



**COURTESY**

**PROFESSIONALISM**

**RESPECT**

**INVESTIGATIVE ENCOUNTERS  
AT A GLANCE**



**COMMAND LEVEL  
TRAINING CONFERENCE  
SEPTEMBER 2015**





## NOTES

## INVESTIGATIVE ENCOUNTERS

### **U.S. SUPREME COURT DECISION IN *TERRY v. OHIO* (1968)**

There are situations where officers, in the interest of investigating crime, are permitted to act on less than probable cause. In the landmark case of *Terry v. Ohio*, the U.S. Supreme Court, for the first time, addressed the issue of a seizure and a search of a suspect on less than probable cause, and found that where an officer had reasonable suspicion that a person was committing, had committed or was about to commit a crime, and that the person was presently armed and dangerous, a stop and frisk were consistent with the Fourth Amendment.

*Terry* is a significant case because it marked the Supreme Court's approval of stop and frisk when the officer did not have probable cause for an arrest. In its conclusion, the Court noted that where an officer, in light of his experience, reasonably suspects that criminal activity is taking place, he or she may investigate and make reasonable inquiries. The Court further held that where an officer observes:

“that the persons with whom he is dealing may be armed and presently dangerous ... and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others to conduct a carefully limited search of the outer clothing...in an attempt to discover weapons which might be used to assault him.”

Following *Terry*, New York State adopted its own standards, or guidelines, for permissible police activity during investigative encounters with citizens consistent with the Supreme Court's ruling in *Terry*. The New York State Court of Appeals' decision in *People v. DeBour* created the standard by which all investigative encounters in New York are assessed.

## THE NEW YORK STANDARD: *PEOPLE V. DeBOUR* (1976)

## NOTES

*People v. DeBour* is an important case for many reasons. The case outlines four levels of police encounters and defines the amount of information an officer must have for each level. In creating the four-tiered analysis, the New York Court in *DeBour* expanded on *Terry*, which dealt with the narrow issue of a possible crime in progress, as compared to *DeBour*, which as you will see, began as a simple request for information. The Court went beyond what the Supreme Court addressed in *Terry*, which held that an encounter that results in an actual “stop” or detention is entitled to Fourth Amendment protection. In New York, under *DeBour*, there are additional restrictions placed upon encounters between the police and the public in situations that do not rise to the level of a *Terry* stop. Thus, *DeBour* created a more restrictive interpretation of a police officer’s authority to confront and question citizens.

The Court in *DeBour* went on to establish the four-tiered analysis that dictates the permissible level of police intrusion. Although the New York State Court of Appeals agreed with the U.S Supreme Court in *Terry* that, “...*there is nothing in the Constitution which prevents a police officer from addressing questions to anyone in the streets,*” it cautioned that an officer must have at least an objective credible reason for intrusions that affect a person’s liberty.

As a police officer, your authority to confront, request information, stop or search someone will be based on your ability to articulate a legally recognized level of knowledge or suspicion. The Levels are as follows:

- Level 1: Request for Information (Objective Credible Reason)
- Level 2: Common Law Right of Inquiry (Founded Suspicion of Criminal Activity)
- Level 3: Stop and Possible Frisk (Individualized, Reasonable Suspicion of Felony or Penal Law Misdemeanor)
- Level 4: Arrest (Probable Cause)

## TACTICS

Officers should remember to use proper tactics in all investigative encounters with members of the public, including conducting a stop based on reasonable suspicion. Individuals are more likely to resist and/or use force against an officer if the officer provides an opportunity. Proper tactics will reduce the perception of opportunity on the part of the suspect. If stopping more than one individual, call for assistance prior to the stop when possible. As we are the largest municipal police agency in the world, we have the resources necessary to have the tactical advantage in most encounters with the public; however, if you don't request assistance, you may be at a tactical disadvantage. While there will be situations that require immediate response, most situations involving reasonable suspicion provides sufficient time to consider the environment prior to conducting the stop. As with all action, the officer should consider his or her safety paramount.

