

COURSE: BASIC PLAINCLOTHES COURSE	TRAINEE LEVEL: In-Service
LESSON: STREET ENCOUNTERS: INVESTIGATIVE ENCOUNTERS	TIME REQUIRED: 2 hours
PREPARED BY: TRAINING ASSESSMENT UNIT	DATE PREPARED:
REVISED BY:	DATE REVISED:
REVISED BY:	DATE REVIEWED:
TRAINING NEED: To ensure that plainclothes UMOS are aware of their legal responsibilities when engaged with the public in street encounters.	

PERFORMANCE OBJECTIVES:

At the conclusion of this lesson, the student will be able to:

1. Discuss the levels of investigative encounters: Request for Information (Level 1), Common Law Right of Inquiry (Level 2), and *Terry* Stops (Level 3), including the level of information or suspicion required for each level and the investigative tools and authority that is available to an officer at each level.
2. Highlight the importance of calibrating tone and actions to ensure that people who are questioned during Level 1 and 2 encounters feel free to leave.
3. Highlight the importance of the protective measures that are available when an officer has safety concerns but does not have reasonable suspicion that a person is armed and dangerous.
4. Differentiate the Level 3/*Terry* stop encounters where a frisk may and may not be performed.
5. Review when frisks in the context of issuing a summons may and may not be performed.
6. Stress the importance of conducting investigative encounters in a safe, professional and respectful manner. Also stress the importance of *explaining* to someone at the conclusion of the encounter the reason they were approached or stopped. Having a fair and transparent process leads to public trust and confidence in the police.
7. Discuss and understand the requirements and importance of documenting a *Terry* Stop.
8. Discuss and understand the requirements of PG 203-25- Prohibitions against profiling/biased-based policing.

METHOD OF PRESENTATION:

Lecture, Question and Answer,
Group discussion

CLASSROOM REQUIREMENTS:

Basic Plainclothes Training Classroom

STUDENT MATERIAL:

None

TRAINING AIDS, SUPPLIES, EQUIPMENT:

Basic plainclothes Power Point Investigative Encounters presentation and Body Worn Camera videos

BIBLIOGRAPHY:

NYPD Police Student's Guide
NYPD Patrol Guide

INSTRUCTIONAL GOAL: At the end of this lesson, students will be able to understand the legal standards required by courts with regards to police/public interactions and be able to conduct investigative encounters lawfully and in compliance with Constitutional standards.



The law is not new

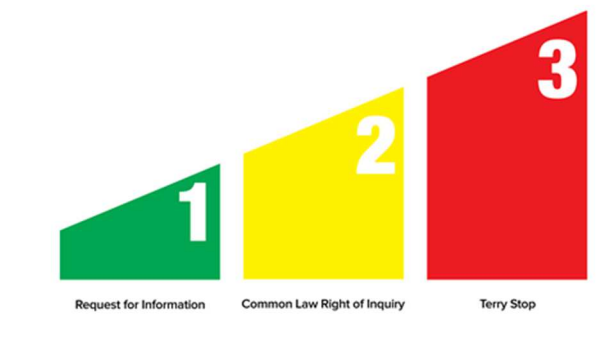


The bottom line: None of this is new. You need to know this stuff to do your job, and ignoring reasonable suspicion when it's in front of you is not doing your job. It is important that you understand the limits of your authority, what you can't do, but it is just as important that you understand **what you CAN do**. Being unsure of your authority can make an officer hesitate, and that can be dangerous.

You must be aware that when you are not in uniform, your appearance and approach means that situations may escalate faster than when you are in uniform. Remember to clearly identify yourself as a police officer when you take enforcement action.

You should never feel as though the law makes you choose between being lawful and being safe. You will have to make split second decisions about these encounters in the future. When you do, we don't want you stuck there thinking "uh, is this a Level 2 or a 3...?" We want you focused on safety and tactics, so stay fresh on the law. This way, the law will be right there in your head. It will be second nature and you can focus on safety.

This can be a complicated area of the law. We're going to UNcomplicate it today, and we're going to start to do that right now, and get to why you are really here...



The law of Investigative Encounters in NY comes from a US Supreme Court case, **Terry v. Ohio**, and a NY State Court of Appeals case called **People v. DeBour**. **In that case, our highest court set up this framework.**

Basically we have **an increasing scale** of information and authority. **The more information you have, the more tools and authority you have.**

One thing to keep in mind as we discuss these levels is this: these encounters are like snowflakes. No two investigative encounters are factually identical, and the courts recognize it. And they don't always progress neatly by starting at a 1, becoming a 2, then 3 and so on.

It is impossible to catalogue police encounters within rigid classifications. These levels are meant to serve as guidelines to help us make a reasonable assessment of the situation and select a lawful approach to dealing with it.

Is there a **Level Zero**? There's no technical "Level 0" but some people construe general community engagement, as opposed to an investigative encounter, as Level 0. Hopefully we do a lot of interacting with the public that does not fall in this chart – it happens off the chart and before Level 1, and it is what you do when you are just engaging your community. Saying hello, answering questions, giving directions, talking about what is going on in the community; you are not on the 1-2-3 scale for those interactions. That's just being a good cop. Obviously you **SHOULD** have these conversations. Basic interactions that you have with other humans are not what we are talking about today.

Is there a Level 4? Yes, Level 4 is Arrest.



The 4th Amendment protects against UNREASONABLE searches and seizures. Everything you do will be evaluated on whether or not it was reasonable. If it is unreasonable, you've acted unconstitutionally and against Department policy, evidence will be suppressed, guns you recover will be suppressed, bad guys will get back out on the street, and you could be subject to disciplinary action.

When courts evaluate your actions, they will look at what you knew, what you observed, your training and experience to determine whether you acted within the law. It is vital that you clearly describe all the information you had, all your observations and how this information combined with your experience to inform the actions that you took when speaking to a District Attorney and testifying in court. Otherwise, evidence can get suppressed. This is why it is so important that you carefully and accurately document all Terry Stops as required by PG 212-11.



Courts will also look at the perspective of the person with whom you are interacting. They determine how your actions would affect a reasonable person. Everything will be decided based on whether a reasonable person would feel free to leave. In Level 1 and 2, the person must feel like they are free to leave and must actually be free to leave. In Level 3, they are not. Remember, it doesn't matter if you think they are free to leave. It just matters that a reasonable person thinks that they would be free to leave.

This concept – **whether the person you are questioning feels free to leave** – comes up in all 3 levels of investigative encounters.

The law defines a “stop,” that is, a Level 3 Terry stop, as any investigative encounter in which a reasonable person would not feel free to disregard the officer and walk away. To determine whether a Level 3 Terry stop occurred, courts will consider the totality of the circumstances: did you direct the person to “stop,” did you and your fellow officers surround the person, block his path, ask him a string of accusatory questions, put hands on him to stop him, or draw your gun? Any one of those actions will likely make the person feel that he or she is not free to walk away. What the courts are asking here is whether you, by your words or actions, created a situation where the person would not feel free to leave.

If you did, then it's a Level 3 Terry stop. It's a detention. And then the courts will consider whether you had enough information – whether you had Level 3 reasonable suspicion- to support that stop. If you did, then you are authorized to take reasonable steps to detain the person

Under the law, it is not the mere fact that you are a police officer asking questions that will make courts find that the person didn't feel free to leave. It's how you ask the questions, and it's your words, your commands, your actions.

	PATROL GUIDE		
	Section: Command Operations	Procedure No: 212-11	
	INVESTIGATIVE ENCOUNTERS: REQUESTS FOR INFORMATION, COMMON LAW RIGHT OF INQUIRY AND LEVEL 3 STOPS		
	DATE ISSUED: 06/27/16	DATE EFFECTIVE: 06/27/16	REVISION NUMBER: PAGE: 1 of 12
PURPOSE	To describe the types of encounters a uniformed member of the service may initiate with a member of the public during the course of his or her official duties, the level of knowledge required for each type of encounter, the scope of a police officer's authority for each type of encounter, the measures that are permissible to protect uniformed members of the service from injury while engaged in such encounters, and the procedures to be followed by a member of the service during these encounters.		
SCOPE	In accordance with their oath to uphold the law, uniformed members of the service must conduct investigative encounters in a lawful and respectful manner; however, nothing in this section is intended to deter an officer from initiating appropriate inquiries and investigative encounters, including stops, or using any lawful and appropriate tactics to ensure the officer's safety during such investigative encounters. Moreover, this procedure should not be interpreted to discourage an officer from engaging in voluntary consensual conversations with members of the public. Members of the service are encouraged to develop positive relationships in		

These pages contain more than the law and procedural steps. They also contain ways you can protect yourself. Knowing PG 212-11 will make you a more effective cop. You can handle any conversation with any ADA in the complaint room about a stop if you know this information. Your stops will be better and you will be safer.



