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Criminal Justice Section

**Police Encounters with
the Public: A Primer on
*People v. De Bour/People v. Hollman***

Friday, October 4, 2013

New York State Bar Association
One Elk Street, Albany, NY 12207



Thank You

To our Faculty for this New York State Bar Association Police Encounters with the Public program. We appreciate his work and service to the attendees today.

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Police Encounters with the Public

Agenda

Friday October 4, 2013

4:30-6:30 p.m.

4:00 p.m. Registration

**4:30-6:30 p.m. Police Encounter with the Public: A Primer on People v. De Bour/
People v. Hollman Michael S. Barone, Esq**

Reception to follow the Program 6:30 p.m. -8 p.m.

Thank you for participating in today's MCLE live program – **Criminal Justice Section 3rd JD CLE Program “Police Encounters with the Public: A Primer on People v. De Bour/People v. Hollman” in Albany on October 4, 2013.**

Please note the following important items:

1. In order to receive your MCLE credit, you are required to complete and return to the registration personnel, at the appropriate times, the Verification of Attendance forms you received when you signed in.
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We thank you for choosing the New York State Bar Association Section MCLE programs.

Police Encounters with the Public:

A Primer on People v. De Bour/People v. Hollman

- Prepared by:
Michael S. Barone, Esq.

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CLE Objectives

- Review Legal Issues Concerning Police/Citizen Street Contact and the Application of the “De Bour Levels” as they pertain to these encounters.



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- Review Legal Issues Concerning the Application of the “De Bour Levels” as they pertain to vehicle stops.
- Basic Review of the Exclusionary Rule and Motions to Suppress.
- Review Legal Issues that may lead to the Suppression of Evidence.

3

Fundamental Case Law

- The United States Supreme Court initially discussed different levels of contact/ intrusion between police officers and citizens and the level of “cause” required for each in the seminal case *Terry v. Ohio*, 392 U.S. 1 (1968).

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- The New York Court of Appeals further defined these levels of contact under New York Law in *People v. De Bour*, 40 N.Y.2d 210 (1976) and expounded upon them in *People v. Hollman*, 79 N.Y.2d 181 (1992).

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The De Bour Levels

- In the *De Bour* Case, The Court of Appeals developed a four (4) tiered method to be used by the courts when analyzing the legality of street encounters initiated by police officers acting in their law enforcement capacity.

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- The Court’s purpose in De Bour was to provide clear guidelines for police officers seeking to act lawfully in what may be fast-moving street encounters and a cohesive framework for courts reviewing the propriety of police conduct in these situations.

People v. Moore, 6 N.Y.3d 496 (2006)

- Courts at all levels in New York State will use this Four (4) Tiered Method of Analysis to test the propriety of street encounters initiated by police in their law enforcement capacity.
- This also includes actions taken by officers while conducting traffic stops.

- The Court of Appeals initially applied the “De Bour /Hollman framework” in the context of traffic stops in People v. Battaglia, 86 N.Y.2d 755 (1995).

- The Court of Appeals, in an effort to provide a bright line rule to guide the decisions of law enforcement and judicial personnel in their day to day operations in the field, recently held

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“...that the graduated framework set forth in *People v. De Bour* and *People v. Hollman* [citations omitted] for evaluating the constitutionality of police-initiated encounters with private citizens applies with equal force to traffic stops.”

People v. Garcia, 20 N.Y.3d 317 (2012)

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- As the intrusiveness of each level increases, so does the justification required for the police action.
- These rules are the result of a combination of Federal Constitutional requirements (Levels Three (3) and Four (4) and New York case law (Levels One (1) and Two (2)).

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- Levels One (1) and Two (2) are not required under the NYS Constitution, but instead are based upon *reasonableness* and sound State policy.
- Police Officers actions that are deemed to be unreasonable under the guidelines will result in the suppression of evidence.

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- The question of the reasonableness of police conduct involves a balancing of the citizen's right of privacy and society's interest in the apprehension of suspected lawbreakers.

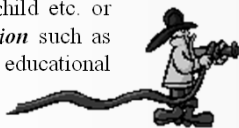
People v. Cantor, 36 N.Y.2d 106 (1975)

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Level 1: Request for Information

- Public Service Function:

- The police contact must relate to either an *emergency situation* such as a car accident, medical emergency, fire, lost child etc. or to a *community function* such as the distribution of educational pamphlets, etc.



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Law Enforcement Function

- Police contact with the public must be supported by an objective, credible reason not necessarily indicative of criminality.



- (Unusual conduct will usually be sufficient.)

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- Under this category, *a police officer may approach an individual and ask the person his name, identification, address, destination or purpose for being at that particular location*, even though the officer has **NOT** observed any indication of criminal behavior.

- Non-threatening encounter, no intimidation allowed.

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- “[A] request for information is a general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination or reason for being in the area.”

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

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- The officer must be able to articulate a reason for making contact with the individual. ANY legitimate reason for the officer to approach a person and strike up a conversation.
- Some fact patterns where courts have held initial police contact was based on objective credible reasons:
 - a person adjusting a dark object in his waist area and pulling his jacket over it

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- a person arguing with a gypsy cab driver
- a crowd of people standing around a persons open trunk examining clothes and shoes that still had the original store tags attached
- a person standing outside a store for an extended period of time in drug prone area

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Since the officer has not observed the individual engage in any criminal conduct, the person can walk away and even run away and not respond to the officer's inquiries without justifying any detention.

The Defendant has a Constitutional right NOT to respond.

