To be argued by
DAVID L. GOODWIN
(20 minutes)

Court of Appeals

STATE OF NEW YORK,

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against –

LANCE RODRIGUEZ,

Defendant- Appellant.

BRIEF FOR DEFENDANT-APPELLANT

PATRICIA PAZNER
DAVID L. GOODWIN
Attorneys for
Defendant-Appellant
111 John Street, Fl. 9
New York, NY 10038
T: (212) 693-0085 x 262
F: (212) 693-0878
dgoodwin@appad.org

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PRELIMINARY STATEMENT

By permission of the Honorable Eugene Fahey, Associate Judge of the Court of Appeals, granted August 24, 2021, appellant Lance Rodriguez appeals from an order of the Appellate Division, Second Department, entered May 19, 2021. That order, upon remittitur from this Court, affirmed a judgment of the Supreme Court, Queens County, rendered October 11, 2016, convicting Mr. Rodriguez, after a guilty plea, of attempted criminal possession of a weapon in the second degree (P.L. §§ 110.00, 265.03[3]), and sentencing him to 2 years in prison and 1½ years of post-release supervision (Margulis, J., at suppression hearing; Zayas, J., at plea and sentence).

On October 7, 2021, this Court granted poor-person relief and assigned Patricia Pazner of Appellate Advocates as counsel on appeal. Mr. Rodriguez has fully served his sentence, and no stay has been sought.

This Court has jurisdiction under C.P.L. § 450.90(1) to entertain this appeal and review all issues raised. The pre-hearing omnibus motion, post-hearing defense submissions in support of the suppression motion, and the suppression court's decision preserved the issues presented of whether police stops of bicycles are Level 3 *De Bour* seizures; whether this stop, in particular, was a Level 3 seizure; and whether that seizure was lawfully supported by reasonable suspicion (A6–16, 132–160, 170–184).[1] This Court is empowered to determine the question of law regarding the legal standard that should have governed the bicycle stop in this case. C.P.L. § 470.35(1); *see People v. Borges*, 69 N.Y.2d 1031, 1033 (1987) (application of incorrect legal standard presents a question of law).

[1] Numerical references preceded by "A" refer to pages of the Appendix for Defendant-Appellant.

QUESTION PRESENTED

> Was the police investigative stop of Lance Rodriguez, a moving bicyclist on a public road, a *De Bour* Level 3 seizure requiring reasonable suspicion of criminality, and if that was lacking, must the fruits of the unlawful stop be suppressed?

SUMMARY OF THE ARGUMENT

For more than 40 years, New York and federal law have recognized the inherent intrusiveness of police stops of moving vehicles. *People v. Sobotker*, 43 N.Y.2d 559, 563 (1978); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). Because these police stops interfere significantly with a person's freedom of movement, create anxiety, involve unsettling shows of authority, and require submission to official commands, they have a unique distinction. Unlike other police-citizen encounters, most of which are assessed under the totality of the circumstances, police stops of vehicles are almost always *per se* constitutional "seizures," Level 3 encounters under the four-step framework of *People v. De Bour*, 40 N.Y.2d 210 (1976). As Level 3 encounters, they must be supported by at least "reasonable suspicion" of criminal wrongdoing in order to be lawful. *People v. Hinshaw*, 35 N.Y.3d 427, 430, 435 (2020).

At first glance, this case involves a typical police stop of a vehicle. Lance Rodriguez was pulled over by the police in Far Rockaway, Queens, late one winter evening. After observing him for a very short

time, plainclothes officers in an unmarked car pulled up alongside him, identified themselves, and ordered him to stop. When he did not, the police continued following alongside him and again commanded him to stop. Mr. Rodriguez responded by pulling over to the side of the road, with the police car parking right next to him. According to an officer's testimony at the suppression hearing, Mr. Rodriguez then allegedly admitted (in response to the officer's inquiry) having a gun, leading to his arrest and prosecution for gun possession.

Had Mr. Rodriguez been driving a car or truck, or riding a motorcycle, this investigative stop would have been considered a *De Bour* Level 3 seizure, requiring reasonable suspicion of criminality at its inception to be lawful. But Mr. Rodriguez was not in a car or truck, or on a motorcycle. Instead, he was riding a bicycle.

To the lower courts that ruled on Mr. Rodriguez's suppression motion, that one difference was dispositive. They treated him as a pedestrian instead of a motorist, holding that the entire police encounter rose to only a *De Bour* Level 2 "common-law right of inquiry," not a constitutional seizure, and therefore required only the lesser "founded suspicion" of wrongdoing. So evaluated, the courts upheld the legality of the stop, determining that the police rationale for detaining Mr. Rodriguez—he was biking in an allegedly "reckless" manner, while holding what the police conceded was an unidentifiable object in his waistband—provided founded suspicion.

Contrary to these rulings, an investigative police stop of a moving bicycle should be treated the same as an equivalent police car stop, not as a pedestrian encounter. The factors that make car stops *De Bour* Level 3 seizures—such the anxiety created, the requirement of submission to authority, and the intrusive interference with the momentum and path of a vehicle—apply with equal force to police stops of moving bicycles, but not to police-pedestrian encounters. New York's Vehicle and Traffic Law also treats bicyclists more like motorists than pedestrians, *see* V.T.L. § 1231, and other jurisdictions have already recognized police bicycle stops as akin to car stops, either explicitly or implicitly. *See*, *e.g.*, *State v. Turner*, 191 P.3d 697, 699–700 (Or. Ct. App. 2008); *Jones v. State*, 572 A.2d 169 (Md. 1990).

For these reasons, this Court should formally hold that police investigative stops of moving bicycles are presumptive *De Bour* Level 3 seizures, just like car stops. And as seizures, they are lawful only if supported by reasonable suspicion of criminal misconduct.

