No. 08-351

In the
Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

PETITIONER,

v.

CHERMAINE SMITH, EMMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER, AND TONY WILLIAMS,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE THE LEGAL AID SOCIETY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial test" employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 54 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

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INTEREST OF THE AMICUS CURIAE

The Legal Aid Society of New York City represents individuals who are unable to afford private counsel.[1] Its Criminal Defense Practice serves as court-appointed counsel for some 236,000 individuals annually drawn into the criminal process. Many arrested persons are deprived of their property, such as cars or cash, as part of the arrest process. The New York City Police Department has for years sought the civil forfeiture of property seized from arrestees on the ground that it was used in the commission of crime.

The Legal Aid Society has actively litigated in state and federal court to safeguard the right of procedural due process for those individuals whose property has been seized and held by the Police Department. Its Special Litigation Unit initiated a class action and attained a ruling from the United States Court of Appeals for the Second Circuit that any person whose automobile was seized and impounded upon arrest has the constitutional right to a prompt post-seizure hearing at which to challenge the legitimacy and necessity of continued impoundment of the vehicle during the pendency of a forfeiture action. *See Krimstock v. Kelly*,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

306 F.3d 40 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003). This hearing process has been institutionalized for more than five years at a city administrative tribunal. Legal Aid Society attorneys have often represented individuals at such proceedings, and the Special Litigation Unit continuously monitors the process to ensure that class members' opportunity to be heard remains a reality.

This Court's decision in the instant case may affect the constitutional underpinnings of the vehicle retention hearing process that has developed. Amicus Legal Aid Society, on behalf of the many current and future participants in that process, has a strong interest in its continuation. In addition, Amicus can demonstrate empirically that, in the more than five years of its operation, the vehicle retention hearing has effectuated a prompt and meaningful opportunity to be heard for countless individuals whose cars have been impounded, with no negative effects on the legitimate interests of law enforcement.

SUMMARY OF ARGUMENT

The Seventh Circuit ruled that, where property has been seized for forfeiture, its owner has a due process right to a prompt hearing "to show that the property should be released." *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008). In so ruling, the court properly applied the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which determines "what process is due" when one is deprived

of property. The court also correctly applied the due process precepts of *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), in which this Court ruled that, when the government seizes private property for forfeiture, the Due Process Clause requires an initial adversary hearing to test the validity of its retention of that property. *Mathews* is the applicable test to decide if due process requires a prompt hearing to determine custody of the property during a forfeiture action. Cases dealing with speedy trial limitations on the time limits for prosecuting the ultimate forfeiture action are not relevant. They concerned the right to outright dismissal of the forfeiture case, not the right to possession of the property during the pendency of the case.

The experience of New York City has been instructive with respect to the necessity and feasibility of a prompt post-seizure hearing where automobiles are impounded pursuant to a forfeiture program. In a factual context in which numerous vehicles were impounded for months and years without a meaningful opportunity for their owners to be heard, the Second Circuit held in *Krimstock v. Kelly* that due process requires a prompt post-seizure hearing at which the deprived owner can test the legitimacy and necessity of further impoundment of the vehicle. The ruling followed the *Mathews* test and the *James Daniel Good* application, and was found persuasive by the Seventh Circuit in *Smith*.

The operation of the vehicle retention hearing process in New York City since its inauguration in 2004

confirms the necessity of a prompt hearing to prevent the erroneous deprivation of property on a wide scale. The opportunity to be heard for vehicle owners at a meaningful time has corrected numerous instances of unwarranted retention of vehicles by the local government. In addition, more than five years of experience with the hearing process has demonstrated no exceptional burden on the local forfeiture program or any interference with criminal prosecutions. The New York City experience empirically rebuts the hyperbolic speculations proffered by petitioner and Government amici as to the purported ramifications of the Seventh Circuit's decision.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROTECTS THE RIGHT TO A PROMPT POST-SEIZURE HEARING TO CONTEST CUSTODY OF PROPERTY IMPOUNDED FOR FORFEITURE.

The Seventh Circuit in *Smith v. City of Chicago* explicitly agreed with the Second Circuit's decision in *Krimstock v. Kelly* that held that vehicle owners have a right to a prompt post-seizure hearing to challenge further retention of vehicles impounded for forfeiture. 524 F.3d at 837-38. The *Krimstock* ruling was made in the context of a local forfeiture program that

aggressively sought forfeiture of vehicles seized and impounded when the operator was accused of a crime.

A. New York City's Vehicle Confiscation Program

In the mid-1980s, the New York City Police Department (the "Department") began a program of confiscating vehicles upon the arrest of the operator. The legal authority for the seizure program was Section 14-140(e) of the Administrative Code, a local ordinance. The provision stated that a person who used any property "as a means of committing crime...or in furtherance of a crime...or permitted or suffered the same to be used...shall not be deemed to be the lawful claimant entitled to...such...property."

