IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK SIMMS,
2904 7th Street, SE
Washington, DC 20032

Plaintiff,

v.

THE DISTRICT OF COLUMBIA,
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001

CATHY LANIER, CHIEF OF POLICE,
300 Indiana Avenue, NW
Washington, DC 20001

VINCENT GRAY, MAYOR
1350 Pennsylvania Avenue, NW, Suite 316
Washington, DC 20004

Defendants.

Case: 1:12-cv-00701
Assigned To: Sullivan, Emmet G.
Assign. Date: 5/1/2012
Description: TRO/PI

Hearing Within 21 Days Requested

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Officers of the Metropolitan Police Department seized Frederick Simms's car without a warrant on May 29, 2011. The police, apparently contemplating a civil action to obtain title to Mr. Simms's vehicle pursuant to the District's civil forfeiture laws, have kept Mr. Simms's vehicle ever since. The police have kept Mr. Simms's car without providing Mr. Simms *any opportunity* to contest the initial seizure and subsequent retention of his vehicle pending any forfeiture proceedings. Nor, eleven months later, have such proceedings been instituted.

The Metropolitan Police Department's seizure and continued retention of Mr. Simms's vehicle without review by a neutral decisionmaker violates Mr. Simms's Fifth Amendment procedural due process rights. Because Mr. Simms continues to be irreparably harmed by the deprivation of his family's primary means of transportation, he respectfully asks this Court for a preliminary injunction ordering Defendants to return his car unless and until they provide a hearing before a neutral arbiter concerning the validity of the initial seizure and the validity of the continued impoundment of the car pending any forfeiture litigation. Plaintiff requests a hearing on this motion as soon as possible within the 21 days provided for by Local Civil Rule 65.1(d).

STATEMENT OF FACTS

I. The Seizure and Continued Retention of Mr. Simms's Car

Officers seized Mr. Simms's car after they claimed to find a firearm in a bag inside the vehicle on May 29, 2011. As a result of this incident, Mr. Simms was charged with one count of Unlawful Possession of a Firearm pursuant to D.C. Code § 22-4503(a)(1), one count of Carrying a Pistol Without a License pursuant to D.C. Code § 22-4504(a), one count of Possession of an Unregistered Firearm pursuant to D.C. Code § 7-2502.01, and one count of Unlawful Possession of Ammunition pursuant to D.C. Code § 7-2506.01(3). Mr. Simms was determined by the court to be indigent, and he was appointed a trial attorney from the Public Defender Service.

Mr. Simms was acquitted of all charges on December 7, 2011, after a jury trial in the Superior Court for the District of Columbia.

That same day, Mr. Simms traveled to the Metropolitan Police Department (MPD) vehicle impound lot in order to retrieve his vehicle. Mr. Simms was informed that, independent of the criminal prosecution by the United States, the police department had determined that it

would attempt to take ownership of his car.[1] Simms Declaration ¶ 6 (Attached to Complaint as Exhibit A).

A police officer informed Mr. Simms that he would be required to pay a "bond" of $1,200 in order to challenge the MPD's decision to take possession of his car.[2] However, payment of this "bond," he was told, would not actually result in return of his vehicle. No officer informed Mr. Simms that the "bond" would be waived or reduced if he were indigent.[3] *Id.*; Complaint at ¶¶ 38, 39.

Mr. Simms was given the name of a detective to contact. After multiple attempts, Mr. Simms finally reached the detective purportedly in charge of the forfeiture of his vehicle. The detective scheduled a meeting with Mr. Simms and told him to bring his driver's license, registration, proof of valid insurance, and a buyer's order. Mr. Simms provided that information

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[1] MPD paperwork suggests that officers intended to seek civil forfeiture as early as the date that they seized the vehicle (May 29, 2011). However, Mr. Simms did not receive actual notice of the MPD's intent to seek forfeiture of his vehicle until December 7, 2011, when he traveled to the impound lot after his acquittal. At that time, police showed him paperwork concerning their attempt to forfeit his vehicle.

[2] Mr. Simms recollects that the bond was "around $1,200." Simms Declaration ¶ 6. The MPD reported to counsel for Mr. Simms that the bond was actually set at $1,277.

While such "bonds" are supposed to reflect 10% of the value of the property, the purchase price of Mr. Simms's 2007 Saturn Aura sedan, which he bought with a loan from Andrews Federal Credit Union, was $10,000, as reflected on the Buyer's Order that he submitted to police.

[3] Although not the subject of this injunction, Mr. Simms also challenges in his complaint the constitutionality of requiring an indigent person like him to pay a sum that he cannot afford simply to obtain a day in court. *See Wiren v. Eide*, 542 F.2d 757, 763 (9th Cir. 1976) (requiring an indigent person to pay a bond to defend against civil forfeiture is unconstitutional); *see also Arango v. United States Dep't of the Treasury*, 115 F.3d 922, 925 (11th Cir. 1997); *United States v. Evans*, 92 F.3d 540, 542-543 (7th Cir. 1996) (Posner, J.) ("[I]t would be anomalous if the government could pauperize you by seizing all your property and then prevent you from challenging the seizure by denying you pauper status, thus requiring you to post a bond with money that you don't have."); *see also Tourus Records, Inc. v. DEA*, 259 F.3d 731, 736 (D.C. Cir. 2001) (discussing promulgation of 19 CFR 162.47(e) in response to the unconstitutionality of requiring a bond for indigents in forfeiture cases).

to the detective when they met in person in late December 2012. At the meeting, the detective told Mr. Simms to keep in contact but that the process would take some time because numerous other cases were ahead of his. Simms Declaration ¶ 7.

Mr. Simms learned from another person whose property had been seized that indigent people could seek to have the "bond" waived. *Id.* at ¶8. Having been unable to get any news from the detective, Mr. Simms eventually submitted an application for waiver of bond with the MPD. When he arrived to submit his application, an officer told him that he would need to get his application notarized and, in addition, that he would have to come back with three prior years of income tax returns. Mr. Simms was eventually able to take time off work to get his application notarized and to obtain copies of his 2009 tax return and to travel again to the police impound lot. He submitted copies of his tax returns from 2009, 2010, and 2011 and the notarized application for waiver to the MPD on March 19, 2012. For about two weeks he heard nothing. Finally, he went to the police station and was informed that his bond would be reduced to $800. *Id.* at ¶¶ 8, 9. Because Mr. Simms cannot afford either amount, the lengthy civil proceedings to determine the fate of his vehicle cannot begin, and his vehicle is in danger of being declared forfeited. *See* D.C. Code § 48-905.02(d)(3)(C).