Alternatively, the totality of the circumstances shows that *this* bicycle stop was a seizure. Police commanded Mr. Rodriguez to stop, pursued him, and then ordered him to stop again. When he submitted to their authority by pulling over, the three officers drove up immediately beside him and confronted him. Police commands, submissions to authority, pursuit, and the loss of freedom of movement are all corner-

stones of a New York seizure analysis, and were all present on this record. *See People v. Bora*, 83 N.Y.2d 531, 534–35 (1994).

Under either route to *De Bour* Level 3, this stop was a seizure requiring reasonable suspicion: a "quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand." *People v. Cantor*, 36 N.Y.2d 106, 112–13 (1975). Although neither the suppression court nor Appellate Division addressed reasonable suspicion (because each applied the wrong legal standard under *De Bour*), the undisputed facts compel a finding that reasonable suspicion was not satisfied. Mr. Rodriguez was not bicycling in a suspicious or illegal manner, and the unidentifiable "object" in his waistband was, on the officer's own admission, not suggestive of criminality.

As a result, the police stop was unlawful. This Court should suppress its fruits—the statements, firearm, and magazine—and dismiss the indictment. *Hinshaw*, 35 N.Y.3d at 439.

STATEMENT OF FACTS

Introduction

Defendant-appellant Lance Rodriguez was charged with possessing a firearm. At a suppression hearing, an officer testified that, late one evening, he saw a "male Hispanic" riding a bike in a "reckless"

manner down a residential street in Far Rockaway, Queens. According to the officer, Mr. Rodriguez was biking with one hand on the handlebars in the middle of the street, with cars passing him or slowing to avoid hitting him. The officer also saw a bulky object in Mr. Rodriguez's waistband, but admitted not knowing what it was, and did not claim it looked like contraband.

The officer, along with two others, followed Mr. Rodriguez in a car for a short while, then pulled alongside his moving bicycle and yelled for him to stop. When Mr. Rodriguez did not comply, the officer repeated his command a second time. Mr. Rodriguez stopped his bicycle, and the police car pulled up alongside him.

When the officer asked whether Mr. Rodriguez had anything on him, Mr. Rodriguez said he did, to the officer's apparent surprise. When pressed, he admitted having had a gun. He was restrained, and a firearm and magazine were recovered from his waistband. He later made incriminating statements at the precinct.

In his own testimony, Mr. Rodriguez denied, among other things, admitting to having a gun. Rather, the officers immediately searched him after pulling him over.

The defense moved to suppress, arguing that the stop of Mr. Rodriguez's moving bicycle amounted to a *De Bour* Level 3 intrusion, akin to a police stop of a moving car, and would be lawful only if supported by reasonable suspicion that Mr. Rodriguez had committed or

was committing a crime. The totality of the circumstances also supported a Level 3 intrusion because, among other things, Mr. Rodriguez had submitted to a show of authority and would not have thought he was free to leave. The police lacked reasonable suspicion because they had not demonstrated Mr. Rodriguez was biking recklessly, and the officer did not have any reason to think the unknown object was suggestive of criminality. Since the firearm, magazine, and statements were all fruits of an illegal stop, they should be suppressed.

The suppression court ruled that police stops of bicycles are more like stops of pedestrians than stops of cars, so this police encounter amounted only to *De Bour* Level 2: a consensual encounter under the common-law right of inquiry, requiring only "founded" suspicion. Under this lesser standard, the stop was lawful.

Mr. Rodriguez eventually pleaded guilty to attempted criminal possession of a weapon in the second degree, purporting to waive his right to appeal. The Appellate Division enforced the waiver, but this Court ruled the waiver was invalid and remitted for consideration of the merits. The Appellate Division then upheld the suppression court's decision by holding that police stops of bicycles are Level 2 *De Bour* intrusions that do not require reasonable suspicion.

The Suppression Hearing

In a post-indictment omnibus motion, the defense moved to suppress physical evidence and statements deriving from illegal police conduct, and asked in the alternative for a suppression hearing. The defense argued that Mr. Rodriguez had been "seized" by officers "without a warrant" or "reasonable suspicion" while he was just "riding his bicycle," and was not "engaged in any unlawful or improper conduct" (A8). The People consented to a hearing on the statements but opposed on the physical evidence (A22–23), and the court ordered a *Huntley*/*Mapp*/*Dunaway* hearing on both (A27). It was held in December 2015.

The People's Case

On December 13, 2014, Officer Richard Schell was on routine plainclothes patrol in Far Rockaway, Queens, accompanied by two other officers. He was positioned in the front passenger seat of their unmarked car, with the windows down (A33–34, 42, 47–48).

That day, the officers' patrol took them down Beach 25 Street, a two-way thoroughfare running roughly north/south through a residential area south of the Rockaway Freeway (A43–44). Beach 25 Street did not have a center-lane divider or bike lane. Cars could park legally on its east side, and would sometimes park illegally on its west side (A43–46).

At around 10:40 p.m., the unmarked police car had just merged onto Beach 25 Street from underneath the Freeway (A47, 50). As the police made their slow turn, Officer Schell saw Lance Rodriguez, "a male Hispanic," about 20 to 25 yards away on a beach-cruiser bicycle—large tires, big seat, and wide handlebars—riding south down the "middle" of Beach 25 (A34–35, 49, 51). Mr. Rodriguez was wearing sweatpants, a puffy winter jacket, and a hat (A70–71).

Three things drew Officer Schell's attention to Mr. Rodriguez. First, he was riding his bike in what Officer Schell described as a "somewhat reckless" manner; two or three cars had to "either stop so they didn't hit him or go around him." Second, Mr. Rodriguez had only one hand on the handlebars (A34, 36, 54–55). And third, despite the late hour, the area was sufficiently well-illuminated for Officer Schell to notice Mr. Rodriguez "favoring his waistband" and holding "something"—an "object"—with his left hand over his pants (A34–35, 39, 48, 60).

