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**ARTICLE:** HOW TO WIN A KRIMSTOCK HEARING: LITIGATING VEHICLE RETENTION PROCEEDINGS BEFORE NEW YORK'S OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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Both authors participate in Latham & Watkins' pro bono program which, among other things, provides legal services to unrepresented and indigent claimants in "Krimstock" cases. See *Krimstock v. Kelly*, 506 F. Supp. 2d 249, 259 n.21 (S.D.N.Y. 2007) (lauding Latham & Watkins' pro bono program). Since the program's inception, Latham & Watkins has represented over one hundred Krimstock clients, devoting more than 8000 hours to the program.

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**SUMMARY:**

... The court has also ordered a seized vehicle released when reasonable suspicion for the arrest is based on an erroneous interpretation of the law. ... Where narcotics were uncovered in a claimant's home, not his car, and the claimant was arrested in his home, OATH found that the retention of the vehicle was not warranted as the vehicle was not used as an instrumentality of a crime. ... Innocent Owner Defense In requiring a due process hearing to assess the validity of the Police Department's continued retention of seized vehicles, the Krimstock court was animated by a "special concern for the risk of erroneous deprivation posed to innocent owners" by forfeiture proceedings. ... OATH noted that under Harris, the claimant was entitled to regain possession of the vehicle if she could show "that continued impoundment would substantially interfere with her 'ability to obtain critical life necessities such as earning a livelihood, obtaining an education, or receiving necessary medical care.'" OATH opined that "Harris does not require proof that it is impossible to survive without a vehicle," but, instead, that the impoundment must "substantially interfere" with an important life activity. ... The typical settlement demand requests: (1) a settlement payment; (2) that the

owner execute a "hold harmless" agreement absolving the Police Department of liability for any damage to the seized vehicle resulting from its seizure and storage; (3) that the owner obtain a district attorney's release or a certified court disposition confirming that the vehicle is no longer needed as evidence in the underlying criminal case; and (4) in cases involving driving while intoxicated or other substance abuse, a request that the owner (if he or she was also the driver) undergo an alcohol/substance abuse assessment performed by a state certified Officer of Alcoholism and Substance Abuse Services ("OASAS") counselor.

**TEXT:**

[\*23] In a seemingly harmless move, Jasmin Braxton allowed a friend to borrow her 1999 BMW on June 28, 2007. n1 Unbeknownst to Ms. Braxton, her friend was in possession of narcotics, a fact that could result in the seizure and ultimate forfeiture of Ms. Braxton's car. n2 At some point during the evening of June 28, officers from the New York City Police Department (the "Police Department") pulled over Braxton's friend, discovered the narcotics, charged the driver with possession of a controlled [\*24] substance in the third degree, and seized the vehicle. n3 Thanks in part to her pro bono legal counsel, Braxton regained possession of her car after successfully challenging the Police Department's continued retention of the vehicle in a due process hearing, commonly known as a *Krimstock* hearing, held before the Office of Administrative Trials and Hearings ("OATH"). n4

Unfortunately, many who, like Braxton, cannot afford to retain legal counsel in connection with so-called "*Krimstock*" proceedings face the daunting task of challenging the retention of their vehicles on a pro se basis. Attorneys who represent clients in *Krimstock* proceedings discover that there are precious few resources to guide them through an unfamiliar process in an unfamiliar forum. Addressing these two concerns, this article endeavors to encourage the pro bono representation of *Krimstock* claimants by providing a guide to conducting *Krimstock* hearings.

Part I of this article reviews the historic tradition of civil forfeiture, highlighting how in rem forfeiture actions evolved from a pre-Judeo-Christian retribution to a proceeding of religious expiation to its modern iteration in New York City as both a form of civil punishment for criminal misconduct and a steady source of governmental revenue. n5 In Part II, we review the seminal *Krimstock v. Kelly* n6 opinion, in which the United States Court of Appeals for the Second Circuit held, on Fourteenth Amendment due process grounds, that claimants of vehicles seized by New York City as an instrumentality of a criminal offense pursuant to New York City Administrative Code section 14-140 ("section 14-140") are entitled to a prompt post-seizure, pre-judgment hearing permitting the claimant to test the merits of the City's continued retention of the vehicle pending forfeiture. n7 In the words of OATH, the forum for vehicle retention hearings, *Krimstock* proceedings are a "rapid, truncated, preliminary, administrative hearings [\*25] concerning the retention of [car owners'] vehicles by the police pending the outcome of a more plenary civil forfeiture action." n8

Part III addresses the most significant substantive defenses and arguments available to *Krimstock* claimants. n9 First, *Krimstock* claimants and their counsel must be keenly aware of the procedural and notice requirements imposed on the Police Department by the United States District Court for the Southern District of New York in its orders implementing the Second Circuit's *Krimstock* opinion. n10 Indeed, the Police Department's failure to comply with those judicially crafted requirements often results in an immediate release of the offending vehicle pending forfeiture. Second, a claimant may challenge the arresting officer's probable cause for initiating the stop leading to the arrest. n11 Third, a *Krimstock* claimant may contest the city's likelihood of success at the ultimate section 14-140 civil forfeiture proceeding--an uphill battle for a claimant in light of the broad forfeiture standard. n12

Fourth, this article addresses defense counsel's best arguments regarding whether a claimant presents a heightened risk to the public--a fact-intensive defense. n13 Within that broader context, this article will address the circumstances of claimants accused of driving while intoxicated, an unfortunate, but all too commonplace circumstance that permeates OATH caselaw. n14 Fifth, this article examines the innocent owner defense, n15 which was prompted by the Second Circuit's "special concern for the risk of erroneous deprivation posed to innocent owners," that is, vehicle owners, like Ms. Braxton, who were not involved in the criminal misconduct [\*26] that prompted the seizure. n16 When raised,

this defense requires the Police Department to prove, by a preponderance of the evidence, that the vehicle owner " 'permitted or suffered' " the vehicle's illegal use. n17

Finally, in Part IV, we provide a practical overview of *Krimstock* hearings, focusing on the procedural practice and OATH rules that *Krimstock* counsel must know. n18 In addition, and based on our collective experience appearing before OATH, Part IV will also present practice pointers relating to the desirability of obtaining a settlement of the forfeiture action prior to a *Krimstock* hearing, effective strategies for negotiating with the Police Department, and the dangers of having a claimant testify where criminal proceedings are pending. n19

## I. HISTORICAL TRADITION OF CIVIL FORFEITURE

The *Krimstock* due process hearing is only one component of a broader civil forfeiture scheme in New York. Indeed, irrespective of the outcome in a *Krimstock* hearing, section 14-140 of the New York City Administrative Code authorizes the property clerk to initiate a civil action in Supreme Court of New York for a final adjudication that the subject vehicle be forfeited. n20 Because the burden on the property clerk in a forfeiture action is fairly low--the property clerk must prove by a preponderance of the evidence only that the vehicle owner used or permitted another to use the vehicle in aid or furtherance of a crime n21 --it is critical that a practitioner evaluate the merits of a potential forfeiture action [\*27] before charting a course of action for the *Krimstock* phase. n22 Before turning to *Krimstock*, however, we review the historical underpinnings and development of civil forfeiture.

The roots of forfeiture proceedings reach back hundreds of years. n23 Likely the closest analogue to modern civil forfeiture was "noxal surrender," an Anglo-Saxon custom pursuant to which the owner of an instrumentality of death surrendered the offending property to the victim's kin. n24 However, most commentators, including Justice Oliver Wendell Holmes in *The Common Law*, n25 contend that the earliest vestiges of civil forfeiture can be found in the Old Testament, specifically Exodus 21:28, n26 and in ancient Greek n27 and Roman manuscripts. n28

[\*28] At common law, an inanimate object that caused an accidental death was forfeited as a "deodand," n29 deriving from the Latin *Deo dandum*, "to be given to God." n30 This "spiritual predecessor[]" of [\*29] forfeiture statutes" n31 reflected the belief that the instrument of death was the offending party and that religious atonement was required. n32 The deodand concept evolved through the Middle Ages, n33 with the crown usurping both the victim's relatives and the deity as beneficiary of a forfeiture and establishing itself as "the transcendent power to whom expiation was due." n34 Despite the fiscal benefits, the deodand concept waned during the nineteenth century. n35 But, by that time, forfeiture actions were firmly [\*30] entrenched as a reliable revenue source for the Crown, flourishing across England, n36 most notably in the forfeiture of property and goods used to violate customs and revenue laws. n37

Although the deodand did not survive, its underlying premise--that the offending res is itself culpable, despite its inanimate nature--endured n38 and spread to America. n39 Indeed, the Supreme Court of the United States observed:

[\*31] "Long before the adoption of the Constitution, the common law courts in the Colonies--and later in the states during the period of Confederation--were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes," . . . which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws. n40

In fact, during America's infancy, Congress authorized civil forfeiture actions against myriad illicit properties, such as: goods unloaded at night or without a permit; n41 "illegally imported goods"; n42 "reland[ed] goods entitled to drawback"; n43 "vessels and . . . cargoes used to supply British forces"; n44 and items that furthered the slave trade. n45 During the nation's formative days, civil forfeiture statutes and proceedings burgeoned n46 to the extent that [\*32] by 1921, the Supreme Court of the United States declared that civil forfeiture statutes were "firmly fixed in the punitive and remedial jurisprudence of the country." n47

Today, in rem forfeiture statutes abound. As a New York appellate panel observed:

Although deodands did not become part of the common-law tradition of this country, in rem as opposed to in person forfeiture statutes have proliferated to the extent that "contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise . . . ." n48

In fact, there are more than one hundred different federal statutes authorizing civil forfeiture of real property and personal assets traceable to criminal conduct, n49 not to mention the throng of state analogues. n50 At the federal level, a plethora of property and [\*33] contraband are forfeitable including, but by no means limited to: any conveyance used to bring an alien to or harbor an alien in the United States; n51 any real or personal property involved in money laundering; n52 illegally imported, manufactured, or dealt firearms or ammunition; n53 obscene printed materials; n54 video games violative of copyrights; n55 equipment used to counterfeit currency; n56 and, of course, controlled dangerous substances, their means of production, containers used to transport them, real property involved in their manufacture and sale, and all "things of value" intended for use in or traceable to a drug transaction. n57 In fact, the broad-ranging spectrum of federal forfeiture statutes permit forfeiture of such diverse items as dying livestock, n58 smuggled wheat, n59 prison-made shivs, n60 and Mayan relics. n61 Those statutory provisions have proven to be a "major weapon in the federal law [\*34] enforcement arsenal." n62 Proving the point, and demonstrating forfeiture's evolution from noxal surrender and deodands to a contemporary crime-busting stratagem, the director of the Executive Office for Asset Forfeiture stated that civil forfeiture is "an ancient legal procedure which is proving to be dramatically effective in attacking modern crime." n63

Following Congress's lead, New York enacted a host of statutes authorizing forfeiture of various contraband and illicit property. n64 Amid those enactments and the time-honored mosaic of civil forfeiture, New York City placed its own stone. In 1881, the New York State Legislature enacted section 14-140 of the New York City Administrative Code as part of the New York Code of Criminal Procedure. n65 Although oddly crafted, n66 the statute confers [\*35] broad authority to the property clerk n67 to forfeit a wide array of property, money, and contraband, including "all property or money suspected of having been used as a means of committing crime or employed in aid or furtherance of crime or held, used or sold in violation of law." n68

[\*36] In 1972, however, the United States Court of Appeals for the Second Circuit deemed portions of section 14-140 unconstitutional on due process grounds in *McClendon v. Rosetti*. n69 Nevertheless, New York has not rewritten the statute to conform to the edicts of *McClendon* and its progeny. n70 However, the state eventually adhered to federal precedent and, in 1998, promulgated rules codifying and implementing the federally mandated strictures applicable to forfeiture proceedings. n71 In February 1999, vehicle forfeiture vaulted into the limelight as New York City Mayor Rudolph Giuliani, along with Police Commissioner Howard Safir, instituted a citywide effort, pursuant to section 14-140, n72 to forfeit the vehicles of motorists arrested for drunk driving. n73 By creatively [\*37] utilizing section 14-140 to its fullest extent, n74 Mayor Giuliani's effort to eradicate drunk driving has led, in its first five years of implementation, to the seizure of over 6500 vehicles from motorists suspected of driving while intoxicated n75 and became the catalyst for a federal case of constitutional proportions. n76

## II. *KRIMSTOCK V. KELLY*

The "*Krimstock*" hearing is the product of *Krimstock v. Kelly*, n77 a class action n78 in which plaintiffs challenged the City's ability to retain their seized vehicles without due process of law pending a forfeiture hearing. The class "contend[ed] that their inability to challenge, promptly after the vehicles are seized, the legitimacy of and justification for the City's retention of the vehicles prior to judgment in any civil forfeiture proceeding violate[d] their constitutional rights." n79 The seven named plaintiffs, all of whom had their vehicles seized by the City, presented [\*38] compelling circumstances. n80 For example, the City seized Clarence Walters' automobile in March 1999 following his driving while intoxicated arrest. n81 Walters, whose criminal record was otherwise unblemished, pled guilty to driving while impaired on June 1, 1999. n82 Three days later, Walters was served with a forfeiture complaint. n83 However, the City did not release Walters' vehicle until May 2001--nearly two years later--and at no point during that period did Walters have an opportunity to challenge the property clerk's retention of his automobile. n84 In light of

those circumstances--and those of other similarly situated plaintiffs--the class alleged that the City's retention of seized vehicles pending forfeiture violated the due process clause of the Fourteenth Amendment n85 and sought a prompt hearing following vehicle [\*39] seizure, at which the City must demonstrate both probable cause that the vehicle was used to further a crime and that retention is necessary until the conclusion of the forfeiture action. n86

In concluding that the City's elongated retention of vehicles between seizure and adjudication of a forfeiture action without the availability of an early opportunity to test the City's likelihood of success on the merits was constitutionally infirm, Judge Sotomayor focused on the implications of the Fourteenth Amendment in the civil forfeiture context. n87 According to the court, the City's intermediate retention of seized property pending forfeiture "raise[d] serious due process concerns," because temporary deprivations of property *pendente lite* must satisfy the Fourteenth Amendment's due process demands. n88

The conclusion that plaintiffs possess a due process right to challenge the City's justification for retaining their vehicles while a forfeiture action is pending was animated by three concerns. n89 Paramount among those concerns was the often long gap between seizure and forfeiture proceedings, a temporal gap that regularly spanned months or years, n90 as evidenced by individuals like Mr. Walters, whose vehicle was retained for twenty-three months. n91 In [\*40] addition, the court examined the ills of erroneous deprivation afflicting innocent owners. n92 Those harms were illustrated by the hardship of Sandra Jones, a named plaintiff, whose minivan was seized when her estranged husband, who had borrowed the vehicle, was arrested. n93 Jones was deprived of her automobile for ten months, during which she was provided no opportunity to challenge the validity of the retention but nevertheless continued to make monthly payments of over \$ 430 on her impounded automobile. n94 Finally, the court was persuaded by the inadequacy of other remedies suggested by the City. The panel rejected the City's contention that a request for judicial intervention n95 or an article 78 proceeding n96 brought under New York law would [\*41] appropriately protect plaintiffs' constitutional rights, n97 because both such remedies, according to the court, would provide neither prompt nor adequate relief. n98

With those three concerns highlighted, the court proceeded to the *Mathews v. Eldridge* n99 inquiry, in which courts balance three factors to evaluate the adequacy of the procedures offered. n100 The first *Mathews* factor--the private interest affected--weighed heavily in the plaintiffs' favor due to the "particular importance of motor vehicles" as a mode of transportation, a means to earn a livelihood, and, often, a person's most valuable possession. n101

[\*42] The court found the second *Mathews* factor--the risk of erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards--to weigh narrowly in the City's favor. n102 On one scale was the fact that neither an officer's unreviewed probable cause determination at the time of arrest, nor a court's future resolution of the forfeiture's merits could "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." n103 Counterbalancing that consideration, however, was the reality that the risk of erroneous vehicle seizure and retention is substantially reduced in the drunk driving context, because assessments of intoxication by trained law enforcement officials are expected to be accurate. n104

In addressing the final *Mathews* factor--the government's interest--the panel sharply criticized the three interests submitted by the City. n105 First, the City asserted its significant interest in preventing forfeitable vehicles from being sold or destroyed prior to a forfeiture adjudication. n106 The court rejected that interest, observing that "continued retention is unjustified where other [\*43] means can adequately accomplish the City's objectives, n107 such as requiring claimants to post bonds or seeking restraining orders prohibiting the sale or destruction of vehicles n108 --two pragmatic alternatives the City has failed to implement. n109 A second reason proffered by the City was that the City's in rem jurisdiction over the forfeitable vehicles required unbroken possession from seizure to judgment, a contention contradicted by federal precedent. n110 Finally, the City claimed that retention of allegedly offending property prevented the vehicle from being used as an instrumentality of future crime, specifically drunk driving. Because that interest loses its urgency as the inebriated defendant regains sobriety, the panel rejected the contention.

Balancing the *Mathews* factors, the Second Circuit held that

the Fourteenth Amendment guarantee that deprivations of property be accomplished only with due process of law requires that plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer to determine whether the City is likely to succeed on the merits of the forfeiture action and whether means short of retention of the vehicle can satisfy the City's need to preserve it from destruction or sale during the pendency of proceedings.

. . . Here, once the vehicles have been seized, and concerns for establishing jurisdiction and immediate prophylactic custody [\*44] are satisfied, we find that the Due Process Clause requires that claimants be given an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles . . . *pendente lite*. n111

On remand, n112 the United States District Court for the Southern District of New York set forth the procedural mechanism for plaintiffs to challenge the seizure of their vehicles, declaring that the *Krimstock* hearing is to be held before OATH, pursuant to OATH's Rules of Practice. n113 At that hearing, to retain the automobile, the Police Department must prove, by a preponderance of the evidence, that: (1) probable cause existed for the arrest; (2) the City will likely prevail in a civil forfeiture action; and (3) it is necessary that the vehicle remain impounded to ensure its availability in the forfeiture proceeding. n114 Nevertheless, even if the City cannot prove the foregoing three elements, it may be entitled to retain the vehicle if the vehicle has evidentiary value to [\*45] the underlying criminal prosecution. n115 That ability to retain the seized property as evidence has been circumscribed by a recent federal order requiring the Police Department to use "reasonable means," such as photography or forensic sampling to preserve the vehicle's evidentiary value, thereby allowing the vehicle to be released to a successful claimant. n116

The Second Amended *Krimstock* Order, penned by Chief Judge Mukasey, further required the Police Department to provide, at the time of seizure, notice of the right to a forfeiture hearing to the arrestee and to mail a duplicate of that notice to the registered owner of the vehicle within five business days of the seizure n117 -- [\*46] stringent notice requirements that, as demonstrated below, can prove fruitful for claimants. n118

It is with that guidance from the federal courts that we now turn to the five most common arguments raised by *Krimstock* claimants seeking the return of their seized vehicles.

