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Mailed 7/3/07

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

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

Trial Court No. 4MC-S04 -024 Cr.

REPLY TO STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR RETURN OF PROPERTY AND 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 case numbers & hereby files the following reply to State's opposition to defendant's motion for return of property and to suppress evidence in accordance with *Alaska Rules of Criminal Procedure Rule No. 42(d).*

INTRODUCTION

This reply is in response to the claim by the State in their opposition that they complied with constitutional and procedural due process when they deprived David and Jackie Haeg of their property. The State never contests that they failed to affirmatively give David and Jackie a prompt post seizure hearing or the constitutionally guaranteed prompt post seizure notice (or any notice whatsoever) to David, Jackie, and/or their attorney (who was hired weeks after the seizure and deprivation) of the right to a hearing. This prompt notice was supposed to be of David and Jackie's right to an immediate

hearing to contest the State's deprivation, of their immediate right to a hearing to bond, of the State's intent to forfeit, of the statutes authorizing forfeiture, and of the justification for forfeiture. Since this property was also used to provide a livelihood the notice to their right to a hearing or the hearing itself had to affirmatively be given "within days if not hours" of seizure. See the Alaska Supreme Court rulings in *Waiste v. State,* 10 P.3d 1141 (Alaska 2000), *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), and *State v. F/V Baranof,* 677 P.2d 1245 (Alaska 1984). See also *Stypmann v. City and Country of San Fransico*, 557 F.2d 1338 (9th Cir. 1977) and *Lee v. Thorton*, 538 F.2d 27 (2d Cir. 1976).

The State then charges David, Jackie, or their attorney for the responsibility of this failure. They claim David is seeking to "impermissibly shift the burden for seeking a post seizure hearing from himself to the State. Essentially, he is claiming that for the seizure to be valid, the State had to schedule a post seizure hearing. This argument is invalid." *Perkins v. City of West Covina*, 113 F.3d 1004 (9th Cir. 1999) proves the State cannot charge anyone one else for his or her failure to provide notice of the constitutional opportunity to promptly contest. The State argues David and Jackie waived their right to a prompt hearing because they or their attorneys failed to ask for a prompt hearing. Yet constitutional rights cannot be waived unless it is a "intelligent, knowing, and voluntary" wavier. The State never addresses the most important issue of this motion and remand – that the State failed to comply with the procedural due process constitutionally guaranteed when it failed to *affirmatively notify* David and Jackie, "within days if not hours" *of their right to a prompt hearing to contest.* That David or Jackie hired an attorney weeks after is moot – the notice was to be given "within days if not hours." In addition, David's attorney was never notified.

The State fails to contest that once they failed to comply with procedural and constitutional due process in depriving David and Jackie of their property they were no longer entitled to keep the property, to use the property as evidence, or to forfeit the property. In other words everything that happened with the property after the illegal deprivation is null and void as "fruit of the poisonous tree". It does not matter that the

property was used as evidence in a later trial – it could not be used as evidence. It does not matter that the property was later forfeited after trial – it could not be forfeited. It does not matter that the State wishes to keep the property in case David obtains a reversal of his conviction – the property cannot be kept. The reason for this is that it is the only way to ensure the State will comply with constitutional and procedural due process when depriving someone of the use of his or her property, especially property used to provide a livelihood. If there were no penalty to the State for failure to comply (as the State claims there is not) the State would never comply with constitutional due process unless it was to their advantage to do so. See *Commentary to Ak Rules of Evidence – Rule 412.*

The State also fails to contest that they failed to provide the constitutionally required notice of the case for forfeiture as no warrant, charge or information filed indicated their intent to forfeit or cited *AS 16.05.190* and *AS 16.05.195*, the Fish and Game statutes which they claim authorized forfeiture of David and Jackie's property. The rational the State uses is that a review of "the record suggests forfeiture of the aircraft was contemplated at all times throughout the plea negotiations in this case." Yet the "record" they are referring to is their own – and plea negotiations failed. So where is the constitutionally guaranteed notice to David and Jackie of the case for forfeiture – especially after trial?

In addition, this reply further establishes that criminal forfeiture statutes *AS 16.05.190 and AS 16.05.195* are unconstitutional as written and as applied because they lack written standards and, as applied, allowed David and Jackie's property to be deprived and/or forfeited without the procedural and constitutional due process of notice of an opportunity to contest, an opportunity to contest, or notice of the case for forfeiture.

FACTS

Between 3/29/04 and 4/2/04 property belonging to both David and Jackie Haeg was seized under search and seizure warrants based upon affidavits containing highly prejudicial perjury. No warrant, charge, or information ever filed cited an intention to forfeit property and no warrant, charge, or information ever filed cited the statutes authorizing forfeiture. David and Jackie used the property seized as the primary means by

which to provide a livelihood for their family of 4. At the time the property was seized they were using it to provide their livelihood. No hearing to protest the property seizure/deprivation was ever given and no notice of the right to a hearing to contest the property seizure/deprivation was ever given. David and Jackie hired attorney Brent Cole weeks after the seizure. Cole stated under oath that he was never told by the State of a right to a hearing to protest. See appendix. David and Jackie never found out they had a right to contest or bond until years after the seizure and deprivation.

On 2/5/07 the Alaska Court of Appeals remanded jurisdiction in this case for:

> "[T]he limited purpose of allowing Haeg to file a motion for the return of property which the State *seized in connection with this case*. The District Court has the jurisdiction to conduct *any proceedings necessary* to decide this motion. We express no opinion on the *merits* of Haeg's motion."

This order was in response to David's 16 previous motions, to both this court and to the Court of Appeals, to address this issue. David finally stated, under sworn affidavit, that since both the District Court and the Court of Appeals refused to rule on he and Jackie's motions for return of property and to suppress evidence for nearly one year and 15 different motions he would physically go to the Trooper impound yard and get their property without a court order. The Court of Appeals order was issued to Homer Judge Margaret Murphy, Aniak Magistrate David Woodmancy, and the Kenai Court (Judge David Landry having recently been removed for corruption).

The District Court of Aniak, 4th judicial district, claimed jurisdiction, even though Criminal Rule 37 (c) motions for return of property specifically states motions are to be filed in the district in which the property was seized or in which it may be used. Virtually all property was seized and used in the 3rd judicial district, near Kenai, Alaska – nearly 200 miles from Aniak.

This court denied David's multiple requests that the Kenai Court be allowed to rule on the motion. This court also denied David's multiple requests he be allowed the constitutionally guaranteed effective hearing that included confrontation, cross-

examining adverse witnesses, presenting evidence, presenting witness testimony, and/or conducting oral argument.

On 6/2/07 David filed a written *Criminal 37 (c)* motion for "return of property and to suppress evidence" with this court as ordered. On 6/22/07 the State filed an opposition without the affidavit required to support their factual claims. See *Rule 503(b)(2)*. This is David's reply to that opposition. The other facts pertinent to David's motion are included in his 6/2/07 opening motion.

LEGAL ARGUMENTS

1. SUMMARY

In his analysis David will go over the State's opposition page by page to show the complete lack of support or precedence for it and how misleading all the claims are.

2. ANALYSIS

Page 1. The State "asks the Court to deny the motion because it is not supported by either the facts or the law in this case."

Nothing could be more false. The undisputed fact is that the State never gave David, Jackie, or any of David's attorneys prompt notice of their right to a hearing to contest the seizure and/or deprivation of property or of the case for forfeiture. No hearing itself was ever given. No warrant, charge, or information indicated the State intended to forfeit property or cited the statutes authorizing forfeiture. The law, in the form of numerous ruling cases by the U.S. and Alaska Supreme Courts, including the U.S. 9th Circuit Court of Appeals, is that if this notice of the right to a hearing to protest and this notice of the case against the property is not promptly and affirmatively given the seized property may not be deprived, forfeited, and/or used as evidence. This is the case even if there is no "meritorious defense" had the hearing been held. David and Jackie had a "meritorious defense". See the mountain of caselaw in David's motion. In other words both the facts and law overwhelmingly support David's motion.

> **Page 5.** The State claims, "The Court of Appeals did not remand Haeg's case to re-litigate the legality of the search warrants and/or seizure of Haeg's property. Similarly, the issue of the suppression of evidence in

> Haeg's criminal proceeding is not before this Court. Haeg's sentence, in addition to jail time, fines and forfeiture of his guide's license, included the forfeiture of illegal wolf and wolverine hides, the Piper PA-12 with tail number N4011M, and the seized guns and ammunition. Non-forfeited evidence, other than evidentiary items necessary in the event of a re-trial may be returned to Haeg."

