basic justice right will require an attorney. Since in almost every setting, where important decisions turn on a question of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Armstrong v. Manzo*,

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

U.S. v Seifuddin, 820 F.2d 1074, 1076 (9th Cir. 1987) the U.S. 9th Circuit Court of Appeals held:

"'Criminal' forfeitures are subject to all the constitutional and statutory procedural safeguards

available under criminal law. The forfeiture case and the criminal case are tried together. **The forfeiture counts must be included in the indictment of the defendant**, which means the grand jury must find a basis for the forfeiture. At trial, the burden of proof is beyond a reasonable doubt."

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) the U.S. Supreme Court held:

> "**[A] judgment entered without notice or service is constitutionally infirm**....Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, **'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'**"

Peralta v. Heights Medical Center, *Inc.*, 485 U.S. 80 (1988) the U.S. Supreme Court held:

> "**When the forfeiture case involves a third party not involved in the criminal action the calculus is different**. When other means could be employed to protect the criminal prosecution from the risk of revealing undiscoverable information through civil discovery, such as protective orders, in camera discovery, sealed files, and other restrictions on dissemination of discovery materials, **the government's need for the stay is easily outweighed by the claimant's due process rights under *U.S. v $8,850***, 461 U.S. 555 (1983).

Armstrong v. Manzo, 380 U.S. 545, 552 (1965) the U.S. Supreme Court held:

> "**Only 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place**.' The Due Process Clause demands no less in this case."

U.S. v. James Daniel Good Real Property 510 U.S. 43 (1993) the U.S. Supreme Court held:

"The court was unanimous in holding that the seizure of Good's property, without prior notice and a hearing, violated the Due Process Clause. The Due Process Clause of the Fifth Amendment guarantees that '[n]o person shall ... be deprived of life, liberty, or property, without due process of law.' Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property.

The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the individual. **Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property** ..." *Fuentes* v. *Shevin*, 407 U. S., at 80-81.

We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in "'extraordinary situations where some valid governmental interest is at stake **that justifies postponing the hearing until after the event**.'" *Id.*, at 82 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971)); *U.S.* v. *$8,850*, 461 U. S., at 562, n. 12.

"[F]airness can rarely be obtained by secret, one sided determination of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss **notice of the case against him and opportunity to meet it**." *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring) (footnotes omitted).

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. See *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (opinion of Scalia, J.) (slip op., at 19, n. 9) "[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit".

> Requiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden. **A claimant is already entitled to an adversary hearing before a final judgment of forfeiture. Finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case**.

Brock v. Roadway Express, 481 U.S. 252 (1987) the U.S. Supreme Court held:

> 'When there are factual disputes that pertain to the validity of a deprivation, due process "require[s] more than a simple opportunity to argue or deny." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 552 (1985) (BRENNAN, J., concurring in part and dissenting in part). **Predeprivation procedures must provide "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges . . . are true and support the proposed action."** Id., at 545-546 (emphasis added). When, as here, the disputed question central to the deprivation is factual, and when, as here, there is no assurance that adequate final process will be prompt, predeprivation procedures are unreliable if they do not give the employer "**an opportunity to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [its] own behalf.'**"
>
> The adequacy of predeprivation procedures is in significant part a function of the speed with which a post-deprivation or final determination is made. Previously the Court has recognized that **"the duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved."** *Mackey v. Montrym*, 443 U.S. 1, 12 (1979). See also *Loudermill*, supra, at 547 **("At some point, a**

delay in the post-termination hearing would become a constitutional violation").'

Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951), at 171-172 the U.S. Supreme Court, Justice Frankfurter, observed:

> "Secrecy is not congenial to truth-seeking ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss **notice of the case against him and opportunity to meet it**. Nor has a better way been found for generating the feeling, so important to popular government, that justice has been done."

Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972) the Supreme Court of Alaska held:

> "Bradley issued the writ pursuant to AS09.40.010 and Civil Rule 89 **without providing notice of hearing to Etheredge**. Justice Stewart in *Fuentes v. Shevin*, 407 U.S. 67, in writing for the majority, said in part: "For more than a century the central meaning of procedural due process has been clear: **'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.'** ... It is equally fundamental that the right to notice and an opportunity to be heard **'must be granted at a meaningful time and in a meaningful manner.'**"

Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976) the U.S. 9th Circuit Court of Appeals held:

> **"Where the property was forfeited without constitutionally adequate notice to the claimant, the courts must provide relief**, either by vacating the default judgment, or by allowing a collateral suit... **Once seizure is accomplished, the justifications for postponement enumerated in Calero-Toledo evaporate, see 416 U.S. at 679-680, and due process requires that notice and opportunity for some form of hearing be accorded swiftly, and, in any event, prior to forfeiture**."

U.S. Supreme Court ***Boddie v. Connecticut***, 401 U.S. 371 (1971):

"Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Thus, this Court has seldom been asked to view access to the courts as an element of due process. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and **denial of a defendant's full access to that process raises grave problems for its legitimacy.**

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

Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth

Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

In the U.S. Supreme Court ***Fuentes v. Shevin***, 92 S. Ct. 1983, 407 U.S. 67:

"[M]ore importantly, on the occasions when the common law did allow prejudgment seizure by state power, **it provided some kind of notice and opportunity to be heard to the party then in possession of the property**, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.