The police have had possession of Mr. Simms's car for over 11 months. The months without his vehicle have been hard for Mr. Simms. First, Mr. Simms had to move out of the house that he shared with his mother in Southeast Washington, D.C. Because Mr. Simms has worked for nearly the past four years in Sterling, VA, he was having difficulty getting to work without his vehicle. As a result, he was forced to rent a place in Virginia in order to keep his job. After several months paying rent in Virginia, he was no longer able to maintain that arrangement, and he had to move back to Southeast Washington with his mother. *Id.* at ¶ 5.

Now, his daily commute is one-and-a-half to two hours each way—he takes a bus from his house to the Metro in Anacostia; he takes the Metro from Anacostia to L'Enfant Plaza; he takes a bus from L'Enfant Plaza to a Park & Ride in Herndon, VA near Dulles Airport; he gets a ride from a coworker or, often, a cab to drive the approximately ten minutes to his job in Sterling, VA—as opposed to the 30-40 minute commute he would have with his car.[4] *Id.* at ¶ 3.

In addition, Mr. Simms has an 11-month-old daughter whom he cares for. Prior to the birth, Mr. Simms depended on his vehicle to take his fiancée to various appointments. The vehicle was, after his daughter's birth, supposed to be used to get the baby back and forth to doctors' appointments, daycare, and to see family. *Id.* at ¶ 10.

Moreover, the job that Mr. Simms has held for nearly four years, at AAAA Storage, is in jeopardy. It is a requirement of his employment that he have a reliable vehicle. Mr. Simms has been forced, at great expense, to rent cars on several occasions to make it to various job sites in order to save his job. Because of these expenses and his ongoing employment requirement that he have a reliable vehicle, this employment situation is now precarious. *Id.* at ¶ 4.

Finally, in order to maintain his interest in the vehicle, Mr. Simms has had to continue his car loan payments to Andrews Federal Credit Union, which amount to $360 per month. Thus, in addition to the expenses associated with raising a newborn baby and at a time that he is incurring significant additional daily transportation costs due to losing the car, Mr. Simms has paid nearly $4,000 simply to maintain his interest in a vehicle that has been sitting on a police lot, unused and depreciating in value. *Id.* at ¶ 9. Mr. Simms makes $12 per hour. *Id.* at ¶ 3.

All of this is in addition to the numerous other tasks of daily life that, without his vehicle, are now more difficult for Mr. Simms, including getting groceries, making appointments, seeing

[4] Each leg of this trip costs a substantial amount, including the bus from L'Enfant Plaza, which itself costs $6 each way.

and spending time with friends and family, and running errands. The loss of his car has thus hindered family relationships, prevented his daughter from seeing her relatives frequently, cost an extraordinary amount of money and time, and been a significant and ongoing source of stress for Mr. Simms and his family.

At no point promptly after the seizure or in the over 11 months since police took Mr. Simms's car has the MPD's decision to seize the vehicle and to retain it pending forfeiture proceedings been justified to or reviewed by a neutral decisionmaker.[5]

II. Forfeiture Procedures in the District of Columbia

Over the last several years alone, the MPD has seized and forfeited millions of dollars in private property, much of it from the indigent. These civil forfeitures are accomplished through means that deny the basic protections of procedural due process.

Forfeiture in the District of Columbia is governed by the procedures set forth in D.C. Code § 48-905.02.[6] Based on the way this law is applied and interpreted by the District and its officers, forfeiture in the District follows the following process: Police begin by seizing property belonging to a person.[7] The MPD then notifies the person that he or she is not permitted to

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[5] Until Mr. Simms's acquittal, Mr. Simms assumed that the vehicle was being held as evidence while the criminal case was pending. The police did not set the bond amount—an amount the statute requires a property owner to pay in order to initiate further proceedings and to prevent the Mayor from disposing of the property, *see* D.C. Code § 48-905.02(d)(3)(B)-(E)—or formally notify Mr. Simms of the intent to forfeit during the first six months after the seizure. As a result, Mr. Simms has only been attempting to retrieve his vehicle for the past five months, since he was given actual notice of the attempt to retain his vehicle despite the acquittal.

[6] There are several other statutory provisions pertaining to forfeiture. Each of those employs the procedures outlined in § 48-905.02, which is part of the District's laws pertaining to "controlled substances." Forfeiture of firearms, for example, is covered by D.C. Code § 7-2507.06a.

[7] Although District-specific statistics are not currently available, one national study found that 80% of owners whose property is forfeited were never even charged with a crime. Andrew Schneider and Mary Pat Flaherty, *Drug Law Leaves Trail of Innocents*, Chicago Tribune C1 (Aug 11, 1991) (discussing a nationwide survey of civil forfeitures).

challenge the property's seizure and eventual forfeiture in court unless the person pays to the MPD a "bond" in the amount of 10% of the value of the property (as that value is determined by the police). The "bond," which the District also calls a "penal sum," must be no less than $250 and no greater than $2,500. D.C. Code § 48-905.02(d)(3)(B). Unless and until the person pays that amount, nothing happens.[8]

Once property owners pay the "bond," they still do not receive their property back pending litigation. Instead, the District holds the property until it begins forfeiture proceedings against the property in Superior Court. In most cases, nothing happens for months even after the "penal sum" is paid. Although the statute requires the District to begin proceedings "promptly" if a person pays the required amount, D.C. Code § 48-905.02(c), in practice, there is nothing prompt about the District's actions. At some point, when the District ultimately begins forfeiture proceedings, attorneys with the Office of Attorney General file a Libel of Information in Superior Court, seeking forfeiture of the property. *See* D.C. Code § 48-905.02(d)(3)(E); Sup. Ct. Rules of Civ. Proc. 71A-I. The individual property owner must litigate the civil action on his or her own if he or she cannot afford to retain a lawyer, including filing an answer, engaging in civil discovery and, ultimately, conducting a trial.[9] The evidentiary burden is placed on the individual property owner to prove that his or her property is *not* subject to forfeiture by a preponderance of the evidence. D.C. Code § 48-905.02(d)(3)(G). D.C. law forbids the property owner from taking any other action to seek prompt return of his or her property. D.C. Code § 48-

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[8] In some cases, police inform property owners that the bond can be waived if they are indigent, although, according to FOIA disclosures, the MPD has no standard set of procedures governing whether officers are required to notify people of this option and no standard set of criteria for determining whether and to what extent a person is indigent.

