

**VALERIE KRIMSTOCK, et. al., Plaintiffs, - against - RAYMOND KELLY and THE CITY OF NEW YORK, Defendants, - and - The DISTRICT ATTORNEYS of the City of New York, Intervenor.**

**99 Civ. 12041 (HB)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK**

**THIRD AMENDED ORDER & JUDGMENT**

**Hon. HAROLD BAER, JR., District Judge:**

1. This Third Amended Order and Judgment amends the Second Amended Order and Judgment entered by Judge Michael Mukasey in this action on December 2, 2005. See Second Amended Order & Judgment, *Krimstock v. Kelly*, No. 99-cv-12041, 2005 U.S. Dist. LEXIS 43845, Dec. 2, 2005 (S.D.N.Y.) (Mukasey, J.) ("Second Amended Order").

2. Plaintiffs represent a class consisting of 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. See, Second Amended Order, para. 1.

The "*Krimstock*" Hearing

3. Following seizure of a vehicle, at the time of the driver's arrest, as evidence of a crime or as the instrumentality of a crime, a claimant, as described in paragraph 6 below, who is entitled to possession of such vehicle, may contest such seizure at a hearing (i.e., the "*Krimstock* hearing") to be held at defendant City of New York's (the "City") Office of Administrative Trials and Hearings ("OATH") pursuant to the OATH Rules of Practice to the extent such rules are not in conflict with the terms of this Order and Judgment. Such "*Krimstock* hearing" will provide the claimant with an opportunity to be heard, either in person or through counsel, as to three issues: whether probable cause existed for the arrest of the vehicle operator; whether it is likely that the City will prevail in an action to forfeit the vehicle; and 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 these issues will be upon the Police Department, and the OATH judge may consider such hearsay and other evidence as that judge may consider reliable. The OATH judge will decide those issues by a statement of findings on the record, or by a written statement to be made a matter of record, not later than three business days following the close of evidence and the completion of argument, if any, at the hearing, unless both parties have consented on the record or in writing to extend the time for such statement. Absent a timely finding by the OATH judge that the Police Department has met the burden of proof as to the issues at the hearing, the vehicle shall be released to the claimant within 10 days without prejudice to further proceedings, including a forfeiture proceeding. Any decision made by an OATH judge shall not be binding in any way upon the Criminal or Supreme Court in any proceeding. Likewise, any legal or factual theory advanced at the OATH hearing by the prosecution or Police Department shall not be binding, nor limiting in any way, upon any decision, trial strategy or issue advanced in the Criminal or Supreme Court.

#### Notice of "Krimstock" Hearing

4. Notice of the right to a hearing will be provided at the time of seizure by attaching to the voucher already provided to the person from whom a vehicle is seized a notice, in English and Spanish, as set forth below. A copy of which notice will also be sent by mail to the registered and/or titled owner of the vehicle within five business days after the seizure. The notice will appear in type at least as large as the largest entry elsewhere on the form, but in no event smaller than 8-point type, and will read as follows:

#### 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, 2 Lafayette Street, 5th Floor, New York, New York 10007, Attention: Vehicle Seizure Unit**. When the form is received, you will be notified of the date, time and place of 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."

### Demand for "*Krimstock*" Hearing

5. The claimant of a seized vehicle has the right to a hearing at OATH, which will commence on a date and at a time, as fixed by the Police Department within 10 business days after receipt by the Police Department of a written demand for such a hearing on the form to be provided by the Police Department and in accordance with the instructions set forth thereon, unless the date for such hearing shall have been extended by OATH upon a showing of good cause by either party. If the Police Department receives more than one such written demand, the timing of the hearing will be governed by the receipt of the first such written demand. If a written demand is mistakenly directed to the District Attorney, the District Attorney shall immediately forward such demand to the Police Department.

The Police Department will notify OATH, the claimant and the relevant District Attorney of the date of the hearing in a notice to be sent by mail, email, or fax within two business days after receipt of the written demand for a hearing, to the addresses specified for such notice by the claimant and the District Attorney. The notification will provide to the claimant the address and telephone number of OATH, and will comply with the specificity requirements for a Petition as stated in OATH Rule 1-22. It will also state that in situations where a court has determined that the vehicle is needed as evidence in a criminal proceeding, including any appeals in any such proceeding, the hearing may not be held and the vehicle may not be released during the period the vehicle is so needed.