### III. COMMON DEFENSES RAISED IN KRIMSTOCK PROCEEDINGS

#### A. Notice Defense

One of the first issues that an attorney representing a *Krimstock* client should examine is whether the Police Department provided the arrestee or vehicle owner proper notice of the right to a *Krimstock* hearing. The Police Department has the duty to provide such notice on two occasions: (1) in person, at the time the vehicle is seized; n119 and (2) by mail to the registered or titled owner within five business days of the seizure. n120

[\*47] Due to the constitutional origin of the foregoing notice requirements, n121 they "are to be strictly construed against the Department." n122 In accord with OATH precedent, the Southern District of New York has confirmed that the initial burden is on the claimant to allege that notice was inadequate. n123 Once inadequate notice has been alleged, the burden shifts to the department to prove its compliance with the notice requirements. n124 OATH courts suggest that proper record keeping, including contemporaneous affidavits from officers when the claimant does not sign an admission of personal service, overcomes this defense. n125 [\*48] However, in determining whether notice was served at the required times, courts often credit the testimony of claimants who were cooperative at the time of their arrest or who had made other attempts to retrieve their car. n126

The dual notice requirement "does not afford the Department an either/or option." n127 With only two exceptions, if notice is not provided at both the time of seizure and by mail within five business days, the vehicle will be released to the claimant, without reaching the merits of the *Krimstock* case. n128 The first of the exceptions occurs where notice is

provided to the driver at the time of seizure, and the driver is also the owner. n129 In such circumstances, a failure to mail notice is harmless error. n130 OATH [\*49] judges have speculated that this exception--which is not universally followed by OATH judges n131 --is grounded in the theory that the mailed notice requirement is to provide notice to the owner when the owner is not the driver. n132 Nonetheless, the Police Department must provide proof of actual notice for the failure to mail notice within five days to be excused. n133

A second exception to the otherwise strict notice requirements arises where the owner or driver of a vehicle is not prejudiced by the lack of notice. n134 For example, in *Police Department v. Tripp*, n135 the Police Department did not serve the claimant with notice when his car was seized. n136 Rather, the claimant learned of his right to a *Krimstock* hearing through his attorney. n137 In fact, the claimant learned of his right promptly enough that he filed a [\*50] request for a hearing only four days after the seizure. n138 The hearing was then scheduled for and conducted within ten business days of the seizure. n139 Because the request was made before the five-day deadline for mail service expired, OATH held that the claimant was not prejudiced because the hearing could have been properly conducted on that date even if the notice was proper. n140 OATH judges, however, have limited *Tripp's* application to cases in which the hearing occurred within ten days of the seizure; that is, the earliest date it would have been scheduled if the claimant's request were made immediately after arrest. n141

Beyond the dual notice requirement, the *Krimstock* orders provide detailed substantive requirements for what information the notice forms must contain. n142 The notice must inform the claimant [\*51] of, among other things: the time frame in which a hearing must be held; the three elements the department is required to prove at the hearing; the burden of proof; and the claimant's right to be represented by an attorney. n143 It also must inform the claimant that an owner who is not the driver may avail himself or herself of an "innocent owner" defense. n144 Finally, the notice must be bilingual, providing notice in both Spanish and English, n145 and include a [\*52] form with which the claimant can formally request a *Krimstock* hearing. n146

Once the request form has been completed by the claimant and received by the Police Department, the department must respond within two business days and hold the hearing within ten business days. n147 Again, those limits are strictly enforced. n148 In *Police Department v. Manning*, n149 OATH rejected the Police Department's argument that settlement negotiations tolled the ten-business day period. n150 The court held that, even if it were desirable to postpone the hearing to effectuate negotiation or a settlement, "the Order does not provide that option." n151 Additional cases concur that delays arising from settlement negotiations will not excuse a failure to comply with the *Krimstock* periods, unless waiver was explicit and voluntary. n152

[\*53] *Manning* also raised an important point about how OATH will deal with hearing delays when a claimant submits an incomplete request form. n153 When the missing information does not prevent the Police Department from beginning to process the request, an undue delay will not be excused and the vehicle will be released. n154 However, where the Police Department acts in good faith but is unable to process the application without the missing information, the delay is excused. n155 For example, in *Police Department v. Cortorreal*, n156 the request form was not properly addressed to the correct unit and lacked enough information about the vehicle itself that a paralegal believed the vehicle in question had not even been detained. n157 Where significant omissions exist, due to the truncated deadlines, "the Department should not be expected to undertake an internal investigation of thousands of arrests and seizures to determine necessary information regarding respondent's arrest and vehicle." n158

#### *B. Lack of Probable Cause for the Initial Seizure*

The first element of a *Krimstock* hearing is "whether probable cause existed for the arrest of the vehicle operator," which the Police Department must prove by a preponderance of the evidence. n159 In *Police Department v. Jackson*, n160 the court emphasized that *Krimstock* "repeatedly referred to the need to [\*54] minimize the risk of erroneous and illegal seizures." n161 The Second Circuit regarded proof of probable cause for the arrest as essential to minimizing the risk of wrongful seizures. n162 As such, the Police Department must release an owner's vehicle pending the forfeiture hearing if probable cause is found lacking at the *Krimstock* hearing. n163

In the *Krimstock* context, the probable cause analysis includes both an examination of "the sufficiency of the evidence supporting the arrest" and "the legality of the means by which the [Police] Department came to that evidence." n164 The Police Department cannot establish probable cause for an arrest if the arresting officer lacked reasonable suspicion to make the initial stop. n165 A forcible stop and detention of a suspect by a police officer is authorized if the officer has reasonable suspicion that a person is committing or about to commit a crime. n166 That reasonable suspicion, according to the Court of Appeals of New York, must be based on "specific and articulable facts" and "rational inferences" drawn therefrom." n167 An arrest is justified on a finding of probable cause based upon information sufficient to support a reasonable belief that a person has committed a crime. n168 Evidence gained from a warrantless stop and used to justify an arrest cannot be retroactively used to establish reasonable suspicion for the officer's original stop of the vehicle. n169 For example, in *Police Department v. Burnett*, the First Department of the Supreme Court of New York ordered the vehicle released when the Police Department failed to produce any evidence that demonstrated why the officer [\*55] initially stopped the vehicle despite the fact that the officer found marijuana inside the vehicle. n170

OATH requires the Police Department to provide sufficient evidence to support reasonable cause for the stop. n171 In *Police Department v. Jackson*, OATH found that the Police Department was unable to establish reasonable suspicion when the police complaint stated that the officer stopped the vehicle after receiving information over the police radio, but the Police Department failed to provide any details as to the content of the radio transmission. n172 Similarly, the court has found that conclusory statements by the arresting officer that the claimant was driving while intoxicated are insufficient to establish reasonable suspicion for the stop. n173 The court has also ordered a seized vehicle released when reasonable suspicion for the arrest is based on an erroneous interpretation of the law. n174 In *Police Department v. Stephenson*, the officer stated that the claimant's license plate was loose thus justifying a stop that led to evidence of a crime. n175 According to the Vehicle and Traffic Law, however, the license plate would only be illegal if it was hanging down or swinging, not merely loose. n176 OATH therefore held that the officer's stated justification did not establish reasonable suspicion and ordered the vehicle released. n177

Likewise, OATH has ordered the release of the claimant's car in cases in which the Police Department's documentation is [\*56] inconsistent, such as where an arrest report indicated that the officer observed the respondent exiting the vehicle and the criminal complaint only stated that the respondent was observed operating the vehicle with the ignition on. n178 The Department's documentation was not found to be inconsistent in *Police Department v. Lord*, where the different reports highlighted different facts, but each document alone was sufficient to prove reasonable suspicion. n179

In the driving while intoxicated context, OATH precedent demonstrates that claimants will, as a general matter, have difficulty defeating the Police Department's efforts to retain a seized vehicle by attacking the probable cause element. n180 That difficulty stems from the various types of conduct that OATH has found to contribute to an officer's suspicion of drunk driving. These various indicia of intoxication include weaving in and out of traffic without signaling, driving off of the road, turning without signaling, straddling the double-yellow line for several seconds, and speeding. n181 Moreover, once the arresting officer observes that the suspect appears intoxicated after the initial stop, the level of suspicion rises to probable cause and permits the officer to make an arrest, even in the absence of a chemical test. n182

If a claimant is convicted of or pleads guilty to the underlying criminal charges, the claimant is generally precluded from asserting a probable cause defense at the *Krimstock* hearing, n183 on [\*57] collateral estoppel grounds, preventing parties from relitigating issues that have already been litigated and adjudicated in prior proceedings. n184 In *Police Department v. Balseca*, the claimant's earlier guilty plea to a weapons possession charge precluded him from challenging the probable cause of his arrest in his *Krimstock* hearing. n185 Nevertheless, cognizant that collateral estoppel is a "flexible doctrine which can never be rigidly or mechanically applied," OATH does not automatically preclude these attacks on probable cause. n186 For instance, in *Police Department v. Alegrias*, the grounds for the vehicle seizure were charges of weapons and drug possession, charges that were dropped in exchange for the claimant's guilty plea to a lesser charge. n187 There, the court stated that "it is questionable what, if any, preclusive effect should be given to respondent's guilty plea to disorderly conduct, a noncriminal disposition." n188 Cases like *Alegrias*, *Arnold*,

and *Balseca* demonstrate that the claimant will be estopped from arguing a probable cause defense where the charge that he pled guilty to is the basis of the vehicle seizure. n189 However, when a claimant pleads guilty to a separate or lesser charge, less preclusive effect will be given to the prior probable cause determination and OATH will conduct a deeper inquiry into probable cause for the stop.

### *C. Likelihood of Success at the Forfeiture Hearing*

Under the second prong of the *Krimstock* paradigm, a vehicle owner may recover a seized vehicle if the Police Department cannot demonstrate that it is likely to prevail at the forfeiture [\*58] hearing. n190 To satisfy that requirement, the Police Department must prove by a preponderance of the evidence "the likelihood that [the Police Department] will prevail in the civil forfeiture action by [showing] that the seized vehicle was used as an instrumentality of a crime." n191 Moreover, *N.Y. C.P.L.R. § 1310(4)* broadly defines "instrumentality of a crime" as "property . . . whose use contributes directly and materially to the commission of the crime." n192 Therefore, any property suspected of having been "used as a means of committing crime or employed in aid or in furtherance of [a] crime," may be forfeited to the property clerk. n193 As a general matter, claimants face an uphill battle because even a tangential connection may satisfy this prong. In *Property Clerk v. McDermott*, n194 the New York Appellate Division, First Department, found the use of a vehicle to drive to and from the location of a drug transaction sufficient to make the vehicle an instrumentality of a crime even though the transaction was conducted outside of the vehicle. n195 The court also found the vehicle to be an instrumentality of a crime because the claimant used the vehicle while making a drug purchase. n196 As a general [\*59] matter, *Krimstock* claimants face many hurdles when challenging the Police Department's retention of vehicles under the likelihood of success prong of the *Krimstock* order at a forfeiture hearing. However, these hurdles may be overcome, as demonstrated in the rare instances where claimants have successfully argued that the City is not likely to prevail at the forfeiture hearing. From these cases, general principles can be adduced.

Where narcotics were uncovered in a claimant's home, not his car, and the claimant was arrested in his home, OATH found that the retention of the vehicle was not warranted as the vehicle was not used as an instrumentality of a crime. n197 Such was the case in *Police Department v. Williams*, where a claimant's vehicle was seized in connection with his arrest for possession of a large quantity of narcotics in his home. n198 There, the Police Department argued that the vehicle was used to transport narcotics. n199 However, no drugs were found in the vehicle, and the vehicle was only referenced on the property voucher as a "vehicle used to transport narcotics." n200 OATH held that the Police Department failed to prove by a preponderance of the evidence that the vehicle was used "directly and materially" n201 in the commission of the crime and that the Police Department would likely not prevail at the forfeiture hearing. n202 *McDermott* and *Williams* demonstrate that, for the Police Department to succeed, the vehicle must be used in the crime. n203 Similar to *Williams*, in *Police Department v. Mercedes*, n204 OATH found that a vehicle was improperly seized because it was not used "in aid or furtherance" of a crime. n205 There, [\*60] the claimant's vehicle was seized in connection with an arrest on charges of possession of controlled substances. n206 OATH noted that repeated references to "his car" in the criminal court complaint, combined with the conclusory statement in the property clerk's invoice stating that the car was used in narcotics transactions, was insufficient to properly identify the vehicle in question. n207 OATH reasoned that the Police Department did not carry its burden of establishing that the driver used the vehicle in question, as opposed to some other vehicle, to arrive at the crime scene. n208 Further, OATH held that the evidence did not establish a connection between the car and the alleged offenses. n209

Likewise, a statement by the arresting officer indicating that a vehicle was used to sell and transport drugs, standing alone, is insufficient to prove that the vehicle was used in effectuating a crime within the meaning of the Second Amended *Krimstock* Order. n210 In *Police Department v. Mazzoli*, n211 the claimant was arrested for selling drugs to an undercover officer on four separate occasions. n212 The court noted, "There is no reference to a vehicle in the arrest report, the felony complaint, or the indictment. The only evidence suggesting that the seized vehicle was used as an instrumentality of a crime is in the property voucher prepared by [the officer] . . ." n213 Concluding that the Police Department could not justify the vehicle's continued retention, OATH reasoned that [\*61] the Police Department could not demonstrate, through competent evidence, that the claimant "either drove the vehicle to the location of an illegal

sale or that such sale n214 occurred within the vehicle." n215

Hearsay statements are even less persuasive. n216 In *Police Department v. Rios*, n217 the Police Department attempted to use hearsay statements by the arresting officer to establish that a claimant was driving while intoxicated. n218 OATH found the reliability of the officer's hearsay evidence to be undermined by its inconsistency, as well as the vagueness of the criminal complaint, because the only sworn document failed to mention that the arresting officer observed the claimant exiting the vehicle. n219 OATH stated that although hearsay was admissible in administrative proceedings n220 and may form the sole basis for a finding of fact, hearsay evidence still must "be found to be sufficiently probative and reliable before it may be accorded any significant weight." n221

Finally, it is important to note that a violation, rather than a misdemeanor or a felony, cannot be the basis for a forfeiture proceeding. n222 In *Police Department v. Alegrias*, the Police Department recovered less than twenty-five grams of marijuana as well as a loaded firearm in a backpack that belonged to the claimant's boyfriend following a stop and arrest. n223 The claimant [\*62] denied knowing that her boyfriend had a loaded gun in his backpack; however, she pled guilty to disorderly conduct. n224 In addition, the police report and the criminal complaint were silent as to where the marijuana was found in the car, an essential element in proving criminal possession of marijuana. n225 At the *Krimstock* hearing, OATH held that the Police Department failed to establish "that it [was] more likely than not that respondent's vehicle was used in furtherance of, or as the instrumentality of, the crime of criminal possession of a loaded firearm or criminal possession of marijuana." n226 Thus, without a showing that the claimant "permitted or suffered" the illegal use of her car, the Police Department could not use the misdemeanor of marijuana possession as a basis for the forfeiture of the claimant's vehicle. n227

#### *D. No Heightened Risk to Public*

In its original formulation of the *Krimstock* standard, the Southern District of New York stated that the third requirement for the Police Department to retain a vehicle was to prove, by a preponderance of the evidence, that retention is necessary to ensure the vehicle's availability in forfeiture proceedings. n228 However, that prong has evolved significantly. Indeed, in *Police Department v. Junior*, n229 OATH stated that preservation of the vehicle from sale, [\*63] loss, or destruction was no longer a ground for the Police Department's retention of the vehicle. n230

Today, the final element the Police Department must prove is that returning the vehicle to the claimant prior to the forfeiture hearing presents a heightened risk to public safety. n231 Although there is no talismanic formula for determining what conduct poses a heightened risk to public safety, n232 the mere "[c]ommission of a crime, without more, is not enough to satisfy this requirement." n233 In assessing whether a claimant presents a significant risk to public safety, courts consider the history of the driver of the vehicle, including the individual's driving and criminal background, family and employment situation n234 and the circumstances of the crime itself. n235 Conduct that is considered egregious--such as altering a [\*64] vehicle for purposes of transporting illegal drugs, n236 using a vehicle to sell illegal firearms, n237 or speeding through multiple red lights, resisting arrest, and engaging in an altercation with police n238 --is indicative of a heightened risk to public safety. n239 By contrast, more common-place--though still wrongful--conduct, such as being involved in a minor "fender-bender," n240 a minor record of traffic violations, n241 or a claimant's unemployment and "decade-old" misdemeanor convictions," n242 generally does not support a finding of heightened risk.

Myriad mitigating factors may indicate that a claimant poses little threat to the general public. Such factors include the driver's [\*65] age and marital status, n243 the disposition of the underlying criminal charges, n244 employment history, n245 and rehabilitated lifestyle. n246 OATH has also considered a claimant's remorse as a factor militating against retention of a seized vehicle. n247 In sum, for seizures arising from a single incident of misconduct, such as a drunk driving arrest, OATH is most likely to conclude that an individual does not pose a risk to public safety if the conduct at issue "appears to be an aberration in an otherwise law-abiding life." n248

A significant portion of OATH precedent discussing heightened risk to the community involves vehicles seized

following an arrest for driving while under the influence of drugs [\*66] or alcohol. n249 Drunk driving suspects already face a societal and judicial perception that they represent a threat to the community. n250 However, in the context of a *Krimstock* hearing, these claimants may obtain their vehicles following a drunk driving arrest and vehicle seizure. n251 In general, n252 absent additional aggravating factors, OATH does not consider individuals arrested with a blood alcohol content ("BAC") of lower than .15 percent a heightened risk to the public. n253 On the other hand, an individual with a BAC [\*67] above .21 percent n254 or an individual with prior alcohol-driving-related offenses n255 is virtually certain to be deemed by OATH to be a heightened risk and, as a general proposition, will not be successful in having his or her vehicle returned prior to a forfeiture hearing. n256

For cases in between those rough benchmarks, the analysis is fact sensitive and can turn on numerous factors including, but by no means limited to, age, employment status, history of prior [\*68] incidents, and details of the crime at issue. n257 For example, in *Police Department v. Figueroa*, the claimant had a .17 percent BAC, which OATH called "extreme," ran a red light, nearly causing an accident with an oncoming vehicle, and refused before OATH to show remorse or accept responsibility for his actions. n258 Based on those facts, OATH determined that the claimant would be a heightened risk to public safety. n259 By contrast, in *Police Department v. Monge*, the claimant, like the claimant in *Figueroa*, also had a .17 percent BAC. n260 In *Monge*, an OATH judge concluded that the claimant was not a heightened risk because he was married with two children, gainfully employed, used his vehicle to take his children to school, had no prior arrests, and was remorseful for his actions. n261 However, also motivating OATH in *Monge* was the New York State Legislature's recent creation of the crime of aggravated driving while intoxicated for BACs greater than .18 percent, n262 which OATH has interpreted as guidance that .18 percent should be the line of demarcation in determining whether an individual presents a heightened risk to public safety. n263

#### *E. Innocent Owner Defense*

In requiring a due process hearing to assess the validity of the Police Department's continued retention of seized vehicles, the *Krimstock* court was animated by a "special concern for the risk of erroneous deprivation posed to innocent owners" by forfeiture [\*69] proceedings. n264 In so doing, the court recounted the plight of plaintiff Sandra Jones, an innocent owner who lent her car to her estranged husband, who was arrested on drug charges. n265 Even though the charges against her husband were later dismissed, the Police Department retained her car for nearly ten months during the pendency of her forfeiture hearing, while Ms. Jones had no means of challenging that retention. n266 Thus, although she had a strong claim that she was the vehicle's true owner and had nothing to do with her estranged husband's criminal misconduct, she was without her vehicle for nearly a year, while still making monthly payments. n267 That inequity prompted the *Krimstock* panel to address the peculiar nature of the "plight of innocent owners" under the New York City Administrative Code. n268

Indeed, the *Krimstock* court found that Ms. Jones' predicament "vividly illustrated" the impact of the New York City procedure on innocent owners. n269 The court highlighted the uniqueness of the New York procedures as compared with the comparable procedures in other states that uniformly offered more explicit protection to innocent owners. n270 In contrast, under section 14-140, potentially innocent owners could be deprived of their vehicles for extended periods without any opportunity to be heard before a neutral arbiter during a vehicle's retention. n271 The court emphasized the "heightened potential for erroneous retention [\*70] where an arrestee . . . is not the owner of the seized vehicle," and, focusing on Ms. Jones's circumstances, concluded that "[t]he plight of innocent owners . . . persuades us that an early retention hearing following seizure under N.Y.C. Code § 14-140 is constitutionally required." n272

The Second Circuit's "special concern" for innocent owners centered on the fact that section 14-140 did not, on its face, contain any limitation protecting innocent owners from the risk of erroneous deprivation. n273 Because of that risk, and the lack of any limitation, the court reasoned that the "plight of innocent owners" was a central reason for requiring an early retention hearing. n274 Since the creation of the *Krimstock* due process hearing, OATH courts have uniformly recognized the innocent owner defense as a "well-established" objection to vehicle retention. n275

[\*71] When a claimant raises the innocent owner defense, the Police Department bears the burden of proving, by preponderance of the evidence, that the vehicle's owner is not entitled to relief. n276 To meet its burden, the Police Department must prove that the claimant "permitted or suffered" the illegal use of the vehicle. n277 The "permitted or suffered" standard is fulfilled where the alleged innocent owner "knew or should have known that the car would be used as the instrumentality of or in furtherance of a crime." n278 [\*72] However, even if the claimant is determined to be "innocent," the Police Department may be entitled to retain the vehicle if there is a determination that the claimant is not the true or beneficial owner. n279

As a preliminary matter, only the vehicle owner or its driver has standing to appear at the *Krimstock* hearing and request the vehicle's release pending litigation. n280 Furthermore, "[o]nly one person or entity may appear as the claimant at the hearing, and preference shall be given to the registered owner of the vehicle." n281 In other words, the vehicle owner's right to challenge the Police Department's continued retention of a seized vehicle trumps the right of a driver to similarly challenge the detention. Thus, when a car has been seized by a lien holder or title has been signed over to a third party, and the new owner chooses not to pursue a *Krimstock* hearing, no *Krimstock* challenge will be heard. n282 A beneficial owner--who is neither the registered nor titled owner--is likewise not entitled to assert standing. n283