[9] The District keeps the "bond" as a down payment on its litigation costs. If the District prevails, the statute allows it to collect additional litigation costs from the property owner. D.C. Code § 48-905.02(d)(3)(B).

905.02(d)(2) states: "Property . . . taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the Mayor."

The MPD benefits directly from these stacked odds. D.C. law provides that the "proceeds" from seizing private property shall go to paying the MPD's expenses, including maintaining custody of the property and forfeiture seizure operations themselves. D.C. Code § 48-905.02(d)(4)(B). The leftover proceeds "shall be used, and shall remain available until expended regardless of the expiration of the fiscal year in which they were collected, to finance law enforcement activities of the Metropolitan Police Department . . . ." *Id.*

As a result, even to obtain access to a neutral judicial review of the seizure of his or her property, a property owner like Mr. Simms must pay the police an amount determined by the police. That money purchases—at some point in the future when the District decides to take action—the opportunity for Mr. Simms to engage in a civil case that could take months or years and in which, without a lawyer, he has the burden to prove that his car is *not* subject to forfeiture and that he is still the rightful owner of his own property. All the while, property owners are deprived of the use of their property but are nonetheless obligated to continue making any loan payments required on a vehicle or risk losing the vehicle to the lending agency.[10] Owners are not compensated for depreciation in the vehicle's value or for expenses related to removing their vehicle from the police lot.[11]

Although D.C. law provides that "[a]n innocent owner's interest in a conveyance which has been seized *shall not be forfeited* . . .", D.C. Code § 7-2507.06a(c) (emphasis added); D.C. Code § 48-905.02(a)(7)(A), at no point during this process are owners given any opportunity to

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[10] The MPD will return vehicles to the lender under the statute. D.C. Code § 48-905.02(a)(4)(D); § 7-2507.06a(b)(2).

[11] Many vehicles, for example, after spending many months on the police lot, do not start.

demonstrate that they are "innocent." An innocent owner in D.C. cannot promptly challenge the judgment of the police officer who decided on the scene that his car should become property of the District. Further, at no point is the District forced to justify to a neutral arbiter—in the face of substantial hardship faced by an owner deprived of his vehicle—its continued retention of the car during the course of the legal dispute over whether it can take ownership of the individual's property.

ARGUMENT

A plaintiff is entitled to a preliminary injunction if he establishes "(1) that he is substantially likely to succeed on the merits of his suit, (2) that in the absence of an injunction, he would suffer irreparable harm for which there is no adequate legal remedy, (3) that the injunction would not substantially harm other parties, and (4) that the injunction would not significantly harm the public interest." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1505-06 (D.C. Cir. 1995).

I. Plaintiff Is Highly Likely to Succeed on the Merits. Mr. Simms Is Entitled to Prompt Independent Review of the Impoundment and Continued Retention of His Vehicle By Self-Interested Government Officials

Two federal circuit courts have squarely addressed this issue. The Second Circuit and Seventh Circuit have both held that due process requires prompt post-seizure hearings when police seize a person's car pursuant to forfeiture laws. *Krimstock v. Kelly*, 306 F.3d 40, 70 (2d Cir. 2002) ("[P]romptly after their vehicles are seized under N.Y.C. Code § 14-140 as alleged instrumentalities of crime, plaintiffs must be given an opportunity to test the probable validity of the City's deprivation of their vehicles *pendente lite*, including probable cause for the initial warrantless seizure.") (Sotomayor, J.); *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir.

2008) (vacated as moot by *Alvarez v. Smith*, 130 S.Ct. 576, 583) (2009) (holding that "some sort of mechanism to test the validity of the retention of the property is required").[12]

Like the scheme employed in D.C., the New York City and Chicago schemes at issue in *Krimstock*, 306 F.3d at 45-47, and *Smith*, 524 F.3d at 835-36, allowed officers in the field to seize a vehicle based on an officer's determination that probable cause existed to believe that the vehicle was subject to civil forfeiture. Again, like the D.C. scheme, neither New York nor Illinois law provided a prompt, independent hearing for an owner to test the validity of an officer's seizure and the police's decision to continue impoundment pending any future civil forfeiture litigation. In each case, the scheme allowed police to hold an owner's car for months before an action commenced and for months or years before providing any hearing on the propriety of forfeiture. Both cases thus directly decided the issue that is the subject of this injunction.

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[12] The Supreme Court of the United States granted certiorari and received briefing in *Smith*. However, at the time of oral argument, the Court learned that the case had become moot because the vehicles had been returned to all of the owners in the class. As a result, the Court vacated the lower court opinion as moot in accordance with its standard practice. The Seventh Circuit's reasoning remains persuasive.

After *Alvarez* became moot, a divided Illinois Supreme Court issued a decision rejecting the analysis of the Second and Seventh Circuits and upholding the constitutionality of failing to provide a prompt post-seizure hearing. *See People v. One 1998 GMC*, 960 N.E.2d 1071 (Ill. 2011). That decision, however, relies on cases applying the speedy trial doctrine of *Barker v. Wingo*, 407 U.S. 514 (1972), which deals with how quickly the substantive forfeiture litigation must proceed and which presumes that a case should not be dismissed on the merits absent delays under *one year*, *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992). The *Barker v. Wingo* line of cases, of course, as the Second Circuit easily concluded, *Krimstock*, 306 F.3d at 68, has nothing to do with the question of *who has possession* of the property during that litigation. How long a state can wait before deciding the merits of a forfeiture action or, for example, before bringing a criminal defendant to trial, is an entirely separate question from what process must be provided to protect an individual's property or liberty interests while that potentially lengthy case is pending.

Moreover, as the lengthy special concurrence in *One 1998 GMC* noted, 960 N.E. 2d at 1102-03, even though the Illinois statute at issue appeared vulnerable to a facial due process challenge, the issue was moot because Illinois had amended its forfeiture statute in 2011 to provide a post-seizure hearing within 14 days of the seizure.