Officer Schell had never encountered Mr. Rodriguez before. Neither of the other officers had provided information about him (A46–47). The police had not received a radio run, either about a crime suspect matching Mr. Rodriguez's description or about a suspicious person more generally (A49).

Nevertheless, the officers began driving behind Mr. Rodriguez, with one car separating theirs from his bicycle. After 30 seconds to a minute had elapsed, and shortly before Mr. Rodriguez reached the

intersection of Beach 25 and Camp Road, the officers pulled up alongside him (A35, 51, 53, 57). Later, at the hearing, Officer Schell made clear that he had decided to make a stop because Mr. Rodriguez had been observed "riding his bike holding an object in his waistband" (A35).

Officer Schell "said" (A35) or "yelled out" (A58) either "Police, stop" (A58) or "Hold up, police" (A35).[2] Mr. Rodriguez did not immediately stop, however, so Officer Schell continued following alongside and "commanded" him a second time, yelling out "even louder" either "stop the bicycle, police" or "Hold up, police" (A35, 58, 65).

This time, Mr. Rodriguez began to stop, turning right on Camp Road. He brought his bike to a stop about 10 yards from where it intersected Beach 25 Street (A36, 52–53, 58).

The unmarked police car pulled up next to Mr. Rodriguez, who was by then straddling his bicycle adjacent to Officer Schell's passenger-side door (A64, 66). Identifying himself again as a police officer, Officer Schell asked Mr. Rodriguez whether he had "anything on him," and Mr. Rodriguez said he did (A36, 58, 61, 64). "[C]aught . . . off guard," Officer Schell repeated his question, and Mr. Rodriguez again confirmed he had something on him (A37).

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[2] The transcript erroneously reads "please" instead of "police" in a few places, but "police" was actually spoken at the hearing (A136).

Officer Schell decided to get out of the car. Because Mr. Rodriguez was "right next to" the door, Officer Schell asked Mr. Rodriguez to "step back" so he could get out (A37, 58, 64).

As the 6'2" Officer Schell stepped out of the car, his badge visible but his hand not on his service weapon, he asked, "what do you have on you?" (A37, 65–66). Mr. Rodriguez then said he had a "gun in [his] waistband" (A37, 62). The entire interaction was "fairly quick" (A65).

Officer Schell restrained Mr. Rodriguez. His sergeant recovered a firearm from Mr. Rodriguez's waistband. The magazine was loaded with 8 rounds, but the gun had nothing in the chamber (A37, 39).

Mr. Rodriguez was arrested, cuffed, and transported to the precinct (A39). During fingerprinting, Officer Schell remarked that Mr. Rodriguez had never "really been arrested for anything serious," and Mr. Rodriguez allegedly said he "carr[ied] [the gun] for protection" (A40).

Officer Schell clarified that his initial impression of Mr. Rodriguez's "reckless" biking derived from having one hand on the handlebars and cars passing the bicycle on the street (A34, 54–56). Officer Schell acknowledged there were no bike lanes on Beach 25, that Mr. Rodriguez had not been riding his bike on the sidewalk, and that no traffic infractions had been charged (A54–56).

Officer Schell also conceded that prior to the stop, and prior to Mr. Rodriguez's alleged admission, he did not know what the "object" might

have been, admitting, "[a]ll I could tell [was] that it was a bulky object" (A75). Officer Schell did not testify that he thought it was a gun, that the object looked like a gun, or that anything gave him reason to believe that Mr. Rodriguez might be armed. Instead, throughout his testimony, Officer Schell simply called it the "object" in Mr. Rodriguez's waistband (A35, 74).

The Defense Case

In his testimony, appellant Lance Rodriguez contradicted several aspects of Officer Schell's version of events. Twenty years old, with no prior felony conviction, he was visiting friends in the Rockaways that day, bicycling down Beach 25 Street with his right hand on the handlebars and his left on his phone, which was playing music (A86–87, 91–92, 108–09). He was not swerving (A127–28).

As he rode towards his second friend's home, Mr. Rodriguez saw a silver car approach from behind (A92). As it cruised past him, he realized it was driven by police, but they did not ask him to stop; no other cars passed him during the relevant stretch of Beach 25 (A93, 108).

The officers waited at the intersection of Camp Road, and then turned with him. The officer in the passenger seat (who was not Officer Schell) asked what he was doing, to which Mr. Rodriguez responded, "Nothing." The officer then told him to stop—the only time the officer

did so—and Mr. Rodriguez brought his bike to a stop in the middle of Camp Road (A93–94, 99, 102, 118).

The officer in the passenger seat got out of the car, walked up to Mr. Rodriguez, unzipped his jacket, and started patting him down (A99). Only then did the officer ask if Mr. Rodriguez had anything on him; Mr. Rodriguez did not respond, and never admitted having a gun (A100). The officer reached Mr. Rodriguez's waistband, yelled "gun," and Officer Schell jumped out of the back seat to restrain Mr. Rodriguez's hands (A102–04). Cuffed and placed in the unmarked car, Mr. Rodriguez was eventually transported to the precinct (A104). He denied ever telling the officers that he had the gun for protection (A128–29).

The Post-Hearing Motion to Suppress

The defense moved to suppress the gun and statements as fruits of an illegal stop under the state and federal constitutions. Mr. Rodriguez was "unlawfully seized," the defense charged, when the police pursued him, twice ordered him to stop, and caused him to submit to their authority, all despite lacking reasonable suspicion of criminal activity at the inception of the stop (A143–44, 152).

