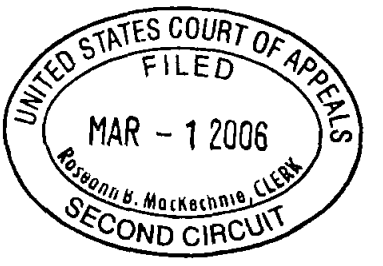
05-6691

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VALERIE KRIMSTOCK, CHARLES FLATOW, ISMAEL DELAPAZ, CLARENCE WALTERS, JAMES WEBB, MICHAEL ZURLO, AND SANDRA JONES, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,



- against -

RAYMOND KELLY, in his official capacity as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department; the CITY OF NEW YORK; and DISTRICT ATTORNEYS of the City of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

The court below (Mukasey, J.) had subject matter jurisdiction under 28 U.S.C. §§1331 and 1343(3) over this class action brought pursuant to 42 U.S.C. §1983 to remedy deprivation of rights under the Fourteenth Amendment. The court had continued jurisdiction pursuant to this Court's remand for further fact finding, as stated in Jones v. Kelly, 378 F.3d 198 (2d Cir. 2004).

Following proceedings on remand, the court below issued an order on December 6, 2005 that finally disposed of plaintiffs' claims. Notice of appeal was filed on December 12, 2005. This Court has jurisdiction of this appeal under 28 U.S.C. §1291.

ISSUES PRESENTED

Whether persons whose vehicles are seized by the police and impounded as evidence for the pendency of a criminal case have the right under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to an opportunity to be heard before a judge to challenge the legitimacy and the necessity of the impoundment of a vehicle until the end of the criminal case.

STATEMENT OF THE CASE

Plaintiffs are members of a class that now includes all individuals whose automobiles are seized by the New York City Police Department and impounded as evidence or for forfeiture. Initially, the lower court had dismissed the case, finding no constitutional right to a prompt, post-seizure hearing for such persons. On the first appeal in this case, this Court reversed, ruling that plaintiffs were entitled under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to prompt post-seizure review by a court of the legitimacy and the necessity of the impoundment of their vehicles pending a forfeiture action. Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002), cert. denied, 123 S.Ct. 2640 (2003).

On the first remand, the lower court included vehicles seized as evidence as part of the post-seizure review. Defendants-Appellants (the "City") appealed this aspect of the order and were joined by the District Attorneys Association of New York State as amicus curiae. They sought the exclusion of any vehicle labeled "arrest evidence" from the post-seizure review process, while plaintiffs argued that their due process opportunity to be heard included the right to challenge the impoundment of a vehicle as evidence.

This Court, explicitly not addressing the merits, vacated that portion of the order relating

to "arrest evidence" and remanded with instructions to the lower court to create a factual record and rule on the parties' legal contentions in light of that record. Jones v. Kelly, 378 F.3d at 204.

On the second remand, the lower court amended its order, doing away with a provision by which the prosecution in a case could continue the impoundment of a vehicle by obtaining a "retention order" from a criminal court judge. In place of this judicial involvement, the new order provides that, if an assistant district attorney designates a vehicle to be "potential evidence," that determination is final. The owner of the impounded vehicle has no right under the Fourth or Fourteenth Amendment, the lower court held, to an opportunity to be heard in court to challenge the necessity of impoundment during the criminal case. Plaintiffs appeal from the Second Amended Order and Judgment that incorporates that decision.

STATEMENT OF FACTS

Background to the Second Remand

With one exception, no New York statute governs the legitimacy or the duration of an impoundment of a vehicle as evidence for a criminal case. The exception is Penal Law §450.10(4)(c), which requires, after photographing, the "expeditious" return to its owner of a vehicle alleged to be stolen.

Nor does any local legislative enactment in New York City govern impoundment of a vehicle as evidence. Under rules promulgated by the executive branch of city government, a person seeking release of any property labeled "arrest evidence" may request from the prosecution a form authorizing release. See Rules of the City of New York, Title 38, §12-34(c). The rules provide no recourse if the prosecution denies, or does not respond to, a request.

The City Rules make no distinction between vehicles and all other forms of seized

property. The Krimstock ruling, however, concerns only vehicles. In view of the fact that automobiles "occupy an central place in the lives of most Americans," 306 F.3d at 61, this Court held that a prompt hearing to challenge the impoundment of an automobile is a constitutional right. Ordered to effectuate that right, the lower court on remand set up a "prompt, post-seizure review" procedure where the hearing was to be available at a local administrative court, the Office of Administrative Trials and Appeals (OATH).

The original draft order, issued in September 2003, included vehicles seized as "evidence" as part of the post-seizure review. (The current order also includes "evidence" vehicles.) The City and the District Attorneys told the court that the order would jeopardize the prosecutions of 1,800 to 2,000 cases in which vehicles impounded as "arrest evidence" were needed as evidence. In response to their objections, the court amended its order to allow the prosecution to forestall release of any vehicle by obtaining a "retention order" from a criminal court judge, and also to require as a condition of release a defense waiver of any factual claim or defense related to the state of the vehicle at the time of arrest. That order became effective on January 23, 2004. The defendants appealed its inclusion of "arrest evidence" vehicles.

This Court found the factual record insufficient for a decision on the merits. It stated: "While the parties have argued at length about the impact of the district court's order on effective prosecution of criminal cases in New York, the district court did not conduct an evidentiary hearing to test the legitimacy of those assertions." Jones v. Kelly, 378 F.3d at 203. Accordingly, the Court remanded the case for the lower court to establish "fixed, established points of reference" to support a legal ruling, such as the "actual number" of "trial evidence" vehicles in current prosecutions compared with "relevant figures" from a period in the past. Id. at 204.

Upon remand, the parties stipulated to the District Attorneys' intervention with respect to the "arrest evidence" issue. (JA 17-19)[1] The factual record was created in two parts. The first part was made up of paper submissions from the parties: the District Attorneys presented figures, which had been requested by plaintiffs in discovery, indicating the numbers of "trial evidence" vehicles in various categories, the plaintiffs presented arguments as to the significance of those figures, and the City argued that the designation of 1,800 - 2,000 vehicles as "arrest evidence" or "evidence" had been in good faith.

The second part of the record was a hearing held on April 25, 2005. The District Attorneys presented two witnesses. Only one was a lawyer: Maureen McCormick, a veteran prosecutor from the Kings County District Attorney's office, testified in favor of elimination of judicial review of the impoundment of a vehicle as evidence. The other witness, Cheryl McCormick, a non-lawyer from the Manhattan District Attorney's office who had compiled the statistics requested in discovery, testified about the statistics that she had compiled.

The Material Facts in the Record

The difference between "arrest evidence" and "trial evidence" was clarified on remand. "Arrest evidence" is an initial designation given to a vehicle by a police officer upon seizure. (JA 29, 42) "Trial evidence" is a designation made later by a prosecutor indicating that the vehicle would be needed as evidence for the criminal trial. (JA 29, 43)

These two classes of seized vehicles appeared in two chronological groups subject to the Krimstock order: the "backlog" group and the "current" group. The "backlog" group represented all vehicles that remained impounded as "arrest evidence" when the initial order took

[1] "JA ___" numbers refer to pages in the Joint Appendix.

effect on January 23, 2004. At that time, the group numbered 2,058 vehicles. (JA 44) The "current" group included those seized vehicles labeled "arrest evidence" during the first eight months of the Krimstock order, from February 2004 through September 2004. There were 3,301 "arrest evidence" vehicles in the "current" group.

The Police Department revealed on remand how seized cars entered the "arrest evidence" category. Some cars were seized as evidence. In other cases, if a vehicle was seized for forfeiture, the police officer was instructed to designate on the voucher that it was both "arrest evidence" and "held for forfeiture." (JA 64, 108, 127)

The record shows that the number of vehicles labeled "arrest evidence" by the police is many times larger than the number later designated "trial evidence" by prosecutors. In the "backlog" group, for example, out of 2,058 cars labeled "arrest evidence" by the police, 249 (12%) were ultimately declared "trial evidence" when prosecutors reviewed the cases some months or years after the original designation. (JA 44) (The "backlog" group covers the 1,800 - 2,000 impounded "arrest evidence" vehicles that the City and the District Attorneys had earlier sought to exclude entirely from the Krimstock process.)