The seizure authority encompassed property allegedly used to further any "crime," felony or misdemeanor. The Department regularly impounded, for a prospective civil "forfeiture" action, vehicles seized in conjunction with an arrest for possession or sale of drugs, possession of a gun, or solicitation for prostitution. The civil action sought a declaration that the owner of such a vehicle was not a "lawful claimant" to the property.

New York appellate courts regularly upheld forfeiture judgments in such cases. *See*, *e.g.*, *Property Clerk v. Negron*, 157 AD2d 602, 603, 550 NY3d 351 (1st Dept. 1990) (drugs). Dismissal of the criminal charge was no barrier to a civil forfeiture judgment. *See*, *e.g.*, *Property Clerk v. Jacobs*, 234 AD2d 96, 650

NYS2d 711 (1st Dept. 1996) (criminal case for solicitation of prostitution had been dismissed); *Property Clerk v. Larouche*, 187 AD2d 289, 589 NYS2d 459 (1st Dept. 1992) (criminal charge for possession of cocaine residue had been dismissed). No disposition of the criminal case, even an acquittal, could preclude an Administrative Code forfeiture action. *See Property Clerk v. Ferris*, 77 NY2d 428, 430, 570 NE2d 225 (1991) ("the outcome of the underlying criminal charges is irrelevant to the outcome of the civil forfeiture proceeding"). In *Ferris*, the promise of the prosecutor to return the vehicle as part of a plea bargain was held not binding on the Police Department.

The sole venue to effect release of an impounded vehicle was the Supreme Court, Civil Term. (In New York, the trial court is called the Supreme Court.) If a demand for an impounded vehicle was served upon the Department, it was obligated to commence an action within 25 days if it wished to retain the vehicle. Title 38, Rules of the City of New York, Section 12-36. The City's rules, however, required only that the Department commence such an action. They imposed no obligation to move the case beyond the initial filing. Nor did the Administrative Code, the City Rules, or court rules afford the owner of seized property any early opportunity to obtain its return *pendente lite*.

The local forfeiture program of New York City must be distinguished from New York State's forfeiture law, contained in Article 13-A of the Civil Practice Law and Rules. Enacted in 1984, that law authorized a

prosecutor to institute a civil action to forfeit property that was the proceeds or instrumentality of a crime. It was restricted to felonies involving narcotics. CPLR §1310. The State law permitted *ex parte* attachment of property. However, the seizing agency was required to confirm the attachment by moving for a hearing within five days, at which hearing it must show a likelihood of success and that the need to retain the property outweighed any hardship suffered by the owner. CPL 1312. A defendant also could move to vacate or modify an attachment. CPLR 1312(4). Because of this availability of early and interim relief, the New York Court of Appeals held that the seizure provision did not violate the Due Process Clause. *Morgenthau v. Citisource*, 68 NY2d 211, 222, 500 NE2d 850 (1986). Applying the *Mathews v. Eldridge* balancing test, the Court concluded that the procedural safeguards in CLPR 1312 protected defendants from an erroneous deprivation of their property. *Id.*

In contrast, as noted, the automobile confiscation program of the New York City Police Department was not constrained by early court review or an opportunity for interim relief for the owner. The trial of the forfeiture action was the only legal proceeding to obtain return of the vehicle following its warrantless seizure. Trials were an infrequent occurrence. In 1998, of the 1,800 cars that had been seized and held for forfeiture, fewer than one percent went to trial. *See* David Rohde, "The High Price of Drunken Driving Law," *NY Times*, Feb. 28, 1999.

In 1999, the Department's car seizure program expanded dramatically with the inclusion of arrests for driving while intoxicated (DWI) as a predicate for impoundment. The new policy multiplied the number of vehicles in long-term police custody. By July 2001, over 4,000 seizures of the vehicles of DWI arrestees had been made. *See* Jacob Fries, "4000 Cars Seized in Effort to Halt Drunken Driving," *NY Times*, July 3, 2001.

B. The Second Circuit's Due Process Ruling

The *Krimstock* class action was commenced in December 1999 in the Southern District of New York. The plaintiffs sought an opportunity for prompt post-seizure court review under the Due Process Clause for those many individuals whose vehicles had been confiscated by the Department. The seven named plaintiffs were individuals whose vehicles had been held for many months with little or no action in civil court. The district court dismissed the case. It ruled that the plaintiffs were not entitled to a prompt probable cause hearing because the "forfeiture proceeding" was all that due process required. *See Krimstock v. Kelly*, 2000 WL 1702035 (SDNY 2000).

The court of appeals reversed. It concluded that procedural due process in the car impoundment setting requires a prompt hearing before a neutral fact-finder to test the probable validity of the case for forfeiture and the necessity for continued impoundment during the pendency of the forfeiture action. *Krimstock v. Kelly*,

306 F.3d 40, 69-70 (2d Cir. 2002), *cert. denied*, 539 U.S. 969 (2003). The Due Process Clause requires such an opportunity to be heard "in order minimize any arbitrary or mistaken encroachment upon plaintiffs' use and possession of their property." *Id.* at 53. The core of the Second Circuit's due process analysis was the application of the three-part balancing test of *Mathews v. Eldridge*, which examines (1) the private interest affected; (2) the risk of erroneous deprivation of that interest in the absence of procedural safeguards; and (3) the Government's interest.