Recognizing that police/motorist stops are presumptive seizures, the defense urged the court to apply "[t]he same constitutional rules and rationale" to "this case involving a police/bicyclist encounter": reasonable suspicion under *De Bour* Level 3 and its federal counterpart,

Terry v. Ohio, 392 U.S. 1 (1968) (A144–45). The defense also argued that the totality of the circumstances elevated this encounter to an intrusive seizure requiring reasonable suspicion: Officer Schell pursued Mr. Rodriguez in his police car and twice yelled at him to stop, leading Mr. Rodriguez to pull his bike over on the side of the road (A145).

Reasonable suspicion was lacking, the defense argued, because the presence of an unidentifiable bulky object in Mr. Rodriguez's waistband could not, without more, give rise to a reasonable suspicion of past or future criminal conduct. Officer Schell admitted he could not tell what the object was, did not act as if the object was a gun when he stopped Mr. Rodriguez, and otherwise conceded there were no relevant radio runs or even prior encounters with Mr. Rodriguez that could have suggested the object was a firearm (A145–47, 150–51). "[A]n unidentifiable bulge," the defense concluded, "which is readily susceptible of an innocent as well as a guilty explanation[,] is not sufficient to justify a seizure" (A150).

To the extent that a traffic infraction could have provided an alternative justification, the record did not establish one. Because there was no bike lane or center divider, Mr. Rodriguez was appropriately biking on the street; Officer Schell's only example of "recklessness" was that cars were passing the bike, indicative of only how "other drivers were operating their car[s]" and not of how Mr. Rodriguez was biking (A147–48). No traffic violations had ever been charged (A148).

The People responded that the stop should be evaluated as a *De Bour* Level 2 "common-law right to inquire" encounter, not as a Level 3 seizure requiring reasonable suspicion, and argued the stop was justified under the Level 2 "founded suspicion" standard (A163–64). The officers' initial calling out to Mr. Rodriguez was supported by an objective, credible reason to inquire about "what he was holding that was prohibiting him from riding his bike with both hands on the handlebars," which further made it "reasonable to ask the defendant to stop and ask if he had anything on him" (A163–64). While conceding there was no "alleg[ation] that [Mr. Rodriguez] committed a traffic infraction," the People argued that his alleged "disrupting the normal flow of traffic" could also have been grounds for police inquiry, as it would "draw the attention" of the officers (A164). The People did not argue in the alternative that the police conduct was supported by reasonable suspicion, or claim that the gun or statements were otherwise admissible irrespective of the legality of the police encounter.

In reply, the defense acknowledged the People's traffic-infraction concession (A172); pointed out, among other things, that Mr. Rodriguez's status as a moving bicyclist distinguished his case from those relied on by the People (A170–72, A174–77); and emphasized again that other drivers' reactions to Mr. Rodriguez did not mean he was biking in a reckless manner. Instead, he was appropriately riding on the roadway, with a single hand on the handlebars as required by law (A173–

74) (citing V.T.L. § 1231; N.Y.C. Rules & Regs. § 4-12(e)). The defense again urged the court to evaluate the encounter as a *De Bour* Level 3 stop, and not a Level 2 encounter, because its circumstances would have conveyed to a reasonable person that he was not free to leave (A177). Even if the initial command to "stop" was a "request" that did not rise to the level of a seizure, it was followed by pursuit, a second "even louder" command to stop, and "submi[ssion] to the assertion of police authority," which did amount to a seizure (A175–77). Because there was otherwise no reasonable suspicion of criminality, the stop was illegal, and its fruits should be suppressed (A177).

The Suppression Decision

The court denied suppression (Decision & Order, Ira H. Margulis, J., dated Mar. 21, 2016). Largely crediting Officer Schell's version of events, but also finding that Officer Schell had "yelled" at Mr. Rodriguez to stop, the court agreed with the People that the encounter should be evaluated not as an automobile stop, but instead as a police/pedestrian encounter, triggering only the common-law right of inquiry under *De Bour* Level 2 (A179, 181–82). The court ruled that the officers had an "objective" and "credible" basis for "approaching and stopping [Mr. Rodriguez] to request information," because he was "riding a bicycle with one hand on the handle bars" and causing a "disrup-

tion in traffic," all while "holding an object on his waistband" (A181–82).[3] Accordingly, the court found "no basis" for suppression (A182).

Despite the arguments raised during briefing, the suppression court did not determine whether Mr. Rodriguez had been "seized." It did, however, determine that he was not in "custody" for a separate request to suppress his statements (A182–84).

The Guilty Plea

On September 19, 2016, Mr. Rodriguez pleaded guilty to a single count of attempted criminal possession of a weapon in the second degree, a class D violent felony, in exchange for a sentence of 2 years in prison and 1½ years of post-release supervision (A186). He purported to waive his right to a direct appeal (A191). The court sentenced Mr. Rodriguez as promised on October 11, 2016, acknowledging his "efforts to turn [his] life around" (A195–97).

The Appellate Proceedings

On his initial appeal before the Appellate Division, Second Department, Mr. Rodriguez argued, among other things, that a police stop

[3] After concluding that this amounted to a lawful *De Bour* Level 2 encounter, the court observed that because Officer Schell "had a reasonable suspicion that the defendant was engaging in criminal activity[,] the stop[] and brief detention [were] authorized" (A182). Because the court's analysis was about *founded* suspicion under *De Bour* Level 2, not reasonable suspicion under Level 3, this appears to be an error and not an alternative holding.

of a bicycle should be a *De Bour* Level 3 encounter akin to a police stop of a car. In any event, even crediting Officer Schell's testimony, the officers' commands to stop, their pursuit, and Mr. Rodriguez's submission added up to a Level 3 intrusion requiring reasonable suspicion, which the officers lacked (Defense Brief at 13–22; Defense's Reply Brief at 1–8). The People responded that Mr. Rodriguez's waiver of appeal barred this claim, and, in any event, the stop was proper under Level 2, because the police had observed Mr. Rodriguez "recklessly riding his bike with one hand holding a bulky object in his waistband," giving the requisite "founded suspicion" (People's Response Brief 4, 11–18, 21).