Additionally at this level a request *for consent to search is NOT allowed.*

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- **Nothing prevents the officer from following the individual and monitoring that individual's activity so long as there is no interference with the individual's movement and no "chase" ensues.**

- The general rule is that mere flight does not create reasonable suspicion.

- See People v. Howard, 50 N.Y.2d 583 (1980)

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Fact Pattern in People v. Howard

- Officers observed the defendant walking on the street at 1 p.m. in an area with a high burglary rate. The defendant was carrying a women's vanity case. As he passed the officers, the defendant looked over his shoulders in a "furtive" manner in the direction of the officers.

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- After the defendant looked in their direction several times, he reversed direction and walked away. The officers pulled their car parallel to the defendant.

- One officer displayed his shield and identified himself, and said, "I would like to speak to you."

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- The defendant ignored the officers request. After the officer repeated the request and began to exit the vehicle, the defendant began to run.
- Officers chased the defendant into a basement of a building, when he threw the vanity case into a pile of garbage. The officer caught the defendant and found a .38 caliber revolver in the vanity case.

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- The Court of Appeals held that
- (1) although the officers had a right to request information from the defendant, the defendant had a right NOT to respond;
- (2) where there was nothing to establish that a crime had been committed, the defendant's flight did not give the officers the right to pursue him; and

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- (3) because the subject was being pursued, discarding the bag was a spontaneous reaction to the evasion of the police and, therefore, he had not abandoned the vanity case.

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- Although a citizen has the right to refuse to answer a police officer's request for information, should he choose to give answers that are false, inconsistent, or evasive this may elevate the encounter to a "Level Two" common-law right to inquire.

See *People v. Jordon*, 9 A.D.3d 792 (3d Dept. 2004)

See *People v. Mitchell*, 283 A.D.2d 769

(3d Dept. 2001)

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- It should be noted that although police officers are not permitted to perform a "Terry Frisk", officers are permitted on a Level One encounter, *when they perceive that their safety is in jeopardy*, to take protective measures that are reasonably related to the circumstance.

People v. Samuels, 50 N.Y.2d 1035 (1980)

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Level 2: Common-Law Right to Inquire

- **Criteria:**
- The Police Officer must have a "**founded suspicion criminal activity is afoot.**"
- **Officers must be able to articulate the reason they suspect criminal activity.**
- **At a Level 2 Stop greater intrusion is permitted.**

30

- Under this level of police/ citizen interaction, the police officer is authorized to interfere with the citizen “ to the extent necessary to gain explanatory information, but short of a forcible seizure.”

- People v. De Bour, 40 N.Y.2d 210 (1976)

- The common-law right to inquire focuses on the citizen as a suspect.

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- Although an officer can not forcibly seize an individual the officer may make a show of authority by displaying a badge and ordering the citizen to stop so that the officer can ask certain questions.

- The Court of Appeals has held that ordering a citizen to “stop” does not constitute a seizure.

- “[A] verbal command alone, will not usually constitute a seizure...”

People v. Bora, 83 N.Y. 2d 531 (1994)

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- However, neither a forcible seizure nor ordinarily a frisk is allowed.

- The officer can ask accusatory questions that would lead the individual to reasonably believe he/she is suspected of wrong doing or is the focus of police investigation.

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Examples of Level 2 Questions:

- Do you have anything illegal on you?
- Do you have any drugs, weapons or contraband?
- Do you have anything on you that I should know about?
- What were you doing over there?

34

- Although at this level an officer may properly ask a person to stop, that person still has no obligation to stop or answer the officer's inquiries and is free to walk away.

- Additionally, silence can not be used as a reason to escalate the encounter.
- See *People v. Oquendo*, 221 A.D.2d 233 (1st Dept. 1995)

- *At this level however, a police officer may ask for consent to search.*

35

- Courts have held that when police officers are dispatched to a call based on an **anonymous source** furnishing a general description and location such as a person with a gun, a man selling drugs, shots fired or a person who just committed a violent crime, the police have a common-law right to inquire when the citizen matches the description.

36

- Both the New York Court of Appeals and the United States Supreme Court have held that an anonymous tip does not establish reasonable suspicion unless police can corroborate the criminal details of the tip.

- See Florida v. JL, 529 U.S. 266 (2000)

- See People v. Moore, 6 N.Y.3d 496 (2006)

37

- When an individual's conduct suggests the presence of a weapon, a common-law inquiry will also be permitted.

- See People v. Correa, 77 A.D.3d 555 (1st Dept. 2010)

- Additionally, when a suspect engages in strange, unusual or furtive behavior that suggests the possibility of criminal activity, a common-law right to inquire would also be authorized.

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- The police also have, at a minimum, a common-law right to inquire when a citizen matches (looks like) an individual on a wanted or BOLO poster.

- People v. Brewer, 73 A.D.3d 1199 (2010)

- See also United States v. Hensley, 469 US 221 (1985) Sufficiently close resemblance used to establish *reasonable suspicion*.

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Officer Safety during a Level 2 Encounter

- During Level Two (2) Encounters police officers who recognize that their safety is in jeopardy can take measures to protect themselves from danger.
- *Examples of protective measures:*

40

An officer can ask a party to do the following:

- take his hands out of his pockets and if he refuses, forcibly remove his hands from his pockets
- raise his hands
- put an object they are carrying down

41

- Additionally, even though the police officer does not have enough facts to conduct a frisk, if the individual being interviewed moves his hand toward his leg, pocket or waistband,
- the officer can tell the individual to open his hands and if he refuses, the officer can even grab his hands

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- Example of what the First Appellate Department deemed a Protective Measure:

- Police were conducting a common-law inquiry of an individual who fit the general description of a party who had placed a gun in the trunk of a car.