## LEVEL 1: REQUEST FOR INFORMATION

The request for information is an encounter between a civilian and a uniformed member of the service conducted for the purpose of requesting information from the citizen. In a Level 1 encounter, an officer can approach to request information when there is "some **objective credible reason** for that interference which is not necessarily indicative of criminality." The intrusion cannot be based on whim, caprice, curiosity, bias, or a desire to harass. Officers may, therefore, ask a person non-accusatory questions as long as the questions would not cause a reasonable person to believe that she is suspected of some wrongdoing. The officer may ask for a person's name, address and destination if those questions are related to the reason for the approach and if the questions are asked in a non-accusatory manner because a Level 1 inquiry is not necessarily indicative of criminality, the police may not ask for permission to search at this level. Although the police are permitted to request information, a citizen has the right not to answer the police. The refusal, in itself, does not permit further action by police. In fact, a citizen can walk or even run away, and, **without indication of criminal activity, an officer may not pursue**. However, a police officer can still keep the person under surveillance as long as the officer does not significantly interfere with the person's liberty.

**Example:** Defendant was observed at 0445 hours carrying two large garbage bags filled with bulky items in a burglary prone area. These circumstances justified the officer's initial approach for information. *People v. Williamson* (1985)

**Example:** The officer had an objective credible reason for speaking to the defendant, a possible witness to a kidnapping, who was observed walking away from the scene. *People v. Hopkins* (1980)

## LEVEL 2: COMMON LAW RIGHT OF INQUIRY

A Level 2 inquiry is an encounter between a civilian and a uniformed member of the service conducted for the purpose of asking the civilian pointed or accusatory questions because the police officer has a ***“founded suspicion that criminal activity is afoot.”*** The officer must be able to express why he or she thought that ***suspicious*** or ***unusual activity indicative of criminality*** was taking place. Courts have defined this term to mean that there is a *“present indication of criminality based on observable conduct or reliable hearsay information.”* It cannot be based on a hunch, or “gut feeling.” While the officer may ask all of the same questions that may be asked during a Level 1 encounter, Level 2 encounters encompass wider scope and a more intense line of questioning is permitted because the encounter ***focuses on the citizen as a possible suspect of a particular crime.*** The officer’s questions can be ***pointed, invasive, and accusatory*** in nature and can be intended to elicit an incriminating response. The officer, however, may not touch the person, display a weapon, or act in a threatening manner. Unlike a Level 1 encounter, an officer may seek consent to search.

Similar to a Level 1 encounter, during a Level 2 encounter an individual may refuse to answer questions, answer only some questions, or walk away, and the individual may not be detained. Moreover, the officer may not create a situation (either by words or actions) where a reasonable person would not feel free to walk away. If a confronted citizen walks away without answering, the officer may not pursue without reasonable suspicion that a felony or Penal Law misdemeanor has been, is being, or is about to be committed. However, flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit and a Level 3 stop.

## RACIAL PROFILING

Racial profiling is defined as a decision to initiate police action against a person that is motivated even in part by the person’s race, color, ethnicity, or national origin. In the context of stop, question and possible frisk, race may only be considered where the stop is based on a specific and reliable suspect description that includes not just race, age and gender, but other identifying characteristics or information. Individuals ***may not be targeted for stops and frisks because they are members of a racial or ethnic group that appears more frequently in local crime suspect data or in a high crime area.*** When an officer carries out a stop based on reasonable suspicion that a person fits such a description, race may be considered, just as a police officer may consider height or hair color. When a stop is not based on a specific suspect description, however, race may not be used at all as a motivation or justification for the stop.

Conducting stops in an unbiased manner fosters and strengthens relationships between police officers and members of the community, and inspires confidence in and support for policing efforts.

The prohibition against racial profiling comes from the 14<sup>th</sup> Amendment of the U.S. Constitution and Article 1, Section 11 of the New York State Constitution. Additionally, New York City Administrative Code section 14-151 prohibits the Department and its officers from intentionally engaging in biased-based profiling. This means that a member of the service may not make a determination to initiate law enforcement action against an individual based “on actual or perceived race, national origin, color, creed, age, alienage or citizenship status, gender, sexual orientation, disability, or housing status... rather than an individual's behavior or other information or circumstances that links a person or persons to suspected unlawful activity.”