Ask the class the following question and solicit answers to facilitate a discussion of this issue:
“What is profiling?”

[If there is no conversation based on the what is profiling question, you can ask the class the following: How has profiling impacted the NYPD’s relationship with the communities they police?]

PG 203-25 states that individuals may not be targeted based on the following:

- Race
- Color
- Gender
- Ethnicity
- National Origin
- Sexual orientation
- Citizenship status
- Creed/Disability
- Housing Status

Note: Race, color, ethnicity, gender, or national origin may only be considered when the stop is based on a specific and reliable suspect description that includes not just race, gender, and age, but other identifying characteristics or information.

You have to remember that you need to have specific information about an individual in order to begin an investigative encounter. Race can be used as a part of a suspect description, but for no other reason. We can’t assume homeless people are on drugs or that people of a certain race are more likely to engage in criminal behavior, even when people of that race are overrepresented in the crime statistics of your precinct. MOST people not criminals. They are innocent. A very small percentage of people commit the vast majority of crime. As you police proactively, and do self-initiated stops, you need to police with this fact in mind.

LEVEL 1 ENCOUNTERS-



Level 1

Request for Information

Objective Credible Reason

To get on to the levels, it means you are investigating something, but it doesn't necessarily mean you are investigating something criminal. Let's start with a Level 1 investigation....

In order to approach at Level 1, you must have an **objective credible reason**

WHAT DOES THIS MEAN? The reason is based on facts and observations.

OBJECTIVE = it's not just what YOU in particular think, but what a reasonable person would think.

CREDIBLE = means it's believable.

It is not just a hunch. You must be able to state why you are interacting with a person.

Again, this is also not hello, good morning and how did the Knicks do last night? You are speaking to them as part of an investigative encounter.

At Level 1, you do not have enough information to suspect this person of a crime. The person should be treated like they are not a suspect of a crime.



Examples of Level 1 encounters, these are from real cases. Instructors should choose 2 or 3 of the following examples to use during class, alternating from class to class, although the NYCHA/TAP building example should always be included:

- **Sick Guy: Guy is leaning against a bench, looks like he is about to vomit:**

What can you do? Talk to him; ask him if he is ok.

- **You are driving by and see three guys hanging out on a street corner, that is known as a Bloods hangout, all wearing red. You recognize one of them as a known Bloods member who you arrested last year for a gun. They are all hanging out in front of a bodega.**

What can you do? You can talk to them, you can continue to observe. But they have done nothing that is indicative of criminal activity.

- **Shots fired:**

Responding to a job for shots fired does involve investigating criminality, but the people you initially encounter may be potential witnesses and not suspects.

What can you do? When you get to the location for the job, let's say you see people seated on a nearby park bench - just sitting there. Common sense suggests they are – if anything – possible witnesses. You want to ask them if they saw or heard anything. THAT WOULD BE YOUR OBJECTIVE CREDIBLE REASON.

- **You see a man arguing with a Taxi Driver:**

What can you do? Neither has committed a crime, but certainly there is potential for something. That is your credible reason for approaching. You can ask them what the problem is. You can mediate their dispute and send them on their way.

- **You see a man staring at the mail boxes in a NYHCA or TAP building for several minutes:**

What can you do? He hasn't done anything wrong, but he is also not just standing there. (Remember, mere presence in a TAP or NYCHA building is not an objective credible reason to approach). He may live there; he may be looking for someone's apartment number. But you have enough to approach him and ask basic, non-accusatory questions. You can ask him why he is in the building. This hypothetical is based on a case, *People v. Wighfall*, 55 A.D.3d 347 (1st Dep't 2008), where the person looking at the mailboxes did not know anyone in the building and had no reason to be there. He said he was visiting a non-existent tenant. This elevated the encounter from Level 1 to Level 4, a trespass arrest.

THERE IS NO 4TH AMENDMENT EXCEPTION FOR INDIVIDUALS INSIDE OF OR IN FRONT OF TAP/NYCHA BUILDINGS. Interior patrols of TAP and NYCHA buildings must comply with Patrol Guide 212-11. They are not an exception to the law of investigative encounters. Everything that you can and cannot do at each level on the triangle chart is just as true when you're conducting an interior patrol.

MERE PRESCENCE near, entry into, or exit out of a TAP or NYCHA building is not an objective credible reason to approach an individual.

- **You are looking for a witness to a crime.**

What can you do? You are canvassing for witnesses. You can approach anyone near the crime and ask them if they know anything or if they saw anything. This is a Level 1 encounter.

What if you work in Washington Heights, a predominately Dominican neighborhood? You have personally arrested multiple white people from New Jersey who have come over the bridge to purchase drugs. You see a white person park a car with jersey plates and walk out. What are you thinking? Is this an objective credible reason to approach someone? What can you do?

Nothing- you have no information and any actions you might take would constitute an inappropriate use of race...

What you **CAN** do?

You can always observe. Wait and watch. That's a tool you have at every level.

During a Level 1 encounter, you can approach and ask non-accusatory questions. Since this is a situation where the person or people you are talking to are NOT suspects, the law requires us to communicate with them in a way that conveys that – that conveys they are free to leave and that you do not suspect them of a crime.

What is the difference between an accusatory and a non-accusatory question?

Non-accusatory questions: What are you doing? Where are you going? Do you live in this building? Did you see anything? Are you OK? Can I talk to you for a second?

Accusatory questions: You got anything in your pocket? What is behind your back? Can I search you? Are you selling? Where's the gun?

At any level, you can ask for ID. The person does not have to provide it. If a person does not provide ID, that does not raise the level of suspicion.

This makes sense. It would be weird to ask, did you hear gun shots, by the way, do you have anything in your pocket?

You Can't



- ⊘ Ask accusatory questions
- ⊘ Seek consent to search
- ⊘ Detain the person, block his path or use force
- ⊘ Direct the person to stop

What you **CAN'T** do?

Ask accusatory questions, seek consent to search, detain the person, block his path, use or threaten to use force, direct the person to stop.

Review list. Discuss the prohibition on consent searches at this level.

At a Level 1 you cannot seek **consent to search** – again, think about it, at this level that would be weird – you feeling ok? Oh, and can I search your pockets? Did you hear anything – and can I search your pockets? Not a way to cultivate cooperation or trust and since we have no basis to suspect the person of anything, we have no legal authority to seek to search them.

False or inconsistent answers **can** elevate an encounter.

What can a person do?

The person does not have to cooperate in any way.

He or she does not have to produce ID

He or she does not have to answer questions.

If a person chooses not to cooperate, does not produce ID, and/or does not answer questions, this does not raise the level of suspicion. In contrast, giving false answers to questions can elevate the encounter.



What if the person runs away?

At a Level 1, the person is **free to walk or even RUN away** and this does not elevate the encounter to a 2....

That is what NY case law holds - at a Level 1, a person can absolutely walk or even run away. **This rule often throws cops off** because your **instinct** is that if the person starts running from you, you think that something is definitely up, he probably did something or was about to, and your strong instinct is to pursue.

One way to keep this in check is this: at a Level 1, if someone runs from you – and again, you have no information that would suggest this person has engaged in any criminality since we're at Level 1 – imagine what you'd put over the radio if you started to pursue him. Ask class: what would you say? "I'm pursuing someone on the suspicion of..." what? Of running from me? That's not a crime. Imagining that radio transmission can help remind us of why we shouldn't be chasing at a Level 1.

Just being at a "drug prone location" or in a "high crime area" with nothing more isn't enough for a Level 1 approach. There has to be something else, some fact or observation related specifically to that person. These can be factors, but alone are not enough.



Show class Level 1 Body Worn Camera video. See BWC video notes.



Level 2

Common Law Right Of Inquiry

Level 2- COMMON LAW RIGHT OF INQUIRY

You still don't have a lot of information, but you have enough to at least begin to focus on this person as a possible SUSPECT for criminal activity.

That's one of the key differences between Levels 1 and 2. At Level 2, you have more information and this information give you a basis to at least START to focus on someone for suspected criminality.



Founded Suspicion

At Level 2, we move up from just merely having an objective credible reason to approach someone – the level of information we saw at Level 1. At Level 1, you may not have even been investigating potential criminality. At 2, you are. To conduct a Level 2 encounter, we must have what the law calls a **FOUNDED SUSPICION THAT CRIMINALITY IS AFOOT**. Founded suspicion of criminal activity arises when there is some present indication of criminality based on observable conduct or reliable hearsay information.

