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Submitted 10/16/06

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA,
3rd JUDICIAL DISTRICT AT KENAI, ALASKA

DAVID HAEG,)
)
)
)
vs.)
) Case No.:_____
)
STATE OF ALASKA,)
)
_____)

MOTION FOR RETURN OF PROPERTY & TO SUPPRESS EVIDENCE

COMES NOW, DAVID HAEG, pro se, and hereby files the following motion for return of property & to suppress evidence in accordance with:

> *Alaska Rules of Criminal Procedure Rule No. 37(c)*:
> "A person aggrieved by an unlawful search 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."[1];
>
> *Waiste v. State*, 10 P.3d 1141 (Alaska 2000) "...Criminal Rule 37(c) hearing, in which a property owner can contest the basis for a seizure."[2];
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> *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980): "Strict construction against government. – As a general rule, forfeitures are disfavored by the law, and thus forfeiture statutes should be strictly construed against the government." "Due process requirements. - 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. When the seized property is

1 Criminal Rule 37(c).
2 *Waiste v. State*, 10 P.3d 1141 (Alaska 2000).

> used by its owner in earning a livelihood, notice & an unconditioned opportunity to contest the state's reasons for seizing the property must follow the seizure within days, if not hours, to satisfy due process guarantees even where the government interest in the seizure is urgent."[3];
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> *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984): "Where the seizure of a fishing vessel is authorized by a judicially approved warrant issued upon probably cause and the state **files a civil complaint on the next working day following the seizure, and the owners are promptly notified, the owners are afforded procedural due process**."[4]

On 3/29/04, 4/1/04, 4/2/04, and 4/3/04 the State seized a wide assortment of Haeg's property, which was used as the primary means of providing a livelihood for his family. Most of this property was seized in the 3rd judicial district. In over two and a half (2 ½) years the State has never provided any of the constitutional guarantees the Alaska Supreme Court required the State provide in decisions made in the cases above.

The specific requirements to comply with these Alaska Supreme Court rulings are found in the *Alaska Rules of Civil Procedure* – as property seizures and forfeitures, although of "quasi-criminal nature"[5], are "civil in form". In fact there is no mention at all of the due process requirements for seizing and forfeiting property in the *Alaska Rules of Criminal Procedure* although Alaska Statutes **authorize** property seizures and forfeitures in Fish and Game criminal prosecutions under:

> *AS 16.05.190*: "[Property] seized under the provisions of this chapter or a regulation of the department, unless forfeited by order of the court, shall be returned, after completion of the case and payment of the fine, if any."
>
> *AS 16.05.195*: "[Property] used in or in aid of a violation of this title or AS 08.54, or regulation adopted under this title or AS 08.54, may be forfeited

3 *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980).
4 *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984).
5 *Graybill v. State*, 545 P.2d 629 (Alaska 1976).

> to the state. (1) upon conviction of the offender in a criminal proceeding of a violation of this title or AS 08.54 in a court of competent jurisdiction; or (2) upon judgment of a court of competent jurisdiction in a proceeding in rem that an item specified above was used in or in aid of a violation of this title or AS 08.54 or a regulation adopted under this title or AS 08.54".

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

> *Alaska Rules of Criminal Procedure Rule 54*: Process – "Process issued in all criminal actions in the superior court shall be issued, and return thereon made, in the manner prescribed by **Rule 4, Rules of Civil Procedure**."
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> *Alaska Rules of Civil Procedure Rule 4:* "(c) *Methods of Service - Appointments to Serve Process* - (3) **Special appointments for the service of all process relating to remedies for the seizure of** persons or **property pursuant to Rule 64** or for the service of process to enforce a judgment by writ of execution shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant, and such appointment may be made subject to such conditions as appear proper in the discretion of the Commissioner for the protection of the public. A person so appointed must secure the assistance of a peace officer for the completion of process in each case in which the person may encounter physical resistance or obstruction to the service of process."
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> *Alaska Rules of Civil Procedure Rule 64*: "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law existing at the time the remedy is sought. **The remedies thus available include** arrest, **attachment**, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, **however designated and regardless of whether by law the remedy**

is ancillary to an action or must be obtained by an independent action."