The "current" group showed an even wider disparity between "arrest evidence" and "trial evidence" vehicles. Out of 3,301 "arrest evidence" vehicles so labeled in that eight-month period, 204 (6%) were designated "trial evidence" by prosecutors. (JA 46)

Prosecutors followed no standards or guidelines in deciding whether a vehicle was to be designated "trial evidence." (JA 116) Statistics as to "trial evidence" designations revealed extreme variations among District Attorneys' offices. See below at 32-34. The Bronx office designated 95 vehicles as "trial evidence" in the backlog group, for example, while the Queens

office put only nine vehicles in that category. (JA 29)

The figures showed marked variations in the offenses for which vehicles were held. In the backlog, for example, the Bronx office listed 30 cars seized in DWI cases as "trial evidence;" no other office approached that number. The Bronx also held 22 cars in drug cases as "trial evidence," while Kings put only two, and Queens and Richmond no vehicles, in that category. (JA 49) Similar inconsistencies appeared in the "current" group as well.

Evidence showed that the number of "trial evidence" designations was strongly affected by the prospect of judicial review. In January 2004, when seeking a stay from this Court on the "arrest evidence" issue, the District Attorneys informed this Court that Kings County prosecutors had designated 151 "trial evidence" vehicles for which retention orders would have to be obtained if a stay were not granted. The Court denied a stay. The prosecutors then reviewed the 151 "trial evidence" designations in February 2004, and the figure was reduced to 51. (JA 209)

All of the retention orders in every borough were obtained by the prosecutors ex parte. (JA 36) No vehicle owner was ever given notice that a retention order for his vehicle was being sought, or provided an opportunity to contest the application. No prosecutor ever participated in an OATH proceeding.

Prosecutors obtained retention orders in 100% of the cases in which they were sought. (JA 31) They obtained 93 orders for the one-time "backlog" group, and 75 orders for the "current" group. (JA 46-47) The District Attorneys' chief witness admitted that getting the orders had not required much effort. (JA 259)

The key factual question posed by the Court of Appeals was whether the January 23, 2004 order presented "an encumbrance to the prosecution of criminal cases." Jones v. Kelly, 378

F.3d at 204. The record created on remand showed that that was not the case.

Only a very small number of cases in which cars had been subjected to long-term impoundment as "evidence" concluded in a trial. In the "backlog" group, out of the 2,058 "arrest evidence" vehicles, of which 249 were later designated "trial evidence" by prosecutors, no more than 20 went to trial. (JA 51) And out of the 3,301 "arrest evidence" cars in the "current" group from February to September 2004, of which 204 were designated "trial evidence" vehicles that had to stay impounded, none of those cases had gone to trial as of April 25, 2005. (JA 48) Impoundment of those vehicles had lasted from seven to 15 months until then, and its future duration was open-ended.

The District Attorneys at the hearing discussed a handful of cases that had gone to trial. (JA 222-30) Several involved fatalities and severe injuries. Their witness stressed the ways in which a vehicle might contain evidence relevant to the case. (JA 217-21)

Plaintiffs never contended that a vehicle could not be relevant evidence in a case. The record on remand showed, however, how small the number of such cases was, especially when compared to the much greater number of vehicle impoundments.

As to the question whether the retention order provision had been an "encumbrance" to the prosecution of criminal cases, the District Attorneys' chief witness admitted that no prosecutions had been compromised by the Krimstock order:

> Q: (Mr. O'Brien) Looking at the period since February 2004, which is the period under which Judge Mukasey's order has been operation, you can't point to any prosecutions that have been seriously compromised as a result of Judge Mukasey's order, can you?
>
> A. (Ms. Maureen McCormick) No, I can't. I can only point to the potential for that, for instance in the Rosser case. It would have been a serious issue if there had been a full blown adversarial hearing in that misdemeanor DWI case. (JA 261)

(In the Rosser case, a Criminal Court judge had purportedly talked about holding a retention hearing, but did not. (JA 230, 261-62) Plaintiffs do not seek a "full blown adversarial hearing" but an opportunity to be heard.)

The Speculations in the Record

In the absence of actual evidence of any cases burdened by retention orders, Ms. McCormick speculated about "potential" burdens. She stated that a "probable cause determination at OATH could conflict with a criminal court's decision." (JA 231) It was also a "concern" that a judge might limit the prosecution to the use of evidence that it had specified in getting a retention order, although she admitted that that had not happened. (JA 232)

She warned that a retention order or OATH proceeding could be used by defense attorneys to obtain discovery for a criminal case. (JA 232) She did not cite any instances of this having occurred. She said that a DWI defense attorney named Peter Gerstenzang advised other attorneys to use pretrial hearings to obtain discovery. (JA 232)

She also conjectured that the waiver of defenses based upon the physical condition of the car, as provided by the Krimstock order, would not protect the prosecution from the late defenses. (JA 234-35) She cited an instance in which a defense attorney had not agreed to such a waiver. The car in that case remained impounded. (JA 235, 255)

Calling the waiver provision "untested waters," she expressed doubt that it would be enforceable and raised the possibility of a new attorney entering the criminal case with a "different opinion." (JA 236-37) She admitted that there were no examples of waivers not being effective. (JA 254-55)

The Decision Below

The lower court ruled in the District Attorneys' favor and removed the retention order and waiver provision from the Krimstock order. The decision whether a car would remain impounded as evidence was placed entirely in the hands of the prosecution. The Second Amended Order and Judgment, dated December 6, 2005, provided that, once an assistant district attorney designates a vehicle to be "potential evidence," it must remain impounded, and the Krimstock hearing at OATH may not be held, during the life of the criminal proceeding and any appeals. (JA 627)

The lower court discussed its reasons in a "brief opinion." (JA 558) It noted that "[v]ehicles can have varied uses as evidence," and impoundment might be necessary to enable the prosecution to "meet late-blooming defense theories." (JA 563)

"Neither retention orders nor defendant waivers offers sufficient protection," the court said. (JA 564) For this conclusion it relied entirely on Ms. McCormick's speculations. With record references only to her testimony, the lower court listed the possibility of "contradictory findings" on the issue of probable cause, the danger of a defense attorney obtaining discovery or "premature disclosure of evidence," the possible limitation of prosecution theories to those specified at a "Krimstock hearing," and the "doubt" about a waiver of a defense being enforceable "if there were a change of defense counsel." (JA 564-65) It also mentioned "possible spoliation of evidence" if vehicles were released pursuant to a court order. (JA 568)

SUMMARY OF ARGUMENT

Plaintiffs have the right under both the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to an opportunity to be heard by a court to contest the legitimacy and the necessity of the impoundment of their vehicles as "trial evidence" for a criminal case.

The Fourth Amendment protects plaintiffs' right to judicial review of the reasonableness of the continued impoundment of a vehicle as "evidence." Reasonableness being the touchstone of the Fourth Amendment, many federal court decisions have followed a reasonableness test in deciding whether prosecutors can retain a person's property for use as evidence. The Supreme Court in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975) has stressed the necessity of a "neutral and detached magistrate," and the insufficiency of "prosecutorial judgment standing alone," as protection for a person's Fourth Amendment right against unreasonable seizures.

The Due Process Clause of the Fourteenth Amendment requires that plaintiffs must have an opportunity to be heard before an impartial decisionmaker about the legitimacy and necessity of long-term deprivation of their vehicles by state officials. The three-part balancing test laid down by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976), must be applied to this case. That test overwhelmingly supports due process protection for plaintiffs.

First, this Court has already held in Krimstock v. Kelly, 306 F.3d 40, 60-62 (2d Cir. 2002) that the "private interest" of vehicle owners in the use of their vehicles weighs in plaintiffs' favor, particularly in view of the long-term deprivation they are made to suffer without any recompense.