#### **LEVEL 4: ARREST (Probable Cause)**

The fourth and final level of police intrusion is the arrest stage. An arrest involves the seizure of a suspected criminal offender. The purpose for the arrest is to bring the suspect before the appropriate court to answer charges against the person.

The police officer must be able to articulate facts that support a finding of probable cause. Probable cause is a legally recognized standard of proof because it results in a significant interference of the person's liberty and is the initial stage of a criminal prosecution that may result in incarceration.

Probable cause consists of facts and circumstances within the arresting officer's knowledge, and of which he or she has reasonably trustworthy information, that would warrant a person of reasonable caution to believe that an offense is being or has been committed and that the person to be arrested committed it.

**Example:** A radio run from an anonymous source furnishing a description of three men selling drugs at a particular area, combined with their observations of individuals matching the description, gave officers the right to conduct a common-law inquiry of persons matching the description from the radio run. *People v. Erazo* (1994)

#### **LEVEL 3: TERRY STOP (Individualized Reasonable Suspicion)**

The third level of permissible police intrusion is the right to **forcibly stop** a citizen. A Level 3 stop is also known as a "Terry stop." A stop occurs any time a reasonable person would not feel free to disregard the officer and walk away. Under this level, an officer may forcibly stop and detain a person when they have **reasonable suspicion** that the person has committed, is committing, or is about to commit any **felony** or a **Penal Law misdemeanor**. The officer may detain the person for a reasonable amount of time in order to **confirm or dispel** the officer's suspicion.

For a Level 3 stop, the officer must be able to articulate specific facts establishing justification for the stop; hunches or gut feelings are not sufficient. This is an objective standard requiring police officers to point to specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion on a citizen's liberty interest. In addition, the reasonable suspicion must be individualized. That is, the officer must have grounds to reasonably suspect the specific person being stopped of criminal wrongdoing.

Facts supporting reasonable suspicion of criminality may come from various sources. Detailed information from an identified individual may provide a basis for reasonable suspicion; however, reasonable suspicion cannot be based solely on anonymous information. Suspicious or evasive behavior, sometimes referred to as a "furtive movement," including "telltale" signs of a particular crime, can contribute to facts observed by the officer that lead to reasonable suspicion

(however, generally evasive behavior by itself will not establish reasonable suspicion). The police are justified in conducting a forcible stop on a person who bears a strong resemblance to a known person who is wanted for a crime. An individual can be approached but may not be stopped merely because he meets a vague or generalized description. There must be additional information, such as a detailed description from an identified caller that includes identifying characteristics beyond just race, age, and gender. Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, can provide the predicate necessary to justify pursuit and a stop. Similar to anonymous information, flight alone cannot serve as the basis for reasonable suspicion.

**Example:** A person pushing a bag up his sleeve when he saw police officers, and subsequently secreting the bag in his pants when the police officers approached him, was highly suspicious behavior where the person is located in a narcotics trafficking area and the officer recognized the person from a recent investigation concerning narcotics trafficking. *People v. Lynah* (2008)

**Example:** A police officer investigating a reported fight between two individuals with handguns was informed that the men involved had just walked into a nearby market. The police officer immediately responded to the market, at which point an individual matching the description stepped into and attempted to push past the officer. The individual moving his hands quickly toward his waistband as a police officer pulled him aside for questioning as a part of the investigation was behavior that gave the officer reasonable suspicion and formed the basis for the frisk. *People v. Curry* (2011)

A frisk is not automatically authorized during every stop. To the contrary, in order to frisk an individual who has been stopped, an officer must not only have reasonable suspicion that the person was (or was about to be) engaged in criminality, he or she must also have reasonable suspicion that the person is armed and dangerous.

A frisk may not be conducted for the purpose of discovering evidence or the proceeds or instrumentalities of a crime, or other contraband such as drugs. The frisk must be strictly limited to a running of the hands over the outside of a person's clothing, feeling for a weapon or dangerous instrument.