First, as to the private interest, the court took note of the paramount importance of the automobile in modern American life, "providing access to jobs, schools, and recreation as well as to the daily necessities of life." 306 F.3d at 61, quoting *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994). This interest was enhanced by "the length of the deprivation," given that "the City retains seized vehicles for months or sometimes years before the merits of a forfeiture action are addressed." *Krimstock v. Kelly*, 306 F.3d at 62.

Second, as to the risk of erroneous deprivation, the court stated: "Neither the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future on the merits of the City's forfeiture claim can fully protect against an erroneous deprivation of a claimant's possessory interest as his or her vehicle stands idle in a police lot for months or years." *Id.* Although the court believed the risk of error to be reduced in an ordinary DWI arrest, other factors

enhanced the risk of an erroneous deprivation. For one, there was "a heightened potential for erroneous retention" of the vehicles of innocent owners, persons not implicated in any criminal conduct, in the absence of an "early retention hearing." *Id.* at 58, 63. In addition, "the City's pecuniary interest" in the outcome of forfeiture proceedings necessitated "greater procedural safeguards" to protect against arbitrary impoundments. *Id.* at 63. The court cited the statement in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 (1993) that those "greater procedural safeguards" are of "particular importance" when "the Government has a direct pecuniary interest in the outcome of the proceeding." 306 F.3d at 63. Money from the sale of vehicles seized by the Department goes to the City of New York. *See* Admin. Code §14-140 (6).

Moreover, again referring to *James Daniel Good*, the court stressed that the impact of erroneous deprivation was heightened in the vehicle impoundment setting because of the absence of any recompense for losses occasioned by erroneous vehicle retentions. It noted that "[a]n owner cannot recover the lost use of vehicle by prevailing in a forfeiture proceeding," and suffers additional loss as the vehicle "continues to depreciate in value as it stands idle in the police lot." 306 F.3d at 64 (citation omitted). As this Court stressed in *James Daniel Good*, the "ultimate judicial decision" in the forfeiture action, even if favorable, would 'not cure the temporary deprivation that an earlier hearing might have prevented,'" 510 U.S. at 56 (citing

Connecticut v. Doehr, 501 U.S. 1, 15 (1991)). By the same reasoning, the *Krimstock* opinion pointed out, an earlier hearing had been found not necessary in *Mathews v. Eldridge* partly because of the availability of full retroactive benefits if the plaintiff ultimately prevailed. 306 F.3d at 64, citing *Mathews*, 424 U.S. at 340.

The third *Mathews* factor addresses the Government's interest in the operation and cost of an additional procedural requirement. The most notable interest identified by the Second Circuit was the City's concern that a seized vehicle not be sold or destroyed before a forfeiture judgment. The court observed that other means of restraint could safeguard that interest, in particular a restraining order to prohibit sale of a vehicle, or a bond. *Id.* at 65. The utilization of "less drastic measures than continued impoundment" could be considered at the retention hearing. *Id.* at 70.

One year after the *Krimstock* decision, the New York Court of Appeals ruled that due process requires a prompt post-seizure hearing for vehicles seized pursuant to Nassau County's forfeiture program. *County of Nassau v. Canavan*, 1 NY3d 134, 141, 802 NE2d 616 (2003). The Court applied the *Mathews v. Eldridge* balancing test.

As did the *Krimstock* court, the New York Court of Appeals took note of the compelling private interest affected by loss of an automobile, which is "often an essential form of transportation, and, in some cases,

critical to life necessities, earning a livelihood and obtaining an education." *Id.* at 143. This loss is exacerbated during the pendency of a forfeiture action that "may not be finally resolved for many months or years." *Id.* at 142. The Court of Appeals pointed out that "the risk of erroneous deprivation is heightened when the driver is not the owner or sole user of the seized vehicle." *Id.* at 143. But even in other cases, the opinion pointed out, "the importance of defendants' possessory interest [is not] diminished by the likelihood that they might lose and the County might eventually prevail in forfeiture proceedings. 'Fair procedures are not confined to the innocent.'" *Id.*, citing *James Daniel Good*, 510 U.S. at 62.

C. The Necessity of the *Mathews* Balancing Test

In applying the three-part *Mathews v. Eldridge* balancing test in determining whether due process requires a prompt post-seizure retention hearing, the Second Circuit and the New York Court of Appeals were following the law set down by this Court. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) (*Mathews* test used to judge inadequacy of *ex parte* attachment procedures); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (*Mathews* test for job termination procedures). In deciding the scope of procedural due process required in a given setting, this Court has repeatedly returned to the *Mathews* balancing test. "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 we articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (citations omitted). The *Mathews* balancing test sets out "a framework to establish the sufficiency of particular procedures." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005).