Second, the risk of erroneous deprivation is far greater in the "evidence" setting than in

the context of vehicles held for forfeiture. In the "evidence" setting, the record shows an arbitrary process of "trial evidence" designations guided by no standards and resulting in striking disparities among District Attorneys offices. Moreover, the "risk" of erroneous deprivation is in fact the assurance of erroneous deprivation in most cases, because impoundment of a vehicle until trial is simply not necessary, as the prosecution of cases involving stolen cars proves.

Third, the record on remand demonstrates that an opportunity to be heard would impose no burden on the prosecution of criminal cases. The evidence showed that no prosecutions had been compromised by the Krimstock process. The reasons cited by the lower court in denying plaintiffs an opportunity to be heard were based entirely on speculations about "potential" problems. None of those reasons was supported by evidence in the record, and all of them were contradicted by governing caselaw.

ARGUMENT

POINT I

UNDER THE FOURTH AMENDMENT, PLAINTIFFS HAVE A RIGHT TO JUDICIAL REVIEW OF THE REASONABLENESS OF THE CONTINUED IMPOUNDMENT OF THEIR VEHICLES AS "EVIDENCE."

The Supreme Court had stated unequivocally that the owner of an automobile has a Fourth Amendment right not to have his possessory interest in the vehicle "unreasonably infringed." Soldal v. Cook County, Illinois, 506 U.S. 56, 63-65, 113 S.Ct. 538, 544-45 (1992). A "seizure" recognized by the Fourth Amendment occurs whenever there is "some meaningful interference with an individual's possessory interest in that property." Id. at 63, 113 S.Ct. at 544.

There is no question that both the initial impoundment and the continuation of that impoundment -- the latter being the factual setting of this case -- must satisfy the Fourth Amendment. In its Krimstock decision, this Court held that persons whose vehicles are impounded by the police have a Fourth Amendment right to challenge the "continued seizure" of the vehicle that impoundment represents. 306 F.3d at 49-51. "If the government," it emphasized, cannot "justify continued impoundment, retention of the seized property runs afoul of the Fourth Amendment." Id. at 50.

The District Attorneys do not dispute the applicability of the Fourth Amendment to this case. Indeed, they argued that the issue of the impoundment of a vehicle as evidence is "entirely a Fourth Amendment issue," to the exclusion of the Due Process Clause of the Fourteenth Amendment. (JA 566) Yet their interpretation of "Fourth Amendment protection" means no protection. Their version endows a prosecutor, not the neutral magistrate central to Fourth Amendment jurisprudence, with the sole unchallengeable authority to subject someone's vehicle to long-term impoundment. It is an oxymoron to say that the state official ordering the seizure of property affords the "protection" of the Fourth Amendment to its owner.

Nevertheless, the lower court adopted this position. Its reasoning resembled that used in its dismissal of plaintiffs' case five years earlier, in which it stated that the fact of an arrest by a police officer was itself a constitutionally sufficient "procedure," so that prompt post-seizure review by a magistrate was not required. Krimstock v. Kelly, 306 F.3d at 52. This Court's rejection of that rationale was fundamental to its decision requiring a hearing: "Contrary to the district court's determination in the present case, a warrantless arrest by itself does not constitute an adequate, neutral 'procedure' for testing the City's justification for continued and often

lengthy detention of a vehicle which may be owned by the arrestee or by someone entirely unconnected with the conduct that gave rise to the arrest." Id. at 53. Nevertheless, the lower court has once again elevated a government functionary's decision regarding a seized vehicle to a realm beyond challenge or judicial review.

Decisions from the Supreme Court and the federal courts demonstrate the untenability of endowing a prosecutor with unreviewable power. Those cases, as well as rules enacted by Congress governing recovery of property held by federal prosecutors, leave no doubt that the availability of judicial review is indispensable to ensure that an impoundment of a vehicle as "evidence" comports with the requirements of the Fourth Amendment.

The Federal "Reasonableness Test" for Holding Property as Evidence

"The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250, 111 S.Ct. 1801, 1803 (1991).

Fed. R. Crim. P. 41(g), formerly Rule 41(e), provides that any person deprived of property in a pending federal criminal case may move in the district court for an order directing its return. Until the rule was amended in 1989, however, the rule did not cover property whose initial seizure had been lawful. Before that amendment, courts often faced the issue whether the continued retention of such property, as evidence, could be challenged in court. Applying a reasonableness analysis, courts repeatedly held that they could order the return of property where the prosecution had failed to show that its retention as evidence was necessary for the prosecution of a criminal case.

In In re Smith, 888 F.2d 167 (D.C. Cir. 1989), for example, the prosecution contended that money seized from the defendant was needed as evidence in a criminal proceeding. The

D.C. Circuit held that the district court must find a nexus between the money and criminal behavior to support the "continued retention" of the money. Id. at 168. If it found the money to be relevant evidence, the trial court must then balance the government's interest in holding the property against its owner's interest in regaining it. In particular, the D.C. Circuit stated, the court should consider "whether the government's interest could be served by an alternative to retaining the property. Id.

In In the Matter of Search Warrant for Premises Known as Encore House, 100 F.R.D. 700, 702 (SDNY 1983), the District Court explicitly followed a "reasonableness test." The property held as evidence was undeposited checks that a business needed. The court balanced the prosecution's need for the checks as evidence against the business's need for their return. It found "no showing of a necessity to retain the checks for evidentiary purposes," particularly where a stipulation would have preserved their evidentiary value, and ordered their return. Id. at 702-04.

A similar reasonableness test that considered alternatives to retention was done in Capriotti v. United States, 1989 WL 100913 (EDPA 1989). The prosecution retained money seized from Capriotti as evidence of gambling activity. Id. at 1. The court noted that, "where the evidentiary value of seized property can be preserved without its retention, it is unreasonable for the government to retain the property for evidentiary purposes." Id. at 2. Pointing out that the government could either photocopy the currency, or retain it and pay Capriotti by check or with other bills, the court ordered the return of the money. Id. Accord, Federal Ins. Co. v. United States, 11 Cl. Ct. 569 (U.S. Cl. Ct. 1987) (prosecutor is "not the final authority on the use of property for evidentiary purposes" before trial; court must balance the "needs of criminal justice

system against the hardship upon plaintiffs," taking into account "alternative means" of preserving evidentiary value).

Similarly, in In re Grand Jury Subpoena Duces Tecum Issued to: Roe & Roe, Inc., 49 F. Supp. 451 (D. Md. 1999), the court addressed a motion to return products seized from a company's warehouse. Although the motion was brought under Rule 41(e), the court relied heavily on pre-1989 caselaw. In view of the government's ability to "sample, photograph, or otherwise preserve the evidentiary value of the products," the court ordered their return. Id. at 454..

All the cases cited above followed the reasoning of United States v. Premises Known as 608 Taylor Ave., 584 F.2d 1297 (3d Cir. 1978). As with its progeny, 608 Taylor Ave. concerned the return of money purportedly held as evidence. The legality of the seizure of the property was not in question; the question, as here, was the legitimacy of the "continued possession" of the property as evidence by the government. Id. at 1300-01. The Third Circuit rejected the government's position that it could hold the property indefinitely until the criminal process was over. Id. at 1302. Rather, the decision was for the court, balancing "the citizen's interest in use of his property against the wide-ranging governmental interest in law enforcement," id. at 1302-03, and considering whether alternatives to retention would serve the prosecution's evidentiary need. Id. at 1304.

To illustrate what it considered an unreasonable retention of property as evidence prior to trial, the Third Circuit cited a single example: an automobile held because it contained fingerprint evidence. Once the evidentiary value of the car was preserved by photographing the fingerprints, the Court observed, the owner's "interest in the use of his automobile would then

clearly outweigh any incidental benefits to the prosecutor in allowing the jury to view the car from which the prints were taken." Id. at 1303.