- The police also had a report of shots fired. The police stopped the individual who fit the description as he exited his vehicle.

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- The party was holding a black leather bag. The officer asked to see the bag and the suspect gave it to him. The officer felt what seemed to be a gun inside the bag. The officer subsequently opened the bag. *The court held that the officer's conduct was not a frisk.*

- People v. Nials, 209 A.D.2d 324 (1st Dept. 1994)

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Unusual Circumstances may warrant a frisk

- “Where no more than a common-law right to inquire exists, a frisk must be based upon a reasonable suspicion that the officers are in physical danger and that the defendant poses a threat to their safety.”

- People v. Hauser, 80 A.D.2d 460 (4th Dept. 1981)
- See also People v. Robinson, 238 A.D.2d 808 (4th Dept. 2000)

45

- The authority to conduct a frisk extends, as well, to common law inquiries **where there is reasonable suspicion to believe that the person is armed.**

- A report of shots fired, coupled with the observations of the officers, one party fleeing the scene passing a small object to another person fleeing the scene, provided them with a founded suspicion that criminal activity was afoot sufficient to approach and make inquiry and then frisk the defendant because of safety concerns.

- People v. Hightower, 261 A.D.2d 871 (4th Dept. 1997)

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- “[T]here certainly is no justification for holding that an officer ... cannot take note of a significant occurrence indicating a possible threat to his life, merely because a call which directed him to the scene was in and of itself an insufficient predicate for intrusive action against a particular person.”

- “It would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety.”

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

47

- Finally, If an individual flees from a police officer, who has a founded suspicion of some criminality, then the officer can chase and stop him because his flight can provide the reasonable suspicion that would justify pursuit.

See People v. Holmes, 81 N.Y.2d 1056 (1993)

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- The pursuit of an individual by the police constitutes a seizure and as a result, must be based on reasonable suspicion.

People v. Martinez, 80 N.Y.2d 444 (1992)



Level 3: FORCIBLE STOP AND DETENTION

- The right to stop a citizen was initially addressed by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968)



- A police officer's right to stop a citizen is codified in the Criminal Procedure Law § 140.50(1).
- An officer can stop a person in a public place "when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law and may demand of him his name, address and an explanation of his conduct."

- Generally, “**reasonable suspicion is defined as that quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe that criminal activity is at hand**”.

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How Reasonable Suspicion can be Established

- A 911 Call from an **identified** complainant, describing a person with a gun at a specified location or a person who has just committed a violent crime, will provide the police with reasonable suspicion if the **description is sufficiently specific** and the officer observes the party at the scene.

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The same phone call from an **anonymous** complainant will only justify a Level Two (2) Common-law inquiry.

Anonymous Tips, standing alone, do NOT establish probable cause or reasonable suspicion.

Anonymous Tips, plus and officer’s observations can lead to reasonable suspicion and probable cause.

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Furtive Behavior

- Furtive, evasive or strange behavior can lead to reasonable suspicion.
- Fact Pattern in People v. Thurman
- Two (2) veteran police officers were working in an area which had a lot of burglaries.

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- They observed two (2) individuals walking down the street moving their heads from side to side in a furtive manner.
- One (1) individual was carrying a plastic bag that contained several objects.
- The officers observed them enter a vehicle. As one of the officers walked by, he observed one of the individuals examining identification papers and credit cards.

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- The individual then tossed these items in the back seat.
- The officer observed a jewelry box, calculator and electric razor inside the plastic bag.
- The officers then called for assistance and the police blocked the defendant's car with their police car.
- **The Court found that the stop of the individuals was justified base upon the furtive behavior of the individuals.**
- People v. Thurman, 81 A.D.2d 548 (1st Dept. 1981)

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- See also *People v. Roots*, A.D.3d 886 (3rd Dept. 2004) (after an altercation in the street the defendant had his hand in his sleeve)
- Furtive behavior in the form of misleading or deceptive answers can also form the predicate for reasonable suspicion.
- *People v. Brown*, 275 A.D.2d 328 (2d Dept. 2000)

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Flight

- When the police approach a citizen to make a common-law inquiry and the individual takes flight upon their approach, pursuit will be justified.
- *People v. Holmes*, 81 N.Y.2d 1056 (1993)
- Under New York State Case Law the pursuit itself is a seizure.

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- It is a seizure within the meaning of the 4th Amendment -
- **A seizure can occur by a use of physical force or by *submission to authority*.**



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• **SEIZURE:** occurs when there is a meaningful interference with an individual's possessory interest in property, *or whenever a person is physically or constructively detained by a significant interruption of their liberty of movement through police action.*

On a legally sufficient Level Three (3) Stop, a Police Officer may have the right to forcibly detain a person but may not necessarily have the right to frisk the person.

If the circumstances allow a frisk; it is for weapons only. *Officer safety* is the only justification for such a frisk.

• "...[A] police officer acting on a reasonable suspicion that criminal activity is afoot and on an articulable basis to fear for his own safety may intrude upon the person or personal effects of the suspect only to the extent that is actually necessary to protect himself from harm."

People v. Torres, 74 N.Y.2d 224 (1989)

- A police officer can frisk **IF** the officer **can articulate independent and reasonable suspicion that the suspect is armed and dangerous**

- [CPL§140.50(3) - may **only** search for a deadly weapon or anything else readily capable of causing serious physical injury.]