Yet the very order from the Court of Appeals states,

> "Jurisdiction in this case is remanded to the District Court 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 jurisdiction to conduct *any* proceedings necessary to decide this motion. We express no opinion on the *merits* of Haeg's motion."

This order very clearly and specifically gives the District Court jurisdiction to conduct any proceedings necessary to address the *merits* of Haeg's motion for the return of *all* property seized in connection with this case. In other words the District Court is required to litigate all merits David chooses to provide that requires the return of all property seized. There are no limits on what David can claim are the merits – and no limits on the property. Property forfeited or property the State used as evidence or thinks it needs as evidence is not excluded, it covers *all* property seized. The State's claim that David cannot re-litigate the seizure and deprivation of his property is false. How else can David make the case for the return of his and Jackie's property? Does the State think if they seized and deprived David and Jackie's property in violation of procedural and constitutional due process they get to keep it? That the subsequent use as evidence or forfeiture judgment somehow made everything right? See:

> *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.'"*

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."

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."*

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

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 [property] 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."*
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> Alaska Supreme Court in <u>*Etheredge v. Bradley*</u>, 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."*
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> **Page 6**. The State claims, "The legality of the search warrants should no longer be an issue due to the fact that Haeg repeatedly admitted during the hearing held on June 7, 2007 that his property was not illegally seized, but rather that he was denied a prompt hearing for the return of his property."

David never "admitted" that his property was not illegally seized because of the perjury on the search warrant affidavits. He stated the opposite. What he agreed to was the rules stated this remand was not the place to contest the initial illegal seizure on *that* issue or to ask for suppression of evidence on *that* issue (See *Criminal Rule 12(e)*) – but the remand was the right place to contest the constitutional *property* due process violation that occurred "within days if not hours" after seizure of his property – and to seek the suppression of evidence that is part and parcel of *property* seized and deprived in violation of constitutional due process. David also stated it was appropriate to point out that if due process had been afforded he would have had an opportunity to protest the initial illegal seizure due to the perjured search warrants. The State is trying to confuse the issue of suppression of evidence that is *not* property, especially property used to provide a livelihood, with suppression of evidence that *is* property, especially property used to provide a livelihood. The procedural due process governing these two issues is vastly different. See all caselaw and *Criminal Rule 37(c)*,

> <u>*Motion for Return of Property and to Suppress Evidence*.</u> **"**A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used *for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized*."
>
> <u>Commentary to Alaska Rules of Evidence</u> - *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."

It is clear that when property is deprived in violation of procedural due process the property "so obtained" may not later be used as evidence. Caselaw is very clear.

> **Page 6-7.** The State claims, "On March 28, 2007, the Alaska Sate Troopers contacted Haeg regarding the return of his property which was seized in this case. The letter identified the property that the State was willing to return and provided Haeg with instructions for claiming his property. Specifically, the letter identified the following items of evidence that could be claimed: (1) Item 504 – five pair of bunny boots; (2) Item 505 – one pair of bunny boots; (3) Item 507 – camera; (4) Item 508 – camera; (5) Item 510 – rope; (6) Item 511 – satellite phone; (7) Item 513 – shot gun shells; (8) Item 514 – wolf snares; (9) Item 515 – maps; (10) Item 516 – bag of ammo; (11) Item 517- two quarts of oil; (12) Item 518 – green cord; (13) Item 520 – aeroshell oil; and (14) Item 521 – white cord. See Exhibit 1. The items on this list were not forfeited and it has been determined that they are not necessary for purposes of appeal and/or retrial. Despite the State's offer to return the above items, Haeg still included these items on in his Motion for Return of Property and to Suppress Evidence."

David or Jackie never received this letter, a copy of which was attached to the State's opposition. David and Jackie respectfully request this Court order the State provide the Court, David, and Jackie with copies of the return receipt for this Certified Letter, Mail # 7002 0510 0000 6077 0690.

> **Page 7.** The State claims, "In this Motion for Return of Property and to Suppress Evidence, Haeg argues that he is entitled to the return of his property, not because the law supports his claim, but rather because he did not receive a post seizure hearing. Haeg claims that this lack of an immediate post seizure hearing resulted in a constitutional due process violation that justifies this Court now ordering the return of his property. In making this argument, Haeg completely ignores the fact that he and his counsel never asked for a hearing. Haeg faults the State for not scheduling an immediate post seizure hearing. Haeg attempts to impermissibly shift the burden for seeking a post seizure hearing from himself to the state. Essentially, he is claiming that for the seizure to be valid, the State had to schedule a post seizure hearing. This argument is without support."

David is claiming the law supports his claim not because he and Jackie did not receive a hearing but because they did not receive their constitutionally guaranteed prompt notice of the case against their property, their constitutionally guaranteed prompt notice of their *right* to a hearing to contest the property deprivation, and, in the absence of that, their constitutionally guaranteed prompt hearing itself. There would be no constitutional due process violation if David and Jackie, *after* they had been promptly notified of their right to a hearing and promptly notified of the case for forfeiture, did not ask for a hearing. But since they were never told of their right to a hearing and of the case by the State, as constitutionally guaranteed by procedural due process, the State cannot now claim David and Jackie waived their constitutional right to the hearing or of the case by not asking for something they never knew about. Constitutional rights cannot be waived unless the waiver is "*voluntarily, intelligently, and knowingly"* made.

> United States Supreme Court *Fuentes v. Shevin*, 92 S. Ct. 1983, 407 U.S. 67 "And, of course, *no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.* In *D. H. Overmyer Co. v. Frick Co*., 405 U.S. 174, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding – although not holding that such standards must necessarily apply – the Court held that, on the particular facts of that case, the… waiver of due process rights was "*voluntarily, intelligently, and knowingly*" made. *For a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the voluntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver*."
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> U.S. Supreme Court *Memphis Light, Gas & Water Div. V. Craft*, 436 U.S. 1(1978) *"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.*"
>
> United States Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975): "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 appear or default, acquiesce or 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).

U.S. Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971): "*Due process does not, of course, require that the defendant in every case actually have a hearing on the merits.* A State, can, for example, enter a default judgment against a defendant who, *after adequate notice*, fails to make a timely appearance, see *Windsor*, supra, at 278, or who, *without justifiable excuse*, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909). What the Constitution does require is "*an opportunity*…granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), "for [a] hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, supra, at 313. *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…"*

U.S. Supreme Court in *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393:, "Indeed, in the civil no less than the criminal area, "*courts indulge every reasonable presumption against waiver."*

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

As shown in the above cases no hearing need be held, if, *after* David and Jackie were informed of the "*availability*" of a hearing and the case against their property, they decided to "*waive*" it or "*default*" or "*acquiesce*". The State is asking this court to rule that David and Jackie "waived" the hearing and notice or the case or "defaulted" or "acquiesced" without being told a hearing to contest and notice of the case was available. David and Jackie will ***never*** accept a ruling such as this from this or any other court. Since they were never told of the availability to a prompt hearing or that they were

required to be given notice of the case they cannot ever be held to have "*voluntarily, intelligently, and knowingly*" waived these constitutional rights. The State failed to provide procedural and constitutional due process and thus is required to make amends.

> *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."

By asking this court to rule that David and Jackie waived their constitutional rights the State seeks to be rewarded for its violation of David and Jackie's constitutional rights. This is a perverse and fundamental breakdown in justice and of the protections afforded by the constitution. The constitutional requirement is very simple. Either a deprived property owner gets prompt notice of their right to a hearing and to the case against their property *or* they promptly get the hearing itself, *after* being told of the case against their property. If they get neither it constitutes a constitutional due process violation that requires the return of the property and for it to be suppressed as evidence. If they get neither it does not mean they waived it - it means the constitution was broken by the State. It is affirmatively misleading for the State to claim David is seeking the return of his property just because of the lack of a hearing. It is affirmatively misleading for the State to claim David is "impermissibly" attempting to shift blame to the State for the *State's* failure to provide constitutional due process. It is affirmatively misleading for the State to claim that David is claiming for the seizure to be valid the State had to schedule a post seizure hearing. It is affirmatively misleading for the State to claim that David or his attorneys are to blame for never asking for a hearing after the State failed to tell them of this right as required by both the U.S and Alaska constitutions. See the overwhelming caselaw that supports David's claim that he and Jackie were constitutionally entitled to either prompt notice of a hearing to contest, along with notice of the case against the property or the prompt hearing itself – *after* notice of the case against their property:

> *Cooksey v. State*, 524 P.2d 1251, Supreme Court of Alaska states: "Furthermore, under our system of criminal justice, it is the prosecution

> which initiates a case and which has the power of going forward with it. In the exercise of this power, *it is the duty of the public prosecutor to observe the constitution*. 486 P.2d at 950 (footnote omitted)."

