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# ALBANY, NEW YORK

## POLICE DEPARTMENT

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1789

### LAW ENFORCEMENT ROLE AND AUTHORITY

#### GENERAL ORDER NO: 5.1.00

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**PURPOSE:** The purpose of this policy is to define the role and authority of sworn personnel of the Albany Police Department and to provide general guidelines for searches and seizures with or without a warrant by sworn personnel of this department.

**POLICY:** It is the policy of the Albany Police Department to respect constitutional rights in making searches and seizures with or without a warrant, to comply with all applicable law, and ensure the admissibility of evidence in criminal proceedings.

**DEFINITIONS:** **Consent Search** – Consent search means a clear and voluntary expression by an individual to allow a member of law enforcement to search them or property over which the consenting party has apparent control. Consent should be documented in writing and witnessed, when practical, and can be limited or withdrawn at any time by the consenting party.

**Frisk/Pat Search** – Frisk/pat search means a search that involves a pat down of a person's outer clothing. Its purpose is to detect weapons that an individual, reasonably suspected of possessing a weapon, may have on their person. A frisk/pat search can include the squeezing of clothing, the patting of clothing, or the sliding of hands over clothing. If an officer feels what they believe to be a weapon, the officer may reach inside the clothing and remove the object.

**Search** – Search means the methodical exploration of a person, vehicle, building or area to locate a person, evidence, or other property.

**Search Incident to Arrest** – Search incident to arrest means a search that occurs subsequent to, and as a direct result of a lawful arrest. During a search incident to an arrest an officer can conduct a head to toe search of the arrestee's person and clothing. A search incident to arrest is permitted in order to protect the officer from a possible weapon or object that could endanger the officer, to detect weapons or objects that could assist the arrestee in escaping, and to prevent the destruction of evidence by the arrestee during the booking process. A search of property in the arrestee's constructive possession (as opposed to immediate physical possession), such as bags or purses belonging to, and in the near vicinity of the arrestee, may be more appropriately justified by the Personal

Inventory Exception, which allows an inventory of an arrestee's property during the booking process.

**Search Warrant** – Search warrant means a written court order and process directing a law enforcement officer to conduct a search of a designated premises, vehicle, or person, for the purposes of seizing designated property, or kinds of property, and delivering it to the court which issued said warrant. A search warrant may also be for the search of a designated premises for the purpose of searching for and arresting a person who is the subject of a designated type of arrest warrant (see CPL 690.05(2)(b)). A search warrant which directs a search of a designated or described place, premise or vehicle, may also direct a search of a person present thereat or therein (see CPL 690.15(2)).

## **I. LEGAL AUTHORITY**

**A.** All sworn personnel of the Albany Police Department are vested with the authority and responsibility to enforce all federal and state laws and local ordinances, within the jurisdiction of the City of Albany. This shall include the following:

1. Sworn personnel shall use lawful means to preserve the peace;
2. Sworn personnel, where authorized by provisions of law, shall interfere without warrant to prevent or suppress crime;
3. Sworn personnel shall execute all lawful processes issued by a magistrate or court; and
4. Sworn personnel shall arrest offenders without warrant, where authorized by provisions of law, for purposes of bringing the offender before the proper magistrate or court to be tried.

**B.** Sworn personnel of this department shall, within jurisdictional authority:

1. Protect the Constitutional Rights of all persons;
2. Preserve peace;
3. Prevent offenses;
4. Detect and arrest criminals;
5. Suppress riots, mobs, and insurrections;
6. Protect the property;
7. Direct the movement of vehicles in public ways or public places;
8. Remove nuisances in public parks or public ways;
9. Provide proper police assistance at fires;
10. Assist, advise, and protect people in public ways or at transportation facilities;
11. Carefully observe and inspect all places of business under license, or required to have them; and
12. Enforce and prevent the violation of all laws.

**C.** When "off duty," officers should be prepared to act to protect life and property.

1. Based on the circumstances that the officer is presented with, and their ability to respond, it shall be the "off duty" officer's discretion whether to take action.

2. If an "off duty" officer does take action they shall immediately be considered "on duty" and shall be granted the legally mandated authority to act.

## II. SEARCH AND SEIZURE

A. The Fourth Amendment of the United States Constitution guarantees the right of the people to be free from "unreasonable searches and seizures." The Exclusionary Rule holds that evidence obtained in violation of this right will generally be inadmissible in a criminal prosecution.

1. There are several specific, well-defined exceptions to the Exclusionary Rule that permit warrantless searches and seizures.
2. Warrantless searches that fall outside of these exceptions may be found to be unreasonable and unlawful, and may lead to the exclusion of any evidence obtained, and exposure to civil and/or criminal liability.
3. The "Fruit of the Poisonous Tree Doctrine" dictates that all evidence directly or indirectly procured as the result of an invalid search becomes tainted and inadmissible.
  - a. Under these circumstances, the ends cannot justify the means, and the validity of a search will be judged by its inception, without regard for the outcome.
  - b. Although there are exceptions to this doctrine, such as the Inevitable Discovery Rule, that may result in such evidence being admissible, officers will not rely on these exceptions, and must make every effort to conduct searches lawfully, as the burden of justifying a warrantless search and seizure rests with the prosecution.
4. All property seized shall be processed in accordance with G.O. 2.1.00 Property and Evidence Control.

