



Policing Legally

Investigative Encounters with the Public

Instructor's Guide

April 2018

An outline of the content in the Policing Legally PowerPoint presentation appears at the end of this Guide. This Guide suggests ways to present the PowerPoint material and should be used in conjunction with the Policing Legally lesson plan.

Learning Outcomes

1. Explain the 4th Amendment prohibition against unreasonable searches and seizures and the Exclusionary Rule.
2. Describe the legal standards set forth in Terry v. Ohio and People v. DeBour as they relate to levels of encounters.
3. Identify the four levels of encounters and demonstrate limits and appropriate use of each based on different fact patterns presented in the classroom setting.
4. Discuss the appropriate and inappropriate use of race in investigative encounters.
5. Demonstrate the proper preparation of a Stop Report and required Activity Log entries that must be made.
6. Explain what is expected during the supervisory debriefs that follow stops.

At the start of the class, hand two students the “*Terry v. Ohio*” notes if you are going to present the facts of the *Terry* case through the demonstration exercise.

Review Learning Outcomes above.

Terry v. Ohio demonstration

Note to Student Actors

Congratulations. You have been selected to act out the facts of *Terry v. Ohio* for your classmates.

The instructor will play the role of Det. McFadden. Your role is to pose as one of the suspects who is casing a jewelry store in order to commit a robbery. You and your co-conspirator want to do it when no other customers are in the store. The store is located in the middle of the block (pretend the Screen in front of the class is the storefront to the jewelry store). You and your co-conspirator will huddle at the front of the class in the corner. You'll have a hushed conversation, covering your mouths, whispering to each other. You'll take turns "casing" the store (walking in front of it slowly, looking in, etc). After each trip one of you takes down the block, you'll have another huddle.

Here's what you do:

1. The two student would-be robbers should stand together in a front corner of the classroom. They should talk with each other quietly, in sort of a huddle, with their mouths covered, looking around as if they are concerned others are watching them, and occasionally they should point at the jewelry store. Get with your co-conspirator in the front corner of the class, huddle, whisper, point at the store, look around as if you're worried people are watching you.
2. Leave your co-conspirator there, walk slowly by and beyond the jewelry store, clearly casing it.
3. Return to your co-conspirator and have another quiet, suspicious huddle
4. Then it will be your co-conspirator's turn to do the same thing.
5. He or she will come back, and you'll repeat the trip down the block one more time

“STOP and FRISK”

They’ve heard the phrase **“Stop and Frisk.”** What comes to their minds when they hear that phrase?

Is Stop and Frisk still legal? Can cops do it?

[Instructors may want to have the “Has anyone here ever been stopped by police?” discussion with this slide OR during one of the next few slides]



Have the class recall their **Oath of Office** (i.e. their oath to uphold the NY State and Federal Constitutions).

Not every member of the world's workforce has "uphold the constitution" as part of his or her job description. The class should pause and reflect on the weight of that.

It makes our work honorable and vitally important, but if we ignore the lines set down by the law and just cross them, it makes our work worse than meaningless. Evidence gets suppressed, bad guys go free, and the public loses confidence in us.



The 4th Amendment protects people in the United States from **unreasonable governmental searches and seizures**. [Article 1, Section 12 of the NY State Constitution contains the same prohibition.]

When an officer stops someone on the street and says "You, stop" and proceeds to try to determine if the person just committed a crime – that's a seizure under the 4th Amendment.

Ask class: [If you haven't already] Has anyone here ever been stopped by the police?

Or the instructor may wish to share his/her own experiences of being stopped, or the experiences of friends or family.

These experiences could be used to discuss "reasonableness" and "unreasonableness" in the context of searches and seizures. Reasonableness is the core of everything they'll learn in this class. It's their guidepost.

Understanding the 4th Amendment and conducting investigative encounters in a constitutional, professional manner is vital for them and their ability to do their jobs effectively. It is also vital for our legitimacy.

If we get an investigative detention or a search wrong, there are consequences (the Exclusionary Rule >>>>)



Weeks v. U.S (1914); *Mapp v. Ohio* (1961)

The Exclusionary Rule: Evidence obtained by violating the defendant’s Fourth Amendment rights may not be introduced at trial by the prosecution for the purpose of providing proof of the defendant’s guilt. The fruits of the unlawful search are suppressed.

Illustrate the Exclusionary Rule with an example: Let’s say officers get a tip that a particular person has an illegal firearm in his apartment. Without getting a warrant, they enter his house, search it from top to bottom, and find an AK-47 under his bed (he has no license for it, plus this kind of gun is per se illegal). The search (the tree in our graphic) was unlawful and anything that came from that unlawful search is poison, it’s suppressed. It can’t be used in court by the prosecutor to prove the gun possession charge, so in this case, since the gun is the basis for the entire case, the charges would not even be filed in the first place. In addition, because the search violated the law and our procedures, the officers could face disciplinary action or civil liability.

Ask class: Why do they think the Supreme Court of the United States devised this rule? [The court devised this rule to protect the 4th Amendment and deter officers from engaging in illegal detentions and searches.]



What we're focusing on in this chapter are encounters that begin on less than probable cause to arrest. In these situations, you are investigating something, you may even have some level of suspicion, but it is not enough to rise to the level of probable cause.

[Illustrate with example of probable cause to arrest]

Let's say a woman calls 9-1-1, reports that her spouse just assaulted her, officers respond to the home to find her and her spouse there, she repeats the allegation and she appears to be wounded. The investigation at this location **began at probable cause to arrest.** You are authorized to arrest and search the suspect incident to that arrest.

[Now contrast with an encounter that starts on less than probable cause].

Let's say your precinct is experiencing a rash of gunpoint robberies at a particular bus stop. The victims have given a general description of the perpetrator. You are on patrol one night and see a man matching the general description at the very same bus stop. Clearly the weight of the information that you have right here isn't as strong as the example we just talked about – where the woman reported to you how her spouse just assaulted her – but...

Can you take some steps to investigate this gentleman at the bus stop?

What can you do?

You clearly don't have probable cause to arrest him, but what can you do?

This course will answer those questions.

You will see in this course that there are **three levels of pre-arrest investigative encounters.**

The level goes up as the weight of the information you have goes up.

The more information you have, the more tools you have, the more authority you have.

Information is power.

So, in our bus stop example - depending on what you know about the pattern and what you see, depending upon the detail of the description – you’re going to be somewhere between Levels 1 – 3 on the chart.

Before we get deep into the levels, **there are two key cases to discuss.** One is from the highest court in the country. One is from the highest court in the State of New York.



The first case we’ll discuss is the case that gave the “Terry Stop” its name: *Terry v. Ohio*. When the **United States Supreme Court decided this case in 1968, it gave an important and powerful tool to police officers.**

The instructor can **present the facts of Terry** through lecturing, getting a student to present the facts, or demonstrating them. Either way, the image of the storefront should be used to get the class to visualize the extent of the suspects’ casing behavior – whether students or the instructor demonstrate.

Demonstration Exercise:

- The instructor will play the role of Det. Martin McFadden
- The two students handed *Terry* Notes should stand in a front corner of the classroom

The instructor advises the class that he/she is playing the role of Det. McFadden:

- I’ve been on the job with the Cleveland PD for 39 years, that’s right, THIRTY NINE YEARS
- Imagine I’m in plainclothes
- I’m assigned to be on the lookout for shoplifters and pickpockets in this area – it’s a commercial, downtown area
- It’s the middle of the afternoon
- Now imagine that the PowerPoint screen is the entrance to a jewelry store. It’s open for business.
- This is what I observe...

The students should take turns “casing” the jewelry store. The first student will case the area in front of the class/jewelry store, then the other student will take a turn casing, then the first student will do it again. After each “casing” trip across the front of the class, the two students

will reconvene in the corner, whisper to each other, gesture tentatively toward the store, and look around to try to check if someone is watching.

The instructor will stop them after about 3 casing trips and:

- Tell the class that the two individuals continue to do what they just saw for about 15 more minutes. They take turns walking in front of the store that same way, never going in – they do it a total of more than 20 times.
- And at one point, when this is going on, a third guy comes over and huddles with them on the street corner for a discussion. Maybe the getaway driver?
- Actors can sit down.

Ask class: On what they just saw (whether the instructor or students demonstrated), would I/Det. McFadden have enough to walk up to them, put handcuffs on them and charge them with attempted robbery?

No. But what can I (Det. McFadden) do?

Imagine you are his partner.

Do you suspect these guys are about to do something?

Why is it reasonable for us to suspect that?

Don't we have to take some action in order to prevent a robbery?

Discuss the rest of the facts of the Terry case (what happened when McFadden approached):

McFadden approached them. As he approached and began questioning them, one of them mumbled something, McFadden turned him around, frisked him, recovered a pistol and placed him under arrest.

The guy who had the pistol - Mr. Terry - challenged the search. He claimed it was a violation of his 4th Amendment right not to be unreasonably searched since Det. McFadden did not have enough for probable cause to arrest. We all just agreed McFadden DIDN'T have enough for probable cause.

So, the Supreme Court had to decide – even though he didn't have enough to arrest Mr. Terry - did he have the right to conduct that brief investigatory detention? Was that reasonable? They said it was and backed Det. McFadden up. In fact, they said it would have been poor police work if he had NOT investigated further.

And that's why we call encounters like this a *Terry* stop. It was in this case that the Supreme Court gave officers the authority to do them.

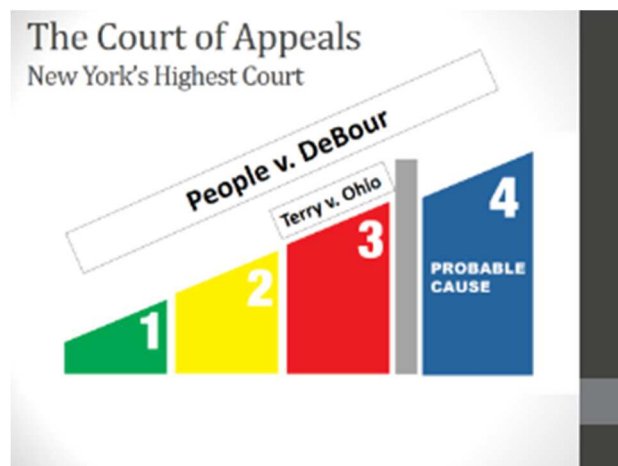
Was this a seizure? Yes, because Terry and his companions were not free to leave while Det. McFadden questioned and then frisked and searched them.