Despite this, the officer may not create a situation (either by words or actions) where a reasonable person would not feel free to walk away. When you only have Level 2 information (founded suspicion), the person still must feel free to leave.



It gets a little more challenging here because you have additional tools at Level 2. You can seek consent to search, and if you need to, you can ask accusatory, pointed questions, yet you still can't create a situation where the person does not feel free to walk away.

During these encounters, if at any point you feel you raise the volume or intensity of the interaction beyond where the facts have taken you, you can dial it back. You can say, “Hey, guy, you are not under arrest. I’m not holding you here, you are free to leave. I just trying to do my job and determine whether...etc.”

Use chart to discuss Level 2 tools and Level 2 rules.

- 1- The person is still free to leave at Level 2 – and you can’t make him feel like he isn’t free to leave. He or she does not have to cooperate. And his walking off or refusal to answer your questions does not elevate the encounter. But, false or inconsistent answers to your questions CAN elevate the encounter to Level 3.
- 2- One thing that is different at Level 2 vs. 1 is that if the guy RUNS away from you during a Level 2 encounter, you can pursue him. At Level 1 you couldn’t. At Level 1 the person wasn’t even a suspect, but at Level 2 you have formed a founded suspicion that a particular person is engaged in possible criminality, and if that person runs from you at Level 2, after you have identified yourself as a police officer, he elevates it to 3 and you can pursue him.
- 3- At Level 2, you can ask pointed and accusatory questions if you need to. You can also continue to ask non-accusatory questions, this is really a question of personal preference and style. If you walk up to a guy and make up an excuse for approaching him such as “we got a call for a dispute, have you seen anything” or start with “hey, what’s up tonight?” you might get farther than starting with “what did you just hand that person?” But at this level, if you need to ask accusatory questions, you can. You can also ask questions like “do you have anything you shouldn’t have?” or “do you have anything that will hurt me?” during a Level 2 encounter.

You can seek consent to search when you have Level 2 founded suspicion.

- 4- And you can engage appropriate protective measures.

What can you do?



- Can you ask accusatory questions?
▪ Yes
- Can you ask for consent to search?
▪ Yes
- Can you use force or threaten to use force?
▪ No

What can you do?



- Can you use protective measures?
▪ Yes
- Can you direct the person to stop?
▪ No
- Can you block the person’s path?
▪ No

What can you do?

1. You can ask accusatory questions
2. You can seek consent to search
3. You cannot use force or threaten to use force
4. You cannot direct the person to stop
5. You cannot block the person's path
6. You can use protective measures



A Level 2 Encounter is not a Stop:

- It is an encounter
 - It is an approach
 - Person must always feel free to leave
-



Level 2 Examples:

Instructor should choose two of the following examples to use in class and rotate using different examples for different classes

- You are in a drug prone location and observe what looks like, based on your training and experience, a hand to hand transaction, followed by a person putting something in their pants. However, you can't tell what has been passed between the two people. You are at Level 2.
- Police officers heard a gunshot. They then saw a group of people looking at them, then looking at a person who was walking away.

- You observe a person buying multiple MetroCards with multiple credit cards. You are focusing on this person as a suspect of a crime, but you don't have enough yet to get to Level 3.
- You are on a corner where you have made dozens of narcotics arrests. Each of those arrests was a black man in his early twenties... You see a black man in his early twenties standing on that same corner —Can you ask pointed questions?

No- this is nothing. Again you can't even approach to request information. If you did, that would constitute an improper use of race.

Consent to Search



“May I search your bag/person?”

“I can only conduct a search if you consent. Do you understand?”

Consent to Search

[Note for instructors – the procedures for Consent to Search are PG 203-09, 204-09, 212-11, 218-13 and 221-16]

In order for consent to be valid, it must be truly voluntary, without coercion or duress. When you are seeking consent to search, it must be conveyed as just that, a request not an order.

If you get consent to search from someone and end up recovering, let's say, narcotics, the court will hold a hearing to decide whether the consent was voluntary.

The court will look at the total picture, all the circumstances of the encounter and who you were dealing with.

They will look at things like:¹

Was the person in custody? At a Level 2, the answer is no.

Was the person cooperative? Evasive? Courts tend to doubt that the evasive, uncooperative person will turn into a voluntary consentor.

¹ See generally *People v. Gonzalez*, 39 N.Y.2d 122 (1976).

Was the person knowledgeable about police procedures? Was it a young adult, who has had no experience with law enforcement, or a convicted felon who has dealt with the police many times? (The latter actually can work in your favor in the voluntariness analysis).

The Right to Know Act required the Department to change its policy on how to obtain consent to search.

Whatever you think of the change, I can tell you one thing: the change is going to take a lot of the guesswork out of proving a voluntary, valid consent in court. One of the big factors courts look at is whether the person was told he could refuse – because of course they do actually have a 4th Amendment right to refuse.

So here is what the law requires now. It requires two questions that are both clearly phrased in a manner that will elicit either a yes or no answer. You must ask the questions in a non-threatening and non-coercive manner. In one question you ask whether you can search and in the second you convey that you need their consent to search and you ask if they understand.

If the person does not consent to a search, you cannot conduct a search.

If the person asks you: do I have to say yes? You have to tell him the truth, he does not.

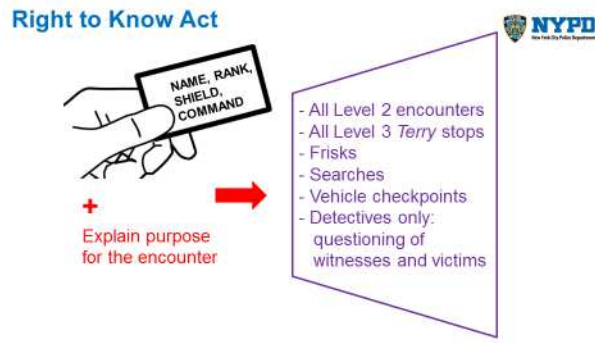
When seeking consent to search a person or their property, vehicle, or home, if you are interacting with a person with limited English proficiency or a person who does not appear to understand you, you must use interpretation services pursuant to the NYPD's language access plan.

If you have a body camera and seek consent to search, you must record it and tell the person they may request the video by making a FOIL request through the NYPD website at www.nyc.gov/nypd.

Regardless of whether you are equipped with a body worn camera, you must document in your memo book the time, location, and date of the search or refusal, and the apparent race/ethnicity, gender and age of the person from whom you sought consent to search. You must also document your name, precinct and shield number. A new form will be provided in the future in order to assist with this documentation.

[This change sometimes prompts a class discussion. Officers are skeptical that they'll ever get consent. Even though there are some differences, officers had the same skepticism about getting *Miranda* waivers way back when, and we get them all the time. It can sometimes come down to confidence and experience.]

Note: Officers may ask about the situations where consent is not sought but it is offered i.e., "I don't have anything, you can look." and the person just opens a bag or lifts his shirt. We see this happen in some of the body camera videos used in this class. The officer does not violate the policy if he/she fails to ask these questions when the search is entirely offered up by the person he's encountered.



There has been a recent change in the law. From now on, officers must identify themselves to an individual who is the subject of law enforcement activity by providing their name, rank, and command. Officers must also explain the purpose of the interaction in the following circumstances:

- All Level 2 encounters
- All Level 3 *Terry* stops
- All frisks
- Any search of person or property, including vehicles
- Vehicle checkpoints
- Home searches
- Investigatory questioning of victims and witnesses to crimes

Additionally, unless the situation results in an arrest or summons, you must offer a Business Card at the end of the encounter. You are not required to offer a Business Card during investigatory questioning of victims and witnesses to crimes, unless you are the assigned detective or a card is requested by the person.

If the person you have interacted with is a minor, you must offer the business card either to the minor or, if they are present at the scene, a parent, legal guardian, or responsible adult.

All officers will receive pre-printed business cards by October 2018. These business cards will include the officer's name, rank, shield number, and a space for the officer to write his/her command. You should write your command on each business card you hand out.



Officers must also provide a Business Card if a person requests an officer's identifying information.

If you run out of pre-printed cards, you must offer to provide the person with the information on a handwritten card. If you run out of cards altogether, you must offer this information verbally and provide the person sufficient time to write it down.

Right to Know Act Exceptions



If explaining the purpose of the interaction would impair a criminal investigation, you do not have to do so.

