DEFENDING DWI CASES - THE CRITICAL ISSUES

STOP AND ARREST ISSUES

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HANDLING THE DWI CASE IN NEW YORK

PART I

STOP AND ARREST

CHAPTER 1

ISSUES FROM THE STOP TO THE ARREST

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§ 1:1 In general

The typical arrest for Driving While Intoxicated (hereinafter "DWI") commences with a motorist attracting the attention of the police by driving erratically or otherwise violating some provision of the Vehicle and Traffic Law (hereinafter "VTL"). Once the motorist is pulled over, the police will invariably observe common indicia of intoxication (e.g., the odor of an alcoholic beverage, glassy/bloodshot eyes, flushed face, impaired speech, impaired motor coordination, etc.). The motorist will then generally be requested to submit to a variety of field sobriety tests and/or a breath screening test, following which he or she will be placed under arrest.

This chapter addresses a variety of common issues that arise in connection with DWI arrests.

§ 1:2 When can a police officer approach a parked vehicle?

The approach of a parked vehicle by a police officer is governed by the same rules that govern police-civilian street encounters. Such approaches are governed by People v. Hollman,

79 N.Y.2d 181, 581 N.Y.S.2d 619 (1992), and People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). See also People v. Moore, 6 N.Y.3d 496, 498-99, 814 N.Y.S.2d 567, 568 (2006); People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162 (1995) ("approach of a parked car may be undertaken for an objective, credible reason"). In both Hollman and DeBour, the Court of Appeals identified 4 levels of police-civilian street encounters -- (1) a request for information, (2) a common-law right of inquiry, (3) a forcible stop/detention, and (4) an arrest.

Pursuant to a DeBour level 1 request for information:

> [P]olice officers have fairly broad authority to approach individuals and ask questions relating to identity or destination, provided that the officers do not act on whim or caprice and have an articulable reason not necessarily related to criminality for making the approach. DeBour also stands for the proposition that the brevity of the encounter and the absence of harassment or intimidation will be relevant in determining whether a police-initiated encounter is a mere request for information. * * *
>
> [W]e emphasize that 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. If the individual is carrying something that would appear to a trained police officer to be unusual, the police officer can ask about that object.

Hollman, 79 N.Y.2d at 190, 191, 581 N.Y.S.2d at 624-25.

By contrast:

> Once the police officer's questions become extended and accusatory and the officer's inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. 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. No matter how calm the tone of [police] officers may be, or how

> polite their phrasing, a request to search a bag is intrusive and intimidating and would cause reasonable people to believe that they were suspected of criminal conduct. These factors take the encounter past a simple request for information.

Id. at 191-92, 581 N.Y.S.2d at 625. Stated another way:

> Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.

Id. at 185, 581 N.Y.S.2d at 621.

The distinction between a DeBour level 1 request for information and a DeBour level 2 common-law right of inquiry:

> [R]ests on the content of the questions, the number of questions asked, and the degree to which the language and nature of the questions transform the encounter from a merely unsettling one to an intimidating one. We do not purport to set out a bright line test for distinguishing between a request for information and a common-law inquiry. These determinations can only be made on a case-by-case basis.

Id. at 192, 581 N.Y.S.2d at 625.

Applying these principles to the facts of the companion case of People v. Saunders, the Court of Appeals held that where the police officer only had enough information to support a DeBour level 1 request for information, it was improper for the officer to have requested permission to search the defendant's bag. Id. at 194, 581 N.Y.S.2d at 626 ("[Officer] Canale crossed the line, however, when he asked to search the defendant's bag. The defendant's behavior, while it may have provided the officer with adequate basis for an approach and for a few general, nonaccusatory questions, was certainly not so suspicious as to warrant the further intrusion of a request to rummage through the defendant's luggage. Because the defendant's consent was a product of the improper police inquiry, the Appellate Division was in error when it found that the defendant had in fact consented to the search of his bag"). See also Matter of Antoine W., 79 N.Y.2d 888, 889-90, 581 N.Y.S.2d 648, 648 (1992)

("Although the police had an 'objective credible reason' for approaching the defendant, the pointed questioning regarding the ownership of the bag and consent to search it was improper because it was not based on a founded suspicion of criminal activity"); People v. Irizarry, 79 N.Y.2d 890, 581 N.Y.S.2d 649 (1992) (same).

In People v. Harrison, 57 N.Y.2d 470, 478, 457 N.Y.S.2d 199, 204 (1982), the Court of Appeals agreed that:

> [T]he defendants' use of a dirty rental car in the City of New York did not establish reasonable suspicion that they were involved in criminal conduct. Contrary to the dissenter's view it is not common knowledge that ordinarily rental cars are relatively clean and well maintained. Rental companies may rent their cars in that condition but their customers are not always so fastidious. The cars are often rented to individual customers for weeks or months at a time and it is not always possible, even for concerned customers, to maintain the cars in their original condition, particularly in large metropolitan areas.

The Court further agreed that the officers' demand that the vehicle's occupants remain in the vehicle was illegal absent reasonable suspicion that criminal activity was afoot. Id. at 476, 457 N.Y.S.2d at 202-03 ("Confining the occupants to the car, even temporarily, is at least equivalent to a stop. A temporary stop is . . . a limited seizure of the person which at least requires reasonable suspicion") (citations omitted). See also People v. Cantor, 36 N.Y.2d 106, 112-13, 365 N.Y.S.2d 509, 516 (1975) ("Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand"); People v. Sobotker, 43 N.Y.2d 559, 564, 402 N.Y.S.2d 993, 996 (1978) ("Mere 'hunch' or 'gut reaction' will not do"); People v. Pizzo, 144 A.D.2d 930, 534 N.Y.S.2d 249 (4th Dep't 1988).

In People v. McIntosh, 96 N.Y.2d 521, 525, 730 N.Y.S.2d 265, 267 (2001), the Court of Appeals noted that "[a]lthough police officers have 'fairly broad authority' to approach and pose questions, they may not do so on mere 'whim or caprice'; the request must be based on 'an articulable reason not necessarily related to criminality.'" (Citations omitted). Critically, the McIntosh Court pointed out that:

> We have never held that a police encounter was justified by anything so general as knowledge that an entire city is a known source of drugs. Even a discrete area of a

> city identified as a high crime area has not, by itself, been sufficient justification for informational requests . . . .

Id. at 526, 730 N.Y.S.2d at 267.

The McIntosh Court made clear, several times, that in order to satisfy Hollman and DeBour, the police need an "objective, credible reason" to approach an individual to request information *in addition to* the mere fact that the person is in a "high crime" or "high drug" area. Id. at 525, 730 N.Y.S.2d at 267; id. at 526, 730 N.Y.S.2d at 268; id. at 527, 730 N.Y.S.2d at 268; id. at 527, 730 N.Y.S.2d at 269. In this regard, the Court distinguished cases in which it had previously upheld requests for information, noting that in each such case the police had observed objective, credible suspicious activity above and beyond the mere fact that the defendant was located in a high crime or high drug area:

> The events in all of these cases occurred in vicinities classified by police as "drug-prone" or with a high incidence of crime. Notably, we did not base our holdings on this factor alone. In determining the legality of an encounter under DeBour and Hollman, it has been crucial whether a nexus to conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. The fact that an encounter occurred in a high crime vicinity, without more, has not passed DeBour and Hollman scrutiny.

Id. at 526-27, 730 N.Y.S.2d at 268. See also Matter of Michael F., 84 A.D.3d 468, 923 N.Y.S.2d 61 (1st Dep't 2011); People v. Miles, 82 A.D.3d 1010, 918 N.Y.S.2d 594 (2d Dep't 2011); People v. Mobley, 48 A.D.3d 374, 853 N.Y.S.2d 31 (1st Dep't 2008); People v. Rutledge, 21 A.D.3d 1125, 804 N.Y.S.2d 321 (2d Dep't 2005); People v. Chism, 194 A.D.2d 351, 598 N.Y.S.2d 481 (1st Dep't 1993); People v. Morrison, 161 A.D.2d 608, 555 N.Y.S.2d 183 (2d Dep't 1990); People v. Medda, 28 Misc.3d 1239(A), 958 N.Y.S.2d 309 (Nassau Co. Dist. Ct. 2010); People v. Powell, 16 Misc.3d 1115(A), 847 N.Y.S.2d 898 (Nassau Co. Dist. Ct. 2007); People v. Rosenbluth, 4 Misc.3d 1025(A), 798 N.Y.S.2d 347 (Suffolk Co. Dist. Ct. 2004); People v. McMaster, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680 (Webster Just. Ct. 2004).

In People v. Karagoz, 143 A.D.3d 912, ___, 39 N.Y.S.3d 217, 220 (2d Dep't 2016), the Appellate Division, Second Department, held that the officer's initial contact with the defendant was a level 1 request for information rather than a level 2 common-law inquiry where:

> Based on the testimony adduced at the suppression hearing, the officer had an objective, credible reason for approaching the defendant's vehicle and asking for her license, registration, and insurance card. The defendant's vehicle was oddly stopped in the left turning lane behind the officer's vehicle, when it was obvious that she could not make a left turn. The defendant could have easily proceeded north on Oceanside Road, but instead stopped her vehicle for several minutes behind the officer's vehicle. Under these circumstances, the officer had an objective, credible reason to approach the defendant's vehicle and request information.

§ 1:3 When can a police officer approach a vehicle that is stopped but not parked?

This issue was addressed in People v. Ocasio, 85 N.Y.2d 982, 629 N.Y.S.2d 161 (1995). In Ocasio, two police officers walked up to the defendant's vehicle -- which was stopped at a red light -- tapped on the window, displayed badges, and asked the defendant for identification. The Court of Appeals laid out the factors to be considered in determining whether such a "stop" is permissible:

> Determination whether a seizure occurred here -- where the car was neither parked nor moving -- requires the fact finder to apply a settled standard: whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom. That involves consideration of all the facts -- for example, was there a chase; were lights, sirens or a loudspeaker used; was the officer's gun drawn, was the individual prevented from moving; how many verbal commands were given; what was the content and tone of the commands; how many officers were involved; where did the encounter take place.

Id. at 984, 629 N.Y.S.2d at 162 (citation omitted).

Considering these factors, the Court held that:

> While there may be instances in which approach of a car at a stoplight constitutes a seizure, the courts below, having considered the relevant factors, found no seizure. We cannot say, as a matter of law, that this determination was wrong.

Id. at 984-85, 629 N.Y.S.2d at 162.

In People v. Thomas, 19 A.D.3d 32, 38, 792 N.Y.S.2d 472, 477 (1st Dep't 2005), the Appellate Division, First Department, held that "police officers are entitled to conduct a level I inquiry of a person at the wheel of a stationary car that is blocking a fire hydrant." The Court further held that "[i]n concluding that the officer is justified in asking to see the license, we are influenced by the consideration that a person who stops a car alongside a fire hydrant plainly invites, and should reasonably expect, an interaction with law enforcement. We also conclude that a police approach to a person in a car that is already stopped does not constitute a level III 'forcible stop and detention', even if the police stop their vehicle in a position that incidentally blocks the civilian vehicle's path." Id. at 33, 792 N.Y.S.2d at 474 (citation omitted). See also People v. Grady, 272 A.D.2d 952, 708 N.Y.S.2d 765 (4th Dep't 2000). Cf. People v. Kojac, 176 Misc. 2d 187, 671 N.Y.S.2d 949 (N.Y. Co. Sup. Ct. 1998) (approach of stopped car illegal where approach was based on nothing more than a "hunch").

§ 1:4 Police jurisdiction to stop

Where a police officer observes an offense committed within the geographical area of the officer's employment, see CPL § 140.50(1), the officer may pursue and serve an appearance ticket upon the offender "anywhere in the county in which the designated offense was allegedly committed or in any adjoining county." CPL § 150.40(3). In addition:

> A police officer may, for the purpose of serving an appearance ticket upon a person, follow him in continuous close pursuit, commencing either in the county in which the alleged offense was committed or in an adjoining county, in and through any county of the state, and may serve such appearance ticket upon him in any county in which he overtakes him.

CPL § 150.40(4).

If such a traffic stop evolves into an arrest for DWI, the arrest would likely be upheld. See People v. Leitch, 178 A.D.2d 864, 577 N.Y.S.2d 725 (3d Dep't 1991). In Leitch, a village police officer:

> [W]itnessed a vehicle driven by defendant inside the Village limits following too closely behind another vehicle as it headed

> out of the Village. The officer turned his vehicle around and began following defendant's car outside the Village limits. The officer observed that defendant failed twice to signal turns, failed to reduce his speed at an intersection and made a wide turn into the oncoming lane of traffic. Upon pulling over defendant's vehicle and asking to see his license and registration, the officer noticed a strong odor of alcohol emanating from the car. Defendant, whose eyes were glassy and bloodshot, admitted that he had no driver's license. After defendant performed poorly on various sobriety tests and an alco-sensor breath test administered by the officer, he was arrested for drunk driving.

Id. at 864, 577 N.Y.S.2d at 725-26. Relying on CPL § 140.10, the Appellate Division, Third Department, held that defendant's arrest was legal.

By contrast, if the initial conduct which attracted the officer's attention in Leitch had occurred outside of the geographical area of the officer's employment, the vehicle stop would have been illegal. In this regard, it is well settled that:

> Although CPL 140.10(3) grants law enforcement officers the power to arrest a person without a warrant anywhere in the state for a crime they have probable cause to believe he committed, *the power to stop and question a person on reasonable suspicion of criminal activity is specifically limited by statute to the geographical area of the officer's employment* (CPL 140.50[1]).

Brewster v. City of New York, 111 A.D.2d 892, 893, 490 N.Y.S.2d 601, 602 (2d Dep't 1985) (emphasis added) (citation omitted). See also CPL § 140.50(1); People v. Wolf, 166 Misc. 2d 372, 636 N.Y.S.2d 570 (App. Term, 2d Dep't 1995); People v. Graham, 192 Misc. 2d 528, 531-532, 748 N.Y.S.2d 203, 206 (Erie Co. Sup. Ct. 2002) ("the Amherst police officer herein, restricted by the clear and unambiguous language of CPL § 140.10-2(a), exceeded his authority herein from the moment he illuminated the lights on his marked patrol vehicle for the purpose of stopping the defendant for petty offenses outside the Town of Amherst, his 'bailiwick'"); People v. Edmonds, 157 Misc. 2d 966, 599 N.Y.S.2d 441 (Dutchess Co. Ct. 1993). Cf. People v. Nenni, 269 A.D.2d 785, 704 N.Y.S.2d 405 (4th Dep't 2000) (Brewster and CPL § 140.50(1) inapplicable where police officer had probable cause to

arrest defendant at time of stop); People v. Nesbitt, 1 A.D.3d 889, 889-90, 767 N.Y.S.2d 187, 188 (4th Dep't 2003) (stop of defendant by village police officer *inside* village for traffic infractions he observed defendant commit *outside* village limits was lawful where the officer's observations of defendant's erratic driving outside of village "gave rise to reasonable suspicion that defendant was driving while intoxicated within the Village").

CPL § 140.50(1) provides, in pertinent part, that:

> [A] police officer may stop a person in a public place located *within the geographical area of such officer's employment* 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.

(Emphasis added). In addition:

> A county, city, town or village, as the case may be, constitutes the "geographical area of employment" of any police officer employed as such by an agency of such political subdivision or by an authority which functions only in such political subdivision.

CPL § 1.20(34-a)(b).

Since most DWI cases emanate from police observation of traffic infractions, CPL § 140.50(1) and Brewster should be asserted where the officer is improperly operating outside of his or her geographical area of employment.

In People v. Van Buren, 4 N.Y.3d 640, 644, 797 N.Y.S.2d 802, 803 (2005), the Court of Appeals held that "the New York City Department of Environmental Protection (DEP) Water Supply Police are authorized to enforce traffic laws within the city watershed." "This authority includes enforcing the Vehicle and Traffic Law, violations of which necessarily create a danger to the driver of an automobile, passengers and other members of the public." Id. at 648, 797 N.Y.S.2d at 806.

By contrast, in People v. Williams, 4 N.Y.3d 535, 538-39, 797 N.Y.S.2d 35, 37 (2005), the same Court held that a Housing Authority peace officer who acts (a) outside of the geographical jurisdiction of his employment, (b) under color of law, and (c) "with all the accouterments of official authority" cannot make a valid traffic stop/citizen's arrest.

§ 1:5 When can a police officer stop a moving vehicle?

"[T]he right to stop a moving vehicle is distinct from the right to approach the occupants of a parked vehicle." People v. Spencer, 84 N.Y.2d 749, 753, 622 N.Y.S.2d 483, 486 (1995). In this regard, a vehicle stop by the police is a DeBour level 3 seizure. See, e.g., People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162 (1995); Spencer, 84 N.Y.2d at 753, 622 N.Y.S.2d at 485-86; People v. May, 81 N.Y.2d 725, 727, 593 N.Y.S.2d 760, 761-62 (1992); People v. Sobotker, 43 N.Y.2d 559, 563-64, 402 N.Y.S.2d 993, 995-96 (1978). Cf. People v. Johnson, 194 A.D.2d 870, 599 N.Y.S.2d 162 (3d Dep't 1993); People v. Holstein, 154 A.D.2d 905, 545 N.Y.S.2d 865 (4th Dep't 1989). So is a gunpoint stop by the police. See, e.g., People v. Moore, 6 N.Y.3d 496, 499, 814 N.Y.S.2d 567, 569 (2006); People v. Allende, 39 N.Y.2d 474, 384 N.Y.S.2d 416 (1976).

While a DeBour level 3 seizure requires "reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor," People v. DeBour, 40 N.Y.2d 210, 223, 386 N.Y.S.2d 375, 385 (1976); see also People v. Cantor, 36 N.Y.2d 106, 112-13, 365 N.Y.S.2d 509, 516 (1975), in the context of vehicle stops the Court of Appeals has relaxed this standard to include probable cause to believe that a motorist has committed a traffic infraction. See People v. Robinson, 97 N.Y.2d 341, 354, 741 N.Y.S.2d 147, 155 (2001) ("the decision to stop a vehicle is reasonable where the police have probable cause to believe that a traffic infraction has occurred"). See also People v. Guthrie, 25 N.Y.3d 130, 133, 8 N.Y.S.3d 237, 240 (2015); Sobotker, *supra*, 43 N.Y.2d at 563, 402 N.Y.S.2d at 996; People v. Ingle, 36 N.Y.2d 413, 414, 369 N.Y.S.2d 67, 69 (1975).

Notably, however, the term "probable cause" as used in Robinson is akin to DeBour level 3 "reasonable suspicion" as opposed to DeBour level 4 "probable cause to arrest." In this regard, in Ingle, *supra*, the Court of Appeals made clear that:

> A single automobile traveling on a public highway may be stopped . . . when a police officer reasonably suspects a violation of the Vehicle and Traffic Law. Absent reasonable suspicion of a vehicle violation, a "routine traffic check" to determine whether or not a vehicle is being operated in compliance with the Vehicle and Traffic Law is permissible only when conducted according to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations. It should be emphasized that, in the context of a motor vehicle inspection "stop", the degree

> of suspicion required to justify the stop is minimal. *Nothing like probable cause as that term is used in the criminal law is required.* * * *
>
> Thus, an arbitrary stop of a single automobile for a purportedly "routine traffic check" is impermissible unless the police officer reasonably suspects a violation of the Vehicle and Traffic Law. * * *
>
> [I]n Pennsylvania an approach quite similar to that taken here was followed. *The position there taken, however, took the form of requiring as a basis for a "routine" traffic stop what was characterized as probable cause, but which may be no different than the reasonable suspicion suggested earlier as the basis for a "routine" traffic stop*.
>
> It should be emphasized that the factual basis required to support a stop for a "routine traffic check" is minimal. An actual violation of the Vehicle and Traffic Law need not be detectable. For example, an automobile in a general state of dilapidation might properly arouse suspicion of equipment violations. All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity. It is enough if the stop is based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."

Id. at 414-15, 419, 420, 369 N.Y.S.2d at 69, 74, 74-75 (emphases added) (citations omitted). See also Sobotker, 43 N.Y.2d at 563, 402 N.Y.S.2d at 996 ("our repeated decisions make abundantly clear that, absent at least a reasonable suspicion that its occupants had been, are then, or are about to be, engaged in conduct in violation of law, the stopping of an automobile by the police constitutes an impermissible seizure").

Robinson is somewhat difficult to reconcile with Sobotker and Ingle. In this regard, the Robinson Court stated that "[t]his Court has always evaluated the validity of a traffic stop based on probable cause that a driver has committed a traffic violation." 97 N.Y.2d at 350, 741 N.Y.S.2d at 152. However, Sobotker and Ingle clearly indicate that "reasonable suspicion" has always been the relevant legal standard. On the other hand, there probably isn't a meaningful distinction between "reasonable

suspicion" to believe that a person has committed a traffic infraction and "probable cause" to believe that he or she did so. See Ingle, 36 N.Y.2d at 420, 369 N.Y.S.2d at 74 ("what was characterized as probable cause . . . may be no different than the reasonable suspicion suggested earlier as the basis for a 'routine' traffic stop"). Cf. Matter of Deveines v. New York State Dep't of Motor Vehicles Appeals Bd., 136 A.D.3d 1383, ___, 25 N.Y.S.3d 760, 761 (4th Dep't 2016) ("'[s]ince Ingle, . . . the Court of Appeals has made it "abundantly clear" . . . that "police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" . . . [,] or where the police have "probable cause to believe that the driver . . . has committed a traffic violation"'") (citation omitted).

The bottom line is this: the police can lawfully stop a vehicle whenever they (a) have probable cause to believe that the driver has committed a traffic infraction, (b) observe an equipment violation, (c) have reasonable suspicion that criminal activity is afoot, or (d) are properly administering a valid checkpoint. See Chapter 5, *infra*.

