RECORDS RETENTION AND DISPOSITION SCHEDULE CO-2

Section 185.13, *8NYCRR* (Appendix J)

FOR USE BY
COUNTIES

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
New York State Archives
1990, revised 2006

Rev. 2006

PUBLIC SAFETY

E-911 AND RELATED RECORDS

♦1.[918] **Master Street Address Guide (MSAG) and related records**

a. MSAG database, containing such information as road/street names, address ranges, addresses, community names, telephone numbers, and information on properties, structure and individuals:
RETENTION: Maintain as perpetual data file, and 1 year after replaced by superseding MSAG data file.

NOTE: Appraise these records, which may contain valuable information on properties, structures and residents, for secondary uses as well as historical significance prior to disposition. Periodic "snapshots" of this data may be created and maintained as either electronic files saved to disk, tape or diskette, or as hard-copy output such as printed maps, or in both formats. Contact the State Archives for additional advice on the creation and maintenance of these records.

b. Street alias file, containing alternative road or street names:
RETENTION: Maintain as perpetual data file, and 3 years after replaced by superseding street alias file.

c. Records of updates, corrections and confirmations to MSAG database, including assignments of new or revised street addresses:
RETENTION: 3 years

d. Non-permanent road/street related information, such as relating to temporary closure of road or street:
RETENTION: 3 years after information becomes invalid

♦2.[919] **Telephone utility address records**

a. Copy of database or printout received from telephone utility:
RETENTION: 0 after no longer needed

b. Updates, corrections, trouble reports and Automatic Location Information (ALI) discrepancy reports, submitted to and received from telephone utility:
RETENTION: 1 year

back to CONTENTS page

♦3.[920] **Non-emergency call receipt and response records**, such as those contained in E-311 system, E-911 system module, or other electronic or manual system by which non-emergency calls are handled:
RETENTION: 1 year

♦4.[921] **Automatic Number Information (ANI) and Automatic Location Information (ALI) records**

a. ALI database, containing street address information on each telephone number:
RETENTION: 0 after no longer needed

NOTE: Local governments which do not maintain MSAG data files may wish to retain this record as a perpetual data file, and for 1 year after replaced by a superseding data file.

b. ANI and ALI reports, such as printouts of ANI or ALI screen displays and similar records, but **not** including ALI discrepancy reports:
RETENTION: 0 after no longer needed

NOTE: Local governments should consult their attorney or counsel before these records are disposed of regarding any potential legal value.

♦5.[922] **E-911 system development and implementation records**

a. Feasibility and implementation reports and studies:
RETENTION: 6 years after completion of project

NOTE: Appraise these records for historical significance prior to disposition. Because of the costs involved and significance of implementing E-911 and related systems, these records may be important in documenting the system itself as well as the implementation process. Contact the State Archives for additional advice.

b. Background materials used in preparing feasibility and implementation reports and studies, preliminary maps, and detailed statistical and other supplementary data accompanying reports and studies:
RETENTION: 6 years after completion of project

c. Records relating to establishment of road/street names, address ranges and addresses, including changes in names of roads/streets and address range changes, including standards followed for naming, addressing and address

back to CONTENTS page

conversions:
RETENTION: **PERMANENT**

d. Aerial photographs and final maps created in conjunction with system implementation:
RETENTION: **PERMANENT**

COMPUTER-AIDED DISPATCH (CAD)

♦1.[923] **Computer-aided dispatch (CAD) or incident data file**, containing data on each call received and equipment dispatch or other resulting action taken:
RETENTION: 3 years

NOTE: In some automated systems no MSAG data file exists, and the CAD or incident data file assumes this function. In these cases local governments should consider maintaining this record as a perpetual data file, and 1 year after replaced by superseding data file.

NOTE: Incidents involving minors, casualties, serious injuries, homicides, fires which are incendiary in nature or under investigation, or unsolved law enforcement cases, may necessitate retention of data relating to these incidents longer for potential or ongoing legal needs. Contact the State Archives for additional advice.

♦2.[531] **Emergency call receipt and/or equipment dispatch record**, including but not limited to police or fire incident report or alarm report, generated each time an alarm or call is received and equipment is dispatched or other resulting action taken

a. When record contains **no** information on emergency medical treatment of an individual:
RETENTION: 3 years

NOTE: Incidents involving minors, casualties, serious injuries, homicides, fires which are incendiary in nature or under investigation, or unsolved law enforcement cases, may necessitate retention of data relating to these incidents longer for potential or ongoing legal needs. Records custodians may wish consult their attorney, counsel or law enforcement agency before these records are disposed of regarding any potential longer legal value. Contact the State Archives for additional advice.

b. When record contains information on emergency medical treatment of an

back to CONTENTS page

individual:
RETENTION: 6 years, or 3 years after individual attains age 18, whichever is longer

♦3.[924] **Geographic Information System (G.I.S.) records used in emergency dispatch process**

a. Street, road right-of-way, road centerline, hydrant, tax parcel or other data layer (official copies maintained and/or updated by dispatching unit):
RETENTION: Maintain as perpetual data files, and 1 year after superseded.

b. Street, road right-of-way, road centerline, hydrant, tax parcel or other data layers (other than official copies, where official copy is maintained by other unit of local government which maintains the G.I.S.):
RETENTION: 0 after no longer needed

c. G.I.S. file and process documentation records, covering G.I.S. operations where dispatch unit creates, revises or performs analyses on data layers and related files:
RETENTION: Maintain until G.I.S. system used in dispatch is superseded or no longer used.

♦4.[532] **Communications log** (radio, telephone, alarm or other) recording each communication between caller and receiving unit **or** between dispatch unit and mobile unit or field personnel, for law enforcement agency, fire department or district, emergency medical or central emergency dispatch unit:
RETENTION: 3 years after last entry

NOTE: Local governments should consult their attorney or counsel before these records are disposed of regarding any potential legal value.

♦5.[533] **Tape recording of communications** kept by dispatch unit of law-enforcement agency, fire department or district, emergency medical service or central emergency dispatch unit:
RETENTION: 0 after information posted to emergency call receipt and/or equipment dispatch record

NOTE: Records custodians may wish consult their attorney, counsel or law enforcement agency before these records are disposed of regarding any potential legal value. The State Police suggests that these tapes be retained for at least 30 days if economically feasible. Recordings of serious incidents may warrant longer retention for legal reasons. These tapes should be retained until legal action is

resolved, or the relevant specific communications should be transferred onto a separate tape. Contact the State Archives for additional advice.

♦6.[925] **Call receipt and dispatch related reports,** other than individual incident reports

a. Incident data files submitted to New York Department of State:
RETENTION: 2 years

b. Summary data reports and detailed reports containing information of potential legal or fiscal value:
RETENTION: 6 years

c. Internal information reports of no legal or fiscal value, such as daily activity reports:
RETENTION: 0 after no longer needed

PUBLIC SAFETY: GENERAL

NOTE: Software and software manuals and documentation are not considered "records" under the Local Government Records Law. Local governments may need, however, to retain older versions of software, as well as relevant manuals and documentation, to document the operation of public safety related systems for legal purposes, such as defending the integrity of systems in court actions. Contact your counsel or attorney for advice in this area prior to destroying outdated software and related documentation.

♦1.[572] **Accreditation records for law enforcement, fire fighting or prevention or emergency medical services agency or unit:**
RETENTION: **PERMANENT**

♦2.[926] **Emergency vehicle, apparatus and equipment records**

NOTE: Items covering purchase, warranty, repair, fuel use, and replacement are found in the Public Property and Equipment section.

a. Vehicle upkeep and use records, including records of incidents where vehicle responded and equipment was used:
RETENTION: 3 years

b. Vehicle readiness checklist, or equivalent record, for any emergency vehicle, needed to ensure that necessary equipment and material is in place and in proper order:

back to CONTENTS page

RETENTION: 3 years

c. Record of equipment (other than firearms) issued to public safety personnel:
RETENTION: 1 year after equipment returned or otherwise disposed of

♦3.[535] **Training records for law-enforcement officers, E-911, dispatch or fire-fighting personnel**, but **excluding** emergency medical personnel

a. Individual's record of courses attended and/or completed, including basic information on course content:
RETENTION: 6 years after individual leaves service

NOTE: Local officials may wish to keep these records longer, possibly for the career of the individual, if the records are consulted throughout that period.

b. Official copy of training manual or bulletin:
RETENTION: 50 years

c. Course instruction records, including attendance lists and lesson plan:
RETENTION: 1 year

♦4.[927] **Alarm records**

a. Permit files for connecting fire, water or burglar alarm to public safety agency emergency telephone system, including applications, copies of permits, inspection reports and related records:
RETENTION: 6 years after denial, expiration or renewal

b. Alarm or fire alarm box call record containing basic information on each alarm transmitted:
RETENTION: 3 years

c. False alarm records, including but not limited to lists of false alarms, notices sent to property owners and records of assessing and collecting fines for responses to false alarms:
RETENTION: 6 years

d. Alarm location records, including maps and listing and descriptions of alarms:
RETENTION: 3 years after superseded or obsolete

♦5.[928] **Public safety personnel service data file** or equivalent record, including incident and activity attendance information showing names of personnel present at fire or other emergency, including attendance at training, drills, meetings and other official activities

NOTE: This item does not cover the personnel records of officer, employee or volunteer. See the Personnel/Civil Service section of this schedule.

a. Summary data on an individual:
RETENTION: 3 years

b. Detailed data on an individual, when posted to or listed on summary data file or other record:
RETENTION: 1 year

c. Detailed data on an individual, when **not** posted to or listed on summary data file or other record:
RETENTION: 3 years

♦6.[929] **Public safety real property data file**, containing basic and detailed information on land and structures, including hazards, property inspections, and individuals associated with properties

a. Basic or "history file" data:
RETENTION: Maintain as updated perpetual data file, for as long as system remains in use and property covered comes under service area.

NOTE: Local governments should **consider** permanent retention of the basic data elements of these property "history" files for all parcels of property, or the creation and permanent retention of "snapshots" of this data. This information may be useful for long-range planning purposes, and for community, urban planning, public safety issues, and other research. Contact the State Archives for additional advice.

b. Detailed data, including plans and computer-assisted design records:
RETENTION: 0 after superseded or obsolete

c. Records of updates and corrections to property data:
RETENTION: 3 years after update or correction made

♦7.[930] **Documentation of macros, queries, and reports**

a. Relating to specific case investigation or subject file:
RETENTION: Retain as long as the case investigation or subject file for which the documentation is created is retained.

b. **Not** relating to specific case investigation or subject file:
RETENTION: 0 after no longer needed

NOTE: Depending on the results obtained from generating these macros, queries and reports, local officials may wish to retain these records for potential legal and other uses.

♦8.[931] **Hazardous materials records**

a. Hazardous materials location report or exemption filed with fire department or district, or equivalent record:
RETENTION: 3 years after hazardous materials no longer stored at site

NOTE: Local officials may wish to retain these records longer, possibly as long as 40 years, if the hazardous materials listed on this record include substances listed in Subpart Z, *29 CFR* (federal O.S.H.A. Regulations).

b. Textual reference information containing medical, chemical or other information used to assist dispatchers and responding personnel, and maps of agency/service coverages:
RETENTION: 3 years after superseded or obsolete

c. Reports on hazardous materials found in the service area in its entirety, or at specific locations:
RETENTION: 3 years after hazardous materials listed in report are no longer present at listed sites

NOTE: Local officials may wish to retain these records longer, possibly as long as 40 years, if the hazardous materials listed on this record include substances listed in Subpart Z, *29 CFR* (federal O.S.H.A. Regulations). In addition, if these reports document the presence of hazardous materials in a community at a given time, they should be appraised for historical significance. These records may have immediate significance for fire fighting and disaster prevention and long-term research value in situations where the hazardous materials found in the area had a significant impact on the community. Contact the State Archives for additional advice.

