Chapter 6:

Introduction to Search and Seizure

Introduction

This chapter deals with search and seizure in order to either draft a motion to suppress physical evidence or to answer that suppression motion.

The laws of search and seizure are complicated. Because of federalism, as it relates to the relationship between the federal and state constitutional provisions, search and seizure in New York is somewhat confusing. Because of changes in the Justices sitting on the United States Supreme Court and the Judges sitting in the New York State Court of Appeals and their ideology or view of the right against unreasonable searches and seizures, changes in police procedures, and changing public attitudes, search and seizure is ever changing and evolving. This makes it, by far, the most confusing of all the constitutional provisions.

The purpose of this chapter is to somewhat simplify search and seizure — if that is possible — in order for you to be able to draft either a motion, an answer or a memorandum of law after the suppression hearing.
The Constitutional Provisions — Federal and State

Federal Prosecutions

The protection against unreasonable search and seizure comes from the fourth amendment to the United States Constitution. This amendment states:

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

The fourth amendment applies to everyone in the United States of America in federal prosecutions.

State Prosecutions

The fourth amendment also applies to prosecutions in state courts through the due process clause of the fourteenth amendment. New York State has its own constitution and its own constitutional provision dealing with search and seizure: Article I, Section 12 of the New York State Constitution. This constitutional provision states:

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

Word-for-word it is the same as the federal fourth amendment.

The final interpreter of the fourth amendment is the United States Supreme Court and the final interpreter of Article I, Section 12 is the New York State Court of Appeals. Decisions from these courts interpret the words, phrases and meaning of these constitutional provisions and make the fourth amendment alive and not static.

States are free to grant protections to their citizens beyond those within the scope of the Bill of Rights.

Also, statutes from Congress and the State Legislature add meaning to the words in the constitution.

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2 Marbury v Madison, 1 Cranch 137 [5 US 137] (1803).
3 See e.g. People v LaValle, 3 NY3d 88 (2004).
Interaction Between the Constitutional Provisions, the Court’s Interpretations and Laws from the Legislatures

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<td>2. Caselaw, by state and federal courts, interpreting the fourth amendment</td>
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<td>3. Federal and state statutes (though they must prescribe a higher standard than that required by the fourth amendment and caselaw interpreting such statutes); and</td>
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<tr>
<td>4. Article I, section 12 of the New York State Constitution and caselaw interpreting that provision (though they must prescribe a higher standard than that required by the fourth amendment and caselaw interpreting such statutes)</td>
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**Constitutional Provisions and the Courts**

The Fourth Amendment is a series of 54 words. It only comes into play when there is a criminal prosecution. Once a person is prosecuted and they raise a search and seizure issue through a motion to suppress, the trial court is required to interpret the fourth amendment through a decision. If the motion to suppress is granted and the case dismissed, or the motion to dismiss is denied and the defendant is either pleads guilty or is found guilty after a trial, the losing party might appeal the suppression decision to an intermediate appellate court. If it is a federal prosecution, it starts in the Federal District Court and the appeal is to the Federal Court of Appeals. If it is a state prosecution for a felony in New York, it starts in the New York State Supreme Court or other local criminal court and the appeal is in the Supreme Court, Appellate Division.

Once the intermediate appellate court makes a decision the losing party might appeal to the highest court. In a federal prosecution, that is the United States Supreme Court in Washington, D.C. In a New York case, that is the New York Court of Appeals in Albany.

Finally, once the New York Court of Appeals interprets the fourth amendment in a decision, the losing party might appeal that to the United States Supreme Court, since the Supreme Court is the final interpreter of the United States Constitution. If the decision of the New York Court of Appeals is based solely on article I, section 12 of the New York State Constitution, then the decision is final, since the New York Court of Appeals is the final interpreter of the New York State Constitution. Of course, if the losing party claims that the Court of Appeals interpretation of article I, section 12 afforded the defendant the same or more rights under the fourth amendment, they can appeal to the United States Supreme Court. The Supreme Court’s decision will only be on whether the Court of Appeals in its interpretation of Article I, section 12 afforded the defendant the same or more rights under the fourth amendment. In other words, if the New York Court of Appeals opinion attempts to restrict rights afforded under the fourth amendment, however, then the fourth amendment controls and the state interpretation will be unconstitutional under the fourth amendment.
Constitutional Provisions and the Legislatures

The legislatures can pass laws that govern situations where search and seizure is an issue. Congress can pass laws that afford federal defendants more rights than under United States Supreme Court decisions. The New York State legislature, likewise, can do the same for laws dealing with Article I, section 12.

The Legislatures and the Courts

The laws that are enacted are, of course, subject to judicial scrutiny. The courts will examine the law, once they are used in a criminal prosecution, to determine whether the laws are consistent with the constitution and whether they either afford the same or a greater level of right protection to the defendant. If they provide the defendant less, then they will be struck down as unconstitutional.

Fourth Amendment Terms Defined

Again, the fourth amendment to the Constitution of the United States and article 1, section 12 of the New York Constitution state:

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

If you read through the fourth amendment to the Constitution of the United States and article 1, section 12, certain words and phrases stand out. Through interpretations from courts and laws passed by legislatures, other words and phrases relating to those words and phrases have become important.

<table>
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<th>Words and Phrases in the Fourth Amendment</th>
<th>Words and Phrases Derived from Words and Phrases in Column A</th>
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<td>search</td>
<td>frisk</td>
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<td></td>
<td>protective sweep</td>
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<td>probable cause</td>
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<td>search or arrest warrants</td>
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<tr>
<td>Search</td>
<td>An intrusion of a protected privacy interest.</td>
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<tr>
<td>Frisk</td>
<td>A very limited search whose purpose is to discover weapons for the safety of the police officer.</td>
</tr>
<tr>
<td>Protective sweep</td>
<td>A very quick and limited intrusion into an area simply to find hidden people who might pose a danger to police while in a premise.</td>
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<tr>
<td>Seizure</td>
<td>A significant interruption of a person’s liberty of movement as a result of police action.</td>
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<tr>
<td>Stop</td>
<td>A stop is a limited seizure, short of an arrest.</td>
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<tr>
<td>Probable Cause</td>
<td>Facts that are known to the police officer would warrant a person of reasonable caution in the belief a particular person has committed a crime. In New York, probable cause is also called reasonable cause and is defined statutorily in CPL 70.10 (2).</td>
</tr>
<tr>
<td>Reasonable Suspicion</td>
<td>Reasonable suspicion is a belief that criminality is at hand. Since this is less than probable cause, a person cannot be arrested on reasonable suspicion.</td>
</tr>
<tr>
<td>Search and Arrest Warrants</td>
<td>A search warrant is a court order directing a police officer to search a particular thing (e.g., home or car) to seize a particular thing. An arrest warrant is similar. An arrest warrant is court order directing a police officer to arrest a particular person.</td>
</tr>
<tr>
<td>Warrantless Searches and Arrests</td>
<td>A police officer may search or may make an arrest without a warrant if some judicially accepted exception to the warrant clause exists. Some of them are: searches incident to a lawful arrest, exigent circumstances, plain view, abandonment, consent, border searches, and administrative searches.</td>
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5 United States v Jacobsen, 466 US 109, 113 (1984); People v Mercado, 68 NY2d 874 (1986); People v Dunn, 77 NY2d 19, 26 (1990).
7 Maryland v Buie, 494 US 325 (1990); People v Febus, 157 AD2d 380 (1st Dept 1990).
8 People v Cantor, 36 NY2d 106 (1975).
9 Terry v Ohio, 392 US 1 (1968).
10 People v Harrison, 57 NY2d 470 (1982).
12 People v Cantor, 36 NY2d 106 (1975); United States v Hensley, 469 US 221 (1985).
13 CPL 690.05
Search Warrants

In order to search or seize, the officer must have probable cause, unless there is consent.

If the police have reasonable suspicion, they can stop the person and frisk them.

Warrants, Arrest and Search

Today, the vast majority of the arrests and the seizures of contraband are done without a warrant. However, they still exist.

The general rule is that absent a warrant a search or arrest is per se unconstitutional, with a few exceptions. A warrantless search or arrest must fit into one of those exceptions created by the United States Supreme Court.

How a Warrant is Obtained

Practically speaking, a police officer goes to the court and sees a particular judge. The officer is sworn in and tells the judge what the judge needs to know in order to issue a warrant.

Basic Requirements for a Warrant

The basic requirements for a warrant are straight out of the fourth amendment of the United States Constitution.

<table>
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<tr>
<th>Requirements for a Valid Search Warrant</th>
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<td>3</td>
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If these requirements must be met or the warrant will not be valid. If the warrant is not valid, then what is seized will be suppressed (that is, cannot be used at trial as evidence).

1. Neutral Magistrate

A magistrate is almost always a judge, though not always. This magistrate must be detached from the investigation and have no financial interest in whether the warrant is issued.


15 Usually a judge is designated to handle warrants for a particular time — usually referred to as the ‘catch’ or emergency judge.

2. Probable Cause Must Be Established

Probable cause, or reasonable cause, can be established either through the police officer’s direct knowledge or from hearsay information the police officer present that is based on information provided by an informant. Hearsay evidence is permissible in the application for a search warrant.

If the information is hearsay, then it has a special way of being evaluated.

Under the Federal rule, the hearsay information is evaluated under the totality of circumstances test: making a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before the Magistrate, including the veracity and basis of knowledge of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.\(^\text{17}\)

New York, on the other hand has a more restrictive test. New York has kept the old standard and has rejected the new Supreme Court standard.\(^\text{18}\) Instead, New York has kept the \textit{Aguilar-Spinelli}\(^\text{19}\) two-prong test.

<table>
<thead>
<tr>
<th>Prong</th>
<th>Definition</th>
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<tbody>
<tr>
<td>1 Reliability</td>
<td>the magistrate must be told why the officer concluded that the informant was credible or reliable</td>
</tr>
<tr>
<td>2 Basis of Knowledge</td>
<td>the magistrate must be told of some of the underlying circumstances from which the informant concluded that the contraband were where he or she claimed they were</td>
</tr>
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</table>

3. Particularity

The last part of the fourth amendment states: “...particularly describing the place to be searched, and the persons or things to be seized.” The general rule is that the description on the warrant must be specific enough that a person not involved in the investigation would be able to pick up the warrant and execute it in a manner intended by the judge issuing the warrant.\(^\text{20}\) Nothing is to be left to the discretion of the police Officer.\(^\text{21}\)


\(^{18}\) \textit{People v Griming,} 71 NY2d 635 (1988).


Standing: “Their” — Challenging the Police’s Action in the Seizure of the Person or Thing

The way the defendant challenges the unconstitutional seizure of something is through a motion to suppress. In order to make a motion to suppress, the defendant must be aggrieved since fourth amendment rights are personal. In order to have standing to challenge the illegal search and seizure the defendant must show a personal legitimate expectation of privacy.22

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**People v Ponder, 54 NY2d 160 (1981)**

The question presented on this appeal is whether the "automatic standing" rule in search and seizure cases should be retained as the law in this State. That rule relieves a defendant charged with a possessory offense of the burden of establishing that he has an interest in the premises searched or the property seized in order to have standing to challenge the search or seizure. We agree with the Appellate Division’s determination that the rule should no longer be applied.

Joseph Salerno was shot on February 10, 1977 and later died of a wound he received during the robbery of his hardware store in Rochester, New York. Two police officers, Parks and Peck, arrived at the scene within five minutes of the shooting. Parks obtained a description of the assailant and an account of the robbery from the victim, Mr. Salerno. Detective Perticone and other police officers arrived shortly thereafter.

A bystander at the scene told Detective Perticone that while shoveling snow at her home, located close to the scene of the crime, she had seen defendant, with whom she was acquainted, running away from the hardware store a few minutes before the police arrived. She said she had noticed a black and silver object protruding from his jacket. Detective Perticone was familiar with defendant as a result of the latter’s prior criminal activity. Perticone also knew that defendant had been apprehended at the nearby residence of his grandmother, Louise Ponder, on previous occasions.

Perticone communicated this information to the other officers and the group proceeded to the Louise Ponder residence. Perticone and two of the other policemen stationed themselves on a street running behind the house. Parks and Peck approached the side door of the house and observed a .22 caliber bullet lying on the snow-covered ground near the door. They knocked on the side door which the defendant opened, although he was not then recognized by either officer. When asked whether "Wade" was inside, the defendant pointed upstairs. Parks and Peck continued into the house leaving the defendant unattended. The defendant was apprehended by Perticone as he fled from the house.

After arresting the defendant, Perticone joined Peck in the house intending to search for the weapon. The Appellate Division found that Louise Ponder, who was home at the time, did not consent to a search of the house. Believing that Mrs. Ponder had consented, the officers proceeded to search the premises without a warrant and Peck found a sawed-off .22 calibre rifle inside a covered washing machine in the basement. Later at the station house defendant gave a written statement in which he described the robbery and admitted the shooting.

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At the Huntley hearing, Mrs. Ponder testified that defendant was one of 30 grandchildren and, like the rest, he did not live with her but occasionally spent the night. She further testified that no particular room had been assigned for defendant's use, that he was not staying at her home on February 10, 1977, and that he never slept in the basement nor used or had any interest in the washing machine.

Defendant was indicted and after a jury trial was convicted of felony murder (Penal Law § 125.25 [3]), manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (Penal Law § 265.02 [4]).

On these facts it is clear that there was probable cause for defendant's arrest. The only other issue raised on this appeal which requires our attention is whether defendant should be afforded "automatic standing" to contest the validity of the warrantless search of Mrs. Ponder's home, which led to the seizure of the weapon.