## III. SEARCHES WITH A WARRANT

- A. As stated, the general rule to be followed is that searches and seizures are reasonable and proper if based upon a valid search warrant, whereby the issuing judge directs law enforcement authorities to conduct a search, based upon demonstration that probable cause exists to believe evidence of criminality will be uncovered by said search.
1. Therefore, with certain exceptions, searches shall only be conducted upon this issuance of a valid search warrant, by a court of competent jurisdiction, after the presentation of a properly executed application.
  2. Personnel shall refer to Article 690 of the NYS Criminal Procedure Law for information related to search warrants.
- B. An officer requiring a search warrant should consult with a detective supervisor before proceeding. If a court of competent jurisdiction is not in session, the detective supervisor may contact an authorized court official to make the necessary arrangements to secure a search warrant.

C. If legal advisement is required for the preparation of the search warrant affidavit, a representative from the applicable District Attorney's Office should be contacted and consulted.

D. After a search warrant is obtained, the executing officer shall:

1. Check to ensure the warrant is signed and it clearly describes the place, premise and/or person to be searched and the articles to be seized;
2. Upon arrival, again check to make certain that the premises are in fact those described in the warrant
3. Execute the warrant within a reasonable time, but in any case, within ten (10) days from date of issuance;
4. Execute the warrant on any day of the week, between the hours of 0600 and 2100 (CPL 690.30), unless it specifically provides for a search at any time of the night or day ("Anytime Exception") (CPL 690.45).

a. During the application process, [REDACTED]

b. Regardless whether an "anytime exception" is included, [REDACTED]

5. [REDACTED]

a. Upon entrance, when practical, the person with apparent authority and/or ownership over said premises will be provided with a copy of the search warrant upon request.

b. If no person is present during the execution, a copy of the warrant will be left on the premises, along with a property receipt containing the name of the issuing court and itemizing and describing any items seized as a result of said search warrant (CPL 690.50 - (3) & (4)).

6. There are exceptions to the Knock and Announce rule as outlined in CPL 690.35 – (4b) and below.

a. During the application process, officers may request the issuing magistrate to authorize a no-knock exception for one of the following reasons:

i. [REDACTED]

ii. [REDACTED]

iii. [REDACTED]

in paragraph (b) of subdivision two of section 690.05 CPL [REDACTED]

7. [REDACTED]

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
  - i. [REDACTED]
  - ii. [REDACTED]
  - iii. [REDACTED]

d. Within this context, "Reasonable Time", is not objectively determinant, but will be defined by facts and circumstances of each case, as judged by the discretion of the searching officers.

E. Although not specified in the search warrant, the following articles may lawfully be seized, from the designated property or premises, by an officer who observes them in plain view while serving a search warrant. It should be noted that the warrant may need to be amended in order to legally seize any of the following property. Prior to seizing any of the following property a detective supervisor shall be consulted:

- 1. Instrumentalities or means by which any crime was committed, (such as weapons, masks, tools, etc.);
- 2. Contraband (articles which may not be legally possessed, such as counterfeit money or controlled substances, etc.);
- 3. Fruits of any crime (such as stolen property);
- 4. Other evidence of any crime (such as clothing or other items fitting the description of the criminal offender); and
- 5. Property which bears a reasonable relationship to the purpose of the search (such as documents establishing who owns the premises searched if ownership is an element of the crime).

F. In order to ensure an orderly and safe search is conducted, and the search warrant is successfully executed, all occupants may be detained for a reasonable amount of time, as is necessary to ensure the safety of all persons present and prevent any potential for the destruction, sequestration, or removal of evidence.

- 1. Once the situation is stabilized and the reasonable suspicion and/or probable cause no longer exists to detain an individual present they shall

immediately be permitted to leave the premises.

G. If during the execution of a search warrant there is probable cause to seize property located outside of area of the area identified in the scope of the warrant, the warrant, unless exigent circumstances exist, the warrant must be amended in order to seize said property. In such a case a detective supervisor shall be consulted.

H. A police officer responsible for the execution of a search warrant:

1. Shall not exceed the authority granted by the warrant;
2. Shall make a diligent effort to find all the property listed in the warrant;
3. Shall not search beyond the area described in the warrant, unless consent is obtained or exigent circumstances exist ( [REDACTED] ),
4. Shall search only those areas capable of containing the property listed in the warrant ( [REDACTED] ),
5. Shall remain on the premises only for the time reasonably necessary to thoroughly search for and seize the property listed in the warrant;
6. Shall make adequate provisions to secure the searched premises before leaving unless the person in control of such premises refuses or rejects such accommodations;
7. Shall leave a copy of the search warrant and a record itemizing any property seized with any person present who has apparent control of such premises. If nobody is present, then a copy of each document shall be left inside the premises;
8. Shall upon seizing property, pursuant to a search warrant, deliver said property to South Station without unnecessary delay and ensure it is properly recorded, packaged, and placed into evidence. All these steps shall be in accordance with current department directives; and
9. Complete all necessary documentation for the warrant return, including a written inventory of any and all property seized as a result of said warrant, sworn and subscribed by the officer.