♦9.[932] **Standard Operating Procedures** for call receipt and dispatch, including codes, abbreviations and authority file data:
RETENTION: PERMANENT

NOTE: Detailed routine procedures are covered by item no. 9 in the General section.

♦10.[933] **Reference files on municipalities, districts and volunteer entities** in service or neighboring areas:
RETENTION: 0 after superseded or obsolete

NOTE: Appraise these records for historical significance prior to disposition. These records may have long-term historical value in documenting emergency services in a given area. Contact the State Archives for additional advice.

♦♦11.[1061] **Wild animal notification records**, consisting of annual notifications from city, town and village clerks to public safety agencies of persons owning, possessing or harboring wild animals as defined pursuant to Section 209-cc of General Municipal Law:
RETENTION: 1 year or when superseded

EMERGENCY MEDICAL SERVICES

♦1.[934] **Patient care records**

a. Ambulance run or prehospital care record created each time a patient is transported by emergency vehicle and/or administered medical treatment:
RETENTION: 6 years, or 3 years after individual treated and/or transported reaches age 18, whichever is longer

b. Patient care data file, containing medical treatment and/or billing information on individual treated by emergency medical personnel:
RETENTION: 6 years, or 3 years after individual treated and/or transported reaches age 18, whichever is longer

c. Summary record of all patients treated and/or transported:
RETENTION: 3 years

♦2.[540] **Ambulance run or emergency medical treatment chronological log**, or equivalent record:
RETENTION: 6 years after last entry

♦3.[541] **Emergency medical training records**, covering local government employees who receive training

a. Application for training or certification filed by individual:
RETENTION: 6 months

b. Original entry training records, when posted to summary record:
RETENTION: 1 year

c. Original entry training records, when **not** posted to summary record:
RETENTION: 7 years

d. Summary record of training:
RETENTION: 7 years

NOTE: Local officials may wish to keep these records longer, possibly for the career of the individual, if the records are consulted throughout that period.

e. Course materials, **except** final or annual reports:
RETENTION: 7 years after course completed

♦4.[935] **Emergency medical training records**, covering local governments which are course sponsors, including but not limited to information on individuals, course files, and information on instructors, as required by Section 800.20, *10NYCRR*

a. Information on individuals and course files:
RETENTION: 5 years

b. Information on instructors:
RETENTION: 5 years after working association of each instructor ceases

♦5.[936] **Rescue and disaster response reports** and related records, covering specific incidents:
RETENTION: 3 years, but not until 3 years after any minor involved attains age 18

NOTE: Specific rescue and disaster response records should be appraised for historical value, and may warrant permanent retention, based on the serious nature of the incident involved. These records may not be duplicated in disaster response files, covered by item no. 61 in the Civil Defense/Disaster Preparedness section. Contact the State Archives for additional advice.

♦6.[937] **Emergency medical services reports,** containing information on such subjects as specific types of medical emergencies, types of supplies used, and call frequency

a. Reports containing billing information:
RETENTION: 7 years

b. Reports **not** containing billing information:
RETENTION: 1 year

c. Summary data received from New York State Department of Health:
RETENTION: 0 after no longer needed

FIRE FIGHTING AND PREVENTION

♦1.[542] **Blotter** or equivalent record providing summary information on all significant activities of a fire department or district:
RETENTION: **PERMANENT**

♦2.[543] **Log,** journal or similar chronological record of all activity at a fire station:
RETENTION: 3 years after date of most recent entry

♦3.[544] **Fire department or district incident listing or report,** received from New York State Department of State

a. When blotter or equivalent record is **not** kept by department or district:
RETENTION: **PERMANENT**

b. When incidents listed on printout are also shown on blotter or log:
RETENTION: 0 after no longer needed

c. County fire coordinator's, marshal's or emergency services director's **information** copy:
RETENTION: 0 after no longer needed

♦4.[545] **Reports on fire-fighting activity, not including** incident reports

a. Reports dealing with serious incidents or problems, or major issues with long-term implications, such as covering overall status of fire-fighting apparatus, equipment and facilities, fire-fighting readiness capability and personnel performance evaluation, and fire casualty reports:
RETENTION: **PERMANENT**

b. Reports on routine activities, including but not limited to daily activity report, daily communications report, false alarm investigation report, and other periodic report, which contain information of legal or fiscal value:
RETENTION: 6 years

c. Reports on routine activities, which **do not** contain information of legal or fiscal value, and reports which contain information duplicated in reports covered by part "a" or part "b," above:
RETENTION: 0 after no longer needed

d. Informational reports received from county fire coordinator:
RETENTION: 0 after no longer needed

♦5.[546] **Fire investigation records**

a. First, second or third degree arson investigation records, disaster or casualty investigation records, or records of investigations of major fires or significant fires of suspicious origin:
RETENTION: **PERMANENT**

b. Fourth degree arson investigation records:
RETENTION: 10 years

c. Routine fire investigation records, not covered by parts "a" or "b," above:
RETENTION: 3 years

d. Master summary record of all fire investigations:
RETENTION: **PERMANENT**

♦6.[547] **Fire mutual aid plan**

a. Final plan, including maps and other attachments:
RETENTION: **PERMANENT**

b. Background materials and supporting documentation used in producing final plan:
RETENTION: 3 years after final plan completed

♦7.[548] **Fire safety inspection records**

a. Master summary record of inspections performed:
RETENTION: **PERMANENT**

b. Report on inspection at school, public building, multifamily dwelling, or commercial or industrial facility and notice of violation:
RETENTION: 21 years

c. Report on inspection of single family dwelling and notice of violation:
RETENTION: 6 years

♦8.[549] **Fire evacuation plan, disaster response plan, fire drill report, fire safety survey,** but not including mutual aid plan:
RETENTION: 3 years after superseded or obsolete

back to CONTENTS page

♦9.[550] **Fire hydrant records**

a. Master record of hydrant locations:
RETENTION: 0 after superseded

b. Installation, repair, location, maintenance, inspection and replacement records:
RETENTION: 3 years after hydrant replaced, removed or use discontinued

♦10.[553] **Copies of volunteer department or organization fund-raising records,** maintained by municipality or fire district:
RETENTION: 6 years

♦11.[555] **Volunteer Firefighter Service Awards benefit plan**

a. Benefit plan (including all revisions):
RETENTION: 0 after superseded and no longer needed to determine benefits

b. Drafts and supporting documentation used in producing and updating plan:
RETENTION: 1 year

♦12.[556] **Annual report ("census of members")** received from Volunteer Firefighters Insurance Service (VFIS):
RETENTION: 0 after superseding report received

♦13.[557] **Summary records of volunteers** listing credits earned and providing breakdown of types of services and how credits earned

a. Annual summary report or listing:
RETENTION: 55 years

b. Monthly or other periodic reports or listings:
RETENTION: 3 years

♦14.[558] **Volunteer Firefighter Service Awards records relating to individual volunteer**

a. Records showing credits earned and providing breakdown of types of services and how individual earned credits:

RETENTION: 6 years after individual leaves service

b. Copy of initial and vested certificates of membership in awards plan:
RETENTION: 6 years after individual leaves service

c. Copy of application to join service awards plan and/or life insurance plan, along with declination statement and related records:
RETENTION: 6 years after individual leaves service

d. Beneficiary designation records:
RETENTION: 0 after superseded or obsolete

e. Records relating to individual's challenge to plan's, department's or district's assignment or of number of points earned:
RETENTION: 3 years after appeal concluded or other disagreement otherwise resolved

♦15.[938] **Controlled burn records,** covering legally approved burning of leaves and debris permitted by fire department or district:
RETENTION: 3 years

LAW ENFORCEMENT: GENERAL

♦1.[559] **Incident data summary record,** including blotter, "desk record book," or equivalent record containing summary record of department or station activities:
RETENTION: **PERMANENT**

♦♦2.[567] **Law enforcement reports, studies or data queries,** including their documentation

a. Reports, studies or queries having legal or fiscal value, such as reports covering use of equipment and personnel resources, reports on crime in specific neighborhoods or on specific kinds of criminal activity, daily activity reports and individual officer "diaries":
RETENTION: 6 years

NOTE: Appraise records covered by part "a" for archival value. Reports and studies analyzing law enforcement activity within a municipality for specific kind of criminal activity or a given area may be valuable for long-term planning, analysis of trends in law enforcement, and for historical and other research. Contact the State Archives for additional advice.

b. Reports, studies or queries having no legal or fiscal value, such as daily communications or other routine internal reports:
RETENTION: 0 after no longer needed

c. Uniform Crime Reports submitted to State Division of Criminal Justice Services:
RETENTION: 1 year

d. Incident-based reports or queries:
RETENTION: 3 years

e. Report or study of law enforcement activity within municipality, generated for local law enforcement agency by county, regional or state law enforcement agency (local law enforcement agency copy):
RETENTION: 0 after no longer needed

NOTE: Appraise records covered by parts "e" and "f" for archival value. Reports and studies analyzing law enforcement activity within a municipality or specific area may be valuable for long-term planning, analysis of trends in law enforcement, and for historical and other research. Contact the State Archives for additional advice.

f. Report or study of law enforcement activity within municipality, generated for local law enforcement agency by county, regional or state law enforcement agency (copy retained by county or regional creating agency):
RETENTION: 3 years

♦♦3.[561] **Case investigation record** for adult, juvenile offender, youthful offender or juvenile delinquent, including but not limited to complaint, investigation report, arrest report, property record, and disposition of the case

a. For homicides, suicides, arson (first, second or third degree), missing persons (until located), active warrants, and stolen or missing firearms (until recovered or destroyed):
RETENTION: **PERMANENT**

b. For all felonies **except** those covered by parts "a" and "c", and fatalities other than homicides:
RETENTION: 25 years after case closed

NOTE: Appraise case investigation files for these felonies for historical and other research value, as well as for analysis of long-term trends. Contact the State Archives for additional advice.

c. For fourth degree arson and non-fatal accidents:
RETENTION: 10 years after case closed

d. For misdemeanor:
RETENTION: 5 years after case closed

e. When offense involved was a violation or traffic infraction:
RETENTION: 1 year after case closed

f. When investigation reveals no offense has been committed by adult:
RETENTION: 5 years

g. When individual involved was a juvenile and no arrest was made, **or** no offense was committed:
RETENTION: 1 year after individual attains age 18

h. Domestic incident report, created pursuant to Section 140.10(5), Criminal Procedure Law, when case investigation record is created:
RETENTION: Retain for 4 years or as long as rest of case investigation report, **whichever is longer.**

♦4.[939] **Master summary record of case investigation information:**
RETENTION: 0 after no longer needed to access case investigation records

NOTE: Appraise this record for archival value. This record may supplement the incident data summary record in providing summary information on all case investigations conducted by the law enforcement agency. Contact the State Archives for additional advice.