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- “[If the police officer] reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons.”

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- If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.”

66

The New York Court of Appeals does **not** recognize the "plain feel" doctrine.

If it does not feel like a potential weapon, the officer cannot seize it.
(Officer could always ask for **consent** to search further.)

People v. Diaz, 81 N.Y.2d 106 (1993)

67

Limited pat downs can occur under two (2) circumstances

- 1. The officer has reasonable suspicion to believe that the suspect is armed and dangerous and
- 2. The officer has reasonable suspicion to believe the subject has committed, is committing or is about to commit a violent crime.

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- Sometimes the right to frisk will be inherent in the nature of the crime the person is suspected of.
- For example, when attempting to apprehend a subject that officers have reasonable suspicion to believe committed a violent crime, the right to both seize and frisk will be present.

69

- The primary difference between the first justification to frisk and the second is that ***the nature of the crime itself is the justification.***

- Once again this is a frisk for “weapons only” not a hunt for evidence.

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- Officers are not required to articulate any additional factors such as suspicious bulges and/or the actions of the target subject.

- However, you do need reasonable suspicion to believe the person has committed, is committing or is about to commit a crime.

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Example:

- When a person is close in time and close in proximity to the scene of an armed robbery and the subject(s) matches the description, it is reasonable for officers to conduct a stop and frisk with guns drawn.

- People v. Chestnut, 51 N.Y.2d 14 (1980)

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Frisk of Personal Property

- On a Level Three (3) stop an officer is also permitted to examine an individual's personal property that is in his "grabbable area" that could reasonably contain a weapon.

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Facts and Circumstances Courts use to determine if a citizen was seized

number of officers involved;
guns drawn?
how many verbal commands were given
physical contact?
was the person prevented from moving?
officers tone; and the exact language used by the officer

74

- "Reasonable Man" Test was set forth in *People v. Bora*. The Court of Appeals held that the test is whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation of his freedom.

People v. Bora, 83 N.Y.2d 531 (1994)

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– *Lawful stop can lead to a brief investigative detention.*

– Only allowed if temporary & lasts no longer than necessary to effectuate the purpose

- The police [can] then utilize a brief period of detention to determine whether a crime has occurred or been reported and whether the suspect can be connected to it.

People v. Lyng, 104 A.D.2d 699 (3rd Dept. 1984)

- If the facts subsequently show the detained person did nothing wrong or there is uncertainty – police officers will **document and release.**

Showups & Investigative Detentions

- Showups are valuable as a means of quickly confirming or dispelling suspicion as to a parties role in a particular crime.
- Showups help to minimize the duration and intensity of the investigative detention of the suspect.

- The Court of Appeals has held, that based on either probable cause (Level 4) or Reasonable Suspicion (Level 3), a suspect may be transported back to the scene of a crime for a showup.

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- Additionally, the act of handcuffing a person will not necessarily elevate the encounter to an arrest as long as the officer can articulate they were in a particularly dangerous situation.

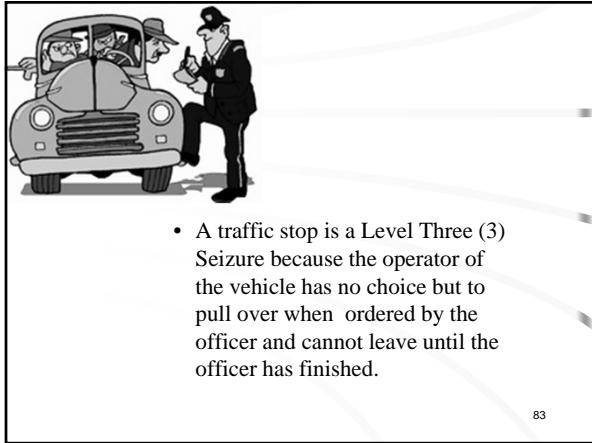
People v. Parker, 49 A.D.3d 974 (3d Dept. 2008)

80

- Handcuffing a suspect of crimes, such as reported robberies and burglaries is reasonable and does not elevate the encounter to a full arrest, if done for the purposes of taking the suspect a short distance for a showup.

81

- Presenting a handcuffed suspect to a witness has been repeatedly held to be acceptable and not unduly suggestive.
- Having the individual in the back of a police car at the time of the showup has also been found to be an acceptable practice.



- A traffic stop is a Level Three (3) Seizure because the operator of the vehicle has no choice but to pull over when ordered by the officer and cannot leave until the officer has finished.

Level 4: ARREST BASED UPON PROBABLE CAUSE (Reasonable cause)

- Criteria: Must be based upon *probable cause* to believe that the person has committed an offense in the officer's presence or a crime, whether in the officer's presence or not.
- Before property is seized or persons are arrested, probable (or reasonable) cause **MUST** be established.

§70.10 of the Criminal Procedure Law defines reasonable cause as follows:



- Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter [CPL], such apparently reliable evidence may include or consist of hearsay.

- Before a police officer can arrest someone, there must be probable cause to believe (1) that a crime has been committed; and (2) that the individual to be arrested committed the crime.

People v. Hines, 18 A.D.3d 882 (2d Dept. 2005)

- The legality of an arrest must be determined upon the facts and circumstances known to the officers at the time of the arrest.

- Probable Cause is a synthesis of all the information known to the police officer, including what he has seen, learned and heard.