The *Mathews* balancing test enables courts to determine whether a State has met "the fundamental requirement of due process," which is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" 424 U.S. at 333. There is no "forfeiture exception" to application of the *Mathews* balancing test. On the contrary, in *James Daniel Good* the *Mathews* test was central to the analysis that, with respect to seizure of property pursuant to a federal forfeiture statute, an early hearing to test the legitimacy of the seizure is required by due process. The fact that the predicate for seizure is a forfeiture program only underscores the need for an opportunity to be heard before a neutral magistrate. As the Court explained, the Government's "financial stake in drug forfeiture" heightened the need for the property owner to be afforded the protection of an early adversary hearing. 510 U.S. at 55-56 and n.2.

This Court did not hold that the early hearing was restricted to seizures of real property. The nature of the property affects only whether the early hearing comes before or after seizure. A pre-seizure hearing is

necessary before seizure of real property. Property that is movable may be seized first, with the hearing to follow promptly after the seizure.

This Court's constitutional analysis in *James Daniel Good* was concerned less with the type of property taken than with the dangers inherent in *ex parte* seizure, which "creates an unacceptable risk of error." *Id.* at 55. The "ultimate judicial decision" in the forfeiture action, "coming months after the seizure," would not cure the deprivation "that an earlier hearing might have prevented." *Id.* at 56 (citation omitted). The Court stressed that even if money, and not realty, "were the only deprivation at issue, it would not render the loss insignificant or unworthy of due process protection." *Id.* at 54. Good's interest, in fact, was not in the real property itself, which he did not occupy, but in the $900 in monthly rent that he received. *Id.* The Court's reliance on *Fuentes v. Shevin*, 407 U.S. 67 (1972), which covered kitchen appliances and household furniture, accentuates that the procedural protection of an earlier hearing is not confined to real property. The overriding purpose of procedural due process is to protect the "use and possession of property from arbitrary encroachment". *Id.* at 53-54.

City of Los Angeles v. David, 538 U.S. 715 (2003) further underlines the necessity of applying the *Mathews* balancing test. David's car was towed for a parking violation; he immediately paid $134.50 to release it from impoundment. A divided Ninth Circuit panel ruled that a hearing held 27 days later on the

merits of the parking violation was untimely under the Circuit's procedural due process cases regarding seized automobiles. *See David v. City of Los Angeles*, 307 F.3d 1143 (9th Cir. 2002).

This Court reversed. In doing so, it applied the *Mathews* balancing test, as the Ninth Circuit majority had not. Application of the first factor was telling. The "private interest" at stake was not the automobile, which had been quickly recovered, but the $134.50, deprivation of which was fully recompensable. 538 U.S. at 717-18. As to the second factor, the likelihood of error for lack of an immediate hearing was very much reduced, since the parking violation at issue was a simple, straightforward issue. *Id.* at 718. And the burden on the Government -- 1,000 or more hearings annually within 48 hours, the vast majority with only a relatively small amount of money at stake -- was considerable. On balance, the 27-day delay for a hearing "to consider claims of the kind here at issue" did not violate the Due Process Clause *Id.* at 719.

In addition to its reliance on the *Mathews* test, the *David* decision is pertinent to the merits of the instant case. It characterizes the "temporary deprivation of the use of the automobile" as a "far more serious harm" than the relatively small amount of money at issue. *Id.* at 717. The dissenting Ninth Circuit judge in *David* was equally emphatic about the distinction, pointing out that deprivation of an automobile would warrant an early hearing. 307 F.3d at 1149 (Kozinski, J., dissenting). As the *Krimstock* and *Smith* courts

concluded, deprivation of one's automobile provides a compelling case for a prompt opportunity to be heard in order to achieve its return.

D. The Irrelevance of the *$8850/Von Neumann* Speedy Trial Cases

The Government parties urge that this Court not apply the *Mathews v. Eldridge* test but instead refer only to the speedy trial test of *United States v. $8,850*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986). Those cases rejected attempts to dismiss as untimely Government actions against property. The courts in *Krimstock* and *Smith* found them to be inapplicable to the question whether an initial hearing to contest custody of the confiscated property *pendente lite* was warranted.

United States v. $8,850 set down a speedy trial standard for federal forfeiture actions. It did not concern the right to an initial hearing, but only the broad time limits within which a federal forfeiture action must be commenced. The property claimant there sought to dismiss the case as untimely. This Court held that dismissal was not required because the Government had shown diligence and given reasonable explanations for the 18-month delay. *Id.* at 569. It applied the four-part speedy trial test for criminal cases of *Barker v. Wingo*, 407 U.S. 514 (1972).

Of course, that speedy trial right coexists in every criminal case with the right to a prompt initial hearing

set out in *Gerstein v. Pugh*, 420 U.S. 105 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (arrestee can challenge detention within 48 hours of arrest). That is the analogous right at issue in the vehicle impoundment context. The right to an initial hearing to challenge whether impoundment should continue throughout the forfeiture case is not an attempt to obtain dismissal of that case on speedy trial grounds, any more than acknowledging an accused person's right to seek release pending trial requires dismissal of the criminal case as well.