♦5.[562] **Individual identification file, except** jail or penitentiary prisoner case record, including but not limited to fingerprint cards, photographs, record sheets from other agencies, local arrest and disposition records, and miscellaneous reports

NOTE: Section 160 of the Criminal Procedure Law requires that individual identification records be returned to the individual involved or destroyed when criminal actions are terminated in favor of the accused or by conviction for a noncriminal offense.

a. When offense involved was a crime (misdemeanor or felony):

RETENTION: 5 years after death of individual, or 0 after individual attains age 80, whichever is shorter, provided no arrest in the last 5 years

NOTE: Records created before establishment of the D.C.J.S. statewide automated identification system in 1966 are not duplicated at the state level and should be appraised for both archival value and ongoing legal and administrative purposes. Contact the State Archives for additional information.

b. When offense involved was a violation or traffic infraction:
RETENTION: 5 years

c. Digital "mug shot" file, containing digital photos and relevant accompanying data on an individual, when official copies of photos are retained in hard copy as part of part "a" or "b," above:
RETENTION: 0 after no longer needed

NOTE: Digital "mug shot" file, containing digital photos and relevant accompanying data on an individual, when official copies of photos are **not** retained in hard copy, must be retained as specified in part "a" or "b," above.

NOTE: Appraise these digital files for archival, legal and administrative value. They may have long term value in criminal investigation. Contact the State Archives and the Division of Criminal Justice Services for additional advice.

d. Digital fingerprint file, containing digital images used to produce fingerprint cards:
RETENTION: 0 after no longer needed

e. Photo arrays, created by combining identification photos for identification and investigative purposes:
RETENTION: Retain as long as relevant case investigation record.

f. Criminal record summaries ("rap sheets"), received from Federal Bureau of Investigation or other law enforcement agency:
RETENTION: Retain most current copy as long as relevant case investigation, or 0 after superseded or obsolete if unrelated to case investigation.

g. Authorized requests for criminal information contained in local government law enforcement agency records, along with response and record of action taken:
RETENTION: 6 years

♦6.[940] **Personal information data file**

a. Data on criminals and suspects:
RETENTION: Retain data for 5 years after death of individual, or 0 after individual attains age 80, whichever is shorter, provided no arrest in the last 5 years.

b. Data on associated persons, such as victims, relatives and witnesses:
RETENTION: Retain data as long as, or information as part of, relevant case investigation record.

c. Documentation of updates and changes to data:
RETENTION: Retain as long as data which has been changed or updated.

d. Trouble and discrepancy reports regarding personal information data:
RETENTION: 3 years

♦7.[941] **County- or region-wide arrest information cumulative data file**, covering county- or region-wide area:
RETENTION: Maintain as perpetual data file, with superseded or corrected data maintained for 3 years after data updated.

♦8.[942] **Profiling reports and related records**, including macros, workspaces or other files (including all documentation) created in profiling process

a. Relating to specific case investigation:
RETENTION: Retain as long as relevant case investigation record.

b. Not relating to specific case investigation:
RETENTION: 0 after obsolete

♦♦9.[1062] **Confidential informant records**, maintained separately from confidential informant information contained in case investigation records

a. Master index or listing of confidential informants:
RETENTION: **PERMANENT**

b. Detailed information on confidential informant:
RETENTION: 0 after individual is deceased or attains age 90

LAW ENFORCEMENT: PERSONAL PROPERTY

♦1.[563] **Personal property record**

a. For dangerous weapon, including but not limited to receipt, identification tag, and report of destruction:
RETENTION: 6 years after disposition of property, or 0 after disposition of any related case investigation records, **whichever is longer**

NOTE: Local law enforcement officials may wish to retain these records longer for investigative or other long-term administrative purposes. See also item no. 594, below.

b. For other property, including but not limited to receipt, confiscated currency report, identification tag, and report of public auction or destruction:
RETENTION: 6 years after disposition of property

♦♦2.[566] **Identification records for an individual person or for number-engraved property**

a. Personal identification card for an individual, including Sheriff ID, copies of child fingerprint records and records of distribution of child identification kits:
RETENTION: 0 after no longer needed

NOTE: Local governments should consult with their legal counsel to determine if these records merit continuing retention due to their legal value or for law enforcements purposes, such as in locating and identifying missing children.

b. Property number assignment register:
RETENTION: 0 after obsolete

c. Identification/validation records for missing or stolen property, license plates, licenses, registrations or ID cards (if **not** part of case investigation records):
RETENTION: 0 after no longer needed

3.[570] **Pawn shop records,** including lists of pawn shops, purchase and sale reports and reports on stolen property:
RETENTION: 5 years

4.[589] **Bicycle licensing or registration record**

a. When a fee is charged:
RETENTION: 6 years after expiration or renewal

b. When **no** fee is charged:
RETENTION: 1 year after expiration or renewal

LAW ENFORCEMENT: FIREARMS

♦1.[592] **Firearm licensing file,** including application for license to sell, carry, possess, repair and dispose of firearms, and supporting records such as affidavit of character reference, and verification of reason for license

a. When application is approved:
RETENTION: 6 years after license was renewed, canceled, revoked, or expired, or after individual is known to have deceased or reached age 90

b. When application is disapproved, after any litigation is completed:
RETENTION: 6 months

2.[593] **Individual firearm purchase record:**
RETENTION: 6 years

♦3.[594] **Certificate of nondestruction of, or notice of intent to destroy, weapon or dangerous instrument, appliance, or substance,** including results of New York State Police files search:
RETENTION: 6 years after disposition of property, or 0 after disposition of any related case investigation records, **whichever is longer**

NOTE: See also item no. 563, above.

♦4.[596] **Records of issuance of firearms or other weapons to law enforcement personnel:**
RETENTION: 3 years after return or other disposition of weapon

♦5.[597] **Repair and maintenance records for firearms or other weapons used by law enforcement personnel:**
RETENTION: 3 years after weapon no longer in use

♦6.[943] **Record of stolen or missing firearms:**
RETENTION: 0 after all firearms are located or destroyed

LAW ENFORCEMENT: MOTOR VEHICLES (including watercraft)

♦1.[583] **Traffic and parking violation records,** including parking, speeding or other appearance ticket (other than court's copy); officer's supporting deposition; parking violation hearing records; "boot and tow" records; and related records:
RETENTION: 2 years after any litigation has been completed

♦2.[587] **Speed-timing records**

a. Original record produced by radar or other speed-timing device:
RETENTION: 2 years after any litigation has been completed

b. Records of use of speed-timing, such as radar activity log and reports of speed monitoring:

RETENTION: 3 years

NOTE: These records may have long-term value in transportation planning, in providing information on average and excessive speeds for specific road segments.

c. Calibration and other quality control and testing records for speed-timing devices:
RETENTION: 3 years after device no longer in use

♦3.[584] **Vehicle accident case record**, including vehicle accident report and related records, after any litigation has been completed:
RETENTION: 6 years, or 3 years after youngest individual involved attains age 18, whichever is longer

NOTE: This item does not cover the case investigation record. See item no. 561, above.

♦4.[585] **Vehicle history files**, including information on specific vehicles or vehicle models, including those which have been involved in accidents or used in the commission of crimes:
RETENTION: 0 after no longer needed

♦5.[586] **Individual's driving and accident records**

a. Order, report, or notice concerning vehicle operator's license or registration, including but not limited to order of suspension or revocation of license, notice of compliance with order of suspension or revocation, notice of noncompliance, notice of restoration of license, and report of lost or stolen plates:
RETENTION: 3 years

b. Driver's summary record of accidents, violations and other activities:
RETENTION: 0 after death of individual, or 90 years after date of birth, if death not verified

♦6.[588] **Impounded or abandoned vehicle record**, including but not limited to impound report, tow-away notice to owner, request for information to determine the last owner, notice to owner and lien holders that vehicle has been taken into custody as abandoned, affidavit stating how ownership was acquired by municipality, transfer of ownership document, and bill of sale:
RETENTION: 6 years after disposition of vehicle by local government

back to CONTENTS page

7.[590] **Reports or other records of repossessed vehicles, not impounded by law enforcement agency:**
RETENTION: 1 year

♦8.[591] **Vehicle towing records**

a. Lists of companies available for towing vehicles:
RETENTION: 0 after superseded or obsolete

b. Contract or agreement with towing firm:
RETENTION: 6 years after expiration or termination

♦9.[944] **Driver-vehicle examination report or equivalent record,** created when local law enforcement agency conducts motor carrier safety inspection:
RETENTION: 7 years

♦10.[945] **Motor vehicle accident and other summary data,** reports and other records:
RETENTION: 6 years

NOTE: Appraise these records for archival value. These records may be useful in providing summary information on all motor vehicle accidents, and may reveal long-term trends and accident-prone areas and vehicles. Contact the State Archives for additional advice.

LAW ENFORCEMENT: INCARCERATION

♦1.[576] **Master summary record of all prisoners,** including "daily record of the commitments and discharges of all prisoners," including date of entrance, name, offense, term of sentence and other information required by Section 500-f, Correction Law:
RETENTION: **PERMANENT**

♦2.[946] **Prisoner data file:**
RETENTION: Maintain data for each prisoner 15 years after death or discharge of that prisoner.

NOTE: If this record takes the place of the master summary record (item no. 576, above) then it must be retained permanently.

♦3.[577] **Prisoner case record**

a. Case records, including but not limited to commitment, general information history, presentence investigation reports, record sheets from other agencies,

back to CONTENTS page

record of personal property taken from prisoner upon commitment, record of letters written and received, copies of general correspondence concerning prisoner, reports of infractions of rules, prisoner's health records, and suicide prevention screening records, **but not including** commissary records:
RETENTION: 15 years after death or discharge of prisoner

b. Commissary records, including listing of items requested by prisoner, and prisoner transaction record:
RETENTION: 3 years

♦4.[578] **Facility housing supervision records, including prisoners' activities log,** including such information as identities of visitors, prisoners' phone calls and mail, and records of visits to cells by officers checking on condition of prisoners:
RETENTION: 3 years

♦5.[579] **Prisoners' periodic work report** listing names of prisoners by work assignments:
RETENTION: 3 years after all prisoners listed have been discharged

♦6.[580] **Complaint or incident report involving alleged prisoner abuse, injury, or similar occurrence** showing description of the problem, identifying the individuals involved and stating the action taken, after any litigation has been completed:
RETENTION: 6 years, or 0 after individual involved attains age 21, whichever is longer

♦7.[581] **Inspection, audit and other reports or studies,** conducted by New York State Commission of Correction or other state or local agency, covering such subjects as jail conditions, compliance with state standards, and prisoner fatalities:
RETENTION: 6 years

NOTE: Appraise these records for archival value. Local officials should retain permanently any reports or studies documenting serious incidents or problems. Contact the State Archives for additional advice.