The Appellate Division ruled that Mr. Rodriguez had validly waived his right to appeal. It did not address the merits. *People v. Rodriguez*, 176 A.D.3d 1111, 1111 (2d Dept. 2019).

Mr. Rodriguez sought leave to appeal to this Court to challenge the appeal waiver. This Court granted leave. *People v. Rodriguez*, 34 N.Y.3d 1162 (2020) (Fahey, J.). The matter was ultimately heard together with several other appeals, with this Court ruling that the appeal waiver was "invalid and unenforceable" and remitting for a decision on the merits. *People v. Bisono*, 36 N.Y.3d 1013, 1017–18 (2020).

On remittitur, the Appellate Division again affirmed. *See People v. Rodriguez*, 194 A.D.3d 968 (2d Dept. 2021) (A2). Reasoning that case law "uniformly" treats police "encounters" with bicyclists "under the *De Bour* analysis applicable to pedestrians," the Appellate Division ex-

plicitly held that investigative stops of bicyclists trigger only the common-law right of inquiry under *De Bour* Level 2, not the "reasonable suspicion" required by *De Bour* Level 3 that "generally" applies to automobile stops (A4). Analyzing the encounter as if Mr. Rodriguez were a pedestrian, the Appellate Division determined that a police command to a pedestrian to "stop" implicates only *De Bour* Level 2. While Mr. Rodriguez "stopped in response to the commands," the officers "did not block [Mr. Rodriguez's] path or otherwise signal that he was not free to leave," and the "unobtrusive manner in which the police followed the defendant did not elevate the pursuit itself to a seizure" (A4). The Appellate Division concluded the officers were "justified in making a common-law inquiry" by telling Mr. Rodriguez to "hold up," and affirmed the denial of suppression (A4).

The Honorable Eugene Fahey granted Mr. Rodriguez leave on August 24, 2021 (A1).

ARGUMENT

THE POLICE INVESTIGATIVE STOP OF LANCE RODRIGUEZ, A MOVING BICYCLIST ON A PUBLIC ROAD, WAS A *DE BOUR* LEVEL 3 SEIZURE REQUIRING REASONABLE SUSPICION OF CRIMINALITY, AND BECAUSE THAT WAS LACKING, THE FRUITS OF THE UNLAWFUL STOP MUST BE SUPPRESSED.

The police ordered defendant-appellant Lance Rodriguez, a bicyclist on a public roadway, to pull over. When he kept moving, the police followed him and again ordered him to stop. This time, he submitted to their authority by coming to a stop at the side of the road, waiting as they pulled up next to him.

These circumstances bore all the hallmarks of a police investigative stop of a moving vehicle, and thus of a *De Bour* Level 3 encounter—a constitutional "seizure." The law has long recognized that when the police pull over a moving motor vehicle, it is a stressful and significant intrusion into a person's freedom of movement, under authority no motorist feels free to ignore. For that reason, case after case establishes that police stops of cars and other motor vehicles are *De Bour* Level 3 seizures at a minimum, requiring at least reasonable suspicion to be lawful.

As many courts have already recognized, police stops of moving bicycles should be treated the same way. They are analytically indistinguishable from police stops of cars, significantly infringing on a person's

freedom of movement, interrupting momentum, and compelling submission to police authority—all at a level exceeding what a pedestrian faces when stopped by police. New York's Vehicle and Traffic Law also already treats bicyclists more like motorists than pedestrians. So a police investigative stop of a moving bicycle should be a *per se De Bour* Level 3 intrusion—one that must, like an investigative stop of a car, be supported at its inception by reasonable suspicion of past or ongoing criminal activity in order to be lawful.

Alternatively, the totality of these circumstances confirms that *this* particular bicycle stop was a *De Bour* Level 3 intrusion. It featured many hallmarks of a constitutional seizure: a yelled command by police to stop, pursuit in the wake of noncompliance, another yelled command to stop, a submission to the show of authority, and the police pulling up so close that Mr. Rodriguez blocked their car door. No reasonable person would feel free to disregard police authority and leave on these facts, especially at such a late hour. The record therefore compels a finding that this stop was a seizure.

Since Mr. Rodriguez was seized, the police conduct was unlawful unless supported by reasonable suspicion at its inception—an issue the lower courts did not reach. Here, though, the sole suspicion of "criminality" was that a "male Hispanic" was riding a bicycle in a "reckless" manner while holding an unidentified object in his waistband. But the officer who saw the "object" freely conceded he could not identify it, and

did not act as if it was a weapon. And not only is "reckless bicycling" not a criminal offense, what the officer characterized as "reckless" was, in reality, innocuous behavior not at all suggestive of criminality.

Because Mr. Rodriguez was unlawfully seized without the requisite reasonable suspicion, this Court should reverse the decision denying suppression. And because the gun, magazine, and statements were all fruits of the illegal stop—the People have never argued otherwise—this Court should dismiss the accusatory instrument. *See* U.S. Const. amends IV, XIV; N.Y. Const. art. I, § 12.

A. Under the four-level *De Bour* framework, a police encounter that significantly interrupts an individual's liberty of movement is a Level 3 "seizure."

Both Article I, § 12 of the New York Constitution and the Fourth Amendment to the United States Constitution protect against "unreasonable searches and seizures." In New York, police/citizen encounters implicating this right are assessed under *People v. De Bour*, 40 N.Y.2d 210 (1976), which applies to encounters with both pedestrians and people in vehicles. *See People v. Hinshaw*, 35 N.Y.3d 427, 431 (2020); *People v. Garcia*, 20 N.Y.3d 317, 323 (2012).