What about the frisk? Det. McFadden was allowed to frisk 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. We will return later to the topic of when a frisk is authorized based on reasonable suspicion that a person is armed and dangerous.

Terry Takeaways

- If an officer does not have probable cause to arrest, but does have a reasonable suspicion that the person is about to commit a crime, can the officer detain the person briefly to investigate? Yes.
- And if the officer also has a reasonable suspicion that the person is armed, can he frisk the person for weapons? Yes.
- An encounter like this IS a **seizure under the 4th Amendment**, but it is permitted if it is based on individualized reasonable suspicion.

Recap per the slide above.



The second key case we need to discuss: *People v. DeBour* (1976)

In this case, the NY Court of Appeals **expanded on *Terry*** (which essentially established one of the levels – the Level 3 *Terry* stop). In *DeBour*, the court set up this **four-tiered framework**, a framework by which all investigative encounters in New York are assessed. The case outlines the four levels of encounters and defines the amount of information an officer must have for each level.

Under the *DeBour* framework, there are **additional restrictions** on what officer can do when they are acting on less information than Det. McFadden had in *Terry*. *Terry* involved a crime in progress. *DeBour* is a case where the officers, at least initially, had much less information...



It was just after midnight.

Two officers were on a foot post, patrolling a deserted street in Brooklyn.

This particular area had a high incidence of drug activity.

The officers noticed someone walking in their direction.

But when this individual got about 40 feet from the officers, he crossed over to the other side of the street - it seemed he wanted to avoid them.

The officers then crossed over too, but then stayed where they were and waited to see if the male would continue to walk toward them. He did.

The male eventually got to the point where they were.

The officers: Good evening, sir. What brings you to this area?

Mr. DeBour: (He was visibly nervous) I, I, I... just parked my car. I'm, I'm, I'm ... going to a friend's house.

An officer: I see - do you have some identification by any chance?

Mr. DeBour: Uh. I don't have any.

It was at this moment that one of the officers looked down and noticed a distinctive, waist-high bulge in Mr. DeBour's jacket. Based on his training and experience he believed it was a gun. The officer recovered a revolver. *[Note, instructors: don't reinforce the DeBour fact of the officers saying "open your jacket" because that's a search.]*

Mr. DeBour was arrested and his attorney said that the gun should be suppressed as a fruit of an unlawful seizure. He said the officers had no right to come up to him in the first place.

Think about what the officers knew, their level of knowledge:

- Area known for drug activity.
- It's late at night.
- Mr. DeBour avoids them, crosses to the other side of the street when he gets near the officers.

- Based on this, they cross over too, to encounter him in the path he's on, and then ask him some basic, non-accusatory questions.
- He's nervous when he answers.

Now, up to this point, **BEFORE they see the bulge**

- They certainly didn't have probable cause to arrest him for anything.
- And they don't even have enough for a *Terry* stop.
 - o Compare this to what Det. McFadden saw in the *Terry* case. McFadden had far more in terms of the behavior he had a chance to observe over more than 15 minutes.

Did they have the right to go up to him and ask him those basic questions? Because if they did, then they had a right to be in the position they were in, the position that enabled them to see the bulge, which elevated the encounter. If the original approach was ok, then everything that followed would be ok, that is, not "poisonous."

The Court of Appeals said

- The officers had an OBJECTIVE CREDIBLE REASON ("OCR") to walk up to Mr. DeBour and ask non-accusatory questions.
- The reason was not based on a whim, bias, a hunch or a desire to harass him. If it had been – in other words – if they didn't have an OCR, then it would have been a police intrusion that would have violated his rights under state law.
- But the court said they had a legitimate reason – the reason did not rise to the level of criminal suspicion - but they had an OCR based on what they knew about the area and Mr. DeBour's evasive maneuver.
- Based on that OCR, they were permitted to simply approach and ask questions regarding his name and destination.
- It was a minimal intrusion. This wasn't a seizure.

So this started as a Level 1 encounter. And since the officers legitimately approached him, they were lawfully in a position to see what they saw next: the distinctive bulge, and the encounter elevated from there.

We'll talk about this more at Level 3, but if you conduct an approach at a lower level and then see a distinctive bulge that, based on your training and experiences, leads you to reasonably suspect is a weapon, it elevates the encounter to a Level 3, warranting a frisk.

A single fact can elevate the encounter. And it's not linear. It does not have to go 1-2-3-4. It can go from 1 to 3 or 1 to 4, and the encounter can start at 1, 2, 3 or 4.



To recap, New York's highest court in *DeBour* said that an officer needs an OBJECTIVE CREDIBLE REASON to approach someone and ask some basic non-accusatory questions, even if the officer has no basis to believe the person is involved in a crime, so long as the approach isn't just based on a hunch, whim, bias, or a desire to harass.

The officer needs an OBJECTIVE CREDIBLE REASON.

WHAT DOES THIS MEAN? The reason is based on facts and observations. It's more than a mere hunch.

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

CREDIBLE = means it's believable.

This level of knowledge is a Level 1 encounter under the *DeBour* framework and is known as a REQUEST FOR INFORMATION. A key feature of Level 1 is that you have no basis (or at least not a strong enough basis) to regard the person you're dealing with as a suspect.

And as we'll learn soon, the next level up, where you begin to have a foundation for suspicion of a crime - that is a Level 2 encounter conducted pursuant to your COMMON LAW RIGHT OF INQUIRY.

Now that we've discussed *Terry* and *DeBour*, we're going to discuss the levels in greater detail, particularly:

- The kinds of facts that make something a 1, 2, 3 or 4
- And what you can and can't do at the different levels

But before we do.....



You need to understand a fundamental principle: what it means to be “free to leave.”

It’s an important concept, because at Levels 1 and 2, people are free to leave. At 3, for a brief period, they are not.

And we as officers have to follow the facts, that is, we have to calibrate the use of our tools to the facts we have.

If we only have, for example, Level 1 facts, but we put on our turret lights, jump out of the car and surround someone, we’ve acted like we’re at 3. We jumped the facts. And that’s when it won’t end as a good gun collar -- we’ll be dealing with poisonous fruit.

At Levels 1 and 2, we can’t act in a way that would make a reasonable person feel as though he was not free to leave.



Ask class: If two uniformed officers came up to you and said:

“Hey, what’s your name? Where are you headed? You from around here?”

Would you feel free to leave? [Solicit a few answers, hopefully some yes and no answers]

Then what if they asked to see your ID? They don’t take it and hold it for 5 minutes. They glance at it and give it back.

[Does that change some answers?]

Now compare this to a different kind of approach – they jump out of the car and shout “hands up!”

Would anyone feel free to leave?

You are reasonable people. You had some different answers. The law recognizes that and gives us some guidance.

The question “would a reasonable person have felt free to walk away” if the officers did x, y, and z.

Who is this reasonable person? [the imaginary person in the empty shoes in our slide]

This reasonable person doesn’t love cops or hate them. He’s just your basic, level-headed, reasonable person. He realizes that sometimes officers have to ask questions, even about something that is urgent or dangerous, and it doesn’t mean that they are about to arrest or detain the person they are questioning.

If you are approaching someone on Level 1 or 2 information, how should you act so as not to cross the line and turn encounter into a detention or a “stop”?

Again, it comes down to being reasonable.

Under the law, the mere fact that you as an officer walk up to someone and ask some questions, even if you ask to see ID, a reasonable person should not feel as though he’s not free to leave.

In fact, you'll hear that at Level 2, you are allowed to ask more accusatory questions that may make the person feel unsettled and uncomfortable. So long as this uncomfortable yet reasonable person would still feel free to leave, you have not turned it into a seizure.

It's not WHO you are (that you are a police officer asking questions) it is HOW you act.

If you yell "stop!"¹ or you and your fellow officers surround the person or block his path in a way that deprived him of freedom of movement, put your hands on him to stop him, threaten him, or draw a firearm,² 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, a seizure. And courts will consider whether you had enough information – whether you in fact had Level 3 reasonable suspicion to support that stop. If you had enough to support reasonable suspicion, then those actions that created a situation where a reasonable person would not feel free to leave are fine because IN FACT the person was NOT free to leave.

Level 1: Request for Information

May a police officer approach a citizen to request information without having any indication of criminal activity?

Yes.

At this point, this should be a refresher question for the class. The class should remember that the Court of Appeals answered this question in *DeBour* - an officer can so long as the officer has an OCR.

Level 1 encounters don't include giving someone directions or greeting someone. And with Neighborhood Policing, you will be getting to know the residents in your sector, so catching up with them, talking to them, that kind of contact does not necessarily put you on the *DeBour* scale. What puts you on the scale is that you are *investigating something*.

¹ *Ligon v. City of New York*, 925 F.Supp.2d 478 (S.D.N.Y. 2013) ("Indeed it is difficult to imagine many contexts in which an officer shouting [STOP, POLICE!!!], followed by the person stopping, would not constitute a *Terry* stop.").

² *United States v. Mendenhall*, 446 U.S. 544 (1980) ("Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.") (Stewart, J. concurring).

During a Level 1 Request for Information, you are looking into something, you are investigating something, but it does not necessarily have to be a crime. You might even be performing a public safety function.

A key feature of Level 1 is that here, you have no basis (or at least not a strong enough basis) to regard the person you are approaching as a suspect.



Let's go over some examples based on case law that will give you a better sense of what a Level 1 is.

The Student Guide gives you some examples. You should read them.

We're going over some additional/different examples here in class.