In a comprehensive opinion, then-Judge Sotomayor found unconstitutional New York City's continued retention of private vehicles seized after arrests for Driving While Intoxicated without providing vehicle owners a prompt hearing at which the owner could challenge the validity of the initial seizure and the validity of the city's continued retention of the vehicle pending forfeiture proceedings. *Krimstock*, 306 F.3d at 69; *see also Smith*, 524 F.3d at 838-39. Not only could a prompt hearing identify mistakes and provide a neutral check on police seizures, but it could also identify and put in place simple alternatives to continued police retention that were less restrictive, allowing the owners to have use of their car pending any forfeiture proceedings. *Krimstock*, 306 F.3d at 69; *see also Smith*, 524 F.3d at 839.

Numerous circuit courts have uniformly found prompt post-deprivation hearings required in similar cases involving vehicle impoundment. *See, e.g.*, *Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994) ("In similar cases involving the impoundment of vehicles, courts have uniformly held that due process requires a prompt hearing before an impartial decisionmaker. We agree."); *Breath v. Cronvich*, 729 F.2d 1006, 1011 (5th Cir. 1984) (holding that, in lieu of continued impoundment, "the vehicle owner's interest in the uninterrupted use of his automobile" can be satisfied by an appearance bond procedure that allows continued use of the vehicle pending a hearing on the merits); *De Franks v. Ocean City*, 777 F.2d 185, 187 (4th Cir. 1985) (collecting cases and agreeing that a hearing within 48 hours did not violate due process because "it was enough that there was a provision for a prompt post-impoundment hearing"); *Goichman v. Rhueban Motors*, 682 F.2d 1320, 1323-24 (9th Cir. 1982) (holding that, while a five-day delay in holding a hearing on an impounded vehicle violates due process, a hearing within 48 hours satisfies procedural due process requirements); *Stypmann v. San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977) ("A five-day delay in justifying detention of a private vehicle is too long. Days,

even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. . . . [A] five-day delay is clearly excessive . . . ."); *see also Cokinos v. District of Columbia*, 728 F.2d 502, 503 (D.C. Cir. 1983) (following the reasoning of *Goichman* and stating: "We adhere to the view, stated and explained by the Ninth Circuit, that due process does not require a more immediate hearing [than 48 hours].").[13]

In each of these cases, owners had their cars seized for violations of local traffic laws. In each case, the federal courts recognized the need for a prompt, post-seizure hearing to test the validity of the impoundment. *See, e.g., Coleman*, 40 F.3d at 260. In *Coleman*, for example, the plaintiff was stopped for committing various traffic offenses. *Id.* at 258. His car was seized and impounded when an officer determined that he could not produce proof of valid insurance and registration. *Id.* This failure, however, was due merely to a mistake in the state database that incorrectly failed to reflect that Coleman did, in fact, have valid insurance and registration. *Id.* Coleman was not given any hearing on the impoundment for seven days. After a lengthy discussion of precedent and after weighing the private interests at stake, the risk of erroneous deprivation, and the government's interests, the Eighth Circuit held: "Our analysis leads us to agree with the Ninth Circuit and hold that a seven-day delay is clearly excessive." *Id.* at 261.

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[13] In *Stypmann*, the Ninth Circuit explained and condemned the basic dilemma confronted by vehicle owners in similar situations involving impoundment and forfeiture:

> The statute establishes no procedure to assure reliability of the determination that the seizure and detention are justified. A police officer must authorize the tow, but he also gathers the facts upon which the charge of ineligibility rests, and his judgment cannot be wholly neutral. . . . No hearing is afforded and no judicial intervention is provided by section 22851 at any stage before or after seizure unless and until the vehicle is sold to satisfy the lien. The only hearing available under any other state procedure may be long deferred, and the burden of proof is placed upon the owner of the property seized rather than upon those who have seized it.

557 F.2d 1338, 1343 (internal quotations and citation omitted).

The basic principle behind these decisions makes sense: because the centrality of the car to modern life makes the property interest in a person's vehicle significant, a person is entitled to a meaningful opportunity to be heard when government agents seize his car and seek to hold it indefinitely.

This common-sense proposition is supported by a long line of precedent. The general constitutional rule is that a due process hearing is required *before* even temporary deprivations of private property by the government. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process.").[14] In *Good*, the U.S. government sought to seize and forfeit the home of James Daniel Good. Good had been convicted of a drug offense resulting from the discovery, among other things, of 89 pounds of marijuana in his home. *Id.* at 46. In an *ex parte* proceeding before a U.S. Magistrate Judge, the government obtained a warrant *in rem* for the property, which Good was then renting to tenants. *Id.* at 47. The Supreme Court applied the balancing test articulated by *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and held that the balance of the interests at stake and the risk of erroneous deprivation required that notice and a hearing before an independent arbiter was required *prior* to the seizure of real property pursuant to forfeiture laws. *Id.* at 62.

The question in this case is: what process is required when the private property seized is a person's car? In "extraordinary situations," due process allows the government to postpone the hearing until after the deprivation. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972) (internal quotations and alterations removed). "Extraordinary" circumstances exist when something about the

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[14] Even the temporary deprivation of property, for example, during the pendency of a forfeiture case, is a constitutional deprivation. *Fuentes*, 407 U.S. at 84-85 ("It is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.").

property or the situation provides a "special need for very prompt action." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974) (noting that the very nature of a yacht made pre-hearing seizure of the vessel necessary). Thus, for example, the Supreme Court has held that "postponement" of the required hearing was permitted until after the seizure in order to protect the public from contaminated food, from a bank failure, and from misbranded drugs, *Calero-Toledo*, 416 U.S. at 679 (collecting cases), and in the context of border enforcement by customs agents, *United States v. Von Neumann*, 474 U.S. 242, 250 (1986) (Requiring pre-seizure process "would make customs processing entirely unworkable.").

Mr. Simms does not challenge here that police may have "extraordinary" reasons to seize a private car prior to an impartial hearing. After all, if police do not seize the car on the scene, it could be difficult for them to ensure that they could later effectively institute legal proceedings concerning whether the car should be forfeited. The only question here, though, is whether the required hearing must be held promptly after the deprivation. Given the clear Supreme Court pronouncements that *pre*-deprivation process is required except in "extraordinary situations" when there is a special, urgent need to seize property prior to giving the person notice and an opportunity to be heard, it is hard to see how the failure to provide a prompt post-seizure hearing—when those exigencies have dissipated—could possibly comport with constitutional process. Indeed, that is precisely what the Second and Seventh Circuits held in *Krimstock* and *Smith*.