With respect to the merits of the innocent owner defense, various factors influence a court's determination of whether the claimant is an innocent owner entitled to the return of the seized vehicle. Most relevant to the analysis is: the owner's use of the vehicle; n284 whether the owner permitted the driver to use the vehicle; n285 and the driver's arrest history and the owner's [\*73] knowledge thereof, particularly where the prior arrests involved the use of a vehicle. n286 Although the name of the purported innocent owner on the title or registration is presumptive evidence of the claimant's ownership, the presumption may be rebutted by a showing, as noted above, that the owner permitted or suffered the illegal use. n287

Such was the case in *Police Department v. Kahn*, n288 where the vehicle owner's son was arrested for criminal possession of a loaded firearm and assault while driving the car. n289 The father claimed that he was the innocent owner of the vehicle and was, thus, entitled to its release. n290 The Police Department argued that, because the father purchased the vehicle for his son and did not use the vehicle himself, his son was the beneficial owner, n291 thereby barring the innocent owner defense. n292 The court agreed, finding that the car was used solely by the son, who had "unfettered access to the vehicle," and therefore OATH refused to honor the father's claim of innocent ownership. n293

[\*74] Whether the owner permitted the driver to use the vehicle is also a factor, though not necessarily determinative. n294 In *Police Department v. Thompson*, the vehicle owner's son was arrested for resisting arrest while driving the vehicle. n295 The court found that the mother was an innocent owner, despite the fact that she gave her son permission to use the vehicle. n296 The court noted that she merely gave her son permission to take her own father shopping and that "it is highly unlikely that she will repeat that mistake." n297

Conversely, in *Police Department v. Walton*, n298 the owner's son was arrested on a narcotics charge while driving the vehicle. n299 The claimant raised the innocent owner defense, but OATH concluded that the evidence determined that she was not innocent. n300 Rather, the court found that the claimant knew of her son's prior drug conviction and had entered into a written agreement with the Police Department restricting her son's use of the vehicle following his prior arrest. n301 By allowing her son to use the automobile, she violated the agreement, "utterly refut[ing]" any claim that she was an innocent owner. n302

Also important is the alleged innocent owner's knowledge of the driver's past criminal history, especially where the prior offense [\*75] involved an automobile. n303 For example, in *Police Department v. Chase*, OATH found that the owner was not innocent due to his knowledge of his son's prior arrest on a drug charge involving the same vehicle. n304 The fact that the owner had given his son "ready access" n305 to the same vehicle in which he had been arrested just a year earlier was sufficient to fulfill the Police Department's burden of proving that the owner was not innocent. n306 *Chase* must be juxtaposed with *Police Department v. Reid*, where, despite the fact that the owner knew of the

driver's prior convictions, OATH returned the vehicle to the claimant because none of the driver's prior convictions involved the use of a vehicle. n307 Therefore, and because she had not given her son permission to use the vehicle on this occasion, OATH held that the Police Department had not fulfilled its burden. n308

[\*76] The Police Department often challenges purported innocent owners by claiming that the alleged innocent owner is not, in fact, the beneficial owner of the vehicle. n309 In other words, the Police Department argues that the arrested driver--not the owner of record raising the defense--had "dominion and control" over the seized vehicle. n310 OATH analyzes several factors when evaluating a claim of beneficial ownership, including: "the name on the documents related to ownership, who bears the expense for the vehicle or for the insurance, who is the primary user of the vehicle, how consistently the person uses the vehicle[,] and how many vehicles the person owns." n311 Therefore, documentation with respect to who possesses or maintains the vehicle, including traffic and parking violations, gas receipts, insurance records, repair receipts, and tolls become particularly relevant. n312

In *Police Department v. Moore*, n313 the claimant raised the innocent owner defense following the arrest of his son on a gun charge while operating the vehicle. n314 The claimant testified that [\*77] he, and not his son, purchased the car and was responsible for its upkeep. n315 Moreover, although the claimant allowed his son to borrow the car occasionally when home from college, the son did not have "frequent or regular use of the car." n316 The Police Department noted that the father owned two other vehicles and that he and his wife primarily used those vehicles to commute to work; thus, the Police Department argued that the son was the primary user of the subject vehicle and therefore its beneficial owner. n317 OATH rejected that argument, however, finding that it had "no factual predicate" because the son was away at college for most of the year and had to ask for permission to use the vehicle any time he was home from school. n318 Thus, the court held that the son was not the beneficial owner and ordered the vehicle released. n319

In *Police Department v. Padilla-Barham*, n320 the boyfriend of the claimant's daughter was arrested on marijuana and weapons charges while operating the vehicle. n321 The claimant raised the innocent owner defense, and the Police Department challenged by asserting that the claimant's daughter was, in fact, the beneficial [\*78] owner of the vehicle and that her boyfriend was a "joint" beneficial owner. n322 OATH concluded that the daughter was the beneficial owner because she was the "intended and eventual owner" of the car, paid for its maintenance, and used it for work. n323 The court continued, however, to find that her boyfriend was not a beneficial owner since he did not make maintenance payments, nor was there any "other evidence that quantified [the boyfriend's] use of the [seized] vehicle." n324

A recent development in the context of the innocent owner defense involves the claims of innocent *co-owners* as opposed to innocent sole owners. In *Property Clerk v. Harris*, n325 Delores Harris, the co-owner of a vehicle seized from her husband during a drug arrest, argued that she was entitled to challenge the vehicle's seizure. n326 OATH ordered the vehicle released to Mrs. Harris, finding that the Police Department failed to meet its burden of proving that she was not an innocent owner and that the Police Department failed to demonstrate that she had acted with constructive knowledge that her husband would use the car for illicit activity. n327 The Supreme Court of New York upheld the OATH ruling, but the Appellate Division of the First Department reversed, finding that the release of vehicles to claimed innocent co-owners during the pendency of future proceedings would, "as a practical matter," destroy the Police Department's "right to a share of future proceeds from an auction of seized vehicles." n328

The Court of Appeals affirmed the Appellate Division, but on different grounds. n329 New York's high court found that innocent co-owners may have a constitutionally significant interest entitling them to notice and an opportunity to be heard at a *Krimstock* hearing, but that co-owners faced a different burden than sole [\*79] owners. n330 Instead of requiring the Police Department to show that the claimant was not an innocent co-owner, those claiming innocent co-ownership are now required to show that their "possessory interest outweighs the City's need to impound the vehicle to (i) deter future criminal conduct, and to (ii) safeguard its right to future auction proceeds by preventing theft, sale, destruction or loss." n331 In order for an innocent co-owner, such as Mrs. Harris, to successfully carry that burden, the co-owner must demonstrate that he or she:

(i) is a registered and/or titled co-owner; (ii) was not a "participant or accomplice" in the underlying offense and did not "permit[]" or "suffer[]" the vehicle to be "used as a means of committing crime or employed in aid or furtherance of crime" . . . ; and that (iii) continued deprivation would substantially interfere with his or her ability to obtain critical life necessities, such as earning a livelihood, obtaining an education, or receiving necessary medical care. n332

*Harris's* paradigm has already trickled down to OATH hearings. For example, in *Police Department v. Miller*, n333 the claimant's husband was arrested on a drug charge while operating the subject vehicle. n334 The claimant asserted that she was an innocent co-owner, but conceded that although she was the sole owner on the title, she and her husband purchased the car together and shared its costs. n335 OATH noted that under *Harris*, the claimant was entitled to regain possession of the vehicle if she could show "that continued impoundment would substantially interfere with her 'ability to obtain critical life necessities such as [\*80] earning a livelihood, obtaining an education, or receiving necessary medical care.'" n336 OATH opined that "*Harris* does not require proof that it is impossible to survive without a vehicle," but, instead, that the impoundment must "substantially interfere[]" with an important life activity. n337 The claimant in *Miller* testified that she used the car every day to commute to work and to drop her child at school or day care. n338 OATH found that those important uses, along with evidence demonstrating that she "spent several hundred dollars for repair and improvements of the vehicle," satisfied her burden that continued impoundment would substantially interfere with her work and child care responsibilities. n339

#### IV. KRIMSTOCK PRACTICE POINTERS

In addition to developing a mastery of the legal concepts that form the basis for a successful *Krimstock* argument, it is important that practitioners understand the nature of the proceeding and identify strategic considerations that impact both the claimant's ability to regain possession of the seized vehicle and the disposition of the claimant's criminal charges. To that end, we first describe in detail a typical *Krimstock* hearing and the rules that govern it. n340 We then review two strategic considerations that often arise during the representation of a *Krimstock* claimant: whether to pursue settlement n341 and, if the matter proceeds to hearing, whether to permit the claimant to testify. n342

##### A. The *Krimstock* Hearing

As explained above, the Police Department must schedule a *Krimstock* hearing within ten business days of receiving a [\*81] claimant's hearing demand form. n343 When the hearing is scheduled, OATH notifies the parties of the date and time of the *Krimstock* hearing. n344 The parties are free to engage in settlement discussions prior to the scheduled date of the *Krimstock* hearing, but if no settlement is reached, the parties must report to OATH on the date and time mandated by the court. n345 On the day of the *Krimstock* hearing, an OATH judge conducts a settlement conference with the parties. n346 Pursuant to the OATH Rules of Practice, the judge mediating the conference cannot be the same judge assigned to preside over the *Krimstock* hearing. n347 In the event that the settlement conference is unsuccessful, the parties immediately proceed to the *Krimstock* hearing.

The *Krimstock* hearing is an expedited proceeding featuring brief opening statements, witness examination, and closing arguments. n348 After each side offers its opening statement to the court, the Police Department, the petitioner in a *Krimstock* hearing, n349 presents its case-in-chief. More often than not, the Police Department will open its case by offering into evidence several exhibits, including the arrest report and criminal complaint [\*82] report. n350 Due to the liberal evidence rules that govern OATH proceedings--the OATH rules do not require compliance with "technical rules of evidence, including hearsay rules" n351 --the Police Department's exhibits are generally admitted into evidence without issue. Indeed, counsel seldom objects during the introduction of evidence and the examination of witnesses. There is no rule prohibiting objections, however, and counsel is free to object whenever he or she feels that doing so is warranted. n352 Moreover, hearsay evidence, though permitted in OATH proceedings, is not necessarily entitled to the same weight as more reliable forms of evidence. n353

Once the exhibits have been admitted, the Police Department typically takes testimony from the claimant, if the

claimant is available. The claimant is often the only witness who will testify during the hearing. The Police Department's examination frequently takes the tone of cross-examination and, as a result, the typical role of counsel for the claimant is to rehabilitate the witness and elicit testimony from the claimant on topics that the Police Department avoided. In the judge's discretion, both counsel for the Police Department and counsel for the claimant may engage in multiple rounds of questioning during the examination of any witness. n354 Further, it is not uncommon for OATH judges to [\*83] participate in witness examination. Pursuant to the OATH rules of practice, judges "may call witnesses, may require any party to clarify confusion, fill gaps in the record, or produce witnesses, and may question witnesses directly." n355

Although the typical *Krimstock* hearing involves testimony from only the claimant, the OATH Rules of Practice permit the parties to call additional witnesses. n356 Such additional witnesses are occasionally necessary to establish the innocent owner's defense or bolster the vehicle owner's testimony concerning one of the elements of the *Krimstock* analysis. n357 Consistent with the liberal evidentiary rules, counsel for the claimant may introduce any relevant documents during his examination of the claimant or other witness, or at any time during the hearing. n358

After the parties have introduced their exhibits and completed their examination of the witnesses, the court directs the parties to make their closing arguments, beginning with the Police Department. Although "[o]n motion of the parties, or sua sponte, the . . . judge may direct written post-trial submissions," n359 the common practice in *Krimstock* proceedings is for the parties to present oral closing arguments. As with witness examination, in the judge's discretion, counsel may engage in several rounds of rebuttal arguments during closing arguments. n360 In rare circumstances, the court may, for good cause shown, grant a continuance of trial to allow the Police Department "to present rebuttal evidence in the form of testimony from witnesses not called [during] the petitioner's case-in-chief." n361 Similarly, the court may grant continuances to allow the claimant additional time [\*84] to respond to discovery requests that the Police Department makes at or shortly before the *Krimstock* hearing. n362

After all of the evidence has been presented and the record is closed, the judge renders a written decision, usually within three business days of the hearing. n363 If the claimant wins the *Krimstock* hearing, the Police Department must issue a Property Clerk's release authorizing the claimant to retrieve his vehicle from the city pound where it is being held. n364 If the Police Department is able to carry its burden under *Krimstock*, the City retains possession of the vehicle. In either case, the Police Department must initiate a forfeiture proceeding, if at all, no later than twenty-five days "after the claimant provides the property clerk with a district attorney's release." n365

## *B. Strategic Considerations*

### 1. Forfeiture and Settlement

Before plotting a strategy for a *Krimstock* proceeding, it is critical that a practitioner weigh his client's chances for success in [\*85] a subsequent forfeiture action. Regardless of the outcome of the *Krimstock* proceeding, pursuant to section 14-140 of the New York City Administrative Code, the Police Department may initiate a civil action in New York Supreme Court for a final adjudication that the vehicle be forfeited. n366 A forfeiture action is, in many ways, no different from a typical civil action under New York state law. Indeed, forfeiture actions typically feature motion practice, comprehensive discovery, and, in some cases, a trial on the merits. The Police Department's burden to succeed in a forfeiture action is not a high one. n367 The Police Department must prove by a preponderance of the evidence only that the vehicle owner used or permitted another to use the vehicle "as a means of committing crime or . . . in aid or furtherance of crime." n368

Some broad brush principles have been established by New York courts disposing of forfeiture actions. For example, it is settled that evidence of a conviction or plea of a driving while intoxicated offense is sufficient to satisfy the "in furtherance" requirement where the vehicle owner is the driver. n369 Additionally, New York courts have found the requirement met where the owner used the subject vehicle to leave the scene of a narcotics transaction, n370 used illegal drugs in the subject vehicle, n371 and solicited a prostitute to perform a sexual act in the subject vehicle. n372

Moreover, the Police Department can satisfy its burden [\*86] under section 14-140 even where the driver of the subject vehicle is *acquitted* of all criminal charges filed in connection with the seizure. n373

Given the minimal burden on the Police Department in forfeiture actions, it is not surprising that owners of seized vehicles have experienced little success litigating forfeiture actions on the merits. n374 The simplest way to avoid a forfeiture action is to negotiate a settlement agreement during the *Krimstock* phase because, at that early stage, the Police Department, if willing to negotiate, n375 is typically open to resolving both the *Krimstock* matter and the forfeiture matter. Therefore, barring the existence of a defense on the merits, on which to contest a forfeiture complaint, it is imperative that the *Krimstock* practitioner pursue settlement options during the *Krimstock* phase. n376

It is not uncommon for settlement talks to occur in the days or weeks leading up to a scheduled *Krimstock* hearing, and those talks are often informal in nature. In some cases, the Police Department will communicate a settlement offer via mail to either the owner or the owner's attorney. The typical settlement demand requests: (1) a settlement payment; n377 (2) that the owner execute a "hold [\*87] harmless" agreement absolving the Police Department of liability for any damage to the seized vehicle resulting from its seizure and storage; n378 (3) that the owner obtain a district attorney's release or a certified court disposition confirming that the vehicle is no longer needed as evidence in the underlying criminal case; n379 and (4) in [\*88] cases involving driving while intoxicated or other substance abuse, a request that the owner (if he or she was also the driver) undergo an alcohol/substance abuse assessment performed by a state certified Officer of Alcoholism and Substance Abuse Services ("OASAS") counselor. n380 Once the claimant has successfully complied with all of the terms of the settlement agreement, the Police Department issues a Property Clerk's release to the claimant and the matter is closed.

## 2. Testimony

In the event that the parties do not reach a settlement and the matter proceeds to a *Krimstock* hearing, the practitioner must confront the issue of whether to permit the claimant to testify. Indeed, although testimony from the owner of the vehicle can be crucial in challenging the Police Department's retention of the seized vehicle, a *Krimstock* practitioner should carefully review with the claimant the potentially negative consequences of testifying in the *Krimstock* hearing while criminal charges are pending against the vehicle owner. This is because the statements that the owner makes about the incident underlying the seizure while testifying in the vehicle retention hearing before OATH may [\*89] be used against the claimant in the pending criminal action. n381 There are two negative consequences that flow from invoking the Fifth Amendment during the *Krimstock* hearing. n382 First, the owner loses the opportunity to offer what might be helpful testimony. n383 Second, the owner's refusal to testify creates a substantial risk that the court will draw an adverse inference from the owner's silence and view the evidence in the light most favorable to the Police Department. n384

To minimize the damage of an adverse inference, a claimant may selectively invoke the Fifth Amendment. n385 For instance, where the claimant's *Krimstock* challenge relies on a notice argument, the claimant may offer testimony relating to that issue while remaining silent with respect to the events underlying the arrest and vehicle seizure. n386 Similarly, a claimant may elect to testify only to matters concerning his or her driving and criminal records in an effort to establish that reclaiming the seized vehicle would not create a risk to public safety. n387 In any event, the decision to allow a claimant to testify and where to draw the line in terms of the substance of that testimony should be made only after [\*90] consultation with the claimant and his or her criminal attorney and careful consideration of the potential consequences. n388

## V. CONCLUSION

To the unrepresented claimant seeking the return of a seized vehicle, the labyrinth of bureaucratic agencies and procedures involved in the *Krimstock* process are, in a word, overwhelming. To an attorney, steeped in the basics of *Krimstock's* underlying rationale and the related principles developed by OATH precedent and outlined in this article, the process should be manageable.

The vehicles seized and improperly retained by the Police Department are often more than a hunk of metal of a varying value. To some, they are a ticket to economic independence, the only means of commuting to a job and earning a livelihood. To others, they are an instrumental component of caring for children or dependent relatives. To many, they are often an item of individual pride, often a claimant's most valuable, material possession. To all, they are important. By representing *Krimstock* claimants on a pro bono basis where vehicles are being improperly retained by the Police Department, an attorney does more than merely help indigent clients recover their vehicles. The attorney helps those clients work, helps those clients care for their families, and most important, helps fulfill the promise of equal justice, by showing that you can, indeed, fight city hall.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Remedies Forfeitures Hearings Criminal Law & Procedure Criminal Offenses Vehicular Crimes General Overview Criminal Law & Procedure Sentencing Forfeitures Proceedings

### FOOTNOTES:

n1 *Police Dep't v. Braxton*, OATH Index No. 1154/08, slip op. at 1-2 (OATH Dec. 26, 2007). Co-author Kevin M. McDonough assisted in the representation of Ms. Braxton.

OATH opinions are available to the public, for free, at the Center for New York City Law website, <http://www.citylaw.org/CITYADMIN.PHP>.

n2 *Braxton*, OATH Index No. 1154/08, slip op. at 4. Braxton's plight is commonplace. From 1999, when New York City Mayor Rudolph W. Giuliani announced a bold initiative to seize and forfeit vehicles involved in driving while intoxicated offenses, to March 9, 2004, the New York Police Department seized 8607 cars from drunk driving suspects. Susan Saulny, *City Police Giving Back Seized Cars*, N.Y. TIMES, Mar. 9, 2004, at B1.

n3 *Braxton*, OATH Index No. 1154/08, slip op. at 1.

n4 *See id.* at 1, 4.

n5 *See infra* notes 23-76 and accompanying text.

n6 *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), cert. denied, 539 U.S. 969 (2003).

n7 *See infra* notes 77-118 and accompanying text.

n8 Police Dep't v. Williams, OATH Index No. 1759/07, slip op. at 5 (Apr. 12, 2007).

n9 See *infra* notes 119-339 and accompanying text.

n10 See *Krimstock v. Kelly*, No. 99 Civ. 12041, 2007 U.S. Dist. LEXIS 82612, at \*4-\*6 (S.D.N.Y. Oct. 1, 2007); *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*2 (S.D.N.Y. Dec. 2, 2005); *infra* notes 119-158 and accompanying text.

n11 See *infra* notes 159-189 and accompanying text.

n12 See *infra* notes 190-227 and accompanying text.

n13 See *infra* notes 228-263 and accompanying text.

n14 See *infra* notes 249-263 and accompanying text.

n15 See *infra* notes 264-339 and accompanying text.

n16 *Krimstock v. Kelly*, 306 F.3d 40, 56 (2d Cir. 2002) (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993)), *cert. denied*, 539 U.S. 969 (2003).

n17 Police Dep't v. Kistoo, OATH Index No. 1906/07, slip op. at 5 (OATH May 8, 2007) (quoting N.Y. CITY, N.Y., CODE § 14-140(e)(1) (2008)).

n18 See *infra* notes 343-65 and accompanying text.

n19 See *infra* notes 366-88 and accompanying text.

n20 *Prop. Clerk v. Pagano*, 573 N.Y.S.2d 658, 659 (App. Div. 1991) (citing N.Y. CITY, N.Y., CODE § 14-140

(e) (2008)).

n21 *Id.*; see also *N.Y. PUB. HEALTH LAW § 3388(2)* (McKinney 2002) (permitting forfeiture where vehicle "used in connection with acts or conduct" sufficient to support certain felony drug charges).

n22 For a discussion of the interplay between the merits of a potential forfeiture hearing and the strategy for a *Krimstock* hearing, see *infra* notes 366-90 and accompanying text.

n23 For a detailed discussion of the historical tradition of forfeiture, see generally *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681-87 (1974).

n24 See William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 *TEMP. L. REV.* 1087, 1104 (1994).