§ 1:5A When can a police officer "stop" a parked vehicle?

A police officer can "stop" a parked vehicle by, for example, using the officer's patrol car to prevent the parked vehicle from leaving a parking space, activating the police car's emergency lights and shining a light into the vehicle. In Matter of Stewart v. Fiala, 129 A.D.3d 852, ___, 12 N.Y.S.3d 138, 138 (2d Dep't 2015), the Appellate Division, Second Department, held that such a stop was illegal under the following circumstances:

> On December 17, 2011, at 1:22 a.m., a police officer was patrolling West Boston Post Road in Mamaroneck as part of his assignment to a driving-while-intoxicated detail, when he observed a parked motor vehicle in the parking lot of a gym. The vehicle was parked in a marked space, with the front end of the vehicle facing a fence, while the back end was facing the lot. The lights of the vehicle were on, and its engine was running. It was the only vehicle in the lot. Although the gym was closed, the officer knew that patrons of the adjacent restaurant, which was open, parked their vehicles in the gym's lot.

> The officer pulled his vehicle perpendicular to the rear of the parked vehicle, activated the emergency lights, and shined a light from his vehicle into the parked vehicle.

§ 1:5B When can a police officer stop a person suspected of being the victim of a crime?

In People v. Coronado, 139 A.D.3d 452, ___, 30 N.Y.S.3d 628, 629 (1st Dep't 2016):

> Two police officers testified that they saw defendant sitting in the driver's seat of a car, while he and a man standing outside the car but inside the driver's open door were pushing and pulling each other. The police also heard yelling but could not understand what the men were saying. After defendant got out of the car, the two men walked together toward a nearby bar. The officers indicated that they suspected that the other man had been committing a crime against defendant, such as robbery, and had coerced him to walk away from the car. However, there is no testimony indicating that the officers believed that defendant was a perpetrator of a crime until after one of the officers forcibly stopped him, by grabbing him by the shoulder to stop him from moving away, and the police then observed signs that he was intoxicated, such as bloodshot, watery eyes and an odor of alcohol on his breath.

Under these circumstances, the Court held that:

> The officers' reasonable belief that defendant might have been a crime victim "authorized the police to ask [him] questions . . . and to follow [him] while attempting to engage him -- but not to seize him in order to do so." * * *
>
> Because proof of defendant's intoxication depended on the fruits of the unlawful stop, we dismiss the accusatory instrument.

Id. at ___, ___, 30 N.Y.S.3d at 629, 630 (citation omitted).

§ 1:5C When can a police officer ask the occupants of a lawfully stopped vehicle if they possess weapons?

In People v. Garcia, 20 N.Y.3d 317, 319-20, 959 N.Y.S.2d 464, 465 (2012), the Court of Appeals held as follows:

> On this appeal, we must determine whether a police officer may, without founded suspicion for the inquiry, ask the occupants of a lawfully stopped vehicle if they possess any weapons. We answer in the negative and, in so holding, necessarily conclude that the graduated framework set forth in People v. De Bour and People v. Hollman for evaluating the constitutionality of police-initiated encounters with private citizens applies with equal force to traffic stops.

(Citations omitted). See also id. at 324, 959 N.Y.S.2d at 468 ("Whether the individual questioned is a pedestrian or an occupant of a vehicle, a police officer who asks a private citizen if he or she is in possession of a weapon must have founded suspicion that criminality is afoot").

Critically, the Garcia Court made clear that this rule also applies to more general questions such as "Is there anything in the car I should know about?" Id. at 323 n.* 959 N.Y.S.2d at 468 n.*.

§ 1:6 Standard for stop differs from standard for arrest

It is well settled that an entirely different legal standard applies to the *stop* of a motor vehicle for a traffic infraction (*i.e.*, reasonable suspicion) than applies to the *arrest* of an occupant of the vehicle for a crime (*i.e.*, probable cause). As is noted in the previous section, a vehicle stop by the police is a DeBour level 3 seizure requiring reasonable suspicion. By contrast, an arrest for a crime such as DWI is a DeBour level 4 seizure requiring probable cause. See, e.g., People v. Moore, 32 N.Y.2d 67, 70, 343 N.Y.S.2d 107, 111 (1973) ("the standard of reasonable suspicion to stop is lower than the standard of probable cause for an arrest"); People v. Martinez, 80 N.Y.2d 444, 447, 591 N.Y.S.2d 823, 824 (1992); People v. Sobotker, 43 N.Y.2d 559, 402 N.Y.S.2d 993 (1978); People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); People v. Hollman, 79 N.Y.2d 181, 581 N.Y.S.2d 619 (1992); People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). See also People v. Sarfaty, 291 A.D.2d 889, 889-90, 736 N.Y.S.2d 817, 818 (4th Dep't 2002); People v. Pistone, 284 A.D.2d 415, ___, 727 N.Y.S.2d 439, 440 (2d Dep't 2001); People v. Swanston, 277 A.D.2d 600, ___, 716 N.Y.S.2d 118, 121 (3d Dep't 2000); People v. Sawinski, 246 A.D.2d 689, ___, 667

N.Y.S.2d 472, 473 (3d Dep't 1998); People v. May, 191 A.D.2d 1011, ___, 595 N.Y.S.2d 165, 166 (4th Dep't 1993); People v. Barnum, 175 A.D.2d 332, ___, 572 N.Y.S.2d 88, 89 (3d Dep't 1991); People v. Dunlap, 163 A.D.2d 814, ___, 558 N.Y.S.2d 347, 348 (4th Dep't 1990).

§ 1:7 Can the police issue tickets for unobserved traffic infractions?

Pursuant to CPL § 140.10(1)(a), a police officer can only make a warrantless arrest for a traffic infraction when the officer has reasonable cause to believe that such infraction *was committed in his or her presence*. See § 1:8, *infra*. This raises the question of whether a police officer can validly issue a ticket for an unobserved traffic infraction.

In People v. Boback, 23 N.Y.2d 189, 191-92, 295 N.Y.S.2d 912, 914 (1968), the Court of Appeals held that "the use of the Simplified Traffic Information is authorized where the information is signed by an officer whose knowledge of the facts is based upon information and belief." See also id. at 194, 295 N.Y.S.2d at 917 ("It is . . . evident that neither the language nor the legislative history of the Simplified Traffic Information statute limits the use of the information to those cases where the officer making the information has some personal knowledge of the violation"); Farkas v. State of New York, 96 Misc. 2d 784, ___, 409 N.Y.S.2d 696, 698-99 (Ct. of Claims 1978); 1987 N.Y. Op. Atty. Gen. (Informal Opinion No. 87-78). Cf. People v. Genovese, 156 Misc. 2d 569, 593 N.Y.S.2d 925 (Mendon Just. Ct. 1992) (reaching opposite conclusion).

The authors would like to thank Deputy James Di Mele of the Ulster County Sheriff's Office, who brought to our attention convincing authority supporting the position that police officers can issue STIs for unobserved traffic infractions.

It should be noted that issuance of a traffic ticket is not an arrest. See, e.g., People v. Marsh, 20 N.Y.2d 98, 100, 281 N.Y.S.2d 789, 791 (1967); People v. McMillan, 112 Misc. 2d 901, 902, 447 N.Y.S.2d 626, 628 (Monroe Co. Ct. 1982); Farkas, *supra*; Matter of Coville v. Bennett, 57 Misc. 2d 838, 839, 293 N.Y.S.2d 685, 687 (Ontario Co. Sup. Ct. 1968).

§ 1:8 Can the police arrest a person for a mere traffic infraction?

The statutory authority for making a warrantless arrest is set forth in CPL Article 140. In the field of DWI law, the primary authority for a warrantless arrest comes from CPL § 140.10. CPL § 140.10 provides, in pertinent part:

§ 140.10. Arrest without a warrant; by police officer; when and where authorized.

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

   (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence; and

   (b) A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise.

2. A police officer may arrest a person for a petty offense, pursuant to subdivision one, only when:

   (a) Such offense was committed or believed by him or her to have been committed within the geographical area of such police officer's employment or within [100] yards of such geographical area; and

   (b) Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him or her in any county in which he or she apprehends him or her.

3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he or she may make such arrest within the state, regardless of the situs of the commission of the crime. In addition,

> he or she may, if necessary, pursue such person outside the state and may arrest him or her in any state the laws of which contain provisions equivalent to those of section 140.55.

CPL § 140.10(1)-(3).

For purposes of CPL § 140.10, a traffic infraction is an offense. See, e.g., VTL § 155 ("For purposes of arrest without a warrant, pursuant to [CPL Article 140], a traffic infraction shall be deemed an offense"); PL § 10.00(2) ("'Traffic infraction' means any offense defined as 'traffic infraction' by [VTL § 155]"); CPL § 1.20(39) ("'Petty offense' means a violation or a traffic infraction").

Although it is clear that a police officer has the authority to arrest a person for a mere traffic infraction (committed in his or her presence), see, e.g., CPL § 140.10(1)(a); Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"), it is equally clear that doing so is both uncommon and disfavored. See, e.g., People v. Marsh, 20 N.Y.2d 98, 100, 281 N.Y.S.2d 789, 791 (1967); People v. Cooper, 38 A.D.3d 678, ___, 833 N.Y.S.2d 118, 120 (2d Dep't 2007); People v. Bulgin, 29 Misc. 3d 286, ___, 908 N.Y.S.2d 817, 827 (Bronx Co. Sup. Ct. 2010); Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL § 140.10. See generally People v. Howell, 49 N.Y.2d 778, 426 N.Y.S.2d 477 (1980); People v. Troiano, 35 N.Y.2d 476, 363 N.Y.S.2d 943 (1974).

Indeed, the whole purpose of permitting uniform traffic tickets, see VTL § 207, and appearance tickets, see CPL Article 150, is to avoid full-blown arrests/detentions for relatively minor offenses.

§ 1:9 Can the police arrest a person for an unobserved DWAI?

Pursuant to CPL § 140.10(1)(a), a police officer can only make a warrantless arrest for a traffic infraction when the officer has reasonable cause to believe that such infraction was committed in his or her presence. See previous section. Since DWAI, in violation of VTL § 1192(1), is generally a traffic infraction, see VTL § 1193(1)(a), it would appear that a police officer could not arrest a person for DWAI unless the officer had personally observed the person operate the vehicle. In this regard, however, VTL § 1194(1)(a) provides that:

> 1. Arrest and field testing. (a) Arrest. Notwithstanding the provisions of [CPL § 140.10], a police officer may, without a warrant, arrest a person, in case of a violation of [VTL § 1192(1)], if such violation is coupled with an accident or collision in which such person is involved, which in fact has been committed, though not in the police officer's presence, when the officer has reasonable cause to believe that the violation was committed by such person.

§ 1:10 When can a police officer pursue a fleeing person?

In People v. Holmes, 81 N.Y.2d 1056, 601 N.Y.S.2d 459 (1993), the Court of Appeals addressed the issue of when a police officer can lawfully pursue a person who responds to a valid DeBour request for information by fleeing. In this regard, the Court held that:

> Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right "to be let alone" and refuse to respond to police inquiry. * * *
>
> While the police may have had an objective credible reason to approach defendant to request information -- having observed him in a "known narcotics location" with an unidentified bulge in the pocket of his jacket -- those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit. Defendant was merely observed in the daytime, talking with a group of men on a New York City street. Given the unfortunate reality of crime in today's society, many areas of New York City, at one time or another, have probably been described by the police as "high crime neighborhoods" or "narcotics-prone locations." Moreover, a bulging jacket pocket is hardly indicative of criminality. As we have recognized, a pocket bulge, unlike a waistband bulge, "could be caused by any number of innocuous objects."
>
> If these circumstances could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to

> the right to seize, and there would, in fact, be no right "to be let alone." That is not, nor should it be, the law.

Id. at 1058, 601 N.Y.S.2d at 461 (citations omitted). See also People v. May, 81 N.Y.2d 725, 593 N.Y.S.2d 760 (1992) (police cannot stop vehicle based solely upon fact that vehicle was parked on a desolate street in a high crime area and the driver slowly pulled away when the police approached).

§ 1:11 When is a vehicle stop improper?

Since the police can lawfully stop a vehicle whenever they have probable cause to believe that the driver has committed a traffic infraction -- no matter how minor -- there is little need to provide a comprehensive list of cases holding that a vehicle stop was lawful. By contrast, since there are comparatively few cases holding that a vehicle stop was improper, a comprehensive list of such cases is useful.

Vehicle stops have been found to be improper under the following circumstances:

1. Where the stop was nothing more than a "routine traffic check." Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979); People v. Simone, 39 N.Y.2d 818, 385 N.Y.S.2d 765 (1976); People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); People v. Mason, 69 A.D.2d 769, 415 N.Y.S.2d 31 (1st Dep't 1979); People v. Mestey, 61 A.D.2d 447, 402 N.Y.S.2d 577 (1st Dep't 1978); People v. Conroy, 51 A.D.2d 1007, 380 N.Y.S.2d 766 (2d Dep't 1976); People v. Deacy, 140 Misc. 2d 232, 530 N.Y.S.2d 753 (Nassau Co. Dist. Ct. 1988);

2. Where there was a lack of probable cause to believe that the defendant committed a traffic infraction. People v. Chilton, 69 N.Y.2d 928, 516 N.Y.S.2d 633 (1987); People v. Mandato, 195 Misc. 2d 636, 760 N.Y.S.2d 809 (App. Term, 2d Dep't 2003);

3. Where the stop was based solely upon the fact that the vehicle was parked on a desolate street in a high crime area and the driver slowly pulled away when the police approached. People v. May, 81 N.Y.2d 725, 593 N.Y.S.2d 760 (1992);

4. Where the stop was based upon the officer's opinion that the occupants of the vehicle looked "suspicious," the vehicle or its occupants "seemed out of place," or the officer sensed that "something was not right." People v. Lopez, 75 A.D.3d 610, 905 N.Y.S.2d 647 (2d

Dep't 2010); People v. Hoglen, 162 A.D.2d 1036, 557 N.Y.S.2d 817 (4th Dep't 1990); People v. Murray, 48 A.D.2d 907, 370 N.Y.S.2d 10 (2d Dep't 1975); People v. Deer, 39 Misc. 3d 677, 960 N.Y.S.2d 891 (St. Lawrence Co. Ct. 2013); People v. Mejia, 133 Misc. 2d 755, 507 N.Y.S.2d 957 (Bronx Co. Sup. Ct. 1986); Blanchfield v. State of New York, 104 Misc. 2d 21, 427 N.Y.S.2d 682 (Ct. Cl. 1980);

5. Where the purpose of the stop was to request information of the driver concerning the whereabouts of a criminal suspect or if he knew anything about a recent crime. People v. Spencer, 84 N.Y.2d 749, 622 N.Y.S.2d 483 (1995); People v. Taylor, 31 A.D.3d 1141, 817 N.Y.S.2d 816 (4th Dep't 2006); People v. Washburn, 309 A.D.2d 1270, 765 N.Y.S.2d 76 (4th Dep't 2003); People v. McMaster, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680 (Webster Just. Ct. 2004). Cf. Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004); People v. John BB., 56 N.Y.2d 482, 453 N.Y.S.2d 158 (1982);

6. Where the stop was based upon the officer's "hunch" that a crime was about to be committed. People v. Sobotker, 43 N.Y.2d 559, 402 N.Y.S.2d 993 (1978); People v. Farrell, 90 A.D.2d 396, 457 N.Y.S.2d 260 (1st Dep't 1982), aff'd, 59 N.Y.2d 686, 463 N.Y.S.2d 416 (1983);

7. Where the stop was based upon the officer's "hunch" that a crime had recently been attempted/committed. People v. Peterson, 266 A.D.2d 738, 698 N.Y.S.2d 777 (3d Dep't 1999); People v. Sunley, 171 A.D.2d 1063, 568 N.Y.S.2d 994 (4th Dep't 1991); People v. Cascio, 63 A.D.2d 183, 407 N.Y.S.2d 703 (2d Dep't 1978); People v. Gutierrez, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680 (Nassau Co. Dist. Ct. 2005);

8. Where the stop was based upon the officer's "hunch" that the defendant -- who the police were looking for -- was the driver of the car. People v. Lindsey, 13 A.D.3d 651, 787 N.Y.S.2d 385 (2d Dep't 2004), aff'g 2004 WL 1087381 (Kings Co. Sup. Ct.);

9. Where the stop was "'[d]ue to the rash of crimes in the immediate area.'" People v. McMaster, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680, *1 (Webster Just. Ct. 2004);

10. Where the stop was made pursuant to an invalid checkpoint. See Chapter 5, *infra*;

11. Where the stop was due to the defendant's purported evasion of a sobriety checkpoint. People v. Bigger, 2 Misc. 3d 937, 771 N.Y.S.2d 826 (Webster Just. Ct.

2004); People v. Rocket, 156 Misc. 2d 641, 594 N.Y.S.2d 568 (Pleasant Valley Just. Ct. 1992). Cf. People v. Chaffee, 183 A.D.2d 208, 590 N.Y.S.2d 625 (4th Dep't 1992);

12. Where the stop was based upon a mistake of law (*i.e.*, where the officer's belief that the defendant had committed a VTL infraction was based on an erroneous interpretation of the law). See § 1:12, *infra*;

13. Where the stop was an invalid anonymous tip stop. See § 1:13, *infra*;

14. Where the testimony of the arresting officer(s) at a suppression hearing was not credible. People v. Anokye, 88 A.D.3d 736, 930 N.Y.S.2d 485 (2d Dep't 2011); People v. Lewis, 195 A.D.2d 523, 600 N.Y.S.2d 272 (2d Dep't 1993); People v. Akwa, 151 Misc. 2d 106, 573 N.Y.S.2d 216 (Kings Co. Sup. Ct. 1991); People v. Jones, 125 Misc. 2d 91, 477 N.Y.S.2d 975 (N.Y. Co. Sup. Ct. 1984); People v. Ananaba, 25 Misc.3d 1242(A), 906 N.Y.S.2d 781 (Queens Co. Sup. Ct. 2009); People v. Aquiar, 2003 WL 21739071 (Westchester Co. Ct. 2003);

15. Where the police lacked reasonable suspicion that criminal activity was afoot. People v. Layou, 71 A.D.3d 1382, 897 N.Y.S.2d 325 (4th Dep't 2010); People v. Solano, 46 A.D.3d 1223, 848 N.Y.S.2d 431 (3d Dep't 2007); People v. Brown, 112 A.D.2d 945, 492 N.Y.S.2d 625 (2d Dep't 1985); People v. Spicer, 105 A.D.2d 1100, 482 N.Y.S.2d 169 (4th Dep't 1984); People v. Corcoran, 89 A.D.2d 696, 453 N.Y.S.2d 877 (3d Dep't 1982); People v. La Borde, 66 A.D.2d 803, 410 N.Y.S.2d 886 (2d Dep't 1978);

16. Where the stop was based upon a claim that the vehicle was observed driving erratically almost an hour earlier. People v. Royko, 201 A.D.2d 863, 607 N.Y.S.2d 515 (4th Dep't 1994);

17. Where the stop was based upon the fact that the defendant was driving slowly, had an out-of-State license plate, or appeared to be lost. People v. Joe, 63 A.D.2d 737, 405 N.Y.S.2d 295 (2d Dep't 1978). See also People v. Conroy, 51 A.D.2d 1007, 380 N.Y.S.2d 766 (2d Dep't 1976); People v. Bergers, 50 A.D.2d 764, 377 N.Y.S.2d 67 (1st Dep't 1975);

18. Where the description of the vehicle/person the police were looking for was too vague. People v. Tindal, 231 A.D.2d 404, ___, 646 N.Y.S.2d 814, 814 (1st Dep't 1996) ("absent some additional information identifying the

vehicle involved in the alleged crime beyond its make and color or distinguishing the driver from other young black males with a commonly worn haircut, the information available to the officers fell far short of that required to justify a stop of defendant's vehicle 24 hours after receipt of this general, limited information provided by the complainant");

19. Where the stop was based upon a vague police radio transmission. People v. Nicodemus, 247 A.D.2d 833, ___, 669 N.Y.S.2d 98, 99 (4th Dep't 1998) ("The dispatch did not give a description of the robbers and did not mention a vehicle. It stated only that two males, one of whom wore a mask, had left the scene on foot"); People v. Crump, 217 A.D.2d 902, 629 N.Y.S.2d 602 (4th Dep't 1995) (a "dark-colored vehicle" -- possibly a Cadillac -- was seen speeding from a specified area); People v. Scheu, 177 Misc. 2d 922, 677 N.Y.S.2d 904 (Nassau Co. Dist. Ct. 1998) (a "part of a partial plate" of a "dark Ford");

20. Where the vehicle that was stopped did not sufficiently match the description of the vehicle that the officer was theoretically looking for. People v. Brooks, 266 A.D.2d 864, 697 N.Y.S.2d 804 (4th Dep't 1999);

21. Where the vehicle was stopped a second time, by a second set of officers, based upon their opinion that the first set of officers had conducted an inadequate search (even though they were apparently correct). People v. Major, 263 A.D.2d 360, 693 N.Y.S.2d 30 (1st Dep't 1999);

22. Where the stop was based upon the defendant's failure to signal a right turn upon leaving a parking lot. Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997); People v. Silvers, 195 Misc. 2d 739, 761 N.Y.S.2d 472 (Mount Vernon City Ct. 2003); People v. Mazzola, 2006 WL 1540297 (Suffolk Co. Dist. Ct. 2006);

23. Where the stop was based upon the fact that the defendant was leaving the parking lot of a closed group home shortly after midnight. People v. Stock, 57 A.D.3d 1424, 871 N.Y.S.2d 545 (4th Dep't 2008);

