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SEARCH AND SEIZURE

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Hon. Mark D. Cohen (Ret.)
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Moderator: Hon. James A. McDonaugh

April 25, 2022
Suffolk County Bar Association, New York

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Judge Mark D. Cohen (Ret.)
Touro Law Center
225 Eastview Drive
Central Islip, New York 11722

Mark D. Cohen served as a Judge of the New York State Court of Claims from 2006 to 2020. During that period, he was an Acting New York State Supreme Court Justice in Suffolk County, New York and from 2015 to 2020, was the Supervising Judge of the Superior Criminal Courts for the Tenth Judicial District (Suffolk).

Judge Cohen has been an adjunct law professor at the Touro Law Center in Central Islip, New York since 1993. In 2021, he was appointed by the law school as a Distinguished Jurist in Residence. In 2004, Touro honored him as its Distinguished Public Interest Attorney in Residence. In 2009, the law school named him as its Adjunct Professor of the Year. In 2013, he received Touro's Annual Award "In Recognition of Devoted Service to the Ideals and Purpose of Legal Education," which in the past, had been reserved only for full-time faculty. During that same year, Touro's Moot Court Honors Board presented him with the Annual Hon. George C. Pratt Award in Appellate Advocacy, in recognition of his work with the law school's competitive moot court teams. In 2014, 2015, 2018 and 2019, Judge Cohen was voted Touro's Best Adjunct Professor by the law school's Student Bar Association.

In 2016, Chief Judge DiFiore named Judge Cohen as a member of the State Judicial Advisory Committee on Evidence and in 2018, she designated him as a member of the State's Continuing Legal Education Board.

Judge Cohen is a graduate of Columbia College, Columbia University, and the Hofstra University School of Law, where he was a member and editor of the Law Review. Upon graduation from law school, he was an appellate law clerk in Boston, Massachusetts.

Judge Cohen was the Deputy Director and Chief Counsel of the New York State Office of Homeland Security from 2001 to 2006. During that time, he also served as Acting Director for the Office and Assistant Director for its Legal Division and held a Top-Secret security clearance.

Judge Cohen was an Assistant District Attorney in the Suffolk County, New York District Attorney's Office from 1976 through 2001 and served as Chief Assistant District Attorney for thirteen years under two elected District Attorneys. He also was Chief of the Office's Appeals Bureau, Deputy Chief of the Special Investigations Unit, and a trial prosecutor in the Felony Trial Bureau.. As a prosecutor, Judge Cohen argued more than 200 cases in the Appellate Division, Second Department, more than 20 cases in the New York Court of Appeals and 10 cases in the United States Court of Appeals for the Second Circuit.

Judge Cohen has spoken extensively to judicial, governmental, bar, professional, and academic organizations across the country and has lectured for or been a member of the faculty of the New York State Judicial Institute, various Judicial Associations, the National College of District Attorneys, the New York Prosecutors Training Institute and the Federal Law Enforcement Training Center. He is a past-President and served on the Board of Directors of the Association of Government Attorneys in Capital Litigation and served as a Legislative Secretary and Treasurer for the New York State District Attorneys' Association. He was honored by the Suffolk County Court Officers' Association as its 2020 Judge of the Year and in 2018, the Suffolk Criminal Bar Association named Judge Cohen as "Judge of the Year" as well.

Judge Cohen has received the New York State District Attorneys Association's highest honor, the Frank S. Hogan Award, and is the only non-elected or non-acting recipient ever given this award.

Donna Aldea, Esq.

Ms. Aldea, who heads the firm's appellate and post-conviction litigation group, earned her law degree from St. John's University in 1998. Before joining Barket Epstein, she was an appellate attorney at the Queens County District Attorney's Office, where she served for 15 years, ultimately holding the position of Counsel for Special Litigation, responsible for handling the office's toughest cases. Ms. Aldea brings extensive experience to the firm, having litigated complex issues in the United States Supreme Court, the United States Court of Appeals for the Second Circuit, the federal District Courts, the New York State Court of Appeals, and the New York State Appellate Divisions. Her work has helped shape the landscape of New York and federal law on issues including the right to counsel, the constitutionality of the state's death penalty statute, and the parameters of post-conviction review of federal habeas corpus proceedings. Ms. Aldea is also an adjunct professor at St. John's University School of Law and is a highly acclaimed and much sought after speaker at continuing legal education seminars statewide. She has been voted a New York Metro Area Super Lawyer every year since 2015.

Recognition

- Chair of Appellate Practice Committee, Nassau County Bar Assoc., 2016-2018
- Super Lawyers Appellate Practice and Litigation; Top Attorneys in Metro New York, 2016, 2017, 2018, 2019, and 2020
- Thomas E. Dewey Medal – NYC Bar Association, 2012
- Award for Outstanding Advocacy in Capital Litigation – Association of Government Attorneys in Capital Litigation, 2008
- Eugene J. Kelly, Jr. Award for best prosecutor – Queens District Attorney's Office, 2007
- Dean's Adjunct Faculty Teaching Award – St. John's University School of Law, 2011-2012
- Alumni Association Honoree Service Award – St. John's University School of Law, 2008
- Alumnus of the Month; Prepare, Lead, and Serve – St. John's University School of Law, 2007

Associations

- Nassau County Bar Association
- New York State Bar Association
- American Bar Association
- Historical Society of the New York Courts
- New York State Association of Criminal Defense Lawyers
- Adjunct Professor at St. John's University School of Law

Suffolk Academy of Law

Search & Seizure: Warrantless Car and Pedestrian Stops, Warrantless Searches & *Terry* Frisks

Remote
Hauppauge, New York
April 25, 2022

Judge Mark D. Cohen (Ret.)
Distinguished Jurist in Residence: Touro Law Center,
Of Counsel, Reynolds, Coronia, Gianelli & LaPinta, P.C.
Donna Aldea, Esq., Barkett, Epstein, Kearon, Aldea and LoTurco, LLP.