The "automatic standing" rule has its genesis in the Supreme Court's 1960 decision of *Jones v United States* (362 US 257), where it was held that the standing of a defendant charged with a possessory offense to challenge the validity of a search was not to be conditioned upon a demonstration that he had an interest in the premises searched or the property seized. Our court retained the rule as part of New York State's criminal jurisprudence in *People v Hansen* (38 NY2d 17), notwithstanding the Supreme Court's apparent receptivity at that time to reconsideration of its "automatic standing" rule (*Brown v United States*, 411 US 223). Jones had not yet been expressly overruled by the Supreme Court and we felt constrained to continue to apply the rule in this State (38 NY2d, at p 23).

In 1980, and after our decision in *Hansen*, however, the Supreme Court unequivocally abrogated the "automatic standing" rule in *United States v Salvucci* (448 US 83). Defendant therefore has no automatic standing under the Fourth Amendment of the United States Constitution to challenge the warrantless search of his grandmother's home, and the only remaining question is whether under section 12 of article I of the New York State Constitution our court would require continued application of the rule.

Analysis indicates that the "automatic standing" rule should be rejected. Even in Jones the Supreme Court made clear that as a general principle "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he * * * establish, that he himself was the victim of an invasion of privacy" (362 US, at p 261). Additionally, section 12 of article I of the New York State Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal courts. Finally, the constraint imposed by the decision in Jones, which we believed mandated our result in Hansen, has been removed by the Supreme Court's decision in *Salvucci*. We are therefore now free to re-evaluate the "automatic standing" rule and, seeing no reason at this time to diverge from the Supreme Court's analysis in Salvucci, we likewise abrogate the rule as part of the law of this State.

Our recent decision in *People v Henley* (53 NY2d 403), although involving nonpossessory offenses, foreshadowed the conclusion we reach today. There, Jim Henley was taken into custody as a burglary suspect and transported to his apartment where he consented to a request by the police to enter. His brother Willie Norman Henley, who also lived at the apartment, was present inside at the time of the entry. The police seized merchandise found in the apartment which bore the name of the company reporting the burglary and the Henley brothers were subsequently indicted for burglary and grand
larceny. We held that the evidence should have been suppressed as to Jim Henley because there was no probable cause to take him into custody and transport him to his abode. We refused to suppress the evidence as to Willie Norman Henley, however, finding that he had no standing to challenge the illegality of his brother’s custodial detention or transportation and, deprived of that premise, had no other basis to question the validity of the consent given by Jim Henley to the police to enter the Henley apartment.

Turning again to the case now before us, with the rejection of the automatic standing rule we conclude that defendant may challenge the validity of the warrantless search which led to the seizure of the weapon only if he can demonstrate a reasonable expectation of privacy in his grandmother’s home. From his grandmother’s testimony at the suppression hearing we can only conclude that defendant had no reasonable expectation of privacy in her home, nor, more specifically, in the particular area searched. The weapon was therefore properly received into evidence.

We have reviewed the other contentions raised by defendant on this appeal and find them to be without merit. The order of the Appellate Division should, therefore, be affirmed.

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**Legitimate Expectation of Privacy**

The concept of needing an expectation of privacy has evolved from everyone charged with possession of a particular item had automatic standing to a requirement that the person moving show that they had an expectation of privacy in the place where the item was seized. Ownership of the item is less important than showing a nexus between the defendant and the place where the item was seized. Two examples will be illustrative of this. First, anything in a bag you are carrying is protected because you have an expectation of privacy in your person and effects. However, what if your item was found in your girlfriend’s purse? Sure it is your item, but it was seized from a bag that was not on your person and not even yours. Therefore, you do not have an expectation of privacy in your girlfriend’s bag. Second, it is clear that in a person’s own home they will have a legitimate expectation of privacy. However, you will also have a legitimate expectation of privacy in someone else’s home if you are an overnight guest because you are using that place as your own home.

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23 Rawlings v Kentucky, 448 US 98 (1980).

Exceptions to the Warrant Requirement

— Consent
— Search Incident to a Lawful Arrest
— Plain View
— Exigent Circumstances
— Vehicle Exception
— Stops, Frisks and Protective Sweeps
— Combinations: One thins leads to another

Consent

The fourth amendment protects people from unreasonable searches and seizures. That right can be waived. One such way is for the person to consent to the search. A consent is, therefore, a waiver of the rights protected under the fourth amendment. Once there is consent, there is no need for a warrant and no need for probable cause.

Because consent is a waiver of constitutional rights, the prosecutor has a heavy burden to show that the consent freely and voluntarily given.25

Consent exists where a person agrees to allow the police officer to search a particular place, such as a home or a car or a bag.

There are several issues involved in determining whether the defendant gave his or her consent. The ultimate issue is whether the consent was freely given or a product of duress or coercion, express or implied.26

People v Gonzalez, 39 NY2d 122 (1976)

The exclusive issue is whether in a criminal action defendants’ written consents to search their apartment were involuntary as a matter of law, as indeed the Appellate Division concluded.

Governmental intrusion into the privacy of the home is, with limited exceptions, prohibited by constitutional limitations in the absence of a valid search warrant (NY Const., art. I, § 12; US Const. Amdts. IV, XIV....). Even if an individual has been lawfully arrested, the police are not thereby free to conduct a full-blown, rummaging search of the arrested person’s home without a warrant (see People v Clements, 37 NY2d 675, 678-679; Chimel v California, 395 US 752, 764-765).

One of the limited exceptions to the warrant requirement and, indeed, to the requirement of probable cause, is voluntary consent to the search (People v Singleteary, 35 NY2d 528, 532; Schneckloth v Bustamonte, 412 US 218, 219, 222). In the instant case, the People concede that the legality of the search of the Gonzalez apartment turns entirely upon the validity of either of the Gonzalezes’ consents.

(Indeed, the agents by obtaining and relying on the signed consents indicated unequivocally that they recognized the doubtfulness of a right to a rummage search without a warrant [cf. People v Clements, 37 NY2d 675].) Of course, the People also recognize that theirs is the heavy burden of proving the voluntariness of the purported consents (see People v Kuhn, 33 NY2d 203, 208; People v Whitehurst, 25 NY2d 389, 391; Bumper v North Carolina, 391 US 543, 548–549...”)

Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle (see People v Kuhn, at 208; Schneckloth v Bustamonte, 412 US 218). As the Supreme Court stated in Bumper v North Carolina, at 550), ‘Where there is coercion there cannot be consent.’

No one circumstance is determinative of the voluntariness of consent; whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstances (... see generally Search — Consent While In Custody, Ann., 9 ALR3d 858, 864-866).

An important, although not dispositive, factor in determining the voluntariness of an apparent consent is whether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest. True, custody or arrest alone does not necessarily preclude voluntariness (see People v Rodriguez, 11 NY2d 279, 287). Custody, or, more compellingly, the immediate events of an arrest, especially a resisted arrest, do, however, engender an atmosphere of authority ordinarily contradictory of a capacity to exercise a free and unconstrained will (... Search—Consent While In Custody, Ann., 9 ALR3d 858, 875-876).

This is especially true when the individual in custody or under arrest is confronted by a large number of police agents (see People v Cameron, 73 Misc 2d 790, 798...). Moreover, the fact that a defendant was handcuffed has been considered a significant factor in determining whether his apparent consent was but a capitulation to authority. Submission to authority is not consent (People v Gorsline, 47 AD2d 273, 276...).

In the instant case, the Gonzalezes were arrested, separated from each other and their arms were handcuffed behind their backs. As many as nine armed Federal agents had swarmed about the small apartment and, about one-half hour after their entry, each defendant was asked to sign the consent to search in the immediate presence of at least three agents. Mrs. Gonzalez’ mother and grandfather had been excluded from the premises. Thus, the atmosphere, as inferred from the testimony of the agents and interpreted on the objective facts, in which the ‘consents’ were obtained could hardly have been more coercive, short of direct police testimony of actual duress.

Another factor to be considered in determining the voluntariness of an apparent consent is the background of the consenter ... A consent to search by a case-hardened sophisticate in crime, calloused in dealing with police, is more likely to be the product of calculation than awe. Here, the Gonzalezes were both under 20 years of age and were newlyweds of three days. They had had very limited prior contact with the police. Under these circumstances, the ineluctable inference, except to the jaded, is that the consents could not be, on any creditable view of the agents’ testimony, the product of a free and unconstrained choice.
Another factor to be considered is whether the consenter has been, previously to the giving of
the consents, or for that matter even later, evasive or uncooperative with the law enforcement
authorities (... cf. People v Alberta, 37 Misc 2d 847, 848). Of course, if defendants had assisted the
Federal agents in their search, this would be evidence of a voluntary consent. But, to the contrary, Mr.
Gonzalez had previously forcibly resisted arrest by the Federal agents, one of whom had his weapon
drawn. Mrs. Gonzalez, too, did not open the apartment door immediately upon request; she delayed
approximately six minutes. She then opened the door only when the banging and kicking at the door
indicated that the agents would enter in any event. If Mrs. Gonzalez had been trying to dispose of
contraband, it was now obvious, she was not to be left free to complete the task. Such determined
resistance and evasion is hardly compatible with a suddenly voluntary consent, which consent in all
likelihood would be recognized as self-destructive. Instead, the circumstances are evidence that the
consents were a yielding of overbearing official pressure.

A final factor is whether a defendant was advised of his right to refuse to consent (People v Mule,
46 AD2d 414). Such advice is not mandatory (People v Kuhn, 33 NY2d 203). Failure to advise, however,
may be considered in determining whether a consent was voluntary. In the instant case, the
Gonzalezes were informed of their right to refuse to consent to the search. It must be noted that such
advice was contained in a printed form read to and signed by them, hardly an amelioration of the
coercive atmosphere in the apartment (cf. People v Rodríguez, 47 Misc 2d 551, 557).

In taking the composite of the facts: the number of agents present in the small apartment; the
youth of the Gonzalezes; the separation and handcuffing of these newlyweds; the removal of parent
and grandparent from the scene; the circumstances of the arrests; and the sudden acquiescence of the
segregated couple, handcuffed, and without further ado, in the signing of the printed consents, negates
totally the idea of a free act of will, or else the pious language of the cases is only a gloss on an
unacknowledged ugly reality. Under these circumstances, as a matter of law, the apparent consent was
induced by overbearing official conduct and was not a free exercise of the will.

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**Search Incident to a Lawful Arrest (SILA)**

Once a person is lawfully arrested, the arresting officer may search the arrested person and the
area within his or her immediate control. 27 This is generally done for the safety of the officer. 28 The
prosecutor must show probable cause in order to justify the search since an arrest must be made on
probable cause. The search incident to a lawful arrest exception plays out differently depending on
where the search is conducted.

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Three Common Places Where SILA Is Applied

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<tbody>
<tr>
<td>1</td>
<td>Home</td>
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<tr>
<td>2</td>
<td>Cars (or vehicles)</td>
</tr>
<tr>
<td>3</td>
<td>The street where there is a bag or other container involved</td>
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</table>

**People v Mangum, 125 AD3d 401 (1st Dept 2015).**

Judgment, Supreme Court, New York County (Carol Berkman, J., at suppression hearing; Michael J. Obus, J., at plea and sentencing), rendered September 20, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of five years, unanimously reversed, on the law, defendant’s motion to suppress granted, and the indictment dismissed.

On January 26, 2012, police officers Maurad Arslanbeck and David Porras were assigned to patrol a housing complex on the Lower East Side of Manhattan. The officers first observed defendant walking through a courtyard along with two other men, each holding a styrofoam cup. Defendant was carrying a thin backpack that sagged heavily on its right side. As the trio continued walking, the officers observed defendant discard the styrofoam cup onto the grass.

The officers then approached the men from opposite directions. Officer Arslanbeck reported seeing defendant adjust his backpack to place it higher up on his shoulder and hearing a clinking sound emanating from inside the bag. The officers identified themselves and after some questions, defendant stated that his backpack contained books. Defendant was then instructed to place the backpack on the ground and the officers reported hearing the sound of a clinking metal object as the bag was being moved. Officer Porras picked the bag up from the ground and felt the barrel of a handgun. Defendant was then arrested. At this point, Officer Porras opened the bag and confirmed the presence of a firearm. At the precinct, defendant was searched and a small quantity of marijuana as well as several glassines of heroin were recovered from his person.

Defendant moved to suppress all of the physical evidence against him, arguing that it was obtained through illegal searches in contravention of the Fourth Amendment. The trial court held that the police did not have reasonable suspicion to stop defendant and frisk his backpack. It nevertheless denied the motion, finding that the evidence was obtained pursuant to a lawful search incident to arrest. The court reasoned that since the police had probable cause to arrest defendant for littering once he discarded the styrofoam cup, the search of the backpack was authorized as incident to the arrest that could have been made, regardless of whether the officers had any actual intent to arrest defendant for littering. Based on the recent Court of Appeals decision in People v Reid (24 NY3d 615 [2014]), which holds that there must be either an actual or intended arrest for the offense justifying the search, we now reverse.
It is well recognized that the police may search the person or area within the immediate control of any individual who is lawfully placed under arrest (see People v Wylie, 244 AD2d 247, 249 [1st Dept 1997], lv denied 91 NY2d 946 [1998]; Chimel v California, 395 US 752, 762-763 [1969]). The warrantless search incident to arrest advances the twin objectives of ensuring the safety of law enforcement and the prevention of evidence tampering or destruction by a suspect. It is not particularly significant whether a search precedes an arrest or vice versa, so long as the two events occur in a nearly contemporaneous manner (People v Verges, 120 AD3d 1028, 1029 [1st Dept 2014], lv denied 24 NY3d 1047 [2014]; People v Evans, 43 NY2d 160, 166 [1977]). Based on Reid, however, it is now clear that the police must either make an arrest or intend to make an arrest at the time of the search in order for the search to be considered lawful (24 NY3d 615). The intent to arrest for the offense justifying the search must be present even if a defendant is ultimately arrested for a different offense (id.).