24. Where the defendant was driving through the parking lot of a closed car dealership -- where crimes had recently been committed -- at approximately 1:00 AM. Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997). See also People v. Buttitta, 2010 WL 1293759 (Pendleton Just. Ct. 2010) (similar facts);

25. Where the stop was based upon a claim that the defendant's vehicle had insufficient plate lamps, but there was insufficient proof supporting this claim at a probable cause hearing. People v. Lang, 2011 WL 539901 (Webster Just. Ct. 2011);

26. Where the stop was based upon an air freshener hanging from the defendant's rearview mirror that did not violate VTL § 375(30). People v. O'Hare, 73 A.D.3d 812, 900 N.Y.S.2d 400 (2d Dep't 2010);

27. Where the stop was based upon the fact that one of the defendant's passengers was hanging out of the vehicle's window apparently making a remark to a person on a nearby sidewalk. People v. Henry, 159 A.D.2d 990, 552 N.Y.S.2d 749 (4th Dep't 1990);

28. Where the stop was based upon the defendant's vehicle weaving within its own lane. People v. Culcross, 184 Misc. 2d 67, 706 N.Y.S.2d 605 (Monroe Co. Ct. 2000) (defendant's vehicle "swerved" within its lane twice and the front tire "struck" the center dotted line once); People v. Teall, 2011 WL 3198874 (Rochester City Court 2011); People v. Lochan, 2009 WL 944246 (N.Y. City Crim. Ct. 2009);

29. Where the defendant was stopped solely because his right front tire traveled partially onto the fog line 3 or 4 times. People v. Davis, 58 A.D.3d 896, 870 N.Y.S.2d 602 (3d Dep't 2009);

30. Where the stop was based upon the fact that the defendant briefly crossed the fog line. People v. Schoonmaker, 2014 WL 2863707 (Red Hook Just. Ct. 2014); People v. Luster, 35 Misc. 3d 735, 946 N.Y.S.2d 407 (Suffolk Co. Dist. Ct. 2012); People v. Bordeau, 2008 WL 4700522 (Essex Co. Ct. 2008); People v. Fisher, 2008 WL 3865212 (Wappinger Just. Ct. 2008). Cf. People v. Wohlers, 138 A.D.2d 957, ___, 526 N.Y.S.2d 290, 290 (4th Dep't 1988) ("the court's finding that defendant's vehicle 'strayed slightly to the right of the driving lane' established a valid basis for the stop. Such conduct is a violation of Vehicle and Traffic Law § 1128(a), which requires drivers to remain in lane"). See generally People v. Morales, 2017 WL 487659, *3 (App. Term, 9th & 10th Jud. Dist. 2017) ("While crossing a single solid white line is discouraged, it is not prohibited. As the only proof in the record of defendant disobeying a traffic control device is that he apparently drove his vehicle across the solid white line marking the shoulder, the judgment convicting defendant of failing to obey a traffic control device

cannot stand") (citations omitted); People v. Hollinger, 2002 WL 31508863 (App. Term, 9th & 10th Jud. Dist. 2002) (same);

31. Where the stop was based upon an alleged "high beams" violation, but the defendant's conduct did not actually hinder or hamper the officer's ability to operate his vehicle. People v. Allen, 89 A.D.3d 742, 932 N.Y.S.2d 142 (2d Dep't 2011); People v. Rose, 67 A.D.3d 1447, 889 N.Y.S.2d 789 (4th Dep't 2009); People v. Garlock, 2010 WL 4670880 (Lockport Just. Ct. 2010);

32. Where the stop was based upon the fact that the defendant floored the gas pedal of his vehicle and squealed the tires, "leaving rubber." People v. Simmons, 58 A.D.2d 524, 395 N.Y.S.2d 188 (1st Dep't 1977);

33. Where the stop was based upon the fact that the defendant caused his moving vehicle to "fishtail." Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, 908 N.Y.S.2d 507 (4th Dep't 2010); cf. People v. Petri, ___ A.D.3d ___, ___ N.Y.S.3d ___, 2017 WL 3176236 (3d Dep't 2017);

34. Where the stop was based upon the fact that the defendant, who had been stopped at a red light, did not start until the light had turned from green to yellow. People v. Martinez, 31 Misc. 3d 201, 915 N.Y.S.2d 819 (Nassau Co. Dist. Ct. 2011);

35. Where the stop was based upon the fact that the defendant was driving below the posted speed limit. People v. Beeney, 181 Misc. 2d 201, 694 N.Y.S.2d 583 (Monroe Co. Ct. 1999);

36. Where the defendant technically committed an offense, but did so as the result of an involuntary act. PL § 15.10; People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (App. Term, 2d & 11th Jud. Dist. 1973) (per curiam); People v. Soe, 9 Misc. 3d 1069, 805 N.Y.S.2d 262 (Valley Stream Just. Ct. 2005); People v. Shaughnessy, 66 Misc. 2d 19, 319 N.Y.S.2d 626 (Nassau Co. Dist. Ct. 1971);

37. Where a plainclothes police officer in his own private vehicle stopped defendant's vehicle and approached with gun drawn based upon the fact that the officer saw burning pieces of paper thrown from defendant's vehicle. People v. Steg, 51 A.D.2d 810, 380 N.Y.S.2d 270 (2d Dep't 1976);

38. Where the stop was based upon the fact that the defendant's car had a broken rear vent window. People v. Elam, 179 A.D.2d 229, 584 N.Y.S.2d 780 (1st Dep't 1992);

39. Where the stop was based upon an alleged cell phone violation that the Court found did not violate VTL § 1225-c. People v. Abdul-Akim, 2010 WL 1856007 (Kings Co. Sup. Ct. 2010); and

40. Where the stop was based upon suspicion that the defendant was driving while intoxicated. People v. Ball, 132 A.D.3d 1286, 17 N.Y.S.3d 358 (4th Dep't 2015).

In People v. Rice, 11 Misc. 3d 539, ___, 810 N.Y.S.2d 306, 311-12 (N.Y. Co. Sup. Ct. 2006), rev'd, 44 A.D.3d 247, 841 N.Y.S.2d 72 (1st Dep't 2007), the Court held that VTL § 1163 "does not require signaling when a lane change can be made in complete safety without such signal." The Appellate Division, First Department, reversed, holding that "[i]n view of the clear language of the statute, coupled with its unequivocal legislative history, we can only conclude that the hearing court erred when it determined that VTL 1163 does not require a signal, in all instances, when changing a lane." 44 A.D.3d at ___, 841 N.Y.S.2d at 76. In so holding, the Court reasoned that:

> VTL 1163(d) unequivocally requires that a turn signal "*shall be used* to indicate an intention to . . . change lanes" (emphasis added). While the legislature's employment of mandatory language, such as "shall" or "must," is not, by itself, conclusive, "such a word of command is ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent." Here, not only is there an absence of any contrary intent, but the absence of any such qualification or limitation is consistent with the wording of section 1163(a), which imposes a duty to signal a lane change under all circumstances. Indeed, if a duty to signal a lane change existed only under certain circumstances, as found by the hearing court, then a harmonizing reference to such a limitation would have been included in section 1163(d).

Id. at ___, 841 N.Y.S.2d at 75 (citations omitted). See also People v. Tamburrino, 26 Misc. 3d 930, 892 N.Y.S.2d 852 (Saratoga Springs City Ct. 2009); People v. James, 17 Misc. 3d 623, 842 N.Y.S.2d 859 (N.Y. City Crim. Ct. 2007); People v. Martinez-Lopez, 16 Misc. 3d 298, 834 N.Y.S.2d 852 (Nassau Co. Dist. Ct. 2007).

In People v. DeCerbo, 4 Misc. 3d 23, ___, 783 N.Y.S.2d 202, 203 (App. Term, 9th & 10th Jud. Dist. 2004), the Court held that:

> Vehicle and Traffic Law § 1102 is "designed to compel obedience to an order of a police officer regulating the control or movement of traffic." The evidence adduced at trial failed to demonstrate that the officer's order directing the defendant to return to his vehicle involved regulating the control or movement of traffic. Consequently, defendant's actions did not fall within the scope of section 1102.

(Citation omitted).

§ 1:12 Mistake of law stop

In Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997), the petitioner's car was stopped by the police "after he turned right out of a parking lot without using his turn signal," which led to the petitioner being arrested for, among other things, DWI. Id. at ___, 661 N.Y.S.2d at 337. The petitioner thereafter refused to submit to a chemical test. A chemical test refusal hearing was held by DMV, following which the petitioner's driver's license was revoked.

On appeal, DMV conceded "that petitioner did not violate Vehicle and Traffic Law § 1163(a), the underlying predicate for the stop, because the statute does not require a motorist to signal a turn from a private driveway," but nonetheless contended "that the officer's good faith belief that there was a violation of the Vehicle and Traffic Law, coupled with the surrounding circumstances, provided reasonable suspicion of criminality to justify the stop." Id. at ___, 661 N.Y.S.2d at 337-38. The Appellate Division, Fourth Department, disagreed, holding that "[w]here the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal." Id. at ___, 661 N.Y.S.2d at 338.

Subsequent to Byer, numerous Courts have held that "mistake of law" stops are illegal, requiring the suppression of any evidence obtained as a direct result thereof. See, e.g., Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, ___, 908 N.Y.S.2d 507, 508 (4th Dep't 2010) (causing a moving vehicle to "fishtail" does not violate VTL § 1162, "which [only] prohibits unsafely moving a stopped, standing or parked vehicle"); People v. Rose, 67 A.D.3d 1447, ___, 889 N.Y.S.2d 789, 791 (4th Dep't 2009) (the mere flashing of high beams does not

violate VTL § 375(3); rather, the high beams must interfere with the driver of an approaching vehicle); People v. Garlock, 2010 WL 4670880 (Lockport Just. Ct. 2010) (same); People v. Smith, 67 A.D.3d 1392, ___, 887 N.Y.S.2d 883, 883 (4th Dep't 2009) ("We conclude that County Court properly suppressed the evidence on the ground that the police officer made a mistake of law in stopping defendant's vehicle, which had in fact performed a legal pass on the right pursuant to Vehicle and Traffic Law § 1123(a)(1) and (2)"); People v. MacKenzie, 61 A.D.3d 703, ___, 875 N.Y.S.2d 908, 908 (2d Dep't 2009) ("the stop of the defendant's vehicle was unlawful, because reasonable suspicion to believe that he had violated Vehicle and Traffic Law § 375(2)(a)(1) was lacking"); People v. Smith, 1 A.D.3d 965, ___, 767 N.Y.S.2d 327, 328 (4th Dep't 2003) ("The lack of a license plate on a vehicle generally will justify a stop of the vehicle for violation of Vehicle and Traffic Law § 402. Here, however, upon stopping defendant's vehicle, the officer observed that it had a Florida rear license plate and realized that no front plate was required") (citations omitted); People v. Silvers, 195 Misc. 2d 739, ___, 761 N.Y.S.2d 472, 472 (Mount Vernon City Ct. 2003) ("nothing in [VTL § 1163(b)] requires a motorist to signal a turn when exiting a parking lot"); People v. Mazzola, 2006 WL 1540297 (Suffolk Co. Dist. Ct. 2006) (defendant's failure to signal right turn out of parking lot did not violate VTL § 1163(d)); People v. Yendo, 2011 WL 452974, *1 (App. Term, 9th & 10th Jud. Dist. 2011) ("Vehicle and Traffic Law § 1201(a) does not prohibit a motorist from stopping a vehicle within 'a business or residence district.' . . . [T]he trooper acknowledged that the spot where he had observed defendant's car stopped was 'a residential or business district'").

In People v. Guthrie, 25 N.Y.3d 130, 132, 8 N.Y.S.3d 237, 239 (2015), the Court of Appeals partially abrogated the mistake of law doctrine, holding that as long as "the officer's mistake about the law is reasonable, the stop is constitutional." In so holding, the Court reasoned that "the relevant question before us is not whether the officer acted in good faith, but whether his belief that a traffic violation had occurred was objectively reasonable. Recently, in Heien v. North Carolina, the Supreme Court of the United States clarified that the Fourth Amendment tolerates objectively reasonable mistakes supporting such a belief, whether they are mistakes of fact or mistakes of law." Id. at 134, 8 N.Y.S.3d at 240-41 (citations and footnote omitted).

Critically, in the footnote omitted from the above quote, the Guthrie Court stated:

> This distinction is significant in that a mistake of law that is merely made in "good faith" will not validate a traffic stop; rather, unless the mistake is objectively

> reasonable, any evidence gained from the stop -- whether based on a mistake of law or a mistake of fact -- must be suppressed. Thus, contrary to the dissent's suggestion, our holding in this case does not represent a limitation on the rule set forth in People v. Bigelow that there is no good faith exception to the exclusionary rule.

Id. at 134 n.2, 8 N.Y.S.3d at 240 n.2 (citation omitted). See also id. at 139, 8 N.Y.S.3d at 244-45 ("As the Supreme Court explained, the requirement that the mistake be objectively reasonable prevents officers from 'gain[ing] [any] Fourth Amendment advantage through a sloppy study of the laws [they are] duty-bound to enforce'") (citation omitted).

Thus, Guthrie clearly does not stand for the proposition that all mistake of law stops are now valid. It merely stands for the proposition that "objectively reasonable" mistake of law stops are valid. See generally People v. Abrucci-Kohan, 52 Misc. 3d 919, 37 N.Y.S.3d 816 (Monroe Just. Ct. 2016).

§ 1:13 Anonymous tip stops

In Florida v. J.L., 529 U.S. 266, 268, 120 S.Ct. 1375, 1377 (2000), the United States Supreme Court held that an anonymous tip that a person is carrying a gun, without more, is insufficient to justify a police officer's stop and frisk of the person. In so holding, the Court reasoned as follows:

> The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. * * *
>
> Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There

> really was a young black male wearing a plaid shirt at the bus stop. The United States as *amicus curiae* makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip . . . ." These contentions misapprehend the reliability needed for a tip to justify a Terry stop.
>
> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. *The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person*.

Id. at 271-72, 120 S.Ct. at 1379 (emphasis added) (citations omitted). Notably, the J.L. Court declined the government's request that it create a "firearm exception" to the anonymous tip rules on the ground that firearms are dangerous. Id. at 272-73, 120 S.Ct. at 1379-80.

In People v. Moore, 6 N.Y.3d 496, 814 N.Y.S.2d 567 (2006), the Court of Appeals discussed the requirements for a valid anonymous tip stop in light of both J.L. and the Court's own post-J.L. decision in People v. William II, 98 N.Y.2d 93, 745 N.Y.S.2d 792 (2002):

> An anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains predictive information -- such as information suggestive of criminal behavior -- so that the police can test the reliability of the tip (see Florida v. J.L.; [People v.] William II). Indeed, in J.L., a unanimous United States Supreme Court held that an anonymous tip regarding a young Black male standing at a particular bus stop, wearing a plaid shirt and carrying a gun, was insufficient to provide the requisite reasonable suspicion to authorize a stop and frisk of the defendant.

> The State argued in J.L. that the tip was sufficient to justify the police intrusion because the defendant matched the detailed description provided by the tipster. The Supreme Court held, however, that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." The Court further explained that an anonymous tip could demonstrate the tipster's reliability and thus provide reasonable suspicion of criminal activity only if it predicted actions subsequently engaged in by the suspect. * * *
>
> [T]he anonymous tip triggered only the police officers' common-law right of inquiry. This right authorized the police to ask questions of defendant -- and to follow defendant while attempting to engage him -- but not to seize him in order to do so. Thus, defendant remained free to continue about his business without risk of forcible detention. * * *
>
> *Under our settled DeBour jurisprudence, to elevate the right of inquiry to the right to forcibly stop and detain, the police must obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior*. * * *
>
> [T]he Court's decision today is wholly in line with our precedent: a forcible stop requires reasonable suspicion that the suspect has committed a crime, not merely the founded suspicion -- triggering the officers' common-law right of inquiry -- present here.

Id. at 499, 500, 500-01, 501, 814 N.Y.S.2d at 569, 570 (emphasis added) (citations omitted). See also People v. William II, 98 N.Y.2d 93, 99, 745 N.Y.S.2d 792, 794-95 (2002) ("*[a] tipster's reliability would be demonstrated only if the suspect subsequently engaged in actions, preferably suggestive of concealed criminal activity, which the anonymous tip predicted in detail*. . . . [R]easonable suspicion 'requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person'") (emphasis added) (citations omitted); People v. Sampson, 68 A.D.3d 1455, 891 N.Y.S.2d 518 (3d Dep't 2009); People v. Hoffman, 224 A.D.2d 853, ___, 638 N.Y.S.2d 203, 205 (3d Dep't 1996) ("An anonymous telephone tip must be

viewed with undiluted suspicion, as it is a notoriously weak and unreliable source of information"); People v. Letts, 180 A.D.2d 931, 580 N.Y.S.2d 525 (3d Dep't 1992); People v. Vega, 178 A.D.2d 1018, 578 N.Y.S.2d 342 (4th Dep't 1991); People v. Burpee, 175 A.D.2d 585, 572 N.Y.S.2d 250 (4th Dep't 1991); People v. Clark, 133 A.D.2d 955, 520 N.Y.S.2d 668 (3d Dep't 1987).

In People v. Rance, 227 A.D.2d 936, ___, 644 N.Y.S.2d 447, 447 (4th Dep't 1996), a "police officer received a radio dispatch that an anonymous informant had reported that an intoxicated woman was leaving a business establishment . . . and was entering the driver's seat of a red Oldsmobile with a particular license plate number." The officer arrived at that location within minutes and observed the car backing out of a space in the parking lot. The officer blocked the car's path with his police car, and approached the defendant to request her license and registration. Only *after* stopping the defendant's vehicle did the officer observe indicia of intoxication and elicit an incriminating admission from the defendant, which led to her arrest for DWI and AUO 1st. In a memorandum decision, the Appellate Division, Fourth Department, held that:

> The information in the radio dispatch provided reasonable suspicion to believe that defendant had committed or was about to commit a crime, thereby justifying a stop of the vehicle. Police action may be based upon information from an anonymous source where, as here, it relates to "matters gravely affecting personal or public safety."

Id. at ___, 644 N.Y.S.2d at 447 (citations omitted).

It is the authors' opinion that Rance has been effectively overruled by J.L., Moore, and/or William II. At the outset, the Rance Court's claim that "[t]he information in the radio dispatch provided reasonable suspicion to believe that defendant had committed or was about to commit a crime, thereby justifying a stop of the vehicle" was expressly rejected by J.L., Moore and William II. Specifically, these cases make clear that an anonymous tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person," and that the tip must accurately predict (*i.e.*, be corroborated by) behavior indicative of criminality. See also People v. Braun, 299 A.D.2d 246, ___, 750 N.Y.S.2d 58, 58-59 (1st Dep't 2002) ("we are constrained to reverse by recent precedent authoritatively holding that an anonymous tip alleging that a described person has engaged in criminal activity, unless corroborated so as to render it 'reliable in its assertion of illegality, not just in its tendency to identify a determinate person,' does not create reasonable suspicion sufficient to justify a stop and frisk") (citation omitted). See generally People v. Elwell, 50 N.Y.2d

231, 234-35, 428 N.Y.S.2d 655, 657 (1980) ("We affirm the Appellate Division's holding that for police observation to constitute the verification that will establish probable cause and permit a warrantless search or arrest predicated upon data from an informer who has not revealed the basis for his knowledge, it is not enough that a number, even a large number, of details of noncriminal activity supplied by the informer be confirmed. Probable cause for such 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").

Since the police observed no illegal conduct by Rance prior to stopping her, the stop clearly violated J.L., Moore and William II. See generally Harris v. Commonwealth, 276 Va. 689, 696, 698, 668 S.E.2d 141, 146, 147 (Va. 2008) ("An anonymous tip need not include predictive information when an informant reports readily observable criminal actions. However, the crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified. * * * Therefore, we hold that Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and that, therefore, Harris was stopped in violation of his rights under the Fourth Amendment") (citation omitted). Cf. People v. Wright, 98 N.Y.2d 657, 746 N.Y.S.2d 273 (2002) (anonymous tip of reckless driving irrelevant in light of Trooper's own observations of traffic infraction); People v. Pealer, 89 A.D.3d 1504, 933 N.Y.S.2d 473 (4th Dep't 2011) (anonymous tip of intoxicated driver irrelevant in light of officer's own observations of traffic infraction); People v. Walters, 213 A.D.2d 810, 623 N.Y.S.2d 396 (3d Dep't 1995) (anonymous tip of erratic driving corroborated by Trooper's own observations of same).

J.L., Moore and William II further make clear that an uncorroborated anonymous tip only gives the police authority to engage in a DeBour level 2 common-law right of inquiry -- *not* a DeBour level 3 seizure. See also People v. Russ, 61 N.Y.2d 693, 694-95 472 N.Y.S.2d 601, 602 (1984) ("Finding defendant in a car meeting the description and the specific location indicated by the informant provided reasonable suspicion that a crime had occurred or was about to occur and warranted the officer's request that she step out of the car for inquiry. It did not, however, justify the frisk. . . . A frisk requires reliable knowledge of facts providing reasonable basis for suspecting that the individual to be subjected to that intrusion is armed and may be dangerous") (citations omitted).