Scope: Important Recent Search and Seizure Cases Concerning:

- Police Stops of Pedestrians and Cars
- Warrantless Searches and Seizures
- Inventory Searches
- *Terry* Stops and Frisks

Warrantless Stops of Cars and Pedestrians

- Predicates For Police Stops of Cars:
  - Investigative: Reasonable Suspicion
  - Traffic Violations: Probable Cause
  - Checkpoints: “Special Needs” (Suspicionless) & Per Reasonably Related Departmental R & P’s and Properly Administered
  - Pretext Stops Are Valid
- Predicates For Pedestrian Stops:
  - New York *DeBour* Levels of Intrusion vs. Fourth Amendment *Terry* Stops and Frisks

So, There's a 911 Call of a Man With a "Long Gun" in a Van That The Police Later Locate a Weapon in Vehicle

- At Suppression Hearing, People Only Put This Proof In, Without Any Evidence Re: Who Was 911 Caller (Was He/She a Citizen Informant) and If Not, What Was Basis For Information Reported
- OK to Justify Stop and Later Seizure of Firearm [*People v. Argyris*, *24 N.Y.3d 1138 (2014) :* Either Totality of Circumstances Per *Navarette v. California*, *572 U.S. 393 (2014) or Aguilar-Spinelli*]*?*

People v. John W. Walls, 37 N.Y.3d 987 (9/6/21)

- It's NG Per Court of Appeals 7-0 [Memorandum]
- People Never Introduced Evidence Whether 911 Caller Was Citizen Informant or "Anonymous Tipster," And Also, The Caller's Basis of Knowledge to Justify Stop
- Insufficient Demonstration of Reliability Caller Under Either *Argyris* Standard: *Aguilar-Spinelli* or Totality of Circumstances
- Lower Court Orders Denying Suppression Reversed
- See Also, *People v. Jose Ponce*, *2022 NY Slip Op 01706 (4th Dept. 3/11/22)* [Same Holding, Citing *Walls*]

And Is a “Similarity Hit,” Received by Police on a Mobile Data Unit, Indicating Something About Registered Owner Was Similar to a Person With an Outstanding Arrest Warrant Enough to Stop a Car?

People v. Everett D. Balkman, 35 N.Y.3d 556 (2020)

- No, Per Unanimous Court of Appeals: 7-0 (Feinman, J.]: Insufficient Basis to Stop
- Divided Appellate Division Reversed and Chrome Hand Gun Suppressed

How About a Stop of a Pickup Truck Based on Fact Police Knew Registered Owner Had Revoked Driver's License and Police "Assumed" Owner Would be Driving?

- Is That Assumption Enough for Reasonable Suspicion?
- Hint: This is Not in New York!

Kansas v. Charles Glover, 140 S.Ct. 1183 (2020)

- Per SCOTUS 8-1 (Thomas, J.): Stop Proper
- Yes Per SCOTUS in Kansas v. Charles Glover, 140 S.Ct. 1183 (2020) (4/6/20), 8-1 (Thomas, J.), Based on Totality of Circumstances and "Common-Sense" Inferences = Driving as Habitual Violator Conviction Upheld
- Majority Rejected Claims That Stop Lacked Individualized Inferences and Was Not Based on Law Enforcement Training and Experience
- Justice Sotomayor Dissented: Stop Based on Nothing More Than "Demographic Profile" That Did Not Equate to Reasonable Suspicion

The Troopers See a Car in Buffalo Doing “Nothing Wrong” But Decide to Run a Radio Check

- It Comes Back With an Indication That The Vehicle Should Be In an Impound Yard
- The Report Also Says This Information Should “NOT BE TREATED AS A STOLEN VEHICLE HIT - NO FURTHER ACTION SHOULD BE TAKEN BASED SOLELY UPON THIS IMPOUNDED RESPONSE” (sic.)
- The Car is Stopped and After a Negative License and Registration, Smell of Marijuana and the Observation of a “Roach” on the Console, The Car is Searched and Marijuana and a Loaded Gun Found
- Was This Stop Good?

People v. Robert Hinshaw, 35 N.Y.3d 427 (2020)

- No Per Court of Appeals 5-1-1 Wilson, J., Reversing Divided Fourth Department [170 A.D.3d 1680 (4th Dept. 2019)]
- For Valid Investigative Stop, Court of Appeals & All 4 Appellate Divisions Have Required Reasonable Suspicion
- Per *People v. Robinson (2001)*, (And As We Noted) Objective Probable Cause for Traffic Infraction Stops Irrespective of Police Motives or Pretext
- Mere Report of Impound With Nothing More Insufficient Especially Where Trooper Candidly Testified “Everything Looked Good” and That He Had “No Reason to Stop the Car”

So, Can a U.S. DHS, CBP Marine Interdiction Agent Who is Deputized on a Niagara Sherriff's Department Task Force Properly Stop an Automobile For VTL Violations?

- And What if Buffalo City PD Officers Who Respond After Agent Holds Person at Scene Discover Illegal Guns and Ammo in the Trunk?
- Was The Stop and Arrest by the CBP Agent Authorized?

People v. Limmia Page, 35 N.Y.3d 199 (2020)

- Per Court of Appeals (Feinman, J.) 5-2, Yes
- Lower Court Orders of Suppression Reversed
- While CBP Marine Interdiction Agent Not Federal Law Enforcement Officer Armed With Peace Officer Powers Pursuant to C.P.L. 2.15 and 140.25, Agent Did Not Violate Prescribed Limits on Peace Officers Arrest Powers, He Was Authorized as Private Citizen to Make Stop

People v. Limmia Page, 35 N.Y.3d 199 (2020)

- Majority Held *People v. Williams*, *4 N.Y.3d 535 (2005)*, Inapposite [Stop by Buffalo Housing Authority For Traffic Infraction Not Authorized]
- Judge Fahey, Joined by Judge Rivera, Dissented: Agent Was Not Acting as Private Citizen and Court Can't Uphold Arrest By Person "Impersonat[ing] a Law Enforcement Official
- And FYI: Per *People v. Jean Janvier, 186 A.D.3d 1247 (2nd Dept. 2020)* [NYC T & L Commission Inspector Held to Be a "Peace Officer" Authorized to Stop Unlicensed for Hire Car After Traffic Infraction, Which Resulted in Assault on Inspector]

An NYPD Police Officer Stops a Mini-Van Because Its Middle Rear Brake Light is Out

- It Turns Out This May Not Be a Violation of the VTL
- Are The Results of the Stop: A Failed Field Sobriety Test - Admissible in the Defendant's Bronx DWI Case?
- Is This Mistake of Fact Under *Heine v. North Carolina, 574 U.S. 54 (2014)* or Was the Police Officer's Conduct Objectively Reasonable Under *People v. Guthrie, 25 N.Y.3d 130, 136 (2015)?*

People v. Robin Pena, 36 N.Y.3d 978 (2020)

- Per a Plurality Memo Opinion [5-2], The Court of Appeals Held: The Stop Was Good Because It Was Objectively Reasonable, Even If The Officer Was Mistaken
- And, Judge Feinman, Joined by Chief Judge DiFiore, Joined The Plurality Memo, and Also, Concurred: The Stop Was Actually, Valid Based on Malfunctioning Middle Lamp In a Review of VTL 375, 376 and DMV Regulations, and Thus, Officer Had PC to Stop

People v. Robin Pena, 36 N.Y.3d 978 (2020)

- Judge Wilson, Joined by Judge Rivera, Dissented: Plurality Opinion Was a “Dodge” = Stop Was Invalid Under VTL 375, Since No Mistake of Fact or Law
- Compare, *People v. Balkman*, *35 N.Y.3d 556 (2020)* “Similarity Hit,” Just Discussed, NG As Basis For Stop

What if Rochester Police Mistakenly Stop the Defendant, Thinking He’s the Defendant's Brother, Who Has Two Outstanding Arrest Warrants?