In Reid (24 NY3d 615 [2014]), the defendant was pulled over by a police officer after he was observed driving erratically. Based on the defendant’s disheveled appearance and odd responses to questions, the officer ordered him out of the car, searched his person, and uncovered a knife in his pocket. Although it was undisputed that the officer’s observations gave him probable cause to arrest the defendant for driving while intoxicated, the officer testified at the suppression hearing that he had no intention of arresting the defendant at the time he was initially stopped and searched. The officer also explained that it was not until discovery of the knife that he decided to arrest the defendant. In declining to uphold the search as incident to the defendant’s arrest, the Court of Appeals observed that “but for the search,” the arrest “would never have taken place” (24 NY3d at 620), concluding that it was irrelevant that an arrest for DWI could have been made prior to the search. The Court explained that the search must be “incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not” (24 NY3d at 619). This necessarily requires that, at the time the search is undertaken, an arrest has either been made or the officer has already formulated the intent to effectuate an arrest.

While in this case the officers had probable cause to arrest defendant for littering (see Administrative Code of City of NY § 16-118; Atwater v Lago Vista, 532 US 318, 354 [2001]), defendant was not arrested for that offense. Nor did either of the officers testify at the suppression hearing that they harbored any intent to arrest defendant until they discovered the gun. According to officer Arslanbeck, it was only after they discovered a weapon in defendant’s backpack that a decision to arrest him was made. Without an actual arrest or the formulation of an intent to arrest defendant for littering prior to frisking his bag, the search cannot be justified as having been incident to defendant’s arrest (Evans, 43 NY2d at 166; Knowles v Iowa, 525 US 113 [1998]).

The trial court found that the officers otherwise lacked reasonable suspicion to stop defendant, a conclusion that the People do not contest on appeal. Consequently, the evidence obtained from defendant’s backpack and from the subsequent search at the precinct should have been suppressed. In light of our decision that the search was unlawful, we need not address defendant’s remaining arguments.
Plain View

The general rule is anything that the police officer sees that is contraband can be seized. However, there is a difference in the Federal standard and the New York standard.

<table>
<thead>
<tr>
<th>In Order for Plain View to Apply</th>
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<tr>
<td><strong>Federal Standard</strong></td>
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<tr>
<td>police must be in a lawful position to view the item</td>
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<tr>
<td>the police have lawful access to the object</td>
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<tr>
<td>it must be immediately apparent that this item is contraband or evidence of a crime.</td>
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People v Sanders, 26 NY3d 773 (2016)

Fahey, J.

The primary issue on this appeal is whether defendant’s constitutional right to be free from unreasonable searches and seizures was violated when police took defendant’s clothing, which had been placed in a clear hospital bag, without either a warrant or his consent. Under the circumstances of this case, we conclude that the seizure was unconstitutional, and that the part of defendant’s motion seeking to suppress that physical evidence should have been granted.

On August 11, 2010, defendant “walked in” to Jamaica Hospital in Queens seeking treatment for a gunshot wound. Pursuant to its protocol, and as required by law (Penal Law § 265.25), the hospital reported the shooting to the police. Defendant told a police officer who responded to the hospital that defendant “was shot in [a nearby] [p]ark.” By the time he spoke to that officer, defendant was “wearing hospital clothing.”

After “dealing with . . . defendant” for “[a] little over an hour,” the officer was directed to clothing defendant “wore when he came to [the] [h]ospital.” Those clothes were in a clear plastic bag that rested on the floor of a trauma room a short distance away from the stretcher on which defendant was situated in a hospital hallway. In the bag the officer observed the “jeans that [defendant] was wearing that night, boxers, and his sneakers,” and there is no dispute that the officer seized that bag. Likewise, there is no dispute that, as he vouched the clothing, the officer inspected each garment. Based at least in part on observations the officer made with respect to the condition of those items.

during the inventory process, authorities believed that defendant had accidentally shot himself with a
gun he carried in his waistband.

Defendant was subsequently charged with, among other things, criminal possession of a weapon
in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree
(§ 265.02 [1]). Before trial, defendant sought suppression of the clothes based on what defense counsel
characterized as the unlawful warrantless seizure of those items. The People opposed the motion on
the ground that “police can seize evidence . . . where the items are in open view and the officer[s] observe[s] [them] from a lawful vantage point.” After a hearing at which the investigating officer
testified essentially to the facts noted at the outset of this opinion, Supreme Court denied suppression.
According to the hearing court, “the clothing in [the] clear bag . . . potentially was evidence of a
crime,” and “there was no violation of any Fourth Amendment rights . . . when th[at] clothing was
recovered to be examined to see if it had relevance to the investigation of a crime of someone being
shot.”

Defendant was eventually convicted of the aforementioned crimes following a jury trial at which
the People supported their contention that defendant criminally possessed a loaded firearm outside of
his home or place of business through, among other things, the admission into evidence of the
clothing seized at the hospital. On appeal, the Appellate Division affirmed the judgment and rejected
defendant’s challenge to the suppression ruling (119 AD3d 878 [2d Dept 2014]). In doing so, the
Appellate Division reasoned that “[s]ince the defendant’s clothing was lying on the floor of a hospital
room in a clear plastic bag, the clothing was openly visible,” and that “the police had probable cause to
seize the . . . clothing as evidence of a crime of which they believed the defendant had been a victim”
(id. at 878). A Judge of this Court granted defendant leave to appeal (24 NY3d 1088 [2014]), and we
now reverse the Appellate Division order.

Our analysis begins with the fundamental precept “that warrantless searches and seizures are per
se unreasonable unless they fall within one of the acknowledged exceptions to the Fourth
Amendment’s warrant requirement” (People v Diaz, 81 NY2d 106, 109 [1993], abrogated on other
grounds by Minnesota v Dickerson, 508 US 366 [1993]). “Where a warrant has not been obtained, it is the
People who have the burden of overcoming th[e] presumption” of unreasonableness (People v Hodge,
44 NY2d 553, 557 [1978]).

Of the “jealously and carefully drawn’ exceptions to the warrant-preference rule” (Matter of
Caruso v Ward, 72 NY2d 432, 443 [1988, Kaye and Titone, JJ., dissenting], quoting Jones v United States,
357 US 493, 499 [1958]), at issue here is the exclusion in which probable cause exists for the seizure of
an object or objects in plain view.

“Under the plain view doctrine, if the sight of an object gives the police
probable cause to believe that it is the instrumentality of a crime, the object
may be seized without a warrant if three conditions are met: (1) the police
are lawfully in the position from which the object is viewed; (2) the police
have lawful access to the object; and (3) the object’s incriminating nature is
immediately apparent” (Diaz, 81 NY2d at 110; see People v Brown, 96 NY2d
80, 89 [2001]).

Against this backdrop we conclude that the hearing court erred in denying defendant’s motion to
suppress the clothes seized by police. There was evidence adduced at the suppression hearing that the
officer who seized the clothes knew defendant to have been shot, and that defendant awaited
treatment at the hospital while dressed in clothes different from those he wore at the time of the shooting. More important, however, is what the evidence presented at the suppression hearing does not establish. That evidence does not show that, before the seizure, the testifying officer knew that entry and exit wounds were located on an area of defendant’s body that would have been covered by the clothes defendant wore at the time of the shooting. Similarly, the record of that proceeding contains no other indicium that could have given rise to a reasonable belief that the shooting had affected defendant’s clothes. To that end, there is no record support for the lower courts’ conclusion that the investigating officer had probable cause to believe that defendant’s clothes were the instrumentality of a crime (see generally People v Cook, 85 NY2d 928, 931 [1995]; cf. generally People v Salvadoron, 127 AD3d 1239, 1240-1241 [2d Dept 2015]).

Consequently, for the foregoing reasons we conclude that the seizure was illegal and the items seized were improperly admitted into evidence at trial. In view of our determination that defendant’s motion to suppress the physical evidence should have been granted, we do not address defendant’s remaining contentions.

Accordingly, the order of the Appellate Division should be reversed, defendant’s motion insofar as it sought to suppress the physical evidence granted, the judgment vacated, and the case remitted to Supreme Court for further proceedings in accordance with this opinion....

Order reversed, defendant’s motion insofar as it sought to suppress the physical evidence granted, judgment vacated and case remitted to Supreme Court, Queens County, for further proceedings in accordance with the opinion herein.

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**Exigent Circumstances**

<table>
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<th>Types of Exigent Circumstances</th>
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<tr>
<td>1 Hot Pursuit</td>
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<td>2 Imminent Threat to Safety</td>
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<tr>
<td>3 Imminent Destruction or Removal of Evidence</td>
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<tr>
<td>4 Emergency Doctrine</td>
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</table>
**Explanation of the Types**

<table>
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<tr>
<th></th>
<th><strong>Type</strong></th>
<th>Description</th>
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| 1 | Hot Pursuit                                  | When the police are in the immediate pursuit of a suspect who is attempting to get away, the police can continue the pursuit in order to arrest the suspect. This is so even if the pursuit takes the police into the suspects home or in a church.                                                                 │
| 2 | Imminent Threat to Safety                    | Police may make a warrantless entry into a person’s home where they reasonably believe that a person in that home is in immediate need of aid. The exception is usually used in kidnaping situations and where the person in need of aid is in serious trouble and might become a murder victim.       |
| 3 | Imminent Destruction or Removal of Evidence  | Most evidence behind closed doors is there long enough for the police to get a search warrant. However, under this type exigent circumstance, if there is reason to believe that the evidence is about to be removed or destroyed, the police may enter the premises to recover the contraband. |
| 4 | Emergency doctrine exception                 | The emergency doctrine exception applies where the police: (1) have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) are not primarily motivated by intent to arrest and seize evidence; and (3) have a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched |

**Factors in Considering Imminent Destruction or Removal of Evidence**

<table>
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<th>Description</th>
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<tr>
<td>1</td>
<td>the degree of urgency and the time needed to obtain a warrant</td>
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<tr>
<td>2</td>
<td>reasonable belief that the evidence is about to be destroyed or removed</td>
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<tr>
<td>3</td>
<td>the possibility of danger to the police who are outside the premises awaiting the warrant</td>
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<tr>
<td>4</td>
<td>evidence that the people inside the premises are aware that the police are outside or on their trail</td>
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<tr>
<td>5</td>
<td>the ease in which the contraband can be destroyed</td>
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Five Factors to Determine Exigency

(1) the degree of urgency involved and the amount of time necessary to obtain a warrant;

(2) reasonable belief that the contraband is about to be removed;

(3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought;

(4) information indicating the possessors of the contraband are aware that the police are on their trail;

(5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.’

Law on the Emergency Doctrine

(1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property — the protection of human life or property in imminent danger must be the motivation for the search

(2) the search must not be primarily motivated by intent to arrest and seize evidence

(3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched

People v Loucks, 125 AD3d 887 (2d Dept 2015)

Appeal by the defendant from a judgment of the County Court, Dutchess County (Greller, J.), rendered April 30, 2012, convicting him of murder in the second degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial, after a hearing, of those branches of the defendant’s omnibus motion which were to suppress physical evidence and his statements to law enforcement officials.

Ordered that the judgment is affirmed.

Contrary to the defendant’s contention, the County Court properly denied suppression of the physical evidence seized from the house that the defendant shared with the victim, his live-in girlfriend. The People met their burden of demonstrating the legality of the police conduct pursuant to the emergency exception to the warrant requirement (see People v Berrios, 28 NY2d 361, 367 [1971]; People v Rossi, 99 AD3d 947, 949 [2012], affd 24 NY3d 968 [2014]; People v Cole, 85 AD3d 1198 [2011]). “[A]lthough warrantless entries into a home are ‘presumptively unreasonable’ ” (People v Molnar, 98 NY2d 328, 331 [2002], quoting Payton v New York, 445 US 573, 586 [1980]), a warrantless search and seizure in a protected area may be lawful, under some circumstances, pursuant to the emergency doctrine (see People v Mitchell, 39 NY2d 173, 177-178 [1976]; People v Rossi, 99 AD3d at 949). The exception applies where the police (1) have “reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property,” (2) are “not . . . primarily motivated by intent to arrest and seize evidence,” and (3) have a “reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched”
The United States Supreme Court has held that the subjective intent of the police is not relevant in determining the reasonableness of police conduct under the Fourth Amendment to the United States Constitution (see Brigham City v Stuart, 547 US 398, 403 [2006]). Consequently, the second prong of Mitchell is now relevant, if at all, only to claims raised under the New York Constitution (see NY Const, art I, § 12). We need not determine in this case whether the second prong of Mitchell is still viable under the New York Constitution (see People v Rossi, 99 AD3d at 949; People v Stanislaus-Blache, 93 AD3d at 741-742), because we conclude that the actions of the police officers were permissible under both Brigham City and Mitchell (see People v Stanislaus-Blache, 93 AD3d at 742).

The evidence presented at the suppression hearing established that the police initially entered the house shared by the victim and the defendant after the police received a call reporting that the victim did not appear for a scheduled appointment with a child protective services agency for the return of her children, and a subsequent call from the grandmother of one of the children. The grandmother, who was also that child's foster parent, had called because she was unable to reach the victim. When a patrol officer arrived at the victim’s house, the grandmother, who was visibly upset and waiting outside after having knocked on the door of the house, informed the officer that it was unusual that the victim was not returning her calls. The grandmother was very troubled that the victim had failed to appear to reunite with her children because the victim had undergone a struggle to reunite with them and this was an important day for her. The grandmother further reported that she had made several unsuccessful phone calls to friends and family to locate the victim, and that she was worried about the victim’s well-being. Additionally, she informed the officer that the victim was pregnant. During the interview with the grandmother, the responding officer, and another officer who subsequently arrived at the location, repeatedly knocked on the door of the house, yelled to gain the attention of any of its occupants, and walked around the outside of the house. The officers heard no response except for the sound of dogs barking from inside the house. At that point, one of the officers opened a window, stuck his head inside, and saw the defendant standing in the living room. Under these circumstances, the initial partial entry into the house through the window was lawful (see People v Rossi, 99 AD3d 947 [2012]; People v Stanislaus-Blache, 93 AD3d 740 [2012]).