For more than a century the central meaning of procedural due process has been clear: **"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."** Baldwin v. Hale, 1 Wall. 223, 233.

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

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be

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

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

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

The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed

evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. **The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing**.

"**To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits**." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken

deprivations of property, however, it is axiomatic that the hearing must provide a real test.

For the foregoing reasons, the judgments of the District Courts are vacated and these cases are remanded for further proceedings consistent with this opinion.

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

The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. **Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo** and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather than holding them for three days.

A prior hearing always imposes some costs in time, effort, and expense, and **it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right**. See *Bell v. Burson*, supra, at 540-541; *Goldberg v. Kelly*, supra, at 261.

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

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

In the U.S. Supreme Court ***Civil Rights Cases***, 109 U.S. 3 (1883): Harlan, J. said:

> "It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul."

Yick Wo v. Hopkins, 118 U.S. 356 (1886) Mr. Justice Matthews of the U.S. Supreme Court wrote,

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

U.S. Supreme Court ***Brinkerhoff-Faris Trust & Savings Co. v. Hill***, 281 U.S. 673 (1930) Justice Brandeis held the basis of the Court's reversal of the Supreme Court of Missouri was because it had denied to the plaintiff due process of law:

> "[U]sing that term in its primary sense of an opportunity to be heard and to defend its substantive right." ... By denying the plaintiff "the only remedy

> ever available for the enforcement of its right to prevent the seizure of its property," the judgment deprived the plaintiff of its property. Significantly, Brandeis stated: "Whether acting through its judiciary or through its Legislature, **a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.**"

United States Supreme Court, in ***Powell v. Alabama***, 287 U.S. 67 (1932):

> "It never has been doubted by this court, or any other so far as we know, that **notice and hearing are preliminary steps essential to passing of an enforceable judgment**, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law."

Galpin v. Page, 85 U.S. 350 (1873) U.S. Supreme Court Justice Field said:

> "[T]he rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. **'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered**.'"

Johnston v. Zerbst, 304 U.S. 458 (1938), the U.S. Supreme Court held:

> "**'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'**"

U.S. Supreme Court ***Griffin v. Illinois***, 351 U.S. 12 (1956) Justice Black wrote:

"Both equal protection and due process emphasize the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' ...Such a law would make the constitutional promise of a fair trial a worthless thing. **Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless**..."

In re Gault, 387 U.S. 1 (1967) U.S. Supreme Court Justice Fortas:

"**No notice of the hearing where Gault was committed to an institution until he was an adult was given. ... the following basic rights were denied: 1) Notice of the charges; 2) Right to counsel; 3) Right to confrontation and cross-examination; 4) Privilege against self-incrimination**. The United States Constitution would guarantee him rights and protections with respect to arrest, search and seizure, and pretrial interrogation. **It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense**."

U.S. v. Kras, 409 U.S. 434 (1973) U.S. Supreme Court Justice Marshall stated:

"I view the case as involving the right of access to the courts, the opportunity to be heard when one claims a legal right ... **There is no way to determine whether he has such a right except by adjudicating his claim**. Failure to do so denies him access to the courts."

U.S. Supreme Court ***Ortwein v. Schwab***, 410 U.S. 656 (1973) Justice Douglas explained:

"**Access to the courts before a person is deprived of valuable interests, at least with respect to questions of law, seems to me to be the essence of due process. We have recognized that token access cannot satisfy the requirements of due process.**"

U.S. Supreme Court in ***Wolff v. McDonnell***, 418 U.S. 539 (1974) held:

> **"[D]ue process required written notice of the charges be given** to the inmate, that there be a written statement by the fact finders as to the evidence relied upon, and the reasons for any discipline. The inmate **should be allowed to call witnesses and present documentary evidence**..."

In the U.S. Supreme Court ***Marbury v. Madison***, 5 U.S. 137 (1803) Mr. Chief Justice Marshall stated:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
>
> Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.
>
> **[W]hen the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.**
>
> [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who

considers himself injured has a right to resort to the laws of his country for a remedy."

The Federal Rules of Criminal Procedure – Rules 7(c)(2) and 32.2 (a) require notice of any intended forfeiture must be given in the charging document along with the statutes authorizing forfeiture to comply with due process:

Rule 7. The Indictment and the Information

(c) Nature and Contents.

(2) *Criminal Forfeiture.*

"No judgment of forfeiture may be entered in a criminal proceeding 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."

Notes to Rule 7 (1979).

"The amendment to rule 7(c)(2) is intended to clarify its meaning...for **at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture** which followed his criminal conviction."

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."

U.S. Supreme Court ***Memphis Light, Gas & Water Div. V. Craft***, 436 U.S. 1 (1978) held:

"Petitioners' notification procedure, while adequate to apprise the Crafts of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central*

> *Hanover Trust Co.*, supra, at 314. **The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing."** Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.
>
> **Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law**. The judgment of the Court of Appeals is affirmed."