Whether calling it a "reasonableness test" or a "balancing test," therefore, federal courts have long provided a judicial check against unjustifiable retention of property as "evidence" by the government. The decisions do not explicitly invoke the Fourth Amendment or the Due Process Clause, since the general supervisory power of the court provided sufficient authority to act. See Search Warrant on Premises Known as Encore House, 100 F.R.D. at 700. Yet, "reasonableness" and "balancing" are the hallmarks of Fourth Amendment analysis. As the Supreme Court has said, "'reasonableness is still the ultimate standard' under the Fourth Amendment," and "the reasonableness determination will reflect a 'careful balancing of governmental and private interests.'" Soldal v. Cook County, Illinois, 506 U.S. at 71, 111 S.Ct. at 549 (citations omitted).

In 1989, Congress amended the Federal Rules of Criminal Procedure to enable any person "aggrieved...by the deprivation of property" to move for the property's return. Fed.R.Crim.P. 41(e) (now 41(g)). "The court must receive evidence on any factual issue necessary to decide the motion," the rule directed, and also stated that a court granting the motion "may impose reasonable conditions to protect access to the property and its use in later proceedings."

The Advisory Committee Notes to the rule show that its derivation and guiding principles come from the Fourth Amendment. The governing standard is that amendment's reasonableness requirement: "The fourth amendment protects people from unreasonable seizures as well as unreasonable searches, United States v. Place, 462 U.S. 696, 701 (1983), and reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of

property." If the government's legitimate interests can be satisfied even if the property is returned, then "continued retention of the property would become unreasonable." Advisory Committee Notes to 1989 Amendment to Fed.R.Crim. P.41.

Gerstein v. Pugh Requires Judicial Review of Impoundments

The lower court cited Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975) to support its decision that "the protection of the Fourth Amendment" was all the Krimstock plaintiffs were entitled to, and not the protection of the Due Process Clause. (JA 568) Yet the court's conclusion that this "protection" could be afforded by a prosecutor acting outside any judicial review is incompatible with the central holding and discussion of Gerstein and the basic tenets of Fourth Amendment law.

In Gerstein, the state argued that the prosecutor's decision to file a charge against someone was itself a determination of probable cause that satisfied the Fourth Amendment. The Supreme Court squarely rejected this contention: "[W]e do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment." Id. at 117, 95 S.Ct. at 864.

The Court's explanation for this proposition demonstrates why "prosecutorial judgment standing alone" is equally unsuitable to determine if the impoundment of a vehicle as evidence is reasonable under the Fourth Amendment. The opinion explained that "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate." Id., 95 S.Ct. at 865. The prosecutor's limited perspective requires judicial oversight, especially in the criminal process: "Zeal in tracking down crime is not in itself an assurance of soberness of judgment.... The awful instruments of the criminal law cannot be entrusted to a single functionary." Id. at 118, 95 S.Ct. at 865, quoting McNabb v. United States,

318 U.S. 332, 343, 63 S.Ct. 608, 614 (1943).

The lower court did not refer to this discussion, which was central to the Gerstein decision. Instead, it justified dispensing with the requirement of a "neutral and detached magistrate" to review impoundment of a vehicle with a single reference to a Gerstein footnote that said that the justice system "is already overburdened by the volume of cases and complexities of our system." Gerstein v Pugh, 420 U.S. at 122, n.23, 95 S.Ct. at 867 n.23. (JA 568)

The citation is inapposite and surely no justification for the complete exclusion of the judge from assessing whether continued impoundment of a person's vehicle is reasonable in a particular criminal case. The "volume" and "complexities" mentioned by the Supreme Court referred not to judicial review but to the "full preliminary hearing" being challenged there, a proceeding with "the full panoply of adversary safeguards -- counsel, confrontation, cross-examination, and compulsory process for witnesses." Id. at 119, 95 S.Ct. at 866.

Plaintiffs, of course, do not seek this "full panoply" of adversary safeguards. They simply seek access to a judicial determination, after the parties have been heard, whether impoundment of a vehicle for the life of a case is reasonable and necessary. This access to prompt judicial review is what the Gerstein court held was the sine qua non of Fourth Amendment protection.

The lower court characterized a vehicle impoundment as a "lesser" deprivation than liberty, one that did not merit "resort to a judge." (JA 568) On the contrary, it presents a heightened need for such Fourth Amendment protection. The Gerstein decision pointed out that "the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of

criminal conduct." Id. at 125-26 n.27, 95 S.Ct. 869 n.27 (emphasis in original) But that "elaborate system" set up by the Fifth and Sixth Amendments safeguards the rights only of the accused in the criminal prosecution, not the property interests of the defendant or of innocent third parties deprived of their property in the course of that case.

For the vehicle owner, the early judicial review required by the Fourth Amendment is the only opportunity to test the reasonableness of the continued seizure of the vehicle. The Supreme Court recognized that protection of property as well as liberty is the province of the Fourth Amendment. Indeed, the model for the "prompt determination" by a magistrate required by the Amendment came from the common-law procedure respecting seizure of property. Id. at 116 n.17, 95 S.Ct. at 864 n.17. In view of the Supreme Court's emphasis on a vehicle owner's Fourth Amendment right not to have his possessory interest in a vehicle "unreasonably infringed," Soldal v. Cook County, Illinois, 506 U.S. 56, 63-65, 113 S.Ct. 544-45, "prompt determination" of the reasonableness of a continued seizure by a "neutral and detached magistrate, " Gerstein v. Pugh, 420 U.S. at 117, 95 S.Ct. at 865, is axiomatic under the Supreme Court's Fourth Amendment jurisprudence. The lower court's delegation of that authority to a "single functionary" representing "prosecutorial judgment standing alone," id. at 117-18, 95 S.Ct. at 864-65, is an aberration.

Unconstrained Discretion Is Inimical to the Fourth Amendment

The assertion of the lower court and the District Attorneys that the "Fourth Amendment protection" enjoyed by the plaintiffs does not include judicial review of the impoundment of their property is not the only anomaly of their Fourth Amendment position. An extensive body of caselaw constrains the discretion of the police when effecting the stop of an automobile. See,

e.g., Delaware v. Prouse, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400 (1979) ("standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed."). It is impossible to reconcile that caselaw with a legal position that, once lawfully seized, an automobile can be impounded for months and even years based solely upon the unreviewable discretion of an assistant district attorney.

And that discretion is truly unbounded. In response to plaintiffs' discovery request as to the criteria used by prosecutors in making the "trial evidence" determination, the District Attorneys revealed that there are no criteria:

> There are **no written criteria** from any of the offices relating to making a determination as to whether a vehicle need be retained as evidence for trail. **Such decisions are made on a case-by-case basis.** (JA 116)

At the hearing, the District Attorneys' chief witness admitted that the prosecutors follow no standards or guidelines in the "trial evidence" determination, and that each decision is left to the discretion of the individual assistant. (JA 244)

Here we have the "evil" of "standardless and unconstrained discretion" condemned by the Supreme Court in Delaware v. Prouse, supra, together with "prosecutorial judgment standing alone," which the Gerstein decision, supra, ruled an unconstitutional basis for detention. Yet the lower court has combined these two elements -- both antithetical to the Fourth Amendment -- in its "trial evidence" determination, and declared that plaintiffs are afforded "the protection of the Fourth Amendment."

A Reasonable Impoundment is Measured In Days, Not Months

In determining the lawfulness of a vehicle impoundment in a criminal case, New York's

highest court has measured the Fourth Amendment reasonableness of an impoundment in days, not months or years. In People v. Quackenbush, 88 NY2d 543, 647 NYS2d 150 (1996), a vehicle was impounded in Suffolk County after an accident. The Court assessed separately the initial impoundment and the "more extended seizure of the vehicle" for a safety inspection. Id. at 544-45, 647 NYS2d at 156. The "more extended seizure" was a two-day impoundment.