The noxal surrender also has roots in the Laws of Alfred the Great, specifically Chapter 13, which provides that a deceased's relatives are to take the tree that fell on and killed their kinsman due to a fellow workman's negligence. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 181 (1973). Traces of noxal surrender also appear in the customs of African tribes.

Among the Akamba, accidental killing was always compensated by only half the amount of blood-money for intentional killing. This is called *mbanga*, which is a word also used by the Akikuyu to signify the killing of a man by some article or animal belonging to another. Both the Akikuyu and the Akamba would award the article or the animal causing the death to the deceased's relatives.

T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 139 (1956).

n25 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 7 (Little, Brown and Company 1973) (1881). The Supreme Court of the United States labeled Holmes' discussion of forfeiture as "a brilliant chapter." *United States v. U.S. Coin & Currency*, 401 U.S. 715, 720 (1971).

n26 *Exodus* 21:28 declares: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." *Exodus* 21:28.

Although Holmes cited this well-known Old Testament passage as the precursor to modern forfeiture, HOLMES, *supra* note 25, at 7, other scholars, including Jacob J. Finkelstein, a professor of assyriology and Babylonian literature, disagree. According to Professor Finkelstein, the deodand is

not strictly of biblical origin. Nowhere in the Bible is there to be found the slightest suggestion that an *inanimate* object that had been the direct or indirect cause or agent of a person's death was to be forfeited, or that its value was to be computed in terms of money which then would be claimed by the authorities as a forfeiture.

Finkelstein, *supra* note 24, at 180. Moreover, the biblical goring ox verse does not, in the strictest sense, contemplate a civil forfeiture because the sovereign does not seize the ox or its value, nor does society benefit by consuming the offending animal. *Id.*; see also STEVEN L. KESSLER, NEW YORK CRIMINAL AND CIVIL FORFEITURE § 2.01 (2007). Furthermore, there is no evidence in subsequent Jewish sources that Exodus 21:28 was implemented. Finkelstein, *supra* note 24, at 180. Thus, Professor Finkelstein argues that "[t]he institution of deodands is almost certainly the result of the confluence and merger of two traditions, the biblical and pre-Christian ones." *Id.* at 181.

n27 HOLMES, *supra* note 25, at 7-9. Under Greek law, if a slave killed another person, the slave was delivered to the deceased's relatives, whereas if a slave injured another person, the slave was forfeited to the injured party. *Id.* at 7. In addition, if a beast or an inanimate object caused the death of another, the offending property was cast beyond the borders. *Id.* at 8. In approximately 200 A.D., Pausanias, the Greek traveler and geographer, observed that in the Prytaneum, "they still sat in judgment on inanimate things." *Id.*

n28 *Id.* at 8-9. Under Roman law, if an animal or slave committed a tort, the tortfeasor was surrendered or the damage paid for. *Id.* at 8; see also The Twelve Tables VIII.1, translated in 1 S.P. SCOTT, THE CIVIL LAW 69 (1932) ("If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury.").

New York courts recognize the deep historical underpinnings of forfeiture proceedings. *Prop. Clerk v. Molomo*, 583 N.Y.S.2d 251, 253 (App. Div. 1992) (citing *Exodus* 21:28) (discussing forfeiture's historical tradition and noting that "forfeiture is not a new phenomenon"); *Prop. Clerk v. Small*, 582 N.Y.S.2d 932, 933 n.1 (N.Y. Sup. Ct. 1992) (citing HOLMES, *supra* note 25, at 7-9).

n29 See Finkelstein, *supra* note 24, at 185. One scholar defined deodands as, "properly speaking, . . . *objects*, including immovable ones, which are the direct agents of a man's death, whether they belong to the deceased himself or to someone else. The deodand objects are not themselves confiscated, but their value assessed, the proceeds then being due to the Crown as a forfeiture." *Id.*

n30 *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 & n.16 (1974) (citing HOLMES, *supra* note 25, at 1-38).

n31 James R. Maxeiner, Note, *Bane of American Forfeiture Law-Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977) (citing *Calero-Toldeo*, 416 U.S. at 680-83).

n32 *Molomo*, 583 N.Y.S.2d at 253.

n33 Finkelstein, *supra* note 24, at 180-81 (discussing historical evolution of forfeiture).

The Supreme Court has discussed forfeiture's medieval roots, referencing one medieval English writer who stated, "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." *United States v. U.S. Coin & Currency*, 401 U.S. 715, 719-20 (1975) (quoting HOLMES, *supra* note 25, at 25). In the early Middle Ages, deodands may have been an alternative to blood feuds, as the instrumentality of death replaced the slayer's family as the object of vengeance. Maxeiner, *supra* note 31, at 771.

n34 Finkelstein, *supra* note 24, at 183. Originally, property, or its value, was forfeited to the crown in "the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses." *Calero-Toledo*, 416 U.S. at 681. Those benevolent purposes, however, soon gave way to "pure, unadulterated greed," as the crown viewed forfeiture as a revenue raising device. KESSLER, *supra* note 26, § 2.01; *see also* F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 12 (1936) (observing that forfeiture was profitable source of revenue); Finkelstein, *supra* note 24, at 182 ("[T]he deodand already at an early date was little more than a source of revenue for whosoever had been designated as the public beneficiary." (citing *Law of Deodands*, 3 LAW MAG. 198 N.S. (1845))); Maxeiner, *supra* note 31, at 771 (finding that deodands provided English kings with "small but steady source of income"); Alice Marie O'Brien, Note, "*Caught in the Crossfire*": *Protecting the Innocent Owner of Real Property From Civil Forfeiture Under 21 U.S.C. § 881(a)(7)*, 65 *ST. JOHN'S L. REV.* 521, 524 n.21 (1991) (commenting that the Crown's "charitable religious purpose" of using value of deodand to pay for religious services "was soon discarded . . . and the practice became nothing more than a convenient source of revenue for the state").

n35 England abolished deodands through The Deodands Act, 9 & 10 Vict. c. 62 (1846). 6 EARL OF HALSBURY, *HALSBURY'S LAWS OF ENGLAND* 722 n.(m) (1932). That legislative action accompanied passage of the first "Act of Compensating the Families of Persons Killed by Accidents," a wrongful death statute. Finkelstein, *supra* note 24, at 170-71; *see also Calero-Toledo*, 416 U.S. at 680-83 (discussing the demise of deodand concept and its rejection in America).

n36 *See* Carpenter, *supra* note 24, at 1104-05. "In the fourteenth century, statutes of Edward III provided for the forfeiture of illegally imported cloth and unauthorized fur coats." *Id.* Later, the Statutes of Edward IV called for the "forfeiture of underpriced foreign grain" and various imported manufactures, and subsequent legislation, enforceable by forfeiture, prohibited, among other things, the exporting of sheep. *Id.*

n37 *Calero-Toledo*, 416 U.S. at 682. One such customs statute was the Navigation Act of 1651, a legislative attempt to bolster the shipping trade, that permitted the forfeiture of vessels and goods. *See* LAWRENCE A. HARPER, *THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING* 50-51 (1939).

Justice Brennan, writing for the Court, observed that statutory forfeitures pursuant to navigation and customs acts were typically enforced via in rem procedures utilized by the Court of Exchequer to forfeit the property of felons. *Calero-Toledo*, 416 U.S. at 682. Those proceedings, brought in the Court of Exchequer, that is, "the court of the King's revenue," were prosecuted either by an attorney for the Crown or by an individual suing *qui tam*, that is suing for himself and the state. Maxeiner, *supra* note 31, at 775; *see also* Carpenter, *supra* note 24, at 1105 (discussing regular procedures used in vice-admiralty courts and Court of Exchequer, in which forfeiture actions were brought in rem). The first American civil forfeiture actions were modeled on the

proceedings of the Court of Exchequer. Maxeiner, *supra* note 31, at 783.

n38 The survival of legal traditions, beliefs, and necessities from age to age is a "common phenomenon" that has permitted untold rules and principles to populate our jurisprudential and statutory landscape. O'Brien, *supra* note 34, at 523-24.

n39 Two opinions penned by Justice Story demonstrate the Supreme Court's early acceptance of the legal fiction underlying in rem civil forfeitures. *Harmony v. United States*, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel . . . is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference . . . to the character or conduct of the owner."); *The Palmyra*, 25 U.S. (11 Wheat.) 1, 14-15 (1827) (concluding that alleged offense was committed by ship, not any individual).

n40 *Calero-Toledo*, 416 U.S. at 683 (alteration in original) (quoting *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1943)). In fact, the First Congress began the American tradition of seizing and confiscating property. See Carpenter, *supra* note 24, at 1105; see also *Harmony*, 43 U.S. at 233 ("The vessel . . . is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference . . . to the character or conduct of the owner."). As one scholar aptly observed, "[T]he founding of a new nation did little to change the ancient tradition of forfeiture." KESSLER, *supra* note 26, § 2.01.

n41 *United States v. Ursery*, 518 U.S. 267, 274 (1996) (citing Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39) (repealed 1790)).

n42 *Id.* (citing Act of July 31, 1789, ch. 5, § 23, 1 Stat. 43) (repealed 1790)).

n43 *Id.* (citing Act of July 31, 1789, ch. 5, § 34, 1 Stat. 46) (repealed 1790)).

n44 Carpenter, *supra* note 24, at 1105 (citing Resolution of Nov. 25, 1775, quoted in *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 54-56 (1795)).

n45 *Id.* at 1105 (collecting citations).

n46 See, e.g., *Boyd v. United States*, 116 U.S. 616, 621, 633-35, 638 (1886) (finding that property owner may claim Fifth Amendment privilege against self-incrimination in in rem proceeding against his property); *Harmony v. United States*, 43 U.S. (2 How.) 210, 210 (1844) (treating forfeitable vessel as offender despite owner's fully established innocence); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) ("[T]he practice [of

forfeiture] has been, and so this Court understand[s] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.""); *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 299 (1796) (forfeiting a vessel for exporting arms and ammunition in violation of federal law).

Specifically, the Civil War spurred a "radical change in the law of forfeiture," as Congress, via the Confiscation Acts, "approved the use of *in rem* proceedings to impose purely punitive sanctions" against Confederate soldiers. See Maxeiner, *supra* note 31, at 785. Despite significant misgivings about the appropriateness of the Confiscation Acts, the Supreme Court of the United States upheld their constitutionality in a triumvirate of 1871 decisions. See Maxeiner, *supra* note 31, at 787 & n. 112 (citing *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 331 (1871); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 313-14 (1871); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 262, 266 (1871)).

n47 *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921). Similar sentiments were expressed two years earlier by the United States Court of Appeals for the Fourth Circuit: "No doubt has ever existed of the power of Congress to impose the penalty of forfeiture on property used to defeat the revenue laws, without respect to the guilt of the owner or his knowledge of the unlawful use." *United States v. One Saxon Auto.*, 257 F. 251, 252 (4th Cir. 1919).

n48 *Prop. Clerk v. Molomo*, 583 N.Y.S.2d 251, 253 (App. Div. 1992) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)).

n49 See, e.g., Carpenter, *supra* note 24, at 1109; see also Lawrence A. Kasten, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 194-95 (1991); Amy D. Ronner, *Prometheus Unbound: Accepting a Mythless Concept of Civil In Rem Forfeiture with Double Jeopardy Protection*, 44 BUFF. L. REV. 655, 657 (1996); David J. Taube, *White Collar Crime Procedural Issues: Civil Forfeiture*, 30 AM. CRIM. L. REV. 1025, 1026 (1993).

n50 See, e.g., GA. CODE ANN. § 16-13-49 (2007) (providing for forfeiture of controlled substances); IDAHO CODE ANN. §37-2744A(a) (2002) (mandating the forfeiture of property used to commit or facilitate violations relating to controlled dangerous substances); N.J. STAT. ANN. § 2C:64-3 (West 2005) (requiring forfeiture of controlled dangerous substances, firearms, gambling devices, untaxed cigarettes, untaxed special fuel, and unlawful recordings); UTAH CODE ANN. §58-37-13 (2007) (noting forfeiture of controlled substances).

n51 8 U.S.C. § 1324(b)(1) (2006).

n52 18 U.S.C. § 981(a)(1)(A) (2006).

n53 § 924(d).

n54 19 U.S.C. § 1305(c) (2006); *see also id.* § 1305(a) (requiring forfeiture of immoral articles including obscenity, inducements to treason, certain abortifacients, and lottery tickets).

n55 17 U.S.C. § 506(b) (2006).

n56 18 U.S.C. § 492 (2006).

n57 21 U.S.C. § 881(a)(6) (2006). Section 881 is the centerpiece of federal forfeiture and is "the most comprehensive of the forfeiture statutes." Taube, *supra* note 49, at 1027; *see also* David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 4.01 (1991) (describing centrality of narcotics forfeiture in federal government's law enforcement arsenal).

n58 § 673(a) (providing for forfeiture of diseased animals transported in commerce).

n59 *See* 18 U.S.C. § 545 (2006) (mandating forfeiture of goods brought into the United States to defraud customs); *Nat'l Atlas Elevator Co. v. United States*, 97 F.2d 940, 941, 945 (8th Cir. 1938).

n60 *See* § 1762(b) (2006) (noting forfeiture of unlawfully transported prison-made goods).

n61 19 U.S.C. § 2093 (2006) (requiring forfeiture of "pre-Columbian monumental or architectural sculptures or murals imported" without certificate from the country of origin). For more examples of items subject to forfeiture under federal statute *see* Carpenter, *supra* note 24, at 1109-10.

n62 Kasten, *supra* note 49, at 194; *see also Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932) ("Forfeiture of vehicles . . . is one of the time-honored methods adopted by the government for the repression of . . . crime."); O'Brien, *supra* note 34, at 521 (referring to forfeiture statutes as "potent and effective means of combating . . . extensive criminal practices" and labeling forfeiture actions as "logical deterrent" to criminal conduct).

n63 Cary Copeland, *Civil Forfeiture for the Non-Lawyer*, BUREAU OF JUSTICE ASSISTANCE: ASSET FORFEITURE PROJECT, Spring 1992, at 2.

n64 At least seventeen New York statutes permit forfeiture. KESSLER, *supra* note 26, § 7.07[1]. Those statutes provide for the forfeiture of, among other items: vehicles, vessels, or aircraft used to facilitate the transportation, carrying, or conveyance of controlled dangerous substances, *N.Y. PUB. HEALTH LAW* § 3388(2) (McKinney 2002); cigarettes on which taxes have not been paid and vending machines or receptacles in which such cigarettes are maintained, *N.Y. TAX LAW* § 1846(a) (McKinney 2004); stolen property, *N.Y. ABAND. PROP. LAW* § 1310 (McKinney 1991 & Supp. 2008), *N.Y. PENAL LAW* § 450.10 (McKinney 2002), and *N.Y. PERS. PROP. LAW* §§ 254, 258 (McKinney 2002); equipment used for the promotion of pornography, *N.Y. PENAL LAW* § 410 (McKinney 2002); vehicles, vessels, and aircraft used to transport or conceal gambling records, *id.* §415; and equipment used in the production of unauthorized sound recordings, *id.* § 420.05.

New York law also provides for an outlier form of forfeiture under article 13-A of the New York Civil Practice Law and Rules ("C.P.L.R."). See *Morgenthau v. Citisource Inc.*, 500 N.E.2d 850, 853 (N.Y. 1986) (permitting the forfeiture of the proceeds or instrumentalities of a crime). C.P.L.R. section 1311(1) creates a "civil, remedial and *in personam*" statutory action. *Id.* That proceeding's *in personam* nature runs contrary to the millennia-long *in rem* tradition of forfeiture proceedings.

n65 KESSLER, *supra* note 26, § 7.02.

n66 David B. Smith, *Cities Fight 'Quality of Life' Offenses with Forfeiture Blunderbuss*, THE CHAMPION, March 2000, at 28 (describing section 14-140 as "a very old, incomprehensibly written local ordinance").

n67 N.Y. CITY, N.Y. CODE § 14-140(a) (2008) (describing duties of the property clerk).

n68 *Id.* § 14-140(b). That section reads, in full:

All property or money taken from the person or possession of a prisoner, all property or money suspected of having been unlawfully obtained or stolen or embezzled or of being the proceeds of crime or derived through crime or derived through the conversion of unlawfully acquired property or money or derived through the use or sale of property prohibited by law from being held, used or sold, all property or money suspected of having been used as a means of committing crime or employed in aid or furtherance of crime or held, used or sold in violation of law, all money or property suspected of being the proceeds of or derived through bookmaking, policy, common gambling, keeping a gambling place or device, or any other form of illegal gambling activity and all property or money employed in or in connection with or in furtherance of any such gambling activity, all property or money taken by the police as evidence in a criminal investigation or proceeding, all property or money taken from or surrendered by a pawnbroker on suspicion of being the proceeds of crime or of having been unlawfully obtained, held or used by the person who deposited the same with the pawnbroker, all property or money which is lost or abandoned, all property or money left uncared for upon a public street, public building or public place, all property or money taken from the possession of a person appearing to be insane, intoxicated or otherwise incapable of taking care of himself or herself, that shall come into the custody of any member of the police force or criminal court, and all property or money of inmates of any city hospital, prison or institution except the property found on deceased persons that shall remain unclaimed in its custody for a period of one month, shall be given, as soon as practicable, into the custody of and kept by the property clerk except that vehicles suspected of being stolen or abandoned and evidence vehicles as defined in subdivision b of section 20-495 of the code may be taken into custody in the manner provided for in subdivision b of section 20-519 of

the code.

*Id.*

n69 *McClendon v. Rosetti*, 460 F.2d 111, 116 (2d Cir. 1972). There, a class of individuals whose property was seized challenged the constitutionality of section 14-140 (then, identified as N.Y. CITY, N.Y., CODE § 435-4.0), arguing that it was arbitrary and violated their constitutional due process rights. *Id.* at 113. In finding the statute unconstitutional, the court found the provisions wanting in terms of notice and due process protections. *Id.* at 114-15; see also *McClendon v. Rosetti*, No. 70 Civ. 3851, 1993 U.S. Dist. LEXIS 6274, at \*3-\*4 (S.D.N.Y. May 12, 1993) (outlining notice requirements, district attorney's ("DA") release, distribution of property where no arrest, vouchering procedures, and forfeiture procedures).

n70 KESSLER, *supra* note 26, § 7.05; see also *Alexandre v. Cortes*, 140 F.3d 406, 413 (2d Cir. 1998) ("Nearly twenty-six years have now gone by since our decision in *McClendon*, yet the City has still not amended its Administrative Code to eliminate the unconstitutional provisions of § 14-140.").

n71 Although the rules applicable to forfeiture proceedings codified in the New York City Rules and Regulations, see 38 N.Y.C.R.R. §§ 12-01 to -19 (2007), are beyond the purview of this article, attorneys litigating forfeiture disputes would be well-served to consult Steven L. Kessler's thorough treatise, *New York Criminal and Civil Forfeitures*, which devotes an entire chapter to forfeiture actions under section 14-140 and the implementing regulations of New York City. See generally KESSLER, *supra* note 26, §§ 7.01-.07 (providing an overview of New York's civil and criminal forfeiture laws).

n72 *Grinberg v. Safir*, 694 N.Y.S.2d 316, 319 (Sup. Ct. 1999) (noting statutory basis of forfeiture).

n73 KESSLER, *supra* note 26, § 7.07[1]; see also Paul Zielbauer, *Police to Seize Cars of People Accused of Drunken Driving*, N.Y. TIMES, Feb. 21, 1999, at 1.