♦8.[582] **Reports relating to local correctional facility or lock-up**

a. Reports containing legal and fiscal information:
RETENTION: 6 years

back to CONTENTS page

NOTE: Appraise these records for archival value. Reports and studies analyzing facility prisoners, occupancy or conditions may be useful for long-term planning, analysis of trends in law enforcement, and for historical and other research. Contact the State Archives for additional advice.

b. Reports of short-term internal administrative value:
RETENTION: 0 after no longer needed

♦9.[947] **Population counts, including daily census of prisoners:**
RETENTION: 3 years

♦10.[948] **Visitation records**, including schedule of visits and visitor identification information:
RETENTION: 3 years

♦11.[949] **Dietary services records**

a. Food service records, including meal counts, roster of prisoners' diet orders, and dietary services studies:
RETENTION: 3 years

b. Menus:
RETENTION: 1 year

♦12.[950] **Health and sanitation inspection and related records**, including records of action taken to correct any problems:
RETENTION: 6 years

♦13.[951] **Review and censorship records for incoming printed materials and publications**, including evaluations by staff and suitability determinations:
RETENTION: 3 years

♦14.[952] **Prisoner exercise records**, including schedule of exercise periods, results of exercise area searches and explanation of any limitations of exercise:
RETENTION: 3 years

♦15.[953] **Application of change in maximum facility capacity**, including determination from New York State Commission of Correction, facility staffing determinations, and related records:
RETENTION: 3 years after superseded by subsequent change in capacity

♦16.[954] **Substitute jail order** issued by New York State Commission of Correction,

back to CONTENTS page

authorizing the confinement of some of all prisoners in another correctional facility, and related records:
RETENTION: 3 years

NOTE: Appraise these records for archival value. These records may provide important information on conditions at the correctional facility which warrant the moving of prisoners to another facility. Contact the State Archives for additional advice.

LAW ENFORCEMENT: MISCELLANEOUS

♦1.[560] **Warrant execution and subpoena or summons service records**

a. Original signature copies of arrest and other warrants executed by law enforcement agency:
RETENTION: 5 years after warrant executed or recalled

b. Other warrant related records, including copies without original signatures and warrant control records:
RETENTION: 5 years after date of most recent entry in record

c. Copies of subpoenas and summonses, and records of their service:
RETENTION: 2 years

d. Warrant information file:
RETENTION: Maintain data on each warrant as long as that warrant is valid.

♦2.[955] **Domestic violence records**, covering single or multiple incidents, not relating to specific case investigation records, including domestic incident report, created pursuant to Section 140.10(5), Criminal Procedure Law, when **no** case investigation record is created:
RETENTION: 4 years

3.[573] **Results of alcohol and drug tests administered by law enforcement personnel**, when not included in case investigation records:
RETENTION: 5 years

♦4.[564] **Escort service record**, including activities such as funeral, parade, military escort, escorting prisoner to and from court or jail, and delivery of blood to hospital:
RETENTION: 3 years

5.[565] **Vacant place check record,** including vacant houses and other places to be checked during patrols:
RETENTION: 0 after obsolete

♦6.[568] **Alcoholic beverage establishment sale and use reports,** including checks of New York State Division of Alcoholic Beverage Control (ABC) violations:
RETENTION: 5 years

♦7.[569] **Parolee and sex offender records**

a. Lists of parolees or sex offenders living within a jurisdiction:
RETENTION: 0 after superseded or obsolete

b. Detailed records on individual parolee or sex offender:
RETENTION: 0 after person's parole terminated

NOTE: This does not include records created pursuant to the Sex Offender Registration Act, which are covered by item nos. 956 and 957, immediately below.

♦8.[956] **Subdirectory of High-Risk (Level 3) Sex offenders:**
RETENTION: 0 after superseded

NOTE: The Division of Criminal Justice Services (DCJS) strongly recommends the destruction of superseded information as soon as superseding information is received.

♦9.[957] **Sex offender registration records,** including but not limited to official notification upon registration, change of address information, determination of final risk level, notification of error or change in jurisdiction, notification that offender is no longer registerable, annual address verification, 90-day personal verification (for level 3 offenders), and community notification information

a. For level 1 or 2 offender, when offender remains in local law enforcement agency's jurisdiction:
RETENTION: 0 after death of individual, or 5 years after completion of registration period, whichever is earlier

b. For level 1 or 2 offender, when offender has left local law enforcement agency's jurisdiction:
RETENTION: 0 after death of individual, or 5 years after offender

back to CONTENTS page

leaves that jurisdiction, whichever is earlier

c. For level 3 offender, when offender remains in local law enforcement agency's jurisdiction:
RETENTION: 0 after death of individual, or individual attains age 100

d. For level 3 offender, when offender has left local law enforcement agency's jurisdiction:
RETENTION: 0 after death of individual, or 5 years after offender leaves that jurisdiction, whichever is earlier

♦10.[571] **Missing person records**

a. Missing person files, covering any records not included in case investigation records:
RETENTION: 10 years, or 0 after individual attains age 90, whichever is longer

b. Validation records, received from and submitted to State Division of Criminal Justice Services (D.C.J.S.):
RETENTION: 6 months

♦11.[958] **Videotape or other recording of booking or arrest processing**

a. When litigation and/or criminal proceedings have commenced:
RETENTION: 3 years, but not until any individual has attained age 21, and not until 1 year after any litigation or criminal proceedings have concluded

b. When litigation and/or criminal proceedings have **not** commenced:
RETENTION: 3 years, but not until any individual has attained age 21

♦12.[959] **Copy of order of protection,** filed with local law enforcement agency having jurisdiction, pursuant to Article 530, Criminal Procedure Law, and related records

a. Copy of order of protection:
RETENTION: 6 months after order expires or otherwise becomes invalid

b. List or similar record of orders of protection in effect in local jurisdiction:
RETENTION: Maintain data on each order as long as that order is

back to CONTENTS page

valid.

♦13.[960] **Videotape or other recording taken from mobile unit**

a. When recording relates to specific case investigation:
RETENTION: Retain as long as the case investigation to which the recording relates is retained.

b. When recording does **not** relate to specific case investigation, such as routine traffic stop:
RETENTION: 6 months

NOTE: Recordings of potentially important incidents may warrant longer retention for legal reasons, even if no case investigation has been initiated. Local law enforcement agencies should carefully review these recordings before destroying or reusing them. In addition, recordings of specific pursuits, arrests and other serious incidents should be appraised for archival or long-term administrative value. Contact the State Archives for additional advice.

♦14.[575] **Child abuse or maltreatment reports** and related records, reporting law enforcement agency copy, when **not** included in case investigation record:
RETENTION: 3 years

NOTE: This item covers copies of child abuse and maltreatment reports and related records retained by law enforcement agencies reporting suspected abuse and maltreatment to the State Central Register or to child protective services units of county social services departments. If these records are included in case investigation records, see item no. 561.

♦15.[574] **Sheriff's civil action case record**, including but not limited to record of service, collections and disbursements, correspondence, copy of court order and related records

a. When money has been paid, when no payment is involved, or when money judgment has not been fully satisfied:
RETENTION: 6 years after date of last entry in record

b. Listing or index of cases which have been destroyed:
RETENTION: **PERMANENT**

c. Index or finding aid used in identifying or locating existing cases:
RETENTION: Retain so that all **existing** cases can be identified and

back to CONTENTS page

located.

♦16.[961] **Facility inmate work crew records**, covering crews from state or county correctional facilities performing work outside the facilities for local government or not-for-profit organization, including but not limited to request for work crew and site visit report

a. County correctional facility's copies of records relating to work performed by its prisoners:
RETENTION: 6 years after all prisoners involved were discharged

b. County agency copies of records of work performed for them by prisoners from state facilities:
RETENTION: 2 years

17.[595] **Gun dealer or gunsmith record book** (transaction book):
RETENTION: **PERMANENT**

LAW ENFORCEMENT: N.Y.S.P.I.N. AND RELATED RECORDS

♦1.[962] **Lists and posters showing "most wanted" persons, and all points bulletins (APBs):**
RETENTION: 0 after superseded or no longer needed

♦2.[963] **N.Y.S.P.I.N. validation records**, including monthly print-out received from New York State Police and related system entry validation records:
RETENTION: 13 months from date report received

♦3.[964] **N.Y.S.P.I.N. system purging records**, including "purge reports" received from New York State Police and records relating to data reentry:
RETENTION: 0 after any necessary data reentry completed

♦4.[965] **N.Y.S.P.I.N. message records**, covering any messages sent or received over N.Y.S.P.I.N. system:
RETENTION: 0 after no longer needed

NOTE: The State Archives and the State Police strongly recommend that local law enforcement agencies consider retaining significant messages as part of case investigation records.

back to CONTENTS page

♦5.[966] **Daily "archive" information** retained in electronic format (on removable electronic media) from N.Y.S.P.I.N. system:
RETENTION: 0 after no longer needed

NOTE: The State Archives and the State Police strongly recommend that local law enforcement agencies consider retaining archive data as long as may be needed for convenience of reference.

♦6.[967] **Log of all transactions**, covering all data entry into N.Y.S.P.I.N. system:
RETENTION: 0 after no longer needed

NOTE: The State Archives and the State Police strongly recommend that local law enforcement agencies consider retaining electronic logs as long as may be needed for convenience of reference.

♦7.[968] **Individual person's authorization** to use the N.Y.S.P.I.N. system

a. Records created by local law enforcement agency, including records of individual's training and acknowledgment of test results:
RETENTION: 0 after individual no longer authorized to use the system

b. Listing of authorized individuals, received from State Police:
RETENTION: 0 after no longer needed

♦8.[969] **Miscellaneous paper records created from former version of N.Y.S.P.I.N. system** in use prior to 1996:
RETENTION: 0 after no longer needed

back to CONTENTS page

Nassau County Police Department
Our Mission is to serve the people of Nassau County and to provide safety and an improved quality of life in our communities through excellence in policing.

Legal Bulletin

BULLETIN TOPIC | FILE NUMBER: 3010 | NUMBER: 12-002

Recent Court Decisions and Legal Updates

Table of Contents

Criminal Possession of Marijuana Applicable to Person in Motor Vehicle

The Court of Appeals has held that a person found in possession of marijuana during a police traffic stop may be charged with criminal possession of marijuana. The court reasoned that because the motor vehicle was traveling on a public highway it met the statutory requirement that the marijuana be possessed in a "public place." The Court further held that the second requirement that the marijuana be "open to public view" may be established by the police officer's observations. The following is a summary of the case:

People v. Jackson, 2012 NY Slip Op 2252 (Decided March 27, 2012)

Facts: Defendant Jackson was driving his motor vehicle on a public street in Brooklyn when he committed a traffic infraction that was witnessed by a police officer. The police officer pulled the car over. When the police officer approached the car she detected a strong odor of marijuana and noticed the defendant was holding a zip lock bag of marijuana. A subsequent search of the motor vehicle resulted in the discovery of more than a dozen bags of marijuana.

The defendant was charged with two counts of Penal Law § 221.05 - (Unlawful Possession of Marijuana) and one count of Penal Law § 221.10 – (Criminal Possession of Marijuana in the Fifth Degree). Although he plead guilty to the charges and was sentenced to five days in jail, the defendant appealed the criminal possession of marijuana conviction.

The defendant argued that because in was in a private vehicle he was not in a public place. He cited subsection (1) of Penal Law § 221.10, which provides the marijuana must be knowingly and unlawfully possessed "...in a public place, as defined in section 240," and be either burning or "open to public view."

Question(s): (1) Was the defendant in a "public place" when he was observed with marijuana inside his car and (2) was the marijuana "open to public view?"