As is noted in § 1:5, *supra*, a vehicle stop by the police is a DeBour level 3 seizure. See, e.g., People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162 (1995); People v. Spencer, 84 N.Y.2d 749, 753, 622 N.Y.S.2d 483, 485-86 (1995); People v. May, 81 N.Y.2d 725, 727, 593 N.Y.S.2d 760, 761-62 (1992); People v. Sobotker, 43 N.Y.2d 559, 563-64, 402 N.Y.S.2d 993, 995-96 (1978). Indeed, in William II the Court of Appeals applied J.L. to a vehicle stop. See 98 N.Y.2d at 99, 745 N.Y.S.2d at 795 ("the only basis for reasonable suspicion advanced before the suppression court for stopping the vehicle in which defendant was a passenger was that he matched the physical description provided by an anonymous tipster. Without more, the tip could not provide reasonable suspicion to stop the car") (footnote omitted).

Further undermining the continued validity of Rance is the Rance Court's statement that "[p]olice action may be based upon information from an anonymous source where, as here, it relates to 'matters gravely affecting personal or public safety.'" 227 A.D.2d at ___, 644 N.Y.S.2d at 447 (quoting People v. Taggart, 20 N.Y.2d 335, 283 N.Y.S.2d 1 (1967)). However, it is clear that Taggart (*i.e.*, the case cited by the Rance Court in support of its apparent creation of a "DWI exception" to the normal anonymous tip rules) was overruled by J.L. Indeed, the facts of Taggart are *strikingly* similar to the facts of J.L. -- *yet the Supreme Court reached the exact opposite conclusion of that reached by the Taggart Court*.

The facts of Taggart are as follows:

> The detective, Richard Delaney, was the only witness at the hearing on the motion to suppress. He testified that on the day of the arrest he received an anonymous telephone call at the police station informing him that "there was a male, white youth on the corner of 135th and Jamaica Avenue * * * (who) had a loaded 32 calibre [sic] revolver in his left hand jacket pocket". The caller also stated that the youth was "eighteen", had "blue eyes, blond hair" and was wearing "white chino-type pants".
>
> Delaney then proceeded to that location and observed from across the street an individual who "matched perfectly" the description given to Delaney by the informer. The youth (defendant) "was standing in the middle of a group of children that had just finished bowling". Thereupon, Delaney crossed the street, "took him (defendant) by the arm and put him against the wall and took the

> revolver out of his left-hand jacket pocket". Delaney did not notice any bulge in the defendant's pocket prior to the search as the weapon "was inside the lining of the jacket".

20 N.Y.2d at 4, 283 N.Y.S.2d at 337-38.

The facts of J.L. are as follows:

> On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip -- the record does not say how long -- two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket.

529 U.S. at 268, 120 S.Ct. at 1377 (citations omitted).

It is clear that Taggart and J.L. are factually indistinguishable, and thus Taggart is no longer good law. To make matters worse, Taggart created the very "firearm exception" to the normal anonymous tip rules that was expressly rejected by J.L. See J.L., 529 U.S. at 272, 120 S.Ct. at 1379-80 ("an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. *Nor could one securely confine such an exception to allegations involving firearms*") (emphasis added). Thus, J.L. not only clearly overruled Taggart, but also foresaw -- and disapproved of -- what the Rance Court did (which was to expand a "firearm exception" to include a "DWI exception").

Simply stated, since the Rance Court's reasoning has been expressly rejected by higher Courts in more recent cases, it is fair to say that Rance is no longer good law. The same Court's

post-J.L. decision in People v. Jeffery, 2 A.D.3d 1271, 769 N.Y.S.2d 675 (4th Dep't 2003), seems to literally defy J.L. and William II. In any event, Jeffery seems hard to reconcile with the Court of Appeals' subsequent decision in Moore, *supra*.

Notably, the Taggart Court stated that:

> It is recognized . . . that using anonymous information as a basis for intrusive police action is highly dangerous. To limit its use to exigent circumstances the police action must relate to matters gravely affecting personal or public safety or irreparable harm to property of extraordinary value. As noted earlier, it should not extend to all contraband or criminal violations. And, of course, the credibility of the police in claiming anonymous information should be subject to the most careful and critical scrutiny, unless abuse should merit or lead to still greater restrictions on police actions. Moreover, the police should be required to make contemporaneous or reasonably prompt detailed records of any such communications which should be subject to inspection and examination on a suppression hearing on the issue of credibility. It would be unfortunate if the people must be subject to the mercy of the criminal because of the limited and non-lethal risks arising from the conduct of the anonymous informer or from the conduct of police too gullible or too crafty.

20 N.Y.2d at 9, 283 N.Y.S.2d at 343.

In Navarette v. California, ___ U.S. ___, ___, 134 S.Ct. 1683, 1686 (2014), the Supreme Court held as follows:

> After a 911 caller reported that a vehicle had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop. We hold that the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.

It remains to be seen whether the Court of Appeals will follow Navarette, as it has previously made clear that "[t]his Court, as a matter of State constitutional law, adheres to the Aguilar/Spinelli test and has expressly rejected the less

protective 'totality of the circumstances' standard which the United States Supreme Court adopted in Illinois v. Gates in lieu of Aguilar/Spinelli." People v. DiFalco, 80 N.Y.2d 693, 697 n.1, 594 N.Y.S.2d 679, 681 n.1 (1993) (citation omitted).

The Court had the opportunity to decide this issue in People v. Argyris, 24 N.Y.3d 1138, 3 N.Y.S.3d 711 (2014). In Argyris, the Court addressed the validity of two separate vehicle stops involving anonymous 911 calls. However, the Court sidestepped the issue of which test should be applied, holding that:

> Regardless of whether we apply a totality of the circumstances test or the Aguilar-Spinelli standard, there is record support for the lower courts' findings that the stops were lawful in People v. Argyris and People v. DiSalvo. The police had reasonable suspicion to stop defendants' vehicle based on the contents of a 911 call from an anonymous individual and the confirmatory observations of the police. Specifically, because sufficient information in the record supports the lower courts' determination that the tip was reliable under the totality of the circumstances, satisfied the two-pronged Aguilar-Spinelli test for the reliability of hearsay tips in this particular context and contained sufficient information about defendants' unlawful possession of a weapon to create reasonable suspicion, the lawfulness of the stop of defendants' vehicle is beyond further review. Furthermore, under these circumstances, the absence of predictive information in the tip was not fatal to its reliability. On this record, the lower courts did not err in concluding that the police's other actions were lawful.
>
> In People v. Johnson, whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established. The caller's cursory allegation that the driver of the car was either sick or intoxicated, without more, did not supply the sheriff's deputy who stopped the car with reasonable suspicion that defendant was driving while intoxicated. Although the deputy observed defendant commit a minor traffic infraction, this did not authorize the vehicle stop because he was outside his geographical jurisdiction at the time of the

> infraction, and defendant's actions in committing the violation did not elevate the deputy's suspicion sufficiently to justify the stop of defendant's car. The issue of whether suppression should be denied on the theory that the deputy's violation of the statutory limits on his jurisdiction does not warrant suppression is not before us.

Id. at 1140-41, 3 N.Y.S.3d at 712 (citations omitted). See also People v. Proper, 2016 WL 3963298 (Webster Just. Ct. 2016). Cf. People v. Wisniewski, 147 A.D.3d 1388, ___, 47 N.Y.S.3d 543, 544 (4th Dep't 2017) ("The evidence in the record establishes that the information provided by the identified citizen informant 'was reliable under the totality of the circumstances, satisfied the two-pronged Aguilar-Spinelli test for the reliability of hearsay tips in this particular context and contained sufficient information about' defendant's commission of the crime of driving while intoxicated").

§ 1:14 Stops based on tips from "known informant" or "identified citizen"

There is a critical distinction between a tip received from an anonymous tipster and a tip received from a "known informant" or an "identified citizen." The former "must be viewed with undiluted suspicion, as it is a notoriously weak and unreliable source of information." People v. Hoffman, 224 A.D.2d 853, ___, 638 N.Y.S.2d 203, 205 (3d Dep't 1996). See also previous section. By contrast, "[a]n identified citizen informant is presumed to be personally reliable." People v. Parris, 83 N.Y.2d 342, 350, 610 N.Y.S.2d 464, 468 (1994). See also People v. Hetrick, 80 N.Y.2d 344, 349, 590 N.Y.S.2d 183, 185 (1992) ("because Katy was an identified citizen informant, and not an unnamed informant, there was a 'built-in' basis for crediting her reliability"); People v. Cantre, 65 N.Y.2d 790, 493 N.Y.S.2d 127 (1985); People v. Hicks, 38 N.Y.2d 90, 94, 378 N.Y.S.2d 660, 664-65 (1975).

Tips received from a known informant or an identified citizen are nonetheless subject to the so-called Aguilar/Spinelli test. See, e.g., People v. DiFalco, 80 N.Y.2d 693, 696, 594 N.Y.S.2d 679, 680 (1993); Hetrick, 80 N.Y.2d at 348, 590 N.Y.S.2d at 185. In this regard, it should be noted that New York adheres to the Aguilar/Spinelli test despite a change in federal law. See, e.g., People v. Edwards, 95 N.Y.2d 486, 495 n.5, 719 N.Y.S.2d 202, 207 n.5 (2000); DiFalco, 80 N.Y.2d at 696 n.1, 594 N.Y.S.2d at 680 n.1; Hetrick, 80 N.Y.2d at 348, 590 N.Y.S.2d at 185; People v. Griminger, 71 N.Y.2d 635, 637, 529 N.Y.S.2d 55, 55-56 (1988).

The Aguilar/Spinelli test provides that:

> [B]efore probable cause based on hearsay is found it must appear . . . that the informant has some basis of knowledge for the information he transmitted to the police and that the information is reliable. The basis of the informant's knowledge must be demonstrated because the information related by an informant, even a reliable one, is of little probative value if he does not have knowledge of the events he describes. Conversely, no matter how solid his basis of knowledge, the information will not support a finding of probable cause unless it is reliable. Since police officers may not arrest a person on mere suspicion or rumor, they likewise may not arrest a suspect on the basis of an informant's tip, perhaps born of suspicion or rumor or intentional fabrication.

People v. Johnson, 66 N.Y.2d 398, 402-03, 497 N.Y.S.2d 618, 621 (1985) (citations omitted). See also People v. Ketcham, 93 N.Y.2d 416, 420, 690 N.Y.S.2d 874, 877 (1999); People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985); People v. Rodriguez, 52 N.Y.2d 483, 438 N.Y.S.2d 754 (1981).

"[I]n the ordinary case where a police officer has obtained evidence from a third person providing probable cause, the defendant has the opportunity to question the officer about the third person's identity, relationship to the crime, basis of knowledge, past relationship to the police and criminal history. The defendant is thus able to raise any appropriate question about the officer's testimony to the suppression court." Edwards, 95 N.Y.2d at 491, 719 N.Y.S.2d at 205.

In People v. Washington, 50 A.D.3d 1539, ___, 856 N.Y.S.2d 783, 784 (4th Dep't 2008), the Appellate Division, Fourth Department, held that "[t]he police officer had reasonable suspicion for the initial stop of the vehicle based upon information from an identified citizen informant that the driver of the vehicle was drinking alcohol and driving erratically." See also People v. Kirkey, 17 A.D.3d 1149, ___, 793 N.Y.S.2d 856, 857 (4th Dep't 2005) ("The police had the requisite reasonable suspicion to stop the vehicle driven by defendant based on information provided by an identified citizen informant, and that information was corroborated by the personal observations of the officer who stopped the vehicle") (citation omitted); People v. Hoffman, 283 A.D.2d 928, ___, 725 N.Y.S.2d 494, 496 (4th Dep't 2001) ("the police had reasonable suspicion to stop his vehicle based on information from an identified citizen informant

concerning a hit-and-run accident. The identified citizen informant was presumed to be reliable and his basis of knowledge was his observation of the offense").

§ 1:15 Pretext stops

"A pretext stop has generally been defined as a police officer's use of a traffic infraction as a subterfuge to stop a motor vehicle in order to investigate the driver or occupant about an unrelated matter." People v. Robinson, 271 A.D.2d 17, ___, 711 N.Y.S.2d 384, 386 (1st Dep't 2000), aff'd, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001). Although the terms "pretext stop" and "illegal stop" had tended to be synonymous, in Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996), the United States Supreme Court held that a police officer's underlying intent or motivation is irrelevant for 4th Amendment purposes. Thus, as long as a police officer possesses a legal basis to stop a vehicle for a traffic violation, the defendant cannot argue that the traffic violation was used as a mere pretext to investigate an unrelated crime. In other words, in determining whether the 4th Amendment has been violated, Courts must apply a standard of objective reasonableness, without regard to the underlying intent or motivation of the officer.

In People v. Robinson, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001), a sharply divided Court of Appeals held that pretext stops are now legal in New York as well:

> The issue here is whether a police officer who has probable cause to believe a driver has committed a traffic infraction violates article I, § 12 of the New York State Constitution when the officer, whose primary motivation is to conduct another investigation, stops the vehicle. We conclude that there is no violation, and we adopt Whren v. United States as a matter of state law. * * *
>
> We hold that where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant. * * *

> Because the Vehicle and Traffic Law provides an objective grid upon which to measure probable cause, a stop based on that standard is not arbitrary in the context of constitutional search and seizure jurisprudence.

Id. at 346, 349, 355, 741 N.Y.S.2d at 149, 151, 155 (citation omitted). See also People v. Wright, 98 N.Y.2d 657, 746 N.Y.S.2d 273 (2002); People v. Pealer, 20 N.Y.3d 447, 457 n.2, 962 N.Y.S.2d 592, 598 n.2 (2013).

Nonetheless, the Robinson Court did note that:

> To be sure, the story does not end when the police stop a vehicle for a traffic infraction. Our holding in this case addresses only the initial police action upon which the vehicular stop was predicated. The scope, duration and intensity of the seizure, as well as any search made by the police subsequent to that stop, remain subject to the strictures of article I, § 12, and judicial review.

97 N.Y.2d at 353, 741 N.Y.S.2d at 154.

§ 1:16 Checkpoint stops

This topic is covered at length in Chapter 5, *infra*.

§ 1:17 Mistaken arrests

In People v. Jennings, 54 N.Y.2d 518, 520, 446 N.Y.S.2d 229, 230 (1981), the Court of Appeals held that:

> An arrest is invalid when the arresting officer acts upon information in criminal justice system records which, though correct when put into the records, no longer applies and which, through fault of the system, has been retained in its records after it became inapplicable. Accordingly, an arrest made in reliance upon the computerized criminal record file of defendant, which showed as outstanding a parole violation warrant which had in fact been executed nine months before and vacated four months before the arrest, is made without probable cause.

See also People v. Watson, 100 A.D.2d 452, 474 N.Y.S.2d 978 (2d Dep't 1984); People v. Lent, 92 A.D.2d 941, 460 N.Y.S.2d 369 (2d Dep't 1983).

Notably, the Jennings Court "expressly reject[ed] the People's contention that Officer Enright's 'good faith' reliance upon the parole warrant 'hit' renders the exclusionary rule inapplicable," reasoning that:

> An assessment of probable cause turns on what was reasonably and objectively in the mind of law enforcement authorities. It does not turn on such subjective considerations as the absence of malice against a suspect, the lack of intent to violate constitutional rights, or any other variation of what has been referred to in another context as the "white heart and empty head" standard. The good faith of the enforcement authorities cannot validate an arrest based upon a warrant which had been vacated four months before and had been executed nine months before the arrest was made.

54 N.Y.2d at 523, 446 N.Y.S.2d at 232 (citations omitted). Cf. Herring v. United States, 555 U.S. 135, 129 S.Ct. 695 (2009).

It should be noted that Herring utilized the "good faith" exception to the 4th Amendment exclusionary rule created by United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). This exception to the exclusionary rule was expressly rejected by the Court of Appeals on State Constitutional law grounds in People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985).

§ 1:18 Warrantless arrests in the home

This topic is covered at length in Chapter 4, *infra*.

§ 1:19 Out-of-state stops and arrests

Pursuant to CPL § 140.10(3), a police officer may only pursue a person out-of-state to arrest the person for a crime. By contrast, where the arrest is for a petty offense, the officer can "follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him or her in any county in which he or she apprehends him or her." CPL § 140.10(2)(b).

In the context of a DWI case, the defendant is literally never arrested for DWI based upon his or driving. Rather, the defendant is typically stopped for a traffic infraction that

evolves into an arrest for DWI. Thus, where a motorist is pursued out-of-state for a traffic infraction which ultimately leads to an out-of-state arrest for DWI, the issue arises as to whether the arrest is lawful. In People v. Lane, 144 Misc. 2d 953, 550 N.Y.S.2d 529 (App. Term, 9th and 10th Jud. Dist. 1989), the Court reversed the defendant's conviction of DWI under these circumstances. In so holding, the Court reasoned that:

> In the instant case, the record indicates that a deputy sheriff pursued defendant into Connecticut only for driving to the left of the pavement markings (Vehicle and Traffic Law § 1126[a]), a mere traffic infraction. The testimony is clear that he made no judgment or opinion as to whether defendant was intoxicated until after the completion of performance tests, all of which were done in Connecticut. Hence, the subject arrest violated CPL 140.10(3) because the deputy was not pursuing a person outside the state who he had probable cause to believe committed a crime. "'Crime' means a misdemeanor or a felony" (Penal Law § 10.00[6]). It does not mean a petty offense which is defined as ". . . a violation or a traffic infraction" (CPL 1.20[39]). * * *
>
> Clearly, in the absence of the evidence unlawfully obtained, the court below could not have found defendant guilty beyond a reasonable doubt of driving while intoxicated pursuant to Vehicle and Traffic Law section 1192.

Id. at ___, 550 N.Y.S.2d at 530-31.

§ 1:20 Authority of out-of-state police officers to make arrests in New York

In People v. LaFontaine, 92 N.Y.2d 470, 682 N.Y.S.2d 671 (1998), the Court of Appeals made clear that, although "[o]ut-of-State police officers may be authorized to make arrests in New York, [they may] generally only [do so] when they are in hot pursuit." Id. at 475, 682 N.Y.S.2d at 674. See also CPL § 140.55. In so holding, the Court reversed the Appellate Division, First Department, decision reported at 235 A.D.2d 93, 664 N.Y.S.2d 587 (1st Dep't 1997).

§ 1:21 Even where initial stop is lawful, continued detention may not be

Even where the initial stop is lawful, the defendant's continued detention can be unlawful where the police immediately discover that the reason for the stop was invalid. See, e.g., People v. Smith, 1 A.D.3d 965, ___, 767 N.Y.S.2d 327, 328 (4th Dep't 2003) ("The lack of a license plate on a vehicle generally will justify a stop of the vehicle for violation of Vehicle and Traffic Law § 402. Here, however, upon stopping defendant's vehicle, the officer observed that it had a Florida rear license plate and realized that no front plate was required") (citations omitted); People v. Mowatt, 176 Misc. 2d 919, ___, 674 N.Y.S.2d 585, 586-87 (N.Y. City Crim. Ct. 1998) ("The initial stop of the defendant was justified based upon the fact that his car did not have front or rear license plates. . . . [However, h]aving seen the temporary license [affixed to the vehicle's rear window], P.O. Hibbert no longer had any reasonable suspicion that the defendant was violating any law or traffic regulation. There was, therefore, no longer any legal basis to further detain the defendant").

§ 1:22 Length of traffic stop must be reasonable

In People v. Banks, 85 N.Y.2d 558, 562, 626 N.Y.S.2d 986, 988 (1995), the Court of Appeals held that a lawful stop turned into an illegal detention under the following circumstances:

> For a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance. While the stop was justified in the instant case, the length and circumstances of the detention were not. Consequently, the evidence ultimately seized must be suppressed.
>
> Trooper Cuprill's observations of Jones' seat belt violation justified the initial stop of Jones and defendant in the vehicle. However, once Cuprill's license and stolen vehicle radio check came back negative and he prepared the traffic tickets for the seat belt violations, the initial justification for seizing and detaining defendant and Jones was exhausted. The Trooper nevertheless retained their licenses, effectively forcing them to remain at the scene while he awaited

> the appearance of the backup Trooper he had requested. This continued involuntary detention of defendant and Jones and their vehicle constituted a seizure in violation of their constitutional rights, unless circumstances coming to Cuprill's attention following the initial stop furnished him with reasonable suspicion that they were engaged in criminal activity. Contrary to the holdings of the courts below, defendant's nervousness and the innocuous discrepancies in his and Jones' answers to the Trooper's questions regarding the origin, destination and timing of their trip did not alone, as a matter of law, provide a basis for reasonable suspicion of criminality.

(Citations omitted). See also People v. Milaski, 62 N.Y.2d 147, 156, 476 N.Y.S.2d 104, 108 (1984) ("The two different reasons given by defendant for his presence in the parking area, although at variance, along with defendant's nervousness and other inconsistencies in his statements, provided no indication of criminality on his part which would have justified further detention"); People v. May, 52 A.D.3d 147, 861 N.Y.S.2d 276 (1st Dep't 2008); People v. Barreras, 253 A.D.2d 369, 677 N.Y.S.2d 526 (1st Dep't 1998); People v. Turriago, 219 A.D.2d 383, 644 N.Y.S.2d 178 (1st Dep't 1996), aff'd as modified, 90 N.Y.2d 77, 659 N.Y.S.2d 183 (1997); People v. Pizzo, 144 A.D.2d 930, 534 N.Y.S.2d 249 (4th Dep't 1988). See generally People v. Major, 263 A.D.2d 360, 693 N.Y.S.2d 30 (1st Dep't 1999); People v. Chann, 221 A.D.2d 155, ___, 633 N.Y.S.2d 150, 150 (1st Dep't 1995) ("During a traffic stop, defendant made a hand motion as if to place an object in the back seat. This did not provide sufficient basis to search the vehicle"); People v. Antelmi, 196 A.D.2d 658, ___, 601 N.Y.S.2d 634, 635 (2d Dep't 1993) ("the record supports the hearing court's finding that the vehicle in which the defendant was a passenger was properly stopped by the police for a traffic violation. However, the police thereafter forcibly detained and searched the defendant when he attempted to leave. We find that this conduct exceeded that which is permissible during a normal traffic stop, as there was no showing of a reasonable suspicion on the part of the police that the defendant was committing, had committed, or was about to commit a crime") (citations omitted).