Alaska Rules of Civil Procedure Rule 89: *Attachment*
"(b) *Motion and Affidavit for Attachment.* The plaintiff **shall file a motion with the court requesting the writ of attachment**, together with an affidavit showing...

(m) *Ex Parte Attachments.* The court may issue a writ of attachment in an ex parte proceeding based upon the plaintiff's motion, affidavit, and undertaking only in the following extraordinary situations: (1) *When Defendant Non-Resident.* In an action upon an express or implied contract against a defendant not residing in the state, the court may issue an ex parte writ of attachment only when necessary to establish jurisdiction in the court. To establish necessity, the plaintiff must demonstrate that personal jurisdiction over the defendant is not readily obtainable under AS 09.05.015. (2) *Imminence of Defendant Avoiding Legal Obligations.* The court may issue an ex parte writ of attachment if the plaintiff establishes the probable validity of the plaintiff's claim for relief in the main action, and if the plaintiff states in the affidavit specific facts sufficient to support a judicial finding of one of the following circumstances: (i) The defendant is fleeing, or about to flee, the jurisdiction of the court; or (ii) The defendant is concealing the defendant's whereabouts; or (iii) The defendant is causing, or about to cause, the defendant's property to be removed beyond the limits of the state; or (iv) The defendant is concealing, or about to conceal, convey or encumber property in order to escape the defendant's legal obligations; or (v) The defendant is otherwise disposing, or about to dispose, of property in a manner so as to defraud the defendant's creditors, including the plaintiff. (3) *Defendant's Waiver of Right to Pre-Attachment Hearing.* The court may issue an ex parte writ of attachment if the plaintiff establishes the probable validity of the plaintiff's claim for relief in the main action, **and if the plaintiff accompanies the affidavit and motion with a document signed by the defendant voluntarily, knowingly and intelligently waiving the constitutional right to a hearing before prejudgment attachment of the property**. (4) *The Government as Plaintiff.* **The court may issue an ex parte writ of attachment when the motion for such writ is made by a government**

agency (state or federal), provided the government-plaintiff demonstrates that such ex parte writ is necessary to protect an important governmental or general public interest.

(n) *Execution, Duration, and Vacation of Ex Parte Writs of Attachment.* When the peace officer executes an ex parte writ of attachment, the peace officer shall at the same time serve on the defendant copies of the plaintiff's affidavit, motion and undertaking, and the order**. No ex parte attachment shall be valid for more than seven (7) business days (exclusive of Saturdays, Sundays, and legal holidays), unless the defendant waives the right to a pre-attachment hearing in accordance with subsection (m) (3) of this rule, or unless the defendant consents in writing to an additional extension of time for the duration of the ex parte attachment, or the attachment is extended, after hearing, pursuant to section (e) of this rule. The defendant may at any time after service of the writ request an emergency hearing at which the defendant may refute the special need for the attachment and validity of the plaintiff's claim for relief in the main action**...

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

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

The above rules desribe the procedure to seize and forfeit someones property while gauranteeing them a constitutional right to a hearing "within days if not hours" as is required by the Alaska Supreme Court in *F/V American Eagle v. State.*

According to the United States Supreme Court, U.S. 9th Circuit Court, and the Alaska Supreme Court, in numerous decisions, the right to your property, especially that used to provide a livelihood for your family, cannot be taken without strict adherence to rule and constitutional due process:

> "[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'."[6]

The obvious reason the State did not afford Haeg his constitutional right to a hearing is he would have no doubt prevailed upon the merits and ended any further prosecution. The obvious reason for the intentional deprivation of the hearing was the fact that <u>all</u> the search warrants were based upon intentionally misleading perjury, that this would have been

6 *Peralta v Heights Medical Center, Inc*., 485 U.S. 80,87 (1988) and *Coe v Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

exposed during a hearing, and that this would have ended any criminal prosecution.