Answer: Yes. The Court ruled that traveling in a car on a public street was similar to walking on a public street or riding a bicycle on a highway. Additionally, the marijuana was in an unconcealed area of the vehicle that was visible to passersby or other motorists, thus meeting the "open to public view" requirement.

Discussion: The Court of Appeals emphasized that the Penal Law § 240.00(1) definition of "public place" was applicable to a number of other crimes and that a restrictive reading of the statute would be "imprudent." It reasoned, "[a] holding that a person in a private vehicle can never be in a public place could have a far-reaching impact" on other offenses such as placing a false bomb in a "public place."

> Concerning the issue whether the marijuana was "open to public view" the court ruled, "...the statute does not require that a member of the public (other than a law enforcement officer) have actually seen the contraband – it requires only that the substance have been open or unconcealed in a manner rendering it susceptible to such viewing."

A Person may not be Charged for Failure to Submit to Breath Test - Vehicle and Traffic Law § 1194(1)(b)

The Office of the Nassau County District Attorney has put the Department on notice that the Nassau County Appellate Term has ruled that a defendant cannot be charged with an offense for refusing to submit to a breath test. *People v. Salerno*, 2012 N.Y. Misc. LEXIS 1050 (N.Y. App. Term Mar. 8, 2012). This ruling is consistent with decisions of other local appellate courts. As such, the District Attorney will move to dismiss the "refusal" charge in pending cases and going forward the Early Case Assessment Bureau (ECAB) has been directed not to process charges under Vehicle and Traffic Law § 1194(1)(b).

Legally Impossible to Charge a Person with Attempting to Violate Penal Law § 120.05(3) - Interfering with Police Officer's Lawful Duty which Results in Physical Injury

It is legally proper to charge Assault in the Second Degree - Penal Law § 120.05(3), when a person intending to prevent a police officer or other recognized official from performing their lawful duty acts in a manner which causes physical injury to the police officer or official. It is important to note that charging the same person with an attempt of the crime is a legal impossibility.

As previously referenced in Legal Bulletin 01-1989, this rule was enunciated by the Court of Appeals in the case *People v. Campbell*, 72 N.Y.2d 602 (1988) and is still controlling law. In *Campbell* the Court explained:

> Because the very essence of a criminal attempt is the defendant's intention to cause the proscribed result, it follows that there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended. Thus, there can be no attempt to commit assault, second degree, N.Y. Penal Law § 120.05(3), since one cannot have a specific intent to cause an unintended injury.

New York State Department of Health Bans the Sale and Distribution of Synthetic Marijuana Products

On March 28, 2012, the New York State Commissioner of Health Law issued an order banning the sale and distribution of synthetic cannabinoids (marijuana). The Department of Health took this action because these products were found to be detrimental to health, safety and welfare of the residents of New York. Additional findings indicated synthetic marijuana was becoming popular among teens and young adults. These products are usually sold at small retail establishments. Some popular commercial names for synthetic marijuana are K2, Spice and Skunk.

The order did not criminalize the possession of synthetic marijuana. The ban concerning its sale and distribution will be enforced by the New York State Department of Health and local boards of health. They will be contacting vendors concerning the ban.

Nassau County Police Department
Our Mission is to serve the people of Nassau County and to provide safety and an improved quality of life in our communities through excellence in policing.

Legal Bulletin

BULLETIN TOPIC | FILE NUMBER

Sufficiency of Information - Marijuana and Drug Arrests

DeBour Decision Revisited (Street Encounters / Stopping Pedestrians)

3010 10-001

Table of Contents

Sufficiency of Information - Marijuana and Drug Arrests

Past Legal Bulletins have emphasized the importance of a preparing a sufficient court information. Last year the Court of Appeals held that a laboratory report was not required to establish a *prima facie* drug case where the court information properly described the evidence seized along with the arresting police officer's drug recognition training and experience. *People v. Kalin,* 12 NY3d 225 (2009). Recently, a local intermediate appellate court embraced the *Kalin* holding to rule that a court information charging Penal Law (PL) § 110.00/220.03 (attempted criminal possession of a controlled substance in the seventh degree) was facially sufficient. *People v. Williams,* (App. Term, 2nd Dept, March 9, 2010). Quoting *Kalin,* it was held that as long as the court information gives the defendant sufficient notice to prepare a defense, it "should be given a fair and not overly restrictive or technical reading." It is important for law enforcement agencies to be familiar with the *Kalin* decision. The following is a review of the case:

People v. Kalin, 12 N.Y.3d 225 (Decided: March 31, 2009)

Facts: Defendant Kalin was a passenger in a motor vehicle that was stopped by a police officer because of a faulty exhaust system. A bag of marijuana and nine bags of heroin were ultimately discovered in the automobile. The defendant and other occupants of the car were charged with PL §§ 220.03 and 221.05 (criminal possession of a controlled substance in the seventh degree and unlawful possession of marijuana). The accusatory instrument was summarized by the Court of Appeals as follows: "(1) he [defendant] was charged with possessing heroin and marijuana discovered in the car in which he was a backseat passenger at approximately 10:50 p.m. on January 21, 2006 at the corner of Cypress and Myrtle Avenues in Queens; (2) the heroin was contained in nine separate plastic bags in the center console of the vehicle; and (3) the marijuana was found in a 'plastic zip lock bag' inside the center console and a 'marijuana pipe containing a quantity of marijuana' was found in the glove compartment." The police officer executing the accusatory instrument went on to provide that the foundation for his conclusion that the items recovered from the automobile were marijuana and heroin was based on his "experience as a police officer as well as his training in the identification and packaging of controlled substances and marijuana."

The defendant was ultimately convicted of the charges. He appealed to the Appellate Division, Second Department. The Defendant argued the court information was insufficient because the police officer had not described what the recovered substances looked like and had not provided a laboratory report. For these reasons it was contended a *prima facie* case of drug possession was not established.

The Second Department agreed with the Defendant and dismissed the charges. The District Attorney appealed the dismissal to the Court of Appeals.

Questions: (1) Did the police officer adequately describe the drugs and (2) was the officer required to provide a laboratory report with the court information in order to substantiate his conclusion that the recovered substances were illegal, i.e. heroin and marijuana?

Answer: The Court of Appeals held the court information established a *prima facie* case for criminal possession of a controlled substance in the seventh degree and unlawful possession of marijuana. They also made it clear that a laboratory report was not necessary in order for an information charging drug offenses to be sufficient. The conviction was reinstated.

Discussion: It was emphasized in the decision that the *prima facie* case requirement for court informations did not amount to the level of "proof beyond a reasonable doubt" required at trial. The applicable standard is whether the information provides the defendant with enough notice to prepare a defense and is sufficiently detailed to prevent the accused from being tried twice for the same offense. Defendant's argument that a laboratory report was required to make the information sufficient was found to be without merit. The Court relying on previous decisions ruled "[w]e have already rejected the notion that a laboratory report is necessary to set forth a *prima facie* case." Addressing the issue whether the information contained an adequate description of the contraband recovered, it was held "[t]he officer in this case presented more...than merely stating that he used his experience and training as the foundation in drawing the conclusion that he had discovered illegal drugs." Important to the Court's analysis was the fact that the police officer "also relied on the packaging of the substance that he determined to be heroin and that the recovery of a marijuana pipe further supported his belief that he had found marijuana." The police officer's cited drug recognition training and experience along with the aforementioned descriptive language made the information sufficient.

Interestingly, the Court conceded that it was a common and a safer practice to describe the appearance of the substance seized. The Court went on to provide sample descriptions such as "white in color" and "powdery," or "off-white" and "rock-like" for cocaine and "green and leafy" for marijuana.

In New York, the parameters for the stop and detention of individuals have been set forth in the case of *People v De Bour*, 40 N.Y. 2d 210 and its progeny. (see *People v Hollman*, 79 N.Y. 2d 181). These cases discuss the justification required for a police officer to intrude into a person's expectation of privacy.

At the **first level**, an officer may stop an individual in order to **request information**, such as information concerning a lost child, or the reason why a person is in a particular area. This level of intrusion requires the officer to articulate an objective, credible reason for the questioning. The reason does not have to involve criminality.

The **second level** of intrusion is the **stop**, but not the seizure, of an individual. This is known as the **common law right of inquiry**. This level of intrusion involves an officer stopping an individual to ask questions regarding criminal activity. This level requires that the officer have a founded suspicion that criminal activity is afoot.

The **third level** is the **stop and seizure of an individual.** At this level, the officer must have a reasonable suspicion that the individual is committing, is about to commit or has committed a crime. At this level the officer is permitted to detain the subject and pat down the individual if he or she has a reasonable belief that they are in danger because the individual is armed.

The **fourth level** is the **arrest of an individual.** At this level the officer must have probable cause that the individual is committing or has committed a crime.

The cases below discuss the various levels of *DeBour* and the justification required for the stop of an individual.

People v. Howard, 50 N.Y. 2d 583, Ct. of Appeals (1980)

Facts: Two officers were in plainclothes, in an unmarked car working in an area with a high number of burglary cases. At approximately 1:00 pm the officers observed the defendant, a male, crossing the street carrying a woman's vanity case. After passing the officers, the defendant looked back over his shoulder towards the officers in a manner described by one of the officers as "furtive". The defendant changed direction several times and looked at the officers several more times. The officers approached the defendant in their vehicle and the defendant began to walk faster away from the officers. One of the officers identified himself as a police officer and asked to speak to the defendant. The defendant looked at the officers but did not respond. The officers continued to follow the defendant and again identified themselves as police and asked to speak to the defendant. The defendant again did not respond and began to run, still holding the vanity case. The officers pursued the defendant who ran into a building and abandoned the vanity case in a basement. The defendant was apprehended and the vanity case was recovered. The officers opened the vanity case and recovered heroin and a .38 caliber gun.

Question: Did the defendant's refusal to stop to answer the officer's question give rise to reasonable suspicion that criminal activity was afoot?

Answer: No. The Court held that the defendant had a Constitutional right to not answer the officer's question.

Discussion: The Court stated that the defendant's failure to answer did not amount to a criminal act. The Court found that absent any other indication of criminal activity, the defendant's refusal to answer the officer and his flight from the officers did not provide a basis for a seizure or the pursuit, which the court found to be a limited detention. The Court stated that the evasive actions of the defendant could have had an innocent explanation, the defendant could have been in fear for his safety since the officers were in an unmarked car and plainclothes. Therefore, the Court found that the officers did not have probable cause to arrest and the opening of the vanity case could not be valid as a search incident to arrest. The Court further found that the defendant did not intend to abandon the property but did so as a result of the police pursuit. The Court ordered the suppression of the physical evidence and dismissed the indictment.

People v. Moore, 176 A.D.2d 297 (2nd Dept., 1991)

Facts: A Police Officer testified at a suppression hearing that he was at a known drug location, with other officers, attempting to execute an arrest warrant. The officer noticed the defendant in the walkway of the building. When the defendant saw the officers, all of whom had badges displayed, he immediately turned the corner. The testifying officer stated that he followed the defendant for approximately five to seven minutes. During that time the defendant was talking to other individuals. The officer further testified that he observed the defendant look over his shoulder approximately four times and observed a bulge at the defendant's waistband underneath a zippered jacket. The officer approached the defendant after he saw the defendant put his hand near the bulge which he described as the defendant making "an adjustment". The officer placed the defendant against a wall, conducted a pat down search and recovered a .32 caliber gun.