The claimant in *$8,850* had not used any of the available remedies that would have afforded her an "early judicial hearing." 461 U.S. at 569. Among those remedies was a motion under Federal Rule of Criminal Procedure 41(e) (now Rule 41(g)) for return of seized property. *Id.* Rule 41(e) provided for a judicial hearing whenever a person subjected to "deprivation of property" by a federal officer sought return of the property. It is noteworthy that this Court set the speedy trial forfeiture standard in a setting where an early judicial hearing on return of the property was already available. Even if a trial on the ultimate question of legal entitlement to the property was months or years away, the property owner in a federal action had early access to a judicial forum to regain use of the property during the pendency of the litigation.

The Government parties lay heavy emphasis on a sentence from *United States v. Von Neumann*, 474 U.S.

at 249 (1986), which said "[i]mplicit in this Court's discussion of timeliness in $8,850 was the view that the forfeiture proceeding, without more, provides the post-seizure hearing required by due process..." The forfeiture proceeding referred to concerned "Von Neumann's property interest in the car." *Id.*

The ultimate "property interest" in cars or other property is not the issue here; the issue is the right to an initial hearing with respect to a party's present possessory interest in the property. That initial proceeding would not end the case or resolve the issue whether ownership passed to the Government under forfeiture. In *Von Neumann*, neither seizure nor retention of the car was an issue. Von Neumann's car had been released to him within two weeks of its seizure by customs officials. 474 U.S. at 245-46. As did the claimant in *$8,850*, Von Neumann sought a definitive ruling in his favor based on a timeliness challenge that would terminate the government's claim.

His claim was that the Custom Service's 36-day delay in ruling on his remission petition violated due process and required cancellation of the $3,600 penalty it had imposed for failing to declare his foreign car at the border. This Court rejected his claim, noting that "his right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money." Von Neumann had not shown that a 36-day delay in the "disposition of his remission petition" deprived him of due process. *Id.* at 251. The

remission petition, which "terminates the dispute," (*id.* at 248-50 n.8) was subject to the same speedy trial criteria as the trial on the merits. The initial hearing to contest the custody of the property pending the litigation on the merits -- the only issue here -- was simply not an issue in *Von Neumann*.

Any doubt about the dual due process requirement in a forfeiture case -- a prompt initial hearing to address custody of seized property and an ultimate trial on the merits of forfeiture -- was subsequently settled in *James Daniel Good*. This Court put the separate questions of the initial hearing and the timeliness of the forfeiture trial in clear relief. The initial hearing was the "principal question." A "second issue," the Court stated, was "the timeliness of the forfeiture action." 510 U.S. at 46. The Court dealt with this "second issue" in a separate section at the end of the opinion. Good, like the money claimant in *U.S. v. $8,850*, sought to dismiss the forfeiture action against his property on the grounds that it was untimely. The Court, citing *$8,850* among other cases, ruled that dismissal was not required. Id. at 65. Clearly, the initial hearing and the ultimate proceeding on the merits are separate rights. The contention that *$8,850* and *Von Neumann* rule out an initial hearing and that due process requires only the ultimate forfeiture trial is incompatible with the holding and reasoning of *James Daniel Good*.

That contention is likewise incompatible with this Court's due process jurisprudence on the necessity

of a prompt hearing to be able to test the "probable validity" of a government entity's claim against seized property. As the Court stated with regard to money seized in a "jeopardy assessment" by the Internal Revenue Service:

> This court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probably validity of the deprivation must be made.

Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 629 (1976) (emphasis supplied).

Notably, the necessity for an interim hearing is not less when the "government function" involved is the collection of taxes by the federal government. This function is surely a more crucial area of government activity than forfeiture programs, which are entirely discretionary and vary greatly, when pursued at all, among states and localities. The controlling constitutional factor is not how Government characterizes the seizure, but whether "irreparable injury

may result from a deprivation of property pending final adjudication of the rights of the parties." *Id.*

II. NEW YORK CITY'S VEHICLE RETENTION HEARING EXEMPLIFIES A PROMPT OPPORTUNITY TO BE HEARD TO RECOVER POSSESSION OF IMPOUNDED PROPERTY AND DOES NOT ENCUMBER THE LEGITIMATE INTERESTS OF LAW ENFORCEMENT.

A. The Contours of the Vehicle Retention Hearing

The Second Circuit in *Krimstock* remanded the case to the district court to formulate, "in consultation with the parties," the outlines of the vehicle retention hearing. 306 F.3d at 70. At the City's suggestion, the district court chose as the locus of the hearings the Office of Administrative Trials and Hearings ("OATH"). *See Jones v. Kelly*, 378 F.3d 198, 200 (2d Cir. 2004). OATH is a tribunal within the executive branch of the city government; it adjudicates matters for a variety of city agencies.