Upholding the trial court's denial of a motion to suppress evidence derived from inspection of the car's braking mechanism, the Court ruled the two-day impoundment "not unreasonable as a matter of law." Id. at 545, 647 NYS2d at 156. "The impoundment served to secure the accident condition of the vehicle from changes due to subsequent road use or even intentional tampering," which was a possibility in view of the defendant's auto mechanic status. Id.

Here is a car that the District Attorneys of New York City would want to impound during the entire pre-trial and appeal periods, purportedly to preserve it as evidence. That position is incompatible with the Fourth Amendment analysis of the Court of Appeals, which focuses on the facts specific to a case that account for each day of the "more extended seizure of the vehicle" after the initial stop.

A motion to suppress comes far too late in a case to provide Fourth Amendment protection for the long-term deprivation that impoundment represents. Although the decision on such a motion in Quackenbush is helpful in drawing the contours of Fourth Amendment analysis and the duration of a reasonable impoundment, a motion to suppress is not a meaningful opportunity to vindicate the Fourth Amendment property interests of a criminal accused or an innocent third party. The latter, of course, has no standing even to participate in a suppression

proceeding.

Such a proceeding addresses only whether the exclusionary rule should be applied to keep the evidentiary results of a vehicle seizure out of the determination of guilt or innocence at trial. The exclusionary rule does not protect the possessory interest of the accused or an innocent third party. Protection of their property from an unreasonable continued seizure -- the Fourth Amendment interest at stake here -- can only be realized by prompt judicial review of the necessity of continued impoundment.

POINT II

PLAINTIFFS HAVE A RIGHT UNDER THE DUE PROCESS CLAUSE TO AN OPPORTUNITY TO BE HEARD TO CONTEST THE LEGITIMACY AND THE NECESSITY OF THE IMPOUNDMENT OF THEIR VEHICLES AS "EVIDENCE."

Plaintiffs have an equally compelling right under the Due Process Clause to an opportunity to be heard to challenge impoundment of their vehicles as evidence in a criminal case.

Their rights under the Fourth Amendment do not supplant their rights under the Fourteenth Amendment. "We have rejected the view," the Supreme Court has stated, "that the applicability of one constitutional amendment preempts the guarantees of another." United States v. James Daniel Good Real Property, 510 U.S. 43, 49, 114 S.Ct. 492, 499 (1993). "The proper question is not which Amendment controls but whether either Amendment is violated." Id. at 50, 114 S.Ct. at 499.

There is no question that impoundment of an automobile affects a substantial property

right. The necessity for procedural due process follows ineluctably: "The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985). The task for a court is then to determine "what process is due." Id. (citation omitted)

The three-part balancing test of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) is the required analytic mechanism to determine the contours of due process protection. Application of that test to this case overwhelmingly favors procedural due process for those whose cars are impounded as "evidence."

Recently, the Supreme Court held in Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2635 (2004), that a citizen detained as an "enemy combatant" must be given "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." It would be incongruous to rule that the same law of due process, which requires an opportunity to be heard for a person designated an "enemy combatant" by the Department of Defense in the war on terror, would nonetheless deny those minimal fair procedures to a person whose automobile has been indefinitely impounded at the behest of a local prosecutor.

The Mathews v. Eldridge Test is the Required Analysis

The Mathews v. Eldridge three-part "balancing test" has long been the required inquiry for courts to determine the elements of procedural due process necessary to protect persons from unfair or mistaken deprivations of liberty or property. The Krimstock court followed the Mathews test in determining the outlines of the opportunity to be heard for those whose vehicles were impounded by the police. Krimstock v. Kelly, 306 F.3d at 60-67. The Second Circuit has

recently reaffirmed, in a criminal case, that the Mathews test is the proper analysis to determine the process that is due to challenge a deprivation of liberty. United States v. Abuhamra, 389 F.3d 309, 318 (2d Cir. 2004).

Nevertheless, the lower court maintained that the Mathews test should not be employed to decide the issue here because the impounded automobiles are held as evidence in criminal cases. It stated that "the test has never been applied to the seizure of property for use as evidence at trial, and I do not see the occasion of applying it here." (JA 567) This approach misconstrues the duty of a lower court to apply the constitutional standards promulgated by the Supreme Court.

The due process issue in this case is a question of law. The Supreme Court in Mathews identified the factors that lower courts must consider in deciding such a question. The test is meaningful only in situations where a higher court has not already ruled. A lower court is not free to discard the required test for protecting due process rights simply because there is no decision on all fours with the facts of its own case.

The lower court did cite two cases for the proposition that the Mathews test is not to be employed in criminal cases. Those cases are clearly distinguishable. They do not support the abandonment of the only analytic mechanism the Supreme Court has laid down to determine the extent of due process protection against improper deprivation of property.

One cited case is Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992). It did not involve property. The Supreme Court ruled that the Mathews three-part test was not the proper test to allocate the burden of proof on the question whether a criminal defendant was competent to stand trial. The "specific guarantees" of the Bill of Rights cover many aspects of criminal

procedure, and courts do not need to resort to the Due Process Clause and the Mathews test for the "proper analytical approach" for the protection of the rights of criminal defendants. Id. at 443-46, 112 S.Ct. at 2576-77.

In other words, it was redundant to superimpose the Mathews test to decide issues as specific as the allocation of the burden of proof on a defendant's competency to stand trial, where other constitutional provisions sufficiently protected the defendant's rights in the adjudication of his criminal case. By contrast, adjudication of the criminal case affords no protection against unreasonable deprivation of property, whether the persons so deprived are innocent third-party owners or defendant/owners.

The other case is Hines v. Miller, 318 F.3d 157 (2d Cir. 2003). In that case the trial court, applying the Mathews test, had ruled that a habeas petitioner was not entitled to an evidentiary hearing on his motion to withdraw his guilty plea. The Second Circuit, citing Medina, ruled that it was not appropriate to employ the Mathews test in that context, particularly where a long line of federal and state precedents held that an evidentiary hearing was not required on a motion to withdraw a guilty plea. Id. at 161-62. Moreover, since Hines was a habeas case, the federal court was obliged to apply a "deferential standard" to final state court decisions in criminal cases. Id. at 162.

As with Medina, the Hines case stands for the limited proposition that the Mathews test is not the appropriate analysis in determining the constitutional rights of a habeas petitioner at one of the many stages of the adjudication of a criminal case. But where liberty or detention is itself the issue, as in United States v. Abuhamra, supra, the Second Circuit has cited the Mathews test in deciding that a defendant could not suffer detention pending appeal based on the government's

ex parte evidence. The fact that the pretext for the deprivation is a criminal case does not negate the applicability of the Mathews test. See, e.g., United States v. Romano, 825 F.2d 725, 729 (2d Cir. 1987) (Mathews balancing test used in assessing required procedures at sentencing). The necessity of applying that test is even more compelling where the deprivation is of property, and the criminal process affords no means by which to challenge it. See United States v. Monsanto, 924 F.2d 1186, 1193-98 (2d Cir. 1991) (Mathews analysis used in requiring pre-trial hearing in criminal case on restraint of forfeitable assets).

It must be emphasized that the Mathews analysis is but a test to determine the extent of due process protection, and that the District Attorneys seek to avoid not only that particular test. Rather, their position is that a deprived vehicle owner simply has no right to procedural due process -- even a minimal opportunity to be heard -- where a prosecutor wishes that a vehicle be impounded for the life of a criminal case.

Even Medina and Hines contradict this extreme position. In declining to employ Mathews to reallocate the burden of proof on competency to stand trial, the Supreme Court in Medina emphasized that a defendant still must be afforded "a reasonable opportunity to demonstrate that he is not competent to stand trial." Medina v. California, 505 U.S. at 451, 112 S.Ct. at 2580. The Second Circuit in Hines judged that he was not entitled to a full evidentiary hearing on his motion to withdraw his guilty plea because the state court had already conducted a "thorough inquiry" on the record on Hines's motion. Hines v. Miller, 318 F.3d at 162.