#### IV. SEARCHES WITHOUT A WARRANT

A. Although the Fourth Amendment prohibits governmental entities from conducting unreasonable searches and seizures of private citizens, the following is a list of the primary, well defined exceptions where warrantless searches have been found constitutionally permissible.

1. "Stop and Frisk", Temporary Warrantless Questioning of Persons in Public Places; Search For Weapons;
2. Search incident to lawful arrest;
3. Exigent Circumstances or Emergency Doctrine ;
4. Consent searches;
5. Automobile Exception;
6. Plain view observations;
7. Personal and vehicular Inventory searches;

8. Payton searches;
9. Abandonment; and
10. Other exceptions.

- B. It should be carefully noted that a police officer should never rely on one of these exceptions, whenever it is practical under the circumstances to obtain a search warrant in advance. If a police officer is acting under the authority of a valid search warrant, he/she is acting on secure legal grounds.
- C. In every case where a warrantless search is conducted, the police officer(s) involved shall complete all necessary documentation containing the pedigree of all parties searched, any pertinent facts and circumstances related to the search, and an inventory of any property seized as consequence of said search in accordance with current department directives.

## **V. TEMPORARY WARRANTLESS DETENTION OF PERSONS; SEARCH FOR WEAPONS**

- A. The basic purpose of Fourth Amendment constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government.
  1. As previously mentioned, an investigatory detention, or stop and frisk, during a street encounter is one of the well noted exceptions to the Fourth Amendment.
  2. Federal and State Case law interpreting the Fourth Amendment and NYS CPL 140.50 - (1) & (3) authorizes police officers to briefly detain and question an individual they have reasonable suspicion to believe has just committed, is committing, or is about to commit a crime.
  3. If the officer possesses reasonable suspicion said person is currently armed and or dangerous they may also perform a pat-down/frisk of said person. However, there a wide range of situations, involving street encounters, which encompass several degrees of criminal suspicion and correlating permissible intrusions on constitutional liberties.
- B. In an effort to clarify the application of the Fourth Amendment in New York, with regard to searches and seizures, the NYS Court of Appeals outlined four (4) types of citizen street encounters, conducted by law enforcement, in People v. DeBour, 40 N.Y. 2d 210, (1976). Each level was defined by the level of intrusion it had on a citizen's constitutional liberties, the corresponding amount of suspicion required to be held by members of law enforcement, and the investigative actions police are permitted to take under the circumstances.
  1. Level 1 – Right to Approach and Request Information:
    - a. Level One is largely defined by its title. An officer may walk up to a citizen and ask them to voluntarily provide information.
      - i. At this level, an officer may ask general questions (such as an individual's pedigree and their anticipated destination) which would not lead an objectively reasonable person to

- believe they are the target of a criminal investigation.
  - ii. The interview must be non-threatening in nature, and the citizen must be permitted to terminate the questioning and walk away at any time.
- b. To satisfy this level, an officer must possess an Objective and Credible Reason to enter into said interview.
- i. While this burden is relatively low, an officer must be able to articulate a legitimate purpose for their actions, which may not be based simply upon whim or caprice.
  - ii. Within this specific area, courts have allowed wider latitude to community officers, whose purpose is to commonly engage members of a particular neighborhood in dialogue.
  - iii. Officers are not permitted to detain a citizen, or forcibly interfere with their freedom of movement while at Level 1.
  - iv. A citizen's failure to answer questions and walk, or even run away at Level 1, will not, in and of itself, create criminal suspicion or increase law enforcement's permissibility with regard to search and seizure.
  - v. The duration of the interview, and relative neutrality of an officer's words should be noted while at Level 1, as they are elements which can significantly affect any subsequent interpretation of an evolving street encounter.
  - vi. Officers are not permitted to request a citizen's consent to search while at Level 1.
  - vii. In *People v. Pirillo*, the Appellate Division, Third Department, held, that when the police observe an individual, already running, who fits a description of a "suspicious person," but [the police] have no knowledge that the individual has committed any crime, the police do not have any reasonable suspicion to chase. Based upon the complaint regarding a described suspicious individual, the officer could lawfully request information from the defendant about his presence in the area. (DeBour Level 1) The law did not require the defendant to answer the inquiry or stop running. Flight from the police, alone, was insufficient to justify further police intrusion. *People v. Pirillo*, A.D.3d 1424 (3<sup>rd</sup> Dep't 2010)
  - viii. NOTE: Although a citizen has the right to refuse to answer a police officer's request for information, should they choose to give answers that are false, inconsistent, or evasive this may elevate the encounter to a Level (2) Two common-law right to inquire. See *People v. Jordan*, 9 A.D.3d 792 (3<sup>rd</sup> Dept. 2004), See *People v. Mitchell*, 283 A.D.2d 769 (3<sup>rd</sup> Dept. 2001)

## 2. Level 2 – Common Law Right of Inquiry:

- a. Level 2 is defined by the actions and words used during the law enforcement interview, which may be more pointed and accusatory in nature, and lead a reasonable person to believe they are the subject of a criminal investigation.