Thereafter, at the officers’ request, the defendant opened the front door and stepped onto the front stoop. After speaking with the officers, the defendant invited them inside and consented to their request to look around. He informed them that the victim had left the house after they argued, and he had not seen her for about a day and a half. The defendant stated that he was a “little worried” about her, and had been looking for her. This additional information established an ongoing emergency and potential danger to life, justifying the continued presence of the police and their subsequent search of the house (see People v Rossi, 99 AD3d 947 [2012]; People v Stanislaus-Blache, 93 AD3d 740 [2012]). Additionally, the testimony at the hearing established that the search was not primarily motivated by the intent to make an arrest or seize evidence, and that there was a reasonable basis, approximating probable cause, to associate the area searched with the emergency (see People v Rossi, 99 AD3d 947 [2012]; People v Stanislaus-Blache, 93 AD3d 740 [2012]). Moreover, the search that followed the initial police entry was conducted after the defendant gave his voluntary consent, and was lawful on that alternate ground (see People v Coome, 48 NY2d 286, 290 [1979]; People v Ortiz, 87 AD3d 602 [2011]).
Contrary to the defendant’s contention, the record shows that defense counsel provided meaningful representation to the defendant, and, thus, the defendant was not deprived of the effective assistance of counsel (see People v Benevento, 91 NY2d 708 [1998]; People v Baldi, 54 NY2d 137 [1981]).

The defendant’s contention that the County Court erred in accepting his plea of guilty without inquiring into whether he was knowingly and voluntarily waiving a defense of intoxication (see Penal Law § 15.25) is unpreserved for appellate review (see CPL 470.05 [2]; People v Dugin, 51 AD3d 687 [2008]; People v Siodeski, 21 AD3d 501, 501-502 [2005]). In any event, this contention is without merit. Nothing in the defendant’s allocution cast doubt upon his guilt, negated an essential element of murder in the second degree, or suggested that a defense of intoxication was applicable (see People v Dugin, 51 AD3d 687 [2008]).

People v George Rodriguez, 77 AD3d 280 (2d Dept 2010), lv denied 15 NY3d 955 (2010)

Chambers, J.

In this case, we conclude that the Supreme Court erred in suppressing physical evidence recovered from the defendant’s apartment, as the police were presented with an emergency situation under the standards articulated in Brigham City v Stuart (547 US 398 [2006]) and People v Mitchell (39 NY2d 173 [1976], cert denied 426 US 953 [1976]).

Facts

On August 4, 2006, Police Officer John Bellico and Sergeant Brian Hennessy responded to a radio call informing them of a stabbing in progress on the fifth floor of an apartment complex in Rockaway Beach. Bellico and Hennessy found the defendant, who was bleeding heavily from two large lacerations, on a fifth-floor stairwell of the apartment complex. The defendant provided a description of his assailant and, pursuant to police protocol, Bellico and other officers were dispatched to a nearby train station, where Bellico observed a suspect meeting that description. Hennessy remained at the scene and questioned the defendant about the attack. The defendant stated only that he was walking along the fifth floor when a man stopped him and stabbed him for no reason. Upon further questioning, the defendant said that he did not live in the building. The defendant was then taken downstairs by emergency services to a waiting ambulance. Hennessy, continuing his investigation, learned from the fifth-floor tenant who called the 911 emergency telephone number that the defendant did in fact live in the building, which raised his suspicion. He knocked on the doors of other fifth-floor apartments, but received no further information. From the fifth-floor stairwell, Hennessy followed a trail of blood leading down to the fourth floor and then to the third floor. On the third floor, Hennessy observed blood on the landing, near the elevator, and in front of apartment 3L, which happened to be where the defendant was living. As he neared apartment 3L, he saw droplets of blood in front of the door, as well as blood on the door.34 Hennessy knocked on the door, but received no response. Given his small stature, he did not think he would be able to break down the door, and knowing that it would take the emergency services unit approximately 30 minutes to respond, Hennessy asked the superintendent to unlock the door. By the time the superintendent arrived with

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34 The blood trail and blood in front of apartment 3L are documented in photographs later taken by the crime scene unit.
the key, about 10 minutes later, Hennessy had learned from a radio transmission that a suspect had been apprehended and that the defendant had made a positive identification at a showup. The superintendent unlocked the door, and Hennessy, along with Bellico, who met Hennessy on the third floor, went inside apartment 3L to ascertain whether someone else had been stabbed. Blood was observed in the kitchen and in the living room, but no other victims were found. On the kitchen counter, the officers noticed a digital scale with what appeared to be powdered cocaine on top, and nearby on the floor, the officers found a hydroponic tank with as many as 12 pots containing marijuana plants inside. A few minutes after entering the apartment, both Hennessy and Bellico left. Pursuant to a search warrant later secured by Bellico, police officers made a complete search and seized a significant amount of marijuana and cocaine, along with drug paraphernalia, from apartment 3L.

The defendant moved to suppress the physical evidence obtained from his apartment. The People asserted that the police’s initial warrantless entry into apartment 3L was justified under the emergency exception to the warrant requirement. The hearing court found that the People failed to satisfy their burden of demonstrating that the police had reasonable grounds to believe there was an emergency at hand requiring their immediate assistance for the protection of life or property, the first prong of the Mitchell standard (see People v Mitchell, 39 NY2d at 177-178). The hearing court ruled that because the People failed to satisfy the first prong of Mitchell, it “need not analyze any other element.” Moreover, relying on the Court of Appeals decision in People v Robinson (97 NY2d 341 [2001]), the hearing court concluded that the Court of Appeals “would probably eliminate the subjective prong” of Mitchell and, therefore, for that reason as well, it need not engage in any further analysis. The People appeal.

Analysis

Analysis begins with the fundamental principle that the Fourth Amendment to the United States Constitution and article I, § 12 of the New York Constitution “accord special protection to a person’s expectation of privacy in his [or her] own home” (People v Knapp, 52 NY2d 689, 694 [1981]). However, “[c]ourts have long recognized that the Fourth Amendment is not violated every time police enter a private premises without a warrant. Indeed, though warrantless entries into a home are presumptively unreasonable, the touchstone of the Fourth Amendment is reasonableness—not the warrant requirement” (People v Molnar, 98 NY2d 328, 331 [2002] [internal quotation marks and citations omitted]; see People v Knapp, 52 NY2d at 694). Recognizing these principles, a number of carefully delineated exceptions to the warrant requirement have been crafted (see People v Molnar, 98 NY2d at 331; People v Knapp, 52 NY2d at 694). One such exception is the emergency doctrine (see Brigham City v Stuart, 547 US at 403; People v Guins, 165 AD2d 549, 552 [1991]).

In People v Mitchell (39 NY2d at 173, 177-178), the Court of Appeals formulated a three-prong test for determining whether the police are presented with an emergency situation that justifies a warrantless intrusion into a protected area:

“(1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

“(2) The search must not be primarily motivated by intent to arrest and seize evidence.
“(3) There must some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.”

In 2006 the United States Supreme Court, in order to resolve differences among the state courts and the federal circuit courts concerning the appropriate standard governing warrantless entry by law enforcement in an emergency situation, rejected the second prong of the *Mitchell* test, stating that an inquiry into “[t]he officer’s subjective motivation is irrelevant” (*Brigham City v Stuart*, 547 US at 404). Thus, the Court concluded, because the officers’ actions in entering the premises were objectively reasonable in that case, it did “not matter . . . even if their subjective motives could be so neatly unraveled . . . whether the officers entered [the house] to arrest respondents and gather evidence against them or to assist the injured and prevent further violence” (*id.* at 405). As a result of Brigham City, “an inquiry into the subjective motivations of the police is no longer necessary in determining whether the Fourth Amendment . . . has been violated” (*People v Desmarat*, 38 AD3d 913, 915 [2007]). Thus, the decision in *Brigham City* created a conflict between the Fourth Amendment and New York law. However, since we find that the police in this case were presented with an emergency under both the Mitchell test and the rule adopted by the United States Supreme Court in *Brigham City*, we need not reach the issue of whether the New York Constitution requires retention of the “subjective motivation” prong of the Mitchell test (*see People v Dallas*, 8 NY3d 890, 891 [2007]; *People v Dillon*, 44 AD3d 1068, 1070 [2007]; *see also Matter of Clara C. v William L.*, 96 NY2d 244, 251 [2001, Levine, J., concurring]).

Under the Mitchell test, the first and third prongs make two related objective inquiries. The first prong asks whether the police have reasonable grounds to believe that there was an emergency at hand and an immediate need for their assistance for the protection of life or property. The third prong asks whether there is some reasonable basis, approximating probable cause, to associate that emergency with the area or place to be searched (*see People v Mitchell*, 39 NY2d at 177-178; *People v Desmarat*, 38 AD3d at 915).

Initially, “[a]lthough factual findings by a hearing court are not to be lightly disregarded, plainly unjustified or clearly erroneous findings are not to be accepted by an appellate court” (*People v Battle*, 301 AD2d 537 [2003] [internal quotation marks omitted]; *see People v Garafolo*, 44 AD2d 86, 88 [1974]). In its decision, the hearing court excluded from its factual findings Hennessy’s testimony that he observed a blood trail on the fifth floor and blood on the third- and fourth-floor landings. This testimony was documented in photographs and corroborated in part by both the defendant and a defense witness.35 Where, as here, the trier of fact has incorrectly assessed the evidence, the Appellate Division has the power to make new findings of fact (*see People v O’Hare*, 73 AD3d 812 [2010]; *Matter of Robert D.*, 69 AD3d 714, 717 [2010]). Moreover, under the circumstances, the hearing court’s decision to discredit much of the testimony of Hennessy and Bellico cannot be accepted.36

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35 The defendant testified that following the stabbing he ran up to the fourth floor and banged on doors, and then went to the fifth floor where he did the same until a tenant opened her door and indicated she would call 911. The defendant then went back to his apartment on the third floor to retrieve his keys and identification before meeting the police on the fifth floor. The defendant indicated that he was bleeding profusely during this time. A defense witness stated that there was blood on the stairways and on the third, fourth, and fifth floors. He also stated that there was blood on the door of apartment 3L and on the doormat in front of the apartment.

36 The hearing court also insinuated that the police withheld obtaining emergency medical assistance for the defendant because he was not forthcoming in answering their questions. However, the defendant testified that before the police questioned him, they informed him that an ambulance was on the way.
“Appraising a particular situation to determine whether exigent circumstances justified a warrantless intrusion into a protected area presents difficult problems of evaluation and judgment” (People v Mitchell, 39 NY2d at 177). For a reviewing court, the difficulty is that, detached from the tension and drama of the moment, it must engage in reflection and hindsight in balancing the exigencies of the situation against the rights of the accused (id).

Critical to our determination, as the hearing court acknowledged, is that the defendant, after being stabbed, ran up to the fifth floor and, once the police arrived, was acting evasively as to whether he lived in the building (see People v DePaula, 179 AD2d 424, 426 [1992] [where the police responded to a specific apartment based on a call informing them that shots were fired, their apprehension that the defendant, who answered the door, or another person, was armed, or that someone inside might be hurt, was heightened by the manner in which he refused them entry]; see also Matter of Pablo C., 220 AD2d 235 [1995] [where the police responded to a call informing them that shots were fired and were directed to the respondent’s apartment, who refused them entry, and a man fled from that apartment via the fire escape and was apprehended but refused to answer questions, the police’s warrantless entry was justified by the emergency at hand]; People v Carby, 198 AD2d 366 [1993] [where the police responded to a call informing them of shots fired at the subject residence and, upon inquiry, the defendant denied hearing any gunshots, that “denial heightened the officers’ suspicions”]).37 Once Hennessy learned that the defendant did in fact live in the building, his suspicion, as he testified, obviously was raised. Up until that point, every indication led to the conclusion that the attack occurred on the fifth floor. The radio call directed Bellico and Hennessy to respond to the fifth floor, the defendant was found bleeding on the fifth-floor stairwell, the defendant told Hennessy that the attack occurred on the fifth floor, and the 911 call originated from a fifth-floor apartment. After Hennessy learned that the defendant lived in the building, he followed blood down to the third floor where he found blood in front of and on the door of apartment 3L (see People v Hodge, 44 NY2d 555 [1978]; People v Desmarat, 38 AD3d at 914; People v Herring, 179 AD2d 549 [1992]; People v Taper, 105 AD2d 813 [1984] all cases involved a blood trail; see also United States v Chipps, 410 F3d 438, 443 [2005] [officer could have reasonably believed that the trail of blood indicated that someone’s life was in immediate danger]). He knocked on the door but received no response. These “specific and articulable facts” (State v Sanders, 8 Wash App 306, 310, 506 P2d 892, 895 [1973]), which include the police coming onto a scene where a person had just been violently stabbed, the defendant’s attempt to conceal where the attack occurred by running to the fifth floor, the defendant’s denial that he lived in the building, the blood trail to the third floor, and the significant amount of blood found on the door and in front of apartment 3L, support a finding that the police had a reasonable basis to believe there was an emergency at hand (see People v Mitchell, 39 NY2d at 178 [noting that the police’s reasons for the belief that an emergency exists must be grounded in empirical facts rather than subjective feelings]; People v Hill, 12 Cal 3d 731, 755, 528 P2d 1, 19-20 [exigency justified warrantless entry into the premises; the police arrived at the premises after learning that one person had been shot and taken to the hospital, they observed blood stains both outside and, looking through the *287 porch window, inside the home, and, when they knocked, they received no response; under the circumstances, it was reasonable for the officers to believe that the shooting may have resulted in other casualties in addition to the one reported to the police, and that an immediate entry was

37 As to the circumstances surrounding the stabbing itself, the defendant gave several differing accounts. In one version, the defendant stated that he was attacked from behind as he was about to open his apartment door. In another version, he stated that the stabbing actually occurred directly in front of the staircase door. At one point the defendant stated that he was stabbed and then his assailant ran off. At another point he said that there was a struggle in the hallway and then the assailant stabbed him a second time.
necessary to render aid to anyone in distress]; 3 LaFave, Search and Seizure § 6.6 [a] [4th ed] [commenting that the useful question is whether the officers would have been derelict in their duty had they acted otherwise]).