Soon after the codification of title 38, chapter 12 of the New York City Rules and Regulations, the Police Department announced the rules would apply to its driving while intoxicated initiative. Prop. Clerk v. River, N.Y.L.J., Oct. 2, 2000, slip op. at 25 (Sup. Ct.).

n74 Police Commissioner Howard Safir even admitted that the New York Police Department would be using a "creative" interpretation of section 14-140. Michael Cooper, *Driving Drunk to Mean Loss of the Vehicle*, N.Y. TIMES, Jan. 22, 1999, at B1.

n75 National Highway Traffic Safety Administration, Traffic Safety Digest, N.Y.P.D. Vehicle Forfeiture Initiative (2004), [http://www.nhtsa.dot.gov/people/outreach/safedige/spring2004/SPR04\\_W04\\_NY.htm](http://www.nhtsa.dot.gov/people/outreach/safedige/spring2004/SPR04_W04_NY.htm) (last visited Dec. 15, 2008).

n76 Mayor Giuliani's drunk driving policy was a lightning rod for litigation, as the day after the policy was announced the New York Civil Liberties Union filed suit on behalf of one of the first claimants subjected to the policy. Smith, *supra* note 66, at 28.

n77 *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), cert. denied, 539 U.S. 969 (2003).

n78 The class, which brought their suit under 42 U.S.C. § 1983 (2006), was defined as all "persons whose vehicles have been seized by the New York City Police Department upon arrest, and kept in police custody for a prospective or pending action to forfeit such vehicles as the alleged instrumentalities of crimes, or as evidence." *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*3 (S.D.N.Y. Dec. 2, 2005) (certifying class).

n79 *Krimstock*, 306 F.3d at 44. The plaintiffs did not contest the property clerk's authority, pursuant to section 14-140, to take custody, following seizure, of property "suspected of having been used as a means of committing crime or employed in aid or furtherance of crime." *Id.* at 44 (quoting N.Y. CITY, N.Y., CODE § 14-140(b) (2008)).

n80 The city seized the vehicles of all seven named plaintiffs between March and May of 1999. *Krimstock*, 306 F.3d at 45-47. Six of the seven named plaintiffs were arrested for driving while intoxicated, in violation of *New York Vehicle and Traffic Law § 1192(2)* (McKinney Supp. 2008), and those six named plaintiffs pled guilty to the lesser charge of driving while impaired in violation of § 1192(1). *Id.* at 46 & n.5.

n81 *Id.*

n82 *Id.* To recover his license, Walters paid a fine, performed community service, and completed a drunk driving program. *Id.*

n83 *Id.*

n84 *Id.* The other circumstances recounted by the Second Circuit were no less sympathetic. For example, Valerie Krimstock, a forty-eight-year-old woman with a previously untarnished record, pled guilty to driving while impaired four months after being served with a forfeiture complaint. *Id.* However, she waited eleven months for a judge to dismiss the forfeiture action and order the return of her vehicle, a vehicle on which she continued to make monthly payments. *Id.*

In addition, the court discussed the plight of Charles Flatow, another first-time driving while intoxicated arrestee, who was arrested in April 1999. The property clerk commenced a forfeiture action against Flatow in June 1999. However, by December of that year Flatow had yet to receive a hearing in the forfeiture action at which he planned to introduce evidence that a prescription anti-depressant caused an exaggerated blood alcohol content. *Id.*

n85 *Id. at 47.* The court also addressed plaintiffs' Fourth Amendment concerns. Recognizing that the Fourth Amendment protects claimants from unreasonable seizures of property, the court concluded that a warrantless arrest was insufficient, in and of itself, to ensure the legality of the seizure. *Id. at 49-50.* In light of the factual circumstances of the named plaintiffs' hardships, the court was "left with grave Fourth Amendment concerns as to the adequacy of an inquiry into probable cause that must wait months or sometimes years before a civil forfeiture proceeding takes place," concerns heightened by the city's direct pecuniary interest in the proceeding's outcome. *Krimstock, 306 F.3d at 51.*

With respect to that pecuniary interest, the court noted that the "remedial purposes" of section 14-140 include revenue generation that offsets law enforcement costs. *Id. at 51* (citing *Prop. Clerk v. Hyne, 557 N.Y.S.2d 244, 248 (Sup. Ct. 1990)*); see also *KESSLER, supra* note 26, § 7.07[1] (noting that proceeds of forfeiture sales go "directly into the police pension fund, or what is euphemistically called the 'widows and orphans fund' "). Indeed, at least one court noted that the Property Clerk's use of proceeds from forfeiture sales "suggests at least the appearance of impropriety." *Prop. Clerk v. Hurd, 496 N.Y.S.2d 197, 201 (Sup. Ct. 1985).*

n86 *Krimstock, 306 F.3d at 47.*

n87 *Id. at 48.*

n88 *Id. at 51.*

n89 *Id. at 53.*

n90 *Id. at 54.*

n91 *Id. at 46.* The Second Circuit contrasted the then-governing procedures in New York City with those in other states, specifically Florida, Arizona, and California, in which statutes provide claimants an early opportunity to challenge the government's probable cause for seizing the property as well as the legitimacy of its retention during the pendency of forfeiture proceedings. *Krimstock, 306 F.3d at 54-55.*

n92 *Id. at 55-57.*

n93 *Id. at 56*. In March 1999, Jones' estranged husband was arrested for drug and weapons possession, charges that were later dismissed. *Id.* Two months later, the property clerk initiated a forfeiture action alleging that Jones "consented, suffered[,] or permitted" her vehicle to be used in the commission of the alleged crimes. *Id. at 46*.

n94 *Id. at 46*.

n95 Pursuant to section 202.6 of the New York Codes, Rules, and Regulations, "[a]t any time after service of process, a party may file a request for judicial intervention." N.Y. COMP. CODES R. & REGS. tit. 22 § 202.6 (2008). However, a request for judicial intervention can only be filed following the commencement of the city's forfeiture action, *Krimstock, 306 F.3d at 59*, a proceeding that the city need only initiate on a claimant's timely demand and, when such demand is made, within twenty-five days of such demand, 38 R.C.N.Y. § 12-36(a) (2007). Along with the request for judicial intervention, the claimant files a request for a preliminary conference. N.Y. COMP. CODES R. & REGS. tit. 22 § 202.12(a) (2008). That preliminary conference is held no later than forty-five days from its request. *Id.* § 202.12(b). However, according to the Second Circuit, because "[t]he rules do not explicitly permit a determination of probable cause or the legitimacy of continued retention at the preliminary conference, or even provide for the taking of evidence, . . . at most, the preliminary conference may serve . . . to set a future date for a probable cause hearing." *Krimstock, 306 F.3d at 59*. Thus, those rules indicate that, even with a request for judicial intervention, any determination of probable cause would come only after, at the soonest, approximately three months transpired from the vehicle seizure. *Id.*

n96 Article 78 codifies and draws together for procedural purposes the common law writs of prohibition, certiorari, and mandamus, and are brought against state or local administrative agencies or officials. *See N.Y. C.P.L.R. 7801* (McKinney 2008). The Second Circuit found this form of relief inadequate because it placed the onus on each claimant to file and pursue a separate civil action to force the City to justify its retention of the seized vehicle. *Krimstock, 306 F.3d at 59*. Moreover, claimants would bear the burden of showing a clear legal right to release of their vehicles. *Id. at 59-60*.

n97 *Krimstock, 306 F.3d at 59*.

n98 *Id. at 59-60*.

n99 *Mathews v. Eldridge, 424 U.S. 319 (1976)*.

In applying the *Mathews* balancing test, the court found the speedy trial test, articulated in *United States v. \$ 8,850, 461 U.S. 555 (1983)*, and *Barker v. Wingo, 407 U.S. 514 (1972)*, inapplicable because plaintiffs' claim was not concerned with the speed with which civil forfeiture proceedings themselves were adjudicated, but rather sought prompt post-seizure opportunity to challenge the legitimacy of the city's retention of the property pending resolution of the forfeiture actions. *See Krimstock, 306 F.3d at 68*.

n100 *Krimstock*, 306 F.3d at 60. In recognizing that due process is a flexible concept, the Supreme Court of the United States declared:

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

n101 *Krimstock*, 306 F.3d at 61 (quoting *Lee v. Thorton*, 538 F.3d 27, 31 (2d Cir. 1976)). The panel recognized other considerations bearing on the importance of the affected private interest, such as the availability of hardship relief (which the New York City Civil Administrative Code did not provide) and the length of deprivation. *Id.* at 61-62.

The court rejected the city's contention, accepted by the court below, that the private interest at stake in possession of an automobile was mitigated by the abounding mass transit options in the five boroughs. *Id.* at 62 (citing *Krimstock v. Safir*, No. 99 Civ. 12041, 2000 U.S. Dist. LEXIS 16444, at \*18 (S.D.N.Y. Nov. 13, 2000)). According to the Second Circuit, the breadth of section 14-140, which applies to all vehicles, not just those registered in New York City, as well as to commercial and non-commercial vehicles, defeated the mass transportation argument. *Krimstock*, 306 F.3d at 62. Moreover, the plight of the named plaintiffs further exemplified the inadequacy of the mass transit argument, as the seizure of plaintiff *Krimstock*'s vehicle hindered her ability to travel to work in a New York suburb and from visiting her mentally ill daughter in Pennsylvania. Likewise, the city's retention of *Walter*'s vehicle hampered his ability to reach his construction job sites, located throughout Long Island and New Jersey and often inaccessible via mass transit. Finally, *James Webb*, a seventy-seven-year-old named plaintiff, had difficulty attending doctor's appointments during his vehicle's retention. *Id.* at 62.

n102 *Id.* at 62-63. The court reiterated the narrowness of the city's victory on this factor, concluding that "[t]he scales are very nearly in equipoise," with respect to the second *Mathews* factor. *Id.* at 64.

n103 *Id.* at 62.

n104 *Id.* at 62-63 (citing *People v. Bennett*, 660 N.Y.S.2d 772, 774 (App. Div. 1997)).

n105 *Id.* at 64-67.

n106 *Id.* at 64.

n107 *Krimstock*, 306 F.3d at 65. Indeed, the Second Circuit observed that not only is a bond an adequate form of security to preserve property value, but a bond is in many ways a "superior form of security because it entails no storage costs or costs of sale." *Id.*

n108 *Id.* Other courts have also noted the city's ability to preserve asset value through less restrictive means. *Prop. Clerk v. Harris*, 878 N.E.2d 1004, 1011 (N.Y. 2007) (opining that the city may protect its interest in forfeiture proceeds by securing bond or seeking temporary restraining order prohibiting sale of property); *cf. County of Nassau v. Canavan*, 802 N.E.2d 616, 625 (N.Y. 2003) (noting that Nassau County could prevent the sale or destruction of forfeitable property by seeking bond, preliminary injunction, or temporary restraining order).

n109 *See, e.g., Police Dep't v. Monge*, OATH Index No. 836/08, slip op. at 3 (OATH Oct. 31, 2007) (citing *Police Dep't v. Junior*, OATH Index No. 1134/06, slip op. at 4 (OATH Feb. 8, 2006)).

n110 *Krimstock*, 306 F.3d at 65 (citing *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 88-89 (1992)).

n111 *Krimstock*, 306 F.3d at 67-68.

n112 Although "declin[ing] to dictate a specific form for the prompt retention hearing," the Second Circuit provided some guidance for the contemplated hearing, a hearing that "must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable cause for the initial warrantless seizure." *Id.* at 69.

Most important, the Second Circuit did not envision the *Krimstock* hearing "as a forum for exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing," but rather foresaw a limited, "initial testing of the merits of the City's case." *Id.* at 69-70.

Moreover, failure to conduct a *Krimstock* hearing may subject the City to civil liability under 42 U.S.C. § 1988 (2006). *See Remigio v. Kelly*, No. 04 Civ. 1877, 2005 U.S. Dist. LEXIS 16789, at \*8-\*9 (S.D.N.Y. Aug. 12, 2005).

n113 *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*3 (S.D.N.Y. Dec. 2, 2005).

n114 *Id.* at \*3-\*4.

The initial third prong has evolved considerably in the intervening years. Specifically, in *Police Dep't v.*

*Junior*, OATH held that vehicles could no longer be retained merely to preserve the value of the asset from sale, loss, or destruction. *Police Dep't v. Junior*, OATH Index No. 1134/06, slip op. at 4 (OATH Feb. 8, 2006). Thus, only a heightened risk to public safety satisfies the third prong. *Id.* at 3.

n115 See *Krimstock v. Kelly*, No. 99 Civ. 12041, 2007 U.S. Dist. LEXIS 82612, at \*10 (S.D.N.Y. Oct. 1, 2007).

n116 *Id.*

n117 *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*5. Judge Mukasey's order further stated that the *Krimstock* hearing before OATH must commence within ten business days of the Police Department's receipt of a written demand for such a hearing, unless OATH opts to extend the date on good cause shown by either party. *Id.* at \*7. It is the Police Department's responsibility to notify OATH, the claimant, and the DA of the hearing date and that, in circumstances in which the vehicle is needed as evidence in a criminal proceeding, no hearing may be held until the vehicle is no longer so needed. *Id.* at \*7-\*8. Indeed, an OATH hearing cannot be held until the DA states, in writing, that the seized vehicle is not needed as evidence in a pending criminal proceeding. *Id.* at \*8-\*9. However, later proceedings in this long-running litigation require an assistant district attorney ("ADA") to, ex parte, seek a retention order permitting the DA to hold the vehicle as evidence. *Krimstock v. Kelly*, 506 F. Supp. 2d 249, 254 (S.D.N.Y. 2007). Moreover, the ADA's application for a retention order must include: (1) an affirmation that there are reasons for the retention, what such reasons are and that such reasons relate to a contested issue in the underlying criminal proceeding; and (2) an affirmation that no other means besides impoundment, such as photographing or forensic testing, suffice to preserve the automobile's evidentiary value. *Id.* Should the court conclude that other means such as photographing or testing are sufficient to preserve the evidence, the court may order the vehicle to be retained for an appropriate time to permit law enforcement to so preserve the evidence. *Krimstock*, 2007 U.S. Dist. LEXIS 82612, at \*10.

Any decision made at OATH does not bind the New York civil or criminal courts in any way in a related proceeding. *Id.* at \*3. Similarly, any legal or factual theory advanced by the prosecution or the Police Department at the *Krimstock* hearing does not limit their advocacy in the civil or criminal court. *Id.*

Finally, the Second Amended *Krimstock* Order provides that OATH decisions are subject to review by the Supreme Court of New York. *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*9. An appeal of a *Krimstock* determination by OATH is properly pursued as an article 78 proceeding. See *Prop. Clerk v. Burnett*, N.Y.L.J., Aug. 6, 2004, slip op. at 18 (Sup. Ct.), *aff'd*, 801 N.Y.S.2d 592, 593 (App. Div. 2005), *rev'd*, 825 N.Y.S.2d 241 (App. Div. 2006), *aff'd*, 878 N.E.2d 1004 (N.Y. 2007).

n118 See *infra* Part III.A and accompanying text.

n119 *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*5 (requiring notice to be attached "to the voucher already provided to a person from whom a vehicle is seized"); see *Police Dep't v. Smith*, OATH Index No. 1796/07, slip op. at 3 (OATH May 21, 2007) ("The whole purpose of the *Krimstock* Order is to provide [them with] immediate notice to respondents and not require them to go to an auto pound to inquire about their rights."); *Police Dep't v. Ogando*, OATH Index 1747/07, slip op. at 4, 7 (OATH May 16, 2007) (releasing vehicle where

Police Department failed to prove service of notice at time of seizure).

n120 *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*5 (ordering copy of notice served at time of arrest to be mailed to owner within five business days); *see* Police Dep't v. Blyden, OATH Index No. 2398/07, slip op. at 2 (OATH July 25, 2007) (releasing vehicle where Police Department failed to mail timely notice to owner); Police Dep't v. House, OATH Index No. 587/07, slip op. at 4 (OATH Sept. 27, 2006) ("This tribunal has held that the *Krimstock* Order obligates the [police] department to service notice twice--once at the time of arrest and again by mail.").

n121 *Krimstock v. Kelly*, 306 F.3d 40, 51 (2d Cir. 2002) (declaring that even temporary seizures of property "must satisfy the demands of the Fourteenth Amendment"), *cert. denied*, 539 U.S. 969 (2003); *see also* Police Dep't v. Ramirez, OATH Index No. 2418/07, slip op. at 4 (OATH July 16, 2007) (citing Police Dep't v. Manning, OATH Index No. 1162/05, slip op. at 5 (OATH Jan. 25, 2005)); *Smith*, OATH Index No. 1796/07, slip op. at 2 ("The *Krimstock* Order's notice requirement serve to further its purpose of ensuring prompt forfeiture hearings to protect the due process rights of persons from whom vehicles have been seized without the issuance of a warrant." (citing *Krimstock*, 306 F.3d at 51)).

n122 *Smith*, OATH Index No. 1796/07, slip op. at 3 (releasing vehicle where no notice had been provided at the time of seizure or within five business days); *see also* Police Dep't v. Braxton, OATH Index No. 1154/08 slip op. at 2-3 (OATH Dec. 26, 2007) ("This tribunal has strictly construed the notice requirements.") (citing Police Dep't v. Blyden, OATH Index No. 2398/07, slip op. at 3-4 (OATH July 25, 2007)); *Ramirez*, OATH Index 2418/07, slip op. at 4 (releasing vehicle on bases of untimely notice, English-only notice, and untimely hearing).

n123 *Krimstock v. Kelly*, 506 F. Supp. 2d 249, 258 (S.D.N.Y. 2007) ("[L]ack of service is generally an affirmative defense, upon which the movant bears the burden.").

n124 Police Dep't v. Lee, OATH Index No. 778/08, slip op. at 12 (OATH Oct. 31, 2007) ("[O]nce challenged, the [police] department must show that it did meet its service obligations."); *see Smith*, OATH Index No. 1796/07, slip op. at 2-3 (finding no evidence that claimant was provided notice at either required time); Police Dep't v. Sica, OATH Index No. 1139/06, slip op. at 3 (OATH Jan. 26, 2006) (crediting claimant's testimony over form completed by arresting officer).

n125 *Lee*, OATH Index No. 778/08, slip op. at 11 ("[R]outinely keeping reliable records proving proper service of all notices mandated by the *Krimstock* Order not only makes sense, but is necessary and required."); *see also* Police Dep't v. Thomas, OATH Index No. 1447/08, slip op. at 3 (OATH Jan. 24, 2008) (declaring that the Police Department is not "entitled to a continuance whenever a respondent raises notice as a defense").

n126 *See, e.g.*, Police Dep't v. Ruiz, OATH Index No. 1440/07, slip op. at 3 (OATH Mar. 27, 2007) ("In light of respondent's persistent efforts to recover her vehicle, I found it unlikely that she would have ignored a notice

sent to her home."); *Police Dep't v. House*, OATH Index No. 587/07, slip op. at 2-3 (OATH Sept. 27, 2006) (finding no notice at time of seizure to claimant who had cooperated with police, was not so intoxicated as to not recall the arrest, and went to Property Clerk's office to locate her car); *Sica*, OATH Index No. 1139/06, slip op at 3-4 (finding no notice at time of seizure to claimant who was cooperative and whose sobriety test was "marginally over the limit").

n127 *Smith*, OATH Index No. 1796/07, slip op. at 2-3 (releasing vehicle where notice not provided at either required time).

n128 *See, e.g., Police Dep't v. Nunally*, OATH Index No. 169/08, slip op. at 4 (OATH July 30, 2007) ("Given the undisputed fact that notice was deficient, there is no need to address the merits . . ."); *Ruiz*, OATH Index No. 1440/07, slip op. at 4 (releasing vehicle where notice was not met and there was no proof of actual notice); *Police Dep't v. Murray*, OATH Index No. 1631/06, slip op. at 3-5 (OATH Apr. 25, 2006) (declining to reach merits where claimant did not receive notice until five months after the seizure).

n129 *Police Dep't v. Melendez*, OATH Index No. 1520/06, slip op. at 1, 3, 5 (OATH Apr. 5, 2006) (finding that the vehicle should be retained as driver was the owner of vehicle and was given notice at the time of seizure); *Police Dep't v. Cardona*, OATH Index No. 1476/06, slip op. at 1-2, 8 (OATH Mar. 29, 2006) (denying motion to dismiss petition on grounds that department did not meet its burden of proof of notice as it was found that respondent was both the owner of the vehicle seized and was clearly served with notice at the time of seizure).

n130 *See Police Dep't v. Adams*, OATH Index No. 1997/06, slip op. at 4 (OATH June 30, 2006) ("The Department's failure to mail a copy of [a registered] notice is not grounds for granting respondent's motion, since respondent, the registered owner, had actual notice of his rights at the time of arrest."); *Melendez*, OATH Index No. 1520/06, slip op. at 3 (finding mail notice not required where owner was driver); *Cardona*, OATH Index No. 1476/06, slip op. at 8 (allowing department to retain vehicle where driver/owner was provided with actual notice at time of seizure but was not provided with notice by mail).

n131 *See Police Dep't v. Pires*, OATH Index No. 2080/07, slip op. at 3-4 (OATH June 18, 2007) (releasing vehicle where Police Department proved in-person service, but not mailed service and collecting cases).

n132 *See Cardona*, OATH Index No. 1476/06, slip op. at 3 ("The better view appears to be . . . to afford notice where the operator and owner are different individuals."); *see also Police Dep't v. Lord*, OATH Index No. 942/08, slip op. at 4 (OATH Dec. 6, 2007) (observing that purpose of dual notice "is to make sure that owners receive actual notice of their right to a vehicle retention hearing"). *But see Police Dep't v. Caban*, OATH Index No. 107/07, slip op. at 3 (OATH July 14, 2006) ("[W]here the driver and the owner are the same person, the mailing would serve as an additional form of notice.").

n133 *Police Dep't v. Velez*, OATH Index No. 2076/07, slip op. at 4 (OATH May 29, 2007); *Police Dep't v.*

Montes, OATH Index No. 1372/06, slip op. at 5 (OATH Mar. 14, 2006) (releasing vehicle where no proof of service); Police Dep't v. Sica, OATH Index No. 1139/06, slip op. at 3 (OATH Jan. 26, 2006) (finding that proof did not support claim of service at time of seizure); cf. *Caban*, OATH Index No. 107/07, slip op. at 6 (holding that where claimant was not served notice on arrest, Police Department must prove that claimant actually received notice by mail).

n134 Police Dep't v. Tripp, OATH Index No. 148/06, slip op. at 2 (OATH July 19, 2005).

n135 *Id.*

n136 *Id.* at 2.

n137 *Id.*

n138 *Trip*, OATH Index No. 148/06, slip op. at 2.

n139 *Id.* at 3.

n140 *Id.* (holding that claimant "has had the opportunity to be heard on the merits in a timely fashion").