Officers are not required to offer a Business Card to identify themselves if engaged in undercover activities, if exigent circumstances are present (for example, imminent physical injury or destruction of evidence, to name a couple), if it is a security search of someone attempting to enter a public building, an event, or an MTA facility, or if verifying the identity of a person seeking entry into an area restricted by the Department due to health or safety concerns.

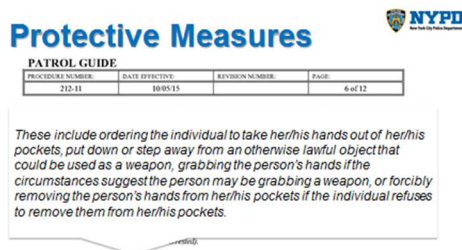
Similarly, the Right to Know Act's requirements for consent searches do not apply if exigent circumstances are present or if it is a security search of someone attempting to enter a public building, an event, or an MTA facility where a person's entrance into the location constitutes implied consent to be searched under an exception to the warrant requirement.

One important exception re: the requirement to offer this card is **exigent circumstances**. For example: You have stopped someone who matches a description and are waiting for the complainant to respond. While you are waiting, you are collecting this guy's pedigree. The complainant gets there, there's a negative ID and then at that moment over the radio you hear they've spotted another individual matching the description and they need back up. You do need to gather pedigree information for the person you stopped but then you can quickly assist your fellow officers – and hand the card out if practicable.

Otherwise, you need to offer this card. Those offered the card can decline to accept it. If they do decline it, document that on the Stop Report if there's room or in your memo book. If they accept the card, complete the information on the card and give it to them.

Remember, Body Worn Camera video may be obtained through the NYPD's FOIL page or via the website on the back of the Business Card. In addition, if a person wants to obtain more information about their stop or a copy of their Stop Report, you should tell them to go to the website on the back of the Business Card.

It is important to note that soon every stop you make will be captured on video, by at least one body-worn camera, so if there are exigent circumstances or the person declines the Business Card, there will be proof that you can depend upon. However, by that same token, if you fail to offer a Business Card in a situation where you are required by the Patrol Guide to do so, that too will be captured on video. Remember to inform the individual how to obtain Body Worn Camera video as explained above.



Of course, a frisk is a protective measure. When you have the lawful authority to frisk, you have one of the best pre-arrest protective measures available, but you don't always have the authority to frisk.

For our purposes today, when we use the phrase "Protective Measures," we're talking about the things you can do during investigative encounters when you *don't yet have enough to frisk* (and in some cases *you never will* have enough).

An officer may engage Protective Measures at any level when an officer does not yet possess enough information to support a reasonable suspicion that the person is armed and dangerous, but nevertheless reasonably perceives his safety may be in jeopardy. He is permitted to take protective measures short of a frisk that are reasonably related to the circumstances. (*See*, Kamins 2.03[1]). However, as will be discussed in further detail below, this tool should be used very rarely at Level 1.

In these situations, an officer can:

- Direct the person to put down an object he is carrying
- Ask the suspect to take his hands out of his pockets/to show his hands
- If a suspect refuses to take his hands out of his pockets, the officer can forcibly remove his hands
- If the person moves his hand toward his waistband or pocket, the officer can grab the hand or place a hand on the pocket to prevent the person from drawing a weapon.
- If the circumstances warrant it, *i.e.* an anonymous gun run, direct the person to raise his hands

You can't say "lift your shirt." That's a search, not a Protective Measure. But you can say things like "take your hands out of your pockets," "raise your hands," "put that down," "open your hands," and when appropriate you can also engage Protective Measures or reflexive touches.

(Sometimes the class asks about this): Yes, you can engage these tools, *i.e.* direct someone to take his hands out of his pockets and if he refuses, take them out at Level 2 even though at Level 2 the person is free to leave and you can't by your words or actions make the person feel as though he is being detained or arrested. Again, if you feel the circumstances have created a situation where the person feels as though he's not free to leave, you can say "sir, you're not under arrest, I need to ask you some questions, and while I do, I'm going to be safe and so are you, so take your hands out of your pockets..."

Are protective measures ever permitted at Level 1? For many Level 1 situations, an officer won't reasonably be in fear for her safety. If you are searching for witnesses, you are not going to be telling every person to show you their hands. But in the rare Level 1 encounter, because of the nature of the approach or the person's behavior, you may reasonably perceive that your safety is in jeopardy. Protective Measures in this context basically include efforts by an officer to see or control a person's hands during an encounter, such as a request to take hands out of pockets or to put down an object that could hurt the officer.

Provide the class with an example based on the facts of this slide:

Example: A male passes by two other men and continues to stare at them with a menacing angry expression. You approach and asking if there is a problem with these men. The male glares at you and begins to reach for his back pants pocket.

What would you do?

This example is based on a real case. Initially, we're at Level 1, correct? A man glaring at other people isn't a crime. A man glaring at you as you approach him isn't a crime. The court said it was an objective credible reason to approach and ask if there was a problem. And in that instant, there was the reach. The court said it was appropriate for the officer to put his hand on the man's pants pocket (and when he did he felt a gun).

The reality is that in most cases, if there is a need to engage Protective Measures at Level 1, it is probably because the person's behavior has taken the encounter up to Level 2. The man's movement toward his back pocket while glaring – did that take the encounter up to 2, maybe, probably, but the point of mentioning it here and including it in the chart with a “?” is that in situations like that it is a tool you can reach for.

Does the person have to:



- Answer your questions?
 - No
- Produce ID?
 - No
- Consent to a search?
 - No (but you can ask)
- Can he or she walk away?
 - Yes

What can a person do at Level 2?

Get class to answer the above question.

1. The person does not have to answer questions
2. He does not have to produce ID (unless he's the operator of a vehicle)
3. He does not have to consent to a search
4. And he can walk away
5. None of this elevates the encounter



But if he runs away in response to the presence of police officers (assuming you have identified yourself as police officer or it is clearly visible that you are an officer), that will elevate the encounter.

Show Level 2 Consent to Search video



We can't leave Level 2 without talking about a pretty big category of cases that lives here at Level 2:

Jobs that come over based on information from anonymous callers.

For starters, let's establish what we are NOT talking about. If a person on the street comes up to you, is clearly frightened, and whispers "that guy around the corner with a green coat, he has a gun, he was just threatening some other guy with it!" If you don't stop to get the person's name, and you run around the corner to address the situation, the person who reported this information to you is not anonymous.² This is a live person on the street with whom you had a face-to-face encounter. In this section, as we discuss information you receive from anonymous sources, that's not the kind of situation we're talking about.

For purposes of the discussion we're having now, we're talking about an anonymous caller. Let's say central advises that an anonymous caller reported that a M/H, early 20s, with a yellow T-shirt and jeans at a specific location has a gun. Under the law, that kind of information only amounts to Level 2 founded suspicion. If you only have a physical/clothing description and location, that does not get you to reasonable suspicion. This rule was announced by the US Supreme Court in 2000 in *Florida v. J.L.* In this case, the Supreme Court suggested they'd make an exception for an anonymous bomb threat, but that's about it. Cases that followed recognized exceptions for true "ongoing emergencies" such as an anonymous call with a sufficient description and location and the caller states the individual is headed to shoot someone now (see *United States v. Simmons*, 560 F. 3d at 105 (2nd Cir. 2009)(cases collected)), but there's no "gun possession" exception, and certainly no drug sales exception.

Here's the rationale behind the case law. A jealous girlfriend may see where her boyfriend is, and see what he's wearing, but she might make up the fact about him having a gun to get him harassed. So might a competitor drug dealer. That's why the courts want more than just corroboration of where someone is and what they are wearing, and until we get it, we are stuck at Level 2. It's like there is this wall between Levels 2 and 3 when the source is an anonymous caller, and we need some additional information in order to get over that wall and it has to be more than clothing and location.

² See *People v. Letriz*, 103 A.D.3d 446 (1st Dept. 2013); *People v. Appice*, 1 A.D.3d 244 (1st Dept. 2003).

Getting over the wall is important. And getting over it **BEFORE** you approach the suspect can be critical.

Continuing with the gun run based on the anonymous caller who described the M/H with the yellow T-shirt – you are a Level 2, we know that, so what can you do? Let's remember the toolbox you have at Level 2.

You can go up to the male matching the description and ask accusatory questions, like “Show me your hands – where is the gun?!”

You can engage protective measures – not let his hands out of your sight, keep them out of the suspect's pockets, etc.

You can seek consent to search. But what if he says No?
Now you've used up all your Level 2 tools.

If you go farther at this point - let's say frisk – and if you recover a gun, it is going to be suppressed.