Emergencies are analytically distinct from other exigent circumstances (see 3 LaFave, Search and Seizure § 6.6 [a] n 6 [4th ed]). The Fourth Amendment is concerned with reasonable probabilities (see Hill v California, 401 US 797, 804 [1971]), and the emergency doctrine is not as exacting as general probable cause analysis (see People v DePaula, 179 AD2d at 426 [noting that the basis for the belief that an emergency existed does not have to meet the probable cause standard]). Indeed, our jurisprudence demonstrates that entry into a home is permissible without a warrant if law enforcement officers reasonably believe that emergency assistance is needed (see People v Desmarat, 38 AD3d at 915 [“objective facts observed by the police provided them with a reasonable basis to believe that an emergency was at hand, that other persons may have been at risk of injury, and that the emergency was associated with (a particular room)” (emphasis added)]; People v Manning, 301 AD2d 661, 663 [2003] [“facts were sufficient to support the detective’s belief that there might have been an injured woman in the defendant’s apartment” (emphasis added)]; People v Longboat, 278 AD2d 836 [2000] [holding that the hearing court, based on the officer’s testimony, properly determined that the entry was justified by an emergency, “i.e., the perception that an injured person might be in the apartment”]; see also Michigan v Fisher, 558 US 45, 48 [2009] [concluding that it was objectively reasonable for the police officers, who observed the defendant throwing things inside his home, to believe that the defendant’s projectiles “might have” a human target or that he would hurt himself; “Officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid exception”]; Brigham City v Stuart, 547 US at 406 [concluding that “the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning” (emphasis added)]; State v Linton, 146 Ariz 184, 185, 704 P2d 825, 826 [1985] [concluding that “it was not unreasonable for the officers to believe that a helpless victim might be lying within the house”]).

The defendant contends that because there was no report of a missing person, and no reason for the officers to believe that there were more than two people involved in the incident, both of whom had been accounted for just prior to the officers’ entry into apartment 3L, there was no objective basis to believe that there was an emergency justifying entry into the apartment. We disagree. “While under normal circumstances the police failure to attempt to find corroborating evidence societally relevant . . . any delay caused by such investigation could plainly result in further injury or other serious consequences” (People v DePaula, 179 AD2d at 426; see United States v Russell, 436 F3d 1086, 1091 [2006] [declining to adopt a requirement that the police obtain independent verification or other information relating to the emergency before entering a home]). In this instance, there was no one else to provide corroborating evidence, and little time within which to investigate further (see People v Stevens, 57 AD3d 1515, 1516 [2008] [in finding the emergency doctrine applicable, the Court noted that the police were unaware whether anyone other than the deceased victim had been shot or whether there were occupants in the house who otherwise might require protection or assistance]). By the time Hennessy reached apartment 3L, the defendant had been driven away by ambulance. The only facts Hennessy had regarding the incident came from the defendant, whom Hennessy suspected had lied to him based on the information he obtained from the tenant who called 911. Under these circumstances, Hennessy could not rely on what the defendant told him about the stabbing, particularly as to where it occurred (see State v Linton, 146 Ariz at 185, 704 P2d at 826 [given the circumstances, in which two men were covered in blood, there was broken furniture and glass, it would have been unreasonable to take their word that no one else in need of help was in the home]). The defendant never indicated how many people were stabbed, and, having been taken by ambulance,
he was not there for Hennessy to ask any additional questions (see United States v Russell, 436 F3d at 1091 [“It is unreasonable to expect the police to piece together a perfectly coherent picture in the scant minutes they had to digest the constantly-updated and conflicting information”]). While both the defendant and his alleged assailant had been accounted for, based on the police’s initial impression that the attack occurred on the fifth floor, Hennessy did not expect to find blood anywhere but on the fifth floor. Further, since the defendant had told Hennessy that an unknown person had attacked him at random on the fifth floor, there was a reasonable basis for Hennessy to conclude that the blood on the third floor belonged to another victim, and that the victim was in apartment 3L (see People v Stevens, 57 AD3d at 1516; United States v Leveringston, 397 F3d 1112, 1117 [2005], cert denied 546 US 862 [2005] [noting that while blood on the defendant’s shirt could have been his own, given the circumstances, a reasonably prudent officer also could infer a fair probability that another party was injured in the suite after some sort of struggle with the defendant]). Alternatively, mindful that the defendant may have lied about living in the building, Hennessy had a reasonable basis to conclude that the defendant was involved in the attack, possibly having injured someone himself, and was trying to distance himself from where the attack occurred.

The defendant also contends that the fact that Hennessy waited 10 minutes for the superintendent to open the door, rather than to break down the door himself, demonstrated that there was no emergency. However, an entry under the emergency doctrine does not have to be immediate in order to be constitutional (see People v Molnar, 98 NY2d at 334 [holding that there was still an emergency notwithstanding the passage of an hour between the time when the police arrived and their entry into the apartment]; People v Manning, 301 AD2d at 662 [noting the rejection of the contention that the failure to burst into an apartment indicates there is no true emergency]). Moreover, Hennessy testified that, given his small stature, he did not think he would be able to knock down the door, and that it was faster to call the superintendent than to wait for the emergency services unit to respond. Thus, contrary to the defendant’s contention, in the context of this case, Hennessy entered the apartment in the most expeditious manner possible.

With respect to the third prong, Hennessy’s observations of the blood trail leading to apartment 3L, the significant amount of blood on the door and its threshold, gave the police some reasonable basis, approximating probable cause, to associate the emergency with the inside of apartment 3L (see People v Desmarat, 38 AD3d at 915 [bloody drag marks leading from the deceased to a motel room gave the police a reasonable basis to associate the emergency with that room]; People v Taper, 105 AD2d at 813 [police, responding to a homicide, found a bloody trail leading from the body to the defendant’s social club; evidence obtained from the social club was lawfully seized under the emergency exception]).

In ascertaining the subjective motivation of the police, which can often prove a difficult task (see Whren v United States, 517 US 806, 814 [1996], cert denied 522 US 1119 [1998]; People v Robinson, 97 NY2d at 350), a reviewing court must look not only to the police’s stated reasons for the conduct they undertook, but also to the objective facts and circumstances surrounding that conduct (see United States v Restrepo, 966 F2d 964, 972 [1992], cert denied 506 US 1049 [1993] [stating that subjective intent is discerned through direct evidence, such as statements, but also may be inferred from the totality of facts and circumstances]; see also Devenpeck v Alford, 543 US 146, 154 [2004] [noting that subjective intent is always determined by objective means]; United States v Magleby, 241 F3d 1306, 1312 [2001], cert denied 547 US 1097 [2006] [stating that a factfinder may draw inferences of subjective intent from a defendant’s objective acts]). In this case, Bellico and Hennessy testified that the reason they entered apartment 3L was to see if someone else had been stabbed. The objective facts and circumstances, a
more reliable indicator of the officers’ motivation, supports their stated reason for the entry. These objective facts and circumstances come from Hennessy’s testimony. Bellico had run off to apprehend the alleged assailant and did not return until just prior to the entry. It was Hennessy then, having undertaken an investigation in Bellico’s absence, who provided the key objective facts and circumstances which form the basis for discerning the subjective intent of the police, and Hennessy’s testimony is supported by the physical evidence which is documented in photographs taken by the crime scene unit. All of the objective facts Hennessy testified to, the initial indications that the defendant had been randomly attacked on the fifth floor by an unknown person, the defendant’s apparent lie about not living in the building, the blood trail leading down to the third floor, the blood on the door of apartment 3L, and its threshold, and the lack of a response when Hennessy knocked at the door, leading him to ask the superintendent to open the door (that being the only way to ascertain whether there was another victim inside), demonstrate that the police were not primarily motivated by an intent to arrest and seize evidence (see People v DePaula, 179 AD2d at 426 [noting that it was difficult to conceive of what action the police could have taken, other than forcibly entering the apartment in order to render immediate assistance, that was consistent with their belief that someone inside the apartment might be injured or threatened]).

Further, and significantly, nothing in the record compelled the conclusion that the police officers undertook their examination as a pretext for a criminal search (see People v Calhoun, 49 NY2d 398, 406 [1980]). The record before us is devoid of any evidence from which an officer might have suspected that the defendant was engaged in criminal activity unrelated to the altercation. Hennessy also candidly admitted that the blood he saw in the hallway and on the door could have been the defendant’s (see United States v Leveringston, 397 F3d at 1117). However, the requirement of reasonable grounds to believe that an emergency existed must “be applied by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences” (State v Bagges, 115 Wis 2d 443, 451, 340 NW2d 516, 522 [1983], quoting State v Kraimer, 99 Wis 2d 306, 324, 298 NW2d 568, 577 [1980], cert denied 451 US 973 [1981], quoting 2 LaFave, Search and Seizure § 6.6 [a] [1970]).

We note that the police officers could reasonably have concluded that, had they left to apply for a search warrant without first entering apartment 3L, they may have been derelict in their duty (see State v Plant, 236 Neb 317, 326, 461 NW2d 253, 263-264 [1990] [concluding that under the totality of the circumstances, had the police failed to enter the home to determine the well-being of children, they may have been derelict in their duty]). “It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here” (Michigan v Fisher, 558 US at 49), for the police do not just fight crime but perform “varied public

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38 The hearing court discredited “much of the testimony” of Bellico and Hennessy. The court’s reason for discrediting Bellico was because he gave contradictory testimony as to whether he followed the blood trail down to apartment 3L. The officer initially testified that, after returning from apprehending the alleged perpetrator, he and Hennessy followed the blood trail from the fifth floor to the third floor. However, on cross-examination, Bellico corrected his testimony, stating that, upon his return, he went straight to the third floor where he met Hennessy. This misstatement, which Bellico corrected on his own volition, was attributable to the officer not being prepared to testify at the hearing about the search, which by then had occurred more than two years earlier, there being legitimate confusion over the scope of the hearing. Since, in the People’s view, the scope of the hearing had been expanded by the court, the People requested an adjournment in order to prepare their witnesses. They were denied that request. In any event, regardless of the misstatement Bellico made in his testimony, it was Hennessy who observed the blood trail and followed it down to apartment 3L. The only inconsistency in Hennessy’s testimony cited by the hearing court related to Hennessy’s testimony that there was a bloody hand print on the door of apartment 3L, which the hearing court was unable to discern in a photograph. This inconsistency was minor since, regardless of whether there was a hand print (the photograph was taken more than an hour after the attack), there was a significant amount of blood on the door of apartment 3L.
service roles,” including protecting citizens from harm and rendering medical assistance to those already harmed (see People v Molnar, 98 NY2d at 333; People v Carby, 198 AD2d at 366-367; United States v Quezada, 448 F3d 1005, 1007 [2006]; 3 LaFave, Search and Seizure § 6.6, citing ABA Standards for Criminal Justice §§ 1-1.1, 1-2.2 [2d ed 1980]). Where the preservation of human life is concerned, it is paramount to the right of privacy (see State v Carlson, 548 NW2d 138, 141 [Iowa 1996]; see also People v Molnar, 98 NY2d at 331-332; Wayne v United States, 318 F2d 205, 212 [1963], cert denied 375 US 860 [1963]; People v Gallegos, 13 Cal App 3d 239, 243, 91 Cal Rptr 517, 519 [1970]).

Accordingly, the police were presented with an emergency situation, justifying their warrantless entry into the defendant’s apartment. Therefore, the order is reversed, on the law and the facts, that branch of the defendant’s omnibus motion which was to suppress physical evidence is denied, and the matter is remitted to the Supreme Court, Queens County, for further proceedings.

Ordered that the order is reversed, on the law and the facts, that branch of the defendant’s omnibus motion which was to suppress physical evidence is denied, and the matter is remitted to the Supreme Court, Queens County, for further proceedings.

**Vehicle or Automobile Exception**

A vehicle does two things:

1. it moves from one place to another; and
2. it does so on public roads and is periodically inspected.

What does this mean? First, the car’s mobility makes obtaining a search warrant impractical. Second, because of the required inspection of the car and the fact that the car operates on a public road means that the people in the car have a diminished expectation of privacy while in that vehicle.

The police may, under the vehicle exception, search a vehicle and the containers inside the vehicle when they have probable cause to believe that it contains contraband, a weapon or evidence of a crime.\(^{39}\)

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**Pennsylvania v Labron, 518 US 938 (1996)**

In these two cases, the Supreme Court of Pennsylvania held that the Fourth Amendment, as applied to the States through the Fourteenth, requires police to obtain a warrant before searching an automobile unless exigent circumstances are present. Because the holdings rest on an incorrect reading of the automobile exception to the Fourth Amendment’s warrant requirement, we grant the petitions for certiorari and reverse.

In Labron, No. 95-1691, police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car from which the drugs had been produced, and found bags containing cocaine. The Pennsylvania

Supreme Court agreed with the trial court (but not with the intermediate court of appeals, 428 Pa Super 616 (1993), whose judgment it reversed) that this evidence should be suppressed. 543 Pa. 86 (1995). After surveying our precedents on the automobile exception as well as some of its own decisions, the court “conclude[d] that this Commonwealth’s jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search.” Id., at 100. Satisfied the police had time to secure a warrant, id., 100-103, the court held that “the warrantless search of this stationary vehicle violated constitutional guarantees,” id., at 101.