Question: Was the search of the defendant reasonable under the circumstances articulated by the officer?

Answer: No. The Court held that under the facts presented at the suppression hearing, the officer did not have reasonable suspicion that the defendant was engaged in criminal activity or that the defendant was armed.

Discussion: The Court found that the officer was "authorized, at best, to exercise his common-law right of inquiry" pursuant to *DeBour*. The officer did not have reasonable suspicion that the defendant had committed, was committing or was about to commit a crime. Further, the Court pointed out, the officer could only pat down the defendant if he had a reasonable suspicion that he was in danger because the defendant was in possession of a weapon. (See CPL §140.50) The Court stated that the behavior of the defendant "was of a totally innocuous nature", in other words it could have an innocent explanation. The Court therefore found that the search of the defendant was unconstitutional and suppressed the evidence recovered.

People v. Stevenson, 7 A.D.2d 820 (2nd Dept., 2004)

Facts: A Detective was sitting in an unmarked police car when he observed the defendant walk past the car and noticed a bulge in the defendant's waistband. The detective also observed the defendant adjust his clothing around the bulge several times. The Detective did not give a more specific description of the bulge nor did he indicate that the bulge looked like or had the outline of a weapon. The detective approached the defendant and asked if he had a weapon. When the defendant did not respond the Detective put the defendant against a fence and frisked him.

Question: Was the Detective permitted to search the defendant when he did not respond to the detective's question regarding a weapon?

Answer: No. The Court held that there was no testimony that the detective was in fear for his safety and the detective did not have reasonable suspicion that the defendant was engaged in criminal activity.

Discussion: The Court found that the Detective acted properly when he stopped the defendant to ask if he had a weapon. However, the fact that the defendant did not respond to this question did not permit the detective to frisk him, as the defendant had a constitutional right not to answer the question. (See *People v Howard,* above) Therefore, the court found that the search was unconstitutional and suppressed the physical evidence.

People v. Dean, 2010 NY Slip Op 3953 (2nd Dept., May 4, 2010)

Facts: A police officer was working at a mall when he was informed by security from a department store within the mall that a telephone purchase had been with a stolen credit card. The telephone purchase was made with a cellular telephone. The caller was a male who indicated that he would be sending a woman, Tracy Carter, to pick up the merchandise. Store security provided the police officer with the number of the cellular phone used to place the order. The officer went to the store and observed Carter picked up the merchandise. The officer then went to his vehicle. Store security cameras monitored Carter as she took the merchandise and went to the parking lot. When Carter entered a vehicle in the parking lot, the police officer blocked that vehicle with his own. The officer observed three people in Carter's vehicle who were all looking in the bags carried out of the store by Carter. The officer approached, with his gun drawn, at the driver's side door of the car while his partner went to the passenger side of the car. The defendant was one of the individuals inside of the vehicle. The defendant was handcuffed and taken to the police station in the mall. At that time the defendant asked for a cell phone which was still in the car in the parking lot. The officer retrieved the phone and confirmed it was the phone used to place the order with the stolen credit card. The defendant was searched and found to be in possession of three bags of marijuana.

Question: Was the seizure of the defendant permissible under the facts present to the court?

Answer: No. The officer did not have reasonable suspicion which would have justified blocking the car, ordering the defendant out of the vehicle and handcuffing the defendant.

Discussion: The Court found that the information the police had at the time the defendant's car was blocked did not give rise to reasonable suspicion. The caller had not been identified and although they had the number of the cell phone, that number had not been linked to a specific individual. Further, the Court pointed out that the police allowed Carter to leave the store without questioning her which would have been permissible. That questioning may have given rise to reasonable suspicion. The defendant was also seized without any inquiry. The Court found that "...the sole basis for seizing the defendant was that he had been travelling in the same car as Carter, was a male, and was observed inspecting the stolen items." The fact that the defendant was in the company of someone the police suspected (Carter) did not give rise to reasonable suspicion "as an inference of

guilt by association is not a permissible basis to support reasonable suspicion". The Court also held that the behavior of the occupants of the car, specifically, the passing of the bags back and forth, could have an innocent explanation. Further, the Court stated that there was no indication that the vehicle was going to be used as a "getaway" car as it was not running and was parked in the lot. Therefore, the Court found that the seizure of the defendant was unconstitutional and suppressed the physical evidence.

Consensual Searches of Homes by the Police

3010 **09-002**

The United States Constitution's Fourth Amendment protects the right of an individual to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The general rule is that searches and seizures inside a home without a warrant are presumptively unreasonable. Situations that justify warrantless entry and searches involve police officers engaged in "hot pursuit," where a person's life is in imminent danger or when the destruction of evidence is imminent. Consent is an exception to the rule often utilized by police officers and will be the focus of this Bulletin. When a person "voluntarily" gives the police permission to enter their residence and conduct a search, there is no requirement for probable cause or a warrant.

Significance of Arrest Warrant

It is well settled that a judicially issued criminal arrest warrant allows a police officer to enter a dwelling in which the defendant lives when there is reason to believe the defendant is at the location. *Payton v. New York,* 445 U.S. 573 (1980). Additionally, the Supreme Court in *Payton* noted that New York State had made into law the general rule that absent exigent circumstances the police must give notice of their "authority and purpose" before entering a private residence to make an arrest. (See Criminal Procedure Law §§ 120.80 and 140.15).

Surveillance by the police indicating the subject is at his residence is not required. Entry into a residence pursuant to an arrest warrant is permitted when "the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality…warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry." *United States v. Magluta,* 44 F.3d 1530 (11th Cir.,1995).

Without exigent circumstances or consent from an authorized person, a search warrant would be necessary to enter a dwelling of another person to search for the suspect. General factors to be considered when deciding whether exigent circumstances exist for a warrantless search of a third-party's home include: 1) the violent nature of the charged act; 2) is there reasonable belief the subject is armed; 3) strong probability the subject is at the location; and 4) likelihood the subject will escape if not immediately arrested. *United States v. MacDonald,* 916 F.2d 766 (2d Cir. 1990).

Administrative Non-Criminal Warrants

The aforementioned legal principles are not applicable to administrative warrants, i.e. non-criminal removal warrants issued by U.S. Immigration and Customs Enforcement (ICE) officials. These warrants are not issued by judges and do not involve criminal prosecutions. They may be enforced in public places, but do not permit entry into a residence without consent or a search warrant. Permission to enter the home based on an administrative immigration arrest warrant does not grant law enforcement officers the broad power to search the entire residence. *United States v. Rodriguez*, 532 F.2d 834 (2d Cir., 1976).

Who May Consent

Only an authorized party may consent to law enforcement officials entering and searching a dwelling without a warrant. An authorized person would constitute the homeowner or renter and co-habitants. The Supreme Court reasoned co-habitants able to give consent would be persons who mutually use the property and have "joint access or control for most purposes," *United States v. Matlock*, 415 U.S. 164, 165 (1974). The Second Circuit has ruled that although overnight guests have an expectation of privacy they would not be able to challenge an "open-ended" consent given by a resident. Such broad consent would allow the police to search and seize any items in the home, unless it "obviously" belongs to the guest. *United States v. Zapata-Yamallo,* 833 F.2d 25, 27 (2nd Cir. 1987). It is the burden of the police to prove by a preponderance of the evidence that the item did not "obviously" and exclusively belong to the overnight guest. The police would have to show that they did not have prior knowledge and/or that the item seized was not marked or tagged in a manner linking it to the defendant. The police may rely on the "apparent" authority of the person providing consent, even if the person was not actually authorized to consent to the entry and search. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). However, the police officer's belief that the person consenting to entry has common authority over the premises must be reasonable and based on the circumstances present at the time consent is given.

The following New York Court of Appeals case provides guidance to local law enforcement officers concerning authorized consent and the scope of the consensual search:

People v. Gonzalez 88 N.Y.3d 289 (Decided May 7, 1996)

Facts: The defendant Gonzalez was a close friend of Sean DeJesus. DeJesus participated along with defendant in the armed robbery and murder of a taxi cab driver. The defendant was arrested shortly after the incident. Detectives continued their search for his accomplice and responded to the apartment where DeJesus resided with his family. The detectives encountered DeJesus' sister at the apartment. She informed them that DeJesus was not present, and that she and her daughter were the only persons at home. She also told the police that the defendant was a frequent over-night guest at her home, often sleeping in DeJesus' bedroom. The detectives asked her if she had ever seen her brother or the defendant with a gun. She stated that her brother had showed her a shotgun. The detectives asked if they could "look in Sean's room," and she agreed. She took the police to the bedroom and pointed out her brother's bed and the bed used by the defendant during overnight visits. The police removed the mattress on the bed used by the defendant and discovered a closed blue canvass bag. They unzippered the bag and found a shotgun, two shotgun shells and personal

clothing belonging to the defendant. Based on this discovered evidence the defendant was convicted of murder.

Question: Was it proper for the police to have relied on the "apparent" authority of DeJesus' sister to consent to a search of the apartment and did this authority extend to the closed bag containing the shotgun?

Answer: No. The Court of Appeals held the trial court should have suppressed the bag and its contents. The matter was remanded back to the lower court for a new trial.

Discussion: The Court opined that "[i]n the absence of any proof whatsoever that Kim DeJesus (sister of defendant's accomplice) shared 'common authority' over defendant's duffel bag, based upon mutual use or joint access and control, the People failed to establish her actual authority to consent to the seizure of the duffel bag and its contents...[t]he evidence also failed to establish her *apparent* (emphasis added) authority to consent to that seizure."

What Constitutes Voluntary Consent?

The United States Supreme Court has held that the issue whether valid consent was obtained by the police is "determined from the totality of all the circumstances," *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). The Court emphasized, "[t]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Id,* at 228. In explaining the *Schneckloth* holding, the Second Circuit Court of Appeals has opined that more than "mere acquiescence in a show of authority" is required to establish that the consent given was voluntarily. *United States v. Wilson,* 11 F.3d 346 (2d Cir. 1993). The court has also emphasized, "[t]he fact that a person is in custody or has been subjected to a display of force does not automatically preclude a finding of voluntariness." *United States v. Snype,* 441 F.3d 119 (2d Cir. 2006). They have gone on to hold that the mere fact that the defendant was arrested at gunpoint and handcuffed did not make his consent to search involuntary. *United States v. Ansaldi,* 372 F.3d 118 (2d Cir. 2004).

The police are not required to advise the person of his right to withhold consent, but knowledge of the right is a factor that may be considered by the court in determining volutariness. *United States v. Garcia,* 56 F.3d 418 (2d Cir. 1995). The Second Circuit addressed the issue whether the consent given needed to be "knowing and intelligent." Citing the Supreme Court's holding in *Schneckloth,* they made it clear that although a "knowing and intelligent" waiver is a factor that may be considered, strict adherence to this standard is not applicable in Fourth Amendment cases.

As such, "consent need not be knowing and intelligent; so long as the police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search." *United States v. Ontiveros,* 547 F. Supp 2d.323 (S.D.NY., April 21, 2008).