- b. The standard to justify a Level 2 street encounter is *Founded Suspicion that criminal activity is afoot* (also termed “mere suspicion”).
  - a. The purpose of a Level 2 inquiry is essentially to obtain explanatory information regarding a criminally-related matter.
  - b. The validity of a Common Law Inquiry will be analyzed based upon the knowledge and facts held by the officer, at the time of the interview, and any reasonable inferences which could be made there from.
    - i. Inferences can be based upon the facts and circumstances of a street encounter, as well as the individual officer’s law enforcement-related training and experience.
    - ii. Due to the almost infinite number of potential variables which may affect a Level 2 analysis, as well as the nebulous area between Level 2 and Level 3, an officer should be prepared to recall and articulate the facts and circumstances of the encounter, with specific attention to sensory observations, specific words used, and actions taken.
- c. Officers are not permitted to detain a citizen, or forcibly interfere with their freedom of movement during a Level 2 inquiry, but may request consent to search the individual’s person and/or property.
  - a. Due to the fact officers are not permitted to detain a citizen at Level 2, they are also prohibited from pursuing them based solely upon Founded Suspicion of criminality, as a pursuit is considered a form of detention, regardless of whether the citizen has yet been physically detained.
  - b. In *People v. Pines*, 99, N.Y.2d 525 (2002), the NYS Court of Appeals citing its previous decision in *People v. Martinez*, 80 N.Y.2d 444, 447-448 (1992) held “that reasonable suspicion...continues to be the standard for a police stop or detention short of arrest, and that a ‘defendant’s flight may be considered in conjunction with other attendant circumstances.”
  - c. While flight alone cannot justify a reasonable suspicion, under certain circumstances, flight can be an escalating factor that may authorize a police officer to stop a suspect by pursuing him. *People v. Martinez*, 80 N.Y.2d 444, (1992)
  - d. The Court of Appeals found that the flight of a suspect may engender additional suspicion that may elevate an encounter to reasonable suspicion. 1 Barry Kamins, *New York Search & Seizure* § 2.04[2][f] (Matthew Bender, Rev. 2016 Ed.)
  - e. Although flight at the approach of a police officer may suggest criminality, courts have held that flight is only of slight value of evidence of consciousness of guilt and of no value unless there are facts pointing to the motive that

- prompted it. *People v. Kreichman*, 37 N.Y.2d 497 (1975)
- f. The NYS Court of Appeals has consistently held however, that where the police approach a citizen to make a common-law inquiry and the citizen takes flight immediately upon their approach, pursuit will be justified. *People v. Holmes*, 81 N.Y.2d 1056 (1993), *People v. Gayden*, 2016 NY Slip Op 07702
  - g. The pursuit is proper because the flight of the individual has escalated the predicate for the encounter; the inquiry was based on some indication of criminality, and the flight elevated it to a reasonable suspicion that the individual engaged in criminal activity. 1 Barry Kamins, *New York Search & Seizure § 2.04[2][f]* (Matthew Bender, Rev. 2016 Ed.)
  - h. While flight can be a relevant consideration in a *Debour* Analysis of an evolving street encounter, it may not, in and of itself, raise the level of suspicion or law enforcement permissibility.
  - i. An officer may arrive at a Level 2 encounter as a result of an anonymous tip by a citizen of criminality.
    - i. The extent, to which an officer can confirm the veracity an anonymous tip, based upon direct observations and/or corroborating information from other informants, may increase the level of suspicion, and consequently, the level of police permissibility with regard to temporary detention.
    - ii. Information received from confidential informants and other sources who wish to remain anonymous, will be judged by the two-pronged *Aguilar-Spinelli* test developed by the Supreme Court analyzing:
      - a) Reasons to support the conclusion the informant is reliable and credible; and
      - b) The underlying circumstances relied upon by the person providing said information.
  - j. An officer is not required to inform the citizen they are free to leave during a level 2 encounter unless they ask.

### 3. Level 3 – Reasonable Suspicion/Temporary Detention:

#### a. Level 3 is supported by Reasonable Suspicion.

- i. A police officer may temporarily detain a citizen based upon reasonable suspicion that individual has just, is currently, or is about to commit an offense. Once this reasonable suspicion has been achieved, an officer may:
  - a) Temporarily detain the individual for a time period, which is reasonable under the circumstances, in an