- And The Police Think the Two “Look Alike and Share the Same General Characteristics”
- And So, the Defendant Flees and When Captured, the Police Find a Loaded Revolver on Him and After Waiving *Miranda* He Makes a Statement About The Gun
- Stop by Mistake: Good or Bad?

People v. Bernard Dortch, 186 A.D.3d 1114 (4th Dept. 2020)

- 4th Department (Memorandum) Said NG 3-2: Suppression Denial Reversed
- Per *People v. Tejada, 270 A.D.3d 656, 657 (3rd Dept. 2000)*, "The Arrest of a Person Who is Mistaken Thought to Be Someone Else is Valid if the Arresting Officer (a) Has Probable Cause to Arrest the Person Sought and (b) Reasonably Believed The Person Arrested Was the Person Sought."

People v. Bernard Dortch, 186 A.D.3d 1114 (4th Dept. 2020)

- But Here, There Was No Proof Presented By the People Re: The Validly of the Arrest Warrants For the Defendant's Brother
- Thus, People Failed to Demonstrate the Legality of the Police Conduct in the First Instance
- Justices Nemoyer and Winslow Dissented: Defendant Never Challenged Validity of Warrants and Even on Merits, Warrants Were Presented in Court and Presumed Valid Without Any Evidence to Contrary

And What If When Called to a Scene of an Altercation, The Police Are Informed by a Person Involved That The Defendant Had a Knife?

- Enough to Make a *DeBour*, Level 2 Common Law Right of Inquiry?
- Enough for the Police to Ask, Do You Have a Knife?
- What If There Are Numerous Police Present and They First "Escort" Him a Short Distance Away?
- Was The Situation Elevated to Custodial Interrogation Requiring *Miranda* Warnings?

People v. Kevin Townshend, 202 A.D.3d 447 (1st Dept. 2/3/22)

- No, Per 2nd Dept, All Good, CPW3 Conviction Affirmed.
- The Police Were in the Process of Gathering Information About the Alleged Incident Before Taking Action
- The Police Inquiry About the Knife Was Merely to Clarify the Situation and to Ensure the Safety of the Officers and the Public

Attenuation

- Remember *Utah v. Streiff, 136 S.Ct. 2056 (2016*)?
- Most Recent SCOTUS Word on Attenuation and a Dissipated Fourth Amendment Taint
- There, Attenuation Doctrine Applied to Save Search Following Invalid Arrest Due to Active Arrest Warrant
- But Does It Apply Even In Extreme Circumstances With a Plainly Bad Stop and Detention of a Suspect?

United States v. Jaquan Walker, 965 F.3d 180 (2nd Cir. 2020)

- City of Troy P.D. PO's and Sergeant Observe Two African-American" Males Walking at 6:50 p.m.
- Police Sergeant Recalled He Received Email the Day Before With Photo Attached Looking to ID Suspect in Shooting Two Days Earlier and Pulled Up on Phone
- Sergeant Later Testified Both Men "Reminded Him" of Suspect in Shooting in Photo: "Medium to Dark Skin Toned Black Males," Both "Thin Build," Both With Facial Hair, One Had Long Hair and One Had Shorter Hair; Both Wore Glasses

United States v. Jaquan Walker, 956 F.3d 180 (2nd Cir. 2020)

- Sergeant Directed Fellow PO's to "Stop Out" These Men [Troy P.D. Procedure: Request ID and Check for Warrants]
- Stopped by Uniformed Police and ID Requested
- Active Arrest Warrant Discovered
- Defendant Arrested; Companion Permitted to Leave
- As Defendant Brought to Police Car, Pat-Down Resulted in "Bulge" in Groin Area
- When Asked If There Was Anything Else the Officers 'Needed to Know," The Defendant Indicated He Had Crack Cocaine on Him

United States v. Jaquan Walker, 965 F.3d 180 (2nd Cir. 2020)

- Second Circuit Reversed District Court Denial of Suppression
- Notwithstanding What Sergeant Claimed He Recalled, the E-Mail Never Said Anything About The Photo Relating to Any Crime, "Let Alone a Shooting" = No Basis For Stop
- With Temporal and Geographic Proximity Between Search and Illegality, in Case In Which Police "Lacked Any Objectively Reasonable Suspicion to Stop" The Police Conduct Was "Deliberately Reckless or Grossly Negligent"
- As Such, *Streiff* – Attenuation Distinguished
- Compare, *People v. Devon Adams*, *2022 NY Slip Op 00311 (2nd Dept. 1/19/22)* [While Initial Stop Concededly Invalid, Defendant's "Free and Independent Act of Pointing Gun at Police Officer Dissipated Taint; Weapon Properly Seized]

We Know a Home's Curtilage is One of The Last Frontiers of the Fourth Amendment

- *Florida v. Jardines, 569 U.S.1 (2013)* [Search Warrant Required For Canine Sniffing Dog's Entry Onto Porch of Suspect's Home]
- *Collins v. Virginia, 138 S.Ct. 1663 (2018)* [Search Warrant Required to Examine VIN on Motorcycle Parked in Driveway Near Home Under Tarp]
- What Happens if During a Police Pursuit, The Police Enter the Curtilage of the Suspect's Home?

NYPD Tries to Stop a Car For Going at Twice the Speed Limit In Queens

- They Activate Their Lights, Lose The Car and Then Two Blocks Later, See It Parked in Front of a House
- As They Drive Up, They See Two People Exit the Vehicle and Run to Back of Home, Which Had a Fence With an Open Gate
- PO Entered Gate to Locate Driver of Car

While Standing in Driveway, Officer Observed Defendant Open Side Door to House and Look Around

- The Officer Then Hears the Defendant “Utter a Profanity“ and Sees a Firearm Coming Out of the Gym Shirts as it Flew Through the Air
- The Gun Was Recovered
- So, A Good or Bad Search?
- Hint: Trespass Onto Curtilage or Hot Pursuit?
- Hint: Abandoned Property?

