INGALDSON FITZGERALD, P.C.

Lawyers

813 West Third Avenue
Anchorage, Alaska 99501-2001
Telephone (907) 258-8750 Facsimile (907) 258-8751

William H. Ingaldson
Kevin T. Fitzgerald
Stuart C. Rader
Jim M. Boardman, of Counsel
Carmen E. Clark
Peter A. Sandberg

April 1, 2016

Gabrielle LeDoux,
House Judiciary Chair

I have had an opportunity to review the Committee Substitute for HB 317 ("CSHB 317") and I believe that, if passed, it would address all of the concerns that I and others have raised regarding standardizing and centralizing forfeiture law in Alaska. In spite of the fact that various witnesses have claimed that forfeiture is not an ongoing problem in Alaska, I believe that it is clear from the testimony that it is, in fact, a very real problem. As Chair LeDoux pointed out, we are aware of no other area of law where a person's property can be taken away from them preemptively in spite of the fact that it has no evidentiary value for proving the case. Yet, as the committee heard yesterday, this is exactly what is happening now in Alaska.

Compounding this problem is the fact that there currently exists no effective or adequate avenue for addressing pre-charge, and even post-charge, seizures of substantial assets. There was a claim that Criminal Rule 37(c) provides such a mechanism. It does not. Criminal Rule 37(c) does not provide any mechanism for challenging warrantless seizures of assets. As a practical matter it also does not address pre-charge seizures. Further, as noted, the Rule provides no real protections to citizens of seizures "per" a warrant. Once the prosecutor alleges the item is "evidence" the judicial inquiry of the executive ceases. We heard first hand yesterday how expansive law enforcement views items of "evidence." This bill not only establishes a procedure, but requires the government to prove the merits of the seizure. And, why isn't that good policy when we're discussing the seizure of items like vehicles and aircraft from private citizens, some of whom haven't even been charged.

CSHB 317 would provide an avenue for people who have had their property taken to argue that it should be given back and to get it back promptly when they believe they have been wronged. Sec. 12.36.350 is absolutely necessary to prevent what amounts to legal limbo as people who have had their property seized for forfeiture purposes wait, at times, months and even years to find out if they will even be charged. Contrary to what appear to be predictions of doom from the Department of Law, this should not put any more burden on the Court system than any other set of pre-trial motions, which abound in both the criminal and civil law.

At the same time, the dual aim of CSHB 317 is not to undermine law enforcement's ability to either seize or ultimately forfeit property. And it doesn't. If law enforcement proves their case, they will still get the forfeiture. The deterrent value still exists when people can still lose their property. All CSHB 317 requires is that law enforcement not seize non-evidentiary property in the hopes that they will own it later. Similarly, law enforcement testimony indicated that the reason they need to seize and hold property that will be subject to forfeiture is that the owner may abscond with it. But, Sec. 12.36.475 addresses this by allowing forfeiture of substitute property in the event that this occurs and by allowing a law enforcement officer who actually had probable cause to believe this will happen to seize the property pursuant to Sec. 12.36.300(e). The only difference is that with the legislation they cannot hold it without court review, often without any arrest, until after the trial, if there is one.

I would also like to address some of the points raised by the letter we received yesterday from DPS. First, the example of computers containing child pornography having to go back to the perpetrators is a pure scare tactic. This presumes a criminal defense attorney would assert such a meritless motion. Computers containing child pornography would be held as *necessary evidence* of the crime. Similarly, no court anywhere would order that child pornography be returned. It is contraband that would not be returned in the same way that a kilo of cocaine would not be returned. This is an argument that the sky will fall, pure and simple.

Second, the fact that statements made at a pretrial hearing cannot be used against the claimant at the later criminal trial

is simply intended to allow a person to testify regarding their "forfeited" items to have them returned without the hearing turning into an opportunity for a wide-ranging inquiry or waiving their constitutional right not to testify at their trial. In this same way we currently allow defendants to assert "standing" relating to search challenges without inculpatory consequence.

Third, law enforcement complains about the burdens of the identifying or reporting requirements of the legislation. Again, this is exaggerated. As it is, most property is seized per a warrant. The warrant requires a "return" wherein the property seized is identified. The other provisions address providing notice of what property the government seeks to forfeit. Why shouldn't the government be required to identify what they have seized and what they intend to forfeit? This is called due process. It is also called good public policy.

Fourth, law enforcement is critical of the "safe-haven" provided by the innocent owner provision, apparently unaware that the same procedure exists at common law. See State v. Rice, 626 P.2d 104 (Alaska 1981) (wherein the Court ruled that not to allow innocent owners an avenue for relief violated the State's constitutional due process provision despite the absence of any statutory scheme for the same).

Fifth, like the Department of Law, law enforcement trumpets that the legislation will require many more hearings, cutting into the time it would otherwise utilize to catch bad guys. But, as it currently stands, the only additional hearing contemplated by the legislation is a potential and timely pre-trial hearing to address the issue of seizure/forfeiture head on. And since law enforcement claims that Criminal Rule 37(c) affords an adequate mechanism already, there wouldn't be any new hearings. There would also be the potential that a trial may last several more hours to address forfeiture before the same jury and judge in much the same way as the existing procedure for proving some aggravators post-Blakley.

Finally, law enforcement claims without evidence or support that the proposed legislation "would effectively make forfeiture illegal in all fish and game cases." This is a ridiculous claim. Rather, what the legislation does is to protect the due process rights of Alaska citizens from whom substantial assets

have been seized. It unquestionably provides a standardized and centralized process following the seizure. And it ensures that if the government is going to seize items that it be prepared to explain and prove why under the Bill.

Further, despite the protestations to the contrary, the legislation does not undermine government's ability to either seize or forfeit assets. Instead, the legislation requires no more than the due process guarantees the constitution otherwise demands,[1] but which are largely unknown or ignored. The legislation also requires of law enforcement no more than what they should be doing in any event. On balance, this seems like a small price to pay for constitutional protections that ensure that if the government seizes and/or forfeits substantial assets from private citizens and/or deprives them of their livelihoods that there exist an adequate, appropriate and timely avenue for citizens to challenge the action. This legislation undeniably so provides.

Very truly yours,

Kevin T. Fitzgerald

jj
f:\w\0903.001\chsb317.doc

[1] See F/V American Eagle v. State, 620 P.2d 657, 666-67 (Alaska 1980) ("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.").