An example where it was held that *voluntary* consent was lacking is found in the following Second Circuit case:

United States v. Mapp, 476 F.2d 67 (Decided: March 28, 1973)

Facts: Members of a narcotics task force, comprised of New York City police officers and federal agents responded to an apartment at 2:00 a.m. to effectuate the warrantless arrest of a known drug dealer. The police had observed drug transactions between the subject, who lived at the apartment and the defendant. They also knew that minutes earlier the defendant had left heroin with the subject at the location in question. They knocked on the door of the apartment and announced it was the police. The officers heard "rapid footsteps" and activity within the apartment. After waiting one or two minutes they forcibly entered the apartment by breaking down the door. They entered with their guns drawn and immediately arrested the subject drug dealer in her bedroom. A detective told the subject, "[y]ou are under arrest and we want the package that Sonny (the defendant) brought in earlier." The subject pointed to a bedroom closet. The police found in the closet a brown paper bag containing two kilograms of heroin. The seized heroin was used to convict the defendant of drug dealing. He appealed his conviction arguing the heroin should have been suppressed because the police illegally obtained it.

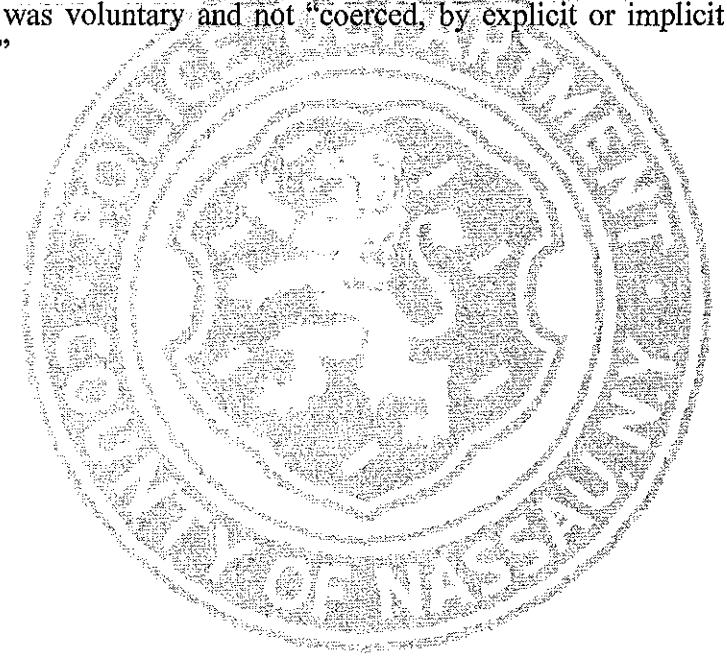
Question(s): Were the police officers required to secure a warrant before making a nighttime arrest in a dwelling? Even if the warrantless entry was legal, did it become unlawful because the officers failed to announce both their identity and purpose prior to entry? If the initial entry and arrest were valid, was the search unlawful because it was conducted without a search warrant?

Answer: Exigent circumstances allowed for the immediate entry into the apartment without an arrest warrant. But the drugs seized should have been suppressed because the consent to search the closet was not voluntary.

Discussion: The Court reasoned that waiting for an arrest warrant could have led to the destruction of evidence. The "[e]xigent circumstances of this case justified the warrantless nighttime entry and arrest." For these same reasons the Court also concluded that the "forcible entry, after announcement of identity but without announcement of purpose, was justified." Concerning the subsequent search it was opined, "nothing in the Fourth Amendment allows officers who, for the purpose of arrest, have intruded, albeit lawfully, upon the privacy of an individual without an arrest warrant, may further invade that privacy by searching without a warrant." The Court held, that given the facts, the only viable exception to a search warrant would have been if the subject had given "voluntary" consent to search the premises. It was held the police did not take any "steps to establish an atmosphere of relative calm…conducive to the making of a knowing and intelligent decision" and that "extraordinary circumstances -- a gun in hand, a breaking down of the door, an arrest, the hour (2:00 A.M.), the place (her bedroom) -- the officers' failure to warn Mrs. Walters, after placing her under arrest, of her right to remain silent or to withhold consent to a search," were significant factors against finding volutariness.

It is apparent based on the foregoing decisions that many factors are to be considered in determining whether consent was voluntarily given. They include: 1) the youth, lack of education, or low intelligence of the defendant; 2) the lack of any advice as to the defendant's constitutional rights; 3) the length of detention; 4) repeated and prolonged nature of the questioning; and 5) the use of physical punishment. *Schneckloth,* 412 U.S. at 228. A New York State appeals court has gone further by holding that a defendant did not consent to a broad search of her apartment by simply inviting the police to enter her residence and that there was "implicit" or "subtle" coercion because the Spanish-speaking defendant was not informed of her right to refuse entry. *People v. Flores,* (1st Dept., 1992).

For these reasons it is important that the consent obtained to enter a residence and conduct a search be given by an authorized person and that it be documented, i.e. by utilizing a written consent form or having the consenting party sign the police officer's "memo" book. When encountering a language barrier it is also advisable to utilize a translator. These safeguards will help to show that the consent obtained was voluntary and not "coerced, by explicit or implicit means, by implied threat or covert force."



BULLETIN TOPIC	FILE	NUMBER
Criminal Negligence **Vehicle Inventory Searches**	**3010**	**09-003**

Table of Contents

Criminal Negligence

In 2008, the Court of Appeals and the Appellate Division Second Department rendered important decisions concerning when a person may be held criminally liable for negligent actions that cause injury or death. The decisions *People v. Cabrera,* 10 N.Y.3d 370 (May 8, 2008) and *People v. McGrantham,* 56 A.D. 3d 685 (2d Dept., November 18, 2008) deal with automobile accidents and provide an analysis of the standard to be used for sustaining a conviction based on criminal negligence pursuant to Penal Law § 15.05. Subsection 4, of Penal Law § 15.05 defines criminal negligence in the following manner:

> [a] person acts with criminal negligence with respect to a result . . . when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

People v. Cabrera, 10 N.Y.3d 370 (Court of Appeals, decided - May 8, 2008)

Facts: A seventeen-year-old inexperienced driver with a junior license was driving his automobile at a high rate of speed (70 mph in a 55 mph zone) when he lost control of his motor vehicle at a curve and drove off an embankment. There were four passengers in the car at the time of the crash. Three were killed and the fourth was seriously injured. None of the vehicle's occupants were wearing seatbelts. The defendant, who was not intoxicated at the time of the accident, was convicted of Criminally Negligent Homicide, Penal Law § 125.10 and Third-Degree Assault pursuant to subsection 3 of Penal Law § 120.00, which provides a person is guilty of third-degree assault when "[w]ith criminal negligence, he causes physical injury to another person by means of . . . a dangerous instrument." The Third Department affirmed the convictions and the defendant appealed.

Question: Is speeding alone sufficient to hold a person criminally responsible for the deaths and injuries caused by their automobile.

Answer: No. In order to establish criminal negligence the State must show that the defendant's actions amounted to *dangerous* speeding, i.e. drag racing or disregard of traffic control devices, which could be considered "morally blameworthy."

Discussion: The Court of Appeals of New York distinguished the facts in *Cabrera* from cases where drivers were engaged in drag racing or were running through red lights while intoxicated. The court noted that in those situations the convictions were upheld because the defendants engaged in other risk-creating behavior in addition to driving faster than the posted speed limit. The court went on to acknowledge that in *Cabrera* the driver's actions were negligent and "blameworthy" but not "morally blameworthy." An example of "morally blameworthy" conduct would be consciously accelerating in the presence of an obvious risk. "When discussing our precedents...we observed that the common thread was the creation, rather than the nonperception, of risk...[i]n short, it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding; conduct by which the defendant exhibits the kind of 'serious[ly] blameworth[y]' carelessness whose seriousness would be apparent to anyone who shares the community's general sense of right and wrong."

Later in 2008, the Appellate Division, Second Department applied the *Cabrera* holding to another case involving a fatal automobile accident.

People v. McGrantham, 56 A.D. 3d 685 (Second Department- decided November 18, 2008)

Facts: Defendant, who was sober, mistakenly drove his vehicle in the wrong direction onto a parkway. The driver could have utilized a roadway shoulder and grassy area to move away from oncoming traffic, but decided to make a slow u-turn across the parkway in order to travel in the right direction. While making the u-turn, the defendant collided with a motorcyclist, causing the motorcyclist's death. He was subsequently charged with Criminally Negligent Homicide, Penal Law § 125.10 and Reckless Driving, Vehicular & Traffic Law § 1212. The trial court determined that defendant did not possess the requisite criminal mental state and dismissed both charges. The District Attorney appealed to the Appellate Division, Second Department.

Question: Did defendant's actions amount to criminal negligence?

Answer: Yes.

Discussion: The court distinguished the facts in *McGrantham* from the facts in *Cabrera*, "wherein a young inexperienced driver entered a tricky downhill curve . . . at a rate of speed well in excess of a posted warning sign." The court emphasized the defendant in *McGrantham* was "neither a young nor an inexperienced driver" and that he did not simply "misgauge his ability to handle road conditions." The court reasoned the accident resulted not from a mere "failure to perceive a risk," but rather from the actions of the defendant, which created the risk. The Second Department held that the charge of criminally negligent homicide was proper because a jury could find the defendant's conduct was "morally blameworthy." They remanded the case to the lower court for a trial.

Vehicle Inventory Searches

It is has been firmly established by our courts that a police officer may conduct an inventory search of an impounded motor vehicle without a search warrant, if the search is performed according to an established police department procedure. The objective of the procedure cannot be to discover criminal evidence. "Three specific objectives are advanced by inventory searches: protecting an owner's property while it is in the custody of the police; insuring police against claims of lost, stolen, or vandalized property; and guarding police and others from dangerous instrumentalities that would otherwise go undetected." *People v. Galak,* 80 N.Y.2d 715 (1993). The Court of Appeals emphasized, "[t]hat the procedure meet two standards of reasonableness. First, the procedure must be rationally designed to meet the objectives that justify the search in the first place...Second, the procedure must limit the discretion of the officer in the field." *Galek*, at 719. In furtherance of the *Galak* decision our Department instituted the following inventory search policy which is contained in Article 6, Rule 14 of the Department's Manual: **[NOTE: Inventory Search Policy is now found in Article 23, Rule 12 of the Department Manual]**

Rule 14. Inventory of Impounded Vehicles

Vehicles will be impounded when provided by law or whenever impoundment is necessary to safeguard a vehicle or its contents. It will be the duty of every member who impounds a vehicle to safeguard valuable personal property that may be contained in such vehicle. The following procedure will be employed in all cases in which a vehicle is impounded:

1. At time of impound, the member impounding the vehicle will inventory the contents of the vehicle and prepare Auto Impound Invoice, PDCN Form 94A. Any visible damage will be noted under miscellaneous on PDCN Form 94A.

2. In all cases in which an inventory is conducted, the officer performing such examination will, without unnecessary delay, make appropriate entries in his memorandum book. Whenever possible, this process will be executed in the presence of another member of the Force or other responsible witness.

3. The scope of the inventory will extend only to those areas wherein it may reasonably be assumed that the operator or owner has left valuable personal property.

4. If personal property is discovered during an inventory and the property is of little value or the property is affixed to the vehicle or impracticable to remove, such property, unless otherwise directed, will be left in the vehicle; however, the tow car operator or garage custodian, as the case may be, will acknowledge the presence of the property in the vehicle by signing the memorandum book of the officer delivering the vehicle to him.