It is clear that when David asked Trooper Godfrey on 4/1/04 "When can I get my plane back? I have clients coming in tomorrow and I have to set up bear camp" that the deprivation of property was going to cause immediate and irreparable harm to both David and Jackie's ability to provide a livelihood for their family of four. It is also clear David wished to contest the deprivation.

When Godfrey responded "Never" to David's question it was clear that the State was intentionally not going to provide any of the constitutionally required "ensemble". No hearing, no notice of a hearing, no justification, and no notice David or Jackie could contest the justification or deprivation or even seek to bond the property out so they could continue making a livelihood. It is clear this lack of due process immediately deprived David and Jackie Haeg of an immensely valuable right, that to use their property to make a livelihood for their 2 daughters, without any notice of the justification for deprivation or notice of an opportunity to contest. To David the

response of "Never" from Godfrey was notice there was no hearing available or that this was the hearing and David had just lost. After a response like this who would think a hearing before an impartial judge was available? Anyone and everyone would be forced to focus on the clients that were arriving the next day and how to weather the disaster ahead instead of looking for some unknown "unconditioned opportunity" for a hearing to protest.

It is clear that if David and Jackie had been provided this hearing they would have shown that the affidavits upon which all the warrants were based contained intentional, misleading, and highly prejudicial perjury from Trooper Gibbens for an illegal prosecution of David – and thus were constitutionally invalid. This would also have required all property to be returned immediately and would have forever suppressed any evidence obtained by the warrants.

It is clear, especially after Gibbens perjury, Godfrey's comment, and Leaders subornation of the same known perjury from Gibbens before David's judge and jury, confirmed by Judge Murphy's use of this as reason for the harsh sentence, that the entire case from the very beginning was meant to illegally end David and Jackie Haeg's guiding business forever. There can be no other reason for the multiple, highly prejudicial crimes and errors in David's case – all which intentionally and effectively shifted focus from the Wolf Control Program to big game guiding. When a violation of the Wolf Control Program is specifically separate from anything to do with hunting or guiding and every one of the many "errors", even when known, wrongly places the "evidence" in the Game Management Unit "where Haeg guides and has a hunting lodge", instead of in the Game Management Unit where wolf control was taking place, it is obvious.

Is it just a "coincidence" that the Wolf Control Program provided for violations that were entirely separate from hunting and thus could not affect David and Jackie's business? Is it just another "coincidence" that David and/or Jackie Haeg never received a hearing or even notice of a hearing to contest the justification for the State's actions? Is it just "coincidence" that the prosecutor who failed to give David and/or Jackie any of the constitutionally guaranteed "ensemble" of due process including notice of a hearing, notice of the justification for seizure and/or forfeiture, opportunity to contest, and opportunity to bond, Scot Leaders, was "chastised" by the judge in a recent murder trial? Judge Card went on to say that in the nearly 14 years he had been a judge he had never seen so many discovery violations – finding it "shocking" – and reminded Leaders of the defendants constitutional right to a fair trial and that "this is not Iraq". Is it just a "coincidence" prosecutor Leaders suborned known perjury from Trooper Gibbens to convict David of something he didn't do?

Not one of the 3 informations filed in David's case gave any justification or indication whatsoever the State intended to forfeit property – not even citing a statute authorizing this. In addition none of the affidavits or warrants gave any justification, authorization, or indication the State intended to forfeit property – all of which violate due process by not providing justification, authorization, or notice of the case for forfeiture. Again, *Federal Rules of Criminal Procedure 7(c)(2) and 32.2(a)* provide just some of the process that has been held due in order to comply with constitutional requirements.

2. MERITORIOUS DEFENSE

For this motion to succeed in the return of their property and to suppress as evidence neither David nor Jackie Haeg are required to show they would have prevailed in keeping their property if they would have been afforded due process in the first place. Yet David had an unbeatable defense – the State was committing perjury on search warrant affidavits and on the witness stand to illegally charge and convict him of something he was not guilty of. Jackie had an even better defense – she was never even charged with anything after her property was seized.

State v. Rice, 626 P.2d 104 (Alaska 1981) the Supreme Court of Alaska held:

> "Where the state files an action pursuant to this section for forfeiture of property, a remission procedure is mandated under the Alaska Constitution, since **not to allow innocent owners and security holders to show that they have not been involved in the criminal activity that triggered the forfeiture proceeding violates Alaska's constitutional due process... that in order to forfeit a third party's interest in this aircraft or in any other particular item, that notice and an opportunity to be heard must be given.**"

U.S. v. James Daniel Good Real Property 510 U.S. 43 (1993) the U.S. Supreme Court held:

> "Finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: **fair procedures are not confined to the innocent**. The question before us is the legality of the seizure, not the strength of the Government's case."

U.S. 9th Circuit Court of Appeals ***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."