People v. Keanu Whitfield, 186 A.D.3d 1414 (2nd Dept. 2020)

- Per 2nd Dept: Suppression Properly Denied; Conviction Affirmed
- Even Though Police Entered Curtilage of Defendant's Property, They Did It Briefly and Peacefully and While They Were in Hot Pursuit
- And Also, Defendant's Throwing The Shorts With Gun Over Fence Was Act of Abandonment Involving a Spontaneous Reaction to a Sudden and Unexpected Confrontation with the Police and Thus, A Calculated Risk That Went Bad

And Is Travelling Slowly on a Road in a Sparsely Trafficked Area of Nassau County Reasonable Suspicion For The Police to Stop a Car by Placing the Patrol Car in Front of the Vehicle ?

- What if The Stop Followed a Report That the Car Was “Suspicious” Because it Was “Following Someone”?

People v. Sayed Ahmad, 193 A.D.3d 961 (2nd Dept. 2021)

- It's NG Per 2nd Dept = Insufficient Basis
- Subsequent Seizure of a Gravity Knife Suppressed
- Also Insufficient Basis in Record For Suppression Court to Conclude Car Actually Stopped on Private Road

And What If an Albany City Police Officer Observes a Rear-Hit Fender Bender Crash and After Confirming Each Motorist Did Not Require Medical Attention, The Offending Motorist Backs Up and Tries to Drive Away?

- What If There Was “Minimal, If Any Damage”?
- Oh, and What If This Motorist's Eyes Were Glassy and Red, It Initially Took This Driver 30 Seconds to Put the Car in Park and He Was “Aggressive”
- Enough PC to Detain as a Violation of VTL 600 - Leaving The Scene of an Incident?
- And What If This Led to a DWI Charge?

People v. Dewey Sims, 201 A.D.3d 1248 (3rd Dept. 1/27/22)

- Per The 3rd Dept: Enough PC to Stop the Car and Engage in a "Limited Seizure" of the Motorist: Suppression Denial Affirmed
- Under VTL 600, The Police Officer Was Required to Request That the Drivers Exchange Information Even if the Damage Was Minimal
- Thus, The Stop Was Justified at its Inception, Reasonable as to Scope and at Each Stage Leading to Arrest With the Entire Time Elapsed of About 10 Minutes

And What About Police Approaches of Already Stopped Cars?

So, An NYPD PO Observes a Person Apparently Passed Out or Sleeping Behind the Wheel of a Parked Car in Queens

- The PO Approaches and Sees The Person, the Defendant, is Hunched Over and the Engine is Running
- An Officer Knocked on the Window Repeatedly and the Defendant Woke up About a Minute Later
- The Officer Then Asked the Defendant to Exit the Car and Then Observed a Liquid in a Cup in the Console and a Bottle of Whisky in the Rear
- The Defendant Was Arrested for DWI
- Good or Bad?

People v. Enique Eugenio, 185 A.D.3d 1050 (2nd Dept. 2020)

- Per The 2nd Department: NG on People's Appeal
- While the Approach of the Vehicle Was Valid Based on an Objective Credible Reason Not Necessarily Indicative of Criminality Under *DeBour* …
- Where the Vehicle Was Lawfully Parked, There Were No Grounds to Impose the Restraint or to Order the Defendant Out of the Car Without Any Request For Information
- Here, There Was an Insufficient Belief Defendant Was Engaging in a Criminal Act That Equaled Reasonable Suspicion to Detain
- Physical Evidence and Statements Properly Suppressed By Lower Court

And Once a Car is Properly Stopped by the Police For Running a Red Light …

- Is Nervousness of the Driver,
- The Fact the Stop Occurred in a "High Crime Area," and
- The Fact That The Car Has Out of State (Massachusetts) Plates,
- Enough to Satisfy the "Founded Suspicion" Standard of *People v. Garcia*, *24 N.Y.3d 317 (2012)*, to Ask the Driver If There Were Any Weapons in the Car?

People v. Sandley Jonathas, 192 A.D.3d 646 (1st Dept. 2021)

- No Per 1st Dept
- *DeBour* Step 2 Common Law Right of Inquiry Not Supported by Founded Suspicion as Required Under *People v. Garcia*, *24 N.Y.3d 317, 3234 (2012)*
- Holding: Stop for Traffic Violation in High Crime Area + Out of State Plates Insufficient Even With "Visible Nervousness"

And What About a Motorist Who's Just Sitting in a Parked Car and After the Police Come Up to the Car, Is Asked by the Police, " What Do You Need?"

- What If The Motorist Says He Needs Cell Phone From Another Car, A Nearby Acura That The Police Believe Is Stolen?
- Suppose the Police Direct the Driver Out of the Car and After He Refuses and an Altercation to Pull Him Out, He Runs Over the Officer's Legs and Then Flees?
- Attenuated From Initial Illegality?
- A "Bad Case" Etc.?

People v. Jeffrey Contreras, 194 A.D.3d 835 (2nd Dept. 5/12/21)

- It's Attenuated Per 2nd Dept
- Initial Police Approach OK as *DeBour* Level I Intrusion But Attempt to Remove Defendant Was Without Basis
- Nonetheless, That Illegality Was Dissipated by the Defendant's Independent Act of Fleeing
- Defendant's Statements Properly Held Admissible

Is The Fact That a Car Was Merely Parked in a “High Crime Area” With 3 Occupants and The Engine Not Running a Sufficient Predicate For the Police to Approach and Inquire as a *DeBour* Level I Encounter?

- Suppose The Approach and Inquiry Led to the Discovery of Narcotics and the Defendant’s Statements to the Police?
- Good or Not?

People v. Keith King, 199 A.D.3d 1454 (4th Dept. 11/19/21)

- It's NG Per 4th Dept.
- With an Insufficient Particularized Reason to Approach to Request Information as a *DeBour* Level One Encounter, The Action Was Not Justified at Its Inception
- Thus, The Narcotics and Statements Were Ordered Suppressed
- See Also, *People v. Tony Jennings, 2022 NY Slip Op 00755 (4th Dept. 2/4/22)* [Presence in High Crime Area + Furtive Movements Inside Car Insufficient Reasonable Suspicion to "Seize" Defendant's Vehicle by Blocking It With Patrol Car; Evidence Suppressed]

And Is a Police Officer's Direction That He, and Not The Motorist Will Retrieve the Registration From a Car Involved in a One-Vehicle Crash, OK or Not?

- What If The Cop Was Standing Closer to the Car Than the Driver?
- What If, While Accessing the Glove Compartment, the Officers Sees a Weapon That Had Not Been Visible Because of a Deployed Airbag?