1. Sick Person: You see a man on the ground. He looks sick.
What would you do? What would you say to him?
If you go over and ask: "Sir, are you feeling ok? Do you need assistance?" You are asking him questions. You are acting on a concern for his safety and well-being. You are looking into something, but at this point you have no reason to think you are investigating a crime. This is a Level 1 encounter. Let's say it turns out this person is very sick, he passes out within a few seconds, you call EMS, and he's taken care of. That started as a Level 1 and ended as a Level 1. New York Search and Seizure ("Kamins") § 2.02[1] (Person in distress).
 - a. WHAT WAS THE OCR FOR THE APPROACH? [Get class to articulate] The guy looked sick. You wanted to see if he needed help. You are investigating something, but this is an example of a "public service" Level 1.
2. Shots Fired: You are responding to a job for shots fired near the courtyard of an apartment building. It's about 9 p.m. You get there right away. You see many people just hanging out, including some people gathered on a park bench. They are just calmly sitting there talking. What would you do? What would you ask?
 - a. WHAT WAS THE OCR? [Ask class] You're investigating the shots fired. You have no basis to regard the people on the bench as suspects. They might be witnesses and you have a basis to go up and request information, such as whether they saw or heard anything. Kamins § 2.02[1] (Possible witnesses). This example, and the examples below, are examples of "law enforcement" Level 1 encounters (as opposed public service).
3. Cabbie and Passenger Arguing: Let's say you see a cabbie pulled over, the driver's door is open and he's standing beside it. He's having a heated (but not physical) argument with another man

who appears to have been his passenger (he's standing outside the open door of the rear passenger compartment). At this point, there isn't enough to suspect criminality, or to regard either of them as a suspect.

- a. WHAT WAS THE OCR? In the real case, the court said the officers had an OCR to approach and address/clear the situation, and when one of the officers started talking to the passenger, he observed a distinctive bulge in his waistband and the encounter elevated. A gun was recovered and the passenger was arrested. *See People v. Thomas*, 201 A.D.2d 252 (1st Dept. 1994). [Be careful not to characterize the oral argument in this example as too dramatic, because in a recent case, *People v. Cabrera*, 135 A.D.3d 412 (1st Dept. 2016), the court found that an individual angrily yelling and cursing at someone while waving bags with both hands was sufficient for Level 2 founded suspicion.³]
4. Man looking at multiple mailboxes in NYCHA lobby: Let's say you see a man in the lobby of a NYCHA building. You are assigned to a PSA and you and your partner are doing an interior patrol for trespassers and drug dealers that hang out in the building. This man is just standing there for several minutes and then he starts to look at all the mailboxes.
 - a. WHAT'S THE OCR? At this point, you don't have enough to regard him as a suspect. He might have just moved in and is looking for his mailbox, but you have enough to approach him and ask basic, non-accusatory questions, such as whether he lives in the building, or if he is visiting anyone. *See People v. Wighfall*, 55 A.D.3d 347 (1st Dept. 2008)

Space for Instructor Notes/Other useful Level 1 Examples:

³ *See also People v. Hale*, 300 A.D.2d 55 (1st Dept. 2002) ("When, in a desolate area after midnight, a livery cab came to an unexplained stop in the middle lane and the driver immediately exited the cab simultaneously with defendant and another passenger, whereupon the driver flailed his arms as he pointed at a police officer while defendant and the other passenger looked at the officer and then fled in opposite directions, there was reasonable suspicion to justify the pursuit of defendant.").

As we see from these examples, sometimes there is simply no information, no basis at all, to regard the person as a suspect at Level 1 -- and in others there is simply not enough.



What can an officer do with only a Level 1 amount of information?

She has a few tools.

She has the tool of observation (which, actually, she always has in public places).

She also can 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.⁴

So what are some examples of some good, non-accusatory question?

Can I talk to you for a second?

Are you ok?

Did you see anything?

Good evening, Sir. Do you live in the building?

Bad examples:

Stop right there, where do you think you're going?

Do you have any weapons?

⁴ *People v. Hollman*, 79 N.Y.2d 181 (1992) (“Where the person approached from the content of the officer’s questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer merely asking for information. The encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is afoot.”).

** You can always ask for ID, so long as you are at least at Level 1,⁵ but the person does not have to produce it unless he is the driver of a vehicle.

Protective Measures

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. An officer is authorized to take protective measures like these during a Level 1 encounter if the officer reasonably fears for his or her safety. However, 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 perceive that your safety is in jeopardy.

Since you are more likely to engage protective measures at Levels 2 and 3, we'll discuss them in greater detail there.

We've talked about examples of things that began just as Level 1s. The sick guy, the cabbie fighting with his fare.

And what you CAN do at Level 1.

Now we have to talk about what you CAN'T do. Remember, at one, we don't have an enough of a basis (or ANY basis at all) to think of the person as a suspect, so it makes sense that there are things we can't do.

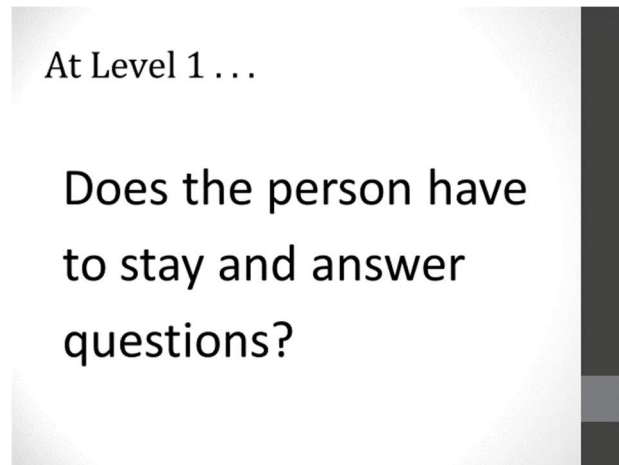
What CAN'T an officer do at Level 1?



The “don’ts” are above.

⁵ *People v. McIntosh*, 96 N.Y.2d 521 (2001) (“It is well-settled that when an officer asks an individual to provide identification...during a police-initiated encounter, the request for information implicates the initial tier of *DeBour* analysis.”).

This all makes sense because at Level 1, the person isn't a suspect and must feel like they are free to end the encounter and leave. For example, seeking consent from the sick person would be weird, and barking accusatory questions at potential eyewitnesses would be not only weird but counterproductive. The rules make sense.



The person you are interacting with during a Level 1 encounter:

- Does not have to answer questions⁶ - THEY DON'T HAVE TO ANSWER OUR QUESTIONS AT ANY LEVEL.
 - o If the person asks if they have to answer question or if they have to remain there for questioning, officers must tell the truth: they don't at Level 1 (or 2).
- Can refuse to produce ID (unless he's the operator of a vehicle⁷)
- And he can walk or EVEN RUN AWAY.....

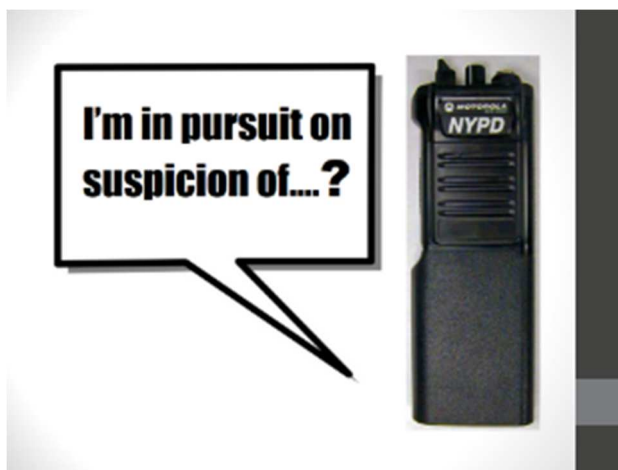
⁶ *People v. Howard*, 50 N.Y.2d 583 (1980) ("But while the police had the right to make the inquiry, defendant had a constitutional right not to respond.").

⁷ *People v. Copeland*, 39 N.Y.2d 986 (1976).



That is what New York case law holds. At Level 1, a person can walk or even *run* away.⁸

This can throw officers off because your instincts probably tell you that if the person starts running from a police officer, the person must be up to no good, so the reaction is to pursue. But when we think about it, at Level 1, this “right to run away” rule also makes sense. If the sick guy comes to, and it turns out he doesn’t like the police, and walks off, he has every right do that. And he can even run off. He does not have to take help from you. Same thing with the passenger and the cabbie. If the passenger runs off and the cabbie just says “what a jerk that guy was” (rather than “he just robbed me!”) the passenger gets to run off. And witnesses don’t have to answer questions, they can walk away from you.



⁸ *People v. Holmes*, 81 N.Y.2d 1056 (1993) (“While the police may have had an objective credible reason to approach defendant to request information...those circumstances, taken together with defendant’s flight, could not justify the significantly greater intrusion of police pursuit.”).

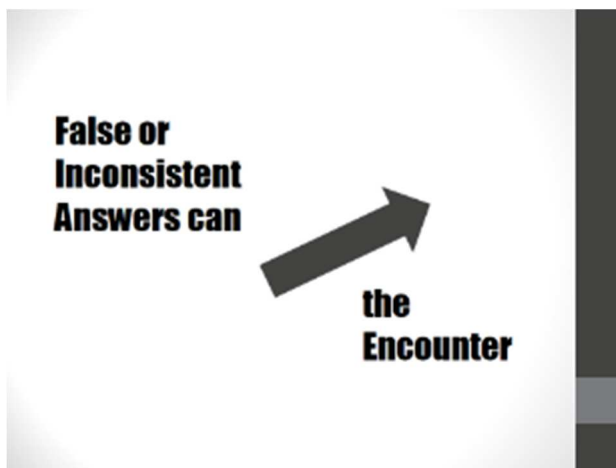
One way to keep this in check: during a Level 1 encounter, if someone runs from you – and again, here at Level 1, you have no (or not enough) information to suggest the person is engaged in any criminality – imagine what you’d put over the radio if you started to pursue? What would you say? “I’m pursuing someone on suspicion of... *running from me?*”

Please note that while officers do not have the right to pursue someone at Level 1, they can continue to observe, surveil and even follow (not *chase*) the person, provided they do not limit the person’s freedom of movement.⁹

So to recap, at Level 1, people don’t have to answer your questions, they can walk or run away, and none of this will elevate the encounter.