In any case, the Supreme Court made clear in 2004 that the Mathews v. Eldridge analysis is the one a court must use to weigh the parties' interests where liberty or property is taken and due process protection is sought: "The ordinary mechanism that we use for balancing such

serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const. Amdt. 5, is the test that we articulated in Mathews v. Eldridge." Hamdi v. Rumsfeld, 124 S.Ct. at 2646. (citations omitted)

Application of the Mathews Test in this Case

The Court of Appeals summarized the elements of the Mathews balancing test: "The factors include: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedures used and the value of other safeguards; (3) the government's interest." Krimstock v. Kelly, 306 F.3d at 60. Consideration of the facts in the manner required by the Mathews test demonstrates how decisively the Due Process Clause supports the right of plaintiffs to a meaningful opportunity to be heard on the evidence issue.

(1) Important Private Interest Affected

The Court of Appeals has already found that the private interest at stake -- the use of one's automobile -- weighs heavily in favor of the plaintiffs. Krimstock v. Kelly, 306 F.3d at 60-62. Automobiles "occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation, as well as to the daily necessities of life." Id. at 61 (citation omitted). Accord, County of Nassau v. Canavan, 1 NY3d 134, 142-43 (2003).

This Court also stressed that deprivation of one's automobile for months without a hearing was not only an injury, but an irreparable one. Even success at an adversary hearing "coming months after seizure 'would not cure the temporary deprivation that an earlier hearing might have prevented.'" 306 F.3d at 64, quoting United States v. James Daniel Good Real Property, 510 U.S. 43, 56 (1993). A deprived owner could recover neither "the lost use of a

vehicle" nor the "depreciat[ion] in value as it stands idle in a police lot." 306 F.3d at 64. And many vehicle owners, as did a number of the named plaintiffs, must continue to make monthly payments on their impounded vehicles. Id at 46.

In addition, the "length of the deprivation" is a factor for the court to consider in judging the "importance of the private interest at stake." Id. at 61. As the record shows, many cars in the backlog "trial evidence" group had been impounded for more than six months, and several for years. (JA 118-19) And in the "current group," which encompassed 204 "trial evidence" vehicles impounded during the period from February through September 2004, the period of deprivation for those vehicles ranged from seven months to 15 months by the time of the April 25, 2005 hearing. The record does not reflect that any of those vehicles had been released before that date.

Unlike Mathews factors two and three, which in this case deal with some different facts in the "evidence" as opposed to the "forfeiture" context, the considerations in the "private interest" factor are virtually identical in both settings. The meaning of the loss of a vehicle is the same to its owner whether the police or the prosecution is responsible for the deprivation. And the "length of the deprivation" has been shown to be the same. The Krimstock court noted that "the City retains seized vehicles for months or sometimes years before the merits of a forfeiture action are addressed." Id. at 62. Similarly, the District Attorneys retain "evidence" vehicles for months or sometimes years before the criminal case is over.

Nevertheless, the lower court belittled the significance of the "private interest" factor. In opining that the Mathews factors would not favor plaintiffs even if that test were applied, the lower court stated that the "private interest" here was merely "delayed return of the vehicle." (JA 568)

The unconstitutionality of that "delay" without a hearing was the core of this Court's Krimstock decision. The Court held that "delay" during the pendency of a forfeiture action triggered constitutional protection. The lower court distinguished between mere "delay" and "outright denial" (JA 569), but that is a distinction without constitutional significance. In both the forfeiture and evidence contexts in which this case has operated, plaintiffs do not suffer "outright denial" in the form of permanent loss of legal ownership, but deprivation of the actual use of the vehicle during the prolonged period before a case terminates in a final judgment..

It is the deprivation itself that implicates the Due Process Clause: "'The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.'" Connecticut v. Doehr, 501 U.S. 1, 15, 111 S.Ct. 2105, 2115 (1991) (citation omitted).

The Krimstock court noted that the Mathews test itself covers the same "delay" in the return of property, that is, "where the government seeks to maintain possession of property before a final judgment is rendered." Krimstock v. Kelly, 306 F.3d at 60. (citation omitted) (emphasis supplied) The Court also characterized a 25-day period of "continued retention" of a vehicle to be a "significant period" of time. Id. at 54.

In its original opinion in November 2000 dismissing plaintiffs' due process claim, the lower court, addressing (1) of the Mathews test, had minimized plaintiffs' private interest in their vehicles by pointing out the availability of mass transit in New York City. This Court rejected that "cursory assessment of the interest at stake" and found that this Mathews factor weighed in favor of plaintiffs. Id. at 62. That finding on the "private interest" was central to this Court's decision. As such, it is part of the mandate in this case, which the lower court is required to follow, not discard when inconvenient to its analysis.

(2) Risk of Erroneous Deprivation

The District Attorneys did not attempt to dispute that factor (2) of the Mathews test favors the plaintiffs. The lower court did not discuss this factor, saying only that the "risk to a private person" was just "delay," not "outright denial." (JA 569) In other words, it treated factor (2) as no different from factor (1).

Factor (2) presents an especially compelling case for due process protection where vehicles are subjected to long-term impoundment as "trial evidence." The "risk" of erroneous deprivation understates what affected vehicle owners face. The reality of such impoundments without an opportunity to be heard is the certainty of unjustified impoundment in the vast majority of cases.

(a) Absence of Standards or Guidelines

A sure source of error is the absence of any standards to govern the decisions of prosecutors whether to retain vehicles as trial evidence.

As noted, the District Attorneys admitted that prosecutors follow no standards or guidelines in making their "trial evidence" determination. Each decision is left to the discretion of the individual assistant. (JA 244) The District Attorneys' offices in New York City employ some 1,572 attorneys overall (Bronx - 404; Kings - 386; New York - 462; Queens - 277; Richmond - 43). (JA 125) Ceding unchallengeable authority over citizens' property to this large group of individuals operating without any standards presents an arbitrariness that is foreign to due process of law.

The primary meaning of "arbitrary," according to the Random House Dictionary of the English Language (2d Ed.), is: "subject to individual will or judgment without restriction;

contingent solely upon one's discretion." The purpose of procedural due process is to protect citizens from arbitrary action by government officials. "The 'touchstone of due process is protection of the individual against arbitrary action of government.'" Black v. Romano, 471 U.S. 606, 624, 105 S.Ct. 2254, 2264 (1985) (citation omitted). Accord, United States v. James Daniel Good Real Property, 510 U.S. at 53, 114 S.Ct. at 501. (protection of citizen's property from "arbitrary encroachment" by government is the purpose of the Due Process Clause's requirements of notice and an opportunity to be heard).

(b) Many Discrepancies in "Trial Evidence" Designations

The inevitable arbitrariness of prosecutors acting without standards or judicial review is exemplified by the striking discrepancies in "trial evidence" designations made by the different prosecutorial offices. In their review of the backlog group, Bronx prosecutors designated 95 vehicles as trial evidence. (JA 49) Of this number, 30 vehicles were held for DWI prosecutions. This Court, of course, reemphasized in Jones v. Kelly the unlikelihood of an arrestee's vehicle serving as evidence in an ordinary DWI case. 378 F.3d at 204. None of the other offices designated such a high number of DWI cases for impoundment. Yet the District Attorneys' position in this case is that any such designation by a prosecutor from the Bronx or any other borough cannot be challenged or reviewed by a judge.

Inexplicable discrepancies by borough are present in other charges as well. For example, the Bronx office designated that 12 vehicles be held for reckless endangerment prosecutions. Kings put only one in the category, and Queens and Richmond put none. The Bronx held 22 cars in drug cases as "trial evidence." By contrast, Kings put two, and Queens and Richmond none, in that category. (JA 49)

The overall figures by borough reflect similar discrepancies. As noted, the Bronx designated 95 backlog vehicles as trial evidence; Manhattan designated 90. Yet Queens, albeit a smaller office, decided that only nine vehicles needed to be retained. Are prosecutors in Queens less conscientious about preserving evidence? The more likely explanation, of course, is that prosecutors in the Manhattan and Bronx offices, by retaining 10 times as many vehicles as "trial evidence," put too many vehicles under that rubric.