> **Page 8.** The State claims: "Haeg cites and quotes from a great number of cases, but fails to demonstrate for the Court or the prosecution how these cases support the issue that is validly before the Court – the return of his property."

All the cases cited by David support his claim that when the State deprives someone of a property right (especially property used in making a livelihood), either civilly or criminally, there are important constitutional due process considerations that must be followed. These considerations include prompt notice of the case against the property, prompt notice of the right to a hearing to contest the deprivation, prompt notice of the opportunity to bond, etc. Since the State did not provide any of this constitutional due process the seizure, deprivation, and/or forfeiture is null and void – and all property must be returned and suppressed as evidence. Many of these cases clearly and specifically hold that if property is deprived in violation of procedural due process the property must be returned and suppressed as evidence. All others hold it is a constitutional violation without giving the specific remedy for a constitutional violation. What other remedy could there be than to return property and to suppress it as evidence if the property was deprived in violation of the constitution? How can the State possibly claim David fails to demonstrate these cases fail to support his motion? See all caselaw.

The State claims: "Haeg's property was seized under AS 16.05.190. Following trial, certain items of Haeg's property was forfeited under AS 16.05.195."

These are affirmatively misleading statements by the State. Nowhere do the warrants, charges, or informations evidence that the State would seek to forfeit the property or it was seized under *AS 16.05.190* or that it was forfeited under *AS 16.05.195*. See included warrants, charges, and informations in appendix.

Without notice of the case against their property and notice of intent to forfeit, including statutes authorizing forfeiture, the seizure, deprivation, and forfeiture is and

was void. This is because without notice of what to contest David and Jackie were effectively denied their constitutional right to effectively contest the forfeiture.

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:

> "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 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."*

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

> *"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. ...
>
> 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).*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."*

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.""

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."*

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

> "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.*

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."

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."

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...

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

> *'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.'*

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

> "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."*

Wolff v. McDonnell, 418 U.S. 539 (1974) the United States Supreme Court held that: "[D]ue process required written notice of the charges be given..."

Federal 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."

Federal 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. 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. Hall now appeals from the judgment of conviction in the criminal action. His principal contention is that his conviction must be reversed because the indictment against him failed to meet the requirement of Fed. R. Crim. P. 7(c)(2). Rule 7(c)(2) provides: *"When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture."*
>
> 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.*"

The reason Hall's conviction was overturned, and didn't just have his property returned, is that the property that had to be returned was the evidence used to convict him, and it was illegally used to do so after it was not specifically cited for forfeiture.

In Goss *v. Lopez*, 419 U.S. 565 (1975) the United States Supreme Court held that:

> "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."* ... "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).

> **Page 9.** The State claims: "Haeg's property was lawfully seized pursuant to search warrant. Haeg failed to challenge the seizure of his property or to seek a post seizure hearing for the return of his property. Following his conviction, the trial court exercised its discretion to lawfully forfeit much of the property seized. See AS 16.05.195. The remaining property, other than that identified above as having no evidentiary value, must be held by the State pending the outcome of Haeg's appeal. See AS 16.05.190 (providing that evidence seized, unless forfeited, "shall be returned, after completion of the case…"). Haeg failed to support his claim that all of his property seized should be returned by this Court and the State therefore asks that this Court deny the present motion and only return the property that the State has already told Mr. Haeg it would return."

As David explained in detail in his opening motion the State did not lawfully seize his property because of highly prejudicial perjury on all search warrant affidavits. The State failed in its constitutional duty to inform David and Jackie of their right to a hearing to bring this to the attention of the Court and the notice of the case for forfeiture – this was not a waiver by David and Jackie – as explained in page 7. After the State failed to provide the due process of prompt notice of a hearing to contest the illegality of the seizure and of the case against the property the illegality of the property deprivation doubled. After this the property could not be used as evidence and could not be lawfully forfeited. There was no lawful case using the property as evidence, there was no lawful property forfeiture, and there can be no lawful property deprivation. It makes no difference what property the State used at trial, what property was forfeited, or what property the State thinks it needs for evidence after David's conviction is reversed. *All* property seized is must be returned immediately and suppressed as evidence. In addition the State cannot state *AS 16.05.195* legally authorized forfeiture because *AS 16.05.195*

was never cited in any warrant, charge, or information filed in David's case – again violating the constitutionally guaranteed notice of the case against the property.

> **Page 9-10.** The State claims: *"Haeg's failure to seek a post seizure hearing does not justify this Court returning his property.* Haeg's first argument alleges that he and his wife had an absolute right to a hearing and/or notice of a hearing to contest the State's seizure and/or planned forfeiture of their property within days if not hours of the property being seized. Haeg seeks an order of this Court, among other impermissible requests, directing the State to return evidence lawfully seized and forfeited in this case. Haeg's first argument is essentially a due process argument in which he claims that the State was required to provide him with a hearing so he could challenge the search warrant which led to the collection of the evidence, his conviction and eventual forfeiture of the items seized. Haeg fails in this motion to cite to a single case and/or statute that supports his position that the property lawfully seized and forfeited should be returned following his conviction. Because he is both legally and factually mistaken, his motion should be denied."

It is not David or Jackie's failure to seek a post property seizure hearing that justifies the return of their property; it is the State's failure to promptly tell them of their constitutional right to this hearing that justifies the return of their property.

David cites numerous cases (most of them U.S. and Alaska Supreme Court or 9th Circuit U.S. Court of Appeals) that all *require* property *must* be returned if has been deprived in violation of constitutional due process – *especially* if it was forfeited after the constitutional violation. There is no discretion for this Court to *not* return the property after the constitutional violation and this is not an impermissible request – the property must be returned to comply with, and guarantee future, 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..."*

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

> 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). …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 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*, ... 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."*

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

> "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 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. ...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.*

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.'"*

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. ... *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."*

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..."*

Boddie v. Connecticut, 401 U.S. 371 (1971) the United States Supreme Court held that:

> 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.

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

> "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. ... *"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.

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) held that:

> "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) United States 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 United States Supreme Court held that: *"'[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.'"*

Federal 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."*

Federal 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:

> *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."

The Alaska Supreme Court in *Etheredge v. Bradley,* 502 P.2d 146 (Alaska 1972) held that: *"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."*

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. Hall now appeals from the judgment of conviction in the criminal action. His principal contention is that his conviction must be reversed because the indictment against him failed to meet the requirement of Fed. R. Crim. P. 7(c)(2). Rule 7(c)(2) provides: "When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture."
>
> 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.*"
>
> *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."

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

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. ...

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.*"

The United States Supreme Court *Boddie v. Connecticut*, 401 U.S. 371 (1971) held: *"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."

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

"[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. Reversed…"

> **Page 11.** The State claims: "Haeg was served with copies of the search warrants on the date of execution which put him on notice that the State had seized his property pursuant to a warrant. Criminal Rule 37(c) provided a mechanism for him to challenge the lawfulness of the seizure and to seek return of his property. Whether Haeg and/or his counsel exercised this right or not is irrelevant. The law provided due process for Haeg to challenge the validity of the search warrants and to seek the return of his property. Once Haeg was charged, Criminal Rule 12 applied. Subsection (b) regulates pretrial motions and permits a defendant to challenge the evidence which may be used against him at trial. Alaska Criminal Rule 12 (b)(3) specifically provides a mechanism for a defendant charged with crime to suppress evidence on the ground that it was illegally obtained. Failure to move to suppress evidence constitutes a waiver."

The State now claims the only "notice" required by due process to be given to David and Jackie was "notice", via a copy of the search warrants, that the State had taken the property David and Jackie used to provide a livelihood for their two daughters. As proven in the numerous cited U.S. and Alaska Supreme Court cases in both David's opening motion and this response the "notice" required is prompt notice that David and Jackie could contest being deprived of their primary means to provide a livelihood, prompt notice of the case for deprivation, prompt notice the State was intending to forfeit the property, prompt notice of the statutes authorizing forfeiture, and prompt notice David and Jackie could bond their property out. None of this information was on any warrant, charge, or information filed in David's case. The State then argues that 8 months later David "waived" his right to notice of a hearing to contest when the State charged him – and after his work season had been already ruined. Yet how can David "waive" this constitutional right when the State had an *affirmative constitutional duty* to notify him and they never did? How did Jackie "waive" this constitutional right when she was never charged? How can these rights be waived when constitutional rights can only be waived "intelligently, knowingly, and voluntarily"? See all caselaw on what "notice" is required by procedural and constitutional due process – especially *Etheredge, Perkins,*

Sniadach, Goldberg, Wiren, Fuentes, Gault, Wolff, Federal Criminal Rules 7(c)(2) and 32.2(a), Memphis Light, Mullane, Hall, Goss, Armstrong, Baldwin, and *Alaska Civil Rule 89.*

> **Page 12.** The State claims: Apparently Haeg's attorney did not file a motion for return of property or seek suppression and this court should not second guess the decision. It is also legally irrelevant whether Haeg personally assented to his attorney's tactical decision not to seek the return of Haeg's property or the suppression of evidence."