### Who May Appear at "*Krimstock*" Hearing

6. The claimant seeking release of the vehicle at the hearing may be either the person from whom the vehicle was seized, if that person was then in lawful possession of the vehicle, or the owner if different from such person. Only one person or entity may appear as claimant at the hearing, and preference shall be given to the registered owner of the vehicle.

### Review of "*Krimstock*" Hearing

7. The decision of the OATH judge will be subject to review in New York State Supreme Court, but the filing of an action in that Court does not affect the claimant's right to an OATH hearing or to release of the seized vehicle in the event that the Police Department is found not to have satisfied the burden of proof at such hearing.

### Retention Orders

8. If the vehicle is seized as evidence of a crime, either the person from whom the vehicle was seized (if in lawful possession of the vehicle) or its owner, if different from such person, may make a demand for a written statement from the prosecutor that retention of the vehicle as evidence is not necessary. The demand may be either in the form of a request for a hearing as provided in the *Krimstock* Order, or by a written demand for a release made directly to the office of the District Attorney prosecuting the criminal case.

9. The District Attorney shall respond in writing no later than seven days after receipt of a request. If the District Attorney decides that continued retention of the vehicle is not

necessary for the criminal case, the District Attorney shall serve a written statement to that effect on the person who made the demand. If the District Attorney seeks to retain the vehicle as evidence for the criminal case, an application for a retention order must be made during the seven-day period before a judge with jurisdiction over the criminal case.

10. The application for a retention order shall be supported by an affirmation from an assistant district attorney familiar with the case. The application may be made *ex parte*. It must refer to this Order and the standards laid out in paragraph eleven.

11. The judge before whom the application is made may issue the retention order if the affirmation, citing facts particular to the individual case, makes a sufficient showing that: 1) specific facts about the condition of the vehicle at the time of seizure may be relevant in the criminal case; and 2) there are no reasonable means other than impoundment such as photographing or testing, to preserve the evidentiary value of the vehicle for presentation to the trier of fact. If the judge ruling on the motion finds that photographing, testing, or other means are sufficient to preserve the evidence, the judge may order the vehicle to be retained for a period of time sufficient to allow law enforcement to complete such photographing, testing, or other means. The identification of evidentiary purposes of the vehicle in the prosecutor's affirmation may not be used to restrict the prosecution from making arguments in a later proceeding based on other theories.

12. An order authorizing retention of the vehicle (i.e., a "retention order") must be served by the District Attorney within 10 days following the demand upon the person who made the demand. If such an intervening retention order is issued, a "*Krimstock* hearing," see paras. 3-7, will not be held during the pendency of the retention order.

An order denying the retention of the vehicle must likewise be served within 10 days of the date of the Order upon the person who made the demand.

13. The person who made the demand may move to vacate or amend the retention order within 10 days following the receipt thereof. Service of that motion must be made in person or by registered or certified mail on the District Attorney and on the defendant in the criminal case, if a different person than the individual who made the demand. A hearing shall be held within 30 days of service of the motion. The hearing shall address to the legitimacy and/or the necessity of the continued impoundment of the vehicle as evidence, and may not be used to obtain premature or unwarranted discovery for the defendant in the criminal case. The judge ruling on the motion may set a date, not to exceed 30 days from the date of the order, by which the Police Department shall release the vehicle, unless continued impoundment is otherwise authorized by law. The judge ruling on the motion may condition vacatur or amendment of the retention order on a waiver by the defendant in the criminal case of any factual claim or defense relating to the condition of the vehicle when seized. Said waiver, if given, will bind the defendant throughout the pendency of the criminal matter.

14. Upon presentation to the Police Department of: a written statement from a prosecutor that a vehicle is not needed as evidence; or a written denial by a court of an application for a retention order; or an order vacating a retention order, the Police Department must, within 30 days, release the vehicle to the person who made the demand, unless continued impoundment of the vehicle is otherwise authorized by law. If

the Police Department seeks at this time continued impoundment of the vehicle as an "instrumentality of a crime," the Police Department shall provide notice as set forth in para. 4.

15. This Court will retain jurisdiction to enforce the terms of this Order and Judgment.

**SO ORDERED. September 27, 2007 New York, New York**

/s/ Harold Baer, Jr.

**U.S.D.J.**

Filed: U.S. Dist. Ct. S.D. N.Y. Oct. 1, 2007