The district court's order setting up the process governs the timing and structure of the hearing procedure. (The current order, the Third Amended Order & Judgment ("*Krimstock* Order"), 99 Civ. 12041 (HB) is accessible at 2007 U.S. Dist. LEXIS 82612, as well as the OATH website.) The hearing is not to be scheduled automatically, but only upon the demand of an eligible claimant, which is either the person from

whom the vehicle was seized, or the registered owner (who has priority). A request for a hearing must be made on a Department form, which the Department must provide to the arrestee and, one week later by mail, to the registered owner. A hearing must be scheduled to take place within 10 business days of the receipt by the Department of the hearing request. The date of the hearing may be extended upon a showing of good cause by either party. (*Krimstock* Order, paras. 4-6)

At the vehicle retention hearing, in order to continue its retention of the vehicle, the Department must demonstrate: (a) probable cause for the arrest of the vehicle operator; (b) likelihood of success in the forfeiture action; and (c) necessity of retention to preserve the vehicle for the forfeiture action, or if return would present a heightened danger to public safety. Reliable hearsay is admissible. The vehicle claimant may testify and present evidence. If the Department sustains its burden, the vehicle will be retained; if it does not, the vehicle must be returned to the claimant. (*Krimstock* Order, para. 3)

The decision of the OATH judge as to retention or release does not affect the right of the Department to seek forfeiture of the vehicle, or to seek review of the retention decision in Supreme Court. The Order states: "Any decision made by an OATH judge shall not be binding in any way upon the Criminal or Supreme Court in any proceeding." Nor is any legal or factual theory

advanced by the Government binding in Criminal or Supreme Court. (*Krimstock* Order, para. 3)

The Third Amended Order also enables a prosecutor to obtain an ex parte retention order from a Criminal Court judge if he or she believes retention is necessary to preserve the vehicle as evidence for the criminal case. The OATH hearing is postponed during the pendency of such an order. (*Krimstock* Order, paras. 8-12)

OATH Rule 1-31 requires that a settlement conference be held before each scheduled hearing. Cases are often settled. Generally, the settlement requires the claimant to give money to the Department, in return for which the Department agrees to return the vehicle and not to pursue a forfeiture action. If a hearing is held, the OATH judge issues a short written decision within three business days.

The vehicle retention hearing process at OATH started in February 2004. Until that time, throughout the litigation in the district court and the Second Circuit, and during the proceedings on remand in the district court, the Department had continued to confiscate vehicles. By the outset of the hearing process, 6,000 cars were in police custody "in legal limbo." Many had been held for years. None had reached a judgment in a forfeiture action. *See* Susan Saulny, "City Police Giving Back Seized Cars," *NY Times*, Mar. 9, 2004. After the district court ordered the Department to either return the

vehicles to their owners or afford them a hearing, the Department made the vast majority of the backlog group available for return.

B. The Working of the Vehicle Retention Hearing: 2004-2009

In the more than five years since February 2004 in which the vehicle retention hearing, or *Krimstock* hearing, has been operating for seized vehicles, there have been several constants. One constant is the nature of the evidence put forth by the Department. As to the merits of the case, the evidence is entirely hearsay. The Department has never presented a police witness to testify at a vehicle retention hearing. And OATH judges have rejected any attempts to subpoena the arresting officer. *See Police Dept. v. McBrien*, OATH Index No. 1058/09 (Oct. 2, 2008). (All OATH decisions are available at http://www.nyc.gov.html/oath)

In addition to the record of convictions, if any, of the vehicle operator, the Department offers as evidence hearsay police reports, usually the criminal complaint and the arrest report. In most cases, if the facts are not controverted, the OATH judge accepts the police documents as sufficient to sustain the Department's burden on the first two prongs, which are probable cause and the likelihood of proving in the forfeiture action that the vehicle was the instrumentality of a crime. *See, e.g., Police Dept. v. Pelle*, OATH Index No. 2666/08 (June 27, 2008). *But see Police Dept. v.*

Williams, OATH Index No. 1899/04 (May 4, 2004) (police reports insufficiently detailed and reliable); *Police Dept. v. Gurley*, OATH Index No. 421/07 (Sept. 12, 2006) (vehicle not sufficiently linked in police reports to sale of untaxed cigarettes).

Some vehicle claimants have prevailed by presenting credible testimony that rebuts the assertions in police documents. *See, e.g., Police Dept. v. Craig*, OATH Index No. 1138/06 (Feb. 22, 2006). In another case, where the issue was whether the claimant was actually driving the vehicle in question, the OATH judge credited the testimony of the claimant and his witnesses that he was not driving the car, but keeping it running to use the radio for a block party. *See Police Dept. v. Rios*, OATH Index No. 146/06 (July 21, 2005). In a recent decision, the judge found the claimant's "detailed and consistent" testimony more credible than the Department's documentary evidence on each of the three prongs of the *Krimstock* test. *See Police Dept. v. Morton*, OATH Index No. 3260/09 (July 6, 2009).