§ 1:23 When can the police request a person's driver's license and registration?

Whenever a person has been lawfully stopped for a traffic infraction, the police can validly request to see the person's driver's license and registration (and related information).

See, e.g., People v. Ellis, 62 N.Y.2d 393, 396, 477 N.Y.S.2d 106, 107 (1984) ("The police officers, observing a traffic infraction, properly followed and stopped defendant and asked him for his driver's license and the rental agreement for the car"); People v. Graham, 54 A.D.3d 1056, ___, 865 N.Y.S.2d 259, 262 (2d Dep't 2008) ("the officer's observation of traffic infractions justified the initial stop and gave him 'the right to ask questions relating to the defendant's destination, to request that he produce his license and registration, and to ask him to stand by momentarily pending further investigation'") (citation omitted); People v. Leiva, 33 A.D.3d 1021, ___, 823 N.Y.S.2d 494, 495-96 (2d Dep't 2006); People v. Derrell, 26 Misc. 3d 697, ___, 889 N.Y.S.2d 905, 913 (N.Y. Co. Sup. Ct. 2009).

Indeed, anyone approached pursuant to a valid DeBour level 1 request for information (involving a motor vehicle) can be asked to produce his or her driver's license. See People v. Thomas, 19 A.D.3d 32, ___, 792 N.Y.S.2d 472, 480 (1st Dep't 2005) ("it is well established by prior case law that a police officer, in directing a level I request for information to an occupant of an already-stationary vehicle, is entitled to ask such a person -- whether the driver or a passenger -- for documentary identification, such as a driver's license").

In People v. Hale, 75 A.D.2d 606, ___, 426 N.Y.S.2d 827, 828 (2d Dep't 1980), the Appellate Division, Second Department, rejected the defendant's claim "that the police had no right, where there had been no accident, to require production of an insurance identification card after defendant had already produced a valid license and registration." In so holding, the Court reasoned that "[a] New York motorist is required to carry an insurance identification card whenever operating a motor vehicle and to produce it upon request of any police officer, and this duty is not negated by the production of a valid license and registration. The purpose of this requirement is to insure that the highways of the State are utilized by insured vehicles." Id. at ___, 426 N.Y.S.2d at 828 (citations omitted).

§ 1:24 What if the person doesn't produce driver's license and registration?

A person who either fails or refuses to produce his or her driver's license and registration following a proper request therefor will generally be arrested. The reason why is simple: a person who does not have proper identification cannot be issued a traffic ticket. See, e.g., People v. Ellis, 62 N.Y.2d 393, 396, 477 N.Y.S.2d 106, 107-08 (1984) ("Once it became evident that defendant could not be issued a summons on the spot because of his inability to produce any identification, the officers were warranted in arresting him to remove him to the police station and in frisking him before doing so"); People v. Copeland, 39

N.Y.2d 986, 986-87, 387 N.Y.S.2d 234, 234 (1976) (same); United States v. Barber, 839 F. Supp. 193, 200-01 (W.D.N.Y. 1993); People v. Cooper, 38 A.D.3d 678, ___, 833 N.Y.S.2d 118, 120 (2d Dep't 2007); People v. Mezon, 228 A.D.2d 621, 644 N.Y.S.2d 763 (2d Dep't 1996); People v. Clark, 227 A.D.2d 983, ___, 643 N.Y.S.2d 836, 836-37 (4th Dep't 1996); People v. Miller, 149 A.D.2d 538, ___, 539 N.Y.S.2d 809, 812 (2d Dep't 1989); People v. Bohn, 91 Misc. 2d 132, ___, 397 N.Y.S.2d 514, 515 (App. Term, 9th & 10th Jud. Dist. 1977) (per curiam) ("The failure or refusal of a motorist to exhibit a license or registration when properly requested is not a violation that falls within the scope of section 1102. We note that where an operator of a motor vehicle fails to exhibit the required documents he may be charged with being an unlicensed operator or operating an unregistered vehicle. Moreover, if he fails or refuses to sufficiently identify himself, the operator may also be arrested"); People v. Alston, 9 Misc. 3d 1046, ___, 805 N.Y.S.2d 258, 261 (N.Y. City Crim. Ct. 2005) (although "refusal to comply with a request for documentation [justifies arrest, it] is not an independently unlawful act that amounts to obstruction of governmental administration"). See generally People v. Branigan, 67 N.Y.2d 860, 501 N.Y.S.2d 655 (1986).

It should be noted that the failure to produce a validly requested driver's license, registration or insurance card (a) violates the VTL, and (b) is presumptive evidence that the driver/vehicle is not validly licensed/registered/insured. See, e.g., VTL §§ 507(2), 401(4), 312(1)(b) & 319(3); Branigan, 67 N.Y.2d at 862, 501 N.Y.S.2d at 656; Cooper, 38 A.D.3d at ___, 833 N.Y.S.2d at 120.

§ 1:25 When can a police officer demand that the driver exit the vehicle?

"In Pennsylvania v. Mimms, the United States Supreme Court held that the inherent and inordinate risk of danger confronting an officer as he approaches the driver of an automobile that has been stopped for a traffic infraction justifies the minimal additional intrusion of ordering the driver out of the car." People v. McLaurin, 70 N.Y.2d 779, 781, 521 N.Y.S.2d 218, 219 (1987) (citation omitted). See also People v. Garcia, 20 N.Y.3d 317, 321-22, 959 N.Y.S.2d 464, 466 (2012); People v. Robinson, 74 N.Y.2d 773, 774, 545 N.Y.S.2d 90, 90 (1989); People v. Livigni, 88 A.D.2d 386, 453 N.Y.S.2d 708 (2d Dep't 1982), aff'd for the reasons stated in the opinion below, 58 N.Y.2d 894, 460 N.Y.S.2d 530 (1983).

In People v. Tittensor, 244 A.D.2d 784, 666 N.Y.S.2d 267 (3d Dep't 1997), the Appellate Division, Third Department, held that the defendant was properly requested to exit his vehicle and perform field sobriety tests after (1) the officer observed the

defendant commit a violation of the VTL, (2) the defendant failed to produce a driver's license at the officer's request, (3) the officer observed several indicia of intoxication (*i.e.*, glassy eyes, slurred speech and strong odor of alcohol), and (4) the defendant admitted consuming 4 rum and coke drinks.

In People v. McCarthy, 135 A.D.2d 1113, 523 N.Y.S.2d 291 (4th Dep't 1987), the Appellate Division, Fourth Department, reversed the County Court's finding that the defendant was improperly requested to exit his vehicle. The Court's memorandum decision held as follows:

> After a hearing, County Court dismissed the indictment charging defendant with driving while intoxicated. The court wrote that the arresting officer stopped defendant's car for an equipment violation at 3:00 A.M. and, other than that, there was no evidence of any moving violation. Without making any other findings, the court concluded, "On these facts we find there was no probable cause to require the defendant to exit his vehicle, retire to the back of the police vehicle and submit to a roadside sensor test." The arresting officer was the only witness who testified at the hearing. His testimony reveals that, after stopping the car, he talked to defendant, who was sitting in his car, and noticed that defendant's eyes were bloodshot, that his speech was slurred, and that there was a strong odor of alcohol coming from the car. Based on those facts, we conclude that the officer had probable cause to believe that defendant had been driving his automobile while at least his ability was impaired by the consumption of alcohol (Vehicle & Traffic Law § 1192[1]). The fact that the stop was based only on the officer's observation of an equipment violation does not preclude a finding that, after the lawful stop, the officer had reason to believe that defendant was guilty of driving while intoxicated or, at least, driving while his ability had been impaired by the consumption of alcohol.

Id. at ___, 523 N.Y.S.2d at 291.

What if the stop was for a reason other than a traffic infraction (e.g., a sobriety checkpoint)? In People v. Scott, 63 N.Y.2d 518, 522, 483 N.Y.S.2d 649, 650 (1984), the Court of Appeals held that:

> A roadblock established pursuant to a written directive of the County Sheriff for the purpose of detecting and deterring driving while intoxicated or while impaired, *and as to which operating personnel are prohibited from administering sobriety tests unless they observe listed criteria, indicative of intoxication, which give substantial cause to believe that the operator is intoxicated*, is constitutionally permissible, notwithstanding that the location of the roadblock is moved several times during the three- to four-hour period of operation, and notwithstanding that legislative initiatives have also played a part in reducing the incidence of driving while intoxicated in recent years.

(Emphasis added). See also People v. Rios, 27 Misc. 3d 963, ___, 898 N.Y.S.2d 797, 803 (Kings Co. Sup. Ct. 2010) ("Normally, a police officer can direct a motorist to exit a vehicle as part of a routine traffic stop. However, as noted above, this case does not involve the stop of a moving vehicle; the police directed an individual to exit a vehicle that was stationary and parked alongside a curb. Under these circumstances, without reasonable suspicion, it is improper for the police to direct occupants out of a car"); People v. Harris, 173 Misc. 2d 49, ___, 660 N.Y.S.2d 792, 795 (Monroe Co. Sup. Ct. 1997) ("because there was no traffic violation, and because there was no reasonable suspicion of criminal activity, Sergeant Giaconia lacked the authority to order the defendant and his passengers out of the defendant's vehicle. As a result, he was not lawfully in the position to observe the handgun") (footnote omitted).

§ 1:26 When can a police officer demand that passengers exit the vehicle?

In People v. Robinson, 74 N.Y.2d 773, 774-75, 545 N.Y.S.2d 90, 90-91 (1989), the Court of Appeals held as follows:

> The Fourth Amendment of the United States Constitution is not violated when a driver is directed to step out briefly from a lawfully stopped and detained vehicle because the inherent and inordinate danger to investigating police officers in completing their authorized official responsibilities in such circumstances justifies that precautionary action. The United States Supreme Court has reiterated that out of a concern for safety, "officers may, consistent with the Fourth Amendment, exercise their

> discretion to require a driver who commits a traffic violation to exit the vehicle *even though they lack any particularized reason for believing the driver possesses a weapon*."
>
> Defendant was a passenger in a car which unquestionably was lawfully stopped by two officers because it made an unsignalled right turn from the left lane of a New York City street across the flow of right-lane traffic cutting off another car and motorist one and a half car lengths behind it in the right lane. After pulling the car over, the officers approached one on each side. While one officer spoke with the driver about the traffic infraction, the other directed the defendant passenger to step out onto the sidewalk. With the passenger door open, the butt of a loaded .357 magnum handgun was plainly visible protruding from beneath the seat. The gun was seized and defendant was arrested. A postarrest search disclosed an additional six rounds of ammunition in defendant's pocket.
>
> We conclude, as to defendant's Federal constitutional argument, the only one preserved in this case, that precautionary police conduct directed at a passenger in a lawfully stopped vehicle is equally authorized, within Federal constitutional guideposts, as that applied to a driver. Inasmuch as the risks in these police/civilian vehicle encounters are the same whether the occupant is a driver or a passenger, "police may order persons out of an automobile during a stop for a traffic violation." Brief and uniform precautionary procedures of this kind are not per se unreasonable and unconstitutional.

(Citations omitted). See also People v. Garcia, 20 N.Y.3d 317, 321-22, 959 N.Y.S.2d 464, 466 (2012); People v. Mundo, 99 N.Y.2d 55, 750 N.Y.S.2d 837 (2002); People v. McLaurin, 70 N.Y.2d 779, 521 N.Y.S.2d 218 (1987); People v. Livigni, 88 A.D.2d 386, 453 N.Y.S.2d 708 (2d Dep't 1982), aff'd for the reasons stated in the opinion below, 58 N.Y.2d 894, 460 N.Y.S.2d 530 (1983).

§ 1:27 "Reasonable cause" and "probable cause" are synonymous

The CPL uses the phrase "reasonable cause" in lieu of the phrase "probable cause." See, e.g., CPL § 70.10(2). However, it is well settled that "[r]easonable cause means probable cause."

People v. Maldonado, 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 158 (1995). See also People v. Johnson, 66 N.Y.2d 398, 402 n.2, 497 N.Y.S.2d 618, 621 n.2 (1985).

§ 1:28 Probable cause to arrest in a VTL § 1192 case

CPL § 70.10(2) provides, in pertinent part, that:

> "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.

As the previous section demonstrates, although the CPL uses the phrase "reasonable cause" in lieu of the phrase "probable cause," it is well settled that "[r]easonable cause means probable cause." People v. Maldonado, 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 158 (1995). See also People v. Johnson, 66 N.Y.2d 398, 402 n.2, 497 N.Y.S.2d 618, 621 n.2 (1985). The Court of Appeals has consistently made clear that:

> In passing on whether there was probable cause for an arrest, . . . the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice.

People v. Carrasquillo, 54 N.Y.2d 248, 254, 445 N.Y.S.2d 97, 100 (1981). See also People v. Vandover, 20 N.Y.3d 235, 237, 958 N.Y.S.2d 83, 84 (2013) (same); People v. DeBour, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 380 (1976) ("We have frequently rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause").

Interestingly, the Court of Appeals had never addressed the issue of what constitutes probable cause to arrest in a VTL § 1192 case until it decided Vandover, *supra*, in 2013. In Vandover, the Court held that "[t]he standard to be followed is that it is more probable than not that defendant is actually impaired." 20 N.Y.3d at 239, 958 N.Y.S.2d at 85. Vandover makes clear that probable cause is not established in a VTL § 1192 case where there is proof that the defendant consumed alcohol (or drugs) but no proof of actual impairment.

Applying the "more probable than not that defendant is actually impaired" standard to the facts of the case, the Court of Appeals affirmed the Appellate Term's determination that there was a lack of probable cause under the following circumstances:

> On October 1, 2008, defendant appeared in Justice Court on an unrelated traffic ticket. While at the courthouse, defendant spoke with an Officer James who noticed that she had glassy, bloodshot eyes, an odor of alcohol on her breath and seemed lethargic. Concerned that defendant may well be intoxicated and intending to drive a vehicle, Officer James informed Officer Barry of his observations. Both officers proceeded to follow defendant to the parking lot where they observed her getting into her automobile and moving in reverse for approximately two feet as she exited the parking spot. Officer Barry stopped defendant. Upon her exiting the vehicle, Officer Barry administered a field sobriety test. Officer James had gone to the nearby police headquarters to retrieve a portable breath analyzer and did not observe the full field sobriety test given by Officer Barry. When Officer James returned with the equipment, he noticed, for the first time a young child in the back seat of the car without a seatbelt. Officer Barry also performed the portable breath test on defendant, which recorded a positive result. Defendant made statements, prior to her arrest, to the effect that she "had gotten off work at 8:00 [a.m.]" and "ha[d] a couple of drinks," but those were consumed several hours prior and that she was not currently under the influence of alcohol. * * *
>
> Defendant moved to suppress her statements and other evidence obtained and a probable cause hearing was held at which Officer James and a Sergeant Metzger, who had come upon the scene, testified. Officer Barry, who administered the field sobriety test and the portable breathalyzer test, however, did not testify. Justice Court found the officers' testimony to be credible but that Sergeant Metzger's testimony was generally cumulative of Officer James' testimony. However, Sergeant Metzger did testify that the positive reading of the portable breath

> analyzer, in this instance, was as consistent with an alcohol content below the statutory level of impairment as with a blood alcohol level above the limit. Justice Court noted Officer Barry's absence and stated that "without [his] testimony there is insufficient testimony in the record necessary for a finding that the arrest on any of the charges was based upon probable cause." Justice Court, citing the testimony of Officer James, that defendant had glassy bloodshot eyes, breath that smelled of alcohol and a generally fatigued demeanor, found that this was insufficient to establish probable cause to arrest defendant and accordingly dismissed the charges. The Appellate Term affirmed the dismissal.

Id. at 237-38, 958 N.Y.S.2d at 84-85 (citation omitted).

Although courts find a lack of probable cause to arrest in DWI cases on a somewhat regular basis, such decisions are almost never published. Since virtually every published decision has held that probable cause to arrest (as opposed to probable cause to stop) existed, there is little need to provide a comprehensive list of cases holding that a DWI arrest was lawful. Other than proof that it is more likely than not that the defendant was actually impaired, the key to a probable cause determination is that the People's proof must be credible. See, e.g., People v. Berrios, 28 N.Y.2d 361, 369, 321 N.Y.S.2d 884, 890 (1971) ("Where the Judge at the suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress"); id. at 368, 321 N.Y.S.2d at 889 ("we are not oblivious to the problem that there is always a possibility that a witness will perjure himself. Indeed, this is why credibility is usually a crucial issue whenever facts are in dispute and courts have traditionally addressed themselves to the resolution of this basic question as a part of the fact-finding process"); People v. Clough, 70 A.D.3d 474, ___, 895 N.Y.S.2d 52, 52-53 (1st Dep't 2010) ("the People have the burden of going forward to show the legality of the police conduct in the first instance, and that burden cannot be met by testimony that the hearing court finds incredible") (citation omitted); People v. Burton, 130 A.D.2d 675, ___, 515 N.Y.S.2d 601, 602 (2d Dep't 1987) ("Since the court concluded that the Police witnesses were not credible, it should have concluded that the People had not met their burden of coming forward with sufficient evidence and granted the motion to suppress"); People v. Farrell, 89 A.D.2d 987, ___, 454 N.Y.S.2d 306, 308 (2d Dep't 1982) ("It is well settled that witnesses must be adjudged by their demeanor as well as their

testimony and that the trial judge, who saw and heard the witnesses, is in a much better position to judge their testimony than an appellate court"); People v. Smith, 77 A.D.2d 544, ___, 430 N.Y.S.2d 95, 97 (1st Dep't 1980) ("It is implicit in this concept that testimony offered by the People, such as that of the detective who was the sole witness in this motion to suppress evidence, must be credible").

Simply stated, anyone can take the witness stand and rattle off a list of indicia of impairment (e.g., odor of an alcoholic beverage, glassy/bloodshot eyes, slurred speech, impaired motor coordination, failure of field sobriety tests, etc.). The mere claim that these things were observed does not make it so. Indeed, the authors find that, where they exist, videos of a defendant's arrest for DWI often depict a very different series of events than what is portrayed in the arresting officer's paperwork and/or testimony. For example, in Matter of Fermin-Perea v. Swarts, 95 A.D.3d 439, ___, 943 N.Y.S.2d 96, 98-99 (1st Dep't 2012), which dealt with a motorist's appeal of a DMV chemical test refusal revocation:

> The arresting officer's refusal report, admitted in evidence at the hearing, indicates that upon stopping petitioner because he was speeding, following too closely, and changing lanes without signaling, the officer observed that petitioner was unsteady on his feet, had bloodshot eyes, slurred speech and "a strong odor of alcoholic beverage on [his] breath." However, the field sobriety test, administered approximately 25 minutes later, a video of which was admitted in evidence at the hearing, establishes that petitioner was not impaired or intoxicated. Specifically, the video demonstrates that over the course of four minutes, petitioner was subjected to standardized field sobriety testing and at all times clearly communicated with the arresting officer, never slurred his speech, never demonstrated an inability to comprehend what he was being asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.
>
> Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law. However, where, as here, a field sobriety test

> conducted less than 30 minutes after the officer's initial observations, convincingly establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record. . . . Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.
>
> The dissent ignores the threshold issue here, namely, that refusal to submit to a chemical test only results in revocation of an operator's driver's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while intoxicated or impaired. Here, while the officer's initial observations are indeed indicative of intoxication or at the very least, impairment, the results of the field sobriety test administered thereafter -- a more objective measure of intoxication -- necessarily precludes any conclusion that petitioner was operating his vehicle while intoxicated or impaired. Any conclusion to the contrary simply disregards the applicable burden which, as the dissent points out, requires less than a preponderance of the evidence, demanding only that "a given inference is reasonable and plausible." Even under this diminished standard of proof, it is simply unreasonable and uninferable that petitioner was intoxicated or impaired while operating his motor vehicle and yet, 25 minutes later he successfully and without any difficulty passed a field sobriety test.

(Citations omitted).

It seems clear that after reviewing the video, the majority in Fermin-Perea believed that the arresting officer's Report of Refusal was not credible.

§ 1:29 A valid arrest is a prerequisite to a lawful request to submit to a chemical test

VTL § 1194(2)(a) provides, in pertinent part:

> 2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:
>
> > (1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] and within two hours after such person has been placed under arrest for any such violation; or . . .
> >
> > (2) within two hours after a breath [screening] test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member. . . .

For underage offenders being requested to submit to a chemical test pursuant to the Zero Tolerance laws, see § 15:30, *infra*.

As VTL § 1194(2)(a) makes clear, either a lawful VTL § 1192 arrest, or a positive result from a lawfully requested breath screening test, is a prerequisite to a valid request that a DWI suspect submit to a chemical test. See, e.g., People v. Moselle, 57 N.Y.2d 97, 107, 454 N.Y.S.2d 292, 296 (1982); Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, ___, 535 N.Y.S.2d 203, 204 (3d Dep't 1988) ("In order for the testing strictures of Vehicle and Traffic Law § 1194 to come into play, there must have been a lawful arrest for driving while intoxicated"); People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 74 (3d Dep't 1983); Matter of June v. Tofany, 34 A.D.2d 732, ___, 311 N.Y.S.2d 782, 783 (4th Dep't 1970); Matter of Burns v.