- attempt to corroborate or refute suspicion of criminality;
  - b) Pursue the individual on foot and/or in a car in an attempt to detain them; and/or
  - c) Utilize handcuffs to temporarily detain the individual, if prudent under the circumstances.
- b. A Level 3 Stop may also involve a pat down frisk for a weapon, also commonly referred to as a "Terry Stop," referencing a controlling Supreme Court decision.
  - i. A Pat Down or Frisk of an individual may be performed by an officer when they reasonably believe the person to be armed with a weapon and/or currently represent a threat to the safety of those present or the public at large. A pat down search may be based upon:
    - a) The subject's appearance (including apparent outline of a weapon in their clothing);
    - b) The totality of the circumstances (officers detaining an individual based upon reasonable suspicion of a violent offense are afforded greater permissibility to frisk for weapons);
    - c) Information known to the officer, regarding the subject, based upon previous encounters or documented data;
    - d) Although there is no "plain feel" doctrine in NY, an officer may retrieve any object they detect during a pat down/frisk which they reasonable believe to be a weapon; or
    - e) Consent may be used, in conjunction with a pat down/frisk, to extend the scope of the search of an individual.
  - ii. Reasonable suspicion has been defined as the quantum of knowledge sufficient to induce an ordinarily prudent and cautious person to believe criminal activity is at hand. It must be based upon specific and articulable facts, which, taken together with rational inferences from those facts, reasonable warrant intrusion.
    - 1. Reasonable suspicion must be based upon specific and articulable facts, not merely a hunch or intuition regarding an individual.
    - 2. Some elements which help amount to reasonable suspicion include, but are not limited to:
      - a. Sensory observations;
      - b. Evasive, erratic, or violent behavior;
      - c. Witness/victim information;
      - d. Information previously known to the officer regarding the individual;

- e. Location and time of day where the individual was observed and/or detained.
- iii. Level 3 represents the minimum amount of suspicion required to effect a traffic stop. With limited exceptions, an officer must directly witness a violation if it is the foundation for their traffic stop.
- iv. If an individual is temporarily detained by a police officer based upon reasonable suspicion of an offense, but then subsequently released without arrest (based upon the officer's discretion, or inability to substantiate criminality within a reasonable amount of time); a minimum of a Field Interview Card must be completed, per current APD guidelines to document the encounter with specific attention to completing the narrative portion, articulating observations and information which led them to form reasonable suspicion of criminality.

**4. Level 4 – Arrest:**

- a. The final level in the Debour analysis is a custodial arrest.
- b. An officer may perform a custodial arrest upon an individual when they have developed Probable Cause (or *Reasonable Cause*, as it is termed in NY) to believe the person has committed an offense. Once probable cause is developed an officer may:
  - i. Detain the individual;
  - ii. Transport them to APD Central Booking (or another detention facility or police agency, as dictated by the circumstances of the arrest and probable cause);
  - iii. Perform a full search incident to arrest of their person and objects in their physical possession;
  - iv. Perform a full Personal Inventory Search of additional items in their constructive possession, which accompany the individual to Central Booking, or other appropriate facility; and
  - v. Conduct all necessary arrest processing procedures, as dictated by the NYS CPL and APD SOP, which may include fingerprinting and photographing the individual.
- c. With some exceptions, an officer is not required effect a full custodial arrest, even if probable cause has been developed.
  - i. In these instances an officer may use their professional discretion to effect a number of different outcomes.
  - ii. At a minimum, an officer who has detained, but not arrested an individual, based upon probable cause an offense was committed (to include Vehicle & Traffic Law violations resulting from a traffic stop, but no issuance of a UTT), must complete a Field Interview Card.

## VI. SEARCH INCIDENT TO LAWFUL ARREST

A. A police officer is authorized to conduct a warrantless search of an arrestee, and the area within their immediate control, incident to their arrest, under the following circumstances:

1. The arrest is lawful;
2. The search is conducted for the purposes of seizing fruits, contraband, and evidence of the offense committed (in order to prevent its destruction or concealment), detecting any weapons in the arrestee's possession, which might represent a threat to anyone present, and uncover any instrumentalities that might aid the arrestee in escaping custody.
  - a. When conducting a warrantless search, incident to arrest, officers should be mindful of the previously articulated purposes and justifications for said search. [REDACTED]
  - b. Searches of bags and other possessions not physically possessed by, directly attached to, or within the immediate reach of an arrestee might not be justified by this exception [REDACTED] absent articulation of specific circumstances indicating that failure to search said item would create a clear and present danger of physical threat, escape, or evidence destruction.
    - i. Since this burden can be challenging to overcome, particularly when an arrestee is handcuffed, it is recommended officers rely on the Personal Property Inventory, Consent, or obtain a search warrant to conduct a lawful search of said articles subsequent to arrest.
  - c. If an officer chooses to issue an appearance ticket for an offense on scene, rather than transporting the individual to Central Booking for arrest processing [REDACTED]
3. The search is substantially contemporaneous with the arrest and conducted in the immediate vicinity of the arrest; [REDACTED]  
[REDACTED] it is nonetheless justifiable;
4. A search of articles physically possessed by the individual at the time of arrest may also be conducted to include their clothing and containers found on their person.

### B. Searches of Cell Phones Incident to Arrest:

1. Officers may not conduct a warrantless search, incident to arrest, of the digital data contained within an arrestee's cell phone, even if they have

reason to believe it contains evidence to support the offense for which they were arrested.