People v. Anthony Lawrence, 192 A.D.3d 1686 (4th Dept. 2021)

- It's NG, Per 4th Dept.: Oneida County Denial of Suppression Reversed
- Holding: With No Probable Cause to Search and a Particularized Safety Concern, As Alleged by People, That Required Police, Rather Than Defendant, to Enter First and Observe the Weapon, Suppression Was Required

OK, Remember Welsh v. Wisconsin, 466 U.S. 740 (1984)?

- Police Hot Pursuit After Fleeing Defendant Inside His/Her Home OK if It’s a Felony
- And NG If It’s Not

CHP Tried to Stop Defendant's Car B/C He Was Playing Music Too Loudly and Honking Horn

- Defendant Ignored them and Proceeded to Nearby Driveway, Exited Car, and Entered Home
- Pursuing Officer Managed to Get Foot Under Garage Door As It Was Closing, Entered House and Arrested Defendant For Driving Under Influence
- Is This "Hot Pursuit" Good?

Arthur Gregory Lange v. California, 141 S.Ct. 2011 (6/23/21)

- Per SCOTUS, 9-0, Per Kagan J., With Concurring Opinions:
- The Flight of a Misdemeanant, Even One “Asking For Attention,” Does Not “Categorically” Permit a “Hot Pursuit” Into the Suspect’s Home
- While There May Be Factual Settings to Support an Emergency or Exigent Circumstances Pursuit, This Was Not One
- DUI Conviction, Reversed

And Suppose the Police See a Bicyclist Riding “Recklessly” in the Middle of a Queens Street

- They Also See Him Holding a “Bulky Object” at His Waist
- They Say, “Hold Up Police” 2X
- After He Stops They Ask Him If He Has Anything “On Him”
- He Says, “Yes, A Gun,” and He’s Arrested After It’s Recovered
- So Is The Stop of This Bicyclist Good?

People v. Lance Rodriguez, 194 A.D,3d 968 (2nd Dept 5/19/21)

- Yes, Per The 2nd Dept!
- *DeBour* Rules For Pedestrians Are Also Applicable to Bicyclists Under *People v. Bora, 83 N.Y.2d 531, 533 (1993)*
- Thus, This Was a Good Level 2 Common Law Right of Inquiry

And In Terms of Legal Predicates For Police Stops and Thereafter, More Intrusive Actions, Keep in Mind, Of Course, The Not So New Cannabis Law

- Marijuana Regulation and Tax Act: L. 2021, Ch. 93
- Signed by Governor, March 31, 2021 and Effective in Most Parts on That Date
- Personal Possession of <3 Oz or 6 Cannabis Plants Permitted For Persons > 21 Years Old
- New P.L. Art. 222 Graded Offenses From Violations to Class C Felonies: Possession and Sale of Greater Cannabis Quantities
- Most Important, Per New P.L. 222.05(3), Eliminates The Smell of Burnt Cannabis as Basis For Probable Cause to Believe Crime Committed Unless Per P.L. 222.05(4), Crime is DWI or Operating Motor Vehicle or Vessel Under Influence of Drugs

And So, First Appellate Case Out of the Box

- NYPD Stop of Car For Traffic Infraction
- Police Smell Odor of Burnt Marijuana and See Car is “Smoky” and a Small Amount of Marijuana in a Plastic Bag on Console
- Trunk Searched and Loaded Revolver Found
- Good or NG Under Automobile Exception?

People v. Danny Ponder, 195 A.D.3d 123 (1st Dept. 5/6/21)

- Per 1st Dept (Kapnick, J.): No!
- "De Minimus" Amount of Marijuana "Consistent With Personal Use" on Console & Smell of Burnt Marijuana Insufficient to Support Warrantless Automobile Exception Search of Trunk
- Holding: With a Footnote Reference to 2021 Cannabis Law, In a Case Litigated Prior to New Law's Enactment, There Was an "Insufficient Factual Nexus" Between Small Amounts of Marijuana and Likelihood Contraband Would Be Found in Trunk Under *U.S. v. Ross, 456 U.S. 798 (1982)* and *People v. Langen, 60 N.Y.2d 181 (1982)*

But Be Sure to Read …

- *People v. Patrica Mortel, 197 A.D.3d 196 (2nd Dept. 7/21/21)* [By 3-2 Vote, Order of Marijuana Held to Not Provide Basis to Conduct Warrantless Search of Search Car Stopped For Traffic Violation Under Automobile Exception, With No Citation to Cannabis Law]
- And See, *People v. Aaron Parker, 196 A.D.3d 651 (2nd Dept 7/21/21)* [Relying on *Mortel*, Denial of Suppression Reversed]

Also Compare …

- *People v. Nehemiah Henderson*, *197 A.D.3d 663 (2nd Dept. 8/18/21)*, In Which the Smell of Burnt Marijuana Was Held to be a Sufficient Predicate For Troopers to Search a Stopped Automobile in Nassau County – No Mention of *Ponder*, *Mortel* or New Cannabis Law
- Compare Also, *People v. Ronnie L. Boswell*, *197 A.D.3d 950 (4th Dept. 8/26/21)* [Odor of Marijuana Provided Basis to Frisk Defendant Who Fled, Which Led to Seizure of Abandoned Weapon; Court Declined to "Revisit" Issue of Smell of Marijuana a Predicate for Police Intrusion With Also No Reference to *Ponder*, *Mortel* or New Cannabis Statute]

And Be Sure to Read …

- *People v. Jahvon Mosquito, 197 A.D.3d 504 (2nd Dept. 8/4/21)* [While Odor of Marijuana, Coupled With Other Police Observations Provided Probable Cause to Search Car, Seizure of Credit Cards in Purported "Plain View" Improper]

And, Also On The New Law:

- *People v. Donnie McCray, 195 A.D.3d 555 (1st Dept. 6/24/21):* Smell of Marijuana + Observations of Smoking Marijuana, Furtive Movements and View of Marijuana on Floor of Car= PC to Search Vehicle
- Thus, Six Weeks Later, *Ponder* Facts Distinguished by Same Court

And Finally, Is The New Law, Somehow Retroactive in Terms of Search a Vehicle Based on Smell of Marijuana?