Following *Tripp*, OATH has consistently adhered to that exception, noting that "the clear intention of the *Krimstock* Order [is] that respondents receive a timely retention hearing." Police Dep't v. Figueroa, OATH Index No. 1525/08, slip op. at 4 (OATH Feb. 15, 2008) (finding that hearing was timely where claimant mailed request on release from prison, the earliest possible date he could have done so); see also Police Dep't v. Stephenson, OATH Index No. 2195/07, slip op. at 5-6 (OATH June 14, 2007) (finding no prejudice where claimant's hearing occurred "within the earliest possible timeframe contemplated by the *Krimstock* Order").

n141 Police Dep't v. Ogando, OATH Index No. 1747/07, slip op. at 5 (OATH May 16, 2007) (finding prejudice to claimant where hearing was scheduled for fourteen business days after seizure); Police Dep't v. Karmansky, OATH Index No. 1694/07, slip op. at 5 (Mar. 30, 2007) (finding prejudice where hearing not within ten days of seizure); Police Dep't v. Velez, OATH Index No. 2076/07, slip op. at 5-6 (OATH Mar. 29, 2007) (same).

n142 *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*5-\*7 (S.D.N.Y. Dec. 2, 2005). Later proceedings altered the language originally proposed by Chief Judge Mukasey. Currently, the required notice is to read:

## NOTICE OF RIGHT TO A RETENTION HEARING

You are entitled to a hearing to determine whether it is valid for the Property Clerk to retain the vehicle seized in connection with an arrest. Please complete this form, make and keep a copy for yourself, and deliver or mail the completed original form to **NYPD Legal Bureau, Two Lafayette Street, 5th floor, New York, NY 10007, Attention: Vehicle Seizure Unit**. When the form is received, you will be notified of the date, time and place where your hearing, which will be held within 10 days of receipt of this form. The NYPD Legal Bureau will do its best to accommodate your schedule by having the hearing on a date when you are available. Please indicate in the space provided below the date(s), if any, within the next four weeks following receipt of this form, when you are NOT available to attend a hearing. The hearing will be held at the Office of Administrative Trials and Hearings, located at 40 Rector Street, 6th Floor, New York, New York 10006, telephone number (212) 442-4000. The hearing will provide you with an opportunity to be heard, either yourself or through your attorney, with respect to three issues: (1) whether probable cause existed for the arrest of the vehicle operator; (2) whether it is likely that the City will prevail in an action to forfeit the vehicle; and (3) whether it is necessary that the vehicle remain impounded in order to ensure its availability for a judgment of forfeiture. The burden of proof by a preponderance of the evidence as to each of these issues will be on the Police Department, and the judge may consider such hearsay and other evidence as the judge may consider reliable. If the Police Department proof is insufficient as to any of these issues, the vehicle will be returned to the claimant within 10 days. Additionally, a claimant who is an owner may present an "innocent owner" defense, namely that in some instances, a vehicle may not be forfeited if its owner did not know or have reason to know that the vehicle would be used in the commission of a crime. Only one person may appear as claimant, and if more than one of these forms is received by the Police Department, priority will go to the registered owner of the vehicle.

However, such hearing shall not be held if there is an intervening order by a Judge of the Criminal Court or a Justice of the Supreme Court that the vehicle is to be held as evidence in a criminal proceeding (a "Retention Order"). If a Retention Order is issued, you have the right to move to vacate or modify that Order in the Court from which it was issued.

*Krimstock v. Kelly*, No. 99 Civ. 12041, 2007 U.S. Dist. LEXIS 82612, at \*4-\*6 (S.D.N.Y. Sept. 27, 2007) (quoting the notice).

n143 *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*5-\*7 (providing language to be used in notice).

n144 *Krimstock v. Kelly*, 506 F. Supp. 2d 249, 258 (S.D.N.Y. 2007) (stating notice should "provide a short statement to those 'innocent owners' whose vehicles may have been used in a crime without their knowledge").

n145 *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*5 (requiring notice to be "in English and Spanish"); *see also* Police Dep't v. Ramirez, OATH Index No. 2418/07, slip op. at 7 (OATH July 16, 2007) (finding that English-only notice was inadequate although it was "likely that respondent's ability to understand English is better than he admits"); Police Dep't v. Rosario-Jimenez, OATH Index No. 2235/07, slip op. at 2-3 (OATH July 3, 2007) (holding that claimant's failure to request an interpreter did not excuse provision of English-only documents).

n146 *Krimstock*, 2005 U.S. Dist. LEXIS 43845, at \*7 (finding that the claimant is to submit "a written demand

for such a hearing on the form provided by the Police Department and in accordance with the instructions set forth thereon").

n147 *Id.* (finding that the OATH hearing "will commence on a date and at a time fixed by the Police Department within 10 business days after receipt by the Police Department of a written demand for such a hearing").

n148 *See, e.g.,* Police Dep't v. Singletary, OATH Index No. 342/06, slip op. at 4-5 (OATH Aug. 24, 2005) (releasing vehicle where Police Department delayed both deadlines without explanation); *see also* Police Dep't v. Stephenson, OATH Index No. 2195/07, slip op. at 11 (OATH June 14, 2007) ("[I]f there is a failure of notice and the hearing falls outside the ten business days following seizure, the vehicle is subject to return to its owner *pendente lite.*").

n149 Police Dep't v. Manning, OATH Index No. 1162/05, slip op. at 4 (OATH Jan. 25, 2005).

n150 *Id.*

n151 *Id.*

n152 Police Dep't v. Ramirez, OATH Index No. 2418/07, slip op. at 8 (OATH July 16, 2007) (refusing to excuse delay where Police Department rejected settlement proposal but failed to convey rejection for three weeks). *But see* Police Dep't v. Williamson, OATH Index No. 1371/05, slip op. at 3-4 (OATH Mar. 8, 2005) (excusing delay where counsel for claimant waived right to hearing in writing).

n153 *Manning*, OATH Index No. 1162/05, slip op. at 3-4 (discussing import of incomplete hearing request form).

n154 *Id.* at 4 (refusing to excuse delay where Police Department began settlement negotiations the next day).

n155 *See* Police Dep't v. Cardona, OATH Index No. 1476/06, slip op. at 8 (OATH Mar. 29, 2006) (excusing delay where claimant's lawyer had copied and filled out only part of form and sent it to Police Department); Police Dep't v. Cortorreal, OATH Index No. 1479/06, slip op. at 4 (OATH Mar. 29, 2006) (excusing delay due to form that "lacked critical identifying information").

n156 *Cortorreal*, OATH Index No. 1479/06, slip op. at 4.

n157 *Id.* at 4.

n158 *Id.* at 5-6.

n159 *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*3-\*4 (S.D.N.Y. Dec. 2, 2005).

n160 *Police Dep't v. Jackson*, OATH Index Nos. 1121/07, 1481/07 (OATH Mar. 22, 2007).

n161 *Jackson*, OATH Index Nos. 1121/07, 1481/07, slip op at 2.

n162 *Id.*

n163 *Id.* at 3.

n164 *Police Dep't v. Burnett*, OATH 1363/04, slip op. at 4 (OATH Mar. 11, 2004), *aff'd*, *Prop. Clerk v. Burnett*, N.Y.L.J., May 19, 2005 (Sup. Ct. July 19, 2004), *aff'd*, 801 N.Y.S.2d 592, 594 (App. Div. 2005).

n165 *People v. Jones*, 568 N.Y.S.2d 88, 89 (App. Div. 1991), *leave denied*, 577 N.E.2d 1068 (N.Y. 1991).

n166 N.Y. CITY, N.Y., CODE § 140.50 (2008); *People v. De Bour*, 352 N.E.2d 562, 572 (N.Y. 1976).

n167 *People v. Hicks*, 500 N.E.2d 861, 863 (N.Y. 1986) (quoting *People v. Ingle*, 330 N.E.2d 39, 44 (N.Y. 1986)).

n168 *People v. Bigelow*, 488 N.E.2d 451, 455 (N.Y. 1985).

n169 *See Burnett*, 801 N.Y.S.2d at 594.

n170 *Burnett*, 801 N.Y.S.2d at 593-94; see also *Police Dep't v. Nasta*, OATH Index No. 728/07, slip op. at 3 (OATH Oct. 26, 2006).

n171 *Police Dep't v. Jackson*, OATH Index Nos. 1121/07, 1481/07, slip op. at 2 (OATH Mar. 22, 2007).

n172 *Id.* at 3-4.

n173 *Police Dep't v. Stephenson*, OATH Index No. 2195/07, slip op. at 12 (OATH June 14, 2007).

n174 *Id.*; see also *Byer v. Jackson*, 661 N.Y.S.2d 336, 338 (Crim. Ct. 1997) (describing where an officer wrongly assumed that turning right out of private driveway without signaling was traffic violation and holding that stop was illegal); *People v. Baez*, 501 N.Y.S.2d 550, 553 (Crim. Ct. 1986) (stating that stop based on the manner of attachment of license plate was no more than a seizure based on "whim, caprice, or idle curiosity" and finding stop illegal).

n175 *Stephenson*, OATH Index No. 2195/07, slip op. at 15.

n176 *Id.* at 16 (citing *N.Y. VEH & TRAF. LAW § 402(1)(a)* (McKinney Supp. 2007)).

n177 *Id.* at 12.

n178 *Police Dep't v. Rios*, OATH Index No. 146/06, slip op. at 1-2, 4-6 (OATH July 21, 2005).

n179 *Police Dep't v. Lord*, OATH Index No. 942/08, slip op. at 6 (OATH Dec. 6, 2007).

n180 See *Police Dep't v. Davis*, OATH Index No. 1794/04, slip op. at 2-3 (OATH Apr. 28, 2004) (demonstrating deference to department evidence and proof of probable cause); see also *Police Dep't v. Modlinger*, OATH Index No. 1833/05, slip. op. at 1-4 (OATH May 4, 2005) (same).

n181 *Lord*, OATH Index No. 942/08, slip op. at 7; see also *People v. Nesbitt*, 767 N.Y.S.2d 187, 188 (App. Div. 2003); *People v. Moore*, 715 N.Y.S.2d 723, 724 (App. Div. 2000); *People v. Johnson*, 681 N.Y.S.2d 30, 31 (App. Div. 1998); *People v. Ogden*, 673 N.Y.S.2d 249, 250 (App. Div. 1998).

n182 *Modlinger*, OATH Index No. 1833/05, slip op. at 2-4.

n183 *Police Dep't v. Arnold*, OATH Index No. 377/07, slip op. at 3 (OATH Aug. 22, 2006) (citing *Police Dep't v. Balseca*, OATH Index No. 103/07, slip op. at 3 (OATH July 25, 2006)).

n184 *Police Dep't v. McFarland*, OATH Index No. 1124/04, slip op. at 2 (OATH Feb. 24, 2004), *rev'd sub nom.* *Prop. Clerk v. McFarland*, N.Y. Sup. Ct. Index No. 400685/2003, slip op. at 1-2 (Apr. 20, 2004).

n185 *Balseca*, OATH Index No. 103/07, slip op. at 3.

n186 *Gilberg v. Barbieri*, 423 N.E.2d 807, 809 (N.Y. 1981) (citing *People v. Berkowitz*, 406 N.E.2d 783, 789 (N.Y. 1980)).

n187 *Police Dep't v. Alegrias*, OATH Index No. 178/08, slip op. at 3 (OATH July 31, 2007).

n188 *Id.* at 4.

n189 *See id.* at 3; *Police Dep't v. Arnold*, OATH Index No. 377/07, slip op. at 3 (OATH Aug. 22, 2006); *Balseca*, OATH Index No. 103/07, slip op. at 3.

n190 *See Police Dep't v. McFarland*, OATH Index No. 1124/04, slip op. at 2 (OATH Feb. 24, 2004), *rev'd sub nom.* *Prop. Clerk v. McFarland*, N.Y. Sup. Ct. Index No. 400685/2003, slip op. at 1-2 (Apr. 20, 2004).

n191 *Police Dep't v. Mazzoli*, OATH Index No. 1610/07, slip op. at 3 (OATH Apr. 6, 2007) (citing *Police Dep't v. Ricci*, OATH Index No. 1404/06, slip op. at 2 (OATH Mar. 20, 2006)).

n192 *N.Y. C.P.L.R. 1310(4)* (McKinney 1997); *accord Prop. Clerk v. Ferris*, 570 N.E.2d 225, 227 (N.Y. 1991) (unlawful use of the property must be established); *see Borzuko v. Prop. Clerk*, 519 N.Y.S.2d 491, 496 (Sup. Ct. 1987).

n193 N.Y. CITY, N.Y., CODE § 14-140(e)(1) (2008); *see also Prop. Clerk v. McDermott*, 585 N.Y.S.2d 746, 749 (App. Div. 1992); *Police Dep't v. Mohammed*, OATH Index No. 1159/04, slip op. at 3 (OATH Mar. 2, 2004) (finding evidence that firearms sales to undercover police officer sufficient to establish to undercover officer took place inside the seized vehicle). *But see Police Dep't v. Williams*, OATH Index No. 1899/04, slip op. at 4-5 (OATH May 14, 2004) (concluding that, where vehicle seized in connection with drug arrest, no nexus existed between vehicle and criminal possession of controlled substance, despite statement by confidential informant).

n194 *Prop. Clerk v. McDermott*, 585 N.Y.S.2d 746 (App. Div. 1992).

n195 *Id.* at 749.

n196 *Id.* at 747-48.

n197 *See Williams*, OATH Index No. 1899/04, slip op. at 4-5.

n198 *Id.* at 1-2.

n199 *Id.* at 3-4.

n200 *Id.* at 4 (internal quotation marks omitted).

n201 N.Y. C.P.L.R. 1310(4) (McKinney 1997) (defining "instrumentality of a crime" as "property . . . whose use contributes directly and materially to the commission of a crime").

n202 *Williams*, OATH Index. No. 1899/04, slip op. at 5.

n203 *Id.* at 4-5; *see also Prop. Clerk v. McDermott*, 585 N.Y.S.2d 746, 749 (App. Div. 1992).

n204 *Police Dep't v. Mercedes*, OATH Index No. 330/07 (OATH Sept. 18, 2006).

n205 *Id.* at 3; *see also* N.Y. CITY, N.Y., CODE § 14-140(e)(1) (2008); *Prop. Clerk v. Aponte*, 552 N.Y.S.2d 118, 119 (App. Div. 1990) ("[T]he fact that respondent did not employ his car during the actual purchase of the contraband or that the sale occurred only four blocks from respondent's home is irrelevant where he was seen driving away in his vehicle from the scene of the transaction."); *Prop. Clerk v. Negron*, 550 N.Y.S.2d 351, 352 (App. Div. 1990) (allowing seizure when vehicle was used to drive away from place of drug purchase); *Police Dep't v. Mohammed*, OATH Index No. 1159/04, slip op. at 3 (OATH Mar. 2, 2004) (finding vehicle instrumentality of crime where firearms sales took place within vehicle).

n206 *Mercedes*, OATH Index No. 330/07, slip op. at 2.

n207 *Id.* at 4.

n208 *Id.*

n209 *Id.*

n210 *Krimstock v. Safir*, No. 99 Civ. 12041, 2000 U.S. Dist. LEXIS 16444 at \*12-\*13 (S.D.N.Y. Nov. 13, 2000).

n211 *Police Dep't v. Mazzoli*, OATH Index No. 1610/07 (OATH Apr. 6, 2007).

n212 *Id.* at 3.

n213 *Id.*

n214 *See, e.g., Prop. Clerk v. McDermott*, 585 N.Y.S.2d 746, 749 (App. Div. 1992) (footnote added).

n215 *Mazzoli*, OATH Index No. 1610/07, slip op. at 3-4.

n216 *Ayala v. Ward*, 565 N.Y.S.2d 114, 115 (App. Div. 1991) (quoting *In re Gelco Builders, Inc. v. Holtzman*, 562 N.Y.S.2d 120, 121 (App. Div. 1990) (declaring that hearsay must be sufficiently probative and reliable before it may be accorded any significant weight)).

n217 Police Dep't v. Rios, OATH Index No. 146/06 (OATH July 21, 2005).

n218 *Id.* at 5.

n219 *Id.* at 5-6.

n220 OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS (OATH), RULES OF PRACTICE APPLICABLE TO CASES, § 1-46 (2007), available at <http://www.nyc.gov/html/oath/html/rules.html>.

n221 *Rios*, OATH Index No. 146/06, slip op. at 5.

n222 Police Dep't v. Alegrias, OATH Index No. 178/08, slip op. at 4 (OATH July 31, 2007).

n223 *Id.* at 1, 6.

n224 *Alegrias*, OATH Index No. 178/08, slip op. at 4.

n225 *Id.* at 6.

n226 *Id.* at 4.

n227 *Id.* at 5 (internal quotation marks omitted); *see also* Police Dep't v. Robinson, OATH Index No. 1768/07, slip op. at 3-4 (OATH Apr. 20, 2007) (holding that the second prong, the likelihood that Police Department will prevail in civil forfeiture action by showing that seized vehicle was used as instrumentality of a crime, not satisfied absent evidence that claimant was in actual or constructive possession of forty-nine bags of crack cocaine found at addresses listed on "rap sheet" and where zip-lock bag of alleged cocaine was found in car registered to claimant).

n228 *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*4 (S.D.N.Y. Nov. 29, 2005).

n229 Police Dep't v. Junior, OATH Index No. 1134/06 (OATH Feb. 8, 2006).

n230 *Junior*, OATH Index No. 1134/06, slip op. at 4. That finding was grounded on the Police Department's failure to establish a procedure, such as requiring the posting of a bond, to maintain the seized asset's value. *Id.* at 4-5.

n231 Police Dep't v. Brown, OATH Index No. 2421/07, slip op. at 1-2 (OATH July 12, 2007).

n232 *See* Police Dep't v. Williams, OATH Index No. 747/07, slip op. at 4 (OATH Oct. 27, 2006) (noting that OATH considers many factors including whether claimant "was involved in a serious accident, resisted arrest, endangered others, drove with a suspended license, or engaged in other criminal activity prior to his arrest").

n233 Police Dep't v. Nan, OATH Index No. 1979/07, slip op. at 3 (OATH May 15, 2007).