- a. The officer may, however, physically examine the phone to ensure it does not contain a weapon, or represent a weapon.
- b. Officers are not required to ignore evidence observed in plain view [REDACTED]. Such images may constitute validation to apply for a search warrant to further examine the contents.
- c. An officer may search the contents of a cell phone based upon valid consent given by the owner.
- d. There are very limited exceptions which allow the warrantless search of cell phones when specific and articulable circumstances said search is a necessary measure to attempt to mitigate or prevent an immediate threat to public safety.
- e. Cell phones may be seized incident to arrest, in contemplation of obtaining a search warrant, when there is probable cause to believe the cell phone may contain evidence of criminality, and failure to seize could reasonably result in the destruction of said evidence.

**C. Protective Sweep:**

- 1. When a lawful arrest occurs inside a building or premises, officers are permitted to conduct a cursory search of the interior surrounding the vicinity of the arrestee's current location, possibly extending to the entire building, including closets, bathrooms, and other enclosed spaces.
  - a. Officers should be mindful [REDACTED] the reasonable concern additional individuals may be present, but undetected.
  - b. This scope of a protective sweep is therefore limited to areas an accomplice, or other individual, might be hiding and represent a threat, or potentially come to the aid of the arrestee.
    - i. [REDACTED]
    - ii. Any inherently illegal item or contraband (e.g., switchblade, heroin, etc.) observed in plain view, during a valid protective sweep may be seized as evidence.

**VII. SEARCH UNDER THE EMERGENCY DOCTRINE OR EXIGENT CIRCUMSTANCES**

- A. A police officer is authorized to conduct a search without a warrant when faced with an emergency situation where delay would endanger him or her, or the public's safety, or might result in the escape of the offender or the destruction of evidence.

**B. Emergency Doctrine:**

- 1. Many emergencies justifying a warrantless entry and search do not necessarily involve criminal acts; for example, when a police officer hears

a call for assistance, when he or she observes smoke or flame, or when he or she learns of an actual or potential natural or man-made calamity or disaster, they have the duty and obligation to respond immediately.

- a. The authority of the police to make warrantless entries in emergency situations, whether criminal or non-criminal is based upon their fundamental responsibility to preserve the peace and to protect the public safety.
  - b. The doctrine that permits warrantless entries and searches because of exigent circumstances requires justification by the police that it was impractical for them to obtain a search warrant in advance and that the warrantless search was truly necessitated by the emergency circumstances which could not have been anticipated.
  - c. While conducting a lawful search justified by emergency circumstances, a police officer may seize any incriminating evidence inadvertently discovered in plain view.
  - d. A warrantless entry into a burning building is permissible in an emergency and officials may remain for a reasonable time to investigate the cause of the fire and any evidence of arson discovered is admissible at trial.
    - i. Any re-entry after the fire has been extinguished and officials have left the scene should be made pursuant to a search warrant.
- C. The Supreme Court addressed the issue of the immediate need to protect public safety, by supporting the "Hot Pursuit" exception to the search warrant requirement.
  - 1. The Court ruled that when the police are in hot pursuit of a criminal suspect, they may make reasonable warrantless entries to apprehend the suspect, to seize weapons and to secure evidence of that crime.
  - 2. The Court stated that "the exigencies of the situation made that course imperative ... and the Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."
- D. The Supreme Court outlined some factors that would support justification of exigent circumstances under the "Hot Pursuit" doctrine, as follows:
  - 1. The officers were on fresh and continued pursuit of the suspect;
  - 2. A crime of violence was involved;
  - 3. There was a strong possibility that the suspect was armed;
  - 4. The suspect was known or reasonably believed to be in the building;
  - 5. There was a likelihood that the suspect might escape unless immediately apprehended; and
  - 6. There was sufficient justification for failure to obtain a search warrant.

## **VIII. SEARCH BY CONSENT**

- A. Police Officers are permitted to conduct a warrantless search of an individuals and or their property when said individual gives them consent to do so.
- B. In many instances, consent may be the quickest, easiest, and least burdensome manner for a police officer to lawfully conduct a valid, warrantless search in furtherance of a criminal investigation. However, a "Consent Search", is based upon a voluntary relinquishment of a fundamental constitutional protection and will be carefully scrutinized by the Court. Therefore, an officer must be mindful the following considerations when conducting a consent search:
1. Consent to search must be knowingly, intelligently and voluntarily given;
  2. By a person who has the authority, or apparent authority, to give such consent over said property;
  3. The scope of the consent search may be limited, or completely withdrawn at any time by the consenting party;
  4. Consent must be freely and voluntarily given, and failure to give consent to search is not an element which may, in itself, increase an officer's level of criminal suspicion;
  5. Although an individual need not be advised of their right to refuse consent, it may be an element considered in any subsequent judicial analysis of the search's constitutionality.
- C. Consent to search may be given verbally, but it is preferable to memorialize it in writing when practical. If consent is given in writing, officers shall complete an Albany Police Department Consent to Search Form, [REDACTED] shown on [REDACTED] of this order. Even if the form is only partially completed, if evidence is obtained from the search and/or the search results in an arrest, the officer must submit the original form to evidence or maintain it as a portion of their case file.
1. Consent cannot be presumed from silence.
  2. Consent must be specifically and intelligently given.
  3. Consent must be voluntary, free of any coercion, intimidation, or threat [REDACTED].
  4. Consent may be obtained from any person who has the right of ownership, possession, or control of the premises or property. If there is substantial doubt regarding an individual's authority to consent, a search warrant should be considered.
    - a. Generally, if property, such as a house, apartment, or business is jointly owned, either co-owner/resident may give valid consent to search the common areas of the premises (but not those areas under the exclusive control of the other party).
      - i. However, if the second co-owner/resident is *actually present*, and denies consent, the search must be discontinued absent a warrant or other exception to search warrant rule.
      - ii. If one of the co-owners/residents consents to a search of the common areas, police need not seek out, or inquire with, the other co-owner/resident regarding consent.
      - iii. Said search is still valid if the second co-owner/resident is absent due to the fact they are in police custody, [REDACTED]