If an entire square block is considered a “high crime area,” do you think you would have an objective credible reason to approach someone and conduct a Level 1 Request for Information of an individual who you see simply walking down the block? No.¹⁰

Presence in a drug-prone location or a high-crime area without more does not give an officer an objective credible reason to approach.¹¹ An individual’s desire to avoid eye contact alone also does not provide an officer with an objective credible reason to approach.¹²



False or inconsistent answers to your requests for information CAN elevate an encounter.¹³

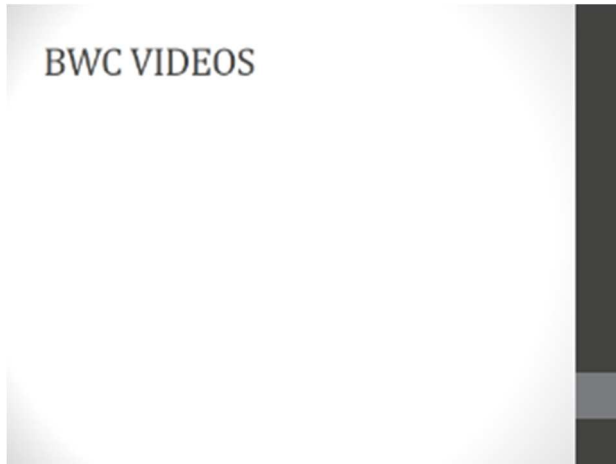
⁹ Kamins § 2.04; *People v. Howard*, 50 N.Y.2d 583 (1980); *People v. Steinbergin*, 4 A.D.3d 192 (1st Dept. 2004)

¹⁰ *People v. McIntosh*, 96 N.Y.2d 521 (2001) (“Even a discrete area of a city identified as a high crime area has not, by itself, been sufficient justification for informational requests...The fact that an encounter occurred in a high crime vicinity, without more, has not passed *DeBour* and *Hollman* scrutiny.”).

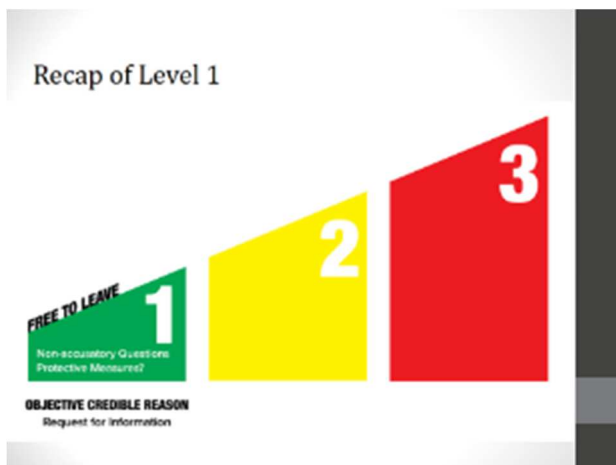
¹¹ *People v. McIntosh*, 96 N.Y. 2d 521 (2001)

¹² *Matter of Michael F*, 84 A.D. 3d 468 (1st Dept. 2001)

[This applies to Level 2 as well]



[Now that they've heard Level 1 case examples and the do's and don'ts, show body camera video(s) of Level 1 and discuss.]



Recap contents of chart before moving on to Level 2.

¹³ *People v. Rodriguez*, 49 A.D.3d 431 (2d Dept. 2008) (“Defendant gave an answer that the officer immediately knew to be false...and this elevated the situation to a level-two common-law inquiry.”); *People v. Hollman*, 79 N.Y. 2d at 193

Level 2: Common-Law Right of Inquiry

- Founded suspicion that criminal activity is afoot.
- Based on observable conduct or reliable hearsay information.
- More than just a hunch.

At Level 2, also known as an encounter conducted pursuant to your Common Law Right of Inquiry, you have more information and this information gives you a basis to start to focus on someone for suspected criminality.

That's the key difference. At Level 1, you had either no reason at all, or not enough of a reason to approach someone and regard him or her as a suspect.

At Level 2 this changes. We move up from just merely having a Level 1 objective credible reason to approach someone to having a foundation for suspicion of criminality. You have a **FOUNDED SUSPICION**.

At Level 2, you have more information, a higher level of suspicion, and more tools.

- Here you **CAN** seek consent to search
- Your questions **CAN** be pointed and accusatory; and
- You **CAN** pursue the person if he runs from you.

We'll talk more about the tools but first let's go over some examples.



1. You are on patrol and you see a male on a corner conversing with another man and a woman. There have been recent complaints of drug activity at this corner. It's about 10 at night. As your van approaches, all three look in its direction. One of the men immediately flees. You see that the remaining male is dangling a small black leather bag in front of him. Then he backs up a few steps, almost to the wall, and places the bag behind his back so that it's hidden from your view. What do you think? Based on this, are you going to begin to focus on this individual as a possible suspect for criminality? Drug location, companion fled, he backs up, hides a bag. Would you begin to look at him as a possible suspect? Here the court said the officer had enough for Level 2 founded suspicion and was able to approach and use Level 2 tools (in this case, the officer said "what do you have in the bag?" and the suspect claimed the bag was his companion's and gave it to the officer, and the officer recovered a gun). See *People v. Boyd*, 91 A.D.2d 1045 (2d Dept. 1983)
2. A Transit officer is watching a male inside a subway station over a surveillance video monitor. The male is rapidly buying multiple MetroCards with multiple credit cards. Based on the officer's training and experience, he begins to suspect the man of using stolen credit cards to buy MetroCards. The court said that these observations provided the officer with a founded suspicion for a Level 2 inquiry. *People v. Wilson*, 52 A.D.3d 239 (1st Dept. 2008). We can see why the officer had a basis to focus on this individual. The information was not strong enough - not yet - to justify a detention (a *Terry* stop), but it was a basis to focus on him and engage Level 2 tools (and in this case, in response to the officer's Level 2 questions, the defendant produced an ID and credit card that clearly did not belong to him, which led to probable cause for arrest).

Instructor Notes for other Level 2 Examples:



The person is still free to leave and should feel free to leave at Level 2. While Level 2 means you've gathered enough information to suggest that this individual may be involved in criminal activity, Level 2-type information is still not strong enough to detain a person. The person does not have to answer questions. And his walking off or refusal to answer your questions¹⁴ does not elevate the encounter.

HOWEVER, at Level 2, there's a change in the rule about running away. 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 – not walking away at a fast pace, but actually fleeing from the police (not just a crowd, but a person or people he can tell are the police) - his *flight* elevates the encounter to 3 and you can pursue him.¹⁵



¹⁴ *People v. Stevenson*, 7 A.D.3d 820 (2d Dept. 2004) (“The defendant had the right to refuse to answer the detective’s questions, and the fact that he did not answer did not justify a further intrusion”) (quoting *People v. Howard*).

¹⁵ *People v. Williams*, 120 A.D.3d 1441 (2d Dept. 2014); *People v. Woods*, 115 A.D.3d 997 (2d Dept. 2014); *People v. Soscia*, 96 A.D.3d 1081 (2d Dept. 2012); *Matter of Jarvis H.*, 94 A.D.3d 570 (1st Dept. 2012); *People v. Agramonte*, 57 A.D.3d 333 (1st Dept. 2008); *People v. Delesline*, 52 A.D.3d 302 (1st Dept. 2008); *People v. Major*, 115 A.D. 3d 1 (1st Dept. 2014)

Use chart to list Level 2 tools.

- Pointed, accusatory questions are permitted
- You can seek consent to search¹⁶
- You may engage appropriate protective measures
- False or evasive answers still may elevate the encounter.¹⁷
- And as we just discussed, flight will elevate a Level 2 encounter to a Level 3.

However, at Level 2, you still cannot, through your words or actions make the person feel like he or she is not free to end the encounter and walk away. You can't direct the person to stop, use or threaten to use force, detain the person, or block their movement.

Let's break these tools down and start with the kinds of questions you can ask.

Level 1 Questions	v. Level 2 Questions
<ul style="list-style-type: none"> • Can I talk to you for a second? • Name, address, destination, reason for being in the area? • Did you see anything? • Did you hear shots? • What's going on? 	<ul style="list-style-type: none"> • Do you have any weapons? • Do you have anything you shouldn't have? • What's in the bag?

Contrast Level 1 and Level 2 questions. At Level 2, you can ask pointed and accusatory questions. Tactically, you may choose not to because you may conclude a less accusatory tone may yield more answers, but you can ask pointed accusatory questions at this level. Here are some Level 2 type questions that courts have allowed (remember, tone and actions matter):

- "Do you have anything you shouldn't have?"
- "Do you have any weapons?"
- "Do you have anything that will hurt me?"
- "What's in the bag?"¹⁸

See Kamins, § 2.03[1]

Consent to Search

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.

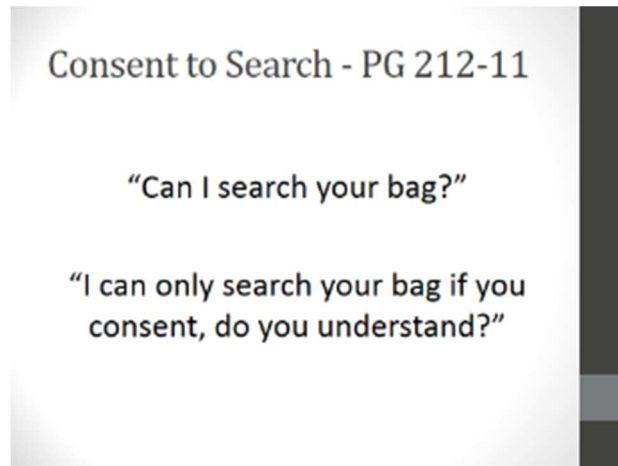
¹⁶ *People v. Hollman*, 79 N.Y.2d 181 (1992).

¹⁷ *People v. Kenon*, 291 A.D.2d 246 (1st Dept. 2002); *Matter of Troy F.*, 138 A.D.2d 707 (2d Dept. 1988).

¹⁸ *People v. Boyd*, 91 A.D.2d 1045 (2nd Dept. 1983)

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.

To seek consent, we must ask two clear "yes" or "no" type questions:



This is what the law requires. 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 question 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 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.

[This change sometimes prompts a class discussion. Students 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.]

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.



If you seek consent to search, you must offer the person a Business Card.



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.

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

Business cards 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.

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 with sufficient time to write it down.

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.

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.