Another frequently litigated issue at OATH is whether return of the vehicle to the claimant would prevent a "heightened risk to public safety." The usual parameters in a DWI case are that a high breathalyzer reading, prior vehicle-related infractions, or aggravating circumstances in the incident itself will justify a retention order in the Department's favor. *See, e.g., Police Dept. v. Figueroa*, OATH Index No. 391/08 (Oct. 2, 2007) (vehicle retained where breathalyzer

reading was .173%). In contrast, a breathalyzer reading that is not exceptionally high, along with the absence of a criminal history, militate in favor of return of the vehicle. *See, e.g., Police Dept. v. Kennerly*, OATH Index No. 706/08 (Oct. 16, 2007) (vehicle returned where breathalyzer reading was slightly over the legal limit and claimant was first offender).

For a claimant to prevail on the "heightened risk" issue, oral testimony, as a practical matter, is required. OATH judges, as their opinions reflect, carefully assess the credibility and reliability of the claimant. As one judge concluded in ordering return of a vehicle, "all available evidence suggests that respondent has led a law-abiding life and that this incident was an aberration." The judge noted that the testimony and demeanor of the claimant were key to his decision. *See Police Dept. v. Javier*, OATH Index No. 241/06 (Aug. 5, 2005). It is not uncommon for claimants with pending criminal cases to decline to speak about the facts of the incident leading up to the arrest, but to limit their testimony to the "heightened risk" issue. *See, e.g., Police Dept. v. Vanegas*, OATH Index No. 1056/06 (Jan. 10, 2006).

Numerous other decisions reflect the importance of personal testimony to prevail on this point. *See, e.g., Police Dept. v. Holburn*, OATH Index No. 879/08 (Oct. 31, 2007) (DWI arrestee "forthright about the circumstances" and "genuinely mortified and remorseful about his behavior"). By the same token, a judge's

conclusion that a claimant's testimony showed insufficient appreciation of the gravity of the matter was a factor in the decision to deny return of the vehicle. *See Police Dept. v. Watts*, OATH Index No. 1865/08 (Mar. 5, 2008).

Testimony of the vehicle owner is especially critical in an "innocent owner" case. Although the Department has the ultimate burden to disprove such a defense, *Property Clerk v. Pagano*, 170 AD3d 30, 34-35, 573 NYS2d 658 (1st Dept. 1991), the vehicle owner must credibly put forward the defense at the hearing and be subject to cross-examination. The judge's decision often hinges on an assessment of witness credibility, in conjunction with an evaluation of circumstantial evidence, on the issue whether the owner knew or should have known that the vehicle would be used in a crime.

More often than not, the decision after a hearing in an innocent owner case is that the vehicle be returned to the owner. (Use of the search terms "innocent owner" and "Krimstock" will access many such cases on the OATH website.) The most common scenario involves an older relative lending a vehicle to a younger relative, who gets arrested. *See, e.g, Police Department v Arroyo, Sr.*, OATH Index No. 2016/06 (June 30, 2006) (vehicle returned to father who had lent it to son); *Police Dept. v. Harding*, OATH Index No. 173/07 (Apr. 16, 2007) (mother lent car to son); *Police Dept. v. Gutierrez*, OATH Index No. 2403/07 (Aug. 15, 2007)

(same). Cars lent to friends also result in innocent owner adjudications at OATH. *See, e.g., Police Dept. v. Passley*, OATH Index No. 2401/07 (July 11, 2007). Virtually every vehicle return in such a case has been predicated on credible testimony by the owner that he or she did not know or have reason to know that the vehicle would be used in a crime.

C. The Indispensability of the Prompt Post-Seizure Hearing

"No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring). Justice Frankfurter's famous condensation of procedural due process was cited approvingly by this Court in *James Daniel Good*, 510 U.S. at 55.

The working of the vehicle retention hearing underlines the truth of this statement. The opportunity to be heard need not be elaborate or constricted by rules of evidence. OATH judges uniformly stress the limited purview of the hearing. Each decision cites the same language from the Second Circuit's opinion: "The due process rights at issue here require 'an initial testing of the merits of the City's case,' not 'exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing.' *Krimstock*, 306 F.3d at 69-70." *See,*

e.g., Police Dept. v. Achakpo, OATH Index No. 1211/09 (Nov. 19. 2008); *Police Dept. v. Satyanand*, OATH Index No. 570/05 (Nov. 13, 2004).

The Seventh Circuit in *Smith* emphasized the same principle: "The hearing should be prompt but need not be formal....We do not envision lengthy evidentiary battles which would duplicate the final forfeiture hearing. The point is to protect the rights of both an innocent owner and anyone else who has been deprived or property...." *Smith v. City of Chicago*, 524 F.3d at 838-39.

For many claimants at vehicle retention hearings, the opportunity to be heard has been, not a term of art, but a literal opportunity to be heard. The key factor in a judge's decision to order return of a vehicle has often been the claimant's credible testimony as to the facts of the incident, or to innocent ownership, or to whether return would present a threat to public safety. This Court has stressed that "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The experience at OATH demonstrates why the "opportunity to present his side of the story," *id.*, is indispensable for one facing long-term deprivation of property.