The State blames David and Jackie's attorney – yet, as stated earlier, David and Jackie hired Cole *weeks* after the seizure. Both the U.S. and Alaska Supreme Courts have ruled David and Jackie had to be given notice "within days if not hours" of seizure. How can David and Jackie hiring an attorney weeks *after* seizure "waive" this constitutional "prompt" notice? Cole stated under oath the State never gave him the constitutional notice of the right to a hearing to contest when he was hired weeks after the seizure. He also stated under oath he did not know David and Jackie could contest. How then could it be a "tactical", "voluntary", "intelligent", or "knowing" decision to "waive" this constitutional right if he did not know and was never told? See all cited cases and appendix of Cole's sworn testimony.

> **Page 12.** The State claims: "Haeg repeatedly claims that the State was required to provide him with more due process. Haeg argues that the State was required to provide him with a hearing immediately upon seizure of his property. However, his argument fails because he relies upon the civil rules which necessarily do not apply to the criminal case. Specifically, Haeg's reliance on Alaska Rule of Civil Procedure 89 is misplaced… Because Haeg misconstrues the procedural rules, his reliance on the case law is also misplaced.

David does not claim the State had to provide him and Jackie with a hearing – he claims the State was required to provide prompt notice of his right to a hearing, promptly notify them of the case for forfeiture, and promptly notify them of the intent to forfeit. See all caselaw and arguments. The procedural due process required in both civil and criminal forfeitures is the same - and thus David's reliance on *Civil Rule 89* is sound. In

addition David relies on both civil and criminal forfeiture caselaw – and all this caselaw uses both civil and criminal indiscriminately to support their decisions.

The Alaska Supreme Court has ruled all forfeitures are civil in form; and in *Waiste* (criminal case), *American Eagle* (civil case), and *Baranof* (civil case) they cite both criminal and civil cases to support their rulings – especially *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Etheredge v. Bradley*, 502 P.2d 146 (1972).

> "Although civil in form, forfeiture actions are basically criminal in nature. *Graybill v. State*, 545 P.2d 629 (Alaska 1976); *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980). 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)."

See also *Perkins v. City of West Covina*, 113 F.3d 1004 (9th Cir. 1999). The ruling in *Perkins* (a criminal case where property was seized by search and seizure warrants, cited *Mullane v. Central Hanover Bank & Trust Co., Memphis Light,* and *Aguchak v. Montgomery Ward Co.* – all civil cases where property was seized and deprived without search warrants. *U.S. v. James Daniel Real Property* was a criminal case but the U.S. Supreme Court cited numerous civil cases, including *Fuentes v. Shevin*, to establish the constitutional due process required. There is no difference in the procedural and constitutional due process that must be afforded between criminal and civil proceedings against property. Virtually all cases David cites in both his opening motion and this reply use criminal cases to support civil cases and use civil cases to support criminal cases – proving the State's claim false.

> **Page 12-13.** The State claims, "Haeg relies upon numerous cases in his "Arguments" section in support of his argument: *F/V American Eagle v. State*, 602 P.2d 657 (Alaska 1980) and *Waiste v. State*, 10 P.3d 1131 (Alaska 2000). Both of these cases indicate that the procedural protections granted by the criminal rules and as they were followed here, satisfies a defendants right to due process. In *F/V American Eagle* the court recognized that both the Alaska and Federal Constitutions require notice and an opportunity for hearing at a meaningful time when property is seized. In *American Eagle,* the Court found that the owners of the vessel were provided sufficient due process because the vessel was seized

> pursuant to a judicially approved warrant, the vessel owners were formally notified of the State's action, and the vessel owners had, "an immediate and unqualified right to contest the State's justification for the seizure before a judge under Criminal Rule 37(c)." *F/V American Eagle*, 620 P.2d at 677. This is the exact same process the State followed in seizing and forfeiting Haeg's property."

The State fails to include the most pertinent part of this case – which was specifically cited in the ruling to prove that the owners received the prompt hearing and/or notice to constitutionally guaranteed hearing:

> "We need not reach the question of the constitutionality of the statutes in question (AS16.05.190 and 16.05.195) in this case, however, because it is apparent that the vessel owners were in fact afforded procedural due process. [F]or prior to the State's filing of a formal *civil* complaint for forfeiture thirteen days after the vessel was seized, their attorneys *mentioned the possibility of suing for release of the vessel…* Rather than avail themselves of this opportunity, *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 parties also agreed to have the seized crab sale proceeds placed in an interest-bearing account pending completion of the suit for forfeiture*." *F/V American Eagle v. State,* 620 P.2d 657 (Alaska 1980)

The owners above immediately received the benefit and use of their property pending disposition of the case – by bonding it out – David and Jackie were denied any and all benefit of their property pending disposition of David's case – which happened *years* later. David and Jackie were never told they had a right to any of the due process that the owners above received – no civil complaint, no notice to sue for release, no negotiated release, no opportunity to contest, no opportunity to bond, or no opportunity to place proceeds into an interest bearing account. The formal civil complaint alone and in great detail and specificity notified the owners of their right to a hearing and if a hearing was not given *within 7 business days* the State *was required to give the property back* or to get a written document signed by the defendants *voluntarily, knowingly, and intelligently waiving the constitutional right to the hearing.* See *Civil Rule 89*. How then

can the State claim, "This is the exact same process the State followed in seizing and forfeiting Haeg's property"? The process was not even remotely similar.

> **Page 13-14.** The State claims: "In *Waiste* the court revisited some of the issues raised in *F/V American Eagle* including seizure and forfeiture of a fishing vessel where the criminal charges resulted in acquittal, but the State still could have proceeded with a civil forfeiture. The court reviewed dicta in *American Eagle and State v. Baranof*, 677 P.2d 1245 (Alaska 1984) and federal law to determine whether the Due Process Clause of the Alaska Constitution would require more than a prompt post seizure hearing. *Waiste*, 10 P.3d at 1147. In deciding this issue in *Waiste*, the Court stated: "[W]e balance the State's interest in avoiding removal or concealment with the likelihood and gravity of error in the relevant class of cases, and, in so doing, we hold that a blanket rule of ex parte seizure comports with due process." *Id*. at 1152. Haeg was placed on notice by the State that his property had been seized. Haeg was entitled to a post seizure hearing, but evidently chose not to exercise his right. Consequently, Haeg cannot now come before this Court and claim in good faith that he was denied his constitutionally protected right of due process. There was no lack of due process in this case and Haeg's property should not be returned on the grounds that he and/or his lawyer failed to seek an immediate post seizure hearing."

The State first quotes *Waiste*, "The [Alaska Supreme] court reviewed dicta in *American Eagle and State v. Baranof*, 677 P.2d 1245 (Alaska 1984) and federal law to determine whether the Due Process Clause of the Alaska Constitution would require *more* than a prompt post seizure hearing." (Emphasis added in "*more*")

Then the State claims that since David did not ask for a hearing he cannot claim he was denied his constitutionally protected right of due process. Yet the State specifically admits the Alaska Supreme Court held constitutional due process did not require *more* than a prompt post seizure hearing – implicitly implying that a hearing *was* required by due process. Not just notice, but the *actual* hearing itself. The point the court was making was that Waiste's claim that a hearing had to be held *before* seizure was invalid – *as long as there was a prompt post seizure hearing*.

> See *Waiste v. State*, 10 P.3d 1131 (Alaska 2000): *"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..."*

In addition, Waiste received a hearing *two (2) days after seizur*e *and a second hearing three (3) days after seizure.* David and Jackie never receive any hearing, let alone a prompt post seizure hearing. They or their attorneys never even received notice of their right to a hearing. They never knew they had a right to a hearing until years afterward. How can the State possibly claim there was no lack of due process and that David "cannot now come before this Court and claim in good faith that he was denied his constitutionally protected right of due process" when constitutional rights cannot be waived unless it is an "intelligent knowing and voluntary" waiver?