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 ... procedure violates the fundamental principles of due process."**

Coe v Armour Fertilizer Works, 237 U.S. 413 (1915) & ***Peralta v Heights Medical Center, Inc***., 485 U.S. 80 (1988) the U.S. Supreme Court held:

> **"[A] judgment entered without notice or service is constitutionally infirm.... Where a person has been deprived of property in a manner contrary to the most basic tenets of due process 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'"**

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

> "**Only 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.**' The Due Process Clause demands no less in this case."

U.S. 9th Circuit Court of Appeals ***U.S. v. Hall***, 521 F.2d 406 (9th Cir. 06/18/1975) held:

> "Indicted for smuggling ... Hall waived his right to a trial by jury and proceeded to trial before the district judge. Hall was convicted and sentenced to imprisonment for one year. The indictment against Hall alleged that: Merchandise introduced into the U.S. in violation of this section, or the value thereof, . . . shall be forfeited to the U.S.
>
> **Our consideration of the whole record leads us to the conclusion that the court's actions, taken together, deprived Hall of the mandatory notice to which he was entitled and the concomitant opportunity to defend against a forfeiture**. The judgment of conviction is

vacated, and, upon remand, the indictment will be dismissed."

Although it is shown above David and/or Jackie Haeg do not have to prove that they would have prevailed on the merits in order to prevail in this Motion for Return of Property and Suppress as Evidence there is little doubt they would have. Jackie never had charges filed against her. Gibbens own reports and affidavits specifically show he was intentionally and illegally trying to convict David of a big game guiding and hunting violation instead of a possible Wolf Control Program violation that could not affect David or Jackie's business. There is no other conclusion possible, to make such an obvious, blatant, and prejudicial claim that all evidence found was in the area where David and Jackie guided (Game Management Unit 19C) instead of the area were the Wolf Control Program was being conducted (Game Management Unit 19D) when even his own GPS coordinates proved him wrong. This is further proven by his continued persistence in this perjury on the witness stand after it was pointed out to him and Leaders. Absolute proof is his subsequent letter, after David was sentenced, admitting all the evidence was found in Game Management Unit 19D – even according to his own GPS coordinates. The absolute proof of the success of this intentional and illegal sabotage of David and Jackie Haeg's life is the on-record justification by Judge Murphy utilizing this very perjury for her stunning sentence. Gibbens malicious perjury convicted and sentenced David for something he was not guilty of – and was the cause for the illegal seizure and forfeiture of David and Jackie's property.

Lewis v. State, 9 P.3d 1028, (Ak.,2000) in the Court of Appeals of Alaska:

"Once defendant has shown that specific statements in affidavit supporting search warrant are false, together with statement of reasons in support of assertion of falsehood, burden then shifts to State to show that statements were not intentionally or recklessly made."

McLaughlin v. State, 818 P.2d 683, (Ak.,1991) in the Court of Appeals of Alaska:

"Search warrant based on inaccurate or incomplete information may be invalidated only when misstatements or omissions that led to its issuance were either intentionally or recklessly made."

Stavenjord v. State, 66 P.3d 762, (Ak.,2003) in the Court of Appeals of Alaska:

"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."

U.S. v. Hunt, 496 F.2d 888 (5th 1974) in the 5th Circuit Court of Appeals:

"If affiant intentionally makes false statements to mislead judicial officer on application for search warrant, falsehoods render warrant invalid whether or not statements are material to establishing probable cause."

Gustafson v. State, 854 P.2d 751, (Ak.,1993) in the Court of Appeals of Alaska:

"Prosecutors and police officers applying for a warrant owe a duty of candor to the court; they may neither attempt to mislead the magistrate nor recklessly misrepresent facts material to the magistrate's decision to issue the warrant."

State v. Malkin, 722 P.2d 943 (Ak. 1986) in the Supreme Court of Alaska:

"Search warrant must be invalidated, & evidence seized pursuant thereto & must be suppressed, whenever supporting affidavit contains intentional misstatements, even though remainder of affidavit provides probable cause for warrant."

In the Supreme Court of Alaska ***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) in the Supreme Court of Alaska:

"State & federal constitutional requirement that warrants issue only upon a showing of probable cause contains the implied mandate that the factual representations in the affidavit be truthful."

The seminal U.S. Supreme Court case of ***Mapp v. Ohio***, 367 U.S. 643 (1961), held that,

"[A]ll evidence obtained by searches & seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state. Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Only last year the court itself recognized that the purpose of the exclusionary rule "is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." If the fruits of an unconstitutional search had been inadmissible in both state & federal courts, this inducement to evasion would have been sooner eliminated. There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People v.*

Defore, 242 N. Y., at 21, 150 N. E., at 587. In some cases this will undoubtedly be the result. But, as was said in Elkins, "there is another consideration - the imperative of judicial integrity." *Elkins v. U.S.*, 364 U.S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003) in the Nebraska Supreme Court:

> "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."

As Justice Brandeis, U.S. Supreme Court, said in ***Olmstead v. U.S.***, 277 U.S. 438, 485 (1928):

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."
>
> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, & that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner & to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason &

> truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, &, to the courts, that judicial integrity so necessary in the true administration of justice. The judgment of the Supreme Court of Ohio is reversed & the cause remanded for further proceedings not inconsistent with this opinion. Reversed & remanded.