n234 *See, e.g.*, Police Dep't v. Solomon, OATH Index No. 1783/04, slip op. at 3-4 (OATH Apr. 22, 2004) (finding a heightened risk where claimant operated vehicle while license was suspended); Police Dep't v. Benkovich, OATH Index No. 1296/04, slip op. at 2-3 (OATH Mar. 9, 2004) (finding a heightened risk when claimant's arrest was his second DWI).

n235 *See, e.g.*, Police Dep't v. Baker, OATH Index No. 1258/07, slip op. at 8 (OATH Mar. 7, 2007) (noting the claimant used drugs while in possession of loaded firearm, demonstrating heightened risk); Police Dep't v. Balseca, OATH Index No. 103/07, slip op. at 4 (OATH July 25, 2006) (describing a claimant convicted of possession of dangerous weapon); Police Dep't v. Harris, OATH Index No. 983/06, slip op. at 4 (OATH Feb. 16, 2006) (describing a claimant arrested for reckless endangerment, menacing, and criminal possession of firearm); Police Dep't v. Rice, OATH Index No. 1709/05, slip op. at 9-10 (OATH Apr. 21, 2005) (finding a heightened risk where stolen loaded firearm was recovered from claimant's car, on floor directly below claimant's seat, and where claimant was also found in possession of substantial quantity of cocaine); Police Dep't v. O'Berry, OATH Index No. 1474/04, slip op. at 3 (OATH Mar. 15, 2004) (finding a heightened risk is demonstrated by severity of accident that led to claimant's DWI arrest); Police Dep't v. Joyner, OATH Index No. 1327/04, slip op. at 3 (OATH Mar. 11, 2004) (finding the necessity to retain vehicle established by claimant's driving at more than twice the speed limit).

n236 *See* Police Dep't v. Ferrer, OATH Index No. 977/08, slip op. at 4 (OATH Nov. 14, 2007) ("Altering the vehicle by creating a special compartment in which to secret illegal drugs to evade police detection establishes a firm intent to continue illegal conduct of the kind for which claimant was arrested here.").

n237 *See* Police Dep't v. Mohammed, OATH Index No. 1159/04, slip op. at 3-4 (OATH Mar. 2, 2004)

(concluding that vehicle was used for multiple sales of illegal firearms).

n238 *See* Police Dep't v. Olberding, OATH Index No. 283/05, slip op. at 2-3 (OATH Aug. 9, 2004) (concluding that claimant was risk to community where claimant passed through multiple red lights, was uncooperative during arrest, engaged in altercation with police, and had four prior convictions for driving while intoxicated). *But see* Police Dep't v. Fung, OATH Index No. 1195/05, slip op. at 6 (OATH Jan. 27, 2004) (failing to establish "heightened risk" despite arrest for reckless endangerment and reckless driving, where petitioner failed to establish speed at which claimant was driving).

n239 *See, e.g.*, Police Dep't v. Washington, OATH Index No. 1525/07, slip op. at 2 (Mar. 30, 2007) (finding threat to public safety where driver was participant in high-speed drag race that resulted in death of other driver).

n240 Police Dep't v. McFarland, OATH Index No. 1124/04, slip op. at 4 (OATH Feb. 24, 2004), *rev'd sub nom.* Prop. Clerk v. McFarland, N.Y. Sup. Ct. Index No. 400685/2003, slip op. at 1-2 (OATH Apr. 20, 2004) (explaining that a minor "fender-bender" does not justify retention).

n241 Police Dep't v. Janjic, OATH Index No. 1931/07, slip op. at 4 (OATH May 29, 2007).

n242 Police Dep't v. Williams, OATH Index No. 747/07, slip op. at 5 (OATH Oct. 27, 2006) ("I also reject petitioner's assertion that claimant's decade-old misdemeanor convictions, or the fact that he was unemployed at the time of the arrest, compel a finding of heightened risk.").

n243 *See Janjic*, OATH Index No. 1931/07, slip op. at 3 (holding that fact that driver was forty-six years old and married with two children weighed against heightened risk).

n244 *See* Police Dep't v. Santos, OATH Index No. 543/08, slip op. at 6 (OATH Sept. 21, 2007) (recognizing that release on own recognizance in underlying criminal matter suggests that claimant is not heightened risk); Police Dep't v. Nan, OATH Index No. 1979/07, slip op. at 4 (OATH May 15, 2007) (concluding that based on "vague evidence" against the petitioner and a "minor [underlying] charge, to which respondent was allowed to plead guilty" the respondent was not heightened risk to community).

n245 *See Janjic*, OATH Index No. 1931/07, slip op. at 3 (observing that claimant needed his car to travel to and from work); Police Dep't v. Jones, OATH Index No. 1943/07, slip op. at 4 (OATH May 8, 2007) (noting that claimant is gainfully employed).

n246 *Jones*, OATH Index No. 1943/07, slip op. at 4 (recognizing that claimant was formerly addicted to drugs, but has since recovered and works as a drug rehabilitation counselor).

n247 *See, e.g., Nan*, OATH Index No. 1979/07, slip op. at 4 (relying on, among other things, a "vivid[] descri[ption of] the humiliation caused by this arrest" to conclude that retention of seized vehicle was not necessary to protect public safety); *Jones*, OATH Index No. 1943/07, slip op. at 5 ("At the hearing, respondent was remorseful for his behavior and appeared to recognize that it was a terrible mistake in judgment.").

n248 *Santos*, OATH Index No. 543/08, slip op. at 6 (releasing vehicle after driving while intoxicated arrest, noting that claimant was "contrite," had no record of recklessness in his past, and did not resist arrest, endanger others, speed or break traffic laws, drive with a suspended license or engage "in [any] other criminal activity prior to his arrest" and distinguishing from cases where reckless and unsafe conduct warranted retention of vehicle).

n249 It is important to reiterate that the aim of this article is to assist counsel representing claimants at their civil *Krimstock* due process hearing. Although many such claimants are indigent, they, like all litigants, are entitled to high-quality and zealous legal representation. To such ends, we hope that this article not only serves as a useful overview of *Krimstock* litigation but also prompts more attorneys to actively participate in these abbreviated hearings on a pro bono basis. *See Krimstock v. Kelly*, 506 F. Supp. 2d 249, 259 n.21 (S.D.N.Y. 2007) (lauding pro bono representation of *Krimstock* claimants by Latham & Watkins LLP and encouraging other attorneys to follow suit).

Conversely, this article does not, by any means, condone drunk driving nor pass on the sagacity of New York City's efforts to curtail the prevalent, and often times deadly, scourge of driving under the influence. Nevertheless, the Second Circuit has declared that claimants are constitutionally entitled to a due process hearing in advance of their ultimate forfeiture proceeding and, accordingly, are entitled to ardent legal representation should they seek it--rights this article endeavors to further. *Krimstock v. Kelly*, 306 F.3d 40, 67-68 (2d Cir. 2002), cert. denied, 539 U.S. 969 (2003); see also John Adams, Diary Entry (Mar. 5, 1773) in 2 DIARY AND AUTOBIOGRPHY OF JOHN ADAMS (L.H. Butterfield, ed. 1961) (discussing representation of British redcoats implicated in Boston Massacre, stating: "The Part I took in Defence of Captn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country.").

n250 *See, e.g., Prop. Clerk v. Waheed*, 630 N.Y.S.2d 644, 647 (Sup. Ct. 1995) ("It is fascinating that despite the large volume of NYC arrests per year for driving while impaired or intoxicated, the Police Department concedes that none of the drivers' cars are forfeited even though the car is the very instrumentality of the crime, a crime which injures and kills, and is an unparalleled public menace.").

n251 *See Santos*, OATH Index No. 543/08, slip op. at 7.

n252 The following "general" rules are not "hard and fast" rules followed by OATH, but rather are short-hand guidelines to provide a *Krimstock* advocate with an overview of typical cases.

n253 *See, e.g.*, Police Dep't v. Kennerly, OATH Index No. 706/08, slip op. at 3 (OATH Oct. 16, 2007) (declaring that a claimant arrested with a .09 percent BAC--barely over the legal limit--presented no heightened risk to public safety); Police Dep't v. Vanegas, OATH Index No. 1056/06, slip op. at 3-5 (OATH Jan. 10, 2006) (concluding that BAC of .15 percent, by itself, failed to prove that gainfully-employed driver, whose only prior offense was misdemeanor conviction from ten years earlier, posed continuing threat to public safety and distinguishing cases involving extremely high blood alcohol levels); Police Dep't v. Cruz, OATH Index No. 339/06, slip op. at 3-4 (OATH Aug. 19, 2005) (releasing vehicle where claimant had .15 percent BAC, rear-ended parked vehicle, and had minor physical altercation with its occupants); Police Dep't v. Toribio-Cabrera, OATH Index No. 245/08, slip op. 3, 5 (OATH Aug. 9, 2007) (returning vehicle where claimant had .129 percent BAC); Police Dep't v. Javier, OATH Index No. 241/06, slip op. at 2-4 (OATH Aug. 5, 2005) (returning vehicle to claimant where claimant had .14 percent BAC and involved in "fender bender"); *cf.* Police Dep't v. Busgit, OATH Index No. 1616/05, slip op. at 4-6 (OATH Apr. 4, 2005) (refusing to return a vehicle where claimant had .126 percent BAC but was repeat offender and already pled guilty to felony driving while intoxicated in the matter that gave rise to vehicle seizure).

n254 *See* Police Dep't v. Franks, OATH Index No. 2377/07, slip op. at 4 (OATH July 13, 2007) (holding that .30 percent BAC, standing alone, established heightened risk); Police Dep't v. Cevallos, OATH Index No. 552/06, slip op. at 2, 7 (OATH Oct. 24, 2005) (.220 percent BAC); Police Dep't v. Serrano, OATH Index No. 499/06, slip op. at 5 (OATH Sept. 22, 2005) (showing that the claimant had .207 percent BAC initially and .239 percent on retest).

n255 *See, e.g.*, *Busgit*, OATH Index No. 1616/05, slip op. at 4-6 (concluding claimant posed heightened risk where claimant had .126 percent BAC but had a prior driving while intoxicated conviction); Police Dep't v. Satyanand, OATH Index No. 570/05, slip op. at 5 (OATH Nov. 23, 2004) (finding two driving while intoxicated arrests within a three month period, even if charges not yet adjudicated, is conclusive of heightened risk); Police Dep't v. Benkovich, OATH Index No. 1296/04, slip op. at 3 (OATH Mar. 9, 2004) (holding that claimant's second DWI offense renders him a heightened risk to public safety).

n256 *Busgit*, OATH Index No. 1616/05, 4-5; *see Satyanand*, OATH Index No. 570/05, slip op. at 5; *Benkovich*, OATH Index No. 1296/04, slip op. at 3.

n257 *See, e.g.*, Police Dep't v. Monge, OATH Index No. 836/08, slip op. at 3-6 (OATH Oct. 31, 2007); Police Dep't v. Figueroa, OATH Index No. 391/08, slip op. at 5-6 (OATH Oct. 2, 2007).

n258 *Figueroa*, OATH Index No. 391/08, slip op. at 5-6.

n259 *Id.*

n260 *Monge*, OATH Index No. 836/08, slip op. at 2.

n261 *Figueroa*, OATH Index No. 391/08, slip op. at 3-6.

n262 *See N.Y. VEH. & TRAF. LAW § 1192(2-a)* (McKinney Supp. 2008).

n263 *See Monge*, OATH Index No. 836/08, slip op. at 5 ("In doing so, the Legislature made a considered determination that . . . drivers [with greater than .18 percent BAC], as opposed to those who operate a motor vehicle with a blood alcohol content of less than .18%, pose a unique and heightened threat to public safety deserving of harsher penalties."). Although *Monge* indicates that OATH may begin to use the legislatively approved .18 percent BAC as a guidepost in the heightened risk to public safety context, the caselaw on this issue is not fully developed. *Id.* at 6.

n264 *Krimstock v. Kelly*, 306 F.3d 40, 56 (2d Cir. 2002) (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993)), *cert. denied*, 539 U.S. 969 (2003); *see also* STEVEN L. KESSLER, *Constitutionality of Section 14-140: Round III*, in *NEW YORK CRIMINAL AND CIVIL FORFEITURES § 7.07*, P 5 (2007) (discussing Second Circuit's decision in *Krimstock* and subsequent related developments).

n265 *Krimstock*, 306 F.3d at 46-47.

n266 *Id.*

n267 *Id.* at 46.

n268 *Id.* at 55-58.

n269 *Id.* at 56.

n270 *Id.* at 57-58 n.19 (collecting citations). For example, the court highlighted that other states, such as Florida and California, had forfeiture statutes that contained "express exceptions for a variety of innocent parties." *Id.* at

57 n.19 (referencing *CAL. HEALTH & SAFETY CODE § 11470(e)-(h)* (West 2007); *FLA. STAT. § 932.703(6)-(7)* (2008)).

n271 *Krimstock*, 306 F.3d at 57-58 (quoting *N.Y. CITY, N.Y., CODE § 14-140(b), (e)(1)* (2008)).

n272 *Krimstock*, 306 F.3d at 58.

n273 *Id.* at 56 (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993)).

n274 *Id.* at 58.

n275 *See, e.g.*, *Police Dep't v. Simpson*, OATH Index No. 502/04, slip op. at 4 (OATH Sept. 23, 2008) (finding no evidence that claimant knew or should have known that boyfriend would use car to commit crime) (co-author Gregory L Acquaviva represented Ms. Simpson); *see also* *Police Dep't v. Thompson*, OATH Index No. 1828/08, slip op. at 3 (OATH Mar. 11, 2008) (holding that Police Department not entitled to seizure because claimant was innocent owner); *Police Dep't v. Mendez*, OATH Index No. 1771/08, slip op. at 4 (OATH Mar. 4, 2008) (finding that Police Department failed to provide evidence to disprove innocent owner defense); *Police Dep't v. Patterson*, OATH Index No. 1629/08, slip op. at 6 (OATH Feb. 11, 2008) (same); *Police Dep't v. Padilla-Barham*, OATH Index No. 1356/08, slip op. at 3 (OATH Jan. 8, 2008) (holding that Police Department failed to fulfill its burden of disproving innocent owner defense).

The innocent owner defense, like all other defenses, remains unavailable in cases where the Police Department intends to retain the vehicle as evidence for a future criminal proceeding. OATH noted early on that in cases involving vehicles which were intended to be used as evidence at trial, the innocent owner defense is unavailable. *See, e.g.*, *Police Dep't v. Means*, OATH Index No. 1846/04, slip op. at 2-3 (OATH May 14, 2004); *Police Dep't v. Rivera*, OATH Index No. 1272/04, slip op. at 4 (OATH Mar. 10, 2004). The United States District Court for the Southern District of New York, in the amended opinion and order in *Krimstock*, affirmed this point, allowing ADAs to seek ex parte affirmations for retaining the vehicle as evidence. *Krimstock v. Kelly*, 506 F. Supp. 2d 249, 254 (S.D.N.Y. 2007). However, the court also noted that the ex parte affirmation must be subject to some adversarial challenge to the retention order, although it did not detail how such a hearing would involve a claim of innocent ownership. *Krimstock*, 506 F. Supp. 2d at 256-57. The court was, thus, willing to allow a claimant to "move to vacate or amend the retention order via a challenge to the legitimacy or necessity of the continued retention of the vehicle as evidence," but did not outline how an innocent owner defense would fit in. *Id.* at 256.

n276 *Krimstock*, 506 F. Supp. 2d at 252 (quoting *Jones v. Kelly*, 378 F.3d 198, 201 (2d Cir. 2004)). The Second Circuit in *Krimstock* raised the question of who would bear the burden of proving or rebutting an innocent owner defense and expressly declined to decide it. *Krimstock*, 306 F.3d at 58 n.18. However, the panel noted that the New York Appellate Division, First Department, in *Property Clerk v. Pagano*, held that the burden lay on the Police Department. *Id.* (citing *Prop. Clerk v. Pagano*, 573 N.Y.S.2d 658, 659 (App. Div. 1991)). OATH courts

routinely allocate the burden in the same manner. *See, e.g., Thompson*, OATH Index No. 1828/08, slip op. at 3 (holding that the Police Department bears burden of disproving innocent owner defense); *Mendez*, OATH Index No. 1771/08, slip op. at 5 (same); *Patterson*, OATH Index No. 1629/08, slip op. at 6 (same); *Padilla-Barham*, OATH Index No. 1356/08, slip op. at 5 (same); *Police Dep't v. Bloise*, OATH Index No. 2138/04, slip op. at 4 (OATH June 17, 2004) (same).

n277 *Police Dep't v. Kistoo*, OATH Index No. 1906/07, slip op. at 5 (OATH May 8, 2007) (quoting *Prop. Clerk v. Pagano*, 573 N.Y.S.2d 658, 661 (App. Div. 1991)).

n278 *Pagano*, 573 N.Y.S.2d at 661. "Sufferance" has received a more detailed explanation by OATH:

Sufferance "implies knowledge or the opportunity through reasonable diligence to acquire knowledge," presupposing in most cases "a fair measure at least of continuity and permanence." The "continuity and permanence" of prior conduct "necessary to charge one with implied knowledge that a particular course of conduct will thereafter ensue" . . . may be proven by evidence of the owner's knowledge that the driver committed criminal acts involving a vehicle in the past.

*Police Dep't v. Reid*, OATH Index No. 853/07, slip op. at 4 (OATH Dec. 19, 2006) (citations omitted) (internal quotation marks omitted).

n279 *See Police Dep't v. Wollmer*, OATH Index No. 1806/07, slip op. at 4 (OATH Apr. 24, 2007). For more discussion on the types of beneficial owners see *infra* notes 311-26 and accompanying text.

n280 *Krimstock v. Kelly*, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845, at \*7 (S.D.N.Y. Dec. 2, 2005).

n281 *Id.*

n282 *See, e.g., Police Dep't v. Wicks*, OATH Index No. 805/08, slip op. at 2-3 (OATH Dec. 12, 2007) (finding no standing where lienholder settled with Police Department); *Police Dep't v. Lord*, OATH Index No. 770/08, slip op. at 3 (OATH Oct. 22, 2007) (finding no standing where vehicle signed to third party).

n283 *Police Dep't v. Green*, OATH Index No. 1347/08, slip op. at 2 (OATH Jan. 9, 2008).

n284 *See, e.g., Police Dep't v. Khan*, OATH Index No. 118/08, slip op. at 5-6 (OATH July 30, 2007) (holding that titled owner was not innocent owner where he did not use vehicle and it was used exclusively by his son).

n285 *See, e.g.*, *Police Dep't v. Passley*, OATH Index No. 2401/07, slip op. at 3-4 (OATH July 11, 2007) (holding that owner who did not give permission for driver to use vehicle was innocent owner).

n286 *Police Dep't v. Chase*, OATH Index No. 185/08, slip op. at 6-7 (OATH July 23, 2007) (holding that a father was not an innocent owner where he knew of son's prior arrest involving same vehicle and still allowed him ready access to vehicle).

n287 *See, e.g.*, *Police Dep't v. Findlay*, OATH Index No. 1911/07, slip op. at 4 (OATH May 15, 2007) (citing *Sosnowski v. Kolovas*, 512 N.Y.S.2d 148, 150 (App. Div. 1987)).

n288 *Police Dep't v. Khan*, OATH Index No. 118/08 (OATH July 30, 2007).

n289 *Id.* at 1-3.

n290 *Id.* at 4 (citing *Pagano v. Prop. Clerk*, 573 N.Y.S.2d 658, 661 (App. Div. 1991)).

n291 *Id.* at 5.

n292 *Id.* at 4.

n293 *Id.* at 6. Title issues can also implicate concerns regarding a claimant's standing to challenge retention of a seized vehicle. In *Police Department v. Thompson*, the Police Department argued that the claimant did not have standing to challenge retention because she was not the vehicle's registered owner. *Police Dep't v. Thompson*, OATH Index No. 1828/08, slip op. at 2 (OATH Mar. 11, 2008). OATH, however, found the argument misplaced, as it would be possible for someone to have an ownership interest in a vehicle without being listed on the title. Therefore, appearing as the owner of record was not a prerequisite to establish standing to challenge retention. *Id.* at 2-3.

n294 *Thompson*, OATH Index No. 1828/08, slip op. at 5 (finding claimant was innocent owner despite giving driver permission to use vehicle).

n295 *Id.* at 1.

n296 *Id.* at 5.

n297 *Id.* at 6.

n298 Police Dep't v. Walton, OATH Index No. 1037/08 (OATH Feb. 28, 2008).

n299 *Id.* at 1.