So you should be trying to get over that wall **BEFORE** you approach. If you do, you will have the full Level 3 toolbox, including being able to approach with guns drawn and frisk, **BEFORE** you approach.

**Corroborating an
ANONYMOUS CALLER
BEFORE YOU GET TO THE SCENE**



Call ANI ALI - Get a NAME



If you can't get a name:

Did caller **JUSTEYEWITNESS** CRIMINALITY?

Get caller's **basis for knowing** about the crime



HOW TO CORROBORATE THE CALLER BEFORE YOU GET TO THE SCENE

How do you get over the wall? How can you corroborate the caller beyond the facts of clothing description and location?

There are ways to do so, and you can accomplish any one of them in the 1 to 2 minutes that it is going to take you to respond to the job. Keep in mind, for these to work, **you must promptly**

arrive at the location provided by the caller and you need to see a suspect(s) matching a sufficiently detailed description in the vicinity where the anonymous caller said they would be. If those things happen when you get there, the info you gather in the few minutes you have BEFORE you get there can allow you to get out of the car at Level 3. [Instructors should note: in commands, some officers, desk sergeants and dispatchers who work together regularly know that the dispatcher or supervisor often call anonymous callers back. So multiple people should not be calling the anonymous caller back. Present these as options that they can resort to as appropriate.]

1. GET A NAME. You all have smartphones. The call back # appears on your phone. You can call back the ANI ALI with a tap of your finger. Call the caller back. Explain you may not be able to get this allegedly dangerous person off the block and you can't frisk for your safety without more information, seek their assistance and try to get the name. It's important that we not pressure callers because we know many are truly afraid and we don't want to discourage crime reports. Note, just because caller ID might provide a name, if a caller won't give his or her name to the dispatcher or you, it's considered anonymous.
2. CONFIRM CALLER JUST EYEWITNESSED CRIMINALITY. If you call the caller back and can't get a name, get information about the caller's basis of knowledge. How does the caller know the suspect has a gun? Did the caller actually see the person with the gun? If the caller confirms (1) that he or she personally observed the criminality (i.e. the gun in the suspect's hand or in his possession) and (2) that this observation just occurred or is presently occurring, then this contemporaneous report of observed criminality combined with actually seeing someone at the given location with a matching description when you get there, can be enough to get over the wall to Level 3 reasonable suspicion. It is not enough that the anonymous caller saw the suspect and his clothing first hand, he or she has to observe the criminality and call 911 immediately or shortly thereafter. This is a developing area of law, so get as much information as you can to corroborate the caller's reliability. If you call the caller back, you can and should make an assessment of whether you think the caller's account of just eye-witnessing criminality sounds credible.³ This applies to the original job memorialized by the 911 operator (see note below).
3. INSIDE INFORMATION (This paragraph about predictive information is offered as background to instructors and can be integrated if appropriate, but there is no corresponding slide because this will be rare for officers performing patrol functions). If the caller did or can provide predictive information that basically shows he has inside information, i.e., "in about an hour, a woman driving a blue Honda with NY tag xyxyxy will be leaving the parking lot of an apartment building located at x, she will have drugs

³ *People v. Argyris* 24 N.Y.3d 1138 (2014); *Navarette v. California*, 134 S Ct 1683 (2014); *United States v. Oden*, 2016 U.S. Dist. LEXIS 128329 (Sept. 12, 2016).

with her in the car, and she will drive to a motel located at x in Queens.” If you then see a female leave the indicated lot in the matching car and make the trip the caller predicted, courts have found that to be enough for Level 3 reasonable suspicion because the anonymous information was sufficiently detailed to suggest it was coming from someone with inside knowledge.⁴ If you are relying on this, it has to be pretty detailed, not just “he’s headed northbound, and he’ll turn right.”

If you can’t reach the caller, you should know that these concepts apply to the content of the 911 caller’s call which you can see from your phones. If the original job is more than just a location and “M/B, early 20’s, red T-shirt has a gun” but instead is very detailed and explicitly conveys an eyewitness account, such as the “caller stated she just saw the male put the gun behind the front passenger seat,” and describes the car and the male in sufficient detail, thus revealing the basis of the caller’s knowledge, that can be enough. A job that simply conveys “caller reports a male with a gun....” does not reveal how the caller knows.

And the above list is not exhaustive. They are techniques an officer can use. Here are other examples of factors that contributed to corroborating the anonymous caller:

- a) What if a caller only provides their first name? Getting a first name alone is not enough to get you to Level 3. However, in combination with other factors, such as correctly predicting the suspect’s direction of travel, it can contribute to reasonable suspicion. See *People v. Dumit*, 136 A.D.3d 510 (1st Dept. 2016); *People v. Rivera*, 84 A.D.3d 636 (1st Dept. 2011); *People v. Hall*, 23 A.D.3d 151 (1st Dept. 2005).
- b) In one case, the caller was reporting a crime and didn’t give his name but gave his apartment number. When the officers arrived to the building, the suspect was not outside. They rang the buzzer # for the apt # the caller provided, they were buzzed in and they saw the suspect matching the description. The court found getting buzzed in by the right apt. contributed to corroborating the call (it was not truly anonymous). See *Herold*, 282 A.D.2d 1 (1st Dept. 2001).



**Corroborating an
ANONYMOUS CALLER
WHEN YOU GET TO THE SCENE**



**Observations that corroborate alleged
criminality**

⁴ *Alabama v. White*, 496 U.S. 325 (1990).

The above list all deal with ways you can corroborate the caller BEFORE you get to the location.

If these fail, there are things you can do ONCE YOU GET TO THE LOCATION to get over the wall to Level 3. If you arrive near the location the caller provided and you see an individual matching the description, you may make observations (beyond location and clothing) that will be sufficient corroborate the caller and get you to Level 3. Here are some examples:

1. PHYSICAL SIGNS OR MOVEMENTS THAT CORROBORATE CRIMINALITY, such as a bulge indicative of a weapon, blading, waistband adjustments, etc. An anonymous caller reports a M/W/early 20s with a ponytail, jeans and a gray sweatshirt is at the corner of x/y and he has a gun. If you get to the location and see a male matching the description, and you also see a bulge in the individual's clothing that would reasonably allow you to believe was a weapon, that observation will corroborate the caller and take you over the wall to Level 3. You can approach that individual with all the Level 3 tools (guns drawn if you elect to, frisk, etc.). Seeing a bulge that is consistent with a weapon is not the only way to corroborate the anonymous caller's allegation of criminality. Distinctive gestures, like seeing the suspect reach for his waistband,⁵ adjust his waistband in a manner that, based on training and experience, is consistent with the possession of a weapon,⁶ or observing the suspect nervously "blade" you,⁷ or engage in other behavior that, based on your training and experience, would lead you to suspect the individual had a weapon. These observations will be sufficient to corroborate the criminal nature of the anonymous caller's tip.
2. FALSE STATEMENTS made by the suspect who matches the anonymous report (in time, location and description) can also elevate the encounter to Level 3.⁸

Some additional examples, if needed to help clarify for the class:

- a) Anonymous call of a man with a gun. Officers respond. They see a male matching the description provided at location. Upon seeing police, suspect quickened his pace and tried to get into a locked van and then discarded an envelope (cocaine). The 911 call plus the fact that the suspect quickened his pace at the sight of the officers, attempted to force his way into a nearby locked van and discard an envelope (later found to contain cocaine) was sufficient for Level 3 reasonable suspicion. *See People v. Gregg* 203 A.D.2d 188 (1st Dept. 1994).
- b) Anonymous caller reported shots fired and provided suspect location and description. Once on scene, officers observed the defendant's associates warning him about the

⁵ *See People v. Moore*, 6 N.Y.3d 497, 498 (2006).

⁶ *People v. Benjamin*, 51 N.Y.2d 267 (1980).

⁷ *People v. Williams*, 136 A.D.3d 1280 (4th Dept. 2016)

⁸ *People v. Belk*, 100 A.D.2d 908 (2d Dept. 1984).

arrival of the police and officers saw the defendant try to hide = Level 3. *See Matter of Freddy S*, 84 A.D.3d 687 (1st Dept. 2001)

- c) The corroborative observation can be an otherwise innocent fact, but based on the content of the tip, it corroborates the report of criminality, i.e. an anonymous caller reports that individuals ripped a mailbox off the wall of an apt. building. Officers respond and find the defendants near the location matching the description and they see what appears to be sheetrock dust on their pants. The observed fact (sheetrock on their pants) standing alone does not suggest criminality, but on these facts, the court said it sufficiently corroborated the caller for Level 3 reasonable suspicion. *See People v. Watts* 43 A.D.3d 256 (1st Dept. 2007).