De Bour classifies encounters under one of four numerical levels based on intrusiveness and severity, and then considers whether "the police action was justified in its inception" and was "reasonably related

in scope to the circumstances which rendered its initiation permissible." *De Bour*, 40 N.Y.2d at 215, 222. Derived from state constitutional law and common law, and "based upon considerations of reasonableness and sound State policy," the *De Bour* framework is more protective of the right to be free from "arbitrary or intimidating police conduct" than its federal Fourth Amendment counterpart. *People v. Hollman*, 79 N.Y.2d 181, 195 (1992).

Reflecting this additional protection, *De Bour* Level 1 and Level 2 address encounters that "fall short of . . . seizures." *Id.* At Level 1, a "minimal intrusion," an officer can "approach[] to request information" when "there is some objective credible reason for that interference not necessarily indicative of criminality." *De Bour*, 40 N.Y.2d at 223. At Level 2, the "common-law right to inquire," an officer may engage in "a somewhat greater intrusion" and "interfere with a citizen to the extent necessary to gain explanatory information," so long as there is "a founded suspicion that criminal activity is afoot." *Id.* However, a Level 2 intrusion cannot cross the boundary into a "forcible seizure." *Id.*; *see People v. Cantor*, 36 N.Y.2d 106, 113–14 (1975) ("The common-law power to inquire [at Level 2] does not include the right to unlawfully seize.").

By contrast, Level 3 is a constitutional "seizure," applying to encounters that result in a "significant interruption with an individual's liberty of movement." *De Bour*, 40 N.Y.2d at 216, 223. At Level 3, an of-

ficer is authorized to "forcibl[y] stop and det[ai]n" a person, but only if the officer "entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor." *Id.* at 223 (citing, among others, C.P.L. § 140.50(1); *Terry*, 392 U.S. at 1). A Level 3 seizure is sometimes called an "investigative stop" or a "*Terry*" stop. *Hinshaw*, 35 N.Y.3d at 431.

Particularly relevant here, a factor that almost always indicates a Level 3 seizure and a "significant interruption" of liberty of movement is if a person submits to "the authority of the badge." *People v. Bora*, 83 N.Y.2d 531, 534–35 (1994) (citing *Cantor*, 36 N.Y.2d at 111); *see California v. Hodari D.*, 499 U.S. 621, 626 (1991) ("submission to the assertion of authority" is a seizure).

Finally, at Level 4, "a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence." *De Bour*, 40 N.Y.2d at 223.

B. The law is settled that police stops of moving cars are *De Bour* Level 3 constitutional seizures that require reasonable suspicion.

This Court has long held that police stops of moving vehicles are *De Bour* Level 3 seizures that cause significant interruption to a person's freedom of movement and personal liberty. *See People v. Spencer*, 84 N.Y.2d 749, 752 (1995) (noting "time and again, that the stop of an

automobile is a seizure implicating constitutional limitations"); *People v. Sobotker*, 43 N.Y.2d 559, 563 (1978) (automobile stops go beyond the "common-law right of inquiry" and are seizures); *People v. Ingle*, 36 N.Y.2d 413, 418 (1975) (observing that a person "accosted" and "restrained" by an officer on a public road has been seized). The "obvious impact" of "stopping the progress of an automobile" is materially "more intrusive than the minimal intrusion involved in stopping a pedestrian," thereby creating "at least a limited seizure subject to constitutional limitations." *Spencer*, 84 N.Y.2d at 752.

Car stops are seizures even if the "resulting detention [is] quite brief" or the "purpose of the stop is limited." *Id.* As the United States Supreme Court has noted, when officers "signal[] a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority," they engage in an "interfere[nce] with freedom of movement" that is "inconvenient," "consume[s] time," and may create "substantial anxiety." *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). And because the stop detains the driver and all passengers after diverting them from their paths, it communicates to any "sensible person" that he is not free to "terminate the encounter" and leave—another hallmark of a seizure. *Brendlin v. California*, 551 U.S. 249, 257 (2007); *see Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) ("[F]ew motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.").

While cars are the quintessential American motor vehicle, this doctrine extends to stops of motorcycles, trucks, and other vehicles too. Stops of those vehicles also involve interfering with a person's freedom of movement, require submission to a show of authority, and create anxiety associated with law enforcement's approach on the road. *See, e.g.*, *People v. Floyd*, 171 A.D.3d 787, 789 (2d Dept. 2019) (treating investigative stop of truck as seizure requiring reasonable suspicion); *United States v. Gunnell*, 775 F.3d 1079, 1083 (8th Cir. 2015) (motorcycle); *State v. Lake*, No. 43101, 2016 WL 1366959, at *2 (Idaho Ct. App. Apr. 6, 2016) (all-terrain vehicles); *State v. Branson*, No. A07-0987, 2008 WL 2796589, at *3 (Minn. Ct. App. July 22, 2008) (snowmobiles); *Stone v. State*, 856 So. 2d 1109, 1111 (Fla. Dist. Ct. App. 2003) (motorized scooter).

In short, it has long been uncontroversial that police stops of cars, motorcycles, and other vehicles significantly interfere with the freedom of movement of driver and passenger, and require the driver's submission to official authority. New York recognizes that these stops are seizures classified as *De Bour* Level 3 encounters.

C. Because there is no material difference between investigative stops of a motor vehicle and stops of a moving bicycle, the bicycle stop here was also a seizure requiring reasonable suspicion.

In this case, the police followed Mr. Rodriguez as he bicycled on a public road. They twice commanded him to stop, and he eventually submitted to their authority and pulled his bicycle over. Because these circumstances are materially indistinguishable from an investigative stop of a motor vehicle, they, too, should amount to a *De Bour* Level 3 encounter and constitutional seizure. This Court should recognize police stops of bicycles as akin to police stops of cars and other motor vehicles, and thus as seizures requiring reasonable suspicion.