Protective Measures

What you can say:

- “Show me your hands”
- “Put that down”
- “Take your hands out of your pockets”
- “Raise your hands”

What you can do:

- You can forcibly remove the person’s hands from their pockets, if they refuse to show them
- You can grab the person’s hands, if they reach for their pocket or waistband

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])

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.

Example of protective measures from case law:

People v. Wyatt, 14 A.D.3d 441 (1st Dept. 2005) - The court found officers had an objective credible reason for approaching a man in a crime-ridden area after observing him pass two other men and stare back at the two men repeatedly, with an angry, menacing look.

Is glaring at two guys a crime?

No, but the court said it was the basis for an OCR.

The officers approached. Upon approach, the officers asked if the man had a problem with the two other men, but he did not answer their question – he just then proceeded to glare angrily at the officers.

Is glaring at officers a crime?

No.

But then as he was glaring at the officers, he began to reach for his back pocket.

Was he reaching back for a weapon?

Or reaching for his ID, to show the officers he's a student nearby?

How could they know?

They couldn't. But what they did next was reasonable. They didn't tackle the guy, put him against the wall – they simply stopped his hand from going any farther by pressing it up against his own body. And that's when the officer felt the gun. If that quick reflexive gesture was reasonable, then the gun isn't poisoned fruit, right?

The court found the officer was justified in putting his hand on the defendant's back pocket to protect himself – they said this was not a full frisk.

It was a singular reflexive motion, not running hands outside his clothing. The reflexive gesture was appropriate, the court said, and upon making it, the officer felt the hard object and now had reasonable suspicion the defendant was armed – and could thus search for the gun.

The case law sometimes calls these cases "touch" cases.



The case we just discussed is a good example of why we have protective measures in your set of tools at every level.

In a situation like that, you don't have to stand there and analyze, did this just go to Level 2 for founded suspicion of ... of what? You simply can make that reasonable reflexive action.


It won't be common at Level 1. Remember the body camera video(s) we saw? [Or the Level 1 examples we talked about?] It would NOT have been reasonable for those officers in that/those situation(s) to have told every person he/she approached to drop their backpacks/purses, or take their hands out of their pockets.

It will be rare Level 1 where you'll need it, but if you have a reasonable fear for your safety, it's a tool that is there for you.

Truly, most of the time when something happens that puts you in fear for your safety at Level 1, the encounter has elevated to a 2 or more.

But in these situations, just focus on being reasonable and that will guide you.

(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..."



Anonymous Caller

- Try calling back caller before you arrive on the scene to get a name
- If you can't get a name, did the caller just observe criminality or are there exigent circumstances?
- If not, observations that corroborate the alleged criminality will escalate to Level 3

We talked about two examples of Level 2 encounters – the guy who hid the bag in front of the drug prone location, and the guy using different credit cards to buy MetroCards.

Another very common type of case that lives here at Level 2 are the cases that come from anonymous 911 callers.

If a person on the street comes up to you, is clearly frightened, and whispers “that guy around the corner with the 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 considered anonymous for purposes of our discussion today.¹⁹ 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, even though the caller provided a location and a detailed description, that kind of information only amounts to Level 2 founded suspicion if the caller won’t give her name. 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.

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 at 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?!”

¹⁹ See *People v. Letriz*, 103 A.D.3d 446 (1st Dept. 2013); *People v. Appice*, 1 A.D.3d 244 (1st Dept. 2003).

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 - the gun 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.

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.²⁰ 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 xxyxyx will be leaving the parking lot of an apartment building located at x, she will have drugs 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.²¹ 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) In several cases, getting a first or partial name has been found to be a factor that 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).

²⁰ *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).

²¹ *Alabama v. White*, 496 U.S. 325 (1990).

- 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).

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 to corroborate the criminality 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 it 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,²² adjust his waistband in a manner that, based on training and experience, is consistent with the possession of a weapon,²³ or observing the suspect nervously "blade" you,²⁴ 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 3.²⁵

Some additional examples:

- a) Anonymous call of a man with a gun. Officers respond. They see a male matching the description provided at location. Upon seeing police, the suspect quickened his pace and tried to get into a locked van and then discarded an envelope (cocaine) inside a tin container

²² See *People v. Williams*, 136 A.D.3d 1280 (4th Dept. 2016); see also *People v. Moore*, 6 N.Y.3d 497, 498 (2006); *People v. Benjamin*, 51 N.Y.2d 267 (1980).

²³ *People v. Benjamin*, 51 N.Y.2d 267 (1980).

²⁴ *People v. Williams*, 136 A.D.3d 1280 (4th Dept. 2016)

²⁵ *People v. Belk*, 100 A.D.2d 908 (2d Dept. 1984).

that sounded like a small caliber gun when it hit the ground at defendant's feet. 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 arrival of the police and they saw the defendant try to hide and flee from officers as they approached = 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."

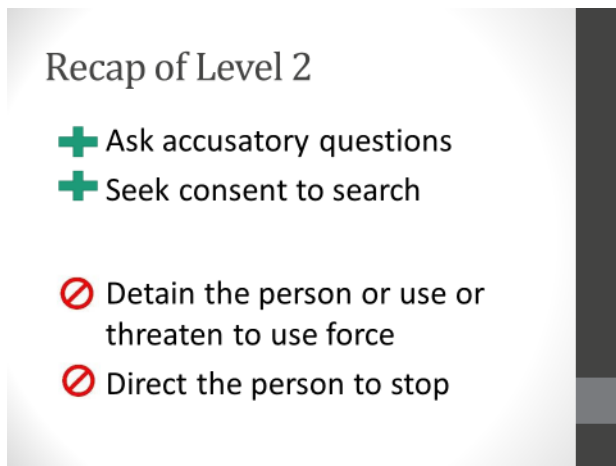
We have no idea whether in the first example the caller's report was contemporaneous to the report or whether the caller made a first-hand observation. In the second one we do.

For case support for the content re: Anonymous callers, see: *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.



Play and discuss Level 2 BWC video(s)



Let's recap Level 2. It's based on founded suspicion. You can ask accusatory questions, you can seek consent to search, and you can engage protective measures. You can't direct the person to stop, use or threaten to use force, detain the person, or block his movement – the person remains free go at Level 2.

At Level 2, does the person have to:

- Answer your questions?
- Produce ID?
- Consent to a search?
- Can the person walk away?
- Does the person's refusal to consent or answer questions elevate the encounter?

- The person does not have to answer questions at Level 2 or any other level
- The person does not have to produce ID (unless he's the operator of a vehicle)
- The person does not have to consent to a search
- The person can walk away
- None of this elevates the encounter

But if the person runs away in response to the presence of police officers, that will elevate the encounter.

LEVEL 3

Level 3: *Terry* Stop

What is a stop?

Whenever a reasonable person would not feel free to disregard the police officer and walk away.

- Physical force or the threat of force is not necessary to constitute a stop.
- If commands or questions would lead a reasonable person to conclude s/he is NOT free to leave, it is a stop.

Where can you stop the person?

- Within the Geographic Area of Employment (GAOE).
- In the 5 boroughs – on or off duty.

Are you doing a *Terry* stop in Niagara County?



Authority to conduct stops on reasonable suspicion comes from the *Terry* case and from CPL 140.50 (authority in the 5 boroughs)

Level 3: *Terry* Stop

- A stop is permissible ONLY when individualized reasonable suspicion exists that the person stopped has committed, is committing, or is about to commit a **FELONY** or **PENAL LAW MISDEMEANOR**.
- Officers must be able to articulate specific facts that justify the stop.

Level 3: *Terry* Stop

What is reasonable suspicion?

- When the information an officer has is of such weight and persuasiveness, that, based on the officer's judgment and experience, it is reasonable to suspect that criminal activity is at hand.
- Must be **INDIVIDUALIZED, PARTICULARIZED, OBJECTIVE,** and **SUPPORTED BY SPECIFIC FACTS.**
- Hunches or gut feelings are insufficient.



1. You can have reasonable suspicion based on a crime 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 three male Hispanics in their early 20's is not going to give you reasonable suspicion for all male Hispanics in their 20's in that area. But if the pattern included descriptive information beyond race, age and gender then it becomes suspect specific information, where race can be used because it is different and superior to just general crime data about Hispanics and robberies in the area. For example, a pattern involving 3 light-skinned M/Hs committing robberies near a particular bus stop in the late evenings during the past two weeks and one of the M/Hs is described as having a distinctive hairstyle. If an officer saw 3 light-skinned M/Hs in their 20s hanging around that particular bus stop at 11 p.m. for an extended period, not getting on any busses, and one of them had the same distinctive hair style. The totality of those facts would support a reasonable suspicion that the men may be there to commit a robbery.

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 detailed physical description including clothing and a direction of flight. You see someone matching the description in the area reported. You 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.

Instructor Notes for other Level 3 Examples:

[For instructor reference only – additional Level 3 examples if needed]

- The First Department in *Darryl C* (98 A.D.3d 69) has a good string cite with examples: “In *People v. Davenport* (92 AD3d 689, 939 NYS2d 473 [2012]), police received a radio call of a shooting at a specific location. Arriving in under a minute, the officers encountered the nervous defendant, his hand on his waistband, making a slow retreat after making eye contact with an officer (*id.* at 689-690. In *People v Thanh Do* (85 AD3d 436, 924 NYS2d 380 [2011], *lv denied* 17 NY3d 905, 957 NE2d 1164, 933 NYS2d 660 [2011]), confidential information was received that a home invasion would take place at a specific location, where police encountered three men fitting the description of the robbers and searched the defendant after observing an L-shaped bulge in his waistband. Again, the information coupled with the observation justified the police action. In *People v Johnson* (22 AD3d 371, 802 NYS2d 444 [2005], *lv denied* 6 NY3d 754, 843 NE2d 1162, 810 NYS2d 422 [2005]), the defendant's "clothing and physical characteristics fit an armed robber's description that was sufficiently specific, given the temporal and spatial factors" (*id.* at 372). In *People v Greenidge* (241 AD2d 395, 661 NYS2d 605 [1997], *affd* 91 NY2d 967, 695 NE2d 715, 672 NYS2d 846 [1998]), police received a radio transmission of an armed robbery and, only three blocks from the location of the crime, observed a man matching the general description they had received and the defendant, who was clutching a jacket under his arm as if concealing something. In *People v Brown* (277 AD2d 107, 716 NYS2d 56 [2000], *lv denied* 96 NY2d 756, 748 NE2d 1078, 725 NYS2d 282 [2001]), defendant and another man were seen hurrying away from an unlocked car, which was in disarray and which they had just parked in an area known to have a high incidence of stolen vehicles. It was not registered to either man, each of whom reached for his waistband upon becoming aware of the presence of plainclothes officers (*id.* at 108).”
- Also: *People v. Nelson* 179 AD 2d 784 (2d Dept. 1992) Radio run for shots fired in an apt building, officers get there promptly, and witness confirms shots came from 3rd floor. Officers see men in the small entry vestibule trying to exit, but upon seeing the officers, they slammed the inner vestibule door behind them and fled back into the narrow hallway. Officers entered and ordered everyone to freeze. The court said this was a valid stop and frisk at Level 3.
- And in *People v. Alston*, 23 A.D.3d 487 (2d Dept. 2005), there was reasonable suspicion to stop two men who were the only people on the street in an area where officers heard guns shots moments before.