This Court had suggested a comparison of relevant figures for "past prosecutions" with those of "current prosecutions." Jones v. Kelly, 378 F.3d at 204. Statistics for the "current group" likewise show marked discrepancies by county. Some offices responded to the Krimstock order by designating more vehicles as "trial evidence," while others put many fewer in that category in the current group than they did for the backlog group. (JA 52) Bronx again designated the most (86), and Queens (12) the least. Yet Kings, which held 51 in the backlog group, increased its retentions to 78 in the current group. Manhattan, on the other hand, lowered its number of 'trial evidence' vehicles from 90 in the backlog group to 21 in the current group.

The Kings County office also showed inexplicable variations in offenses marked for "trial evidence" retention, when the backlog group is compared to the current group. In the backlog group, 16 vehicles were retained in homicide cases; in the current group, only one. In the backlog only two vehicles in drug cases were "trial evidence;" in the current group that number swelled to 25. And the number of cars purportedly needed for DWI cases rose from four to 23, a trend difficult to justify in view of the Second Circuit's emphatic statements on the unlikelihood of such vehicles being needed as evidence.

The District Attorneys had no explanations for these discrepancies. Their witnesses did

not provide any at the hearing. In their Post-Hearing Memorandum to the lower court the District Attorneys merely offered such truisms as "different cases have different facts" and "different prosecuting agencies may have different policies and strategies depending on many factors." (JA 447) The lower court's "brief opinion" contained no discussion of the incongruity of the "trial evidence" designations in the record.

Nevertheless, the erratic results of these designations further demonstrate the indispensability of an opportunity to be heard for those hundreds of persons unlucky enough each year to have their vehicles chosen for impoundment as "trial evidence."

(c) 151 "Trial Evidence" Vehicles Reduced to 51 After Review

The record of the Kings County District Attorney in designating vehicles as "trial evidence" exemplifies the substantial risk of error in leaving such decisions to the unilateral discretion of prosecutors. At the end of 2003, prosecutors from that office determined that 151 out of 472 vehicles designated by the police as "arrest evidence" needed to be retained as "trial evidence." (JA 209) That review was undertaken without the assurance that judicial retention orders would be needed, since the Defendants were seeking to stay that part of the Order.

At the end of January 2004, when the Second Circuit denied the stay, it became apparent that a retention order would be required if a vehicle were to be held as "trial evidence." The prosecutors had to decide by February 20, 2004 if they wanted the Police Department to retain or release a vehicle pursuant to paragraph 9 of the original Order. Between the denial of the stay (January 30, 2005) and that date, the Brooklyn office performed a review of the 151 "trial evidence" designations it had made in late 2003, this time with the knowledge that retention orders would have to be sought to retain vehicles. In that review, only 51 out of the 151 "trial

evidence" vehicles were determined to be "trial evidence." (JA 209, 251-52)

On its face the reduction of the 151 "trial evidence" vehicles to 51 shows the extreme risk of error in unilateral prosecutorial decisions. The 151 figure represented an initial "trial evidence" assessment when the necessity of a retention order was not yet present; a review, after it became certain that retention order would be required, resulted in cutting two out of every three cars out of the "trial evidence" category.

The District Attorneys' witness from the Brooklyn office admitted that she did not know the reasons for the changed designations that the review produced in 100 out of 151 cases:

> Q. (Mr. O'Brien) But would you admit that the process of the second look resulted in cases that were first considered trial evidence being determined not to be trial evidence?
>
> A. (Ms. Maureen McCormick) None of the cases that I looked at. All I can tell you is that I asked the people who had made the original determination to relook at each of those cases. I can't tell you how many of them were disposed of already, or whether there was a different change in strategy, whether a defense strategy had became no longer necessary to making it keep the case.
>
> I don't know what the decision making was.
>
> As with the preliminary review, it is based on the individual assistant in conjunction with their supervisor making that decision.
>
> Q. Would you say it shows a certain fallibility in the trial evidence designation process?
>
> A. No, because that would indicate that I know the reason for why they determine the designation to be different and I don't know the reasons on each case. I just don't.
>
> (JA 251)

With the prospect of judicial review by February 20, 2004, the 151 "trial evidence" vehicle number was reduced to 51. The lower court erroneously characterized this period as

"three and a half month[s]" and conjectured that the drastic reduction was owing to disposition of misdemeanor cases. (JA 561) The court did not note Ms. McCormick's express disavowal of any knowledge of the reasons for the changed designations.

(d) Impoundment of Vehicle until Trial Rarely Necessary

Finally, "the risk of erroneous deprivation" must take into account the reality that impoundment of a vehicle until trial is rarely necessary, even for "trial evidence." A pertinent illustration proving this point is the manner in which vehicles alleged to be stolen are treated. In contrast to the absence of statutory authority for impoundment of vehicles in all other cases, disposition of stolen vehicles is governed by a state statute, Penal Law §450.10. A vehicle alleged to be stolen, although its condition may well be of evidentiary relevance, is not impounded. Rather, it must be released "expeditiously" to its owner. "Before such release," the statute requires, "evidentiary photographs shall be taken of such motor vehicle." The statute specifies approximately 15 locations on the vehicle to be photographed. PL §450.10(4)(c)

This statute reflects how vehicles are treated in the real world of criminal prosecutions. They are not impounded for months until trial, whereupon the jury is transported to the pound to examine the car. Rather, they are photographed or tested, and documentary or testimonial evidence about their condition is presented to the trier of fact. Indefinite impoundment of a "trial evidence" vehicle is simply not necessary.

The City itself has acknowledged this reality. The stolen car release provision, PL §450.10(4)(c), was added in 1992. The Legislature decided that the 48-hour period under the previous version for holding a stolen car by the police was too long. It amended the law to require that the vehicle be released "expeditiously" to its owner. The City of New York

supported the new measure. A memorandum from the Legislative Representative of the City of New York stated: "Unlike other forms of evidence, **the vehicle is never physically introduced into evidence** but it is testimonially introduced by its owner testifying to specific identifying data." 1992 McKinney's Session Laws of New York, p.2607 (emphasis supplied).

The District Attorneys' witness acknowledged that presenting evidence in photographic form had been no barrier to the effective prosecution of stolen car cases. (JA 243-44) Similarly, in the few cases that went to trial discussed by the witness, evidence of the vehicle's condition had been introduced through photographs or expert testimony. (JA 246)

In this light, the risk of erroneous deprivation is far greater in the case of a vehicle impounded as evidence than for one held for forfeiture. Since even a "trial evidence" vehicle need not be kept until trial, except in the very unusual case, depriving an owner of its use for the life of a criminal case presents not just an unacceptable risk but a great likelihood of erroneous deprivation. The District Attorneys' absolute position also contradicts the repeated concern of the Second Circuit that "means short of retention of the vehicle" be employed whenever possible to avoid impoundment. See Krimstock v. Kelly, 306 F.3d at 67. Impoundment, this Court reiterated, is a "drastic measure." Id. at 44, 49, 70.

Factor (2) of the Mathews test thus weighs overwhelmingly in favor of an opportunity to be heard for the vehicle owner on the legitimacy and the necessity of continued impoundment of a vehicle as evidence.

(3) The Government's Interest

In this factor the Court must examine "the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 424 U.S. at 335, cited in Krimstock v. Kelly, 306 F.3d at 64. The function at issue here is the prosecution of the criminal case. It was undisputed that the "fiscal and administrative" burden was negligible. (JA 91)

This Court posed the question whether the original order would "present an encumbrance to the prosecution of criminal cases." Jones v. Kelly, 378 F.3d at 204.

After 15 months of experience with the Krimstock process, and the trial of some 20 cases in the "backlog" group, there was no evidence in the record to support the prior claim of defendants to this Court that "seriously-compromised criminal prosecutions" would result. (February 24, 2004 Brief at 25) The District Attorneys' chief witness acknowledged that no prosecutions had been compromised by the Krimstock order. (JA 261) The record also showed, as noted above, that the "burden" of obtaining retention orders had been minimal. Factor (3) of the Mathews test, therefore, also decisively favors plaintiffs' due process claim.