In Kilgore, No. 95-1738, an undercover informant agreed to buy drugs from respondent Randy Lee Kilgore’s accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made to a farmhouse where she met with Randy Kilgore and obtained the drugs. After the drugs were delivered and the Kilgores were arrested, police searched the farmhouse with the consent of its owner and also searched Randy Kilgore’s pickup truck; they had seen the Kilgores walking to and from the truck, which was parked in the driveway of the farmhouse. The search turned up cocaine on the truck’s floor. The trial court denied Randy Kilgore’s motion to suppress the cocaine, holding the officers had probable cause to make the search. The appellate court affirmed. 437 Pa Super 491 (1994). The Supreme Court of Pennsylvania reversed, citing Labron and holding that although there was probable cause to search the truck, 544 Pa. 439, 444 (1995), the search violated the Fourth Amendment because no exigent circumstances justified the failure to obtain a warrant, id., at 445.

The Supreme Court of Pennsylvania held the rule permitting warrantless searches of automobiles is limited to cases where “unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause.” 543 Pa, at 100, quoting Commonwealth v White, 543 Pa 45, 53 (1995). This was incorrect. Our first cases establishing the automobile exception to the Fourth Amendment’s warrant requirement were based on the automobile’s “ready mobility,” an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. California v Carney, 471 US 386, 390-391 (1985) (tracing the history of the exception); Carroll v United States, 267 US 132 (1925). More recent cases provide a further justification: the individual’s reduced expectation of privacy in an automobile, owing to its pervasive regulation. Carney, at 391-392. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more. Carney, at 393. As the state courts found, there was probable cause in both of these cases: Police had seen respondent Labron put drugs in the trunk of the car they searched and had seen respondent Kilgore act in ways that suggested he had drugs in his truck. We conclude the searches of the automobiles in these cases did not violate the Fourth Amendment.

Respondent Labron claims we have no jurisdiction to review the judgment in his case because the Pennsylvania Supreme Court’s opinion rests on an adequate and independent state ground, viz., “this Commonwealth’s jurisprudence of the automobile exception.” 543 Pa., at 100. We disagree. The language we have quoted is not a “plain statement” sufficient to tell us “the federal cases [were] being used only for the purpose of guidance, and d[if] not themselves compel the result that the court ha[d] reached.” Michigan v Long, 463 US 1032, 1041 (1983). The Pennsylvania Supreme Court did discuss several of its own decisions; as it noted, however, some of those cases relied on an analysis of our cases on the automobile exception, see, e.g., 543 Pa., at 95 (observing Commonwealth v Holzer, 480 Pa 93, 103 [1978], cited Coolidge v New Hampshire, 403 US 443 [1971]); 543 Pa, at 100 (stating Commonwealth v White, at 53, rested in part upon the Pennsylvania Supreme Court’s analysis of Chambers v Maroney, 399
US 42 [1970]). The law of the Commonwealth thus appears to us “interwoven with the federal law, and... the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” Michigan v Long, 463 US, at 1040-1041. Our jurisdiction in Labron’s case is secure. Ibid. The opinion in respondent Kilgore’s case, meanwhile, rests on an explicit conclusion that the officers’ conduct violated the Fourth Amendment; we have jurisdiction to review this judgment as well.

The judgments of the Supreme Court of Pennsylvania are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

People v Taylor, 92 AD3d 961 (2d Dept 2012)

Appeal by the People from an order of the Supreme Court, Queens County (Grosso, J.), dated March 24, 2010, which, after a hearing before a Judicial Hearing Officer (Cooperman, J.H.O.), granted that branch of the defendant’s omnibus motion which was to suppress physical evidence.

Ordered that the order is reversed, on the law and the facts, that branch of the defendant’s omnibus motion which was to suppress physical evidence is denied, and the matter is remitted to the Supreme Court, Queens County, for further proceedings consistent herewith.

The Supreme Court erred in granting that branch of the defendant’s omnibus motion which was to suppress physical evidence. “An inventory search is . . . designed to properly catalogue the contents of the item searched. The specific objectives of an inventory search, particularly in the context of a vehicle, are to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments” (People v Johnson, 1 NY3d 252, 256 [2003]). “[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence” (id., quoting Florida v Wells, 495 US 1, 4 [1990]). “To guard against this danger, an inventory search should 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’ ” (People v Johnson, 1 NY3d at 256, quoting People v Galak, 80 NY2d 715, 719 [1993]). “The procedure must be standardized so as to ‘limit the discretion of the officer in the field’ ” (People v Johnson, 1 NY3d at 256, quoting People v Galak, 80 NY2d at 719). “While incriminating evidence may be a consequence of an inventory search, it should not be its purpose” (People v Johnson, 1 NY3d at 256).

“[W]hen determining the validity of an inventory search, ‘two elements must be examined: first, the relationship between the search procedure adopted and the governmental objectives that justify the intrusion and, second, the adequacy of the controls on the officer’s discretion’ ” (People v Gomez, 13 NY3d 6, 10 [2009], quoting People v Galak, 80 NY2d at 719).

As is relevant to this appeal, “courts may take judicial notice of the standardized search procedure. While this procedure need not be offered into evidence, a description of what the procedure requires must be proffered” (People v Gomez, 13 NY3d at 11). Here, contrary to the finding of the Supreme Court, the procedure utilized “did what it must do: create[d] a usable inventory” (People v Galak, 80 NY2d at 720, see People v Gomez, 13 NY3d at 11; People v Cochran, 22 AD3d 677, 678 [2005]).
Significantly, the Court of Appeals has explained that the failure to use an “inventory search form” is “not fatal to the establishment of a valid inventory search as long as (1) the search, in accordance with the ‘standardized procedure,’ is designed to produce an inventory and (2) the search results are fully recorded in a usable format” (People v Gomez, 13 NY3d at 11). Here, contrary to the finding of the Supreme Court, the arresting officer specifically testified that the procedure routinely followed was to use a “property clerk’s invoice” form, also referred to as a “voucher,” to record the items removed from a vehicle during an inventory. Moreover, the search results were fully recorded in this manner by the officer in this case (id.; see People v Cochran, 22 AD3d at 678).

Contrary to the further finding of the Supreme Court, there is nothing in the hearing testimony to support the conclusion that the back seat of the vehicle was “removed.” The People established that the lifting up of the middle seat of the back row of the vehicle, underneath which there was a “metal,” “square” storage area, was justified under the established police inventory procedure (see generally People v Gomez, 13 NY3d at 11). The record supports the conclusion that the search was conducted in accordance with the New York City Police Department Patrol Guide, of which we take judicial notice (see People v Gomez, 13 NY3d at 11), which states that officers should search areas under the seats and any closed containers in a vehicle as part of an inventory search (see NYPD Patrol Guide § 218-13). Moreover, all of the items were removed and inventoried, and no property was left in the vehicle when the search was complete (cf. People v Gomez, 13 NY3d at 10-11; see generally People v Galak, 80 NY2d at 718-719). Furthermore, the evidence adduced at the suppression hearing was sufficient to establish that the motivation of the police officers in conducting the inventory search was caretaking rather than criminal investigation (see People v Galak, 80 NY2d at 718-719; People v Cochran, 22 AD3d at 677).

Accordingly, considering the police testimony elicited on both direct and cross-examination, we find that the hearing evidence amply demonstrated that the search in this case was performed pursuant to an established and standardized procedure which limited the discretion of the police, safeguarded the defendant’s constitutional rights, and fulfilled the legitimate purposes of a valid inventory search.

People v May, 81 NY2d 725 (1992)

We preliminarily note that, despite the fact that defendant was seated in a stolen car, the police stopped him personally and he consequently has standing to challenge the legality of that stop (see People v Millan, 69 NY2d 514, 520-521). Turning to the merits, we hold that when the police, using red turret lights, a spotlight and a loudspeaker, ordered defendant to pull the car over, defendant was effectively “seized” (see People v Sobotker, 43 NY2d 559, 563; People v Ingle, 36 NY2d 413, 418; see also People v Cantor, 36 NY2d 106, 111). Consequently, the stop was proper only if the officers had a reasonable suspicion of criminal activity (see People v Sobotker, 43 NY2d at 563; People v De Baur, 40 NY2d 210, 223).

Under the circumstances existing, the police officers here could not have entertained a reasonable suspicion that a crime had been or was about to be committed. They knew only that defendant and another person were sitting in a car parked on a desolate street, a fact which provided them with no information regarding criminal activity. Moreover, defendant’s action in moving the car slowly away as the police approached could not serve to create a reasonable suspicion of criminality given defendant’s right “to be let alone” and to refuse to respond to police inquiry (see People v Howard, 50 NY2d 583,
590-591 [quoting Olmstead v United States, 277 US 438, 478]). The police could have followed the car, to keep it under observation while they checked on its plates to determine if it was stolen (see People v Sobotker, 43 NY2d at 564), but they had no legal basis to stop the car when they did.

Nothing said here should be construed as holding that the police may not make a common-law inquiry of those in a vehicle based upon a founded suspicion and, as suggested by the dissent, the officers here had grounds to do so. The police may not forcibly detain civilians in order to question them, however, without a reasonable suspicion of criminal activity and once defendant indicated, by pulling away from the curb, that he did not wish to speak with the officers, they should not have forced him to stop without legal grounds to do so (see People v Martinez, 80 NY2d 444). Any other rule would permit police seizures solely if circumstances existed presenting a potential for danger.

Accordingly, the evidence should have been suppressed (see Wong Sun v United States, 371 US 471, 485; People v Ingle, 36 NY2d, at 418-419).

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**Stops, Frisks and Protected Sweeps**

When police do not possess probable cause they are not powerless. While they cannot seize, they can, with the lesser standard of reasonable suspicion that a crime has, is or about to take place, stop a person.\(^\text{40}\) If that person has a bulge consistent with a gun or the police officer has reason to believe that the person is carrying a gun, the police officer can frisk the person for a weapon. The stop must be temporary and the frisk must be for weapons and not evidence of a crime. Where the police have a reasonable belief based on specific and articulable facts that an area to be swept harbors an individual posing a danger to those at the arrest scene the officers may engage in a limited search for an individual.\(^\text{41}\)

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**People v Moore, 6 NY3d 496 (2006)**

On November 12, 1997, at approximately 9:35 a.m., Police Officers Racioppo and Molinaro were on a routine patrol in their marked police car when they received a radio call of a dispute involving a male Black with a gun, described as approximately 18 years of age, wearing a gray jacket and red hat-information that came from an anonymous phone tip. The officers drove to the scene without their lights flashing and arrived within approximately one minute of receiving the radio call. No dispute was taking place. They did, however, see a male Black on the corner — defendant — wearing a gray jacket and red hat, with no similar individuals in the vicinity.

The officers exited their vehicle and walked toward defendant, who began to walk away. Without attempting any verbal inquiry, the officers immediately drew their guns and yelled “police, don’t move.” The defendant then turned and continued to walk a short distance toward a closed gate before stopping. When the officers told defendant to put up his hands, he made a movement toward his

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\(^\text{40}\) Terry v Ohio, 392 US 1 (1968).

\(^\text{41}\) Maryland v Buie, 494 US 325 (1990).
waistband as he raised his arms. Officer Racioppo patted down defendant, felt a hard object in his left jacket pocket and recovered a gun.

Defendant was arrested and charged with criminal possession of a weapon. He moved to suppress the gun, and Supreme Court held a hearing at which Officer Racioppo was the sole witness. After the hearing, based on the foregoing description of the incident, Supreme Court denied defendant’s motion to suppress. The Appellate Division affirmed, holding that

“[t]he detailed anonymous tip authorized the officers to exercise their common-law right of inquiry only and did not provide reasonable suspicion to stop and frisk the defendant. Nevertheless, a frisk was justified by the defendant’s conduct thereafter. Specifically, upon finding his path blocked, the defendant reached toward his waistband, whereupon the officers possessed reasonable suspicion for the forcible stop and frisk that revealed the defendant’s possession of a .25 caliber handgun” (People v Moore, 13 AD3d 395, 396-397 [2004] [citations omitted]).

Although we agree with the Appellate Division that the anonymous tip authorized only an inquiry, the police here failed to simply exercise their common-law right to inquire. Instead—in ordering him at gunpoint to remain where he was—the police forcibly stopped defendant as soon as they arrived on the scene. Because the officers did not possess reasonable suspicion until after defendant reached for his waistband, however—by which time defendant had already been unlawfully stopped—the gun should have been suppressed. Defendant’s later conduct cannot validate an encounter that was not justified at its inception (see People v De Bour, 40 NY2d 210, 215 [1976]; People v William II, 98 NY2d 93, 98 [2002]).

In De Bour, we set forth a graduated four-level test for evaluating street encounters initiated by the police: Level One permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; Level Two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; Level Three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; Level Four, arrest, requires probable cause to believe that the person to be arrested has committed a crime (De Bour, 40 NY2d at 223; see also People v Hollman, 79 NY2d 181, 184-185 [1992] [citation omitted]). The Court’s purpose in De Bour was to provide clear guidance for police officers seeking to act lawfully in what may be fast-moving street encounters and a cohesive framework for courts reviewing the propriety of police conduct in these situations. Having been the basis for decisions in likely thousands of cases over the past 30 years, De Bour has become an integral part of our jurisprudence.

Here, the gunpoint stop unquestionably constituted a seizure of defendant’s person — De Bour’s Level Three — and required reasonable suspicion (see People v Chestnut, 51 NY2d 14 [1980] [where police draw their firearms and order a suspect to “freeze,” this is a seizure, the propriety of which is measured by the reasonable suspicion standard]; People v Townes, 41 NY2d 97 [1976] [ordering a suspect to “freeze” with guns drawn amounts to a seizure of the suspect by police]).