Level 3: *Terry* Stop

Factors that may be relevant to reasonable suspicion:

- Information from an identified informant.
- Matches a specific description (not just race, age, gender) of a suspect wanted in a reported crime.
- Carrying objects in plain view used in commission of crime (slim jim, pry bar, etc.)
- Actions indicative of “casing” victim or location.

Level 3: *Terry* Stop

Additional factors that may be relevant to reasonable suspicion:

- Actions indicative of acting as a lookout.
- Actions indicative of engaging in a drug transaction.
- Actions indicative of concealing or possessing a weapon.
- Proximity to recent known crime scene location.

Level 3: *Terry* Stop

- The factors listed are only factors that MAY be relevant in determining reasonable suspicion.
- Any one factor in isolation may not lead to reasonable suspicion.
- A generic crime suspect description by itself, such as “young black male”, does NOT support reasonable suspicion.

Note about the FELLOW OFFICER RULE: information which justifies police action may be acted upon by an officer who lacks personal knowledge of the information as long as a fellow officer involved in the investigation has the requisite information.²⁶ In other words, if officer A has all the facts supporting reasonable suspicion, and officer B joins in the pursuit and doesn’t, he can rely on a fellow sworn officer’s direction to stop the person even if officer B doesn’t know the information before making the stop.

²⁶ *United States v. Colon*, 250 F.3d 130 (2d Cir. 2001) (“Under the collective or imputed knowledge doctrine, an arrest or search is permissible where the actual arresting or searching officer lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify the arrest or search was known by other law enforcement officials initiating or involved with the investigation.”); *People v. Ketcham*, 93 N.Y.2d 416 (1999) (“Under the fellow officer rule, a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause so long as the officer is acting upon the direction or as a result of communication with a fellow officer or another police agency in possession of information sufficient to constitute probable cause for the arrest.”).

Now that you've covered basic principles of Level 3 and given some examples, discuss the tools an officer has at Level 3



The same 3 tools that you had at Level 2 slide over – you still have them at Level 3, plus you pick up 3 potential new tools.

A note about the questions you ask at Level 3:

- You can still ask pointed, accusatory questions.
- But now, at Level 3, the person is detained, not free to leave
 - o So does the *Miranda* rule apply? No. Under the law, so long as you have not handcuffed the person or have weapons drawn during the Terry stop, you don't have to administer *Miranda* warnings before asking accusatory questions.
- The person can refuse to answer.
- Refusal does not elevate the encounter.

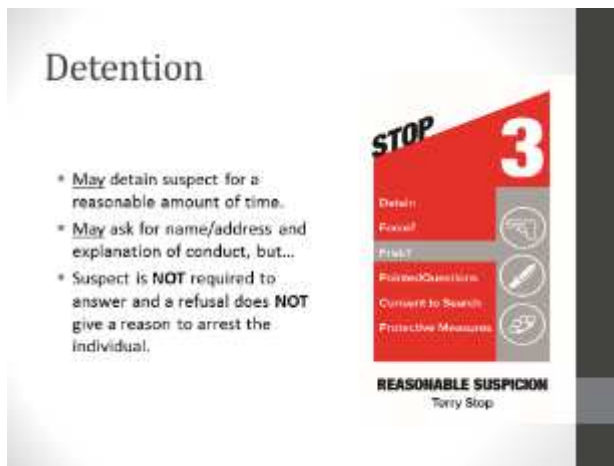
The new tools you've picked up at Level 3 are:

You have the authority to DETAIN, the person is not free to leave.

You may be able to use FORCE - That's why there's a question mark in the chart.

You may also FRISK – again, that's why there is a question mark.

So let's talk a little more about these three new tools you picked up.



Upon reasonable suspicion that a person just committed, is committing or is about to commit ANY FELONY or a PENAL LAW MISDEMEANOR, an NYPD officer has the authority to detain that person for a reasonable period²⁷ to investigate his or her suspicion.

How long is reasonable? The courts have not set a time limit. The duration has to be reasonably related to the purpose of the detention. Most stops can be completed within 20 minutes. Courts will generally uphold stops that are under an hour.²⁸

Generally speaking, you should not transport a person during the stop. If you, for example, detain someone and take him back to the precinct to continue your investigation, you've effectively placed that person under arrest. You need more than reasonable suspicion for that – you need probable cause.

But, if you have to move the person because, for example, you confront an angry crowd or you need to take the suspect to the location of the crime or witness for a show up, then such movement is permissible.²⁹

²⁷ *United States v. Sharpe*, 470 U.S. 675 (1985) (“In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.”)(citations omitted).

²⁸ Kamins § 2.06[2].

²⁹ Kamins § 2.06[3].



Can you handcuff someone during a Terry stop?

The general rule is the handcuffs are for ARRESTS and should not be an automatic step in a *Terry* stop. However, handcuffs may be used during a *Terry* stop if

- An officer has to deal with a rapidly unfolding, dangerous situation OR
- The suspect acts violently OR
- The suspect resists being detained or tries to flee OR
- If the officer has information that the suspect may be armed or there may be a weapon near the site of the stop

If you do need to handcuff a suspect during a *Terry* stop and if you are going to continue to ask the suspect questions while he is handcuffed, the best practice is to Mirandize him before you continue to question the suspect.

Also, if you do need to handcuff the suspect, cover or block the view of the handcuffs during any show up identification. Failure to do so could taint the identification which may result in its suppression.

Force

- Reasonable amount of force may be used to stop or detain.
- The type and amount of force must be objectively reasonable.

If necessary, reasonable **FORCE** may be used to stop a person.

Frisk

- **STOP** and **FRISK** are two separate things.
- An officer **CANNOT** automatically **FRISK** everyone who is lawfully **STOPPED**.



Frisk

- A frisk is only permitted when there is independent reasonable suspicion that the person is **armed and dangerous**.
- It is limited to a pat down of the outside of the suspect to check for **dangerous weapons**.
- It cannot be used to search for evidence of a crime, such as drugs.
- An officer **CANNOT** go inside of pockets or clothing during the frisk.

Frisk

Armed and Dangerous:

- Officer observes a weapon.
- Officer has knowledge that suspect may have a weapon.
 - Suspect states that he/she has a weapon.
 - Witness or victim states that suspect has a weapon.
- Reasonable suspicion of a violent crime.

Frisk

Frisk of a Portable Container/Bag:

- May **ONLY** frisk portable container/bag that:
 - Is within the grasp of the suspect.
 - Could contain a weapon.
 - Is unlocked.
- If the container is solid and unlocked, the officer may open it to determine whether a weapon is present.

After going through the above slides/rules, use this example or an example to recap the rules and to get the class to better understand them.

The manager of a clothing store on 14th Street calls 911 and identifies herself.

She says a couple just ran out of her store. They are in their early 20s, the female is Asian with a short bob haircut and the male has brown curly hair, glasses, and is wearing a purple T-shirt. He's very thin.

They were in the store last week and they used what turned out to be stolen credit cards to run up about \$2,500 dollars in purchases. They appeared back in the store, and when the security officer in the store started to approach them, they took off and ran toward University Place.

That's Level 3. You've got reasonable suspicion. Known caller. Details of a felony in the past. Good description.

Now let's say you are the first sector to get to University Pl. The security guard is canvassing with another sector. You and your partner spot the couple matching the descriptions exactly walking very quickly down University Pl.

You get out of the car and direct them to stop. You can do that. This is Level 3. They are not free to go. You have the authority to hold them there until the witness arrives for the show up.

You can walk up to them and ask accusatory questions, such as do you have any weapons?

You can direct them to keep their hands out of their pockets or to drop any bags they might be carrying. And let's say they do. They say they have no weapons and they comply by keeping their hands out of their pockets.

WHILE YOU WAIT FOR THE 3 MINUTES IT IS GOING TO TAKE TO GET THE WITNESS THERE FOR THE SHOW UP – CAN YOU FRISK THESE TWO?

No. Not based on these facts.

A frisk is only authorized when you have a reasonable suspicion that the person was or is about to commit a crime AND YOU ALSO have a reasonable suspicion that the person is **armed and dangerous**.³⁰

When officers say “I frisked for my safety” (and you will hear them say that) under the law, they are only saying half the sentence. Why did they fear for their safety? To validly frisk someone, this fear must be supported by reasonable suspicion that the person was engaged in criminality AND a reasonable suspicion that the person was armed and dangerous. That's the complete sentence... “because I believed the suspect was armed and dangerous.”

Your authority to frisk someone is not the same as your authority to stop. You can stop someone whenever you have reasonable suspicion that the person committed, is in the act of committing, or is about to commit a felony or Penal Law misdemeanor. This allows you to detain the person, ask accusatory questions, seek consent to search, engage protective measures, pursue if the person walks or runs away, and use reasonable force, if necessary.

In order to frisk, on the other hand, you also need reasonable suspicion that the person is armed and dangerous. There are two parts of reasonable suspicion for frisking.