People v. Bello, 240 A.D.2d 964 (3d Dept. 1997)

Establishing Probable Cause

- The police must always establish both reliability and the basis of knowledge in order to show probable cause to effect an arrest

Probable Cause from Police Sources:

- Probable Cause may be based upon the officer's own observations. Additionally a police officer may base his probable cause determination on information provided by another officer. (Fellow Officer Rule)

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- A police officer who has received information from another officer has probable cause to make an arrest if the sending officer had probable cause. In other words, probable cause can be transferred among police officers and among police departments.

People v. Lypka, 36 N.Y.2d 210 (1975)

People v. Parker, 84 A.D.3d 1508 (3d Dept. 2011)

People v. Landy, 59 N.Y.2d 369 (1983)

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Probable Cause from Non-Police Sources

- Information from civilians can also establish probable cause.
- Before the information from the **civilian** is relied upon, the officer must demonstrate that:
 - 1. The person providing the information was reliable; and

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2. There was an adequate basis of the person's knowledge.

Information from victims- automatically meets these requirements.

Information from the victim is always presumed to be reliable. The basis of knowledge is the victim's personal experience.

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- Therefore, **an accusation from a victim of a crime against a specific individual will establish probable cause** UNLESS the police know of some reason to doubt the accusation.

Information from identified witnesses to a crime- also meets these requirements.

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- Information from a witness is presumed to be reliable and the basis of knowledge is their own observation of the incident.

- An identified citizen informant is presumptively reliable.

See *People v. Hetrick*, 80 N.Y.2d 344 (1994)

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- Information from a victim of a crime or from an identified witness is presumed to be reliable. *People v. Read*, 74 A.D.3d 1245 (2d Dept. 2010); *People v. Gonzalez*, 138 A.D.2d 622 (2d Dept. 1998)
- Where an identified citizen accuses another individual of a specific crime, the police possess probable cause to arrest. *People v. Mendoza*, 49 A.D.3d 559 (2d Dept. 2008)

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- Information from an unidentified witness – is generally not deemed reliable because there is no way to hold the person accountable for the false report.
- However if the police have a **face-to-face** encounter with the unidentified witness, the courts recognize that the police officer can make an assessment of that person’s demeanor.
People v. Harris, 175 A.D.2d 713 (1st Dept. 1991)
People v. Smith, 63 A.D.3d 510 (1st Dept. 2009) ⁹⁵

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- Information from a criminal informant- the police must establish:
 1. The informant’s reliability and
 2. The informant’s basis of knowledge

People v. Griminger, 71 N.Y.2d 635 (1988) [re-affirming that New York State will continue to follow the two-part Aguilar-Spinelli rule for establishing the reliability of an informant as opposed to following the federal “totality of the circumstances” rule set out by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983)]

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Probable Cause and Anonymous Tips

- Under the **Aguilar-Spinelli** Test, an anonymous tip provides probable cause for an arrest or search only where the tip and any police corroboration demonstrate **both the veracity or reliability of the informant AND the basis of the informant's knowledge**. *Spinelli v. United States*, 393 U.S. 410 (1969)/ *Aguilar v. Texas*, 378 U.S. 108 (1964)

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- "Probable cause for [] an arrest or search will have been demonstrated only when there has been confirmation of sufficient details suggestive of or directly related to the criminal activity informed about to make reasonable the conclusion that the informer has not simply passed along rumor, or is not involved (whether purposefully or as a dupe) in an effort to frame the person informed against."

People v. Elwell, 50 N.Y.2d 231 (1980)

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Probable Cause leading to Drug Arrests

- The "totality of the circumstances" is the legal standard for determining probable cause for drug arrests in New York State.

99

- The way illegal drugs are packaged however, such as glassine envelopes, tin foil and vials, are the hallmarks of illicit drug activity “[and] the exchange [of these items] would all but constitute per se probable cause”

People v. McRay, 51 N.Y.2d 594 1980

100

- In People v. McRay the Court identified three (3) factors in determining probable cause in drug cases: (1) The “telltale sign” or “hallmark” of illicit drug activity [the packaging] (2) a drug prone area and (3) the experience of the arresting officer in drug cases.

101

- In 1997 the Court of Appeals adopted the totality of the circumstances standard.
- An experienced police officer observed the defendant, in a drug-prone area, exchange an unidentified object for currency with an unapprehended woman.

102

- From the manner in which the woman handled the object, the officer believed the object to be a crack vile.
- Additionally the officer followed the defendant and observed him remove a plastic bag from his person and hide it among several cinder blocks at a construction site.

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- The Court held that although the officer did not observe a hallmark of drug activity (the container that was exchanged) probable cause could exist if there was some other indicia of drug activity.

People v. Jones, 90 N.Y.2d 385 (1997)

104

- The Court of Appeals has even gone as far to hold that the way a defendant handles a package and furtive movement in conjunction with the way the drugs were handled could provide the *indicia of drug activity* needed to establish probable cause.

People v. Alvarez, 100 N.Y.2d 549 (2003)

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People v. Alvarez, 100 N.Y.2d 549
(2003)

Facts of Case:

- Officer on mobile patrol observes defendant walking down the street with his arm around a woman.
- Officer saw defendant holding a small bundle of folded white pieces of paper wrapped in black plastic.

106

- Officer knew based on his training and experience as a PO that this was common packaging for cocaine.
- As PO approached the defendant, the defendant turned his body and hid the papers in his pants.
- Officer stopped suspect and subsequently arrested suspect for possession of cocaine.