The long-established precedent classifying police motor vehicle stops as *De Bour* Level 3 seizures does not rely on those vehicles being motorized. Rather, what is constitutionally significant is the obvious "impact" of "stopping" or "interfering" with "the progress" of a moving vehicle. *Hinshaw*, 35 N.Y.3d at 432, 439 (internal quotation marks and citations omitted). A vehicle stop requires a person to affirmatively bring the vehicle to a halt for the police to investigate or even just to answer questions, which is categorically "more intrusive than the minimal intrusion involved in stopping a pedestrian." *People v. John BB*, 56 N.Y.2d 482, 487 (1982). In *Spencer*, for instance, this Court distinguished "police/motorist encounters" from "police/pedestrian encounters" precisely because the degree of intrusion in stopping a car is

so great. *Spencer*, 84 N.Y.2d at 752. Analogous federal decisions focus on similar concerns, like officers' interference with an individual's freedom of movement and their "show of authority." *Prouse*, 440 U.S. at 657. Vehicle stops are *per se De Bour* Level 3 seizures because they require redirection or halting of movement and submission to authority, neither of which depends on the presence of a motor or a mechanism of propulsion beyond human power.

By contrast, when an officer approaches a pedestrian to make a mere inquiry, whether in a law-enforcement or "public service" capacity, *see De Bour*, 40 N.Y.2d at 218, the pedestrian is not necessarily "seized" because he "may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 498 (1983). Directing questions at a pedestrian does not require interfering with the pedestrian's movement; a pedestrian can answer or decline without altering his or her intended course or direction, and even if he or she does stop briefly, there is no significant diversion. *See People v. Carrasquillo*, 54 N.Y.2d 248, 252–53 (1981) (police conversation with pedestrian was Level 2 *De Bour* encounter because they did nothing to suggest he was compelled to answer questions).

So like a car stop, and unlike a pedestrian encounter, a stop of a moving bicyclist requires the police, through a show of authority, to command the rider to stop, and the rider to halt his or her momentum. This is significantly more intrusive to a bicyclist's freedom of movement

than posing a question to a pedestrian, and reflects a clear submission to the authority of the badge. *Spencer*, 84 N.Y.2d at 752; *Cantor*, 36 N.Y.2d at 111.

Further demonstrating that interference with movement through police authority is the key to the car-stops-are-seizures doctrine—not the motorized nature of the subject vehicles—are those few cases where car "stops" are *not* seizures. Police can approach a car that is already stationary, for instance, because they have neither "interfer[ed] with [the] moving vehicle" nor caused it to stop through their own authority. *People v. Ocasio*, 85 N.Y.2d 982, 984 (1995); *see Spencer*, 84 N.Y.2d. at 753; *United States v. Baker*, 290 F.3d 1276, 1279 (11th Cir. 2002) (no seizure of car "blocked by traffic" because no show of authority). Courts have also recognized that officers on foot do not seize vehicles that have only just begun to move, as both the degree of intrusion and "abundant displays of authority" that normally characterize a vehicle stop are absent. *United States v. Adegbite*, 846 F.2d 834 (2d Cir. 1988); *see also State v. Simpson*, 446 P.3d 1160, 1166–67 (N.M. Ct. App. 2019) (on-foot officer tapped on car's window in a parking lot as it begins to move). *But see Sobotker*, 43 N.Y.2d at 562–64 (police stop of slow-moving car *temporarily* stopped at a stop sign was still *De Bour* Level 3 seizure).

For these reasons, stopping a bicycle in motion is a seizure because it is indistinguishable from stopping a moving motor vehicle. In both kinds of stops, the police command the driver or bicyclist to stop,

requiring the driver or bicyclist to halt his or her momentum to comply with police authority. Because both kinds of stops cause extensive interference with the driver or bicyclist's chosen path and require submission to a police show of authority, the constitutional intrusion is the same.

This conclusion—that bicycle stops are constitutionally the same as motor vehicle stops, and should be treated as such under *De Bour*—finds additional support in other sources of law. For instance, equating the two kinds of stops is fully consistent with the Vehicle and Traffic Law, which for most relevant purposes applies similarly to bicycles and motor vehicles, but not pedestrians.

While the Vehicle and Traffic Law does not include bicycles and other human-powered devices in its definition of vehicles, V.T.L. § 159,[4] it renders this distinction irrelevant by "grant[ing]" every person riding a bicycle "all of the rights" and "subject[ing]" them to "all of the duties" that are "applicable to the driver of a vehicle" under the traffic laws.

[4] The omission of bicycles from the definition of "vehicle" is due to historical quirk. Prior to the 1959 enactment of the Vehicle and Traffic Law, the model Uniform Vehicle Code, on which the V.T.L. was based, omitted bicycles from the definition of "vehicle," but paired that omission with a "rights" and "privileges" provision. New York followed that framework. But although the Code's definition of "vehicle" was updated to *include* bicycles in 1975, New York remains among a "slight majority of states" that have not updated their own laws to account for this change in the model code. Ken McLeod, *Bicycle Laws in the United States: Past, Present, and Future*, 42 Fordham Urb. L.J. 869, 876–78 (2015).

V.T.L. § 1231 ("Traffic Laws Apply to Persons Riding Bicycles . . ."). Bicycles are therefore equal participants on public roadways, sharing in the rights and responsibilities of other drivers and riders. The Vehicle and Traffic Law also uses the same "rights" and "duties" language with other vehicles, in sections establishing that "traffic laws apply" to them. *See* V.T.L. §§ 1105 & 1261 (riders of animals and animal-drawn vehicles), 1250 (motorcycles), 1281(1) (scooters).