Hults, 20 A.D.2d 752, ___, 247 N.Y.S.2d 311, 312 (4th Dep't 1964); Matter of Leonard v. Melton, 58 A.D.2d 669, ___, 395 N.Y.S.2d 526, 527 (3d Dep't 1977) (proof that DWI suspect operated vehicle is necessary prerequisite to valid request to submit to chemical test pursuant to VTL § 1194). See also Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984) ("It is not disputed by the parties that an arrestee's refusal to take a breath test would be reasonable, and therefore operating privileges could not be revoked, if the underlying arrest was not lawful. Indeed, state law has consistently provided that a valid arrest is a necessary prerequisite to the imposition of a breath test").

§ 1:30 Probable cause can generally consist of reliable hearsay

CPL § 70.10(2) provides that:

> "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, such apparently reliable evidence may include or consist of hearsay*.

(Emphasis added). See also CPL § 710.60(4) (at a suppression hearing, "hearsay evidence is admissible to establish any material fact").

Critically, however, probable cause cannot be established based solely upon hearsay evidence. In this regard, in People v. Randall, 135 A.D.2d 915, ___, 522 N.Y.S.2d 314, 315 (3d Dep't 1987):

> At the [suppression] hearing the People failed to produce any of the officers involved in the original street encounter with defendant to testify as to probable cause. The only evidence of the officers' probable cause to detain defendant on the street was the hearsay testimony of Sergeant Angel. As the Court of Appeals has held, probable cause cannot be established solely upon hearsay evidence.

See also People v. Gonzalez, 80 N.Y.2d 883, 587 N.Y.S.2d 607 (1992); People v. Havelka, 45 N.Y.2d 636, 641, 412 N.Y.S.2d 345, 347 (1978); People v. Mercado, 197 A.D.2d 898, 602 N.Y.S.2d 254 (4th Dep't 1993).

In Gonzalez, *supra*:

> The issue [was] whether the hearsay testimony of Detective Grossman, the People's sole witness at the suppression hearing, was sufficient, standing alone, to meet the People's burden of showing that defendant voluntarily went to the police precinct where he allegedly made the inculpatory statements.
>
> Detective Grossman testified at the suppression hearing that the three detectives present when defendant was taken from his house told him that defendant voluntarily accompanied them to the precinct. Defendant's wife, however, testified that although her husband was not arrested, the detectives said to him that if he did not come to the precinct voluntarily, he would be forced to do so. The People did not produce any of the three detectives. Nor did the People give any indication that the three detectives were unavailable or offer any reason for not producing at least one of them. The Appellate Division, with one Justice dissenting, affirmed Supreme Court's denial of defendant's suppression motion, holding that it was up to the hearing court to determine the weight and credibility of Detective Grossman's hearsay testimony.
>
> We agree with the dissent at the Appellate Division that the People did not meet their burden of showing that defendant freely consented to go to the precinct. Although Detective Grossman's hearsay testimony was admissible (CPL 710.60[4]), it did not supply the necessary proof of consent. That Grossman, who had no personal knowledge of the relevant facts, testified truthfully as to what the detectives told him has no bearing on the pertinent issue of whether the other detectives' statements were true. Thus, the finding of the hearing court that Grossman was credible is irrelevant. * * *

> The hearing evidence presented substantial questions concerning the legality of the non-testifying detectives' conduct. There is no basis for attributing reliability to the hearsay information related by Grossman or for assuming its truth. Thus, because the People produced no witness with firsthand knowledge of the police conduct in dispute, their proof was insufficient to meet their burden of showing that defendant's consent was voluntary.

80 N.Y.2d at 884-85, 587 N.Y.S.2d at 607-08 (citations omitted).

In People v. Moses, 32 A.D.3d 866, __, 823 N.Y.S.2d 409, 410-11 (2d Dep't 2006):

> At a combined Dunaway/Wade hearing, the prosecution presented only the testimony of the arresting officer, who stated that he received a radio communication regarding a robbery in progress and responded to the complainant's location. After speaking with the complainant, the officer received a second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection. The officer then drove the complainant to that location, where the officer and the complainant observed the defendant leaning against an unmarked police car between two plainclothes police officers wearing "NYPD" jackets. The complainant identified the defendant as the man who broke into her home, and he was placed under arrest. The prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection.

(Citations omitted).

Under these circumstances, the Appellate Division, Second Department, held as follows:

> At a suppression hearing, the prosecution has the initial burden of going forward with evidence to demonstrate the legality of the police conduct in the first instance. The prosecution in this case failed to present any evidence to establish that the defendant was lawfully stopped and detained before the

> complainant made her identification. In this regard, the original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant. Similarly, the vague and equivocal hearsay testimony of the arresting officer concerning a statement made by one of the plainclothes officers was inadequate to demonstrate that the defendant's presence at the scene was lawfully obtained. Accordingly, the prosecution failed to satisfy its burden of establishing the legality of the police conduct which led to the identification of the defendant, and the pretrial identification should have been suppressed.

Id. at ___, 823 N.Y.S.2d at 411 (citations omitted).

§ 1:31 Fellow officer rule

In People v. Ketcham, 93 N.Y.2d 416, 419-21, 690 N.Y.S.2d 874, 877-78 (1999), the Court of Appeals set forth a concise summary of the "fellow officer rule":

> 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 of 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. Information received from another police officer is presumptively reliable. Where, however, an arrest is challenged by a motion to suppress, the prosecution bears the burden of establishing that the officer imparting the information had probable cause to act.
>
> The People may, of course, establish probable cause for a warrantless arrest with hearsay information that satisfies Aguilar-Spinelli. To meet that two-part test, the prosecution must demonstrate the reliability of the hearsay informant and the basis of the informant's knowledge. In other words, there must be evidence that the informant is

generally trustworthy and that the information imparted was "obtained in a reliable way" -- that it constitutes more than unsubstantiated rumor, unfounded accusation or conclusory characterization. An unsubstantiated hearsay communication -- even when transmitted by a fellow officer -- will not satisfy the People's burden.

Where, however, the People demonstrate -- through direct or circumstantial evidence -- how a reliable hearsay informant acquired the information, both prongs of Aguilar-Spinelli may be satisfied. When, for example, the hearsay informant is a police officer who imparts to fellow officers information gathered while personally participating in or observing an undercover drug transaction, there is little doubt as to the reliability of the informant or the basis of knowledge (see, e.g., People v. Petralia [officer made lawful arrest on the basis of radio communication from undercover officer who had purchased heroin and then relayed information describing suspect and suspect's car]; People v. Maldonado [probable cause established based on transmission by primary undercover who engaged in a hand-to-hand drug transaction with a suspect, stating "positive buy," followed by description of individual]; People v. Washington [undercover officer charged with observing primary undercover transmitted "positive observation," a phrase commonly used to indicate exchange of drugs for money, and arresting officer understood those words to mean that the transmitting officer had personally witnessed a drug transaction]).

The prosecution may satisfy its burden even with "double hearsay," or "hearsay-upon-hearsay," so long as both prongs of Aguilar-Spinelli are met at every link in the hearsay chain. As such, police officers may rely on hearsay information derived from a trustworthy informant who did not personally observe a defendant's criminal activity, but came by that information in a reliable, albeit indirect, way. Where, however, there is no evidence indicating how the informant obtained the information passed from one officer to another, there is nothing by which

> to measure the trustworthiness of that information (People v. Parris [police officer's conclusory characterization of informant as an "eyewitness" did not satisfy basis of knowledge requirement where there was no further evidence indicating how the informant obtained description of the suspected burglar]).

(Citations omitted). See also People v. Landy, 59 N.Y.2d 369, 465 N.Y.S.2d 857 (1983).

It has been held that the fellow officer rule applies to auxiliary police officers, see People v. Rosario, 78 N.Y.2d 583, 578 N.Y.S.2d 454 (1991), as well as to out-of-State law enforcement officers. See People v. Lypka, 36 N.Y.2d 210, 366 N.Y.S.2d 622 (1975).

§ 1:32 Probable cause must exist at time of arrest

In determining whether probable cause existed for a defendant's arrest, observations made, or evidence obtained, *subsequent to* the arrest (such as incriminating statements, the results of a chemical test, etc.) cannot be considered. See, e.g., People v. McCarthy, 14 N.Y.2d 206, 209, 250 N.Y.S.2d 290, 292 (1964) (per curiam); People v. O'Neill, 11 N.Y.2d 148, 153, 227 N.Y.S.2d 416, 419 (1962); People v. Loria, 10 N.Y.2d 368, 373, 223 N.Y.S.2d 462, 467 (1961); People v. Oquendo, 221 A.D.2d 223, ___, 633 N.Y.S.2d 492, 493 (1st Dep't 1995); People v. Feingold, 106 A.D.2d 583, ___, 482 N.Y.S.2d 857, 859 (2d Dep't 1984); People v. Bruno, 45 A.D.2d 1025, ___, 358 N.Y.S.2d 183, 184 (2d Dep't 1974); People v. Garafolo, 44 A.D.2d 86, ___, 353 N.Y.S.2d 500, 502 (2d Dep't 1974).

Similarly, "[t]he police may not justify a stop by a subsequently acquired suspicion resulting from the stop. This reasoning is the same which refuses to validate a search by what it produces." People v. DeBour, 40 N.Y.2d 210, 215-16, 386 N.Y.S.2d 375, 380 (1976). See also People v. Sobotker, 43 N.Y.2d 559, 565, 402 N.Y.S.2d 993, 996-97 (1978) ("Subsequent events did indeed demonstrate that the officers' hunch may well have been correct. But a search may not be justified by its avails alone. Constitutionally protected rights are not to be dispensed with in this case solely because the results of the improper search and seizure uncovered the fact that one or all of the persons who were its targets were armed with a deadly weapon. Almost any series of indiscriminate seizures is bound to produce some instances of criminality that might otherwise have gone undetected or unprevented. But were hindsight alone to furnish the governing criteria, a vital constitutional safeguard of our personal security would soon be gone").

§ 1:33 When is a probable cause hearing required?

A warrantless arrest is presumptively illegal. See, e.g., Broughton v. State of New York, 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 94 (1975) ("Whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful"); People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998) ("When the validity of a warrantless arrest is challenged, the presumption of probable cause disappears and the People bear the burden of coming forward with evidence showing that it was supported by probable cause").

In addition, "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, 655, 81 S.Ct. 1684, 1691 (1961). See also Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). In this regard, obtaining a breath or blood sample from a DWI suspect for alcohol and/or drug analysis constitutes a "search" and "seizure" within the meaning of the 4th Amendment. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966); People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1976).

In Brown v. Illinois, *supra*, the defendant "was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by Miranda v. Arizona. Thereafter, while in custody, he made two inculpatory statements. The issue [was] whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue [was] whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the Miranda warnings sufficiently attenuated the taint of the arrest." 422 U.S. at 591-92, 95 S.Ct. at 2256 (citation omitted). In other words, the issue in Brown was whether statements that were voluntarily made under the 5th Amendment were admissible at trial if the statements were the fruits of an illegal arrest without probable cause.

The United States Supreme Court held that:

> The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and

> seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.
>
> Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.
>
> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at 601-03, 95 S.Ct. at 2260-61 (citations and footnotes omitted).

Brown is not a model of clarity, and it apparently confused the Appellate Division, Fourth Department, in People v. Dunaway, 61 A.D.2d 299, 402 N.Y.S.2d 490 (4th Dep't 1978) (as the United

States Supreme Court reversed it in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979)). In Dunaway, the Supreme Court held that:

> [D]etention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation.

442 U.S. at 216, 99 S.Ct. at 2258. This is where the so-called Dunaway hearing (a.k.a. probable cause hearing) comes from.

Since virtually every DWI arrest is warrantless -- and thus presumptively unconstitutional -- it would seem that probable cause hearings would be available for the asking. However, this is not the case. See, e.g., People v. Gruden, 42 N.Y.2d 214, 217, 397 N.Y.S.2d 704, 706 (1977) ("Generally hearings are not available merely for the asking"). Rather, CPL § 710.60 sets forth the procedure governing suppression motions. Critically, however, if the defendant's motion papers are sufficient, then the Court literally *must* grant a Dunaway (*i.e.*, probable cause) and/or a Mapp (*i.e.*, suppression) hearing. See *infra*.

The defendant's motion papers are sufficient when they (a) challenge the lawfulness of the defendant's arrest, and (b) assert sworn allegations of fact in support of such claim that raise a factual dispute on a material point. See CPL § 710.60(3), (4). In this regard, it is well settled that an attorney's affirmation signed by defense counsel is sufficient to satisfy the pleading requirements of CPL § 710.60 (*i.e.*, an affidavit of the defendant is not required). See, e.g., CPL § 710.60(1) ("Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated"); People v. Mendoza, 82 N.Y.2d 415, 425, 604 N.Y.S.2d 922, 926 (1993); People v. Mabeus, 47 A.D.3d 1073, ___, 850 N.Y.S.2d 664, 666 (3d Dep't 2008); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999); People v. Marquez, 246 A.D.2d 330, ___, 667 N.Y.S.2d 359, 360 (1st Dep't 1998); People v. Ayarde, 220 A.D.2d 519, ___, 632 N.Y.S.2d 174, 175 (2d Dep't 1995); People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 500 (1st Dep't 1995); People v. Vasquez, 200 A.D.2d 344, ___, 613 N.Y.S.2d 595, 596 (1st Dep't 1994); People v. Foster, 197 A.D.2d 411, ___, 602 N.Y.S.2d 395, 395 (1st Dep't 1993); People v. Aponte, 193 A.D.2d 529, ___, 598 N.Y.S.2d 937, 937 (1st Dep't 1993); People v. Moore, 186 A.D.2d

591, ___, 588 N.Y.S.2d 388, 389 (2d Dep't 1992); People v. Rodriguez, 185 A.D.2d 802, ___, 586 N.Y.S.2d 968, 968-69 (1st Dep't 1992); People v. Miller, 162 A.D.2d 248, ___, 556 N.Y.S.2d 607, 607 (1st Dep't 1990); People v. Huggins, 162 A.D.2d 129, ___, 556 N.Y.S.2d 75, 75-76 (1st Dep't 1990); People v. Marte, 149 A.D.2d 335, ___, 539 N.Y.S.2d 912, 913 (1st Dep't 1989); People v. Lee, 130 A.D.2d 400, ___, 515 N.Y.S.2d 260, 262 (1st Dep't 1987); People v. Patterson, 129 A.D.2d 527, ___, 514 N.Y.S.2d 378, 379 (1st Dep't 1987); People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986); People v. Sutton, 91 A.D.2d 522, ___, 456 N.Y.S.2d 771, 772 (1st Dep't 1982).

The Court of Appeals has made clear that:

> A trial court is *required* to grant a hearing if the defendant "raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue" of whether evidence was obtained in a constitutionally permissible manner.

People v. Burton, 6 N.Y.3d 584, 587, 815 N.Y.S.2d 7, 9 (2006) (emphasis added) (citation omitted). See also CPL § 710.60(3), (4); People v. Mendoza, 82 N.Y.2d 415, 426, 604 N.Y.S.2d 922, 926 (1993); People v. Gruden, 42 N.Y.2d 214, 215, 397 N.Y.S.2d 704, 705 (1977); People v. Bennett, 240 A.D.2d 292, ___, 659 N.Y.S.2d 260, 261 (1st Dep't 1997) ("It is not necessary that a moving defendant raise an issue of fact as to every factual allegation put forth by the prosecution in order for a hearing to be ordered").

Nonetheless, many prosecutors oppose the granting of a Dunaway/Mapp hearing in literally every single case, reflexively asserting that the defendant has failed to allege sufficient facts to entitle him/her to a hearing regardless of the facts alleged in the defendant's motion papers. In this regard, the People typically cite cases such as People v. Roberto H., 67 A.D.2d 549, 416 N.Y.S.2d 305 (2d Dep't 1979), in which the defendant failed to allege a single fact in support of his motion to suppress.

A review of Roberto H. demonstrates that defense counsel's affirmation in that case was patently inadequate to justify a suppression hearing. Specifically, as the Roberto H. Court noted:

> With regard to the remaining portions of the motion to suppress, defense counsel submitted a supporting affirmation alleging:

"That your affirmant has been served with a notice, a copy of which is annexed hereto, by the District Attorney's office that testimony will be offered at the trial of this matter identifying the defendant as the perpetrator of the within crimes.

"That your affirmant submits that should it appear that the identification herein was made under circumstances highly suggestive, unfair and prejudicial to the defendant, so as to deny him due process of law in violation of the 'FOURTH', 'FIFTH', 'SIXTH' and 'FOURTEENTH' Amendments to the United States Constitution, that evidence should be suppressed from the trial of this matter and your affirmant requests a hearing to determine that issue.

* * * * * *

"That upon information and belief, upon the date of his arrest an illegal and unlawful search was conducted by arresting law enforcement officials.

"That the District Attorney has failed to disclose the exact facts and circumstances surrounding the search and it is your affirmant's belief that contraband which is the subject of the within indictment was obtained therefrom.

"That your affirmant respectfully submits that if it should appear that the search conducted was an unreasonable search and seizure in violation of defendant's 'FOURTH', 'FIFTH' and 'FOURTEENTH' Amendment Rights of the United States Constitution, the contraband obtained therefrom should be suppressed from use upon the trial of this matter and your affirmant requests a hearing to determine that issue."

It is abundantly clear from these excerpts, which comprise the sum and substance of the allegations in support of the motion, that defendant failed to comply with the

> *requirements of CPL 710.60. The affirmation fails to allege any facts whatever, let alone facts in support of the grounds for the motion.*

Id. at ___, 416 N.Y.S.2d at 306-07 (emphasis added).

Simply stated, there was literally not one single fact alleged by the attorney in Roberto H. that either (a) dealt with any of the specific facts of the case, and/or (b) stated a ground for suppression.

Another case that is frequently misapplied by the People is People v. Gruden, 42 N.Y.2d 214, 397 N.Y.S.2d 704 (1977). In Gruden, *the defendants* brought speedy trial motions pursuant to CPL § 30.30. The defendants' motion papers alleged sufficient facts which, if undisputed, would require that the motions be summarily *granted* without a hearing. "The People did not dispute the facts alleged in the defendants' motion papers. Instead they consented to a hearing." Id. at 215, 397 N.Y.S.2d at 705. The People claimed that the relevant statute should be construed "so as to preclude the court from summarily granting the motion to dismiss unless the facts are expressly conceded by the People to be true, arguing that a failure on the part of the People to controvert is not necessarily to be deemed a concession under the statute." Id. at 216, 397 N.Y.S.2d at 705.

In other words, in Gruden *the People* claimed that they were entitled to an evidentiary hearing on every speedy trial motion even if none of the defendants' factual allegations were in dispute. The specific holding in Gruden was as follows: "Generally hearings are not available merely for the asking. We therefore hold that the court may summarily grant a motion to dismiss unless the papers submitted *by the prosecutor* show that there is a factual dispute which must be resolved at a hearing." Id. at 217, 397 N.Y.S.2d at 706 (emphasis added). See also id. at 216, 397 N.Y.S.2d at 706 ("Obviously it is not the statutory language but *the prosecution's* interpretation of it which is unusual. Normally what is not disputed is deemed to be conceded. Generally a party *opposing* a motion cannot arbitrarily demand a hearing to conduct a fishing expedition") (emphases added). Simply stated, Gruden dealt with the sufficiency of *the People's* responding papers (*not* the defendant's motion papers); and, as in Roberto H., not one single fact was alleged in the relevant papers.

A fair reading of Gruden is that if the defendant's motion papers do not dispute any of the material factual allegations surrounding the stop, arrest, detention, search, etc., then the defendant should not expect a suppression hearing to be granted. On the other hand, if the defendant's motion papers do raise a "factual dispute on a material point," then a suppression hearing

must be granted. In other words, where the defendant contests material factual assertions raised by the People, a hearing is required as a matter of law (*i.e.*, discretion plays no part in the analysis).

Where material facts are in dispute, the Court is called upon to assess credibility -- which cannot be done in the absence of a hearing involving live witnesses and the opportunity for cross-examination. In this regard, the People frequently quote the "hearings are not available merely for the asking" line in Gruden out of context. Gruden makes clear that a party generally cannot demand a hearing without putting forth any facts whatsoever in support of its position. By contrast, Gruden clearly does not stand for the proposition that Courts should scour defense motions looking for any excuse to deny a suppression hearing. Indeed, the Court of Appeals has indicated that even where the defendant's motion papers are deficient, a Court should both (a) seriously consider granting the defendant a requested suppression hearing as a matter of discretion, see Mendoza, 82 N.Y.2d at 429-30, 604 N.Y.S.2d at 928-29, and (b) grant the defendant "the opportunity to seek leave to cure the defect, often a simple matter." Id. at 430, 604 N.Y.S.2d at 929. See also People v. Bonilla, 82 N.Y.2d 825, 827, 604 N.Y.S.2d 937, 938 (1993) (same).

Notably, CPL § 710.60(6) requires that "[r]egardless of whether a hearing [i]s conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." See also Bonilla, 82 N.Y.2d at 827-28, 604 N.Y.S.2d at 938. Where material facts are disputed, a Court cannot fairly and impartially make the "findings of fact" required by CPL § 710.60(6) without holding a hearing, because:

> The question of probable cause is a mixed question of law and fact. Determination of the facts and circumstances bearing on the issue, which hinges primarily on questions of witness credibility, is a question of fact. However, it is a question of law whether the facts found to exist are sufficient to constitute probable cause.