Reasonable suspicion that a person is armed and dangerous may arise from the officer's observations or the facts and circumstances of the encounter, including observing something on the person that the officer reasonably suspects is a weapon, such as a bulge in the shape of a firearm in, or near, the waistband. If an officer has reasonable suspicion that the subject has committed, is committing, or is about to commit a violent crime, such as murder, assault, kidnapping, rape, robbery, or burglary, the officer may conduct a frisk to determine if the person is armed with a weapon. An officer need not articulate independent facts of a weapon, only facts regarding a violent crime.

If an officer reasonably suspects that an object felt in a suspect's clothing during a frisk is a weapon, the officer may take appropriate and necessary action to examine the object and protect him or herself. This includes removing the object from the clothing of the stopped person. If an officer feels something in the suspect's clothing that is clearly not a weapon, the officer may not search for or remove that item. If the officer feels something and does not know what it is but it is clearly not a weapon, he may not search for or remove it.

A search is the placing of hands inside a pocket or other interior part of clothing or possessions. A search, in the context of a frisk, is ONLY permitted to remove the object that the officer felt during the frisk and reasonably suspects to be a weapon based on his or her frisk. During a *Terry* stop/Level 3 encounter, the officer may ask for permission to search, but **may not compel** a person to submit to a search of their person or belongings. The consent, if given, must be provided voluntarily.

<u>TYPE OF ENCOUNTER</u>	IV. ARREST
<u>LEVEL OF KNOWLEDGE REQUIRED</u>	PROBABLE CAUSE TO BELIEVE THAT (A) AN OFFENSE WAS COMMITTED AND (B) THAT THE SUBJECT ARRESTED COMMITTED IT. PROBABLE CAUSE REQUIRES THE EXISTENCE OF FACTS AND CIRCUMSTANCES WHICH WHEN VIEWED TOGETHER WOULD LEAD A REASONABLE PERSON POSSESSING THE EXPERTISE OF THE ARRESTING OFFICER TO CONCLUDE THAT AN OFFENSE HAS BEEN COMMITTED.
<u>NATURE AND EXTENT OF PERMISSIBLE QUESTIONING</u>	A UMOS MAY ENGAGE IN CONSTITUTIONAL PERMISSIBLE CUSTODIAL INTERROGATION (I.E., <i>MIRANDA</i> WAIVER MUST BE LAWFULLY OBTAINED. <i>MIRANDA</i> WAIVER IS NOT REQUIRED TO OBTAIN PEDIGREE INFORMATION).
<u>AUTHORITY TO SEARCH</u>	"SEARCH INCIDENT TO ARREST" (I.E., A SEARCH OF A SUBJECT CONDUCTED IMMEDIATELY AFTER THE ARREST TO SECURE WEAPONS, PREVENT EVIDENCE DESTRUCTION).  "INVENTORY," ETC.
<u>FORCE AND DETENTION</u>	A UMOS IS PERMITTED TO USE REASONABLE FORCE TO ARREST AND DETAIN A SUBJECT.

<u>TYPE OF ENCOUNTER</u>	I. REQUEST FOR INFORMATION
<u>LEVEL OF KNOWLEDGE REQUIRED</u>	AN OBJECTIVE, CREDIBLE REASON TO APPROACH. SUSPICION OF CRIMINALITY IS NOT REQUIRED. HOWEVER, THE UMOS MUST BE ABLE TO ARTICULATE A BASIS BEYOND MERE WHIM AND CAPRICE.
<u>NATURE AND EXTENT OF PERMISSIBLE QUESTIONING</u>	NON-ACCUSATORY QUESTIONS CONCERNING THE REASON FOR THE APPROACH.
<u>AUTHORITY TO SEARCH</u>	AT THIS LEVEL OF SUSPICION, THERE IS NO BASIS TO SEARCH. A REQUEST FOR CONSENT TO SEARCH THE PERSON OR A BAG, POCKETBOOK, LUGGAGE, OR OTHER ITEM OF PERSONAL PROPERTY IS IMPROPER.
<u>FORCE AND DETENTION</u>	FORCE MAY NOT BE USED TO DETAIN A SUSPECT AT THIS LEVEL OF SUSPICION. THE SUBJECT IS FREE TO WALK AWAY FROM THE UMOS IF THEY SO DESIRE. THEY NEED NOT ANSWER QUESTIONS.