Trooper Gibbens testified on the search warrant affidavits, under penalty of perjury, that the suspicious sites he investigated were in Unit 19C, and that our lodge, that we "use for guiding", was in 19C (leading everyone, including the judge issuing the search warrants, to believe the suspicious sites involved a big game guiding violation and had nothing to do with the Wolf Control Program). In fact all the sites that Trooper Gibbens investigated were in Unit 19D, the unit which the Wolf Control Program was being conducted and where Haeg had never hunted, guided, or ever been licensed to guide. Trooper Gibbens and Prosecutor Scot Leaders taped Haeg telling them this during the interview Haeg gave them for the Rule 11 Plea Agreement. Then, after Prosecutor Leaders broke the agreement and forced Haeg to trial on big game guiding charges rather than some Wolf Control Program violation (a conviction of which could not affect our guide business), he asked for and accepted sworn testimony, from Trooper Gibbens in front of my judge and jury that sites he investigated were in GMU 19C. Then Judge Murphy uses this continued perjury to justify my unbelievably harsh sentence of taking our business away for 6 years and our business property forever, saying it was because, "the majority if not all the wolves were taken in 19C ... where you were hunting." Even more unbelievable is when Haeg filed a complaint of this continuous perjury that harmed his family unbelievably, with the entire Trooper chain of command from the Governor on down; they had Department of Law prosecutors do the "investigation". Prosecutors Roger Rom and James Fayette ruled: "to convict Trooper Gibbens of perjury, a jury would have to believe that you were truthful when you told him where you thought the kill sites were located." (Roger Rom is the one representing the State against Haeg in his appeal and Trooper Gibbens is his main witness) After this response Haeg tried for a long time to get anyone in authority to

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

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

> *Lewis v. State*, 9 P.3d 1028. (Ak., 2000). "Once defendant has shown that specific statements in affidavit supporting search warrant are false, together with statement of reasons in support of assertion of falsehood, burden then shifts to State to show that statements were not intentionally or recklessly made."
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> *Gustafson v. State*, 854 P.2d 751, (Ak.,1993). "Prosecutors and police officers applying for a warrant owe a duty of candor to the court; they may neither attempt to mislead the magistrate nor recklessly misrepresent facts material to the magistrate's decision to issue the warrant."
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> *Cruse v. State*, 584 P.2d 1141, (Ak.,1978). "Constitutional protection against warrantless invasions of privacy is endangered by concealment of

relevant facts from district court issuing search warrant, as search warrants issue ex parte, & issuing court must rely upon trustworthiness of affidavit before it."

State v. Davenport, 510 P.2d 78, (Ak.,1973). "State & federal constitutional requirement that warrants issue only upon a showing of probable cause contains the implied mandate that the factual representations in the affidavit be truthful."

State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003). "An error in admitting or excluding evidence in a criminal trial, whether of a constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt."[7]

U.S. Supreme Court in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "Only 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.' The Due Process Clause demands no less in this case."

U.S. Supreme Court in *Sniadach v. Family Finance Corp*., 395 U.S. 337 (1969). "[D]ue process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged [defendant] before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court [U.S. Supreme Court]."

U.S. Supreme Court in *Wiren v Eide*, 542 F2d 757 (9th Cir. 1976)."Where the property was forfeited without constitutionally adequate notice to the claimant, the courts must provide relief, either by vacating the default judgment, or by allowing a collateral suit."

Alaska Supreme Court in *Etheredge v. Bradley,* 502 P.2d 146 Alaska 1972. "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing ... this

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

prejudgment garnishment procedure violates the fundamental principles of due process."

Haeg's property, used to put food in the mouths of his wife (Jackie) and two daughters (Kayla, age 8 and Cassie, age 5), was seized, held, and forfeited without any regard whatsoever for the constitutional safties protecting the right of every U.S. and Alaskan citizen to provide a livelihood for their family. Again Haeg would like to ask where the "ensemble of procedural rules" that "bounds the State's discretion to seize vessels and limits the risk and duration of harmful errors" that the Alaska Supreme Court has ruled protects citizens against unecessary or illegal seizures and/or forfeitures.[8] In Haeg's case the State did not ever indicate it wished to forfeit his property in any of the search warrants or informations filed in his case.

In consideration of the above arguement, affidavits, and overwhelming caselaw, showing the States gross, intentional, knowing, and intelligent constitutional violations of civil due process rights, Haeg respectfully asks for the return of his property and suppress evidence.

This motion is supported by the accompaning affidavits from David and Jackie Haeg.

RESPECTFULLY SUBMITTED this _____ day of _____, 2006.

_____

David S. Haeg

I HEREBY CERTIFY that a copy of the foregoing was served on the Prosecuting Attorney's Office, in person on _____, 2006.

By: _____

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