It's as if the toolbox for Level 3 has two compartments. One is opened up by reasonable suspicion of a felony or Penal Law misdemeanor, and it leads you to all the tools EXCEPT frisk (so it opens the compartment where you can reach your right to detain, pursue, etc.). But the tool of frisk is in its own compartment and the only thing that will open up that compartment is a separate reasonable suspicion that the person is armed and dangerous.

For some crimes, the compartments open at the same time. That's when the crime you suspect is a violent crime, like robbery or an assault.

³⁰ *Arizona v. Johnson*, 555 U.S. 323 (2009) (“To justify a pat down of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”).

But for others [take our Grand Larceny example] reasonable suspicion of the crime itself doesn't open up the compartment to reach for frisk. But other things can, such as:

- Statement by a victim or witness that the suspect is armed (i.e. in our example, the manager of the store says "and when the guy ran out, we saw he had a box cutter.")
- Admission by suspect that he or she is armed (you ask "do you have any weapons?" and he admits he does)
- Visible bulge characteristic of a weapon
- Suspect threatens MOS with physical harm

Search

- A search is the placing of hands inside a pocket or other interior part of clothing or possessions.
- It is only permitted to remove an object felt during the frisk that the officer reasonably suspects to be a weapon.
- The purpose of the search is for officer safety and **NOT** to discover other evidence of the crime.

Frisks and searches are two distinct events.

A SEARCH is when you actually go inside, i.e., a pocket, a bag, upon feeling the hard object.

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.

If you are sure it IS NOT a weapon, you can't go in and search.³¹

If you reasonably suspect it might be, you can't rule it out, then search.

What if you feel something, you know it isn't a weapon but you are pretty sure the items are vials. What can you do? Not search. But you could say,

"What's in your pocket?" Or seek consent to search the pocket.

³¹ *People v. Diaz*, 81 N.Y.2d 106 (1993) ("There can be no question that reaching into defendant's pocket and seizing the drugs were not within the scope of the *Terry* pat-down.").



Play and discuss BWC VIDEOS

Level 4: Arrest

- An arrest requires **probable cause**.
- Probable cause exists when facts and circumstances would lead a reasonable person to believe that:
 - ✓ An offense has been committed

AND

- ✓ The person to be arrested is the person who committed the offense.

DOCUMENTATION RESPONSIBILITIES RELATED TO LEVEL 3 TERRY STOPS

You must complete a Stop Report any time you detain someone for a Level 3 *Terry* stop. This is true even if it develops into an arrest or a summons – if an arrest/summons arises because of a *Terry* stop, the Stop Report should be part of the arrest/summons paperwork.

Stop Report

- Prepare one Stop Report for EACH person stopped.
- NOT required for Level 1 or Level 2 encounters unless the encounter escalates to Level 3.
- If the person stopped refuses to identify him/herself, request the Patrol Supervisor to verify.
 - The person stopped is **NOT** to be detained while waiting for the patrol supervisor.

If you stop two suspects because the radio run was for two individuals, you must complete two separate Stop Reports. You must do one for each person stopped.

Stop Reports are in FORMS:

STOP REPORT

Incident Information

Date: MM/DD/YYYY Time of Stop: HH:MM

Period of Observation Prior to Stop: Minutes Duration of Stop: Minutes

Location of Stop

Location Type: Select... Suspected Crime Location: Select...

Address Type: Select...

Basis for Stop/Identification/Suspected Crime

Stop Was: Select... ICAD No.: Select...

Officer in uniform?: Select...

Crime Suspected: Select...

Factors that Led to Stop: None selected

Person Stopped

Identification: STOP REPORT

Narrative (Describe the circumstances that led to the Stop):

Frisk/Search/Weapon/Contraband Information

Was person frisked?: Yes If Yes, Indicate Basis for Frisk: None selected

Was person searched?: Select... Object Observed Suspicious of Being a Weapon

Was weapon found?: Select... Reasoning Suspicious

Was other contraband found?: Select... Reason Known to Carry Weapons

Was other contraband found?: Select... Weapon Found

Was other contraband found?: Select... Other

Narrative (Describe the circumstances that led to the Frisk and/or Search):

STOP REPORT

Factors that Led to Stop

None selected

☐ Looking for or Processing a Weapon

☐ Leaving Vehicle or Location

☐ Engaging in a Drug Transaction

☐ Matches a Specific Suspect Description

☐ Acting as a Lookout

☐ Proximity to the Scene of a Crime

☐ Non-Willful Obey Pattern

☐ Other

Other (Stops, Tensions, Court Orders, etc.):

Stop Information

Did officer explain reason for stop?: Select... Information read given to person stopped?: Select...

Were other persons stopped (Questioned/Interviewed): Select...

Did a Body Worn Camera (BWC) capture the event in whole or in part?: Select...

Actions Taken to Stop (After Person Prior to Arrest):

STOP REPORT

Narrative (Describe the circumstances that led to the Stop):

Frisk/Search/Weapon/Contraband Information

Was person frisked?: Yes If Yes, Indicate Basis for Frisk: Object Observed Suspicious of Being a Weapon

Was person searched?: Select... If Yes, Indicate Basis for Search: None selected

Was weapon found?: Select... If Yes, Indicate Basis for Search: None selected

Was other contraband found?: Select... If Yes, Indicate Basis for Search: None selected

Was other contraband found?: Select... If Yes, Indicate Basis for Search: None selected

Was other contraband found?: Select... If Yes, Indicate Basis for Search: None selected

Was other contraband found?: Select... If Yes, Indicate Basis for Search: None selected

Narrative (Describe the circumstances that led to the Stop):

[The students won't be able to see all the fields, so the instructor can highlight the key fields in this series of FORMS screenshots]

The form must be complete. You must fill out all fields and clearly explain the basis for why you believe you had reasonable suspicion to stop, frisk or search in the report. You should check off all of the stop factor checkboxes that relate to your reason(s) for making the stop and all of the frisk/search factor checkboxes that relate to your reasons(s) for conducting the frisk and/or search. The narrative sections should include all of the facts and information you relied upon to conclude that there was reasonable suspicion.

The content contained within the four corners of a Stop Report should make clear to whoever is reading it why you stopped the individual and the basis for any frisk or search.

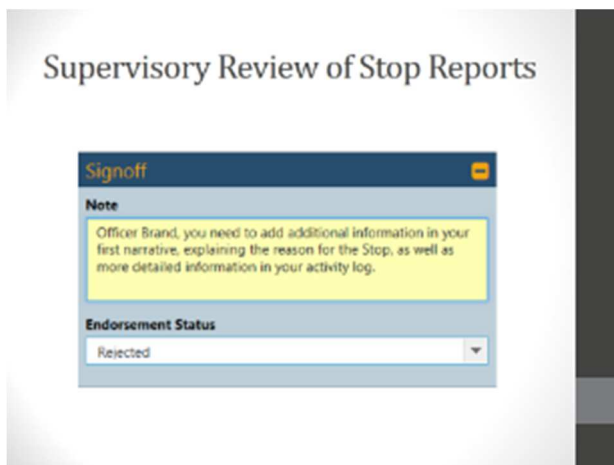
A narrative that fails to convey the essential facts is a common error we see in Stop Reports.

The first narrative section is utilized to explain why you stopped an individual.

The second narrative section is utilized to explain why you frisked or searched the person stopped if one or both of those actions were taken.

In each of the narrative sections on the Stop Report, you must explain in your own words the facts supporting each of the checkbox stop factors checked off on the front side of the Report and each of the checkbox frisk and search factors you checked off on the back of the Report. For example:

1. If you check off “Matches a specific suspect description,” you must include in the narrative all the details of that description, beyond just race, age and gender, as well as whether that description was provided by an anonymous or identified source.
2. If you check off “Identified Crime Pattern,” you must provide all of the details of that crime pattern in the narrative.
3. If you check off “Concealing or Possessing a Weapon,” you must provide all the facts which led you to suspect the person of possessing a weapon. Don’t just write conclusory statements like “furtive movement” or “bulge observed.” Provide detailed and specific facts (e.g. “bulge observed in waistband” or “suspect repeatedly touching object in waistband while staring at officer”).



If there are errors or omissions in your Stop Report, your supervisor will reject it and send it back to you with an electronic note telling you how it is deficient. Once you have corrected it, resubmit it to your supervisor.



It is important that your Stop Reports convey all the facts and circumstances that supported your decision to stop and frisk/search someone.

You've heard the expression "less is more." That does not apply to these narratives. Less is less. You want narratives that paint the picture of what happened. Let's look at some examples together...

FORMS
STOP REPORT GREEN - REQUIRED 38

Narrative (Describe the circumstances that led to the Stop)

AT T/P/O INDIVIDUALS WERE OBSERVED WALKING AT A FAST PACE TOWARD A FOOD DELIVERY PERSON RIDING ON A BICYCLE AND UPON NOTICING POLICE VEHICLE, INDIVIDUALS IMMEDIATELY TURNED AROUND AND WALKED IN OPPOSITE DIRECTION

Frisked/Searched/Weapon/Contraband Information

Was person frisked?
Select... YES

Was person searched?
Select... YES

Was weapon found?
Select... NO

Was other contraband found?
Select... NO

Narrative (Describe the circumstances that led to the Frisk and/or Search)

FRISKED DUE TO VIOLENT CRIME. SEARCH REVEALED NO WEAPONS.

100%

What do they think?

Can they tell from this narrative whether the officer has reasonable suspicion?

Based on these facts – if this is all that happened, did they have enough for a stop?

Doesn't sound like it. But what if what the officer actually saw was this:

The delivery guy parked his bike in front of a brownstone apt. building.

Two guys popped out from beside/under the stairs to the apt. building and looked at hm.

Then they tried to sneak up behind the delivery guy and catch up to him before he got buzzed into the building, but he got in and the door shut before they caught up to him – he didn't even see them.

So they went back to their hiding spot, the cops start to move toward them now, but then the delivery guy comes out, gets on his bike, the two guys start going toward him again, but then run away when they see the police.

Is that reasonable suspicion? Yes. And if that is what happened, he left most of it out of the report.

The screenshot shows a police report form. The narrative section contains the text: "MALE WAS OBSERVED CASING APARTMENT BUILDING IN THE VICINITY OF BURGLARY PRONE LOCATION". Below the narrative, there is a section titled "List of questions" with the following questions and answers:

- Was person frisked? YES
- Was person searched? NO
- Was vehicle frisked? NO
- Was other searched frisked? NO

At the bottom of the form, the text "SUSPICION OF VIOLENT CRIME" is visible.