<p><b><u>TYPE OF ENCOUNTER</u></b></p>	<p><b>II. COMMON – LAW INQUIRY</b></p>
<p><b><u>LEVEL OF KNOWLEDGE REQUIRED</u></b></p>	<p>A FOUNDED SUSPICION THAT CRIMINALITY IS AFOOT. THIS COULD BE TRIGGERED BY FALSE RESPONSES TO QUESTIONS POSED DURING THE REQUEST FOR INFORMATION, AS WELL AS OBSERVATIONS BY THE UMOs.</p>
<p><b><u>NATURE AND EXTENT OF PERMISSIBLE QUESTIONING</u></b></p>	<p>UMOS MAY CONDUCT MORE EXTENSIVE QUESTIONING. ACCUSATORY-TYPE (GUILT-SEEKING) QUESTIONS MAY BE ASKED.</p>
<p><b><u>AUTHORITY TO SEARCH</u></b></p>	<p>A SUBJECT MAY BE ASKED TO CONSENT TO THE SEARCH OF AN ITEM OF PERSONAL PROPERTY. THIS CONSENT MUST BE VOLUNTARY ON THE SUBJECT’S PART.</p>
<p><b><u>FORCE AND DETENTION</u></b></p>	<p>FORCE MAY NOT BE USED TO DETAIN A SUBJECT AT THIS LEVEL OF SUSPICION. THE SUBJECT IS FREE TO LEAVE IF THEY DESIRE. THEY NEED NOT ANSWER QUESTIONS.</p>

<p><b><u>TYPE OF ENCOUNTER</u></b></p>	<p><b>III. STOP, QUESTION AND POSSIBLE FRISK</b></p>
<p><b><u>LEVEL OF KNOWLEDGE REQUIRED</u></b></p>	<p>REQUIRES AN INDIVIDUALIZED REASONABLE SUSPICION THAT THE SUBJECT IS COMMITTING, HAS COMMITTED OR IS ABOUT TO COMMIT A FELONY OR PENAL LAW MISDEMEANOR.</p>
<p><b><u>NATURE AND EXTENT OF PERMISSIBLE QUESTIONING</u></b></p>	<p>THE UMOs MAY STOP THE SUBJECT, ASK FOR HIS OR HER NAME AND ADDRESS, AN EXPLANATION OF CONDUCT, AND DETAIN THE PERSON WHILE AN EXPEDITIOUS INVESTIGATION IS CONDUCTED TO DETERMINE IF THERE IS PROBABLE CAUSE TO ARREST THE SUBJECT.</p>
<p><b><u>AUTHORITY TO SEARCH</u></b></p>	<p>IN ADDITION TO THE CONSENT SEARCH DESCRIBED ABOVE, THE UMOs MAY FRISK THE SUBJECT FOR A DEADLY WEAPON OR ANY INSTRUMENT OR ARTICLE READILY CAPABLE OF CAUSING SERIOUS PHYSICAL INJURY, AND OF A SORT NOT ORDINARILY CARRIED IN PUBLIC PLACES BY LAW-ABIDING PERSONS, IF THE UMOs REASONABLY SUSPECTS THE PERSON IS ARMED AND DANGEROUS.</p>
<p><b><u>FORCE AND DETENTION</u></b></p>	<p>A STOP OCCURS WHENEVER A REASONABLE PERSON WOULD NOT FEEL FREE TO DISREGARD THE OFFICER AND WALK AWAY. A UMOs IS PERMITTED TO USE REASONABLE FORCE TO STOP AND QUESTION A SUBJECT. THE TYPE AND AMOUNT OF PHYSICAL FORCE USED MUST BE OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES FACING THE UMOs.</p>