Equally significant is the opportunity to point out the insufficiency of the government's case. This Court,

citing *Loudermill*, recently stressed the constitutional necessity to provide "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. at 532. The examples from OATH cases illustrate that the opportunity to challenge the Department's hearsay allegations has rescued numerous vehicles from continued erroneous impoundment.

In the 2008 fiscal year at OATH, which covered the period from July 1, 2007 through June 30, 2008, OATH judges decided 59 cases after holding a hearing. Examination of the results shows that 37 decisions ordered return of the vehicle to the claimant, while in 22 cases the Department was allowed to retain the vehicle.

The vehicle retention hearing process has exposed the large proportion of unnecessary and erroneous property deprivations inherent in a vehicle impoundment program based entirely on warrantless seizures. The backlog of 6,000 vehicles that stood impounded, many for years, before the prompt post-seizure hearing went into effect in February 2004 represents the logical outcome of a governmental property seizure program unchecked by a "meaningful opportunity to be heard at a meaningful time."

It should also be pointed out that, at least in the vehicle impoundment setting, lack of an early hearing effectively forecloses the possibility of any due process at all for many owners. The average life of a standard

civil case in New York's Supreme Court is 27 months. *See New York State Unified Court System, 2007 Annual Report*, p.22, available at http//www.courts.state.ny.us/reports/annual/pdfs/2007annualreport.pdf . The "ultimate forfeiture proceeding" often referred to may not be for years after the initial seizure. Yet many owners have monthly leasing or financing obligations to meet on the impounded vehicle. Named plaintiff Sandra Jones in the *Krimstock* case, for example, continued making monthly payments of $482 for 10 months before she, an innocent owner, regained possession of her impounded vehicle. *See Krimstock v. Kelly*, 306 F.3d at 46. Many people cannot continue to make such payments, in addition to satisfying mandatory insurance costs, on a car that they cannot use, while having to finance alternate means of transportation during the extended period of deprivation. Missed payments can result in a loss of standing to challenge forfeiture. *See United States v. One 1986 Volvo 750T*, 765 F.Supp. 90, 91-2 (SDNY 1991) (termination of car owner's lease after missed payment extinguished standing to challenge forfeiture action).

Without means to achieve return of the vehicle *pendente lite* provided by the prompt hearing, many owners, unable to sustain a litigation challenge over the long haul while making payments on an impounded vehicle, would be forced to give up on their property. This is how the backlog of impounded vehicles "in legal limbo" grew to 6,000. For many owners, the "ultimate forfeiture proceeding" is a mirage if the vehicle is

impounded until then. In the absence of an early hearing, the Government in many cases could effectively gain permanent possession solely by means of a seizure whose validity is never reviewed in court. In such cases, procedural due process is not merely postponed, but never afforded.

Compared to the demonstrable value of the prompt hearing to vehicle owners, the burden on the Government has been minimal. The Department does not present police witnesses at the hearing, and OATH has generally accepted the paper case made up of police reports as sufficient to establish the Department's case on the merits, if unrebutted. The OATH proceeding has not provided early discovery for the criminal defendant. The arrest report and criminal complaint presented at OATH are also available at the outset of the criminal case. A discovery demand in a criminal case must be answered within 15 days, virtually the same timetable as the 10-business-day scheduling of the retention hearing. *See* Criminal Procedure Law, §240.80(3).

The Department has never maintained that the working of the vehicle retention process has been unduly burdensome. The early hearing does not foreclose or inhibit the Department's ability to pursue a forfeiture action in Supreme Court. Although plaintiffs have sought to amend the Order to ensure that claimants' rights are safeguarded, *see Krimstock v. Kelly*, 506 F.Supp. 2d 249, 253 (SDNY 2007), the Department has

never sought to alter or amend the process on the ground that it interfered with its forfeiture program.

The only challenge to the *Krimstock* process after February 2004 was on behalf of the prosecutors, who objected to the inclusion of any vehicle marked as "evidence" by a police officer. Ultimately, the Second Circuit allowed the prosecution in any vehicle seizure to obtain an ex parte order from a judge that would allow continued retention of the vehicle as long as it was needed as evidence. *See Krimstock v. Kelly*, 464 F.3d 246, 255 (2d Cir. 2006). The overall experience of the vehicle retention hearing process has shown no effect on the prosecution of the criminal case. The Second Circuit concluded, based on a hearing held in the district court: "The data presented by the witnesses confirm that no undue burden on criminal enforcement results from mandated review by a neutral fact finder." 464 F.3d at 252.

In sum, the prompt post-seizure hearing has effectuated what this Court has identified as "the two central concerns of due process:" one, "the prevention of unjustified or mistaken deprivations;" and two, "the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The real-world furtherance of these core constitutional values confirms the soundness of the *Krimstock* and *Smith* decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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