What about this one? Can you tell if this was a good stop? No. There's not enough information.

STOP REPORT

Narrative (Describe the circumstances that led to the Stop)

RR / VERIFIED CALLER OF F/W, 40's, INTOX, BLACK T-SHIRT, RED PANTS MENACING PEOPLE IN TOMPKINS SQ PARK NEAR AVE A AND 7TH ENTRANCE WITH A KNIFE. ARRIVED AT EXACT LOCATION AND OBSERVED SUSPECT INTOX, BLACK SHIRT, RED PANTS YELLING AT PEOPLE.

Related/Seized/Weapons/Contraband Information

Was person frisked? YES

Was person searched? YES

Was weapon found? YES

Was other contraband found? NO

Narrative (Describe the circumstances that led to the frisk and/or search)

BASED ON REPORT OF MENACING WITH A KNIFE, FRISKED SUSPECT AND FELT OBJECT IN R.F. JACKET POCKET THAT FELT LIKE A KNIFE. RECOVERED ONE GRAVITY KNIFE.

Now what about this one? Much better.

LEVEL 3 BWC VIDEO

STOP REPORT EXERCISE

[Use BWC to have class write Stop Reports – they can swap and review each other's]

Activity Log Entries

Detailed activity log entries must be made for each person stopped, and must include:

- ✓ Date, time, and location of stop.
- ✓ Pedigree information, unless refused, and a detailed description of the person stopped.
- ✓ The suspected felony/Penal Law misdemeanor.
- ✓ ICAD number.
- ✓ Disposition including the time the encounter was concluded.
- ✓ Precinct serial number assigned to Stop Report, if available.



Summary

1. Explain the 4th Amendment prohibition against unreasonable searches and seizures and the Exclusionary Rule.
2. Describe the legal standards set forth in Terry v. Ohio and People v. DeBour as they relate to levels of encounters.
3. Identify the four levels of encounters and demonstrate limits and appropriate use of each based on different fact patterns presented in the classroom setting.
4. Demonstrate the proper preparation of a Stop Report and required Activity Log entries that must be made.
5. Explain what is expected during the supervisory debriefs that follow stops.
6. Explain the appropriate and inappropriate use of race in conducting investigative encounters.

Policing Legally Summary Outline

- I. Constitutional Considerations
 - a. Fourth Amendment
 - i. Protects citizens against unreasonable governmental searches and seizures
 - b. Exclusionary Rule
 - i. Unlawfully obtained evidence will be suppressed in court – “fruit of the poisonous tree”
- II. *Terry v. Ohio* (1968)
 - a. A *Terry* stop is an encounter with an officer where a reasonable person would not feel free to walk away
 - b. It is a seizure under the Fourth Amendment
 - c. Requires reasonable suspicion
 - d. Reasonable suspicion is individualized suspicion based on specific facts
 - e. Reasonable suspicion is less than probable cause
 - f. Officers may frisk for weapons only if they reasonably suspect that the person stopped is armed and dangerous
- III. *People v DeBour* (1976)
 - a. NY Court of Appeals created a four-tier analysis that dictates limits on the levels of permissible police intrusion
 - i. Level 1: Request for Information
 - ii. Level 2: Common Law Right of Inquiry
 - iii. Level 3: *Terry* Stop
 - iv. Level 4: Arrest
- IV. Level 1: Request for Information
 - a. May a police officer approach a citizen to request information without having any indication of criminal activity?
 - b. Yes, provided the approach is:
 - i. Based on an objective credible reason
 - ii. Not based on curiosity, bias, or intent to harass
 - iii. May only ask non-accusatory questions
 - 1. Public service or law enforcement function
 - iv. Person must feel free to leave
 - v. May not ask to search
- V. Level 2: Common Law Right of Inquiry
 - a. Founded suspicion that criminal activity is afoot
 - b. Based on observable conduct or reliable hearsay information

- c. More than a hunch
 - d. Cannot be a stop: subject must feel free to walk away
 - e. May ask pointed, accusatory questions
 - f. May continue to observe the subject without approaching
 - g. May request consent to search, but consent must be voluntary
 - i. Ask in way that elicits clear yes or no response for:
 - 1. Consent to search
 - 2. Whether person understands they can say no
 - h. Level 1 vs. Level 2
 - i. Level 1: The officer has an objective credible reason to ask for information
 - ii. Level 2: The officer has information that indicates possible criminal activity
 - iii. Level 1 and Level 2
 - 1. Cannot use or threaten to use any level of force
 - 2. Individuals may refuse to answer, may choose to answer only some questions, and/or may freely walk away
 - 3. Individuals must feel free to leave
 - 4. Refusal to answer questions or walking away does not raise level of suspicion
 - 5. Events and observations at Level 1 or 2 can elevate the encounter to Level 3
- VI. Level 3: *Terry* Stop
- a. What is a stop?
 - i. A stop occurs whenever a reasonable person would not feel free to disregard the officer and walk away
 - ii. Physical force or threat of force is not necessary to constitute a stop
 - iii. If commands or questions would lead a reasonable person to conclude he or she is not free to leave, it is a stop
 - b. Where can you stop the person?
 - i. Within the geographical area of employment (5 boroughs) whether on or off duty
 - c. Use of Force
 - i. Reasonable amount of force may be used to stop or detain
 - ii. The type and amount of force used must be objectively reasonable
 - iii. Handcuffs should not be used unless:
 - 1. Rapidly unfolding, dangerous situation

2. Suspect acts violently, resists being detained or tries to flee
 3. Suspect may be armed OR
 4. There may be a weapon near the site of the stop
- d. A stop is permissible only when individualized reasonable suspicion exists that the person stopped has committed, is committing, or is about to commit:
 - i. A felony or
 - ii. A Penal Law misdemeanor
- e. Officers must be able to articulate specific facts that justify the stop
- f. What is reasonable suspicion?
 - i. When the information an officer has is of such weight and persuasiveness that, based on the officer's judgment and experience, it is reasonable to suspect criminal activity is afoot
 - ii. Must be individualized, particularized, objective, and supported by specific facts
 - iii. Hunches and gut feelings are insufficient
- g. Factors that may be relevant to reasonable suspicion:
 - i. Information from an identified informant
 - ii. Matching a specific description (beyond race, age, gender) of a suspect wanted in a reported crime
 - iii. Carrying objects in plain view used in commission of crime (e.g. slim jim, pry bar)
 - iv. Actions indicative of "casing" victim or location
 - v. Actions indicative of acting as a lookout
 - vi. Actions indicative of engaging in drug transaction
 - vii. Actions indicative of concealing or possessing a weapon
 - viii. Proximity to recent known crime scene location
- h. The factors listed above are only factors that MAY be relevant in determining reasonable suspicion - any one factor in isolation might not be sufficient
- i. A generic crime suspect description, by itself, like "young black male" does not support reasonable suspicion
- j. Information from an Anonymous Caller
 - i. Usually only gets you to Level 2 unless caller just saw criminality or there are exigent circumstances
 - ii. Otherwise, need to get caller's name or corroborate alleged criminality through observation to get to Level 3
- k. Intrusion
 - i. May detain suspect for reasonable amount of time

- ii. May ask for name/address and explanation of conduct
- iii. Suspect is not required to answer and refusal does not give reason to arrest

l. Questioning

- i. May ask pointed, accusatory questions related to reason for the stop, as well as pedigree information
- ii. *Miranda* warnings are not required
- iii. Person may refuse to answer
- iv. Refusal to answer is not a reason for arrest

m. Frisk

- i. “Stop” and “frisk” are two different things
- ii. Cannot automatically frisk everyone who is lawfully “stopped”
- iii. Only permitted when there is independent reasonable suspicion that the person is armed and dangerous
- iv. Limited pat down of the outside of suspect to check for dangerous weapons
- v. Cannot be used to search for evidence of a crime such as drugs
- vi. Cannot go inside of pockets or clothing during frisk

n. Armed and Dangerous

- i. Officer observes a weapon
- ii. Knowledge that suspect may have a weapon
 - 1. Suspect states that he/she has a weapon
 - 2. Witness or victim states suspect has a weapon
- iii. Reasonable suspicion of a violent crime

o. Frisk of a Portable Container

- i. May only frisk portable container that is:
 - 1. Within grasp of suspect
 - 2. Could contain a weapon AND
 - 3. Is unlocked
- ii. If container is solid, may open to determine whether weapon is present

p. Search

- i. A search is the placing of hands inside a pocket or other interior part of clothing or possessions
- ii. Only permitted to remove object felt during frisk that you reasonably suspect to be a weapon
- iii. Purpose is for officer safety, not to discover other evidence of a crime

VII. Level 4: Arrest

- a. Requires probable cause

- b. Probable cause exists when facts and circumstances would lead a reasonable person to believe:
 - i. An offense has been committed and
 - ii. The person to be arrested committed it

VIII. Stop Report

- a. Prepare one Stop Report for each person stopped
- b. Not required for Level 1 or 2 encounters unless the encounter escalates to a Level 3 encounter, even if it results in an arrest
- c. If the person stopped refuses to identify him/herself, request patrol supervisor to verify
 - i. Person stopped is not to be detained while waiting for patrol supervisor

IX. Activity Log Entries

- a. Detailed Activity Log entry must be made for each person stopped and include the following:
 - i. Date, time, and location of stop
 - ii. Pedigree information, unless refused, and a detailed description of the person stopped
 - iii. The suspected felony/Penal Law misdemeanor
 - iv. ICAD number
 - v. Disposition including the time the encounter was concluded
 - vi. Precinct serial number assigned to Stop Report, if available
- b. Describe all facts and information relied upon to conclude that there was reasonable suspicion that the person stopped has committed, was committing, or was about to commit a felony or Penal Law misdemeanor
- c. If there was a frisk, describe the facts and information relied upon to determine that there was reasonable suspicion that the person stopped was armed and dangerous
- d. If there was a search, describe the area searched and basis for suspecting that object felt during frisk resembled a weapon