- No, Per *People v. Artur Babadzhanov, 2022 NY Slip Op 2273 (2nd Dept. 4/6/22):* Queens Suppression Denial In Search of Car Based on Smell of Marijuana Affirmed Under Old Law Effective At Time of Police Action
- *"We Discern No Expression of Legislative Intent to Apply the New Penal Law § 222.05(3) Retroactively So As to Invalidate a Search That, When Conducted, Was Lawfully Supported by Probable Cause to Believe That a Substance Then Contraband in Any Amount Would Be Found in the Car."*
- *See Also, People v. Daniel Hall, 202 A.D.3d 1485 (4th Dept. 2/4/22)* [Search of Car Following Valid Traffic Stop Upheld As In Plain View; Seizure and Conviction For Marijuana Affirmed Since Amount Seized Above Statutory Limits of Lawful Marijuana Possession, Under New Law, Even If Retroactive]

And See, People v. Anthony Fudge, 199 A.D.3d 16 (4th Dept. 8/26/21)

- "Olfactory Sense" by Police of Distinctive Smell of PCP Provided Probable Cause to Search Car in Syracuse, Relying on *People v. Darby, 263 A.D.2d 112 (1st Dept. 2000)*
- Lengthy Opinion by Fourth Department (Nemoyer, J.) Provided Extensive Review of New York, Federal and National Caselaw Along With "Reprove" of Appellant's Counsel's Failure to Provide Court With Available Negative Caselaw and Various of His Unsupported Factual Assertions

Warrantless Searches

- To Begin This Section, We Know Under Both State and Federal Constitutions, They’re Presumptively Unreasonable
- Thus, Burden Always on Government to Demonstrate Propriety and Exception to Fourth Amendment and NYS Constitution, Art. I, Sec. 12 Preference for Search Warrants

“Community Caretaking” Exception

- We All Know About Exigent Circumstances and Emergency Aid as Exceptions to the Fourth Amendment Warrant Requirement
- But What is the Police “Community Caretaking Function”?
- Generally, in New York and Elsewhere, With Some Exceptions, It’s Been Applied to Permit The Impoundment and Inventorying of Vehicles. *People v. Hinshaw, 35 N.Y.3d 427 (2020); People v. Tardi, 28 N.Y.2d 1077 (2016)*

So, Is This a “Community Caretaking” Function Sufficient to Justify a Warrantless Seizure of a Weapon?

- It’s a Domestic Dispute in Rhode Island
- Police Arrive and Persuade Defendant, Husband, to Go to Psychiatric Hospital
- Wife Then Tells Police Husband Had 2 Handguns
- She Allows Police Inside Home to Seize Weapon
- Husband is Charged With Illegal Gun Possession
- 1st Circuit Ruled Seizure of Weapons OK Under “Community Caretaking Exception”

Edward A. Caniglia v. Robert F. Strom, 141 S.Ct. 1596 (5/17/21)

- The Unanimous Answer (9-0) is No, Per SCOTUS (Thomas, J.)
- The Rule Announced in *Cady v. Dombrowski*, *413 U.S. 433 (1972)*, Permitting Warrantless Inventory Search of Impounded Car for Weapons to Protect Public Did Not Apply Here
- Three Separate Concurring Opinions (Roberts, C.J., Kavanaugh, J., and Alito, J., Expressed Concern Re: Continued Breadth of Emergency Aid Exception and Application of Non-Criminal "Community Caretaking" Exception For Preventing Suicides and "Red Flag" Law Enforcement

Can an Inbound International Traveler's Computer be Searched at JFK by DHS Agents Without a Warrant?

- What's The Required Standard of Proof?
- Doesn't Special Needs Apply?

People v. Thomas Perkins, 184 A.D.3d 776 (2nd Dept. 2020)

- DHS Agents Executed SW in Texas in Residence Associated With Defendant's Family For Child Porn
- None Found There But Agents Developed Further Information That Defendant Was Carrying Some on Electronic Device He Had With Him at Time
- Defendant Thereafter Stopped in JFK Airport by DHS Agents After Exiting International Flight From Montreal

People v. Thomas Perkins, 184 A.D.3d 776 (2nd Dept. 2020)

- Defendant Told He Was Free to Leave But DHS Agents Asked For Password to Ipad He Was Carrying
- DHS Agent Advised: Two Options Unlock Device Now or Agents Would Retain it and Forensically Examine It
- Defendant Entered Password and Child Porn Discovered

People v. Thomas Perkins, 184 A.D.3d 776 (2nd Dept. 2020)

- 2nd Dept. Affirmed Denial of Suppression
- Assuming Without Deciding Reasonable Suspicion Required to Search Ipad, DHS Had It
- Defendant Also Not Coerced into Providing PIN Number For Access Such Statement Device Would Be Retained Was Not a False Assertion of Authority That Would Render Defendant's Inputting of Password Involuntary When Free to Leave
- "Special Needs" Exception to Warrant Not Reached
- Leave to Appeal Was Denied [10/20/20]

And, When Does an Emergency End to Justify a Warrantless Entry & Search?

- What If NYPD Are Called to Queens Home on Report of Woman Being Held at Gunpoint?
- What If Police See a Frantic Victim Through Basement Window Holding a Small Child and Then Pry Bars From Window Open to Life Child and Victim Out of House?
- And As This is Happening, The Victim Yells: “He’s Got a Gun. He’s Got a Gun” and That Person is “Tony”
- Then, At the Direction of the Police, 3 More Occupants, Including the Defendant, “Tony,” Exit the Home

And So, The Police Enter the Home to Search For Other Occupants

- They Get to the Bottom of the Basement Stairs and Peer Into a Boiler Room
- In Plain View is a Firearm on Top of a Piece of Furniture
- The Police Show to the Victim Who Says That Wasn’t the Weapon and Then She ID’s “Tony” as Perpetrator
- The Police Execute a SW The Next Day and Don’t Find the Actual Weapon But The Weapon Found in Plain View Had D’s DNA On It
- A Good or Bad Warrantless Search?

People v. Tony Richards, 186 A.D.3d 1720 (2nd Dept. 2020)

- It's Good Per The 2nd Dept.: Suppression Order and Conviction Affirmed
- The Emergency Hadn't Ended Where the Police Were Responding to Emergency and Their Entry Was Not Motivated By an Intent to Arrest and Seize Evidence
- When The Police Entered Since the Perpetrator was Still Unknown at That Point and It Was Still Unknown Whether There Were Additional People at Risk of Injury or Danger

We Know That Per *P. v. Mothersell*, *14 N.Y.3d 303 (2010)* and *P. v. Hall*, *10 N.Y.3d 303 (2008)*, a Strip Search of an Arrestee is Permitted Only On "Specific Articulable Facts Supporting Reasonable Suspicion that a Person is Secreting Evidence Inside a Body Cavity"

- What About "Evasive Delay" in Pulling Over Car on Police Command, "Furtive" Movements Inside, Cocaine and Drug Paraphernalia Found Inside Passenger Compartment, But Not on Defendant's Person During Frisk, + Cell Phones?
- Enough to Satisfy Reasonable Suspicion Inference of Defendant Trying to Conceal Something by Secreting Inside Body?