n300 *Id.* at 5.

n301 *Id.* at 3, 5.

n302 *Id.* at 5; *see also* Police Dep't v. Gutierrez, OATH Index No. 2403/07, slip op. at 5 (OATH Aug. 15, 2007) (finding that fact that driver had to ask permission before occasionally borrowing car, in addition to fact that he contributed financially to support the household, was insufficient to establish that he was beneficial owner of vehicle); Police Dep't v. Passley, OATH Index No. 2401/07, slip op. at 2-3 (OATH July 11, 2007) (concluding that claimant was innocent owner where he did not give driver permission to use vehicle); Police Dep't v. Reid, OATH Index No. 853/07, slip op. at 4 (OATH Dec. 19, 2006) (holding owner innocent where she had not given her son permission to use car on day of incident and required him to ask permission before using it at other times).

n303 *See, e.g.*, Police Dep't v. Chase, OATH Index No. 185/08, slip op. at 6-7 (OATH July 23, 2007).

n304 *Id.* at 6-7.

n305 *Id.* at 6. The owner testified that he let his son use the vehicle any time he asked for it, and although he was asleep at the time his son took the keys to the car that night, "had his son . . . sought his permission to use the car, respondent probably would have allowed him to use it." *Id.*

n306 *Id.* at 5-6.

n307 *Reid*, OATH Index No. 853/07, slip op. at 4-5.

n308 *Id.* at 4; *see also* Police Dep't v. Hendrix, OATH Index No. 2341/08, slip op. at 5 (OATH May 12, 2008) ("[M]ere knowledge that a family member has a criminal record does not provide reason to anticipate that he or she would use a vehicle to commit further crimes, where the prior criminal activity did not involve the use of a vehicle." (citing *Reid*, OATH Index No. 853/07, slip op. at 4)); Police Dep't v. Thompson, OATH Index No. 1828/08, slip op. at 5-6 (OATH Mar. 11, 2008) (holding owner's knowledge of driver's prior youthful offender adjudication, which did not involve any vehicle, held insufficient to fulfill Police Department's burden); Police Dep't v. Haskell, OATH Index No. 484/08, slip op. at 5 (OATH Oct. 4, 2007) (citing Police Dep't v. Dunn, OATH Index No. 150/07, slip op. at 4 (OATH Sept. 14, 2006)) (finding that where Police Department did not present evidence that driver had criminal record, owner could not be charged with foreseeing that driver would engage in illegal activity with vehicle); Police Dep't v. Woodson, OATH Index No. 1076/07, slip op. at 4-5 (OATH Dec. 20, 2006) (holding owner innocent where her knowledge of driver's past criminal history did not include incidents involving vehicles); Police Dep't v. Hill, OATH Index No. 633/07, slip op. at 4 (OATH Oct. 24, 2006) (holding that evidence that owner allowed driver to borrow car occasionally was insufficient to refute innocent owner defense); Police Dep't v. Plaskett, OATH Index No. 463/06, slip op. at 4-5 (OATH Sept. 8, 2005), *aff'd*, 833 N.Y.S.2d 385 (App. Div. 2007) (finding owner to be innocent, despite finding owner's denial of knowledge of her son's prior conviction to be incredible, owner found to be innocent, as only evidence refuting innocent owner defense was that son had been arrested on weapons charge, and that charge did not involve any vehicle).

n309 *See, e.g.*, Police Dep't v. Green, OATH Index No. 1347/08, slip op. at 2 (OATH Jan. 9, 2008).

n310 *Id.* at 4 (citing *Vergari v. Kraisky*, 502 N.Y.S.2d 788, 789 (App. Div. 1986)); *see also* Police Dep't v. Dei-Baning, OATH Index No. 2294/07, slip op. at 3 (OATH July 17, 2007); *Hill*, OATH Index No. 633/07, slip op. at 3 (citing *Vergari*, 502 N.Y.S.2d at 789).

n311 *Green*, OATH Index No. 1347/04, slip op. at 4; *see also* Police Dep't v. Torres, OATH Index No. 1412/06, slip op. at 4-5 (OATH Mar. 31, 2006).

n312 *See, e.g.*, Police Dep't v. Miller, OATH Index No. 2420/08, slip op. at 2-3 (OATH May 21, 2008) (noting the importance of repair receipts submitted by claimant in evaluating innocent co-ownership defense); Police Dep't v. Small, OATH Index No. 1556/07, slip op. at 3-4 (OATH Mar. 26, 2007) (citing Police Dep't v. Baker, OATH Index No. 1258/07, slip op. at 5-7 (OATH Mar. 7, 2007)) (finding claimant not innocent owner where he produced no repair receipts and where Police Department introduced oil change receipt signed by beneficial owner).

n313 Police Dep't v. Moore, OATH Index No. 1033/08 (OATH Nov. 26, 2007).

n314 *Id.* at 1, 4.

n315 *Moore*, OATH Index No. 1033/08, slip op. at 4.

n316 *Id.*

n317 *Id.*

n318 *Id.*

n319 *Id.* at 4-5. Other courts have also addressed the "beneficial owner" argument. *See, e.g.*, Police Dep't v. Khan, OATH Index No. 118/08, slip op. at 5-6 (OATH July 30, 2007) (finding driver of car was beneficial owner because he had unfettered access to vehicle, which his parents testified they had purchased for him); Police Dep't v. Washington, OATH Index No. 1525/07, slip op. at 5 (OATH Mar. 30, 2007) (holding that driver of car was beneficial owner, even though mother had purchased vehicle, because driver's use of car was "regular and predictable" and mother's use was irregular); Police Dep't v. Dunn, OATH Index No. 150/07, slip op. at 5 (OATH Sept. 14, 2006) (finding driver of car was not beneficial owner because "the Department has not established that [the driver] has a possessory interest in the vehicle or that he exercised dominion and control over the vehicle"); Police Dep't v. Walker-Richards, OATH Index No. 2020/06, slip op. at 3-4 (OATH Jun. 30, 2006) (citing Police Dep't v. Bacon, OATH Index No. 551/06, slip op. at 2, 5-6 (OATH Oct. 19, 2005) (holding that driver of car was not beneficial owner because even though he was permitted to use car, he did not help maintain it and only used it periodically); Police Dep't v. Bloise, OATH Index No. 2138/04, slip op. at 1, 5 (OATH June 17, 2004)).

n320 Police Dep't v. Padilla-Barham, OATH Index No. 1356/08 (OATH Jan. 8, 2008).

n321 *Id.* at 2.

n322 *Padilla-Barham*, OATH Index No. 1356/08, slip op. at 3-4.

n323 *Id.* at 3.

n324 *Id.* at 5.

n325 *Prop. Clerk v. Harris*, 878 N.E.2d 1004 (N.Y. 2007).

n326 *Id.* at 1005-06.

n327 *Id.* at 1007 (quoting *Police Dep't v. Harris*, OATH Index No. 971/05, slip op. at 3 (OATH Dec. 27, 2004)).

n328 *Id.* at 1008 (quoting *Prop. Clerk v. Harris*, 825 N.Y.S.2d 442, 444 (App. Div. 2006)).

n329 *Id.*

n330 *Harris*, 878 N.E.2d at 1008-09.

n331 *Id.* at 1009.

n332 *Id.* at 1012 (quoting N.Y. CITY, N.Y., Code § 14-140(e)(1) (2008)). The court went on to decide that, on the facts of the case, Mrs. Harris had not made the requisite showing of hardship to entitle her to the release of the vehicle. *Id.* at 1012. Thus, the Court of Appeals of New York affirmed the ruling of the appellate division vacating the order of the OATH court, albeit on different grounds. *Id.* at 1008, 1013.

n333 *Police Dep't v. Miller*, OATH Index No. 2420/08 (OATH May 21, 2008).

n334 *Id.* at 1.

n335 *Id.* at 2.

n336 *Miller*, OATH Index No. 2420/08, slip op. at 2-3 (quoting *Harris*, 878 N.E.2d at 1012).

n337 *Id.* at 3 (alteration in original).

n338 *Id.*

n339 *Id.*

n340 *See infra* notes 343-364 and accompanying text.

n341 *See infra* notes 366-57 and accompanying text.

n342 *See infra* notes 381-388 and accompanying text.

n343 *Krimstock v. Kelly, No. 99 Civ. 12041, 2005 U.S. Dist. LEXIS 43845*, at \*7 (S.D.N.Y. Dec. 2, 2005).

n344 *See Krimstock v. Kelly, No. 99 Civ. 12041, 2007 U.S. Dist. LEXIS 82612*, at \*3-\*6 (S.D.N.Y. Sept. 27, 2007).

n345 *See* 48 R.C.N.Y. § 1-30(c) (2008). Parties may apply for adjournments as provided for in section 1-32 of the OATH Rules of Practice. *See* 48 R.C.N.Y. § 1-32 (2008). Applications will be granted "only for good cause." *Id.* § 1-32(b). Though preferred, consent of opposing counsel is not required. *Id.*

n346 Previously, these settlement conferences were coordinated by OATH clerks. However, OATH recently changed its practices and now has OATH judges oversee the settlement conferences, presumably because judicial figures are more successful at facilitating compromise. *Id.* § 1-31(a).

n347 *See id.*; *see also* Office of Administrative Trials and Hearings (OATH), Description, <http://www.nyc.gov/html/oath/html/description.html> (last visited Dec. 15, 2008) (discussing settlement conference).

n348 *See* 48 R.C.N.Y. § 1-46 (2008) ("Traditional rules governing trial sequence shall apply.").

n349 *Id.* § 2-42.

n350 At the beginning of the hearing, both sides may submit to the judge copies of exhibits, reserving the right not to use those exhibits if unnecessary. § 1-42.

n351 *See id.* § 1-46; Police Dep't v. Outlaw, OATH Index No. 1181/08, slip op. at 4 (OATH Apr. 29, 2008) (finding hearsay "generally admissible" and noting that "the expedited nature of the proceedings, intended to ensure a prompt hearing for the owner, may require that some legal shortcuts be taken").

n352 *See* § 1-46(b). For example, objections may be warranted where counsel repeatedly asks the same question, attempts to harass the witness through overly aggressive questioning, or inquires into irrelevant topics.

n353 *See, e.g.,* Police Dep't v. Nieves, OATH Index No. 1888/99, slip op. at 22-24 (OATH Oct. 4, 1999) (finding hearsay evidence insufficient to meet petitioner's burden of proof that respondent used excessive force against a civilian); Dep't of Corr. v. Aiken, OATH Index No. 1750/99, slip op. at 13 (OATH Aug. 4, 1999) (finding hearsay evidence insufficient to prove conduct absent testimony of victim).

n354 *See generally* § 1-46 (providing that the administrative law judge will have a wide range of discretion in altering traditional trial procedures during the hearing).

n355 § 1-46(b).

n356 *Id.*

n357 *See* Police Dep't v. Johnston, OATH Index No. 2837/08, slip op. at 2-3, 5-6 (OATH July 11, 2008); Police Dep't v. Mendoza, OATH Index No. 1829/08, slip op. at 3, 5 (OATH Mar. 12, 2008).

n358 *See generally* § 1-46 (providing that the administrative law judge will have a wide range of discretion in altering traditional trial procedures during the hearing). Where a second witness will testify, the second witness will generally leave the courtroom when the claimant testifies.

n359 *See id.* § 1-46(c).

n360 *See id.* § 1-46.

n361 *See id.* § 2-44.

n362 *See, e.g.,* Police Dep't v. Braxton, OATH Index No. 1154/08, slip op. at 1-2 (OATH Dec. 26, 2007). Although the OATH Rules of Practice permit discovery, the parties to a *Krimstock* action seldom engage in any pre-hearing discovery. The exception to that rule is innocent owner cases in which the Police Department regularly, though by no means uniformly, requests documents relating to a claimant's income, taxes, savings, and expenses, specifically expenses related to the care and maintenance of the seized automobile. The form requests are overbroad and irrelevant in part and many of them do not survive objections on these grounds.

n363 *See* Office of Administrative Trials and Hearings (OATH), Forfeiture: Information for Drivers and Owners of Cars Taken by the New York Police Department After Arrest, <http://www.nyc.gov/html/oath/html/forfeiture.html> (last visited Dec. 15, 2008).

n364 Importantly, for the Property Clerk to release the vehicle, the claimant must still present either a DA's release or a certificate of disposition of the criminal matter. NYPD-Property Clerk, [http://www.nyc.gov/html/nypd/html/property\\_clerk/property\\_clerk.shtml](http://www.nyc.gov/html/nypd/html/property_clerk/property_clerk.shtml) (last visited Dec. 15, 2008).

n365 38 R.C.N.Y. § 12-36(a) (2007). In cases where no DA's release is required, the Police Department must bring the forfeiture action within twenty-five days of the date upon which the claimant makes a demand for the vehicle. *See id.*

n366 *See Prop. Clerk v. Pagano*, 573 N.Y.S.2d 658, 659-61 (App. Div. 1991) (finding that section 14-140(e)(1) requires the petitioner to prove that "defendant owner 'permitted or suffered' the *illegal* use of the property").

n367 Police Dep't v. Mendoza, OATH Index No. 1829/08, slip op. at 2 (OATH Mar. 12, 2008).

n368 N.Y. CITY, N.Y., CODE § 14-140(e)(1) (2008); *see also* N.Y. PUB. HEALTH LAW § 3388 (McKinney 2002) (permitting forfeiture where vehicle "used in connection with acts or conduct" sufficient to support certain felony drug charges).

n369 *See Grinberg v. Safir*, 694 N.Y.S.2d 316, 320 (Sup. Ct. 1999) ("A drunk driver's automobile is the quintessential instrumentality of a crime--the *sine qua non* without which the crime could not have been committed."); Police Dep't v. Lord, OATH Index No. 942/08, slip op. at 8 (OATH Dec. 6, 2007).

n370 *See Prop. Clerk v. Amato*, 567 N.Y.S.2d 263, 263 (App. Div. 1991); *Prop. Clerk v. Aponte*, 552 N.Y.S.2d

118, 118 (App. Div. 1990); *Prop. Clerk v. Negron*, 550 N.Y.S.2d 351, 351 (App. Div. 1990).

n371 See *Prop. Clerk v. Vogel*, 573 N.Y.S.2d 511, 512 (App. Div. 1991).

n372 See *Prop. Clerk v. Small*, 582 N.Y.S.2d 932, 933-35 (Sup. Ct. 1992).

n373 See *Small*, 582 N.Y.S.2d at 934 ("[A]ll the Property Clerk need do is show by a preponderance of the evidence that the property is subject to forfeiture in order to establish a legally sufficient case; the disposition of the underlying criminal case is irrelevant to the resolution of the forfeiture action."); see also *Prop. Clerk v. Pagano*, 573 N.Y.S.2d 653, 658-60 ("The fact that [the driver] was never convicted of [a] crime and that the charges against him were dismissed . . . is no bar to a finding that the car was used [in furtherance of a crime]."). Conversely, a conviction in the underlying criminal case will often be all the property clerk needs to succeed on a summary judgment motion, explaining why the Police Department (and court) typically likes to adjourn forfeiture hearings until the criminal matter is resolved.

n374 See *supra* notes 190-227 and accompanying text.

n375 In our experience, the Police Department is generally unwilling to settle cases involving firearm offenses and repeat drunk drivers.

n376 Notably, the property clerk will, on occasion, not pursue forfeiture of the seized vehicle, most often where a meritorious innocent owner defense is raised.

n377 Settlement payment demands range from a few hundred to a few thousand dollars. The amount sought often depends upon the nature of the incident, the egregiousness of the claimant's conduct, the claimant's criminal record, and the value of the seized vehicle, both objectively and from the claimant's perspective. As a general matter, the settlement payment amount is negotiable and the Police Department will consider proof of a driver's financial hardship during settlement negotiations. It should be noted, however, that there are cases, whether due to the nature of driver's conduct or his criminal record, that the Police Department will not settle for any amount, even a figure equaling the fair value of the vehicle. In those cases, a category that often includes cases where the underlying offense relates to gun possession, the practitioner's only option is to challenge the seizure at a *Krimstock* hearing.

In addition, where the Police Department does not request a sum for the return of the vehicle, they may still seek to recover an impoundment fee of five dollars per day, to a maximum of \$ 500, for each day the Property Clerk stored the vehicle. In certain situations, the Police Department may also be willing to adjust this fee, occasionally agreeing to capping the fee at an amount less than \$ 500.

n378 N.Y. City Police Department, Hold Harmless Agreement (on file with authors). The "hold harmless" agreement, breathtaking in scope, purports to discharge the Police Department from any claim that the owner, his "heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have . . . from the beginning of the world" until the date that the parties execute the agreement. *Id.* The agreement also includes a clause indemnifying the Police Department for any claim for any damage, expense, or cost arising out of the seizure and storage of the vehicle. *Id.* Generally speaking, the "hold harmless" agreement is an absolute requirement for the settlement of any *Krimstock* action and the Police Department will not consent to any alterations in the language of the agreement.

n379 To the extent that the claimant's underlying criminal action is still pending when the parties achieve settlement, the owner must obtain a DA's release before the Police Department will authorize the release of the vehicle. A typical DA's release confirms that the vehicle is no longer needed as evidence in the criminal action. Counsel in a *Krimstock* action may request a release by contacting the ADA assigned to the criminal action, but it is not uncommon for the owner's criminal defense attorney to request a DA's release. Although ADAs generally issue releases as a matter of course, a particular ADA may withhold the release because the vehicle has not been inspected and photographed, the vehicle is especially critical to the case, or the ADA views the release as a source of leverage in plea negotiations. In such a situation, pursuant to the dictates of the Third Amended *Krimstock* Order, counsel should make a formal "written demand for a release," requiring the Police Department to either use reasonable means other than impoundment to preserve the vehicle's evidentiary value, such as photographing or taking forensic samples, or petition the court for an order permitting their continued retention. *Krimstock v. Kelly, No. 99 Civ. 12041, 2007 U.S. Dist. LEXIS 82612, at \*8 (S.D.N.Y. Sept. 27, 2007).*

In the event that the vehicle owner has resolved his criminal action prior to any settlement or other disposition of the *Krimstock* proceeding, the owner need only submit a certified court disposition confirming that the criminal action is no longer pending.

n380 Where the assessment reveals no substance problem, no further action is necessary. In the event that the OASAS assessment reveals that the owner suffers from a substance abuse problem that requires a course of treatment, the Police Department will not release the vehicle until the owner has completed the prescribed treatment, often lasting several months, and supplied the Police Department with proof to that effect. In the normal course, the Police Department requires the owner to execute a Consent to Disclosure of Confidential Information Regarding Drug or Alcohol Treatment, in which the owner reveals the name and contact information of his treatment facility and authorizes the Police Department to discuss with the owner's OASAS counselor his or her diagnosis and treatment. Under the terms of the consent, this authorization remains in effect until the *Krimstock* proceeding is terminated.

n381 *See People v. Zimmer, 632 N.Y.S.2d 945, 946-47 (Sup. Ct. 1995)* (noting that testimony given in administrative proceeding may be used against declarant in criminal trial).

n382 *See Police Dep't v. Figueroa, OATH Index No. 1525/08, slip op. at 5 (OATH Feb. 15, 2008).*

n383 *Id.* (finding that the owner's failure to offer information led to the administrative law judge's decision to

draw a "negative inference therefrom").

n384 *See id.*; Police Dep't v. Lord, OATH Index No. 942/08, slip op. at 5 (OATH Dec. 6, 2007); Police Dep't v. Chan, OATH Index No. 197/08, slip op. at 3-4 (OATH Aug. 14, 2007); *see also Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."). A court may make the "strongest inference that 'opposing evidence in the record permits,' " but "the adverse inference does not permit the trier of fact to fill in gaps in the petitioner's proof, or to speculate about what the respondent's testimony might have been." Police Dep't v. Williams, OATH Index No. 747/07, slip op. at 5 (OATH Oct. 27, 2006) (quoting *Noce v. Kaufman*, 141 N.E.2d 529, 531 (N.Y. 1957)).

n385 *See, e.g., Figueroa*, OATH Index No. 1525/08, slip op. at 5.

n386 *See id.*

n387 *See, e.g., Police Dep't v. Mendoza*, OATH Index No. 1829/08, slip op. at 2-3 (OATH Mar. 12, 2008).

n388 In addition, *Krimstock* counsel should attempt to coordinate their efforts with their client's legal defense attorney. In addition to discussing the implications of the claimant testifying before OATH at the *Krimstock* hearing, the claimant's defense attorney may be able to provide additional information and guidance with respect to the status of the pending criminal matter and/or efforts to obtain a DA's release.