> **Page 13**. The State claims, "A review of the file suggests that forfeiture of the aircraft was contemplated at all times throughout the plea negotiations in this case. The return of the aircraft was apparently not a consideration."

To David and Jackie this is confusing. David gave the State a 5 hour interview and he and Jackie gave up a whole years guiding for a plea agreement for which the aircraft was not required to be forfeited; and then, after the guide season given up was past and just 5 business hours before David was to get his side of the plea agreement – the State changed the charges to ones far more severe than agreed to. (The plea agreement had been in place for months) Not only this but they used David's interview that was given for the plea agreement as the only basis for most of the new charges. This is another huge violation of David's constitutional rights. See Evidence Rule 410. Then, at sentencing, the State claimed they did not know why David and Jackie did not guide for a whole year when this had been their explicit requirement for the plea agreement they broke – another huge constitutional violation.

If the "forfeiture of the aircraft was contemplated at all times throughout the plea negotiations" why isn't this indicated in any warrant, charge, or information? Or was the forfeiture "contemplated" by the State but the State failed to inform David and Jackie they "contemplated" this? If only the "aircraft" was "contemplated" for forfeiture, even according to their own "file", how could the State ask the sentencing court to forfeit *all the items seized?* How could the sentencing Court forfeit much other property then even what the State's own "file" "contemplated" forfeiting? Where is the constitutionally required *formal written intent to forfeit and the case for forfeiture* that must be in the warrants, charges, and informations filed so David and Jackie would know to prepare a defense and what to prepare a defense for? See all caselaw requiring notice of the case against property.

> **Page 14.** The State claims, "Haeg's Meritorious Defense Claims Fail to Support His Motion for Return of Property Lawfully Seized. Haeg's second argument makes unsupported allegations that he had an unbeatable defense against the State charges, but that the State's witnesses committed perjury which resulted in his conviction. Haeg's alleged "Meritorious Defense" and/or the alleged perjury committed by State witnesses are both issues that Haeg needs to raise on appeal or in a PCR application, not in a motion for return of his property."

David's claim he had a meritorious defense had the State provided him with the constitutionally guaranteed hearing (as they were supposed to do) is absolutely proper to bring before this Court. Although all U.S. Supreme Court rulings since 1915 hold David does *not* have to demonstrate he had a meritorious defense to be entitled to the return of his property, had he been provided procedural due process, cases further back have so held. The old cases required something much like a harmless error test – if you had no meritorious defense had you been provided the hearing the State failed to tell you about, there was no violation. Now, however, no meritorious defense need be proven. Yet it is obvious that if David had a meritorious defense the violation is that much worse. See:

> *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915)*:"[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.'"

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: "*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."*

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."

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."

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."

> **Page 14-15.** The State claims, "Haeg's first argument under this section alleges that Jackie Haeg is an innocent owner and that forfeiture of her interest in the property violates Alaska's constitutional due process. Haeg cites to *State v. Rice*, 626 P.2d 104 (Alaska 1981) to support his claim that Jackie's constitutional rights were violated. *Rice* was a case in which the defendant was found guilty of game violations while using an airplane. The Superior Court forfeited Rice's airplane and Cessna Finance Corporation filed a civil suit for the remission of its interest in the airplane on the basis that it was an innocent non-negligent third party. On appeal, the Alaska Supreme Court held that forfeiture should not apply to an innocent non-negligent third party. See id at 110. The Court further held that the party alleging to be an innocent non-negligent third party must prove the following: (1) ownership and/or a security interest; (2) a lack of knowledge that the property was being used for illegal purposes; and (3) lack of negligence. *See id*. This Court should deny this portion of Haeg's motion due to the fact that Jackie Haeg has no standing in the motion currently before this Court, Haeg failed to prove any of the factors set forth in *Rice*, and this Court lacks jurisdiction to consider this issue. First, the Court can not consider Jackie Haeg's claim, due to the fact that she is not a party to the current proceedings. Second, Haeg has failed to establish any of the factors set forth by *Rice*. Specifically, Haeg has not established that Jackie Haeg was a part owner of the airplane seized, that she lacked knowledge of Haeg's illegal wolf hunting activities and that she was not negligent in her lack of knowledge. Finally, the Court of Appeals remanded jurisdiction in this matter to the District Court for limited purpose of determining if David Haeg, not Jackie Haeg, is entitled to the return of any property seized and or forfeited. Thus this Court should reject this portion of Haeg's motion."

Since Jackie, the same as David, never received a hearing, notice of her right to a hearing, or notice of the case for forfeiture, this Court has jurisdiction and she has standing to enter under *Civil Rule 20* – Permissive Joinder of Parties. See *Rice*. Jackie formally request to be joined as a party to these proceedings. See Jackie's affidavit. This "remand" is to decide if David's *civil* right to due process was violated. Jackie's civil right to due process never left this Court on appeal. Much of the property was hers exclusively and she owned half of the business property. See legal papers in appendix.

Jackie swears under penalty of perjury she had no knowledge of what the property was being used for and she was not negligent because David had no prior criminal history whatsoever – the other requirements that must be met to establish she was an innocent

non-negligent third party. See appendix of David's nonexistent criminal record and *State v. Rice*, 626 P.2d 104 (Alaska 1981):

> "Cessna Finance, possessing a substantial security interest in the airplane, sought and *was granted leave to intervene in the superior court proceedings, to plead violations of substantive and procedural due process in the forfeiture of the airplane without formal notice to it of the sentencing proceeding.* The superior court also held that constitutional due process requires *"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."* On November 18, 1977, the state issued a notice of complaint for forfeiture which was sent to Cessna Finance. Cessna later moved for summary judgment on this action, asking, inter alia, that AS 16.05.195 be held unconstitutional as violating due process. Cessna has urged that both substantive and procedural due process have been or will be violated by forfeiture of Rice's airplane, in which Cessna has a security interest. Given its security interest in the airplane and its innocence in respect to the criminal offense upon which the forfeiture is based, Cessna contends that *the civil forfeiture statute, AS 16.05.195,* deprives it of a property right without just compensation. The importance of a remission procedure has also been noted in several other cases. *The state argues that none of these cases hold that remission is constitutionally required. However, after careful consideration, we are persuaded that a remission procedure is mandated under the Alaska Constitution. 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 provision." United States v. United States Coin & Currency*, 401 U.S. 715, 721, 91 S.Ct. 1041, 1044, 28 L.Ed.2d 434, 439 (1971); *United States v. One 1976 Lincoln Mark IV*, 462 F.Supp. 1383 (W.D.Pa.1979); *United States v. One 1974 Mercury Cougar,* 397 F.Supp. 1325 (C.D.Cal.1975). We think that if a party can show "the manner in which the property came into possession of such other person" and that *"prior to parting with the property he did not know, nor have reasonable cause to believe, (either) that the property would be used to violate (the law, or) ... that the violator had a criminal record or a reputation for commercial crime," [FN37] substantive due process under the Alaska Constitution requires that a procedure be available for remission of the forfeited item.* Here, Cessna Finance has asserted it is an innocent holder of an interest in the seized airplane which did all it could reasonably be expected to do. *We conclude that Cessna has been deprived of its constitutional rights to substantive due process through the failure of the*

> *statutory scheme relating to forfeitures to provide for remission of the interests of innocent non-negligent third parties in the forfeited item.* Thus, the case is remanded to the superior court to hold a remission hearing. If Cessna Finance can make the requisite showing,[FN38] it is entitled to reimbursement from the state for its share in the forfeited airplane at the time of seizure. FN38. The state argues that Cessna had not done anything more than a routine credit check. *However, it seems that Rice had neither a prior criminal record nor a record or reputation as a game law violator. If the inquiry would have revealed nothing, the loan was made in good faith. If Cessna had no knowledge that Rice was a violator of the game laws and was not negligent in its inquiry, it is entitled to remission.* Cf. *United States v. One 1972 Ford Pickup Truck*, 374 F.Supp. 413, 415 (E.D.Tenn.1973).
>
> Having determined that the forfeiture itself violated substantive due process, we need not consider whether the superior court was correct in finding that procedural due process was also violated."