Mesarosh v. U.S., 352 U.S. 1 (1956) the U.S. Supreme Court held:

> "[T]he dignity of the U.S. Government will not permit the conviction of any person on tainted testimony; this conviction is tainted; and justice requires that petitioners be accorded a new trial. Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. U.S.*, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124.
>
> The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."

Mooney v. Holohan, 294 U.S. 103 (1935) the U.S. Supreme Court held:

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

Napue v. Illinois, 360 U.S. 264 (1959) U.S. Supreme Court held:

> "Conviction obtained through use of false evidence, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go through uncorrected when it appears. Principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

Commentary to Ak Rules of Evidence - *Rule 412 Evidence Illegally Obtained*:

> "Although illegally obtained evidence may be highly probative, this rule recognizes that such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas."

Not only would David and Jackie have prevailed on the merits if they would have been given due process David and Jackie should have also had the rest of the "ensemble" of due process so they were not financially devastated before charges were filed, trial joined, or judgment imposed. Trooper Gibbens and prosecutor Leaders had already almost bankrupt David and

Jackie before the State even filed the charges. How can someone put on a defense after this? Even if David were never charged he and Jackie would have been harmed for life. This illegal and ex parte deprivation and prosecution through warrants from a single trooper's perjured affidavits harmed David and Jackie Haeg in a fashion that is almost beyond comprehension. If due process had been provided in the beginning this harm would have certainly been avoided.

3. CRIMINAL FORFEITURE STATUTES UNCONSTITUTIONAL

AS 16.05.190 and *AS 16.05.195,* Alaska's statutes that allow criminal forfeitures in Fish and Game cases, are unconstitutional in that they lack standards to comply with constitutional due process. In addition, as applied to David and Jackie's case where no hearing was provided, no notice of a hearing was provided, no notice of an opportunity to bond, and no notice of the case against the property was provided, they are also unconstitutional – and thus the seizure and forfeiture of David and Jackie's property is and was void. In Jackie's case where no charges were filed, they are also unconstitutional as they provide for no remission procedure to innocent owners. These forfeiture statutes lack standards for criminal forfeiture actions including but not limited to: specifying times, procedures, limits, and deadlines for notice, justification, hearing, bonding, and/or ex parte deprivation or even non-ex parte deprivation.

Waiste v. State, 10 P.3d 1141 (Alaska 2000) in the Supreme Court of Alaska:

> "Waiste argues in his opening brief that the forfeiture statute is facially unconstitutional because it lacks standards for forfeiture actions, but - as the State noted in its brief, and Waiste did not contest in his reply - he waived this claim by failing to raise it below."

Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972) in the Supreme Court of Alaska:

> "A statute or regulation is impermissibly vague when the language is so indefinite that the perimeters of the prohibited zone of conduct are unclear, violating rights to due process because the law fails to give adequate notice of what type of conduct is prohibited."

Jennings v. Mahoney, 404 U.S. 25 (1971) in the U.S. Supreme Court:

> "Appellant attacks the statutory scheme as not affording the procedural due process required by our decision in ***Bell v. Burson***, 402 U.S. 535 (1971). **We there held that the Georgia version of a motor vehicle responsibility law was constitutionally deficient for failure to afford the uninsured motorist procedural due process.** We held that, although a determination that there was a reasonable possibility that the motorist was at fault in the accident sufficed, 'before the State may deprive [him] of his driver's license and vehicle registration,' **the State must provide 'a forum for the determination of the question' and a 'meaningful . . . hearing appropriate to the nature of the case.'** Id., at 541, 542. Appellant submits that Utah's statutory scheme falls short of these requirements in two respects: (1) by not requiring a stay of the Director's order pending determination of judicial review, the scheme leaves open the possibility of suspension of licenses without prior hearing; (2) in confining judicial review to whether the Director's determination is supported by the accident reports, and **not affording the motorist an opportunity to offer evidence and cross-examine witnesses, the motorist is not afforded a 'meaningful' hearing**.
>
> There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by *Bell v. Burson*. This case does not, however, require that we address that question. The District Court in fact afforded this appellant such procedural due process. That court

stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine [404 U.S. 25, 27] witnesses. Both appellant and the Director testified at that hearing. The testimony of the investigating police officer would also have been heard except that appellant's service of a subpoena upon him to appear was not timely under the applicable court rules."

U.S. Supreme Court in ***Goss v. Lopez***, 419 U.S. 565 (1975) held:

"Appellee Ohio public high school students, who had been suspended from school for misconduct for up to 10 days without a hearing, brought a class action against appellant school officials seeking a declaration that the Ohio statute permitting such suspensions was unconstitutional and an order enjoining the officials to remove the references to the suspensions from the students' records. A three-judge District Court declared that **appellees were denied due process of law in violation of the Fourteenth Amendment because they were "suspended without hearing prior to suspension or within a reasonable time thereafter**," and that the statute and implementing regulations were unconstitutional, and granted the requested injunction. Held:

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

(a) Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred, and must recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Due Process Clause, and that may not be taken away for misconduct without observing minimum procedures required by that Clause. Pp. 573-574.