5. If it is necessary to remove valuable personal property from an impounded vehicle (i.e. expensive cameras or jewelry, money, doctor's equipment, etc.), the Desk Officer of the command wherein such property was removed will make appropriate entries in the Impound Book, attach PDCN Form 94A to the appropriate page of PDCN Form 94, and secure such property for release; if such property cannot be returned to the owner within a reasonable period of time, the Desk Officer, when applicable, or investigating member will invoice such property to the Property Bureau.

Subsequent Appellate Division decisions have applied the *Galak* ruling to actions taken by police officers during inventory searches of impounded motor vehicles. Let's examine a case where the Court held the legal standards applicable to inventory searches were met, and allowed criminal evidence obtained during such a search to be used at trial.

People v. Banton, 28 A.D.3d 571 (Second Department – decided April 11, 2006)

Facts: A New York State Trooper made a lawful stop of a motor vehicle. The Trooper checked the driver's license. Department of Motor Vehicle (DMV) records indicated the license was suspended. The driver was then arrested. There was no other licensed driver present who could take possession of the vehicle, so the Trooper decided to impound the vehicle for safekeeping. During the inventory search illegal contraband was discovered. The defendant made a motion to suppress the evidence. The lower court granted the motion and the District Attorney appealed.

Question: Was the motor vehicle properly impounded? Was the subsequent inventory search legal?

Answer: Yes.

Discussion: The Appellate Court ruled that the motor vehicle was properly impounded because there was no licensed driver to whom the car could be entrusted. Concerning the subsequent inventory search the Court focused on the Trooper's trial testimony and the fact that an inventory form was completed. The testimony showed "the motivation of the State Troopers in conducting the subsequent search was caretaking rather than criminal investigation." The Court went on to hold "[t]he search was conducted pursuant to a police procedure which was rationally designed to meet the objectives justifying such a search and effectively limited the State Trooper's discretion so as to assure that they were not merely rummaging for incriminating evidence." The Appellate Court held the discovered criminal evidence could be introduced at defendant's trial.

What is significant to note in the above case was the importance of the Trooper's testimony in establishing that his discretion in conducting the inventory search was limited by the written inventory search policy of the New York State Police. The Trooper was able to show he was familiar with the policy and its objective of securing personal property.

BULLETIN TOPIC | FILE NUMBER

Searches of Motor Vehicles Incident to Arrest: *Arizona v. Gant*

Use of a GPS Tracking Device Requires a Search Warrant: *People v Weaver*

3010 **09-004**

Table of Contents

On April 21, 2009, the United States Supreme Court rendered an important decision concerning the ability of police officers to legally search a motor vehicle after the driver or occupant of the vehicle has been arrested. The following is an analysis of the decision and a how it affects the day-to-day operations of our Department.

***Arizona v. Gant*, 556 U.S._____(2009) United States Supreme Court**
Decided – April 21, 2009

Facts: Police Officers in Tuscon, Arizona were conducting an investigation into narcotic activity at a particular location. In the course of this investigation, the defendant, Rodney Gant, was arrested for driving with a suspended license. Gant was handcuffed and placed in the rear of a police vehicle. His vehicle was then searched. As a result of that search, one officer recovered a gun and another officer recovered cocaine that was located in a jacket on the backseat of the car. The trial court denied the defendant's motion to suppress the evidence. Arizona's State Supreme Court reversed, finding the search unreasonable. The Case was argued before the United States Supreme Court on October 7, 2008 and decided on April 21, 2009.

Question: Was the search of the defendant's vehicle, incident to his arrest, reasonable when the defendant was handcuffed in the rear of a police vehicle and the only charge was driving with a suspended license?

Answer: No. The Court held that a vehicle can only be searched incident to a lawful arrest when the arrestee is in a location where he is in "reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."

Discussion: The Supreme Court stated that searches incident to arrest are reasonable when they are conducted to protect the safety of the officer, i.e. to search for weapons or dangerous instruments that the arrestee may be able to reach and use against the officer; or when the search is conducted to prevent the destruction of evidence. In *Gant*, the defendant was handcuffed and in the rear of a police vehicle. It was not reasonable to believe that he was able to reach into his vehicle under those circumstances. The Court also stated that a search incident to a lawful arrest would be justified if it were "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thorton v. United States,* 541 U.S. 615, 632 (2004). In *Gant*, although the officers were conducting a narcotics investigation, Gant was only arrested for driving with a suspended license. Therefore, the "police could not expect to find evidence in the passenger compartment of Gant's car."

The Court's holding in *Gant* does not preclude members from searching a vehicle incident to a lawful arrest under all circumstances. If the officer has probable cause to believe that the vehicle may

contain evidence of the crime being charged, the arresting officer may search the vehicle. Further, if an arrestee or another individual remains within the reachable area of a vehicle, the officer may search the vehicle for weapons or dangerous instruments in order to protect himself from potential harm. The New York State Court of Appeals ruling in *People v. Mundo,* 99 N.Y.2d 55, 59 (2002), held that in non-arrest situations involving car stops where the suspect's actions would lead a police officer to conclude that there was "...a perceptible risk to the officers that a weapon located within the vehicle would be a specific danger to their safety" a limited search in that area within the car, where the furtive movements had been seen, is reasonable. In *Mundo* the Court of Appeals held that the limited search for a weapon was warranted given the defendant's actions, i.e. suspicious hand movements indicating the hiding of an object, initial non-compliance to directions to pull over and unsafe maneuvers while evading the police in a car.

It is important to note the Court of Appeals of New York has held that although there must be a nexus between the arrest and the search of the vehicle, that nexus is flexible, and a search "...can be justified on grounds other than those that initially prompted police to stop the vehicle." *People v Blasich*, 73 NY2d 673 (1989); *People v Galak*, 81 N.Y. 2d 463 (1993). In other words, probable cause to search the car may develop after the car stop and the probable cause may be to search for evidence of a crime different than the one the prompted the stop initially.

If an officer makes an arrest and does not search the car incident to arrest, for example, if a defendant is arrested only for a suspended license and is not within the reachable area of the vehicle, an inventory search of the impounded car should be conducted. Members are advised that if a vehicle is impounded and an inventory search is conducted (as opposed to a search incident to arrest) the officers should be familiar with the Department's policies and procedures relating to inventory searches.

Use of a GPS Tracking Device Requires a Search Warrant

Recently the New York State Court of Appeals rendered a decision which distinguished the covert placement of a GPS device on a suspect's motor vehicle from other methods of police surveillance that do not require a search warrant. Here is a summary of the case and the reasoning behind the decision.

People v Weaver, 2009 NY Slip Op 3762 (Decided May 12, 2009)

Facts: A state police investigator placed a global positioning system (GPS) tracking device on the bumper of the defendant's vehicle. The GPS device, "Q-Ball," remained on the defendant's vehicle for approximately 65 days. During that time, data regarding the vehicle's speed and location was taken. This data could indicate the vehicle's location within 30 feet. The information was retrieved by an investigator driving past the defendant's vehicle with a receiving unit and the data was transmitted and saved to a computer within the investigator's car. It was not known why the GPS was initially placed on the defendant's vehicle or what the circumstances of that initial investigation were. However, the defendant was ultimately charged with two separate burglaries. At the trial for

one of the burglaries, the prosecution offered evidence from the GPS device to show that at the time of the burglary, the defendant's vehicle was in the parking lot of the burglarized premises driving six miles per hour. The County Court denied the defendant's motion to suppress the GPS evidence. The defendant was convicted of this burglary and acquitted of the other charges. This judgment was affirmed by the Appellate Division.

Question: Was the placing of a GPS device on the defendant's vehicle without a warrant a violation of the defendant's fourth amendment right?

Answer: Yes. The Court held that the "massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy." The Court held that "...Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause."

Discussion: The Court of Appeals, in its decision, distinguished the technology of the GPS device used by the investigator in this case from the devices which were available to police previously. The Court stated that the GPS devices used by police today are technologically superior to devices used in the past. The older devices were used to supplement the visual surveillance of a police officer whereas the devices used today can provide information, which "...would require, at a minimum, millions of additional police officers and cameras on every street lamp." The Court stated that the technology today is so sophisticated that "any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time...the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period.". The Court went on to say that the data collected by GPS devices, which is retrieved readily and instantaneously, is frequently private in nature. For instance, the police would know about "...trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the hour motel, the union meeting, the mosque, synagogue or church, the gay bar...". Despite the diminished expectation of privacy of an individual traveling in his vehicle on a public roadway, the Court held that the expectation of privacy is not so diminished "...that we effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal." In citing the recent United States Supreme Case of *Arizona v Gant*, the Court stated "Although we have recognized that a motorist's privacy interest in his vehicles is less substantial than in his home....the former interest is nevertheless important and deserving of constitutional protection" (2009 WL 1045962, *8).

The Court of Appeals has made it clear that a search warrant is required before an electronic tracking device may be utilized by police officers during a criminal investigation. Without a warrant or exigent circumstances our criminal courts will now suppress evidence obtained through such a device.

Nassau County Police Department
Our Mission is to serve the people of Nassau County and to provide safety and an improved quality of life in our communities through excellence in policing.

Department Administrative Order

ORDER TITLE	FILE NUMBER
Roadside Stop Probation/Parole Inquiry Response Program	**13-015**

REFERENCE DOCUMENTS	EFFECTIVE DATE	TERMINATION DATE
	7/30/2013	

Commanding Officers are directed to bring the following to the attention of all members.

All NCPD members should be aware of the "Roadside Stop Probation/Parole Inquiry Response Program" recently implemented through DCJS. The program's goals are to:

1. improve officer safety by raising officer awareness regarding the person(s) they have stopped and
2. to assist Probation and Parole Agencies supervise probationers/parolees by providing meaningful information regarding probationer/parolee conduct.

Whenever a police officer submits a query to DMV using an individual's driver's license number, vehicle registration number, or VIN number, the name, gender, and DOB returned from DMV will be automatically sent to DCJS and compared with the probation, parole, and wanted/missing persons files for possible matches. A list of possible ***HIT*** matches will be ranked and returned to the inquiring officer. When the officer selects a possible match from the list who is under probation/parole supervision, the information provided will include the offense for which the person is being supervised, as well as the name and phone number of the supervising probation/parole agency (the phone number returned will be that associated with the agency's ORI). **Since these queries are not fingerprint based, the results returned will include a disclaimer that the subject should not be searched, detained, or arrested based solely on that information.** Further, the disclaimer will request that the police officer contact the supervising agency. **NCPD members will comply with the contact request by following the below described procedure:**

If the inquiring officer receives a ***HIT*** **(the subject appears to be a probationer or parolee)** and a Field Interview is completed or TRACS Ticket is issued, the officer will email Asset Forfeiture and Intelligence (AFI) at **afildc@pdcn.org** the subject's name only. Otherwise the email will include the following information as applicable:

- Subject's information
- Name and phone number of the supervising probation/parole department
- Vehicle information
- Time and place of occurrence
- Reason for stop
- Action taken

AFI personnel will be responsible for contacting the probationer/parolee's supervising agency with the information received and will maintain records of that contact.

Note: This procedure should also be used to check illegal drug overdose aided victims for probation/parole status. Probationer/parolee use of unlawful drugs is usually a violation of probation terms and an act that could trigger violation of parole. This process will serve to alert probation/parole supervisors of such conduct enabling them to take appropriate corrective action.