Jackie was never given her constitutionally guaranteed prompt notice and hearing after her property was seized and deprived. Jackie was never given the constitutionally guaranteed remission procedure for innocent holders of interest after property she had an interest in was deprived. The statutes authorizing forfeiture AS 16.05.190-195 are unconstitutional because they failed to provide these constitutional protections. See *Rice*, "*We conclude that Cessna has been deprived of its constitutional rights to substantive due process through the failure of the statutory scheme relating to forfeitures to provide for remission of the interests of innocent non-negligent third parties in the forfeited item.* Thus Jackie may successfully challenge the forfeiture statutes as being unconstitutional for not providing her procedural due process. Jackie asks she be made

> **Page 16.** The State claims: "Haeg's final argument alleges that the criminal forfeiture statues AS 16.05.190 and 195 are unconstitutional. Haeg cites to a number of cases and civil statutes that allegedly support his claim that AS 16.05.190-195 are unconstitutional. Haeg's argument is without support and ignores the law of the State of Alaska and therefore Haeg's motion should be denied.
>
> The Alaska Supreme Court analyzed AS 16.05.190-195 in the case of *Graybill v. State*, 545 P2.d 629 (1976). The defendant in *Graybill* was convicted of possession and attempted transportation of a bear hide by airplane. Graybill challenged the forfeiture of his plane by claiming that the

> trial court lacked authority to forfeit his plane. The Supreme Court held that the trial court had authority to order the forfeiture of the defendant's airplane which was used in violation of game laws. The court noted that following Graybill's conviction, the Legislature enacted AS 16.05.195(a), which expressly provides for forfeiture through either civil or criminal proceeding. The court further noted that under AS 16.05.195, a civil proceeding was not necessary for the State to forfeit property. The Court reasoned that there was no benefit to a separate civil proceeding as any arguments available to the defendant to prevent forfeiture in a civil case where also available to the defendant in a criminal trial at sentencing. In upholding the forfeiture of Graybill's airplane, the Alaska Supreme Court, by implication, found the forfeiture statute passed by the Legislature to be constitutional."

The State does not address David's argument. *Graybill* was claiming that for the forfeiture statutes to be valid they had to provide a separate civil in rem proceeding for criminal forfeitures. *Graybill* was not claiming the statues were unconstitutional because they allowed the seizure, deprivation, and forfeiture without the procedural due process of being afforded notice of a hearing or notice of the case for forfeiture. *Graybill* never claimed he was not afforded procedural due process or that he was not notified the State intended to forfeit his property and not notified of the case for forfeiture. The State claims that since *AS 16.05.190-195* have been held constitutional by the Supreme Court when no civil "in rem" proceeding was required it means the Supreme Court held they are constitutional when they fail to provide the procedural due process of notice and hearing. This is affirmatively misleading. David is claiming the statutes are unconstitutional because they lack standards and allowed the seizure, deprivation, and forfeiture of he and Jackie's property without the procedural due process of notice and hearing.

> **Page 17.** The State claims: "The legality of AS 16.05.195 was again challenged in the case of *Jordan v. State*, 681. P.2d 346 (Alaska App. 1984). In *Jordan*, the defendant was convicted of taking a black bear the same day airborne and the court forfeited the defendant's airplane. Jordan challenged the forfeiture of his airplane by claiming that the sentence was illegal and in alternative that was excessive. The Court of Appeals held that the forfeiture of an airplane under AS 16.05.195 was neither illegal or excessive. The Court of Appeals further held that the forfeiture was

> appropriate due to the fact that it was the instrumentality by which Jordan committed the offense of same day airborne."

The State again uses the affirmatively misleading argument that since *AS 16.05.190-195* has been held constitutional after a challenge they allowed an illegal or excessive sentence due to the forfeiture of an airplane it means they are constitutional if they failed to provide the procedural due process of notice and hearing. This cannot be so. The Supreme Court cannot make a determination a statute is constitutional on issues that have yet to be brought up. Jordan received the procedural due process of prompt notice and hearing and bonded his airplane out pending trial. He merely complained the forfeiture statute was unconstitutional because it allowed the illegal or excessive forfeiture of his airplane. The Supreme Court never looked to see if the statute was unconstitutional because it allowed violations of the procedural due process of notice and hearing in Jordan's case – because no procedural due process violation took place or was complained of.

> **Page 17.** The State claims: "Additionally, the Court of Appeals has previously ruled that the process for forfeiture in criminal cases meets the constititutional due process requirements. *See Waiste*, 10 P.3d at 1152 (holding that a "blanket rule of *ex parte* seizure comports with due process."). In the case at bar, Haeg's airplane was the instrumentality by which he committed the crime of same day airborne and unlawful possession. Given the nexus between the airplane, guns, hides, traps, etc., and the crimes committed, the forfeiture of these items was not only legal, but appropriate."

First, it was the Alaska Supreme Court who decided *Waiste*, not the Alaska Court of Appeals. As pointed out earlier, this was a case where the defendant (Waiste) claimed procedural due process required a *pre*-seizure hearing, in his case specifically, to comply with constitutional requirements. He was not complaining he did not receive a prompt *post* seizure hearing. Waiste received a hearing and notice of the case only *two (2)* days after seizure. Waiste received a *second* hearing *three (3)* days after seizure. Waiste was arraigned *four (4)* days after seizure. David *never* received a hearing (or even notice of a hearing) or notice of the case for forfeiture and was arraigned *eight (8) months* after

seizure. Jackie never received anything at all and was never charged. The statutes allowed this because they lack standards to require this procedural due process – and are thus unconstitutional.

In deciding this case the Supreme Court *and* the State agreed a "blanket rule of ex parte seizure" (no hearing *before* seizure of *any* boat potentially subject to forfeiture) comports with due process, *as long as there is a prompt post seizure hearing*. Not just "notice" of a prompt post seizure hearing – the prompt post seizure hearing itself. Neither David nor Jackie ever received a hearing, let alone a prompt hearing – or even notice they had a right to such a hearing. David's attorneys never received notice of a hearing. In other words the State and the Alaska Supreme Court have agreed that if David and Jackie did not receive a prompt post seizure hearing or at least prompt notice of a post seizure hearing neither David nor Jackie received procedural and constitutional due process. *Waiste v. State*, 10 P.3d 1141:

> "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 *agreed* in *Waiste* that the constitution *required* a prompt post seizure hearing. Yet the State in David and Jackie's case now claim no prompt post seizure hearing is needed and that they don't even have to give David and Jackie notice of the right to a prompt post seizure hearing. What changed? The State cites 3 cases not dealing directly with post seizure procedural due process (*Graybill*, *Jordan,* and *Waiste)* as support for this claim no prompt post seizure hearing is needed or even prompt notice of the right to a post seizure hearing. Yet as shown *Waiste*, which deals directly with the procedural due process issue of whether a *pre* seizure hearing is required, and was the most recently decided (October 13, 2000), the Supreme Court still firmly *requires* a prompt post seizure hearing be *given,* not just provided, to comply with constitutional due process. Could the change in the State's position possibly be that they *failed* to give David and Jackie the procedural due process of prompt post seizure notice and hearing

and do not wish to admit this? In *Waiste* the State even outright argues a prompt postseizure hearing is due – not just notice of a hearing – so they can argue they do not have to provide a *pre* seizure hearing:

> "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.*"

The Alaska Supreme Court in *Waiste* agrees with the State that a prompt post seizure hearing is required by procedural due process:

> "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. *[G]iven 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 his or her primary source of income."

The Supreme Court even gives the reason why the prompt hearing and notice of the case is so important. The property David and Jackie were deprived of was the primary means by which both of them provided a livelihood for their daughters. They never received a hearing. They never received notice of their right to a hearing or notice of the case against their property. They never had the opportunity to bond their property out. Because of this constitutional violation the deprivation of their property and forfeiture of their property has been illegal for years. They have received this remand over 3 years after the being deprived of their property– and even then were denied their constitutionally guaranteed effective opportunity to contest – no confrontation, no cross examining adverse witnesses, no evidence presentation, no witness testimony, and no oral argument – all which has been held as necessary for the "effective" hearing required by procedural due process. See *Goldberg, Sniadach, Brock, Etheredge, Fuentes, Boddie, Mullane, Brinkerhoff, Gault, Ortwein, Wolff, Good, Jennings, and Gos*s.