People v. Morales, 42 N.Y.2d 129, 134, 397 N.Y.S.2d 587, 590 (1977). More specifically, in People v. Oden, 36 N.Y.2d 382, 384, 368 N.Y.S.2d 508, 511 (1975), the Court of Appeals held that:

> Probable cause exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing that the offense has been committed. The question of

> probable cause is a mixed question of law and fact: the truth and existence of the facts and circumstances bearing on the issue being a question of fact, and the determination of whether the facts and circumstances found to exist and to be true constitute probable cause being a question of law. If the facts and circumstances adduced as proof of probable cause are controverted so that conflicting evidence is to be weighed, if different persons might reasonably draw opposing inferences therefrom, or if the credibility of witnesses is to be passed upon, issues as to the existence or truth of those facts and circumstances are to be passed upon as a question of fact; however, when the facts and circumstances are undisputed, when only one inference can reasonably be drawn therefrom and when there is no problem as to credibility, or when certain facts and circumstances have been found to exist, the issue as to whether they amount to probable cause is a question of law.

(Citations omitted).

In the absence of a hearing, the "facts" alleged in the parties' motion papers are merely *allegations of fact* -- they do not constitute evidence. "While it may turn out that [the defendant's claims are not] borne out by the facts ultimately found, the existence of sworn allegations supporting . . . viable legal arguments mandates that a hearing be held." People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986).

The Court of Appeals has expressly rejected a prosecution claim that the "defendant must offer an innocent explanation for his conduct." People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995). See also People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 501 (1st Dep't 1995) (same); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999) (defendant "need not prove his entire case in the motion papers").

Rather, the standard to be used in deciding whether the defendant's motion papers raise a factual dispute on a material point was set forth by the Court of Appeals in Mendoza: "We conclude that the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." 82 N.Y.2d at 426, 604

N.Y.S.2d at 926. See also People v. Jones, 95 N.Y.2d 721, 723 N.Y.S.2d 761 (2001). In this regard, Mendoza makes clear that "[i]t would be unreasonable to construe the CPL to require precise factual averments when, in parallel circumstances, defendant . . . does not have access to or awareness of the facts necessary to support suppression." 82 N.Y.2d at 429, 604 N.Y.S.2d at 928.

In People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994), the Appellate Division, First Department, stated that:

> [I]t should be stressed that whether or not the defendant knew he had done something illegal was not the relevant issue in determining whether there had been an unreasonable search and seizure; it was rather whether the *police* knew a sufficient amount about any transgressions by the defendant to render their intrusion upon him legal. Plainly, the defendant was not obliged globally to assert his innocence of all wrongdoing as a condition of maintaining his motion to suppress. All that he was obliged to do was to raise an issue as to the legality of the arrest, and to do that no more could reasonably have been required than that he cast into question, to the extent possible given the nature of the factual context and the information made available to him, whether the arresting officers' knowledge of any wrongdoing by him was sufficient to constitute probable cause. * * *
>
> As Mendoza implicitly recognizes, and as is in any case obvious, it was not the Legislature's intention in enacting CPL § 710.60 to create an insuperable barrier to the assertion of possibly meritorious suppression claims.

Id. at ___-___, 613 N.Y.S.2d at 597-98.

Even if the defendant's factual allegations are deficient, the Court of Appeals has indicated a preference that a suppression hearing be granted where the defendant claims that the People's evidence was unlawfully obtained. In this regard, the Mendoza Court stated that, in addition to the three traditional factors used to decide the sufficiency of a defendant's motion papers, a fourth factor -- "(4) Court's Discretion to Conduct a Hearing" -- comes into play. See 82 N.Y.2d at 429, 604 N.Y.S.2d at 928.

In explaining why it is preferable for a Court to conduct suppression hearings where the defendant claims that evidence was unlawfully obtained, the Mendoza Court stated:

> The CPL does not mandate summary denial of defendant's motion even if the factual allegations are deficient (see, CPL 710.60[3] ["The court *may* summarily deny the motion"] [emphasis added]). If the court orders a Huntley . . . hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses, the court may deem it appropriate in the exercise of discretion to consider the Mapp motion despite a perceived pleading deficiency. Indeed, considerations of judicial economy militate in favor of this procedure; an appellate court might conclude that summary denial of the Mapp motion was improper, requiring the parties and witnesses to reassemble for a new hearing, often months or years later.

Id. at 429-30, 604 N.Y.S.2d at 928-29. See also People v. Higgins, 124 A.D.3d 929, ___, 1 N.Y.S.3d 424, 428-29 (3d Dep't 2015) ("we wholly reject the People's contention that County Court erred in granting defendant's request for a Mapp/Dunaway hearing. Although a defendant seeking a suppression hearing must make sworn factual allegations supporting his or her motion, CPL 710.60 'does not mandate summary denial of defendant's motion even if the factual allegations are deficient.' Here, the People had consented to a Huntley hearing 'grounded in the same facts involving the same police witnesses.' Principles of judicial economy clearly weighed in favor of conducting any related suppression hearings, and we cannot find any error in so proceeding") (citations omitted).

In keeping with this stated preference that suppression hearings be granted where the defendant's motion papers are minimally sufficient, appellate courts in New York "have frequently criticized the practice of summarily denying suppression motions without a hearing where defendant sets forth a minimally sufficient showing to warrant a hearing on the suppression issue," People v. Harris, 160 A.D.2d 515, ___, 554 N.Y.S.2d 170, 171 (1st Dep't 1990), and routinely hold appeals in abeyance and order that improperly denied suppression hearings be conducted. See, e.g., People v. Hightower, 85 N.Y.2d 988, 629 N.Y.S.2d 164 (1995); People v. Mendoza, 82 N.Y.2d 415, 604 N.Y.S.2d 922 (1993); People v. White, 137 A.D.3d 1311, 28 N.Y.S.3d 423 (2d Dep't 2016); People v. Chamlee, 120 A.D.3d 417, 991 N.Y.S.2d 313 (1st Dep't 2014); People v. Atkinson, 111 A.D.3d

1061, 975 N.Y.S.2d 227 (3d Dep't 2013); People v. Jennings, 110 A.D.3d 738, 972 N.Y.S.2d 104 (2d Dep't 2013); People v. Jones, 73 A.D.3d 662, 901 N.Y.S.2d 274 (1st Dep't 2010); People v. Acosta, 66 A.D.3d 792, 887 N.Y.S.2d 187 (2d Dep't 2009); People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dep't 2009); People v. Trotter, 54 A.D.3d 1065, 863 N.Y.S.2d 924 (2d Dep't 2008); People v. Otero, 51 A.D.3d 553, 858 N.Y.S.2d 157 (1st Dep't 2008); People v. Mabeus, 47 A.D.3d 1073, 850 N.Y.S.2d 664 (3d Dep't 2008); People v. Joyner, 46 A.D.3d 473, 848 N.Y.S.2d 146 (1st Dep't 2007); People v. Bacon, 6 A.D.3d 241, 774 N.Y.S.2d 332 (1st Dep't 2004); People v. Phillips, 4 A.D.3d 233, 771 N.Y.S.2d 658 (1st Dep't 2004); People v. Muhammed, 290 A.D.2d 248, 736 N.Y.S.2d 19 (1st Dep't 2002); People v. Mathison, 282 A.D.2d 283, 722 N.Y.S.2d 872 (1st Dep't 2001); People v. Butler, 280 A.D.2d 399, 720 N.Y.S.2d 788 (1st Dep't 2001); People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dep't 1999); People v. Nenni, 261 A.D.2d 900, 689 N.Y.S.2d 912 (4th Dep't 1999); People v. Wright, 256 A.D.2d 106, 682 N.Y.S.2d 154 (1st Dep't 1998); People v. Face, 247 A.D.2d 336, 669 N.Y.S.2d 289 (1st Dep't 1998); People v. Lewis, 247 A.D.2d 227, 668 N.Y.S.2d 356 (1st Dep't 1998); People v. Marquez, 246 A.D.2d 330, 667 N.Y.S.2d 359 (1st Dep't 1998); People v. Perilla, 240 A.D.2d 313, 660 N.Y.S.2d 113 (1st Dep't 1997); People v. Bennett, 240 A.D.2d 292, 659 N.Y.S.2d 260 (1st Dep't 1997); People v. Sanchez, 236 A.D.2d 243, 653 N.Y.S.2d 563 (1st Dep't 1997); People v. Vittegleo, 226 A.D.2d 1128, 642 N.Y.S.2d 827 (4th Dep't 1996); People v. Ayarde, 220 A.D.2d 519, 632 N.Y.S.2d 174 (2d Dep't 1995); People v. Bailey, 218 A.D.2d 569, 630 N.Y.S.2d 499 (1st Dep't 1995); People v. Youngblood, 210 A.D.2d 948, 621 N.Y.S.2d 265 (4th Dep't 1994); People v. Holmes, 206 A.D.2d 604, 614 N.Y.S.2d 474 (3d Dep't 1994); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994); People v. Altruz, 198 A.D.2d 423, 604 N.Y.S.2d 134 (1st Dep't 1993); People v. Foster, 197 A.D.2d 411, 602 N.Y.S.2d 395 (1st Dep't 1993); People v. Aponte, 193 A.D.2d 529, 598 N.Y.S.2d 937 (1st Dep't 1993); People v. Cole, 187 A.D.2d 873, 590 N.Y.S.2d 542 (3d Dep't 1992); People v. Moore, 186 A.D.2d 591, 588 N.Y.S.2d 388 (2d Dep't 1992); People v. Rodriguez, 185 A.D.2d 802, 586 N.Y.S.2d 968 (1st Dep't 1992); People v. Davis, 169 A.D.2d 379, 564 N.Y.S.2d 320 (1st Dep't 1991); People v. Miller, 162 A.D.2d 248, 556 N.Y.S.2d 607 (1st Dep't 1990); People v. Huggins, 162 A.D.2d 129, 556 N.Y.S.2d 75 (1st Dep't 1990); People v. Harris, 160 A.D.2d 515, 554 N.Y.S.2d 170 (1st Dep't 1990); People v. Zarate, 160 A.D.2d 466, 554 N.Y.S.2d 137 (1st Dep't 1990); People v. Whiten, 151 A.D.2d 708, 543 N.Y.S.2d 944 (2d Dep't 1989); People v. Alvarez, 151 A.D.2d 684, 543 N.Y.S.2d 935 (2d Dep't 1989); People v. Marte, 149 A.D.2d 335, 539 N.Y.S.2d 912 (1st Dep't 1989); People v. Astride, 147 A.D.2d 407, 538 N.Y.S.2d 5 (1st Dep't 1989); People v. Lee, 130 A.D.2d 400, 515 N.Y.S.2d 260 (1st Dep't 1987); People v. Patterson, 129 A.D.2d 527, 514 N.Y.S.2d 378 (1st Dep't 1987); People v. Marshall, 122 A.D.2d 283, 504 N.Y.S.2d 782 (2d Dep't 1986); People v. Sutton, 91 A.D.2d 522, 456 N.Y.S.2d 771 (1st Dep't

1982); People v. Calhoun, 73 A.D.2d 972, 424 N.Y.S.2d 247 (2d Dep't 1980); People v. Carter, 72 A.D.2d 963, 422 N.Y.S.2d 258 (4th Dep't 1979); People v. Carrasquillo, 70 A.D.2d 842, 418 N.Y.S.2d 3 (1st Dep't 1979); People v. Werner, 55 A.D.2d 317, 390 N.Y.S.2d 711 (4th Dep't 1977).

The Appellate Division, First Department's decision in People v. Estrada, 147 A.D.2d 407, ___, 538 N.Y.S.2d 5, 5-6 (1st Dep't 1989), is illustrative:

> Defendant made a pretrial motion to suppress his confession, claiming that it was the product of an illegal arrest. In his motion papers, defendant alleged that prior to his arrest he had not been observed with any contraband or acting in a suspicious manner. He claimed, therefore, that there had not been probable cause for his arrest. As the People now concede, and as is in any case evident, defendant's allegations were sufficient to require that a Dunaway hearing be held. Justice Rothwax, however, summarily denied the defendant's Dunaway motion without a hearing. Although the summary denial may have appeared efficient at the time, its ultimate consequence will be unnecessarily to delay the adjudication of defendant's case. If this were an isolated case it would not merit comment but we have on at least six previous occasions had to hold appeals in abeyance and remand for hearings upon suppression motions inappropriately denied by the same judge.

(Citations omitted). Notably, following the remand the New York County Supreme Court "granted defendant-appellant's motion to suppress on the District Attorney's concession that it was unable to proceed. The prosecution concede[d] that without this confession it [was] unable to sustain its burden of proof. In view of this concession the indictment [was] dismissed." People v. Estrada, 152 A.D.2d 499, ___, 544 N.Y.S.2d 475, 475 (1st Dep't 1989).

In People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 962-63 (1979), the Court of Appeals made clear that:

> Clearly, statements obtained by exploitation of unlawful police conduct or detention must be suppressed, for their use in evidence under such circumstance violates the Fourth Amendment (Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824). It is

> therefore "incumbent upon the suppression court to permit an inquiry into the propriety of the police conduct." Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted.

(Quoting People v. Wise, 46 N.Y.2d 321, 329, 413 N.Y.S.2d 334, 339 (1978)) (footnote omitted). See also People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998); People v. Sanchez, 236 A.D.2d 243, ___, 653 N.Y.S.2d 563, 564-65 (1st Dep't 1997). See generally People v. Gonzalez, 71 A.D.2d 775, ___, 419 N.Y.S.2d 322, 323-24 (3d Dep't 1979).

In Misuis, the Court of Appeals reversed the Appellate Division, vacated the defendant's guilty plea, and remitted the case for a probable cause hearing where:

> At the hearing on defendant's motion to suppress [various] admissions, his counsel repeatedly attempted to interrogate the two officers in an effort to discover whether the police had probable cause to make the arrest. His avowed intention was to show that the detention was unlawful and thus any statements made as a result of the claimed unlawful arrest and detention tainted any admissions. However, at the insistent urging of the prosecutor the court refused to permit that inquiry and permitted only questions concerning the voluntariness of the statements themselves.

47 N.Y.2d at 980, 419 N.Y.S.2d at 962.

The same conclusion was reached in People v. Whitaker, 79 A.D.2d 668, ___, 433 N.Y.S.2d 849, 850 (2d Dep't 1980):

> As the People concede, the suppression court erred in severely limiting the defendant's cross-examination of the sole arresting officer who testified, with respect to the issue of whether there was probable cause to arrest defendant. It is well-settled that on a motion to suppress a defendant's postarrest statements, the suppression court is required to permit the defendant to "delve fully into the circumstances attendant upon his arrest", for "[a] statement, voluntary under Fifth

> Amendment standards, will nevertheless be suppressed if it has been obtained through the exploitation of an illegal arrest."

(Citations omitted). See also People v. Lopez, 56 A.D.3d 280, 867 N.Y.S.2d 83 (1st Dep't 2008); People v. Roberts, 81 A.D.2d 674, 441 N.Y.S.2d 408 (2d Dep't 1981); People v. King, 79 A.D.2d 1033, 437 N.Y.S.2d 931 (2d Dep't 1981); People v. Specks, 77 A.D.2d 669, 430 N.Y.S.2d 157 (2d Dep't 1980). See generally People v. Williamson, 79 N.Y.2d 799, 800, 580 N.Y.S.2d 170, 171 (1991) ("We agree that it was error to restrict cross-examination under these circumstances . . . . Unlike the Appellate Division, however, we conclude that the error requires a reversal") (citation omitted); People v. Garriga, 189 A.D.2d 236, ___, 596 N.Y.S.2d 25, 29 (1st Dep't 1993) ("We also find reversible error in the excessive constraints placed upon defense counsel in cross-examination of the People's witnesses both at the Mapp hearing and at trial").

Practically speaking, probable cause hearings are granted routinely as a matter of judicial and prosecutorial economy. In the authors' experience, many prosecutors are willing to stipulate to a so-called Huntley/Dunaway/Mapp hearing. Such hearings tend to resolve most of the issues that would arise at trial, and give both sides a preview of the case (which generally results in a pre-trial disposition). Thus, pre-trial hearings are often a very efficient use of scarce judicial resources.

Another factor warrants consideration. Many people accused of DWI have no prior experience with the criminal justice system. They expect to be treated fairly and impartially by both the People and the Court. When the People vehemently oppose the granting of a probable cause hearing, and the Court finds that an arrest was lawful based solely on a police officer's hearsay accusations, the defendant is often left with the perception that the system is biased and unfair, which undermines respect for the rule of law.

§ 1:34 Standing

In response to a defense motion to suppress, the People frequently claim that the defendant has failed to allege facts establishing his or her standing to pursue the motion. Such claims are generally frivolous when made in connection with DWI cases. In this regard, the doctrine of standing typically applies to cases where a search of *someone else's* property yields evidence that the People seek to use against the defendant. The doctrine is all but inapplicable to a typical DWI case, where the primary thing searched and seized is the defendant's person (including a sample of the defendant's breath and/or blood).

It is well settled that a defendant has a legitimate expectation of privacy in, and thus standing to contest, a search of his or her own "person" by the police. See, e.g., People v. Burton, 6 N.Y.3d 584, 588, 815 N.Y.S.2d 7, 10 (2006) ("Under the Fourth Amendment to the United States Constitution, individuals possess a legitimate expectation of privacy with regard to their persons"); People v. Wesley, 73 N.Y.2d 351, 361, 540 N.Y.S.2d 757, 763 (1989) (in case of search of defendant's person, "there plainly is standing"); People v. Moore, 186 A.D.2d 591, ___, 588 N.Y.S.2d 388, 389-90 (2d Dep't 1992) ("the defendant clearly had standing to contest the search of his person"); People v. Marte, 149 A.D.2d 335, ___, 539 N.Y.S.2d 912, 913 (1st Dep't 1989) ("There is no question that defendant had standing to challenge the legitimacy of the search and seizure of evidence from his person"); People v. Lee, 130 A.D.2d 400, ___, 515 N.Y.S.2d 260, 262 (1st Dep't 1987) ("since it was clear that defendant's person had been subjected to a search and seizure, no proprietary interest need be asserted").

Similarly, where the defendant is the driver of a vehicle stopped by the police, he or she has standing to challenge the lawfulness of the stop -- *even if the vehicle is stolen*. See People v. May, 81 N.Y.2d 725, 727, 593 N.Y.S.2d 760, 761 (1992).

§ 1:35 Proving the basis to stop at a suppression hearing

It is axiomatic that the People's burden of proof at a probable cause hearing is less onerous than their burden of proof at trial. In this regard, in People v. Saylor, 166 A.D.2d 899, ___, 560 N.Y.S.2d 560, 561 (4th Dep't 1990), the Appellate Division, Fourth Department, held that:

> The issue at the hearing was not whether defendant was speeding, but whether the police officer had reasonable suspicion to believe that defendant was speeding. Although the officer did not testify in detail about his training, the court was entitled to assume, for purposes of this hearing, that a police officer with over a year's experience can visually estimate the speed of a moving vehicle. Moreover, the radar unit clocked defendant's speed at 54 miles per hour, adding additional support to the officer's estimate. Although at trial it would be necessary for the People to establish that the radar unit was in proper working order, the suppression court properly concluded that such detailed proof was not required at a probable cause hearing.

(Citation omitted). See also People v. Robinson, 97 N.Y.2d 341, 354, 741 N.Y.S.2d 147, 155 (2001) ("the decision to stop a vehicle is reasonable where the police have probable cause to believe that a traffic infraction has occurred"); id. at 350, 741 N.Y.S.2d at 152 ("This Court has always evaluated the validity of a traffic stop based on probable cause that a driver has committed a traffic violation"); People v. Guthrie, 25 N.Y.3d 130, 133, 8 N.Y.S.3d 237, 240 (2015).

§ 1:36 Prosecution generally only has one chance to prove probable cause

Where the People fail to call a necessary witness or witnesses at a pre-trial hearing, and/or fail to prove a necessary piece of evidence at the hearing, it is generally improper for a Court to re-open the proof to allow the People to "cure" the defect. Stated another way, Courts traditionally refrain from giving the People a "second bite at the apple" in such circumstances. See, e.g., People v. Kevin W., 22 N.Y.3d 287, 289, 295, 980 N.Y.S.2d 873, 873, 877-78 (2013); People v. Havelka, 45 N.Y.2d 636, 643, 412 N.Y.S.2d 345, 348-49 (1978); People v. Bryant, 37 N.Y.2d 208, 211, 371 N.Y.S.2d 881, 884 (1975) (per curiam); People v. Knapp, 57 N.Y.2d 161, 175, 455 N.Y.S.2d 539, 544 (1982); People v. Dodt, 474 N.Y.S.2d 441, 447, 61 N.Y.2d 408, 418 (1984).

An exception to this rule exists where "the People were 'deprived of an opportunity to fully present all the available evidence * * * because the hearing court made an incorrect ruling.'" People v. Serrano, 93 N.Y.2d 73, 79, 688 N.Y.S.2d 90, 94 (1999) (citation omitted). See also People v. Crandall, 69 N.Y.2d 459, 464, 515 N.Y.S.2d 745, 747 (1987) ("'the People should not be deprived of one full opportunity to present evidence of the dispositive issues involved at the suppression hearing. If an error of law is committed by the hearing court which directly causes the People to fail to offer potentially critical evidence a rehearing should be ordered so that the evidence may be presented'") (citation omitted); Havelka, 45 N.Y.2d at 643, 412 N.Y.S.2d at 348 (same).

§ 1:36A Where trial testimony conflicts with testimony at suppression hearing, defendant should move to reopen hearing

In People v. Badia, 130 A.D.3d 744, 14 N.Y.S.3d 73 (2d Dep't 2015), a pre-trial suppression hearing was held, following which the defendant's blood test results were found to be admissible. On appeal, "the defendant relie[d] on portions of the trial record in support of his contention that the blood test results should have been suppressed." Id. at ___, 14 N.Y.S.3d at 74. The Appellate Division, Second Department, held that:

> [T]his Court is precluded from reviewing trial testimony in determining whether the hearing court acted properly. The propriety of the hearing court's ruling must be determined only in light of the evidence that was before that court. Since the defendant did not seek to reopen the hearing based on the trial testimony, or move for a mistrial, the question of whether the trooper's trial testimony undermined the hearing court's determination is not properly before this Court.