People v. Qwunta Curry, 192 A.D.3d 1649 (4th Dept. 2021)

- Yes, Per 4th Dept: The Strip Search Was Valid
- The Bodily Intrusion was Justified Under *Hall*, Not As a Blanket Policy But Under Totality of Circumstances, Viewed Objectively, That Led to Police Conclusion Supported by Reasonable Suspicion, Defendant Was Indeed Concealing Contraband on His Person

And What If the Police Have “Detailed Information” From a Store Employee of Man Trying to Use a Stolen or Forged Credit Card to Buy Merchandise?

- And What If The Police Chase the Defendant as He Leaves the Store and Then Tackle Him?
- Is That a Seizure Amounting to an Arrest Requiring Probable Cause?

People v. Terry Luke,
176 A.D.3d 428 (1st Dept. 2019)

- First Dept: Held Issue Not Preserved or In Alternative, Chase and Tackle Did Not Elevate to Arrest
- Tackle Was “Reasonable Measure” to Prevent Defendant From Frustrating Police Efforts to Detain Him Based on at Least Reasonable Suspicion

We Know the Supreme Court in Has Held That a Canine Sniff of the Exterior of a Vehicle In The Course of Traffic Stop That Does Not Delay the Motorist Beyond the Reason for the Stop Is Valid Under the 4th Amendment

- See, *Rodriguez v. United States*, *575 U.S. 348 (2015); Illinois v. Caballes*, *543 U.S. 405 (2005)* and *City of Indianapolis v. Edmund*, *531 U.S. 32 (2000)*

We Also Know That Under *People v. Devone*, *13 N.Y.3d 106 (2013)* in New York, Founded Suspicion is Required For Canine Sniffs of Exteriors of Autos

- In Fact, Just Last Fall, In *People v. Reginald Blandford*, *37 N.Y.3d 1062 (10/14/21)* [5-2; Memorandum], The Court of Appeals Held There Was Sufficient Founded Suspicion to Conduct Canine Sniff of Outside of Car Based on Hand to Hand Gestures Indicative of Narcotics Sale Outside Elmira Convenience Store

So What About the Warrantless Canine Sniff of the Motorist?

- What's The Standard: Reasonable Suspicion, Probable Cause or Something Else?

People v. Devon T. Butler, 196 A.D,3d 28 (3rd Dept. 5/20/21)

- Per Majority of 3rd Dept. 4-1 (Lynch, J.) In Case of First Impression, a Canine Sniff of a Person is Akin to a *Terry* Frisk and Thus, The Standard Must Be Reasonable Suspicion
- Suspicious “Hand to Hand” Activity in a Parked Car in Binghampton after Male Entered; Car Stopped For Traffic Violation; Canine Sniff of Exterior and Then Passenger Compartment With “Alert” = Reasonable Suspicion to Conduct Canine Sniff of Defendant’s “Groin/Buttocks” Area With Alert; Narcotics Recovered After Defendant “Bolted”
- Justice Pritzker Dissented: Probable Cause Should Be Standard For Intrusive Canine Sniff of Person

And So, A Motorist Was “Nervous,” After a Traffic Stop, and Focused on the Waistband Area of His Body.

- When Asked Why He Was Looking There, He Stated He Was Trying to Find a Bottle Cap to Chew (Yes, That’s What He Said!)
- He Exited The Car by Police Direction and Was Frisked
- Thereafter, He “Blad[ed] Away” While Reaching For The Waistband From the Police
- Enough to Justify a Police Pursuit?

People v. Joshua Williams, 191 A.D.3d 1495 (4th Dept. 2021)

- No Per 4th Department by a 3-2 Vote: Monroe County Denial of Suppression of Weapon Found After Police Chase Reversed
- Police “Candidly” Admitted Never Saw a “Bulge” in Waistband and Also Never Saw Defendant Touch Waistband
- Thus Insufficient Basis to Conclude Defendant Engaged in Criminal Activity to Justify The Pursuit
- Justices Centra and Nemoyer Dissented: All Facts Considered, Including “Nonsensical” Bottle Cap Explanation Added Up to Reasonable Suspicion

And For Something Completely Different …

- Suppose Investigators in a Child Porn Case Learn The Defendant Pays for Material Downloaded From a Child Porn Website in Bitcoin Currency
- They Get the Bitcoin Address by GJ Subpoena
- Does The Defendant Have a Reasonable Expectation of Privacy in This Address or “Bitcoin Blockchain”?
- Is This Information Like CSLI in *Carpenter v. United States, 138 S.Ct. 2206 (2018)*?
- Do They Need a Search Warrant?

United States v. Richard Nikolai Gratkowski, 964 F.3d 307 (5th Cir. 2020)

- Per 5th Circuit: No – Motion to Suppress Properly Denied by District Court
- Defendant Had No Legitimate Expectation of Privacy in Bitcoin "Blockchain Address"
- While There is Greater Degree of Confidentiality Than in Wire Transfers, Amounts and Parties Involved in Bitcoin Transfers Are Recorded in a Publicly Available Bitcoin Blockchain
- CSLI - *Carpenter* Analogy Rejected
- Every Bitcoin User Has Access to Public Bitcoin Blockchain and Can See Every Bitcoin Address and Respective Transfers

And on Inventory Searches …

- Remember, *Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987), South Dakota v. Opperman, 428 U.S. 364 (1976) and People v. Galak, 80 N.Y.2d 715 (1993)*?
- Of Course, The Purpose of This Warrantless Search Isn't to Gather Criminal Evidence …
- It's To Protect The Owner's Property While In Custody of Police; to Insure Against Claims of Loss or Vandalism: and to Guard the Police Against Danger

With Thanks to Donna Aldea, These Are The Issues in Inventory Searches:

1. Was the Vehicle Lawfully Impounded / the Arrest Proper?
2. Was the Search Conducted Pursuant to Local Police Procedures?
   a. Did the People Prove that a Procedure Existed?
   b. Did the People Prove that the Procedure Was Followed?
3. Was the Procedure Reasonable?
4. Was the Procedure Rationally Designed to Foster the Objectives That Justify the Search?
5. Was the Inventory a Pretext to Rummage for Evidence?

So, After His Weapons Possession Arrest in Queens, The Defendant's Vehicle is Found Parked In The Street

- It's Parked Legally and There Was No Evidence Presented That The Area Was Prone to Burglaries or Vandalism
- A Police Officer Testified to PD Patrol Guide Supporting Impound and Inventory Searches of Vehicles
- The Car Is Inventoried and "Physical Evidence" is Recovered
- Good or NG?