The Fish and Game criminal forfeiture statutes do not specify what procedural due process is required when utilizing them (prompt hearing or at least prompt notice of the opportunity for a hearing, opportunity to bond, opportunity to contest, notice of case etc.) even though they are constitutionally required to. If defendants are given this procedural due process as a matter of grace they may not challenge the statutes as unconstitutional. But if this procedural due process is not given the statutes may be successfully challenged as unconstitutional. This is very clearly described by the Alaska Supreme Court in *F/V American Eagle* and *State v. Baranof* 677 P.2d 1245 (Alaska 1984):

> "The owners of the American Eagle also complain they were denied due process of law in that the forfeiture statutes under which the vessel, gear, and sale proceeds were seized provide for no in rem procedure or prompt post-seizure notice and hearing. Given this broad deficiency, the owners, in our opinion, have raised a substantial question whether the statutory scheme on its face affords adequate procedural due process. 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). See note 1 supra.
>
> *We need not reach the question of the constitutionality of the statutes in question in this case, however, because it is apparent that the vessel owners were in fact afforded procedural due process.* Jennings v. Mahoney, 404 U.S. 25, 92 S.Ct. 180, 30 L.Ed.2d 146 (1971); Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976).
>
> FN24. Wiren acknowledged the old line of United States Supreme Court authority on which the vessel owners rely for the proposition that due

> process provided as a matter of grace or in court rules does not deprive a litigant of his standing to challenge the failure to require specific procedures in the applicable statute itself. 542 F.2d at 762. See Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928); Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915); Central of Georgia Ry. Co. v. Wright, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134 (1907); Security Trust and Safety Vault Co. v. Lexington, 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204 (1906); People v. Broad, 216 Cal. 1, 12 P.2d 941, cert. denied sub nom. People v. General Motors Acceptance Corp., 287 U.S. 661, 53 S.Ct. 220, 77 L.Ed. 570 (1932). Wiren explained that these past decisions must be read in light of the Supreme Court's more recent self-imposed rules of restraint in deciding constitutional questions. 542 F.2d at 762. See United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). *Jennings was not discussed in Wiren, but held that a person whose driver's license was summarily suspended by an administrative agency could not challenge the validity of the applicable statute, even though the statute's constitutionality presented a "substantial question," where the license suspension had been stayed pending completion of judicial review.*

As pointed out earlier the American Eagle's owners received a formal c*ivil* complaint (which in great detail notified them of their absolute right to a prompt post seizure hearing) and obtained release of their boat through a bond so they could continue fishing. Since the seizure, deprivation, and/or forfeiture was thus "stayed" pending "judicial review" they could not challenge the constitutionality of the statute because it was not unconstitutional "as applied" to them (since they received the procedural due process that was not written into the statute) – even though it was unconstitutional "facially". The harm caused to David and Jackie was never "stayed" pending judicial review. The State and the statute denied them the procedural due process of notifying them they had a right to judicial review when they were harmed, along with failing to give notice of the case for harming them.

> *"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).
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> 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.
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> 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."

Again David and Jackie were never given the procedural due process of a hearing to protest or bond or even notice of such procedures or notice of the case for forfeiture. (The civil complaint alone, given in both *American Eagle* and *Baranof*, gives very specific and detailed notice of the right to an immediate hearing and if the hearing isn't held within 7 days the State must get a written waiver of the hearing – or the property must be returned. See *Civil Rule 89*) Thus, unlike the owners in *American Eagle* and *Baranof*, David and Jackie have a right to successfully challenge the constitutionality of *AS 16.05.190-195* as not affording the procedural due process of notice and hearing as guaranteed by constitution.

> **Page 17-18.** The State claims: "This Court should further deny Haeg's constitutional claims on the grounds that this Court lacks jurisdiction and waiver. First, this Court lacks jurisdiction to consider the constitutionality of AS 16.05.190-195. The State bases this jurisdictional argument on the remand order issued by the Court of Appeals. The order remanded jurisdiction in this case to the District Court for the limited purpose of determining if Haeg is entailed to the return of his property, not whether or not the forfeiture statutes are constitutional."

How can the State possibly claim this Court has no jurisdiction to consider David's constitutional claims? The State, in many different ways, failed to comply with constitutional due process. They failed to give David or Jackie their constitutionally guaranteed right to prompt notice of a hearing to contest, constitutionally guaranteed right to a prompt hearing, constitutionally guaranteed right to prompt notice of the opportunity to bond, constitutionally guaranteed right to prompt notice of the case for forfeiture, constitutionally guaranteed right to prompt notice of the intent to forfeit, and constitutionally guaranteed right to notice of the statutes authorizing forfeiture. *AS 16.05.190 and AS 16.05.195* lacked the standards needed to require the State to give this constitutional due process – thus making the statutes unconstitutional. Isn't the first duty of every judicial officer to make sure the constitution is complied with? In David's motion to the Alaska Court of Appeals he made the claim *AS 16.05.190-195* are unconstitutional facially and as applied because they allowed the seizure, deprivation, and/or forfeiture of David and Jackie's property without procedural due process and thus the property must be returned and suppressed as evidence. The Court of Appeals remanded *jurisdiction* to the District Court to conduct "any proceedings necessary" to decide the "merits" of David's motion. See 2/5/07 order from Court of Appeals. In other words the Court of Appeals specifically ordered the District Court to decide this and every other of David's claims made for the "purpose" of deciding the "merits" of David's "motion for the return of his property which the Sate seized in connection with this case". The "merit" of David's motion is that the statutes are unconstitutional. Magistrate Woodmancy accepted this remand over David's objections it should be decided in Kenai. The State and Magistrate Woodmancy cannot now claim the Court

does not have jurisdiction to decide all David's claims, including the constitutionality of *AS 16.05.0190-195*. David must be allowed to make all arguments why he is entitled to the return of his property. If he is not he is denied his constitutional right to an effective hearing. He is entitled for this Court to rule on each and every reason he gives – constitutional claims above all others. If this is not the case why was jurisdiction remanded to decide this motion on the "merits" through, "any proceedings necessary"?

> **Page 18.** The State claims: "Second, Haeg's constitutional argument should be denied due to the fact that Haeg never raised this issue with the trial court. In *Waiste*, the Court of Appeals held that the defendant waived any right to challenge the constitutionality of AS 16.05.190-195 due to the fact that a constitutionality argument was never raised with the trial court."

Over a year ago David and Jackie raised the constitutional issue in both the trial court and in the court in the district in which the property was seized. (See *Criminal. Rule 37(c)*). These courts refused to decide multiple motions. David and Jackie then raised this issue with the Alaska Court of Appeals – telling them of all the refusals to rule by the 2 different District Courts. The Court of Appeals refused to decide multiple motions. After a total of 16 different motions never ruled on spread out over nearly a year David finally told the Alaska Court of Appeals he would physically go get his and Jackie's property from the Trooper impound yard. Immediately after this the Court of Appeals issued the order to the District Court to decide the merits of this motion. After all this how can the State now claim this was never brought up in the trial court and thus should not be ruled on?

The frustration level David and Jackie have is extreme. It seems to David and Jackie that the system is using their ignorance of the law at every turn to deny them a fair opportunity to consideration of their allegations of error - or any consideration at all – which violate their constitutional rights. See *Lewis v State*, 565 P.2d 846 (Alaska 1977):

> "We emphasize that every defendant is entitled to be treated fairly by the courts, and is entitled to an opportunity to have his allegations of error considered."

Now the State is claiming that David "waived" any constitutionality argument because he never brought it up in the trial court. Yet even if he had not brought it up in the trial court numerous times over a year ago is it not before the trial court *right now*? Was not David's motion filed with the trial court, *as ordered*? Was not the State's opposition filed with the trial court, *as ordered*? Is not this reply being filed with the trial court, *as ordered*? Are not waivers of constitutional rights supposed to be "voluntary, intelligent, and knowing"?

CONCLUSION

David and Jackie are entitled to the return of all property seized because both the State and statutes *AS 16.05.190* and *AS 16.05.195* failed to affirmatively provide them with the constitutionally guaranteed procedural due process of prompt notice and hearing that is required by two constitutions. The "skeletal" search warrant copies left with David and Jackie when the State seized David and Jackie's property, used as the primary means of providing a livelihood, did not even remotely comply with the procedural due process demanded by two constitutions. The proper amount of procedural due process that must be afforded in seizing, depriving, and forfeiting property is given in the numerous cases and rules cited in both David's opening motion and in this reply.

David and Jackie were to be affirmatively given notice of their right to a prompt post seizure hearing – at which they could protest being deprived of their property or even to just ask to bond the property out. They were to be affirmatively given notice of the case for forfeiture along with the intent to forfeit. They were to be affirmatively given the statutes authorizing forfeiture. If, *after* being given this notice, David and/or Jackie didn't wish contest or bond they could waive the hearing. But if the State never notified David, Jackie and/or their attorney (which is moot because the attorney was hired weeks after the seizure) of their constitutional right to a prompt post seizure hearing and notice the State is not allowed to claim David and Jackie "voluntarily, intelligently, and knowingly" waived this procedural due process guaranteed by two constitutions. That

David wished to get his property back so he could make a livelihood is affirmatively documented in Trooper Godfrey's report, which quotes David, "When can I get my plane back? I have clients coming in tomorrow and I have to set up bear camp." See Godfrey's report in appendix. To David when Godfrey answered "Never" it meant there was no way to ask for the plane or other property back – no hearing, no opportunity to contest, no right to see or oppose the case for the seizure, deprivation, or forfeiture, and no opportunity to bond. Nothing. To David it meant Godfrey was the one who decided if he got anything back and Godfrey had decided it would not be. Who would think anything different?

Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1999) is nearly identical to David and Jackie's case – with the property (personal and not used to provide a livelihood) seized under authority of a search warrant during a criminal investigation, a copy of the search warrant was left, with the prosecution charging Perkins with the responsibility for the failure to persist and unearth the remedy of, and how invoke, a hearing to contest. In deciding the case the United States Court of Appeals, 9th Circuit, utilized civil cases as precedent:

> "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."*

How can the State, as was done by the City in *Perkins,* claim it is David and Jackie's fault that they did not "unearth the proper remedy and the method of its invocation" when the State never told David and Jackie that they could contest or how to do so? How can the State, as was done by the City in *Perkins*, claim a copy of the search warrant was all the "notice" required when the notice under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing"- and include information required for initiating that procedure in the appropriate court? How can the State claim civil and criminal forfeiture due process requirements are different when the United States Court of Appeals, 9th Circuit, uses civil case due process requirements to support criminal case due process requirements?

David and Jackie respectfully ask this Court remember what was quoted in *Sniadach, Fuentes*, and *Etheredge*:

> "The idea of wage judgment in advance of judgment, of trustee process, 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 family to the wall. 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 considered as de minimus, she must be accorded the usual requisites of procedural due process: notice and a prior hearing."
>
> "[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. *Appellant Fuentes says that she was never told she could recover the stove and stereo.*
>
> *[N]o hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.*
>
> *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. Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'"*
>
> *"[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."*

David and Jackie respectfully ask this court consider *Commentary to Alaska 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."

In addition to the violations above it cannot be seriously argued the State did not have an affirmative constitutional duty to place written notice in the charging documents

the State was going to seek forfeiture of David and Jackie's property and the case for doing so. This is part of the constitutionally guaranteed "notice" of the intent to forfeit and the case for forfeiture, so that an effective defense may be prepared. The federal rules, which provide *less* constitutional protection to the defendant then Alaska's rules, make this very clear.

> *Federal Rule 7: The indictment and the Information*: "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."
>
> *Federal Rule 32.2: Criminal Forfeiture*: "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."

In its opposition the State never challenges the fact that not one warrant, charge, or information filed in David's case gives any notice whatsoever the State intended to ask to forfeit *all* the property seized. See appendix. How does this comply with the constitutional due process of "notice" of the case for forfeiture? How can the State claim *AS 16.05.190* and *AS 16.05.195*, the Fish and Game forfeiture statutes, authorized the forfeiture when these statutes were never placed on any warrant, charge, or information filed in David's case? See appendix. How does this comply with the constitutional due process of "notice" of the case for forfeiture?

It cannot be seriously argued the State did not have an affirmative constitutional duty to promptly notify David and Jackie they had a right to a prompt hearing when the State seized the property David and Jackie used as the primary means to provide a livelihood. In the State's opposition they never deny this – they just try to blame David, Jackie, or one or their attorney's for the State's failure to obey the constitution.

It cannot be seriously argued that criminal forfeiture statutes *AS 16.05.190* and *AS 16.05.195* meet constitutional requirements in David and Jackie's case - *either* facially or as applied. The ruling by the Alaska Supreme Court in *Etheredge* sets the constitutional

violation in stone. The only reason they have stood for so long is that in every other procedural due process challenge the defendants had been afforded procedural due process as a matter of grace – invoking the holding that if you received procedural due process as a matter of grace you could not challenge the statutes constitutionality even if they lacked standards for providing procedural due process.

The State's reluctance to admit the error was their own is easily apparent – if they admit to a constitutional due process violation virtually all evidence in the case is and was unusable. All forfeitures are void. All property must be returned. They will lose the very effective and "inhuman" ability to "drive defendants to the wall" before charges are ever filed or trial joined. In addition, they will lose a very effective revenue-generating tool – the ability to seize and/or forfeit hundreds of thousands of dollars of property unchallenged. This does not even take into consideration the numerous people who will be forced to take responsibility for their actions in David and Jackie's case.

What could or should have happened if David and Jackie had been given constitutionally guaranteed procedural due process? They would have no doubt told the Court about the perjury on the search warrant affidavits moving the evidence found from the GMU in which the Wolf Control Program was taking place to the GMU where David and Jackie were licensed to guide. Could this have changed anything? How could it not when the sentencing court cited this very perjury as the reason for David's unbelievably harsh sentence? How could it not when prejudicial perjury on a search warrant affidavit is cause to suppress all evidence obtained by the tainted search warrant? How could it not when Wolf Control Program (for which David had a permit) violations were intentionally excluded from guiding violations, which provided most of David and Jackie's livelihood?

Jackie would have no doubt asked that her interest in the property not be affected. How could this not have an effect when she had an interest in *all* property seized? There is no doubt David and Jackie would have bonded the property out if all else failed. There is absolutely no doubt that this would have had an effect – David and Jackie would have still had the primary means by which to provide a livelihood for their 2 daughters – able

to conduct their guide business, flight seeing business, and their trapping business for the *years* between seizure and judgment.

> *Alaska Rule of Criminal Procedure 47* states: *(a) Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. *(b) Plain Error.* Plain errors or defects may be noticed although they were not brought to the attention of the court.
> The annotations to this rule are as follows:
>
> *"Denial of a constitutional right affects substantial rights. Plain error requiring reversal will be deemed present unless the defect is harmless beyond a reasonable doubt. Martin v State*, Op. No. 991, 517 P2d 1399 (Alaska 1974)."
>
> *"A denial of a constitutional right, in the normal case, will affect substantial rights and give rise to plain error.* However, when an error, even of constitutional dimension, may be said to be harmless beyond a reasonable doubt, the rights of an accused are not prejudiced and the requirements of plain error have not been met. *Burford v. State*, Op. No. 954, 515 P2d 382 (Alaska 1973)."
>
> *"If the statute under which a defendant is charged is unconstitutional, the resulting indictment and conviction constitutes "plain error" under this rule. Accordingly, the Supreme Court will consider the issue although it was not brought to the attention of the trial court. Tarnef v. State,* Op. No. 911, 512 P2d 923 (Alaska 1973)."

Since David and Jackie's constitutional rights were denied and the error was not harmless beyond a reasonable doubt they respectfully ask for reversal and that this Court grants each and every request in the Short Statement of the Relief Sought that is located at the end of David's opening motion – including the return of *all* property seized. Jackie formally asks to be made a party to these proceedings. David also respectfully asks this court to order the State produce the return receipt for the "March 28, 2007" certified letter the State claims David or Jackie received. Of special need is for this court to document its factual and legal findings on all requests with specificity in accordance with *Rule 42(e)(4) and Rule 12(d*). This is needed both for David's appeal and to include in a federal complaint.

David and Jackie wish this Court to know that they and many others feel they have been betrayed over and over by a judicial system they all had been taught to trust and respect. The frustration, anger, and resentment this has engendered in the last 3 years is beyond description. A great number have already read the State's recent opposition and have expressed shock and disbelief at the complete lack of substance or caselaw to support their allegations when compared to the facts. (Friends of David and Jackie have set up the website www.alaskastateofcorruption.com to promptly publish nationwide all records in David's case.)

David and Jackie cannot stop their pursuit of justice until the unbelievable injustice they have endured and their claims of error are addressed with the solicitude read about in hundreds of published decisions. To do less is to admit this is no longer a free country where everyone is equally entitled to justice as guaranteed by constitution and the rule of law.

David and Jackie have been unjustly "put to the wall" and will fight with each and every means at their disposal, for as long as it takes, to defend their constitutional rights. David and Jackie's family, the U.S. and Alaska constitutions, and all citizens require no less. Hopefully this Court respects this endeavor and proceeds to fairly, completely, and thoughtfully consider David and Jackie's motion by applying the law (especially caselaw) to the facts, without regard to anything or anyone else.

This reply is supported by the accompaning affidavits and appendix.

RESPECTFULLY SUBMITTED this ____ day of _____, 2007 at Brown's Lake, Alaska.

_____

David S. Haeg, Pro Se Appellant

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: _____