- [REDACTED]
- b. This circumstance is commonly encountered in domestic-related situations. For example, a spouse may give consent to a police search of the common areas of a jointly owned home ([REDACTED]).
  - c. A suspect's roommate may give police valid consent to search the common areas of the apartment, but not those areas under the exclusive control of the suspect ([REDACTED]).
  - d. Generally, a landlord cannot give consent to the search of a tenant's apartment; nor can a hotel/motel owner or manager give consent to a search of a guest's lodgings while they are still exercising lawful, temporary residency (occupying a room during the time period they paid for).
- 5. Consent must be free of misrepresentation or fraud.
  - 6. Consent must be obtained prior to the search, and after the police officers have identified themselves as law enforcement.
  - 7. The extent of a consent search must be limited to the area specified, or that which a reasonable person would have understood they were consenting to under the circumstances. [REDACTED]
  - 8. Consent may be revoked or limited at any time, at which point the search should cease absent additional, superseding factors.

## **IX. AUTOMOBILE EXCEPTION**

- A. Although motor vehicles are considered "effects" and property within the meaning and intent of the Fourth Amendment, courts have not afforded private individuals the same level of expectation of privacy with respect to motor vehicles that is applied dwellings, structures, and other personal property.
  - 1. Because individuals purposely avail themselves to public highways through the use of motor vehicles, the Supreme Court has observed that "the inherent mobility of automobiles often makes it impracticable to obtain a warrant and in addition the configuration, use and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property.
  - 2. Therefore, under this exception officers may not need to procure a search warrant for automobiles if they possess probable cause to believe there are items of evidentiary value inside.
    - a. If practical, a search warrant may still be obtained in the manner prescribed by CPL 690 in advance of a motor vehicle search.
    - b. This option is preferred during instances where the search is not conducted in a timeframe contemporaneous with, or is otherwise sufficiently removed from the point at which the probable cause was procured.

**B.** The practical considerations of police work, however, often require that a warrantless search of a motor vehicle be conducted under the following circumstances:

1. When the officer has probable cause to believe there is contraband or evidence of a crime in the car;
2. Warrantless stopping, questioning, and frisk/pat search of motor vehicle operator or occupants:

- a. A type of protective search to determine whether a suspect is armed, with the search confined to the area of the motor vehicle from which a suspect might gain possession of a weapon.

3. Search of motor vehicle incident to arrest of operator or occupant:

- a. If it is impractical to conduct the search immediately at the scene, the vehicle should be towed to a police facility, as per current directives, to be searched later.

4. Consent:

- a. A search conducted with the voluntary consent of the person in lawful control of the vehicle.
  - b. Consent should be documented in writing and witnessed, when practical, and can be limited or withdrawn at any time by the consenting party.
  - c. If consent is gained in writing, officers shall complete an Albany Police Department Consent to Search Form, APD Form [REDACTED] shown on [REDACTED] of this order.

5. Plain view observations:

- a. If a police officer has lawfully stopped a motor vehicle and is questioning the operator, any incriminating item in or on the vehicle observed in plain view, including anything observed with the use of a flashlight, may furnish probable cause to search the vehicle and seize the item observed without a warrant.

**C.** All police officers should be especially watchful and alert when stopping and searching a motor vehicle or its occupants as many officers have been seriously injured, some fatally, in taking this police action which should never be considered "routine."

## **X. THE "PLAIN VIEW" DOCTRINE**

**A.** The "Plain View" doctrine has often been relied upon by both State and Federal Courts to permit seizures of evidence observed by police officers during the course of their duties. This "Plain View" exception to the warrant requirement is permissible if the following conditions are met:

1. Officer is in lawful position to observe the object;
2. The officer must be in lawful position to seize object;
3. The discovery of the item seized must be "inadvertent;" and
4. The item seized must be "immediately apparent" as contraband or evidence of crime.