A. The *Mathews v. Eldridge* Factors Strongly Demonstrate that a Prompt, Independent Hearing Is Required.

Mathews sets forth a three-part balancing test to determine what process is due when an individual's property right is threatened by government action: 1) the court considers the nature of the private right at stake; 2) the court examines the risk of erroneous deprivation given the

procedures currently being employed and assesses the probable value of additional safeguards; and 3) the court evaluates the government's interest in avoiding additional procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, these factors strongly condemn the District's impoundment of a person's vehicle without a prompt hearing before a neutral arbiter to test the validity of the seizure and continued retention of the vehicle.

1) The Private Interest At Stake Is Strong

As the Seventh Circuit explained:

> Our society is, for good or not, highly dependent on the automobile. The hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate. It can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment. This is bad enough for an owner of an automobile, who is herself accused of a crime giving rise to the seizure. But consider the owner of an automobile which is seized because the driver—not the owner—is the one accused and whose actions cause the seizure. The innocent owner can be without his car for months or years without a means to contest the seizure or even to post a bond to obtain its release. It is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal.

Smith, 524 F.3d at 838. In *Krimstock*, the Second Circuit agreed:

> The particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood. An individual has an important interest in the possession of his or her motor vehicle, which is often his [or her] most valuable possession.

306 F.3d at 61 (quotations, alterations, and citation omitted). *See also Coleman*, 40 F.3d at 260-61 ("Automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life. Consequently, we find that Coleman's interest in a speedy hearing to adjudicate the validity of the impoundment is substantial."). Indeed, the Supreme Court itself has recognized the heightened seriousness of the deprivation of a person's vehicle. *See City of Los Angeles v. David*, 538 U.S. 715 (2003) (noting

that the loss of a vehicle, like the loss of a job, is "a far more serious" harm than loss of a small amount of money and citing favorably cases that required heightened prompt process for the loss of a job or the loss of a car).

The personal interest is even greater than lost jobs, moving residences, missed appointments, strained relationships, and an altered social life. A person whose vehicle is seized often must continue paying loan payments on the vehicle, not knowing when or if the vehicle will ever be returned. Because statute allows the MPD to return the vehicle to a lienholder, D.C. Code § 48-905.02(a)(4)(D); § 7-2507.06a(b)(2), innocent owners are often stuck paying hundreds of dollars per month just to maintain their interest in the vehicle at a time when the loss of their vehicle is itself the source of tremendous financial difficulty. For example, Mr. Simms, in addition to all of the other expenses that come with supporting himself and his daughter, has been paying $360 per month to his creditor in order to prevent his car loan from defaulting—all the while being without the car and incurring the additional transportation expenses that result.

All of these harms are further exacerbated when, unlike the federal forfeiture law, the jurisdiction's forfeiture law does not offer any kind of hardship relief to protect potentially innocent owners pending litigation. *Krimstock*, 306 F.3d at 61. Under federal law, statute provides for the return of a vehicle *pendente lite* upon a showing of hardship, calling for "immediate release" if the owner meets certain conditions. *See* 18 U.S.C. § 983(f)(1)(C)-(D) (allowing return of a vehicle pending litigation when continued police retention "will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless . . ."). A statutory scheme that does not provide even these basic protections lacks the simple fairness and reasonable

accommodations that are required when balancing private and governmental interests. *See Krimsock* 306 F.3d at 61, 68.

Moreover, all of the consequences that give weight to the personal stakes are further magnified by the *length* of the deprivation, *Krimstock*, 306 F.3d at 62, which in the District of Columbia can be months or upwards of a year. What inconveniences can be endured and accommodated for hours or days slowly become onerous changes in lifestyle. Mr. Simms is no exception. The loss of his vehicle has threatened his stable job, affected his living arrangements, transformed the way he spends his time each day, and complicated the care of his infant daughter.

2) The Risk of Erroneous Deprivation Is Enormous

A police officer's decision to seize a vehicle is fraught with potential error for several reasons. Like any warrantless seizure, a police officer's initial decision to seize a vehicle on the scene is necessarily a rushed and incomplete judgment. Indeed, the exigencies of the situation are precisely why the requirement of a warrant is excepted. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Almost by definition, the initial decision can only be based on facts known at the time or readily apparent to the officer. As a result, individual police officers making a judgment call in the field with respect to probable cause of a crime being committed are often incorrect as a matter of fact or as a matter of law.[15] This is of little solace to innocent owners who, if given

[15] The seizure of private property includes yet an additional judgment: the officer must determine not just that probable cause exists that a person has committed a crime, but also that probable cause exists to believe that any particular piece of property is subject to forfeiture as a result of that crime based on existing statutory and constitutional principles, as well as the facts of the particular case concerning the nexus between the property and the crime and, further, the owner of the property. Those statutory and constitutional decisions are made in the heat of the moment, on the scene, when the police officer may not even have the benefit of additional evidence in the possession of the property owner—and, indeed, when the person who actually owns the property may not even be present or aware of the seizure.

the chance, may very easily be able to explain why the car should not be forfeited or why they had no knowledge of the alleged offense that occurred in the vehicle that they own.[16] D.C. law appears to contemplate that reality by providing innocent ownership as an absolute defense to forfeiture, *see* D.C. Code § 48-905.02(a)(7)(A); D.C. Code § 7-2507.06a(c), even if the procedures now used by police in practice provide no chance for an owner to make that showing for months or years.

Our system attaches great importance to the opportunity of a person to be heard as to why the government's deprivation of liberty or property is erroneous or unlawful. *See Good*, 510 U.S. at 55-56 ("Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.") (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring)). Because police determinations on the scene are fallible even when police do *not* have a financial stake in the decision, prompt determinations of probable cause by an objective decisionmaker are thought indispensible to guard against erroneous deprivations after warrantless arrests. *See Gerstein*, 420 U.S. 103; *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The Supreme Court's reasoning in *Gerstein* is equally powerful here: once the seizure on the scene has been effectuated "the reasons that justify dispensing with the magistrate's neutral judgment evaporate." 420 U.S. at 114.