Id. at ___, 14 N.Y.S.3d at 74-75 (citations omitted).

§ 1:37 When can a police officer search the interior of a vehicle during a stop for a traffic infraction?

In People v. Class, 67 N.Y.2d 431, 503 N.Y.S.2d 313 (1986) (per curiam), after the U.S. Supreme Court held that the *Federal* Constitution was not violated, see New York v. Class, 475 U.S. 106, 106 S.Ct. 960 (1986), the Court of Appeals reconsidered the case under the *State* Constitution and held that a "police 'officer's nonconsensual entry into [defendant's] automobile to determine the vehicle identification number violates the . . . State Constitution[] where it is based solely on a stop for a traffic infraction.'" Id. at 432-33, 503 N.Y.S.2d at 314 (citation omitted). Similarly, in People v. Torres, 74 N.Y.2d 224, 226, 229-30, 544 N.Y.S.2d 796, 797, 800 (1989), the Court of Appeals held as follows:

> A police officer acting on 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 while he conducts the inquiry authorized by CPL 140.50(1). In People v. Lindsay, we left open the question whether under article I, § 12 of our State Constitution such an intrusion may extend to items within the passenger compartment of the suspects' vehicle solely on the theory that "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and will then have access to any weapons inside." Having been squarely presented with the issue by the parties' submissions on this appeal, we now answer that question in the negative and hold that,

> despite the Supreme Court's approval of such intrusions in Michigan v. Long, our more protective State constitutional provisions prohibit them under the circumstances presented here (N.Y. Const. Art. I, § 12). * * *
>
> A police officer's entry into a citizen's automobile and his inspection of personal effects located within are significant encroachments upon that citizen's privacy interests. Under our own long-standing precedent, such intrusions must be both justified in their inception and reasonably related in scope and intensity to the circumstances which rendered their initiation permissible.

(Citations omitted). Cf. People v. Carvey, 89 N.Y.2d 707, 709, 657 N.Y.S.2d 879, 880 (1997) ("We agree with the courts below that the police action here was proper. Defendant was wearing an article uniquely indicative of his present readiness to use an available firearm -- a bulletproof vest. This salient fact, when coupled with the police observation of defendant furtively placing something beneath his seat, warranted the conclusion that a weapon located in the vehicle presented an actual and specific threat to the officers' safety. In these particular circumstances, the officers could lawfully reach into the vehicle, even after removing the driver and passengers").

§ 1:38 Search of vehicle incident to lawful arrest for traffic infraction

In People v. Marsh, 20 N.Y.2d 98, 100, 281 N.Y.S.2d 789, 791 (1967), the Court of Appeals made clear that:

> There is no question, and the entire court agrees, that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction. It is urged, however, that the officer is empowered to conduct a search, as incident to a lawful arrest, when the defendant is taken into custody for a traffic violation on a warrant of arrest, following his failure to appear in court pursuant to the summons initially issued. We find no basis for making such a

> distinction, concluding as we do that it not only would offend against the legislative design for the treatment of traffic offenders but would also exceed constitutional limits on search and seizure.

See also id. at 101, 281 N.Y.S.2d at 792 ("Although, as a general rule, when an individual is lawfully arrested, the police officer may conduct a contemporaneous search of his person 'for weapons or for the fruits of or implements used to commit the crime', we do not believe that the Legislature intended the rule to cover arrests for traffic violations. It is obvious that, except in the most rare of instances, there can be no 'fruits' or 'implements' of such infractions and the search, to be upheld, would have to be justified as one for weapons. But there is something incongruous about treating traffic offenders as noncriminals, on the one hand, and subjecting them, on the other, to the indignity of a search for weapons") (citation omitted); People v. Erwin, 42 N.Y.2d 1064, 1065, 399 N.Y.S.2d 637, 638 (1977) ("Although there may have been reasonable cause to effectuate an arrest for a traffic infraction, no such arrest was made and indeed, Officer Bennett testified that he did not even intend to issue a summons, but was merely 'going to give him a warning'. There being no arrest the subsequent search of defendant's person and his automobile can be justified only if independent reasonable cause existed"); People v. Adams, 32 N.Y.2d 451, 455, 346 N.Y.S.2d 229, 232 (1973) ("We hold in this case that a violation of [former] section 422 of the Vehicle and Traffic Law, without more, will not sustain [the warrantless] search" of the defendant's person, followed by a search incident to his arrest for such charge (even though the charge was a misdemeanor)). Cf. People v. Troiano, 35 N.Y.2d 476, 478, 363 N.Y.S.2d 943, 945 (1974) ("so long as an arrest is lawful, the consequent exposure to search is inevitable. If the unnecessarily intrusive personal search is to be restricted, the cure must be by limiting the right to arrest or to take into custody"). See generally Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998) (police cannot, consistent with the 4th Amendment, conduct a full search of motorist's car where motorist is stopped for speeding and issued citation in lieu of arrest).

§ 1:38A Search of defendant's person incident to arrest

In People v. Reid, 24 N.Y.3d 615, 2 N.Y.S.3d 409 (2014), although probable cause existed to arrest the defendant for DWI, the officer had no intention of placing the defendant under arrest. Nonetheless, the officer "asked defendant to step out of the car and patted him down. In the course of doing so, he found a switchblade knife in defendant's pocket. Defendant was then arrested." Id. at 618, 2 N.Y.S.3d at 410. "The People ma[d]e no claim that the pat down in this case was justified either by

reasonable suspicion that defendant presented a danger to the officer or by probable cause to believe contraband would be discovered. The only justification the People offer[ed] for the search [was] that it was incident to a lawful arrest, and exempt for that reason from the general rule that searches require a warrant." Id. at 618, 2 N.Y.S.3d at 411.

Under these circumstances, the Court of Appeals held as follows:

> It is not disputed that, before conducting the search, [the officer] could lawfully have arrested defendant for driving while intoxicated. And it is clear that the search was not unlawful solely because it preceded the arrest, since the two events were substantially contemporaneous. Nor is it decisive that the police chose to predicate the arrest on the possession of a weapon, rather than on driving while intoxicated. The problem is that, as [the officer] testified, but for the search there would have been no arrest at all.
>
> Where that is true, to say that the search was incident to the arrest does not make sense. It is irrelevant that, because probable cause existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not. * * *
>
> The incident to arrest exception is a "bright-line rule" that does not depend on whether there is a threat of harm to the officer or destruction of evidence in a particular case -- but the rule is inapplicable to cases that fall, as does this one, outside the bright line. * * *
>
> [T]he "search incident to arrest" doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the "search incident" exception is to be applied.

Id. at 618-19, 619, 620, 2 N.Y.S.3d at 411, 412 (citations omitted). See also People v. Mangum, 125 A.D.3d 401, 3 N.Y.S.3d 332 (1st Dep't 2015); People v. Hoffman, 135 A.D.2d 299, 525 N.Y.S.3d 376 (3d Dep't 1988).

§ 1:39 Search of vehicle incident to lawful DWI arrest

One of the exceptions to the 4th Amendment's warrant requirement is a search incident to a lawful arrest. See, e.g., Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344 (1914). In Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969), the Supreme Court held that the scope of such a search is limited to:

> [A] search of the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

In New York v. Belton, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 2864 (1981), the Court applied Chimel to a situation where the arrested person was the occupant of a motor vehicle, and held that:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

(Citations and footnotes omitted). The Belton Court defined the term "container" as:

> [A]ny object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. *Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.*

Id. at 460 n.4, 101 S.Ct. at 2864 n.4 (emphasis added).

In Arizona v. Gant, 556 U.S. 332, 349, 129 S.Ct. 1710, 1722-23 (2009), the Supreme Court concluded that a broad reading of Belton had resulted in countless unconstitutional searches in the 28 years since Belton was decided. In this regard, the Court stated that:

> Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection. It is particularly significant that Belton searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment -- the concern about giving police officers unbridled discretion to rummage at will among a person's private effects. * * *
>
> Construing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. * * *

> Although it appears that the State's reading of Belton has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the Chimel exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. . . . If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence. * * *
>
> The experience of the 28 years since we decided Belton has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely "within 'the area into which an arrestee might reach,'" and blind adherence to Belton's faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.

Id. at 345, 347, 349, 350-51, 129 S.Ct. at 1720, 1721, 1722-23, 1723 (citations and footnote omitted).

Accordingly, the Gant Court held that:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 351, 129 S.Ct. at 1723-24. See also id. at 335, 129 S.Ct. at 1714 ("we hold that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle"); id. at 335, 129 S.Ct. at 1714 ("we also conclude that circumstances

unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle"); id. at 343, 129 S.Ct. at 1719 ("we . . . hold that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"); id. at 343, 129 S.Ct. at 1719 ("Although it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence") (citation omitted). Compare People v. Belton, 55 N.Y.2d 49, 55, 447 N.Y.S.2d 873, 876 (1982) ("we hold, that where police have validly arrested an occupant of an automobile, and they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein"); Wyoming v. Houghton, 526 U.S. 295, 307, 119 S.Ct. 1297, 1304 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search").

In assessing Gant's applicability to DWI cases, two issues immediately come to mind. First, will the courts create a "DWI exception" to Gant, concluding that it is *always* reasonable to believe that relevant evidence (e.g., open containers of alcohol) might be found in the vehicle of a person arrested for DWI? Second, if such a search-incident-to-arrest is permissible, will its scope be limited to locations where it is likely that relevant evidence might be found; or rather will a full-blown Belton search of every container in the vehicle be authorized?

Regardless, a critical aspect of Gant is the Court's comment that even where a search-incident-to-arrest would be improper, a warrantless vehicle search can nonetheless be conducted where "another exception to the warrant requirement applies." In DWI cases, such a search can generally be conducted pursuant to the "inventory search" exception to the warrant requirement. See, e.g., Florida v. Wells, 495 U.S. 1, 110 S.Ct. 1632 (1990); Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987). See also Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999) (discussing the "automobile exception" to the warrant requirement). An inventory search is easier to challenge, however, as such a search must be conducted pursuant to

"standardized criteria" or an "established routine" limiting the "latitude" and "discretion" of the officer(s) conducting it, and "must not be a ruse for a general rummaging in order to discover incriminating evidence." Wells, 495 U.S. at 4, 110 S.Ct. at 1635.

In People v. Johnson, 1 N.Y.3d 252, 771 N.Y.S.2d 64 (2003), the Court of Appeals found an inventory search to be invalid where, *inter alia*:

> [T]he evidence adduced at the [suppression] hearing was clearly insufficient to satisfy the prosecutor's initial burden of establishing a valid inventory search. Although the officer testified that he knew of the general objectives of an inventory search, and declared that his search of the glove compartment box fulfilled those objectives, the People offered no evidence to establish the existence of any *departmental policy* regarding inventory searches. Even assuming such a policy existed, the People failed to produce evidence demonstrating either that the procedure itself was "rationally designed to meet the objectives that justify inventory searches in the first place," or that this particular officer conducted this search properly and in compliance with *established procedures*.

1 N.Y.3d at 256, 771 N.Y.S.2d at 66-67 (emphases added) (citation omitted). See also People v. Gomez, 13 N.Y.3d 6, 884 N.Y.S.2d 339 (2009); People v. Galak, 80 N.Y.2d 715, 719, 594 N.Y.S.2d 689, 692 (1993); People v. Francisco, 63 A.D.3d 1554, 880 N.Y.S.2d 806 (4th Dep't 2009); People v. Elpenord, 24 A.D.3d 465, 806 N.Y.S.2d 675 (2d Dep't 2005).

More recently, in People v. Padilla, 21 N.Y.3d 268, 272-73, 970 N.Y.S.2d 486, 488-89 (2013), the Court of Appeals held that:

> Our jurisprudence in this area is clear. Following a lawful arrest of a driver of a vehicle that is required to be impounded, the police may conduct an inventory search of the vehicle. The search is "designed to properly catalogue the contents of the item searched." However, an inventory search must not be "a ruse for a general rummaging in order to discover incriminating evidence." To guard against this danger, the search must be conducted pursuant to an established procedure "clearly limiting the conduct of

> individual officers that assures that the searches are carried out consistently and reasonably." "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose." The People bear the burden of demonstrating the validity of the inventory search.
>
> Here the People proffered written guidelines, the officer's testimony regarding his search of the vehicle, and the resulting list of items retained. Although defendant takes issue with the officer's removal of the speakers by arguing that such action was a ruse designed to search for drugs, the officer's testimony that it was police protocol to remove any owner-installed equipment, was accepted by the hearing court and we perceive no grounds upon which to overturn that determination. Thus, the People met their burden of establishing that the search was in accordance with procedure and resulted in a meaningful inventory list.
>
> The fact that the officer did not follow the written police procedure when he gave some of the contents of the vehicle to defendant's sister without itemizing that property, did not invalidate the search. Notably, it was defendant himself who called his sister to come to the precinct to retrieve his property. The primary objectives of the search -- to preserve the property of defendant, to protect the police from a claim of lost property and to protect the police and others from dangerous instruments -- were met when the officer complied with defendant's request and gave the items to his sister and then prepared a list of the other items retained by the police.
>
> Finally, it is clear the officer's intention for the search was to inventory the items in the vehicle. It was reasonable for the officer to check in the seat panels that were askew as part of his inventory. The fact that the officer knew that contraband is often hidden by criminals in the panels did not invalidate the entire search.

(Citations omitted).

In People v. Walker, 20 N.Y.3d 122, 124, 957 N.Y.S.2d 272, 273 (2012), the Court of Appeals held as follows:

> Having decided to arrest defendant for driving with a revoked license, a police officer also decided to impound the car he was driving. The officer did not inquire whether defendant's passenger, who was not the registered owner of the car, was licensed and authorized to drive it. We hold that such an inquiry was not constitutionally required. We also hold that the officer's search of the car after he decided to impound it was a valid inventory search.

In so holding, the Court reasoned as follows:

> When the driver of a vehicle is arrested, the police may impound the car, and conduct an inventory search, where they act pursuant to "reasonable police regulations relating to inventory procedures administered in good faith." Here, the trooper testified that it is state police procedure to "tow the vehicle" if the operator's license "is either suspended or revoked" and the registered owner is not present. We hold this to be a reasonable procedure, at least as applied to this case, where no facts were brought to the trooper's attention to show that impounding would be unnecessary.
>
> Neither defendant nor his girlfriend asked the trooper if the girlfriend could drive the car, or told him that she had a driver's license and the owner's permission to drive it. The trooper was not required, as a matter of constitutional law, to raise the question, or to initiate a phone call to the owner. To impose such a requirement on police in such situations would not only create an administrative burden, but would involve them in making (and the courts in reviewing) difficult decisions in borderline cases. If a person present claims to have the owner's permission to drive, must the police take her word for it? If the owner is called and does not answer immediately, must police wait for a call back? It is reasonable for the police to institute clear and easy-to-follow procedures that avoid such questions.

Id. at 125, 957 N.Y.S.2d at 273-74 (citation omitted).

Regarding the inventory search itself, the Court found that:

> We have held that, even where a vehicle has been lawfully impounded, the inventory search itself must be conducted pursuant to "an established procedure" that is related "to the governmental interests it is intended to promote" and that provides "appropriate safeguards against police abuse." Defendant argues that the inventory search in this case failed to meet this requirement. We reject the argument.
>
> Defendant's argument focuses on several alleged deficiencies in the proof relating to the inventory search: the written policy that governed the search was never produced; the state trooper's description of the policy was very vague; and the descriptions of the returned property on the inventory form -- "MISC ITEMS" and "PAPERWORK" -- would be of limited usefulness in the event the car's owner claimed that some of her property was missing. These criticisms are not without force. Certainly, it would be better for a prosecutor seeking to prove the existence of a written policy to put a copy of the policy into evidence. On the other hand, defense counsel could have demanded that the policy be produced to help her cross-examine the trooper. She did not do so.
>
> When a car has been lawfully impounded, the reasonable expectation of the person who was driving it that its contents will remain private is significantly diminished. In such a case, the driver presumably expects the police to find whatever is in the car. Galak, Johnson and Gomez establish that this does not give the police carte blanche to conduct any search they want and call it an "inventory search." The police must follow a reasonable procedure, and must prepare a "meaningful inventory list." But it would serve little purpose for courts to micromanage the procedures used to search properly impounded cars. The United States Supreme Court implicitly recognized as much in Bertine by upholding as constitutionally valid a search producing what a trial court

> had found to be a "somewhat slipshod" inventory. The inventory here, while not a model, was sufficient to meet the constitutional minimum.

Id. at 126-27, 957 N.Y.S.2d at 275-76 (citations omitted).

In People v. Wells, 21 N.Y.3d 716, 977 N.Y.S.2d 712 (2014), the Court of Appeals held that the defendant's guilty plea was invalid where it was induced by the trial court's erroneous ruling upholding an improper inventory search.

§ 1:40 Use of GPS device to track suspect's movements

In People v. Weaver, 12 N.Y.3d 433, 447, 882 N.Y.S.2d 357, 365 (2009), the Court of Appeals held that "[u]nder our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." See also United States v. Jones, ___ U.S. ___, 132 S.Ct. 945 (2012) (attachment of GPS tracking device to vehicle and use of such device to monitor vehicle's movements on public streets is search within meaning of 4th Amendment). The Weaver Court reasoned as follows:

> Here, we are not presented with the use of a mere beeper to facilitate visual surveillance during a single trip. GPS is a vastly different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability. With the addition of new GPS satellites, the technology is rapidly improving so that any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time and regardless of atmospheric conditions. Constant, relentless tracking of anything is now not merely possible but entirely practicable, indeed much more practicable than the surveillance conducted in Knotts. GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or "seeing" by law enforcement would require, at a minimum,

> millions of additional police officers and cameras on every street lamp.
>
> That such a surrogate technological deployment is not -- particularly when placed at the unsupervised discretion of agents of the state "engaged in the often competitive enterprise of ferreting out crime" -- compatible with any reasonable notion of personal privacy or ordered liberty would appear to us obvious. One need only consider what the police may learn, practically effortlessly, from planting a single device. The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations -- political, religious, amicable and amorous, to name only a few -- and of the pattern of our professional and avocational pursuits. When multiple GPS devices are utilized, even more precisely resolved inferences about our activities are possible. And, with GPS becoming an increasingly routine feature in cars and cell phones, it will be possible to tell from the technology with ever increasing precision who we are and are not with, when we are and are not with them, and what we do and do not carry on our persons -- to mention just a few of the highly feasible empirical configurations.

12 N.Y.3d at 441-42, 882 N.Y.S.2d at 361-62 (citation omitted).

§ 1:41 Lawfulness of canine sniff of automobile

In People v. Devone, 15 N.Y.3d 106, 110, 905 N.Y.S.2d 101, 102 (2010), the Court of Appeals held both (a) that "a canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under article I, § 12 of our State Constitution," and (b) that, to be lawful, such search requires "founded suspicion that criminal activity is afoot." In so holding, the Court reasoned as follows:

> [W]hether a canine sniff constitutes a search is necessarily dependent upon whether it constitutes an intrusion into a place where a person has a reasonable expectation of privacy. One clearly has a greater expectation of privacy in one's home than in an automobile, but that does not render the latter interest undeserving of constitutional protection. There is a legitimate, albeit reduced, expectation of privacy in an automobile. But that expectation is greater than the significantly reduced expectation of privacy one has in luggage turned over to a common carrier. We therefore hold that a canine sniff of the exterior of an automobile constitutes a search under article I, § 12.
>
> In both of these cases the Appellate Division properly concluded that the officers' "founded suspicion" that criminality was afoot provided sufficient grounds for the search. While the more demanding "reasonable suspicion" standard applies to a canine sniff outside the door of one's residence, there is a "diminished expectation of privacy attributed to individuals and their property when traveling in an automobile." It follows that law enforcement need only meet a lesser standard before conducting a canine sniff of the exterior of a lawfully stopped vehicle. Given that diminished expectation of privacy, coupled with the fact that canine sniffs are far less intrusive than the search of a residence and provide "significant utility to law enforcement authorities," application of the founded suspicion standard in these cases is appropriate.

Id. at 113, 905 N.Y.S.2d at 104-05 (citations omitted).

§ 1:42 Lawfulness of stop based on automated license plate scanning device

In People v. Davila, 27 Misc. 3d 921, 901 N.Y.S.2d 787 (Bronx Co. Sup. Ct. 2010), the Court addressed the lawfulness of a vehicle stop based on information obtained via an automated license plate scanning device. In Davila, the Court held a lengthy suppression hearing at which the NYPD procedures regarding "plate reader" stops were spelled out in considerable detail. According to the hearing testimony:

> In 2007, the NYPD issued departmental guidelines for the "use, maintenance and accountability," of plate readers (NYPD Operations Order No. 33). The guidelines set forth a [2]-step process to ensure the reliability of plate reader information. First, before operating the device, officers are required to update the plate reader's database by downloading the hot list issued within the last [24] hours. Second, if the plate reader alarm sounds, before "initiating any law enforcement action", an officer must consult the NYSPIN database to check whether the plate reader information is accurate.

Id. at ___, 901 N.Y.S.2d at 789 (citation omitted).

Although the police officers in Davila failed to follow either of the steps in the Department's guidelines (*i.e.*, they failed to either update the plate reader's database within the past 24 hours or consult the NYSPIN database to confirm that the plate reader's information was accurate), the Court upheld the lawfulness of the stop. Id. at ___, 901 N.Y.S.2d at 791.