APPENDIX D – SEIZURE AND FORFEITURE CASE LAW

Waiste v. State (10/13/00) sp-5320. 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 question is thus narrowed to whether a preseizure hearing is due. ...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. Precedent does not foreclose Waiste's claim. ... 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. With that in mind, we turn to general due process analysis. ... As Waiste notes, the State's own policy in commercial fishing seizures of negotiating the release of vessels and allowing the owners to resume fishing -- and its willingness in this case to delay Waiste's trial until after the fishing season -- make quite implausible any suggestion that preventing continued violations is its immediate aim in seizing fishing boats before any hearing. ... 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. ... But it does not fully remedy the basic flaws in ex

parte proceedings. 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 (510 U.S. 62), 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. ... The search warrant affidavit evinces 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. ... Good, 510 U.S. at 59 ("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."). See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985); *F/V American Eagle*, 620 P.2d at 666-67 ("[W]hen 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.").

F/V American Eagle v. State, 620 P.2d 657, (Alaska, 1980). However, assuming the operations were beyond the three-mile limit, we conclude that the state possesses valid authority to regulate crab fishing in these waters. This precise question was decided in *State v. Bundrant*, 546 P.2d 530 (Alaska), appeal dismissed sub nom. *Uri v. State*, 429 U.S. 806, 97 S.Ct. 40, 50 L.Ed.2d 66 (1976).

U.S. v. Seifuddin, 820 F.2d 1074 (9th Cir. 1987). "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.

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

674 F2d 1293 (9th Cir. 1982) the Ninth Circuit vacated an ex pane restraining order, holding that Even when exigent circumstances permit an ex pane restraining order, the government may not wait until trial to produce adequate grounds for forfeiture.

U.S. v Crozier, 674 F2d 1293 (9th Cir. 1982). In the absence of specific language to the contrary, the district court must apply the standards of Rule 65 of the Federal Rules of Civil Procedure, which requires an immediate hearing whenever a temporary restraining order has been granted ex parte.

Mullane v Central Hanover Bank, 339 U.S. 306, (1950), the Supreme Court set the standard for notice: An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ... The notice must be of such a nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance.... But when notice is a person's due, process which is a mere gesture is not due process. ... *Grannis v. Ordean*, 234 U.S. 385 ; *Priest v. Las Vegas*, 232 U.S. 604 ; *Roller v. Holly*, 176 U.S. 398 . The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance. But when notice is a person's due, process which is

a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski*, 274 U.S. 352.

U.S. v. James Daniel Good Real Property, 510 U.S. 43 (1993). 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. The Fourth Amendment strikes a balance between the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes. *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978); see also *Maryland* v. *Buie*, 494 U.S. 325, 331 (1990); and *Skinner* v. *Railway Labor Executives' Assn*., 489 U.S. 602, 619 (1989). Compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the "process" that is "due" to respondent.

U.S. v. All Assets of Statewide Auto Parts, Inc., 971 F. 2d 896, 905 (CA2 1992). We continue to be enormously troubled by the

government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.

U.S. Supreme Court Fuentes v. Shevin, 407 U.S. 67 (1972). 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 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.

U.S. Supreme Court Anti-Fascist Committee V. McGrath, 341 U.S. 123 (1951). "[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."

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.) "[I]t makes sense to scrutinize

governmental action more closely when the State stands to benefit."

Justice Kennedy wrote in the majority opinion: [Protection provided by an adversary hearing] is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding. The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged U.S. Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target: "We must significantly increase production to reach our budget target. "Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine public confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990." Interestingly, in the previous bulletin Acting Deputy Attorney Edward Dennis, Jr. advised all U.S. Attorneys that they "will be expected to divert personnel from other activities," including the Criminal Division if necessary, in order to fully prepare all forfeiture cases for judicial action. Obviously, the risk of erroneous deprivation is great in a hearing at which only the plaintiff seeking financial gain is present.

One 1980 Ford Mustang, 648 F. Supp. 1305, 1308 (N.D. Ind. 1986). If the complaint does not comply with the Supplemental

Rule C(2) and E(2) requirements of verification and specificity it is subject to dismissal.

Coe v Armour Fertilizer Works, 237 U.S. 413 (1915). SCR-Civil Rule 55(c). The Supreme Court has held that it is unconstitutional to require a litigant who has not received notice to file a verified answer in order to vacate a default judgment: [A] judgment entered without notice or service is constitutionally infirm.... Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Where the property was forfeited without constitutionally adequate notice to the claimant, the courts must provide relief, either by vacating the default judgment, or by allowing a collateral suit. See *Sequin v Eide*, 720 F2d 1046 (9th Cir. 1983), on remand after judgment vacated, 462 U.S.1101,103 S. Ct. 2446 (1983); *Wiren v Eide*, 542 F2d 757 (9th Cir. 1976). *Menkarell v. Bureau of Nar*cotics, 463 F2d 88 (3rd Cir. 1972); *Jaekel v U.S.*, 304 F Supp. 993 (S.D.N.Y 1969); Glup v U.S., 523 F2d 557, 560 (8th Cir. 1975).

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defense upon the merits." Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S. Ct. 625, 629, 59 L. Ed. 1027 (1915). As we observed in Armstrong v. Manzo, 380 U.S. 545, 552 (1965), only "wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.

Sniadach V. Family Finance Corp., 395 U.S. 337 (1969) U.S. Supreme Court. 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).

Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950) U.S. Supreme Court. 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.