In addition, as the Supreme Court noted in *Good*, police are not a disinterested party in forfeiture decisions; they have a financial interest in the outcome. The Supreme Court held that the risk of erroneous deprivation is "of particular importance . . . where the Government has a

[16] For example, officers on the scene know that a bag of marijuana is found in a vehicle driven by person A but may not be aware that the vehicle is actually owned by person A's mother, who has no idea that person A had brought drugs into the car. Or, police officers find a weapon possessed by a rear passenger but do not realize that the driver had no idea that the rear passenger was armed, and had merely agreed to give him a ride home.

direct pecuniary interest in the outcome." *Good*, 510 U.S. at 55-56; *id.* at 56 ("It makes sense to scrutinize governmental action more closely when the State stands to benefit.") (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of Scalia, J.)). In explaining the importance of a pre-deprivation hearing for seized real property in *Good*, the Supreme Court highlighted an internal Department of Justice memorandum:

> The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:
>
> "We must significantly increase production to reach our budget target.
>
> ". . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990." Executive Office for United States Attorneys, U. S. Dept. of Justice, 38 United States Attorney's Bulletin 180 (1990).

Good, 510 U.S. at 56 n.2.[17]

The MPD has a direct pecuniary interest in seizing property because the MPD gets to keep a large percentage of the proceeds. D.C. Code § 48-905.02(d)(4)(B) states directly that forfeiture funds "shall be used . . . to finance law enforcement activities of the Metropolitan Police Department." D.C. Code§ 48-907.02, while ambiguous, contemplates that at least 49% of

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[17] The perverse incentives identified by the Supreme Court have been described in the civil forfeiture context in comprehensive detail in numerous academic articles. *See, e.g.*, Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.CH. L. REV. 35, 68 (1998); Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 45-46 (1994) ("It is the aggregate effect of forfeiture proceedings—summary seizures, minimalist government justification, shifting of burdens, unreasonable time limits for contesting forfeitures, generous time limits for prosecuting them, readily invoked default rules, and bond posting requirements—which combine to make the process unfair."); *see also* Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2010), available at http://www.ij.org/images/pdf_folder /other_pubs/assetforfeituretoemail.pdf.

all seized funds can be used almost immediately by the MPD to fund law enforcement. Freedom of Information Act disclosures reveal that the MPD has seized and forfeited millions of dollars in property in the last several years, with D.C. municipal regulations allowing virtually unfettered discretion for the Chief of Police, CDCR 6-A810 ("The Chief of Police may retain any forfeited or unclaimed tangible property for official use by any unit of the Metropolitan Police Department."). But while even federal civil forfeiture laws received much needed fairness reforms to guard against the risk of erroneous deprivations with the passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000—including a provision for "immediate release" of property pending forfeiture litigation if government retention would cause substantial hardship, *see* 18 U.S.C. § 983(f)—the law in D.C. continues to languish in the lawless pre-CAFRA due-process underworld.[18]

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[18] The unfairness that characterizes the D.C. scheme stands in stark contrast with certain provisions of federal civil forfeiture law. In 2000, in the face of Congressional concern that civil forfeiture laws deprived property owners of due process, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA), which is now codified at 18. U.S.C. § 983. *See, e.g.*, 145 Cong. Rec. H4852 (daily ed. June 24, 1999) (statement of Rep. Pryce) ("Our current civil asset forfeiture laws, at their core, deny basic due process . . . ."). Representative Henry Hyde, the leading sponsor of CAFRA, stated on the floor of the House that "civil asset forfeiture as allowed in our country today is a throwback to the old Soviet Union, where justice is the justice of the government and the citizen did not have a chance." 145 Cong. Rec. H4854 (daily ed. June 24, 1999); *see also* House Judiciary Report, H.R. Rep. No. 106-192 at 11 (explaining that reform was needed in order "to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures").

CAFRA replaced old federal laws that were similar to *current* D.C. law. In contrast to D.C.'s forfeiture laws, CAFRA places the burden of proof for forfeiture on the government, provides for appointed legal representation in certain cases, and, most importantly, contains simple procedures for owners to maintain use of their property pending the forfeiture litigation if the continued retention of their property would cause substantial hardship and if the hardship to the owner outweighs the government's interest in continued retention. In such cases, CAFRA authorizes the court to take several measures to ensure the interests of all parties, including "any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending." 18 U.S.C. § 983(f)(7).

Here, then, it is improper to allow the MPD—the agency whose finances stand to benefit from a seizure of property—to make all of the important determinations to render that seizure a reality without any neutral review.[19] Because of these incentives, extra procedures are necessary "to ensure the requisite neutrality that must inform all governmental decision-making." *Good*, 510 U.S. at 55-56; *see also Tumey v. Ohio*, 273 U.S. 510, 533-35 (1927) (holding that a mayor's professional interest in increasing the town budget made his position as a municipal judge on certain offenses violate due process); *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (Due process would be violated if, in a civil enforcement scheme, there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts.").[20]

The risk of erroneous deprivation is further magnified when erroneous deprivation "cannot be recompensed," *Krimstock*, 306 F.3d at 63, in later proceedings. Here, the erroneously deprived innocent owner loses access to his or her car for months, suffering all of the attendant

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[19] For this reason, the Second Circuit had strongly criticized federal forfeiture laws prior to the enactment of CAFRA in 2000—laws that are materially identical to current D.C. forfeiture laws:

> We have previously observed the government's virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes. Another source of potential abuse is that forfeited funds are kept by the Department of Justice as a supplement to its budget. *Thus the agency that conceives the jurisdiction and ground for seizures, and executes them, also absorbs their proceeds. This arrangement creates incentives that evidently require a more-than-human judgment and restraint.* The Supreme Court has politely remarked on the Department of Justice's "direct pecuniary interest" in maximizing drug forfeitures to meet the Department's budget target. . . .
>
> The bare financial facts of this case shine a light on the corrupting incentives of this arrangement . . . .

United States v. Funds Held ex rel. Wetterer, 210 F.3d 96, 110 (2d Cir. 2000) (emphasis added) (citations and quotations omitted).