Nevertheless, the lower court altered the order to eliminate any judicial review and ceded total authority over impoundment of a vehicle as "evidence" to the prosecution. The court asserted that it would be a "substantial burden" to the criminal justice system if "a hearing at an early stage" regarding the vehicle took place. (JA 569)

None of the reasons for this conclusion was backed by facts in the record. The lower court cited only the unsupported speculations of the testifying prosecutor. All of those hypothetical scenarios they conjured are either highly implausible, or, given the relevant caselaw, legally untenable.

First, the lower court raised the specter of "contradictory findings on the issue of probable cause." There are no instances of this having occurred in the wake of the Krimstock process.

The issue of the collateral effect of a probable cause ruling is a purely legal question, but the court cited no law.

The New York law of collateral estoppel rules out any preclusive effect in the prosecution of a criminal case of a prior finding on the same issues by an administrative body. In People v. Fagan, 66 NY2d 815, 498 NYS2d 335 (1985) the New York Court of Appeals declined to give collateral estoppel effect in a criminal case to an administrative court's decision in a defendant's favor at a parole revocation hearing. "Strong policy considerations militate against giving issues determined in prior litigation preclusive effect in a criminal case, and indeed we have never done so." Id. at 816, 498 NYS2d at 335 (citation omitted). Accord, People v. Hilton, 95 NY2d 950, 952, 722 NYS2d 461, 462-63 (2000) (after probation revocation decision by judge in defendant's favor, collateral estoppel cannot bar relitigation of same issues in criminal case where "determination of guilt or innocence is paramount"). For the same reasons, no court "could limit the prosecution later in the case" to earlier theories about the evidentiary use of the vehicle, as the lower court supposed. (JA 564)

Second, the court gave the prosecutor the power to, in effect, enjoin any Krimstock hearing to prevent the defense from obtaining discovery there. There was no evidence in the record of any defendant gaining premature discovery. The only "evidence" on the issue was a prosecutor's statement that a defense attorney gave colleagues general advice on taking advantage of pretrial hearings to gain discovery. (JA 232)

The Krimstock hearing at OATH is hardly an opportunity to obtain discovery. No police officer has ever testified at a vehicle retention hearing there. (All decisions on such cases are written and contained on OATH's website at http://www.nyc.gov/oath.) When this case was

remanded on the evidence issue, plaintiffs first moved in October 2004 to require that an OATH decision be based on some testimony from a witness with first-hand knowledge. The lower court denied the motion. (JA 23-24) The Police Department documentary submissions to OATH are nothing more than the same police reports, usually the arrest report and the complaint filed in Criminal Court, that the defense obtains early in the criminal case. The criminal accused gains no discovery at an OATH hearing. The many innocent third-party owners, of course, have no interest in using such a hearing to get inadvertent disclosure about a criminal case.

No state court would enjoin a proceeding to which a person was otherwise entitled just to protect the prosecution's interest in non-disclosure. In Matter of Mountain v. Poersch, 89 AD2d 632, 453 NYS2d 93 (3d Dept. 1982), the District Attorney sought to enjoin an administrative hearing in order to forestall "premature disclosure" of witness statements. The Appellate Division rejected the application. Since "a criminal defendant has no right to stay a disciplinary proceeding pending the outcome of a related criminal trial [citations omitted], it follows that the prosecution has no greater right to protect its case." Id., 453 NYS2d at 94.

And, as a constitutional matter, a person may not be denied his right to a prompt administrative hearing so that the prosecution can preempt any possible disclosure relating to its criminal case. For example, individuals facing revocation of parole have a due process right to both a preliminary hearing and a later revocation hearing. See Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). Both the initial "probable cause" hearing and the final hearing may concern the same issues as the related criminal case. Yet the parole hearings are a constitutional right. There is no suggestion in Morrissey that those hearings can be blocked by a prosecutor in order to forestall disclosure of some aspect of the criminal case.

Third, the lower court stated its "doubt" about the enforceablity of the waiver of defenses or factual claims relating to the vehicle. The waiver provision was included in the initial order in response to the prosecution's ostensible concern about "late-blooming defenses," as the lower court put it. (JA 563) There was no evidence of any problems with waivers on this record, nor were there any instances of a new attorney entering the case and refusing to be bound by such an agreement, which was the specter raised by the District Attorneys' witness.

More important, the "doubt" about the enforceability of waivers is groundless as a matter of New York law. The New York Court of Appeals has stated that "an accused may waive any right which he or she enjoys." People v. Seaberg, 74 NY2d 1, 7, 543 NYS2d 968, 970 (1989). Defendants regularly waive such significant rights as the right to a jury trial and the privilege against self-incrimination as part of a plea bargain. Neither the District Attorneys nor the lower court cited any caselaw that would invalidate the waiver of a particular defense or claim in return for tangible benefit. The plea bargains so integral to the criminal justice system are built upon such waivers.

Finally, the lower court ruled out a retention order proceeding because of "possible spoliation of evidence" if a vehicle were released. As with the reasons cited above, there was no evidence in the record to substantiate this prospect. And as with the other reasons, no law was cited to support the possibility of altered vehicles compromising prosecutions. In fact, the relevant caselaw makes this supposition highly unlikely.

The court cited "spoliation of evidence" as a realistic possibility as if there were no rules about chain of custody. The hypothetical situation is presumably that a defendant will win release of a vehicle, alter its condition while it is in his possession, and then have his lawyer try

to deceive the trier of fact into believing that the altered condition was the same as that of the vehicle when originally seized. Almost certainly, such evidence would be inadmissible. People v. Julian, 41 NY2d 340, 392 NYS2d 610 (1977) points out the chain of custody rules. The "offering party" must establish, first, that its evidence is "identical" to that involved in the crime, and second, "that it has not been tampered with." Id. at 342-43, 392 NYS2d at 612. If the likelihood of failing to meet this burden is not enough to deter the hypothetical defendant and his unethical attorney and criminal confederates, there is the fact that Tampering with Physical Evidence is a Class D felony. See P.L. §215.40.

Still, plaintiffs should not have to prove that a hypothetical "spoliation" sequence of events can never happen. It is unfair for a court to base a decision, especially one that denies the protection of due process to members of a large class, on conjectural scenarios that by their nature can never be ruled out with absolute certainty.

Such judicial decision-making is particularly inappropriate at this point in the Krimstock case. The remand for a fact-finding hearing was ordered because this Court was dissatisfied with mere "supposition and innuendo." Jones v. Kelly, 378 F.3d at 204. "Judicial decision-making," this Court stressed, "should not occur without fixed, established points of reference." Id.

This guiding principle has been subverted on the second remand. Facts were established. A record for review was made. Ample caselaw was provided. Yet the lower court, in reversing its earlier ruling on retention orders, ignored the facts showing that retention orders and the Krimstock process had imposed no burden on criminal prosecutions. It did not follow the standard Mathews v. Eldridge test for deciding the extent of due process protection in an appropriately balanced manner. And it based its decision on strained speculations and legally implausible hypotheticals, the very "supposition and innuendo" that necessitated remand for fact

finding.

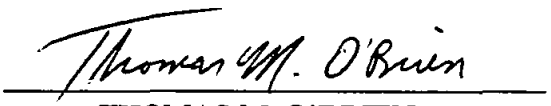
Nonetheless, the material facts in the record and the caselaw do provide this Court with "fixed, established points of reference" upon which to base a decision recognizing plaintiffs' rights to Fourth Amendment protection and procedural due process when their vehicles are impounded as "evidence" for a criminal case.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. This Court should order that members of the plaintiff class are entitled to a prompt opportunity to be heard by a judge on the legitimacy and the necessity of the continued impoundment of their vehicles as "trial evidence."

Dated: New York, New York
March 1, 2006

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief contains approximately 12,500 words. It thereby complies with the type-volume limitation of Fed.R.App.P. 32 (a) (7) (B).

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