107

Procedural Posture:

- The People appealed the decision of the Queens County Supreme Court suppressing the seized evidence.
- The Appellate Division reversed the decision stating that the observation of the papers, along with the police officer's explanation of their relevance, was...

108

- Sufficient to establish reasonable suspicion allowing a stop and detention.
- The defendant appealed and the Court of Appeals affirmed.

109

- The Court of Appeals not only agreed that the observation of the papers established reasonable suspicion, but went even further and added that the attempt by the defendant to hide the items elevated the level of suspicion to probable cause.

110

Application of the DeBour Levels to Traffic Stops

- The stop of a motor vehicle is a seizure under both the Federal Constitution and the New York State Constitution.

People v. May, 81 N.Y.2d 725 (1992)

Vehicles can be legally stopped based on the following reasons:

111

• **Probable Cause of a Vehicle and Traffic Law violation:**

The officer is sure that a V&T law violation has occurred (usually due to direct observation of the infraction).

An automobile stop is a lawful when an officer has probable cause to believe that an individual has violated the Vehicle and Traffic Law.

112

• This includes minor offenses such as equipment violations concerning defective headlight, taillights, muffler, etc. The purpose of this stop is to enforce the Vehicle and Traffic Law.

• **Reasonable Suspicion of a Vehicle and Traffic Law violation:**

The officer's observations of a vehicle create reasonable suspicion in the officer's mind that an infraction has occurred.

113

• **Reasonable Suspicion of a crime:**

This type of traffic stop, also referred to as a "Terry Stop" requires that the officer develop reasonable suspicion to believe that the driver or passenger of the vehicle has committed, is committing, or is about to commit a crime, prior to pulling the car over.

• **Checkpoints (Roadblocks):** These must be systematic and non-arbitrary.

114

Stops based on lawful roadblocks

- A vehicle may be stopped during a lawful roadblock. In order to be lawful, a roadblock must be conducted for a proper purpose and the officers conducting the roadblock should have little or no discretion in determining which vehicles to stop.
- *People v. Scott*, 63 N.Y.2d 518 (1984)

115

- The U.S. Supreme Court held that an officer's intent when conducting a traffic stop is irrelevant, as long as the officer observed a legitimate traffic infraction.
- *Whren v. United States*, 517 U.S. 806 (1996)
- Police officers are justified in stopping a motor vehicle if they observe the vehicle violate the NYS Vehicle and Traffic Law.¹¹⁶

- The Court of Appeals adopted the reasoning of *Whren* as the law of New York under the New York Constitution.
- As long as an officer has reason to believe the driver of the motor vehicle has committed a traffic offense, the officer's subjective intent, IF ANY, is no longer relevant in determining the legality of the stop.
- *People v. Robinson*, 97 N.Y.2d 341 (2001)¹¹⁷

- If the vehicle was parked at the curb & officers got out of their squad car and approached, this would be the same as an officer having initial contact with a pedestrian in terms of its legal ramifications.
- It is considered a Level One (1) Stop and the officer would need an objective credible reason not necessarily indicative of criminality to speak to the occupants.

People v. Harrison, 57 N.Y.2d 470 (1982) ¹¹⁸

- Officers also need an objective credible reason not necessarily indicative of criminality to approach a *stationary* car.

Stationary Car- temporarily stopped by itself

- (car sitting at a traffic light)

People v. Ocasio, 85 N.Y.2d 982 (1995)

¹¹⁹

- When a car is stopped for a traffic violation it is a Level 3 Seizure of the vehicle, however without a “founded suspicion that criminal activity is afoot”, ***in regards to matters independent of the traffic stop***, officers can not legally ask the operator for consent to search the vehicle.

¹²⁰

Vehicle “Sniff” by Canine Unit

- The Court of Appeals held that a canine sniff outside of a lawfully stopped vehicle is a search under the NYS Constitution requiring a “founded suspicion that criminal activity is afoot”.
- People v. Devone, 15 N.Y.3d 106 (2010)

121

- The Court of Appeals held that an officer can request information from the driver that relates to the traffic infraction, including the ownership of the vehicle.
- People v. Banks, 85 N.Y.2d 558 (1995)
- The officer must be afforded a reasonable time to examine the documents relating to the driver and the automobile.

122

The Court of Appeals has held the police officers can ask non-threatening questions including the driver’s address and destination.

- See People v. Kelly, 37 A.D.3d 866 (3d Dept, 2007)
- See People v. Ocasio, 85 N.Y.2d 982 (1995)

123

- Once the officer issues a summons and determines that the driver's license, registration and insurance are in order, the initial justification for seizing and detaining the suspect is exhausted.
- The Court of Appeals held that the duration of the traffic stop will be viewed from an objective standard.
- People v. Edwards, 14 N.Y.3d 741 (2010)

124

- When a police officer issues a traffic summons, for a violation to a motorist, the law in New York will neither permit the motorist nor the vehicle to be searched.
- People v. Marsh, 20 N.Y.2d 98 (1967)

125

- If however the operator of a motor vehicle provides the officer with a license or registration containing a false identity, this would create a founded suspicion of criminality and thus the officer could ask the operator to search the vehicle.
- People v. Battaglia, 86 N.Y.2d 755 (1995)

126

- The Court of Appeals has held that a custodial arrest for traffic misdemeanors should not be made where an alternative summons is available and can be issued.

- People v. Howell, 49 N.Y.2d 778 (1980)

127

- If a motorist does not have any identification, the police officer would however be authorized in arresting the party and bringing him down to the police station for identification purposes.