People v. Francisco Rivera, 192 A.D.3d 920 (2nd Dept. 2021)

- It's NG: Denial of Suppression Reversed by 2nd Dept
- People Presented No Evidence Supporting Need For Impoundment and Inventory Search and That It Indeed Complied With NYPD R & P's and Was In Interests of Public Safety Under *South Dakota v. Opperman*, *428 U.S. 364 (1968*) and *People v. Tardi*, *28 N.Y.3d 1077 (2016)*
- And Be Careful of Delayed Inventory Searches: Unless Explained, Suppression May Be Required. *People v. Rakeem Douglas*, *193 A,D.3d 622 (1st Dept. 4/27/21)* [Delay Resulting From Police Investigation OK]

And, Of Course, With This Warrantless Search Comes The People's Burden of Demonstrating that the Inventory Search Was Conducted Pursuant to Police Department R & P's

- So, In *People v. Patricia Mortel, 197 A.D.3d 196 (2nd Dept. 7/21/21)* [Already Discussed in New Cannabis Law Section], The 2nd Dept. Held That The People Failed to Present Proof at the Suppression Hearing That Troopers Conducted an Inventory Search Pursuant to State Police R & P's
- Indeed, The Trooper Who Conducted The Search Was Not Even Aware of What The State Police R & P's Were and Thus Was Unable to Testify That He Followed Them

And on Searches Incident to Arrest

- Remember What's Required For Search of an Arrestee's Container (Like a Backpack) in New York as a Search Incident to Arrest Under *People v. Jiminez, 22 N.Y.3d 717 (2014)?*

People v. Nathaniel Mabry, 37 N.Y.3d 933 (5/27/21)

- Court of Appeals Brief Memo Decision Recently Reminded Us:
- Unlike Federal Law, Need Some Record Exigency to Search That Container, (Like a Backpack) and Proof It's Under "Immediate Control" or "Grabbable Area" of Defendant
- Although Suppression Denial Was Reversed, Case Remitted For Lower Court to Consider Alternate Claims Raised by People at Suppression Hearing Not Reached
- See Also, *People v. Michael Lewis, 195 A.D.3d 427 (1st Dept. 6/1/21)* [Absent Exigent Circumstances, Police "Peek" Inside Manilla Envelop of Arrestee Not Valid Search Incident to Arrest; Manhattan CPFI Conviction Reversed] and People v. Arthur Collins, 199 A.D.3d 580 (1st Dept. 11/23/21) [Same Holding, Relying on *Mabry*]

And Finally on This Topic, As an Overarching Concept, What is a “Seizure” Under the Fourth Amendment?

- He Know *California v. Hodari D.*, *499 U.S. 621 (1991*) Says a “Seizure” Under the Fourth Amendment is Physical Touching
- BTW: We Also Know in New York, Under *People v. Martinez*, *80 N.Y.2d 444 (1993)*, a Person is “Seized” When The Police Pursue or Chase Him or Her
- But What If The Police Shoot and Wound Someone in an Attempt to Execute an Arrest Warrant and That Person Nonetheless Gets Away?
- Is That a “Seizure” For Civil Liability as Excessive Force in a 1983 Action?

Roxanne Torres v. Janice Madrid, 141 S.Ct. 989 (2021)

- SCOTUS Held Yes, Per Roberts C.J., By a 5-3 Vote
- Under Fourth Amendment a "Seizure" Is Not Only Physical Touching Under *California v. Hodari D., 499 U.S. 621 (1991)* or The Bowing to Authority, But the Application of Physical Force to the Body of a Person With Intent to Restrain, Even If Unsuccessful
- Application to Criminal Law?

Terry Stops and Frisks

What If The Police Handcuff a Defendant During a *Terry* Stop and "Detain" Him While They Investigate Suspicious Activity?

- Does That Impermissibly Elevate the Encounter to a Full-Blown or an Illegal "De Facto" Arrest, Such That Any Evidence Derived as a Result Should Be Suppressed?

United States v. Bekim Fiseku, 915 F.3d 863 (2nd Cir. 2018)

- Leading Case: Per Second Circuit: When Considering a Claim of De Facto Arrest During *Terry* Stop …
- Court Must Evaluate: 1) Length of Time of the Stop; 2) Was It a Public or Private Setting; 3) The Number of Participating Police; 4) The Risk of Danger Presented by the Person Stopped; and 5) The Display or Physical Force Against the Person Stopped

And What About New York Law on This?

- See *Cruz v. Colvin, 2019 WL 3817136 (E.D.N.Y. 2019)*, Cert. of Appealability Denied, 2020 WL 106863 (2nd Cir. 2020)
- Suggesting in Federal Habeas Case at P. 9 That New York Follows *Fiesku*'s Holding That Use of Handcuffs During *Terry* Stop Does Not Necessarily Convert Encounter to Illegal Arrest
- And So, See, *People v. Jose Hernandez,187 A.D.3d 1502 (4th Dept. 2020)* [Use Of Handcuffs Transformed Stop to De Facto Arrest Not Supported by PC Following Narcotics Stop]

So What If …

- The Police See The Defendant, Who's a Passenger in a Car, Approach Another Vehicle in a Remote Area of a Mall Parking Lot in Syracuse Known For Drug Dealing
- They Can't See Much But "Surmise" He's Involved in a Narcotics Transaction
- The Police Try to Intercept the Defendant's Car as He Leaves Scene and Catch up to Him at a Fast-Food Restaurant ½ Mile Away

And Then …

- The Defendant Exits the Car, Is Handcuffed and After Being Questioned For "A While," He Admits to Narcotics Dealing
- He's Arrested and The Police Recover $50 and Cocaine From Him
- Did The Handcuffing Transform the Encounter to an Illegal, De Facto Arrest?

People v. Jose Hernandez, 187 A.D.3d 1502 (4th Dept. 2020)

- Yes, Per 4th Dept: Statements and Narcotics Suppressed & Conviction Reversed
- With No Reasonable Suspicion to Detain Defendant in First Instance With a "Hunch" or "Gut Reaction," Insufficient Basis to Support Each Successive Police Intrusion in The Unfolding Episode
- But Compare, *United States v. Jesus Torres-Miranda, 2021 WL 77096 (D. Conn. 2021)* [Following *Fiseku;* Detention of Defendant in Handcuffs During 30 Minute *Terry* Stop Not Unreasonable; Suppression of Handgun Denied]

We All Know That *Carpenter v. U.S., 138 S.Ct. 2206 (2018*) Requires a Search Warrant For the Police To Acquire Historic CSLI

- What if It's Real-Time and Based on an Exigency?

People v. Robert Costan, 197 A.D.3d 716 (2nd Dept. 8/25/21)

- It’s OK, as Distinguished From Historical CSLI, Without Warrant Under Exigency Exception Per 2nd Dept
- Here There Was Probable Cause as Found by Suppression Court

The End

4/11/22

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