- 3. FLIGHT. If a suspect who matches the physical description is present at/near the location the anonymous caller provided, and the suspect runs when police approach, the flight corroborates the caller and it elevates the counter to Level 3.

To recap:

Not good enough (only Level 2):

“M/B/30’s wearing x,y,z at x location has a gun”

Good enough for Level 3 if officer’s observations are consistent with the information provided by the caller:

“A man driving a gray BMW, plate xyz 123, just ran me off the road. He’s headed northbound on the FDR near X Street.”

We have no idea whether in the first example the caller’s report was contemporaneous to the report or whether the caller made a first-hand observation. In the second one we do.

For case support for the content re: Anonymous callers, see Anonymous section in Real Cases Digest and see also: *Alabama v. White*, 496 U.S. 325 (1990), *Florida v. J.L.*, 529 U.S. 266 (2000), *Navarette v. California*, 134 S. Ct. 1683 (2014), *People v. Argyris*, 24 N.Y.3d 1138 (2014).

Instructor Note: Instructors may get a question regarding multiple anonymous calls. The same caller calling twice and adding no new information does not get an officer to Level 3. But what if there are anonymous calls that purport to be different callers (from different call back numbers). In that case, based on the totality of the circumstances, if the officer believes they are actually two different callers and their information is corroborated, that may be enough for Level 3 reasonable suspicion.



Body-Worn Camera Video

Show Body Camera video of response to anonymous call.



Level 3

The Terry Stop

Why do we call it a “Terry” stop? The US Supreme Court in 1968 officially gave us this tool in the case of Terry v. Ohio. They recognized that we need the authority to briefly detain people we reasonably suspect of crimes and possibly even frisk them if we reasonably suspect they might be armed and dangerous even if we have not yet developed probable cause to arrest them.

Terry v. Ohio. Det. McFadden, an experienced officer, saw two men on a street corner. He saw them proceed alternately back and forth along an identity path, pausing each time to stare into a store – let’s assume it was a jewelry store. They did this 12 times. After each time one of them would complete the route, they would come together at the corner and have a conference. During one of these, a third man came over to them who joined for the conference and then left very quickly.

Det. McFadden was an experienced officer. So are you. What would you think if you saw that?

You’d think those two are going to rob that place. They were casing. Maybe the 3rd guy was the lookout, or getaway driver? But they were definitely casing.

And that’s what Det. McFadden thought. He went right up to them, did a stop AND a frisk, and recovered guns off of both the men. And the Supreme Court backed him up.

Unlike Level 1 or 2 encounters, Terry and his companions were not free to leave while Detective McFadden questioned and then frisked and searched them. Even though Det. McFadden did not

have probable cause to arrest them, he was allowed to frisk them because he had reasonable suspicion that the men were about to commit a robbery, an offense that is likely to involve the use of weapons.



What are your tools at Level 3?

1. At Level 3, you can DETAIN a person for a reasonable period of time to investigate your suspicion, and while you do this, the person is not free to leave – he is not free to either walk or run away.
2. If necessary, **reasonable** FORCE may be used to stop a person. The general rule is the handcuffs are for ARRESTS and should not be an automatic step in a *Terry* stop. However, if an officer has to deal with a rapidly unfolding, dangerous situation, handcuffs may be used during a *Terry* stop. If a suspect acts violently, resists being detained, or tries to flee, handcuffs may be used. If the suspect may be armed or there may be a weapon near the site of the stop, handcuffs may be used. A gun run from an identified caller will allow an approach with guns drawn, but a radio run for a petit larceny where there's zero information regarding a weapon will not allow for an approach with guns drawn. It's common sense. **The use or show of force must be reasonable.**

[THE NEXT FOUR TOOLS ARE TOOLS WE CARRY OVER FROM LEVEL 2]

3. You can ask accusatory, POINTED QUESTIONS.
4. You can still seek CONSENT TO SEARCH, and since there may be Level 3 situations where you can't lawfully frisk, this is an important tool. Again, we must convey this as a request not an order. Any consent must be voluntarily given without any coercion or duress.
5. You can engage PROTECTIVE MEASURES such as directing someone to take their hands out of their pockets or show you their hands, and the tool is easier to use here because you don't have to worry about making the person feel as though he's not free to leave – because he isn't.

6. You can ASK FOR IDENTIFICATION but unless they are the driver of a motor vehicle, refusal to provide ID does not escalate the encounter to a higher level.
7. FRISK: This is not always available, you may only frisk if you have reasonable suspicion to believe that a person is armed and dangerous.

If your reasonable suspicion is based on a bulge that appears to be a weapon, then you can only frisk that area.

During a Level 3 Terry stop, we have the potential to use the tool of a Frisk.

I said potential tool. A frisk is not automatic for every Terry stop.

A frisk is only authorized when you have a reasonable suspicion not just that the person was or is about to commit a crime. You ALSO must have an independent reasonable suspicion that the person is **armed and dangerous**.

Remember a frisk is not a search.... It is a pat-down on the outermost part of a person's clothing. It is not a search of a person's pockets or under their clothing. And the purpose of a frisk is to check for weapons or other dangerous instruments that could hurt you, not to look for drugs, contraband or other evidence of criminal activity.

If and only if you feel something during the frisk that you reasonably believe may be a weapon, may you search that specific area, that is, actually put your hands in the area, such as a pocket, where you feel the possible weapon.



EXAMPLES So what's enough to make out "reasonable suspicion?" Instructors should choose 2 or 3 examples to use during class.

The information you are relying on must be tied to the person or people you are stopping. That is what is meant by "individualized" reasonable suspicion. In other words, general information

that an area is a “high crime area” isn’t enough. Instead, for example, you see a person engaging in what appears to be hand to hands or he appears to be casing a location. That would likely provide individualized reasonable suspicion.

There is not one magic source of information to get to **reasonable suspicion**. The information could come from:

- An identified 911 caller
- Information from a witness on the street
- Your own observations of criminality
 - Casing behavior – either a store front (Terry case) or a victim (observe someone walking down the street and you see someone walking behind them, checking them out, trying not to be seen by the individual, getting closer to them, and they clearly are not walking with each other)
 - While close to the scene of a burglary, tossing a knapsack as the police approach you (if you are clearly identified as a police officer), and saying “what bag?” once police asked you about the bag. (People v. Anderson, 94 AD3d 1010)
 - Holding a bag in an unusual manner as if holding a firearm. (People v. Washington, 81 AD3d 991)
 - In a neighborhood plagued by car theft, watching someone looking around and looking into cars holding a bent wire hanger.
 - Drug prone location, person is standing out front, as police approach and clearly identified as police (shields out, turret lights on, verbal notification), the person turns his body away from the officers at the sight of them, grabs his waistband and moves something to the far side of his waistband, and then turns to face the officers again.
- A known and sufficiently detailed crime pattern, i.e., more than simply crime data showing “several recent robberies in the Precinct committed by black males” – it must include more than just race, gender, and age in order to lend support for reasonable suspicion
- Information you get from your Smartphone such as whether the person matches a detailed description (that includes more than just race, gender, and age) of someone suspected of committing recent crimes in the area

What if there were 32 shootings in your neighborhood in the last three months and 90% of the suspects are young black men. You are patrolling that neighborhood and you see a group of young black men wearing hoodies and jeans standing on a corner for five minutes. Can you approach them? [maybe]. If so, what level are you at? [You are at Level 1]. What can you do? [You can ask them non-accusatory questions to see if they have any information about the shooting investigations.] Can you stop any of the men that you see standing there? [No, you do

not have sufficient information for founded suspicion, let alone reasonable suspicion for any of these individuals]

Most young black men in the community are not involved in any criminal activity whatsoever and should not be viewed as suspects. If you stopped them, that would be an improper use of race.

STOP AND POSSIBLY FRISK



There are two standards here:

Stop: reasonable suspicion that someone has committed, is committing, or is about to commit a felony or Penal Law misdemeanor.

Frisk: independent reasonable suspicion that someone is armed and dangerous.

There are two standards that you need to know here:

You are permitted to detain a person for a brief period of time if YOU HAVE REASONABLE SUSPICION THAT THE PERSON HAS COMMITTED, IS COMMITTING OR IS ABOUT TO COMMIT A FELONY OR PENAL LAW MISDEMEANOR.

There is a separate standard for frisking: You must have individualized reasonable suspicion that the person is presently armed and dangerous.