- People v. Ellis, 62 N.Y.2d 393 (1984)

128

- Police Officers on a Traffic Stop can only detain the vehicle as long as it is necessary to run the Operators License, complete any special file checks and issue the appropriate UTT or warning.

- Once this has occurred the vehicle can NO longer be detained.

129

- Further detention of the vehicle **WITH OUT** Reasonable Suspicion constitutes an illegal seizure and a violation of the operator's Constitutional Rights.

130

Traffic Stops based on Reasonable Suspicion

- A police officer may stop a car when there is reasonable suspicion that the motorist or occupants of the vehicle have committed, are committing or are about to commit a crime.

131

- The reasonable suspicion must be based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant the intrusion.

- People v. Sobotker, 43 N.Y.2d 559 (1978)

132

- The stop of the motor vehicle constitutes a seizure, and an officer may stop a vehicle to investigate criminal activity when he has reasonable suspicion that its occupants have been engaged, are presently engaged, or are about to engage in conduct in violation of the law.

- People v. May, 81 N.Y.2d 725 (1992)

133

- In determining whether there is reasonable suspicion to stop a vehicle in connection with a crime that has been committed the courts will analyze two (2) factors:

1. The specificity of the information regarding the vehicle and its occupants; and
2. The spatial and temporal nexus between the location of the car and the location of the crime.

134

- When the traffic stop is based upon reasonable suspicion of a crime, Level 3, the vehicle and its occupants may be detained while the police investigate further.

- This would include asking for consent to search.

135

- An officer's request for consent to search a vehicle must be justified by founded suspicion that criminal activity is afoot. (Level Two)
- People v. Tejada, 217 A.D.2d 932 (4th Dept. 1995)

136

SEARCHES OF VEHICLES

- Any actions or questioning undertaken by the police officer on matters unrelated to the traffic infraction must be supported by a separate, articulable reason to justify a Level 1 Request for information.
- The officer must start all over again for unrelated matters, just like the occupant was a pedestrian on the street.

137

- Officer can ask for Consent if the officer is at Level 2 of the "De Bour Levels" with respect to matters independent of the original traffic stop
- Consent must be truly VOLUNTARY.
- Operator may revoke consent at ANY time.

138

- Voluntariness is determined by the totality of the circumstances. A court must determine whether the abandonment of the individual's 4th Amendment Rights and the consent to search was an act of FREE WILL.

139

- Only a person with Legal Standing can give a consent to search.
- (Only the person with control and authority over the vehicle, premises or property can give consent to search.)
- If the owner has given full control of property to another, that person can consent to search.

140

- A driver and/or owner cannot give consent to search the personal belongings of the other occupants.
- ** In New York, once a person requests counsel he CANNOT validly consent to a search.
- Officer need not tell driver/owner he has a right to refuse.

141

Automobile Exception

- Under the automobile exception the police may search a vehicle and any containers found inside where they have probable cause to believe that it contains contraband, a weapon, or evidence of a crime, or they believe the vehicle is the instrumentality of a crime.
- In addition they may search the person of any occupants.

142

- The Court of Appeals has held that the smell of marijuana coming from the vehicle provides probable cause and will therefore justify a search of the entire vehicle, including the trunk.

143

- The odor of marijuana emanating from a lawfully stopped vehicle, standing alone, has been held to be sufficient to provide officers with probable cause to search a vehicle **and** the occupants.
- *People v. Chestnut*, 43 A.D.2d 260 (3rd Dept. 1974) *aff'd* 36 N.Y.2d 971 (1975).

144

- Probable Cause to search under the automobile exception may be developed in several ways:

- If an officer makes a valid stop of a vehicle and either smells marijuana, observes in plain view a quantity of drugs, a weapon, or evidence of a crime or having reliable and timely knowledge that the vehicle contains drugs or contraband, the officer would have probable cause to search the vehicle.

145

- Probable cause can also be established based on the positive reaction of a trained narcotics dog.

- People v. Devone, 15 N.Y.3d 106 (2010)

146

- The Court of Appeals held that in assessing the propriety of an automobile exception search, the proper inquiry is “simply whether the circumstances gave the officer probable cause to search the vehicle.”

People v. Blasich, 73 N.Y.2d 673 (1989)

147

4th Amendment/N.Y. Constitution Article 1 § 12

- The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

148

Protection against unreasonable searches and seizures

- The Fourth Amendment and the NYS Constitution Article 1 § 12 protect individuals against UNREASONABLE searches and seizures.
- If a search or seizure is reasonable and evidence obtained in the search will be admissible against the defendant.
- Evidence seized during an unreasonable search is subject to suppression under the Exclusionary Rule.

149

Origin of Exclusionary Rule

- Prior to 1961 the Exclusionary Rule was only applied on the Federal Level.
- In 1961, the U.S. Supreme Court held "...all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court.
- Mapp v. Ohio, 367 U.S. 643 (1961)

150

- In 1982 the Court of Appeals set forth the basic purpose of the Exclusionary Rule.
- The Court found the rules primary objective is to deter future unlawful police conduct.