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., 529 US 266 [2000]; William II, 98 NY2d at 99). 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” (529 US at 272). 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.

Here, the tip did not provide any predictive information, nor did it accurately portray the alleged criminal activity. The tipster reported a dispute involving a man with a gun, but when the police arrived within a minute of receiving the radio call, they did not find a dispute in progress. Under J.L. and William II, such a tip was insufficient to afford the police reasonable suspicion of criminal activity, and thus did not support the gunpoint stop.

That defendant began walking away from the scene when the police arrived does not render the gunpoint stop permissible. As the Appellate Division recognized, the 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 (see People v May, 81 NY2d 725, 728 [1992] [“The police may not forcibly detain civilians in order to question them ... without a reasonable suspicion of criminal activity and once defendant indicated ... that he did not wish to speak with the officers, they should not have forced him to stop without legal grounds to do so. Any other rule would permit police seizures solely if circumstances existed presenting a potential for danger.”] [citation omitted]).

Indeed, the very right to be let alone—the right of citizens not to be stopped at gunpoint by police, based on anonymous tips — is the distinguishing factor between the level of intrusion permissible under the common-law right of inquiry and the right to stop forcibly. If merely walking away from the police were sufficient to raise the level of suspicion to reasonable suspicion — and a suspect who attempted to move could be required to remain in place at the risk of forcible detention — the common-law right of inquiry would be tantamount to the right to conduct a forcible stop and the suspect would be effectively seized whenever only a common-law right of inquiry was justified (see People v Holmes, 81 NY2d 1056, 1058 [1993] [“If these circumstances (observing defendant standing in an area known for drug trafficking with an unidentified bulge in his jacket pocket) 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”] [internal quotations omitted]).

This simply is not the law. Under our settled De Bour 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. Had defendant, for example, reached for his waistband prior to the gunpoint stop or actively fled from the police, such conduct, when added to the anonymous tip, would have raised the level of
However, “we have frequently rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause. It is equally true that innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand” (De Bour, 40 NY2d at 216...).

Finally, addressing the dissent, the 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. Surely the possibility that defendant had a gun merited investigation by the police, just not immediately at gunpoint.

Accordingly, the order of the Appellate Division should be reversed, defendant’s motion to suppress granted and the indictment dismissed.

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People v Giles, 223 AD2d 39 (1st Dept 1996), app den 89 NY2d 864

We are presented with yet another permutation of a late-night street confrontation between the police and a private citizen, an unexpected encounter occurring on routine patrol that resulted in the discovery of a gun in defendant’s possession. These particular events unfolded in the following fashion. Shortly after midnight on a hot August night, three plain-clothes police officers driving westbound on 145th Street in an unmarked car noticed defendant walking westbound in the middle of the two-way street, between the lanes of opposing traffic. He was wearing a heavy winter jacket that reached almost to his knees (the same one he was wearing at the late November suppression hearing). They observed him reach under the jacket and make a motion as if adjusting something in the rear of his waistband. Seeing this, Officer Moran, the driver, continued westbound until he was almost alongside defendant, who turned, looked at the officers and then quickly crossed the street, narrowly avoiding being hit by a vehicle proceeding eastbound. Defendant proceeded to walk along a row of parked cars, still in the street. Officer Moran drove across the lane of eastbound traffic and stopped the car, facing the wrong way. As he jumped out of the car and announced “police,” defendant put his hand towards the rear of his waistband. Officer Moran immediately reached out, grabbed defendant’s hand and felt a gun in the rear waistband under the jacket. He recovered a loaded .38 caliber revolver.

In determining whether, from the inception of the police conduct and at each ensuing stage of the encounter, the degree of intrusion was warranted, we must apply the four-tier test articulated in People v De Bour (40 NY2d 210, 223) and reaffirmed in People v Hollman (79 NY2d 181). In order to approach an individual for the purpose of requesting information, a police officer must possess an “objective, credible reason, not necessarily indicative of criminality” (People v Hollman, at 184). As clarified by Hollman, the information requested might include identification, destination and the reason for the individual’s presence in the area; Hollman made plain that the information sought is not meant to be wholly unrelated to the individual and his or her circumstances, as the nature of this inquiry was sometimes misconstrued after De Bour (79 NY2d at 189).

42 Although defendant reached a gate that prevented him from continuing to walk in the direction he had been walking, he could have continued to walk away from the officers in a different direction had he wanted to flee. Indeed, there was no finding that defendant’s conduct constituted flight.
Beyond this first tier of permitted police contact is the common-law right of inquiry, which requires “a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion” (People v De Bour, at 223). The third tier, authorizing a forcible stop and detention, requires that the police have a “reasonable suspicion that a particular person was involved in a felony or misdemeanor” (People v Hollman, at 185). At the fourth tier, where the police have probable cause to believe a person has committed a crime, they may make an arrest (People v Hollman, at 185).

Measuring this encounter against the four-tiered test, we conclude that defendant’s conduct was sufficient to entitle Officer Moran to approach defendant and request information (People v Hollman, at 185). Defendant was first observed walking down the middle of a two-way street, i.e., between lanes of opposite-moving traffic. This constitutes more than “odd” behavior, which alone may not justify police intrusion (People v Cornelius, 113 AD2d 666). It is, in fact, dangerous behavior, both to the pedestrian and those driving. The fact that defendant was wearing a long winter coat on a hot summer night, standing alone, is no more than “odd” behavior, but, when taken together with the motion of adjusting an object in the rear of his waistband — where, it has been recognized time and again, a handgun is often hidden (People v Benjamin, 51 NY2d 267, 271; Matter of Clarence W., 210 AD2d 71, 72...; People v Jenkins, 209 AD2d 164, 165; People v Montague, 175 AD2d 54, 55) — it assumes another possible meaning, i.e., that the inappropriate garb is worn for the very purpose of hiding something. These factors together gave rise to an objective, credible reason, not necessarily indicative of criminality, for Officer Moran to approach defendant.

An objective, credible reason may be predicated upon conduct as minimal as walking in a known drug location, holding a “dark, opaque plastic bag” close to one’s body (People v Diaz, 180 AD2d 415, 416, affd 80 NY2d 950). In Diaz (at 416), as here, defendant argued that there was no “‘founded suspicion that criminal activity was afoot’” to justify a common-law right of inquiry. However, there was no actual inquiry in either case because of each defendant’s response to the approach by the police. In Diaz, too, the police first followed defendant in their car, making a U-turn to stay with him as he crossed the street.

We have similarly found an objective, credible reason to approach and seek information based only upon an observation that a defendant, standing with several others at a known drug location, began to walk away as an unmarked police car approached and looked “nervously” at the uniformed officers several times (People v Montague, at 54). When four officers got out of the car, and one asked what he was doing, defendant reached into his front waistband. This was a minimal police intrusion met by a response that immediately “escalated” the encounter and warranted more intrusive action (id. at 55). In the case before us, only one officer got out of the car — a far less “threatening” circumstance — and simply identified himself before defendant’s conduct similarly “escalated” the situation. In both instances, it was proper for the officer to reach out and grab defendant’s hand (People v Montague, 175 AD2d at 55). Notably, the officer’s reaction was limited to the conduct that prompted it: Moran, who only moments before had seen defendant adjust an unseen object in his rear waistband, did nothing more than grab defendant’s hand; he did not draw his weapon or otherwise touch or physically restrain defendant. Nor at any time prior to that had Moran touched or drawn his gun or issued a command (compare People v Wilson, 201 AD2d 399; People v Soto, 194 AD2d 371; People v Taveras, 155 AD2d 131...).

Moreover, the mere announcement of “police,” uttered upon Officer Moran’s getting out of the car, without more, is not tantamount to intimidation such that the encounter, by this single word of identification, became a tier two intrusion. We are well aware that the distinction between the two
levels is itself subtle, and that, as explained in *Hollman*, it is “certainly unsettling to be approached by a police officer and asked for identification.” *(Id, at 192.)* In such circumstances, a reasonable person might well be “taken aback” *(79 NY2d at 192.)* The distinction rests upon the content and number of questions, and “the degree to which the language and nature of the questions transform the encounter from a merely unsettling one to an intimidating one” *(79 NY2d at 192.)* While defendant may have found it “unsettling” to find himself confronted by a police officer, no such transformation occurred in the split second before defendant reached toward his rear waistband for the second time.

Of particular relevance to this assessment is the fact that the officer in *Diaz*, whose shield was, like Moran’s, hanging around his neck, approached that defendant with “his hand held over his gun, noticeable at his waist” *(180 AD2d at 416).* If this factor did not transform a tier one intrusion into at least a tier two intrusion, then Officer Moran’s announcement of “police” can hardly do so. In this regard, it is also relevant that Moran alone exited the car, whereas in *Diaz* both officers did (and, in *People v Montague*, at 55, four uniformed officers exited the car). Notably, in affirming *Diaz*, the Court of Appeals said that not only was the initial approach justified, but the officer’s hand on his gun was not by itself sufficient to raise the encounter to a second level stop *(80 NY2d at 952).*

Finally, we note that defendant’s conduct in crossing the street “quickly” does not constitute flight in these circumstances, nor does the police conduct in following defendant in the car and then getting out of the car rise to the level of pursuit; as noted above, the police conduct in *Diaz* was similar and included the presence of two officers. And, even considering all of Moran’s conduct, including the announcement of “police,” it did not constitute a seizure. Indeed, if an actual command to “stop” by a uniformed police officer as an individual is walking away does not constitute a seizure, as the Court of Appeals explicitly found in *People v Bora* *(83 NY2d 531)*, then the announcement of “police” by a plain-clothes officer cannot be said to rise to that level.

Typically, no single factor will justify the police conduct under scrutiny; rather, it is the peculiar combination of factors known to the police at the time, and as circumstances evolve, that will determine the appropriate level of intrusive conduct. Because Officer Moran possessed an objective, credible basis for approaching defendant, and did nothing to exceed the first tier of police intrusion until defendant’s furtive move, suppression was correctly denied.

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**People v Powell, 246 AD2d 366 (1st Dept 1998)**

Judgment, Supreme Court, New York County rendered November 13, 1996, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 3 years, reversed, on the law, the gun recovered from defendant and his second statement to the police are suppressed, the plea vacated, and the matter remanded for further proceedings.

On March 27, 1996 at approximately 2:30 P.M., police officers Ramos and Bonet and Sergeant Lippi were on plainclothes anti-crime patrol when they noticed defendant walking north at a “quick pace” near 112th Street and First Avenue. From their unmarked police car, approximately 10 to 15 feet away, the officers observed defendant, who was wearing a waist-length leather jacket, make an adjustment to the right side of his waistband. After responding to an unrelated radio transmission, the officers returned to the area 10 minutes later and observed defendant walking at the same quick pace.
near 121st Street and Second Avenue. The defendant’s left arm was swinging freely but his right arm was held stiffly against his body.

The unmarked car pulled over toward the curb and Officer Bonet identified his team as police and called defendant over. Defendant hesitated and looked around, and after Bonet repeated his request, defendant complied. Bonet asked defendant if he had any identification, where he was going and why he was in the area. Defendant responded, in a nervous manner, that he had no identification and was going “to the school.” The officers acknowledged at the hearing that a college is located at 124th Street and Second Avenue, and that defendant’s route was consistent with his statement. When Bonet asked defendant whether he needed a school ID to get into the school, defendant hesitated and was unable to answer. Bonet and Ramos exited the car and stood on either side of defendant. Then, “[j]ust for my safety to make sure [defendant] didn’t have anything,” Bonet patted the right side of defendant’s waistband. Feeling the outline of a gun, Bonet reached in and recovered a loaded .38 caliber pistol.

During the ride to the precinct, one of the officers told defendant “you got caught with a gun, just take it easy,” and defendant responded that he carried the gun because someone had put a contract out on him. Two hours later, after defendant received his Miranda warnings, another detective, who was unaware of the earlier statement, questioned defendant and elicited a similar statement.

The suppression court concluded that the initial stop was justified by the speed in which defendant was walking, the high-crime area involved and the arm movements by defendant which suggested to the officers that defendant might be carrying a gun. The court further ruled that those circumstances, when combined with defendant’s answers to the officer’s questions, “were sufficient to justify a minimal touching of defendant’s waistband” which was “the least intrusive search feasible.”

The pivotal legal determination to be made in this case is whether the police had reasonable suspicion of criminal activity so as to justify the patting of defendant’s waistband. Our assessment of the police conduct is of course guided by the four-tier test enunciated by the Court of Appeals in People v De Bour (40 NY2d 210), and reaffirmed in People v Hollman (79 NY2d 181). “In evaluating the propriety of ... police action we must consider whether it was justified in its inception and whether or not it was reasonably related in scope to the circumstances which created the encounter (People v De Bour, 40 NY2d 210; People v Cantor, 36 NY2d 106,).” (People v Grant, 164 AD2d 170, 172....)

With respect to the initial stop and inquiry of the defendant, we focus on the first and second levels of the De Bour analysis. The first level of permissible police authority, the right to request information, exists when an officer possesses an “objective credible reason ... not necessarily indicative of criminality” (People v De Bour, at 223; People v Hollman, at 184; People v Giles, 223 AD2d 39, 40...). The second level, the common-law right of inquiry, “is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion” (People v De Bour, at 223). We need not analyze the distinction between these two levels of intrusion (see People v Hollman, at 184), however, because we find that the officer’s questioning in this case never exceeded a limited request for information. The questions asked by Officer Bonet concerned defendant’s identity, destination and reason for being in the area — subjects expressly found by the Hollman Court to be within the parameters of a first-level request for information (at 191). Since the officers’ observations of defendant provided an objective, credible reason to request information, we agree with the suppression court that the stop and inquiry was justified (see People v Dawkins, 201 AD2d 336, 336-337...).
Our analysis departs from that of the suppression court, however, regarding the subsequent actions taken by the police. “The necessary predicate for the forcible stop and detention of a particular person is a reasonable suspicion that such person has committed, is committing or is about to commit a crime (People v De Bour, at 223; CPL 140.50 [1]).” (People v Grant, at 172.) Assuming this predicate is met, a frisk of the detainee is authorized if the officer reasonably suspects that he or she is in danger of physical injury (CPL 140.50 [3]). Neither predicate was met in this case.