You can have reasonable suspicion that a person is committing a crime without having reasonable suspicion that they are armed and dangerous.

What should be clear is that the devil is in the details. It's all about absorbing all of the information you can and then being able to articulate the facts. There need not necessarily be the one golden fact that gets you to Level 3. The courts will look at the totality of the circumstances. And the facts can't be general facts, like I see this individual in a high crime area. **The suspicion has to be individualized.** What do you see this particular person doing in this high crime area that indicates his involvement in a crime? That's what the case law means when it talks about requiring individualized suspicion.

What's the difference between a Level 2 founded suspicion encounter and a Level 3 based on "reasonable suspicion?"

Let me show it by examples:

1. We just mentioned Terry v. Ohio. Det. McFadden saw three men casing a store and stopped and frisked them. It wasn't just one fact; it was everything that he observed that let him do it.
2. Another classic example of a Level 3 is a 911 call of a robbery, let's say 1 minute in the past, the caller is IDENTIFIED, and provides a good physical description including clothing and a direction of flight. You see someone matching this information in the area reported. The complainant is not on the scene – if she were this would be Level 4 (arrest). But you definitely have reasonable suspicion to stop, detain and in this case frisk the individual for the period of time it will take to get the CW there for a show up. Or this could have started with a person coming up to you on the street providing the same information and the direction of flight of the perpetrator.
3. You can even have reasonable suspicion based on a pattern, but it has to be an actual pattern and the details of the pattern have to be specific. In other words, a robbery pattern in a certain area involving 3 male Hispanics in their early 20's is not going to give you reasonable suspicion for male Hispanics in that area. But if the physical descriptions were better, more specific, more detailed and you saw individuals matching those descriptions in the area during the time period when the robberies occurred, then you could.

How strong is this level of suspicion? It's less than "beyond a reasonable doubt," the standard juries use to find guilt in a criminal case. It's less than "probable cause." "Probable cause" basically means "more likely than not" and it's the standard we use for search warrants and arrests. Reasonable suspicion is a lower level of suspicion than that, but it still has to be more than a gut feeling or a hunch, and must be based on specific, articulable facts.

At this point, you may do things that would make a reasonable person would feel that they are not free to walk away.



What is a Frisk?

What is a Search?

A frisk is a pat down of the outer layer of clothing, and does not include going into any pockets.

A search is when you go inside people's pockets, bags, and take items out.

What are some of the ways an officer can develop reasonable suspicion that a person is armed and dangerous? Review PG 212-11:

This isn't an exhaustive list, just examples:

- Suspicion of a violent crime
- Statement by a victim or witness that suspect is armed
- Admission by suspect that he or she is armed
- Visible bulge characteristic of a gun
- Suspect threatens MOS with physical harm

So if the radio run based on an identified caller reports a robbery 1 minute in the past and the caller provides a location and detailed description, can you frisk?

Yes. If it's from an identified caller who provides a sufficiently detailed description that includes more than just race, gender, and age, and a specific location and you find the person matching both, you can frisk because you have reasonable suspicion of a violent felony.

What if the radio run relates to a non-violent felony? Like Grand Larceny? Or a narcotics felony?

Absent specific information about a weapon, like seeing a distinctive bulge or a statement from the suspect or a witness that the suspect may be armed, you can't frisk. You can still ask pointed questions, like "do you have anything that could hurt me?" and if the person says "yes" you can frisk. His admission opened up the other door of the tool box even though you started with suspicion of a non-violent crime.

You do not need to be absolutely certain. You just need to be able to explain your reason with clear facts.

In our hypo, let's say you are running your hands down the guy's outer clothing and you feel what you think might be a gun.

What can you do – go in and get it.

What if you feel something hard and you're not sure what it is? It could be a weapon?

Go in and confirm it isn't.

What if you feel something you are SURE is not a weapon but you are SURE are his keys?
What can you do?

Nothing. Leave it there. It's just keys.

What if you feel something in his pocket that you are SURE is NOT a weapon but it feels like vials of crack

Ask class: What can you do? You cannot go into the pocket and search it.

A lawful frisk based upon suspicion that the person is armed and dangerous leads to a proper search if and only if the officer feels something that he or she reasonably believes could be a weapon. It is not a search for contraband. But there are other things the officer can do:

Here are possible ways to handle it:

What's that? If he admits he has drugs, then you are at Level 4 and can arrest and search incident to arrest.

Would you take that out of your pocket for me please? [But of course, he can say no].

May I check to see what's in your pocket? Of course he or she can say no, and remember you have to tell him that you can only search him if he consents.

In other words, it is possible that you will not arrest the person in this scenario for drug possession unless you get him to admit that he has drugs or he consents to a search. Remember, if you treat this guy in a "procedurally just" way – that is, if you are respectful and fair, then he will be more likely to be cooperative.



One fact that can lead you to suspect the person is armed and dangerous are visible and distinctive signs of a weapon.

Just how "distinctive" the bulge must be, depends on all the other facts.

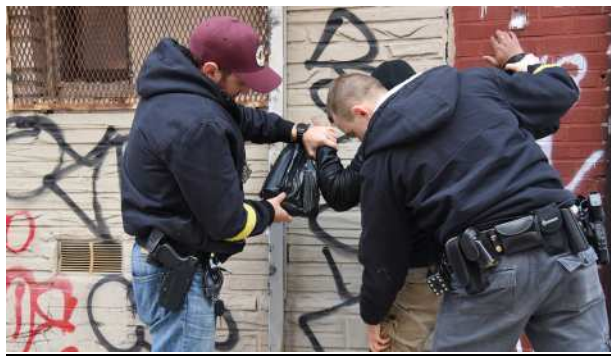
In a nutshell, if you see someone just walking down the street minding his own business, you have to see the outline of some feature of a weapon in order to detain the individual and conduct a frisk. He's not tied to any radio run. He's not casing anyone. He's just walking down the street. And you see a bulge, in order for you to lawfully frisk this guy; the bulge has to be distinctive. This is a high standard, but it makes sense since in this situation you are not even at Level 1 yet and you have no other reason to suspect anything.

Conversely, when you do have other information of criminality, like an anonymous gun run, you need to see something on the suspect's person that you **reasonably suspect is a weapon**. If you see a bulge you reasonably suspect is a weapon, you don't need to wait and look for outlines of features of a gun. Remember, it cannot be just any bulge. As we know, every day items such as wallets, keys, and cellphones, which most of us carry in our clothing pockets, create bulges. But these kinds of bulges do not provide reasonable suspicion that a person is armed.

The location of the bulge is noteworthy because unlike a pocket bulge which could be caused by any number of innocuous objects, a waistband bulge is more often a sign of a weapon.

Suspects carrying a weapon are often self-conscious. They are usually nervous and unable to prevent themselves from touching the weapon periodically with some part of their body such as their hand, wrist, forearm, elbow, or bicep. So their gestures near or adjustments of a bulge may also provide reasonable suspicion that the bulge is a weapon

Remember, if you have someone stopped for a violent felony, like robbery, you don't have to wait to see bulges. You can frisk automatically.



What about bags? What if you have reasonable suspicion for a suspect for a gunpoint robbery 2 minutes in the past, he fits the description near the scene of the incident, you stop him, tell him to drop this bag, he does, you frisk him, no gun on him but this bag is next to him at his feet. Can you “frisk” the bag? Yes, during this lawful Terry stop you can frisk the bag without going inside the bag, just like you would not go inside someone's pockets if you are merely frisking and not searching them. [Provided the container is unlocked. Frisks are for safety. If the container is locked, nothing in it can hurt you, and you therefore cannot unlock the container to “frisk” it.]

But if the CW shows up and IDs the suspect **before** you frisk the bag, you have probable cause to arrest, and are at a Level 4 encounter. You may not frisk a bag after you have conducted a lawful arrest. At this point, you may only search the bag according to the PD's inventory search procedure

But what if he's got a LOCKED hard container? You can move it away from the subject while you investigate, but you'd need a warrant or consent to unlock it. Remember the purpose of a frisk – whether it's of his person or his bag - is to disarm someone for your safety. The subject can't reach a gun in a locked case he can't reach, so you're safe.

Remember



There is no requirement that you be absolutely certain the suspect is armed. Reasonable suspicion deals with probabilities and not hard certainties – just be able to explain your reason based on clear and articulable facts.



Body-Worn Camera Video

Show BWC video of Level 3

A summons is a Level 4 encounter.



Can you frisk someone you are going to summons?

Beyond Level 3, is Level 4. Arrest. Reasonable suspicion is what you need to detain someone. Probable cause is what you need to arrest someone. Probable cause = more likely than not.