[20] *See also Ward v. Village of Monroeville*, 409 U.S. 57, 59-62 (1972) (reaffirming that executive obligations and not merely personal pecuniary interests were sufficient to create a due process violation and emphasizing that due process is violated when there is even a "slight temptation").

ills on family, education, employment, and health, all while his or her vehicle depreciates in value.[21]

Perhaps most importantly, the "probable value . . . of additional or substitute procedural safeguards," *Mathews*, 424 U.S. at 335, is extremely high here. A hearing in front of a neutral arbiter could greatly reduce the risk of erroneous deprivations pending resolution of the case. Not only would the hearing serve as a basic test of the initial warrantless determinations of the officer on the scene and provide the owner a chance to provide some simple information that could illuminate the issues (including the chance to assert the innocent owner defense), but it would also allow for the institution of conditions that protect the interests of everyone involved. For example, the car can be returned to the owner—thereby preventing any wrongful deprivation pending litigation—with an order that the vehicle not be disposed of or upon paying of an appearance bond. Such a procedure protects the important private interests at stake while also protecting the government's interest in preventing the dissipation of the seized asset—the *only* justification for avoiding the *pre*-deprivation hearing in the first place. The Supreme Court made this point in the clearest possible terms in *Good*:

> The Government's legitimate interests at the inception of forfeiture proceedings are to ensure that the property not be sold, destroyed, or used for further illegal activity prior to the forfeiture judgment. *These legitimate interests can be secured without seizing the subject property.*

510 U.S. at 58 (emphasis added) (discussing the availability of less drastic measures, such as *lis pendens*, restraining orders, or "other appropriate relief" to prevent destruction or sale of a person's property).

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[21] Impounded cars sit on the police lot, depreciating in value and often becoming unworkable, thus requiring costly towing at the property owner's expense. Under existing D.C. law, if the seizure is found unlawful, no one is required to reimburse the owner for all of the costs incurred to regain possession of a working vehicle.

As the Seventh Circuit noted, "[i]t is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal." *Smith*, 524 F.3d at 836; *see also Coleman*, 40 F.3d at 261 ("[I]t is clear that a city can provide a less-than-prompt hearing, but only if the owner is permitted to regain the use of the impounded vehicle in the interim."). In *Krimstock*, the court explained at length why a hearing on the validity of the government's continued retention of the car pending litigation was eminently reasonable because it would allow for the person's use of his or her private property pending a decision on whether it was subject to forfeiture while providing the government the chance to assert any "justification... for the retention of th[e] vehicles during the pendency of proceedings." *Krimstock*, 306 F.3d at 49, 53 (noting that the government would be able to "persuade the court that its interest in the accused instrumentality would not be protected by measures less drastic than continued deprivation").

The probable value of these procedures is therefore unquestionable. A private owner will have use of his or her vehicle while the government gains assurance that the owner will not dispose of the vehicle prior to a decision on forfeiture. Such a procedure protects both innocent owners from the devastating effects of losing their means of transportation and protects the District by ensuring that it can maintain a forfeiture action. A similar procedure has proven to be eminently workable in the federal system when federal agents seize vehicles. *See, e.g., United States v. $1,231,349.68 in Funds*, 227 F.Supp.2d 125 (D.D.C. 2002) (ordering return of vehicles on demonstration of need and ties to the community).

3) The District's Interest in Avoiding an Informal Hearing Before a Neutral Decisionmaker Is Minimal

Mr. Simms does not here contest the District's interest in civil forfeiture in general. Nor, for the purposes of this motion, does Mr. Simms contest, per se, the financial arrangement in

which police benefit directly from the forfeitures that they pursue. All that is at issue here is the District's interest in avoiding any kind of neutral hearing concerning the validity of the seizure and the continued retention of the vehicle pending litigation on the merits.

As *Krimstock* explained at length, any asserted interests by the police in avoiding a prompt post-seizure hearing are extremely minimal. 306 F.3d at 64-67. As an initial matter, the government has no legitimate interest in maintaining property if a neutral decisionmaker finds that the property is not subject to forfeiture.[22]

Moreover, the informal hearing establishing probable cause for the seizure and evaluating any other alternatives to continued police retention suggested by the parties under the circumstances would not be overly burdensome. Indeed, such hearings have not proven to be onerous in New York after *Krimstock* was decided ten years ago.[23] Similar hearings are already provided for in many states, as well as by the federal forfeiture statute—CAFRA provides for "immediate release," 18 U.S.C. § 983(f), if certain conditions are met, *see, e.g.*, *U.S. v. $1,231,349.68 in Funds*, 227 F.Supp.2d 125 (D.D.C. 2002) (ordering the release of a family's two vehicles pending litigation)—and there is no indication that those jurisdictions are facing

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[22] Applicable law provides a number of reasons that property seized by a police officer may not ultimately be forfeitable, including a lack of probable cause, a lack of a proportionate connection to an enumerated forfeitable offense, an innocent owner, an illegal seizure, or a simple factual error.

[23] The experience in New York after *Krimstock* is telling. Before *Krimstock*'s requirement of a prompt post-seizure hearing went into effect in February 2004, there was a backlog of 6,000 vehicles that sat impounded, many for years, in the custody of police. Post-*Krimstock*, in many cases, a hearing was unnecessary because the parties were able to come to other arrangements. In the cases in which hearings were held, they proved to be simple but important. In FY 2008, for example, judges decided 59 cases after holding a hearing, returning vehicles to 37 owners and allowing police to retain 22. Amicus Brief of the Legal Aid Society, *Alvarez v. Smith*, 130 S.Ct 576, at 30. Those results speak to the significant number of unnecessary retentions that plague a system left entirely to police discretion.

In addition to neutral decisionmakers returning a large percentage of the vehicles, the hearings at which those decisions occurred have not been a burden. *See id.* at 32-33.

unworkable burdens in assuring the constitutional rights of their citizens. *See, e.g.*, Fla. Stat. Ann. § 932.703(2)(a); Ariz. Rev. Stat. § 13-4310. If the costs were overly burdensome or unworkable, experience in those jurisdictions would bear that out.

Moreover, the existence of simple alternatives demonstrates that the District may not even need to provide a hearing at all. The District can get an order restraining the sale of the vehicle pending a resolution of forfeiture proceedings. Obtaining such an order is an eminently simple task, akin to any number of preliminary orders issued by judges and hearing officers in administrative, civil, and criminal cases in any forum. *Krimstock,* 306 F.3d at 69-70; *Smith*, 524 F.3d at 839; *Good*, 510 U.S. at 58 (discussing impropriety of government possession of property when other alternatives to protect the government's interests, like court orders, are available). To the extent the District is concerned about granting an indigent person access to the vehicle because of the mobility of vehicles, a brief hearing could be held to determine whether the person is a flight risk and to place certain conditions on the return of the car. Another option for the District is to allow owners to make an appearance bond in a reasonable amount if they can afford it. *See Krimstock,* 306 F.3d at 65; *Coleman,* 40 F.3d at 261 (discussing an appearance bond and stating: "it is clear that a city can provide a less-than-prompt hearing, but only if the owner is permitted to regain the use of the impounded vehicle in the interim"); *Breath v. Cronvich*, 729 F.2d 1006, 1011 (5th Cir. 1984) (same). In either case, the government has no legitimate interest in avoiding less restrictive alternatives that could reasonably assure the presence of the vehicle for future litigation. As the Seventh Circuit noted, it is "hard to see any reason" why a property owner should not have the vehicle returned with those conditions pending the forfeiture litigation. *Smith*, 524 F.3d at 838.