**B.** The term "inadvertent" has been interpreted to mean that a police officer did not have probable cause to believe or suspect that such evidence would be found on the premises (e.g., officers came across the item unexpectedly while in the course of their normal duties, to include discovering it in the course of a lawful search for a separate and distinct item).

1. This element has not generally been strictly enforced by courts but is still a necessary component of the Plain View Exception, and exists to guard against officers circumventing the search warrant requirement by gaining lawful access to a premise as a ruse with the intent, or anticipation of discovering contraband or items of evidentiary value in plain view.
2. To satisfy the condition of being "immediately apparent" as evidence or contraband, the officer shall have probable cause to believe that the evidence was observed in plain view.

**a.** Example: An officer lawfully enters private premises to execute a valid search warrant for designated property or articles and while conducting this lawful search he/she inadvertently discovers within plain view other evidence which he or she immediately recognizes as incriminating. These items may be properly seized.

**C.** Whenever an officer, in good faith, enters upon private premises as authorized or required by their duties, he or she is not a trespasser and, therefore, anything that they inadvertently observes in plain view that is subject to seizure, may be seized without a warrant.

**D.** It should be carefully noted, however, that whenever it is possible, under the particular circumstances, officers shall obtain a search warrant prior to seizing the property, and shall not search any further areas in the search of evidence without obtaining a search warrant first.

## **XI. INVENTORY SEARCHES**

### **A. Vehicles:**

1. If the vehicle is impounded, the vehicle shall be thoroughly searched and all valuable personal property found in the vehicle shall be removed by the police, carefully inventoried and kept in safe custody, in accordance with procedures in G.O. 3.4.30 - Motor Vehicle Towing Procedures.
2. Evidence or contraband discovered during an inventory search may be seized. If a vehicle is to be towed by the Albany Police, an inventory search of the vehicle shall be conducted before it is towed for the exclusive purposes of:

**a.** Protecting the police and tow operator from dangerous

instrumentalities inside said vehicle;

- b. Safeguarding the owner's/occupant's property; and
- c. Protecting the police and tow operator from false claims of loss or theft.

B. Pursuant to Illinois v. Lafayette, 462 U.S. 640 (1983) prior to incarcerating an arrestee in a police lockup, police shall conduct a pre-incarceration or inventory inspection of his/her belongings. This shall be done to uncover and safeguard any weapons or implements the arrestee could use to injure themselves or others, to safeguard valuables and to protect the police against false claims of theft or loss of the arrestee's belongings.

1. Searches incident to arrest are covered in depth in General Orders 5.2.15, 5.2.20, and 5.2.25.
2. Pursuant to Colorado v. Bertine (479 U.S. 367 (1987)), the inventory may also extend to closed containers found in an impounded vehicle, as long as the inventory is carried out pursuant to standard procedures.
3. Police may impound vehicles under the following circumstances:
  - a. An unattended to car illegally parked or otherwise illegally obstructing traffic;
  - b. A vehicle involved in an accident when the driver is physically or mentally incapable of making a prudent decision regarding its disposition;
  - c. When there is probable cause to believe the vehicle has evidentiary value;
  - d. When a custodial arrest is made of the operator, and owner is a separate person who is not present;
  - e. An abandoned car;
  - f. A car so mechanically defective as to be a menace to others using the public highway; or
  - g. A car impoundable, pursuant to ordinance or statute, as in the case of forfeiture.

4. Inventories:

- a. All impounded vehicles and containers therein shall be completely inventoried.
- b. Any items of contraband or evidence shall be placed into property.
- c. Vehicle impoundment and inventory procedures shall be in accordance with G.O. 3.4.30 - Motor Vehicle Towing Procedures.

## **XII. OTHER EXCEPTIONS**

### **A. Abandoned Property:**

1. Incriminating evidence may often be found in wastebaskets, trash receptacles, garbage barrels, etc. Garbage or trash that has been left in an area particularly suited for public view and inspection, for the express purpose of having strangers take it and dispose of it, is property which no

longer enjoys the protection associated with the property that individuals associate with a reasonable expectation of privacy.

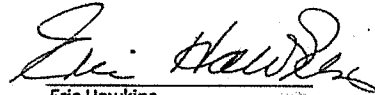
2. With regard to abandonment of premises, such as an apartment or hotel room, the courts have noted that abandonment consists of the act of leaving coupled with an intention not to return.

**B. Payton Search:**

1. Must have an active bench or arrest warrant;
2. Officer must reasonably believe they are inside the residence at the time of the search; and
3. Premises must be the subject of the arrest warrant's primary residence.

**C. Searches by Persons other than Law Enforcement Officers:**

1. Generally, a private individual may deliver to the police items or evidence, which that private person obtained by searching someone else's property.
  - a. For example, in one case, the mother of a sixteen (16) year old girl (who was the suspect's girlfriend) opened a letter from the suspect to the daughter, read it and handed it over to the police. The Fourth Amendment did not apply to this search by a private individual.
  - b. A search of the defendant's basement by city gas company inspectors was held to be outside the scope of the Fourth Amendment (that search revealed gas used via un-metered pipes).

  
Eric Hawkins  
Chief of Police