What about issuing a summons? If you are issuing someone a summons, can you direct him to take his hands out? Yes. Can you frisk the person?

A SUMMONS IS NOT A FREE TOSS.

When someone is ARRESTED for a violation, they can be **searched incident to the arrest**. However, when an officer decides to give a person a summons, officers do not have the automatic right to frisk the individual.⁹ Courts have required specific and reasonable safety concerns based on the facts of the encounter to justify a frisk. In cases involving Disorderly Conduct (*St. Clair*),¹⁰ playing a car stereo too loudly (*Driscoll*),¹¹ a traffic infraction (*Randall*),¹² and carrying an open container (*Muhammad*),¹³ New York courts have ruled frisks to be improper. However, if the officer has specific and reasonable safety concerns based on the facts of the encounter, a frisk is permitted.¹⁴ You don't need to see the outline of a weapon or a distinctive bulge. If the person is aggressive, hostile, or suspiciously uncooperative during processing for a summons, that kind of behavior can provide a reasonable basis to have a safety concern and conduct a frisk. For example, in *People v. Aponte*,¹⁵ another Disorderly Conduct case, the defendant was among a group blocking the sidewalk, acting boisterously and interfering with pedestrian traffic from a nearby social club. The defendant refused to comply with the officer's direction to disperse and confronted the officer. The court permitted a frisk based on the violation committed in the officer's presence combined with the defendant's behavior. In *People v. Nichols*,¹⁶ the officer observed the defendant drinking in public. As he was being processed for a summons, the defendant was agitated, trembling, and refused to answer questions. On these facts, the court permitted a frisk. Finally, in *People v. King*,¹⁷ an officer observed the defendant committing a gambling violation, approached him, the defendant fled to a nearby store and refused to come out until the officer pried the door open. The officer frisked the defendant and recovered a loaded firearm. The court permitted a frisk in this case based upon the defendant's "uncooperative and suspicious" behavior during processing for a summons.

During a summons encounter, an officer may ask if the person has any weapons.

Ex: Young man riding his bike on the sidewalk. He is a messenger. You've seen him do this before. You approach him. He stops. He's compliant and respectful. His hands are out of his pockets while you write his summons. Are you going to frisk him? NO.

⁹ Kamins § 2.05[3][c].

¹⁰ *People v. St. Clair*, 54 N.Y.2d 900 (1981).

¹¹ *People v. Driscoll*, 101 A.D.3d 1466 (3d Dept. 2012).

¹² *People v. Randall*, 85 A.D.2d 754 (3d Dept. 1981).

¹³ *People v. Muhammad*, 120 A.D.2d 937 (4th Dept. 1986).

¹⁴ *People v. King*, 65 N.Y.2d 702 (1985) ("Although the fact that a person has been stopped for a violation does not ordinarily justify a frisk, a limited pat down for concealed weapons was reasonable in light of the defendant's uncooperative and suspicious conduct after he had been ordered to stop by the officer.").

¹⁵ 959 N.Y.S.2d 91 (Bronx Co. 2012).

¹⁶ 250 A.D.2d 370 (1st Dept. 1998).

¹⁷ 65 N.Y.2d 702 (1985).

Ex: You see male with an open container at a parade. You approach him. He's intoxicated and belligerent and he smashes his beer bottle on the ground. Are you going to frisk him?

DOCUMENTATION SLIDES 33-37

A Good Stop Report

DOES THE TALKING FOR YOU

The Narrative: DETAILS, DETAILS, DETAILS

DO THE FACTS SUPPORT A STOP? ARE ALL CHECKBOXES EXPLAINED? IS THE RADIO RUN DESCRIPTION INCLUDED AND HOW THE SUSPECT MATCHED IT?

Why person stopped?

Why person arrested?

Why person released?

Why other individual arrested?

Why other individual released?

Why did you frisk? Why did you search?

You must **ALWAYS** do a Stop Report for ANY TERRY STOP, including stops in TAP or NYCHA buildings.

Any time an encounter passes through Level 3, do a Stop Report. If you detained the person (he or she was not free to leave), do a Stop Report.

You must do it even if you eventually arrest the person.

Why just Level 3?

We've detained someone and it needs to be documented. We reached a certain level of suspicion with regard to the individual and that also should be documented. However, it is important to understand that anytime you stop someone and they are not free to leave (a Terry Stop), a Stop Report is required, even if you don't know or don't think you have facts that support reasonable suspicion.

But for Level 1 and 2, remember, the person is actually free to go, they are not detained, and should not be made to feel like they are being detained.

So, for example, if an encounter begins at a 1 and goes to a 2, what then?

Do you complete a Stop Report? No

What if a gun run based on an anonymous call starts as a Level 2 but goes up because the subject runs when you get there. You give chase, catch him, frisk him, and recover a gun from him. So he's under arrest.

If there is an arrest, do you have to do a Stop Report?

Yes, because this started as a 2 and became a 3. You did a Terry Stop and Terry Stop = a Stop Report, even if it ends in an arrest.

If you start at Level 4, then you don't need a Stop Report. You only must do a Stop Report if it was a Level 3 stop at any point during the encounter.

If you detain more than one person, then you must complete a Stop Report for **each** person you stop.

Your Stop Report and your memo book entry have to contain all the essential facts that show your reasons for conducting the stop, and, if you conducted a frisk or a search, your reasons for the frisk and search. Anyone should be able to take your Stop Report and your memo book and understand what happened, why you did what you did, without you even being in the room. Basically, the **paper does the talking for you**.

One important part of filling out a Stop Report is making sure you check off the factors that led to the stop – and a frisk or search if you conducted any – and explaining all those factors in your narrative. Be as specific as you can. For example, if you check off “**concealing or possessing a weapon**,” be sure to include a detailed description in the narrative section of any observed bulge or any movement (do not use the word furtive, describe the movement itself) that suggested the presence of a weapon. If you check off “**Identified Crime Pattern**,” provide the pattern number and explain the details of the pattern in the narrative.

If you check off “**matches a specific suspect description**,” make sure you include the details of the description you received (acted on), how the suspect matched it, and whether the description came from an identified or anonymous source.

If you conducted a frisk or a search, you must also include all of the facts and observations that led you to conduct the frisk and the search. You must describe what area of the person you frisked, and what led you to conduct a search.

Every stop is different and the details matter.

Furtive movements or mere presence in a **high crime area** by themselves **aren't enough** to justify a stop or frisk. You need more. Even if furtive movements are a factor supporting reasonable suspicion, it's important you specify exactly what those movements are and what made them suspicious. And be careful not to define “high crime area” too broadly, such as a whole precinct or borough. Again, explain what the movements are that made you suspicious. We used to use the phrase furtive movements as shorthand for what we saw. But this phrase doesn't tell us much about what happened and **should be avoided. Instead, you need to describe in detail what you observed the individual doing**.

What if you mess up your first draft of a Stop Report and have to start over after you talk to your supervisor? If there's an arrest, make a copy of the first draft and give it to the ADA. In any case, arrest or not, attach the first draft to the final Stop Report you submit to the desk officer/designee.

The Activity Log Entry



You need to include:

- Date, time and location of stop
 - Pedigree information
 - ICAD #
 - Suspected Felony or Penal Law Misdemeanor
 - Precinct Serial Number, if available
-

You also need to include:

- Date, time and location of stop
- Pedigree information, unless refused, and detailed description of the person stopped
- Identify in plain language, the suspected felony or Penal Law misdemeanor
- ICAD number, if applicable
- Disposition including the time the encounter was concluded
- Precinct serial number assigned to STOP REPORT, if available

These requirements are in the PG.

Stop Report:



- All Level 3 Terry Stops, even if it leads to an arrest
 - Every person stopped
-

- All Level 3 Terry Stops
- Each person stopped
- Even if the person is arrested

PG 212-11: Minor or Inadvertent Mistakes



Minor or inadvertent mistakes in documentation or isolated cases of erroneous but good-faith stops or frisks by members of the service should ordinarily be addressed through instruction and training. In most instances, instruction and training should be accomplished at the command level. The application of the law in this area can be complicated, and investigative encounters are fluid situations in which one event or observation can alter the level of suspicion or danger. A single erroneous judgment will not generally warrant referral to the Legal Bureau for retraining. However, members of the service who evince a lack of comprehension of the core concepts of the law governing this procedure should be referred to the Legal Bureau.



The Dept. acknowledges that these encounters are complex and that you have to make decisions quickly. It says it right there in black and white the patrol guide, that isolated good faith mistakes should not make an officer lose days.