The People argue that the totality of circumstances — the defendant’s quick pace, his adjustment to his waistband during the initial police observation, his walking with arm stiffly against his body during the second encounter, the high-crime nature of the area and his inconsistent and evasive responses during the police questioning — provided the officers with a reasonable suspicion that defendant was in possession of a gun. We disagree. Defendant’s actions were at all times innocuous and readily susceptible of an innocent interpretation (People v De Bour, at 216; see People v Howard, 147 AD2d 177, 179-180...; People v Silvestre, 119 AD2d 601, 601-602; see also People v Moore, 176 AD2d 297, 298-299), and, as such, may not generate a founded suspicion of criminality (People v De Bour, at 216). While the officers testified at the hearing that in their experience such actions suggested that defendant was carrying a concealed weapon, one officer also conceded that the object could just as easily have been something as innocuous as a newspaper (see People v Howard, 147 AD2d at 179-180...). Notably, no officer testified that he observed the outline of a gun, a waistband bulge or any other telltale sign of weapon (People v De Bour, at 221...).

Nor did defendant’s verbal responses provide a basis for any greater intrusion. The failure to have personal identification is not a crime, and defendant’s statement that he was going to school was facially credible since there was a college a few short blocks away. Defendant’s failure to respond to the question concerning a school ID, objectively viewed, was likely the product of confusion rather than evasion. Defendant never said he was a student, and there are many possible and legitimate reasons for his presence there. In light of the recognized “unsettling” aspect of a police-initiated inquiry of citizens (People v Hollman, at 192...), we reject the People’s suggestion that defendant’s allegedly nervous reaction to this questioning authorized a greater intrusion. Additionally, that this may have been a high-crime area (we note that the evidence was weak on this point) could not itself validate the search since no other objective indicia of criminality existed to supply the requisite reasonable suspicion for the forcible stop and frisk (see People v Howard, at 182; People v Marine, 142 AD2d 368).

To be distinguished are those cases where, after an initially proper stop and inquiry, a greater intrusion was warranted due to additional suspicious observations by the police or the attendant circumstances (see People v Benjamin, 51 NY2d 267... People v Montague, 175 AD2d 54). In these cases, while the information initially available to the police authorized, at most, their common-law right of inquiry, subsequent dangerous and indeed life-threatening movements by those defendants justified an immediate patdown for weapons. Such facts are plainly inapposite to the present case where defendant made no threatening gestures in the presence of the police, and no bulges or weapons were observed (see People v Rainey, 228 AD2d 285, 287...).

While the suppression court properly suppressed defendant’s first statement, made in the police car without the benefit of Miranda warnings, as the product of police inducement (see People v Lynes, 49 NY2d 286, 294-295; People v Maerling, 46 NY2d 289, 301-302), it erred in denying suppression of defendant’s post-Miranda statement made two hours later at the precinct. The court’s finding that the statement was attenuated from the illegal arrest and the earlier statement is not supported by the
Combinations — One Thing Leads to Another

These exceptions are not always isolated. Sometimes one exception leads to another exception. For example, if during a protective sweep, the officer sees a gun, drugs or other contraband, they can seize it under the plain view doctrine.

Sometimes, only certain exceptions are allowed in certain situations. For example, in order to enter a person’s home without a warrant, the police must have the consent or there must be exigent circumstances.45

Differences Between the Federal and the State Standards

As stated before, the New York Court of Appeals can provide the defendant with more rights under Article I, Section 12 of the New York Constitution than the United States Supreme Court does under the Fourth Amendment of the Federal Constitution. Here are a few examples:

Good Faith Exception to the Warrant Clause

The rule under the Fourth Amendment is that evidence seized pursuant to a defective search warrant will not be suppressed if the police acted in good faith.44 This rule is not accepted under Article I, Section 12. The Court of Appeals held that “the exclusionary rule’s purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future.”45 — Totality of the Circumstances

Under the Federal rule, the hearsay information is evaluated under the totality of circumstances test: making a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before the Magistrate, including the veracity and basis of knowledge of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.46 New York, on the other hand has a more restrictive test. New York has kept the old standard and has rejected the new Supreme Court standard announced in Illinois v Gates.47 Instead, New York has kept the Aguilar-Spinelli two-prong test.

45 People v Bigelow, 66 NY2d 417 (1985).
47 People v Griminger, 71 NY2d 635 (1988).
The Plain Touch Doctrine

Under the federal rule, if a police officer is frisking someone and the officer feels something that feels like contraband, the officer may seize it under the plain touch doctrine, an offshoot of the plain view doctrine.\(^48\) New York has rejected this doctrine.\(^49\)

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**People v Torres, 74 NY2d 224 (1989)**

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*, 72 NY2d 843, 845, 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” (*Michigan v Long*, 463 US 1032, 1052). 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* (id.), our more protective State constitutional provisions prohibit them under the circumstances presented here (NY Const. Art. I, § 12).

At approximately 11:00 A.M. on the morning of October 25, 1985, the police received a telephone tip from an anonymous caller that an individual known as “Poppo,” who was wanted on homicide charges, could be found having his hair cut at a barber shop located at 116th Street and Third Avenue in Manhattan. The suspect was described as a large, six-foot tall Hispanic male wearing a white sweater, driving a black Eldorado and carrying a gun in a shoulder bag.

Arriving at the specified address shortly after this tip was received, two plain-clothes detectives saw defendant leave the barber shop with another man and enter a black Eldorado. Defendant, who fit the anonymous caller’s description, was wearing a white sweater and carrying a green nylon shoulder bag. The detectives approached the car with their guns drawn and, after identifying themselves, ordered the two occupants to exit and immediately frisked each of them. While defendant was still being frisked, the detective who had just patted down defendant’s companion reached into the car and took the shoulder bag from the front seat, where it had been left by defendant. Having immediately noticed its unusual weight, the detective felt the outside of the bag, discerned the shape of a gun and, upon unzipping the bag, discovered a three-inch Rossi revolver and several rounds of live ammunition.

Defendant pleaded guilty to third degree criminal possession of a weapon after his motion to suppress the physical evidence was denied. The suppression court held that the anonymous tip, coupled with the detectives’ on-the-scene observations, was sufficient to justify the detectives’ intrusive actions. On appeal from the judgment of conviction, a divided Appellate Division affirmed

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\(^49\) *People v Diaz*, 81 NY2d 106 (1993).
Dissenting alone, the Presiding Justice argued that, regardless of whether the initial frisk was proper, there was no basis for the detectives to reach into the car and remove the shoulder bag, since its presence presented no immediate threat to the officer’s safety (143 AD2d, at 42-44 [Murphy, P.J., dissenting]). We agree with the dissenter’s view and, accordingly, reverse.

On this record, there is room for disagreement as to whether the anonymous tip, coupled with the detectives’ on-the-scene observations, provided support for the finding below that the forcible stop and frisk was reasonable. However, even assuming the reasonableness of the detectives’ conduct in ordering the suspects out of the car and conducting a protective pat-down, once the detectives had frisked the two men, and had thereby satisfied themselves that there was no immediate threat to their safety, there was, as a matter of law, no justification for conducting a further, more intrusive search extending to the removal of personal effects on the front seat of defendant’s car. At most, the detectives may have had a reasonable basis for suspecting the presence of a gun. Their information plainly did not rise to the level of probable cause to search closed containers within the car’s passenger compartment for a weapon (People v Elwell, 50 NY2d 231; see People v Belton, 55 NY2d 49 [on remand]). Thus, the actions of the detectives may be justified only if the expansive view of the Terry v Ohio, 392 US 1 “stop and frisk” procedure that was adopted in Michigan v Long, 463 US 1032 is determined to be consistent with the privacy rights guaranteed by our State Constitution (N.Y. Const., art. I, § 12).

In concluding that it is not, we note that although the history and identical language of the State and Federal constitutional privacy guarantees (US Const. 4th Amend; N.Y. Const., art. I, § 12) generally support a “policy of uniformity,” this court has demonstrated its willingness to adopt more protective standards under the State Constitution “when doing so best promotes ‘predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens.’” (People v PJ Video, 68 NY2d 296, 304 [on remand], quoting People v Johnson, 66 NY2d 398, 407). Accordingly, we have in recent years carved out an independent body of principles to govern citizen-police encounters in a number of specific areas (see e.g. People v PJ Video, 68 NY2d 296 [warrant application requirements in obscenity cases]; People v Bigelow, 66 NY2d 417 [declining to follow “good faith” test outlined in United States v Leon, 468 US 897 and Massachusetts v Sheppard, 468 US 981]; People v Johnson, 66 NY2d 398 [declining to apply “totality of circumstances” test outlined in Illinois v Gates, 462 US 213 to warrantless arrests]; People v Class, 67 NY2d 431 [on remand] [search for vehicle identification number in connection with traffic stop]; People v Goke, 60 NY2d 309 [warrantless search incident to arrest]; People v Belton, 55 NY2d 49 [search of personal effects within automobile]; People v Landy, 59 NY2d 369, [reiterating Elwell rule]; People v Elwell, 50 NY2d 231 [probable cause predicated on informant’s tip]; see also People v Stith, 69 NY2d 313, 316, n., [exclusionary rule as it pertains to inevitable discovery doctrine]).

Our present decision to add to this emerging body of precedent rather than to follow the Federal position was foreshadowed by our analysis in People v Belton, 55 NY2d 49. Indeed, it is significant that Michigan v Long, the decision on which the People’s and dissenter’s positions are premised, was, at least in part, an elaboration of the Supreme Court’s analysis in New York v Belton, 453 US 454, an analysis which we have declined to follow (see People v Belton, 55 NY2d 49...).

In Belton, which involved a search of a closed container within the passenger compartment of an arrestee’s automobile, we invoked the State Constitution and held that, under our own “automobile exception” to the rule against warrantless searches, an automobile’s passenger compartment, and closed containers within that compartment, may be searched “where police have validly arrested an occupant *** and *** 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” (id., at 55). In adopting this position, we expressed our dissatisfaction with the Supreme Court’s position under the Fourth Amendment that such a search is permissible as an incident to a lawful arrest (id., at 52-53; see, New York v Belton, 453 US 454). We noted that the Supreme Court’s position in Belton was a drastic departure from Chimel v California, 395 US 752 and that “[o]nce the exception is employed to justify a warrantless search for objects outside an arrested person’s reach it no longer has any distinct spatial boundary” (55 NY2d, at 53). Quoting from then-Judge Wachtler’s opinion in People v Brosnan, 32 NY2d 254, 267, we observed that “search and seizure law [becomes] uncontrollable when the rubric [is] adopted and the rationale discarded” (55 NY2d at 53). That observation is equally apt in this context.

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 (cf. People v Class, 63 NY2d 491, 495, revd. 475 US 106, adhered to on remand 67 NY2d 431). 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 (People v De Bour, 40 NY2d 210, 215). While there are certainly legitimate law enforcement concerns that would justify such an intrusion (see People v Blasich, 73 NY2d 673; People v Belton, 55 NY2d 49, 55), such concerns were simply not present here.

The need here, as one commentator has noted, was “only to find implements which could be reached by the suspect during the brief face-to-face encounter, not to uncover items cleverly concealed and to which access could be gained only with considerable delay and difficulty” (1 La Fave & Israel, Criminal Procedure § 3.8 [e], at 309; see also People v Smith, 59 NY2d 454, 458). In this instance, for example, the suspects had already been removed from the car, a permissible intrusion if there was reasonable suspicion of criminality in light of the need to protect the detectives’ safety (Pennsylvania v Mimms, 434 US 106; People v McLaurin, 70 NY2d 779). Further, the suspects had been patted down without incident. At that point, there was nothing to prevent these two armed detectives from questioning the two suspects with complete safety to themselves, since the suspects had been isolated from the interior of the car, where the nylon bag that supposedly contained the gun was located. Any residual fear that the detectives might have had about the suspects’ ability to break away and retrieve the bag could have been eliminated by taking the far less intrusive step of asking the suspects to move away from the vicinity of the car (see 1 La Fave & Israel, op. cit., at 310). Finally, it is unrealistic to assume, as the Supreme Court did in Michigan v Long, 463 US at 1051-1052, that having been stopped and questioned without incident, a suspect who is about to be released and permitted to proceed on his way would, upon reentry into his vehicle, reach for a concealed weapon and threaten the departing police officer’s safety. Certainly, such a far-fetched scenario is an insufficient basis upon which to predicate the substantial intrusion that occurred here (see People v De Bour, 40 NY2d at 215).

For all of these reasons, we conclude that the detective’s conduct in reaching into defendant’s car and removing his bag, conduct which revealed the presence of a gun, was not reasonably related to the need to protect the officers’ safety in this street encounter. The detective’s actions were thus improper under article I, § 12 of our State Constitution, and the resulting evidence should have been suppressed.
The Exclusionary Rule & Fruit of the Poisonous Tree

In simple terms, the exclusionary rule is any evidence seized in violation of the defendant’s constitutional rights, must be excluded from trial. This is a concept that is unique to American jurisprudence.

Taking it one step further, any evidence that was seized as a result of the evidence seized in violation of the defendant’s constitutional rights must be suppressed as fruit of the poisonous tree. For example, if the police enter into an apartment because they were able to get a person’s consent through coercion, and upon entry, they see an automatic gun on the table, and as a result of finding that gun, they arrest and frisk the defendant in that place, which is his home, and during the frisk they find cocaine, that cocaine must be suppressed as fruit of the poisonous tree.

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