(b) Since misconduct charges if sustained and recorded could seriously damage the students' reputation as well as interfere with later educational and employment opportunities, the State's claimed right to determine unilaterally and without process whether that misconduct has occurred immediately collides with the Due Process Clause's prohibition against arbitrary deprivation of liberty. Pp. 574-575.

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

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

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a "severe detriment or grievous loss." The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest [419 U.S. 565, 576] at stake." *Board of Regents v.*

Roth, supra, at 570-571. Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring); *Boddie v. Connecticut*, 401 U.S. 371, 378 -379 (1971); *Board of Regents v. Roth*, supra, at 570 n. 8. A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S., at 481. We turn to that question, fully [419 U.S. 565, 578] realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

There are certain bench marks to guide us, however. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 [419 U.S. 565, 579] (1950), a case often invoked by later opinions, said that:

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

McGrath, 341 U.S. 123, 168 -169 (1951) (Frankfurter, J., concurring). At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.

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

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. **[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action.** At least the disciplinarian will be alerted to the existence of disputes about facts and arguments [419 U.S. 565, 584] about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required. **The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute**

> **unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is Affirmed."** "In its judgment, the court stated that the statute is unconstitutional in that it provides "for suspension . . . without first affording the student due process of law." (Emphasis supplied.) However, the language of the judgment must be read in light of the language in the opinion which expressly contemplates that under some circumstances students may properly be removed from school before a hearing is held, **so long as the hearing follows promptly."**

U.S. Supreme Court ***Boddie v. Conneticut***, 401 U.S. 371 (1971):

> "**Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right** although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."

Alaska Civil Rule 89 is another sterling example of the due process that is required to be given when someone is to be deprived of property – including ex parte deprivation – as it was also found to be unconstitutional by the Alaska Supreme Court in ***Etheredge v. Bradley*** 502 P.2d 146 (Alaska 1972):

> "**[W]ithout providing notice of hearing to Etheredge...Civil Rule 89 cannot be squared with the procedural due process principles elaborated in Sniadach and Fuentes...** The attachment gives the plaintiff great leverage: it pressures the defendant to do whatever is necessary to recover his property. Since this pressure often causes defendants to abandon legal rights, a challenge to the constitutionality of Civil Rule 89 may evade review...We therefore hold that summary property attachment authorized by Civil Rule 89 violates article I, section 7 of the Alaska constitution and the due process clause of the fourteenth amendment of the U.S. Constitution."

Civil Rule 89 has since been made to comply with constitutional due process:

Alaska Civil Rule 89. Attachment.

(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:

(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.

(m) (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.

(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.

It is clear that in David and Jackie Haeg's case the statutues that provide for criminal forfeiture in Fish and Game cases are unconstitutional – both facially and as applied. The above caselaw indicates that if David and Jackie Haeg had been given a prompt hearing and/or prompt notice of the existance of the right to such a hearing, along with prompt notice of the case against their property – including justification, they may not be able to contest the constitutionality of the statutes.

In David and Jackie Haeg's case, however, none of this constitutional due process was ever given as a matter of grace. Thus David and Jackie Haeg have an absolute right to successfully challenge the constitutionality of Alaska's Fish and Game criminal forfeiture statutes.

SUMMARY

It is clear that constitutional due process guarantees required the State to provide notice to David and Jackie Haeg "in days if not hours" they had "an unconditioned opportunity" to a hearing to contest the seizure and deprivation of their property. If the State did not provide the notice to the right to a hearing they were obligated to provide the hearing itself to David and Jackie in "days if not hours". It is clear that the State was required to provide notice "in days if not hours" they intended to keep and forfeit the property. It is clear the State was required to provide notice of the justification for the deprivation and forfeiture of David and Jackie's property "in days if not hours" so David and Jackie could meet and contest it. It is clear David and Jackie should have been told they had an opportunity to post bond for the property. It is clear the State had to cite the statutes authorizing forfeiture. It is clear the State had to inform David and Jackie of a remission procedure. It is clear this constitutional due process is even more binding when the property was used to provide David and Jackie's primary livelihood. It is clear David and Jackie were using the property to make a livelihood at the very time it was seized. It is clear not a single one of these constitutional due process guarantees were ever given to David or Jackie Haeg in over 3 years.