B. The Balance of *Mathews* Factors Points Strongly Toward A Prompt Independent Check on Police Discretion

The significance of the personal interest, the risk of erroneous deprivation, and the probable value of simple, alternative procedures at minimal cost strongly suggest that the MPD's indefinite seizures violate basic standards of due process. A long line of Supreme Court cases has balanced these factors and repeatedly and consistently held that a pre-deprivation or prompt post-deprivation hearing is required in analogous situations. In *Commissioner v. Shapiro*, the Supreme Court said:

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

424 U.S. 614, 629 (1976) (emphasis added); *see also, e.g.*, *Fuentes*, 407 U.S. at 80 (hearing required prior to pre-judgment attachment of household appliances); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339, 342 (1969) (Pre-judgment wage garnishment violates due process "absent notice and a prior hearing" because "in the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have."); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 607 (1975) (striking down garnishment statute in part because "[t]here is no provision for an early hearing" in which the validity of the garnishment could be tested); *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (requiring "prompt postsuspension hearing" when suspension of a horse trainer's license causes the trainer significant harm). These cases—and many more—stand for the simple proposition that the Due Process Clause does not tolerate extended constitutional deprivations when a timely hearing before an objective arbiter could prevent that harm without significant risk to the public interest.

See Connecticut v. Doehr, 501 U.S. 1, 15 (1991) (holding that due process is offended when a delayed hearing "would not cure the temporary deprivation that an earlier hearing might have prevented"). Otherwise, if the District's practice is upheld, thereby allowing police to seize and retain a private citizen's car indefinitely, the Due Process Clause's guarantee of a neutral hearing "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), would be a nullity.

Thus, the constitutional relief ordered in *Krimstock* and in *Smith* is simple and reasonable. The due process hearing need not be formal, *see Smith*, 524 F.3d at 838, *Krmistock*, 306 F.3d at 69-70. It must merely provide an independent means to test the initial police seizure and to evaluate the reasons that would justify continued retention of the vehicle until a court ultimately determines whether the property is forfeitable or not, especially when less restrictive means such as a restraining order and appearance bond are available. *See Good*, 510 U.S. at 58; *Smith*, 524 F.3d at 838-39; *Krimstock*, 306 F.3d at 70.

It is therefore clear that Mr. Simms is likely to prevail on the merits of his claim that he is entitled to a prompt hearing that tests the validity of the seizure and the validity of the continued detention of his car pending the outcome of forfeiture proceedings. He requests that this Court require the District to return his vehicle unless and until it provides such process.

II. Mr. Simms Will Continue to Suffer Irreparable Harm If This Court Does Not Issue an Injunction

Mr. Simms suffers irreparable harm each day that he goes without his car. *See Coleman*, 40 F.3d at 260-61; *Krimstock*, 306 F.3d at 61; *Smith*, 524 F.3d at 838. The loss of his car has already forced him to move residences so that he could maintain the job that he has held for four years. Even that situation is now precarious. Simms Declaration ¶ 4, 5. Because his employer requires that employees have access to a reliable car, even Mr. Simms's long record of service

with the employer may not be enough to prevent him from losing his job. Mr. Simms cannot afford the expensive cost of continuing to rent a vehicle on days in which he is required to travel from one job site to another. *Id.* at ¶ 4. The loss of the vehicle puts pressure on Mr. Simms and his family, who are forced to struggle each day to complete basic tasks, such as attending doctors appointments with their baby, getting groceries, seeing family and friends, and making it to work. *Id.* at ¶ 3, 10. All of this comes at a time when Mr. Simms has been under the additional financial stress of paying rent in Virginia, paying for day care, making expensive car loan payments to preserve his interest in his vehicle, and, now, commuting to work for a total of 3-4 hours each day using multiple forms of public transportation. *Id.* at ¶ 3, 9. Not only can Mr. Simms not afford the reduced $800 "penal sum" that the MPD requires in order to allow him to challenge its seizure, but he surely cannot afford to purchase a new vehicle that is safe and reliable for his family.

III. An Injunction Will Not Harm Other Parties. Instead, It Will Serve the Public Interest.

The MPD has had possession of Mr. Simms' primary means of transportation for 11 months without any check on its self-interested decisions. The car is currently sitting on an MPD impound lot. Allowing Mr. Simms and his family use of his vehicle pending a neutral hearing on the validity of the District's continued retention of the vehicle will not harm the District. Indeed, any claims of harm to the MPD or the District can be alleviated through an order that Mr. Simms preserve the vehicle pending potential litigation. Moreover, when important private interests are at issue, the public benefits from adequate procedures that produce accurate results. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 28 (1981) (noting that a contested hearing prior to deprivation serves both the government and the individual because the government "shares the [individual]'s interest in an accurate and just decision").

CONCLUSION

For the reasons stated, the Court should grant Mr. Simms's Motion for a Preliminary Injunction ordering the MPD to return his vehicle unless and until it provides a hearing before a neutral decisionmaker to test the validity of the MPD's initial seizure and the validity of its continued retention pending any potential civil forfeiture litigation.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK SIMMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE DISTRICT OF COLUMBIA,	)	Case No. _____
	)	
CATHY LANIER, Chief of Police,	)	
	)	
VINCENT GRAY, Mayor,	)	
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of Plaintiff's Motion for Preliminary Injunction, it is ORDERED that the motion is GRANTED. Defendants are ORDERED to return Plaintiff's property immediately unless and until Defendants provide a hearing before a neutral decisionmaker to test the validity of the seizure of Plaintiff's car and to test the validity of the continued retention of the car by Defendants pending the outcome of any potential forfeiture proceedings.

Ordered this ___ day of _____, 2012.

_____

Hon. _____, District Judge