People v. Young, 55 N.Y.2d 419, 31(1982)

151

- The NYS Court of Appeals recognized a State Constitutional Exclusionary Rule in People v. Bigelow, 66 N.Y.2d 417 (1985)
- While reasonable mistakes of fact are generally tolerated under the Fourth
- Amendment, **a police officer's mistake of law, no matter how reasonable, will not be excused.**

People v. Gonzales, 8 N.Y.2d 289 (1996)

152



- If a police officer's initial contact with a citizen is unconstitutional, evidence seized as a result of the encounter may be suppressed. This evidence includes any weapons, drugs or admissions gleaned from the unconstitutional stop.
- Article 710 of the NYS Criminal Procedure Law governs suppression motions. CPL § 710.20(1) states that a court may suppress or exclude evidence upon the ground that it was "obtained by means of an unlawful search and seizure."

153

- Additionally Unconstitutional Stops can subject the Police Department and any Officers involved in any unconstitutional acts to Civil Liability.

154

- A suppression motion pursuant to Article 710 is the exclusive method of challenging the admissibility of evidence obtained in an illegal search.

- A defendant who does not make a motion waives his right to judicial determination of any such contention. CPL 710.70 (3); People v. Jackson, 67 A.D.3d 1067 (3d Dept. 2009); People v. Lancaster, 272 A.D.2d 719 (3rd Dept. 2000)

155

- A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the People (CPL 710.60).

- If a search is being contested by the defense, the court may hold a special hearing to determine if any of the evidence should be excluded. These hearings are sometimes referred to as “Mapp Hearings”.

156

- The motion must contain sworn allegations of fact (CPL 710.60). If a motion is not supported by sworn factual allegations supporting the grounds for the motion, it may be summarily denied. *People v. Mendoza*, 82 N.Y.2d 415 (1993); *People v. Jones*, 95 N.Y.2d 721(2001); *People v. Gilmore*, 72 A.D.3d 1191 (3d Dept. 2010); *People v. Howard*, 21 A.D.3d 585, (3d Dept. 2005)

- If the defendant’s allegations in support of his motion are too conclusory, a hearing is not warranted. *People v. Lopez*, 5 N.Y.3d 753 (2005); *People v. Hickson*, 806 N.Y.S.2d 577 (1st Dept. 2006); *People v. Cox*, 37 A.D.3d 211 (1st Dept. 2007)

157

- The required allegations of fact may come from the defendant or another person or persons. In assessing the adequacy of a motion to suppress tangible evidence, a defendant is entitled to rely on the People’s proof.

- The necessary allegations of fact may be gleaned in part from statements made by law enforcement officials in the accusatory instrument. *People v. Burton*, 6 N.Y.3d 584 (2006).

158

Credibility of Officer’s Testimony

- Courts will reject a police officer’s testimony when it is not credible.
- In *People v. Feingold the Second* Department suppressed evidence because an officer’s testimony was not credible.

People v. Feingold, 106 A.D.2d 583 (2d Dept. 1998)

159

Officer's Testimony

- The arresting officer testified that as he approached the defendant's car, he "happened to look down" and saw a burlap bag lying on its side on the floor behind the drivers seat and he observed a white substance and some pills protruding from the top of the bag.

160

- **The Appellate Division** examined the photographs of the defendant's car that had been admitted into evidence and **concluded that it would be impossible to see the bag behind the driver's seat just by looking down directly through the driver's window.**

- The drugs were suppressed because there was no probable cause to arrest the defendant.

161

Suppression of Evidence

- A suppression court must focus on the reasonableness of the police conduct in view of the totality of the circumstances, rather than assigning more weight to some factors than others.

People v. Anderson, 17 A.D.3d 166 (1st Dept. 2005)

162

- A court's suppression ruling is limited to the evidence presented at the suppression hearing and is limited to the issue whether the evidence in question was obtained in violation of the defendant's constitutional rights.

- The people have the burden of providing evidence of the legality of police conduct via credible testimony. This is called the *burden of production*.

- People v. Baldwin, 25 N.Y.2d 66 (1969)

- [A] court will find that the People have not sustained their initial evidentiary burden if:

- the court finds the testimony is manifestly untrue or incredible as a matter of law,
- **has all the appearances of having been patently tailored to nullify constitutional objections,**
- is evasive and disingenuous,
- or is physically impossible.

- People v. Quinones, 61 A.D.2d 765 (1st Dept. 1978)

Biographic Information

Lieutenant Michael S. Barone, Esq. is the District One (1) "B" Shift Patrol Supervisor for the City of Albany, New York Police Department. He has successfully completed both the NYS Division of Criminal Justice Services (DCJS) Certified Basic Course for Police Officers and Course in Police Supervision. He is also a practicing attorney admitted to the bar in the State of New York and the Commonwealth of Massachusetts. Lt. Barone holds a Bachelor of Arts Degree from SUNY Albany and a Juris Doctor from Western New England College School of Law.

Lieutenant Barone is a DCJS Certified General Topics Instructor and a Field Training Officer. He has taught various topics to law enforcement officers, including Search and Seizure and the Usage of Force. Lieutenant Barone has served as a member of the Department's Planning and Training Committee. Lieutenant Barone also serves as an Instructor at the Zone 5 Regional Law Enforcement Training Center teaching NYS Juvenile Law and Procedures. Lieutenant Barone is a recipient of the APD Life Saving Medal and has various commendations in his personnel file for exceptional duty.

In addition to Lieutenant Barone's duties at the police department, he serves as an Attorney for Children on the Albany County Family Court Panel. Lieutenant Barone also serves on the Executive Committee of the Criminal Justice Section of the NYS Bar Association. He is the District Representative for the Third Judicial District which includes seven (7) counties within the State of New York Supreme Court, Appellate Division Third Judicial Department. Lieutenant Barone also serves as a member of the NYSBA Task Force on Gun Violence.