That this deprivation was going to immediately and severely hurt the Haeg's and that David wished to contest this is clearly apparent when he asked Trooper Godfrey, on the same day most of the property was seized, "When can I get my plane back? I have clients coming in tomorrow and I have to set up bear camp". That Godfrey answered "Never" is proof that the State knowingly did not intend on providing David or Jackie the required notice of a hearing, the hearing itself, justification, the case for deprivation and/or forfeiture, opportunity to bond, or

opportunity to contest. As perverse as it sounds this was the only "hearing" ever afforded to David or Jackie before they were convicted and sentenced by the prosecution to proceed through life without their primary means of providing a livelihood. No judge, jury, case, justification, or opportunity to contest, protest, bond or show the extremely serious deprivation was not warranted or authorized for a day – let alone the years it has turned into. The State destroyed David and Jackie's life without the due process of being able to tell their side of the story. It is clear that the due process required is a function of the interest deprived and the time between seizure and final judgment. **"The adequacy of predeprivation procedures is in significant part a function of the speed with which a post-deprivation or final determination is made."** ***Brock v. Roadway Express***, 481 U.S. 252 (1987). In David and Jackie's case it is their interest in putting food on the table for their two daughters for three (3) **years** and counting. It is no wonder that the U.S. and Alaska Supreme Courts have held an interest of this magnitude requires notice of an opportunity for a hearing **"in days if not hours"**. How then can it possibly be that neither David nor Jackie have not been provided this opportunity in over three (3) **years**?

The fact that not one search warrant, search warrant affidavit, or information cited a statute or other law authorizing forfeiture is additional proof that no constitutionally guarantied notice or justification for forfeiting David and Jackie's property was ever given.

It is clear the statutes authorizing criminal seizures, deprivations, and forfeitures of property in Fish and Game cases, *AS 16.05.190* and *AS 16.05.195*, are unconstitutional as they lack standards and permitted the seizure, deprivation, and forfeiture

of David and Jackie Haeg's property without the constitutionally guaranteed notice and/or hearing. It is clear that since David or Jackie Haeg were never given the required notice and/or hearing the seizure and forfeiture was and is void and everything seized, and/or forfeited must be returned.

It is clear that the search warrants issued in David's case were not valid since they were based upon affidavits that contained known, intentional, misleading, and highly prejudicial perjury. This would also require the return and suppression of all evidence obtained from the fruits of these warrants and also void the seizure, deprivation, and forfeiture of David and Jackie's property.

The undisputed essence of due process is the right to be heard. The hearing required by due process must be both "meaningful" and "appropriate to the nature of the case." Thus it is clear that to decide this motion for the return of their property and to suppress as evidence David and Jackie have a right to a fair confrontational hearing, complete with subpoenaed witnesses that may be cross-examined, evidence presentation, and sworn testimony. *(See Goldberg v. Kelly*, 397 U.S. 254 (1970)*)*.

A SHORT STATEMENT OF THE RELEIF SOUGHT

1. David and Jackie respectfully request this court to issue an order that because their property was seized, deprived, and/or forfeited in violation of Alaska and United States constitutional due process guarantees they are entitled to the return of their property and to suppress it as evidence.

2. David and Jackie Haeg respectfully request this court to issue an order that Fish and Game criminal seizure and forfeiture statutes *AS 16.05.190 and AS 16.05.195* are unconstitutional as they lack standards and permitted the

seizure, deprivation, and/or forfeiture of David and Jackie Haeg's property without the constitutionally guaranteed due process of notice and/or hearing.

3. David and Jackie Haeg respectfully request this court to issue an order that because *AS 16.05.190 and AS 16.05.195* are unconstitutional the seizure, deprivation, and/or forfeiture of David and Jackie Haeg's property, without the constitutionally required notice and/or hearing, was and is void.

4. David and Jackie Haeg respectfully request this court to issue an order that because the seizure, deprivation, and/or forfeiture of David and Jackie Haeg's property was and is void everything seized, deprived, and/or forfeited must be immediately returned and suppressed as evidence.

5. David and Jackie Haeg respectfully request this court issue an order that Trooper Gibbens search warrant affidavits, upon which all search warrants were authorized, contained intentional, misleading, and highly prejudicial perjury – and thus all evidence gathered as a result of these search warrants affidavits must be suppressed in accordance with the constitutional due process Alaska must provide as required by the seminal U. S. Supreme Court case *Mapp v. Ohio* and numerous subsequent Alaska decisions. As a result all property and evidence seized by *Search Warrants 4MC-04-001SW, 4MC-04-002SW, 4MC-04-003SW, 3KN-04-81SW, & 4MC-04-004SW* must be returned and suppressed as evidence.

6. Because of the material issues of fact presented David and Jackie Haeg respectfully request this court to order an evidentiary hearing be scheduled in which David and Jackie Haeg are allowed to testify, present evidence and oral argument, and subpoena witnesses so they may cross-examine them under oath. See Criminal Rule 42(e)(3), "If material issues of fact are not

presented in the pleadings, the court need not hold an evidentiary hearing." This means that if material issues of fact *are* presented, *as have been,* there must be an evidentiary hearing held. Witnesses David and Jackie Haeg request subpoena's for (but may not be limited to) include: Trooper Brett Gibbens, Trooper Glenn Godfrey, Trooper Steve Bear, Prosecutor Scot Leaders, Attorney Brent Cole, Attorney Arthur Robinson, Attorney Mark Osterman, Ted Spraker and Judge Margaret Murphy.

7. Because of the chilling and unbelievable obstructions and delays in getting this motion timely ruled on by any court David, Jackie, Kayla, and Cassie Haeg respectfully ask this court to rule on *all* above requests – including the one declaring that *AS 16.05.190 and AS 16.05.195* are unconstitutional. This court has a duty and obligation to do so, otherwise David and Jackie will have to appeal the refusal to rule, and the appellate courts will make a decision they can't rule since their was no decision in the lower court. Then the appellate court will then have to remand the issue, as *already happened with this motion when this court refused to rule by stating Judge Murphy had already ruled.* David asked this same court to rule on this very motion on 7/25/06 *OR OVER 1 EARLIER TO THE DECISION DATE NOW SET FOR DECIDING THIS VERY SAME MOTION BY THIS VERY SAME COURT.* This is a fundamental breakdown in justice, as deprivations of property are to be decided "within days if not hours" – not *years*. How can it possibly be that David asked for this right over a year earlier and it is just now being addressed? Is this the courts "tactic"? To intentionally deprive someone of rights by making them wait so long for a decision, cost them so much money, and have them jump through so many hoops that the will never receive the rights? This court has now successfully utilized this "tactic" to deprive David and Jackie of 2 years income from the use of their business

property. David and Jackie respectfully request this court to include its essential findings on the record, including caselaw to support it, for the decision on each and every above request – especially the rational to differentiate between items that are returned and those not returned. Also how the seizure, deprivation, and/or forfeiture of their property complied with U.S. and Alaska constitutional due process guarantees. See Criminal Rule 42(e)(4) "Where appropriate, the court shall make factual findings in accordance with Rule 12(d)." Rule 12(d) Ruling on Motion "Where factual issues are involved... the court shall state its essential findings on the record." This is David and Jackie's right and is absolutely necessary if they wish to have a *timely* appeal of any adverse decision without *another* remand. If this court will require David and Jackie to wait approximately a year for each these rulings please include this in the findings.

8. David and Jackie respectfully ask this court place a very clear and detailed finding for dispensing with any and/or all evidentiary hearings in order to decide this motion which turns on issues of material fact - i.e. whether David and/or Jackie received a hearing or notice of their right to a hearing "within days if not hours" to contest the seizure of the property they used to provide a livelihood or even bond it out, notice of the case to forfeit before the hearing, notice of the statute authorizing this in the charging documents, whether the property was used to provide a livelihood, etc, etc, etc - and how this does not deprive David and Jackie of their constitutional right to an *effective* opportunity to present their case. David and Jackie have a right to this so they may appeal any adverse decision without *another* remand taking over a *year* to accomplish.

9. David and Jackie Haeg respectfully ask this court to consider this: rather than dismissing this motion without any consideration "so David can move on" or because David has "delusions of conspiracy" (as this court has stated on the record) and that Jackie is essentially brainwashed by him (also stated on the record), just apply the *law* (especially caselaw) to the *facts*. Since this court refuses to conduct an evidentiary hearing it must take as fact all factual claims by David that are made under penalty of perjury that are not positively refuted by the State under penalty of perjury. If the State refuses to support their factual claims with an affidavit (as they have recently started doing) they cannot be taken as the truth or used to refute David's claims. Remember also our legislature became so corrupt they printed hats with "corrupt bastards club" on them and sold their votes to the highest bidder - and even tried to tell the public at one point this was legal to do. No one should be naïve enough to believe this corruption is confined to the legislative branch of government.

10. David and Jackie also respectfully request that this court consider that the petition for hearing that was just denied by the Alaska Supreme Court is at this time being appealed to the U.S. Court of Appeals – and will be appealed until David and Jackie get their constitutional right to an *effective* hearing of his motion and fundamentally fair proceedings. The only reason this court is even now ruling on this motion is David told the Court of Appeals he would physically go get his property back from the Troopers if someone didn't give him the hearing he was constitutionally entitled to – in fact being forced to lay his life on the line just to get the rights guaranteed him. Then when they "give" him this hearing they deny his right to have it be "effective" – conducting it in Aniak far from the people it

involves (violating due process) and on briefs only without testimony, cross examination of adverse witnesses, oral argument, or evidence presentation – in complete violation of the caselaw above. How can this be anything but the very worst kind of corruption – that committed under the cloak and color of law?

11. If this court thinks Haeg is wrong about any of this he asks the court to consider this – Haeg was right that he was entitled to file a motion for a hearing to ask for the return of property. The only way he received this right was by literally betting his life on it – now that he was proven correct does this court think he will not continue to go as far to receive his rights guaranteed by the U.S. Supreme Court in the caselaw above?

This motion is supported by the accompaning affidavits from David Haeg, Jackie Haeg, & Wendell Jones (who was among those who testified at the most recent face to face meeting with the Department of Justice about this motion), & attatched appendix.

RESPECTFULLY SUBMITTED this ____ day of _____, 2007.

_____

David S. Haeg

CERTIFICATE OF SERVICE

I certify that on the ____ day of _____ 2007, a copy of the forgoing document by ___ mail, ___ fax, or ___ hand-delivered, to the following party:

Andrew Peterson, Attorney, O.S.P.A.
310 K. Street, Suite 403
Anchorage, AK 99501

By: _____