Pedestrians, by contrast, are not granted equal status under the Vehicle and Traffic Law. The traffic laws do not "apply" to pedestrians in the way they do to bicyclists; instead, pedestrians are "subject to traffic regulations." V.T.L. § 1150. And rather than sharing the same "rights and duties" as motorists, pedestrians have certain "privileges" and "restrictions" enumerated in the pedestrian-specific Article 27. *Id.*; *see also* N.Y.C. Rules & Regs. § 4-04(a) (creating parallel framework in New York City).

Bicyclists are thus treated more like motorists, and unlike pedestrians, with respect to laws relating to traffic and the roadways. *See, e.g.*, *Redcross v. State*, 241 A.D.2d 787, 791 (3d Dept. 1997) (bicyclists were not pedestrians for the purposes of an invalidly installed pedestrian control device). This further supports that bicyclists should be treated like motorists with respect to police encounters.

Another part of the Vehicle and Traffic Law illustrates why police encounters with bicyclists are qualitatively different than encounters

with pedestrians. A key indicator of a seizure is whether a person feels free to disregard the police request and "proceed[] on his way." *Cantor*, 36 N.Y.2d at 111; *Royer*, 460 U.S. at 498. Bicyclists are more likely than pedestrians to be in the flow of vehicle traffic, and are sometimes required to ride on roads rather than on sidewalks. *See, e.g.*, V.T.L. § 1156(a) (requiring pedestrians to use sidewalks when provided); N.Y.C. Rules & Regs. § 4-07(c)(3)(i) (prohibiting biking on sidewalks unless permitted by sign); N.Y.C. Administrative Code § 19-176 (prohibiting bicycling on the sidewalk). Bicyclists also reach speeds generally unattainable by pedestrians—speeds at which they can cause damage to objects and people they strike.

Thus, unlike pedestrians, bicyclists are more likely to receive and perceive commands by police to be "lawful order[s]" or "direction[s]" by officers "duly empowered to regulate traffic." V.T.L. § 1102. Because a failure to comply with a lawful order is itself an infraction, *see id.*, and can lead to an escalation of an encounter, a bicyclist on a roadway is less likely than a pedestrian to perceive a police order to be a mere request that can be ignored—especially if the order is a direction to pull over to the side of the road and stop. *See Berkemer*, 468 U.S. at 436 & n.24 (citing § 1102 and observing that it is a "crime either to ignore a policeman's signal to stop one's car" or to drive away once stopped); *see generally* James Mooney, Note, *The Power of Police to Give "Lawful Orders*," 129 Yale L.J. 1568 (2020) (addressing significant problems cre-

ated by vague "lawful order" statutes). A command to "stop" directed at a bicyclist on a public road is very different from one directed at a pedestrian; moving bicyclists will tend to assume that submission to any police "show of authority" is required, rendering the encounter a seizure. *Prouse*, 440 U.S. at 657.

Support for the conclusion that bicycle stops should be treated the same way as car stops also finds support in the law of other jurisdictions. Several courts have already recognized that bicycle stops should be treated the same as car stops—as seizures requiring reasonable suspicion—and many more assume this to be true.

In *State v. Turner*, 191 P.3d 697 (Or. Ct. App. 2008), for instance, an officer saw a Critical Mass bicyclist with what appeared to be a sword handle wedged in his back. The officer inquired, and when the defendant said it was a "ninja sword," the officer motioned for him to pull over. *Id.* at 699. Relying in part on Oregon statutes granting "the same rights and duties" to bicyclists as drivers, and making it a traffic violation to refuse to obey a police officer, the Oregon intermediate appellate court held that the command to pull over amounted to a significant restriction on the defendant's liberty, and could reasonably communicate that he was not free to leave. *Id.* at 700 (citing Or. Rev. Stat. §§ 814.400(1), 811.535). Based on similar reasoning—and, again, a statute granting the same duties to bicyclists that are enjoyed by drivers of cars, much like V.T.L. § 1231—the New Mexico intermediate ap-

pellate court has also held that "a person riding a bicycle and subject to a traffic stop is afforded the same protections from unreasonable search and seizure as those afforded to a person in an automobile subject to a traffic stop." *State v. Mendez*, No. 34,778, 2017 WL 3484696, at *2 (N.M. Ct. App. July 12, 2017) (citing N.M. Stat. Ann. § 66-3-702).

The Ohio intermediate appellate court has also repeatedly equated bikes and cars for the purpose of investigative stops. *See, e.g.*, *State v. Swift*, No. 27036, 2016 WL 7367764, at *2 (Ohio Ct. App. Dec. 16, 2016) ("A stop of a person on a bicycle is governed by the same standards as any other traffic stop . . . ."); *State v. Roberts*, No. 23219, 2010 WL 334913, at *2 (Ohio Ct. App. Jan. 29, 2010) (police can stop vehicles, "motorized or otherwise," only with reasonable suspicion). So, too, has the Georgia intermediate appellate court. *See In re T.J.B.*, 517 S.E.2d 77, 78 (Ga. Ct. App. 1999) (bicycle stop governed by "analysis involv[ing] the legitimacy of a vehicle stop").

At least three federal courts also have expressly treated bicycle stops like car stops for Fourth Amendment purposes. *See United States v. Morgan*, 855 F.3d 1122, 1125 (10th Cir. 2017) (analyzing bike stop under law governing car traffic stop); *United States v. Barker*, No. 8:13-CR-224-T-33AEP, 2013 WL 6231282, at *2 (M.D. Fla. Dec. 2, 2013), *aff'd in relevant part*, 644 F. App'x 1000 (11th Cir. 2016); *United States v. Morris*, 482 F. App'x 779, 780 (4th Cir. 2012); *see also United States v.*

Bell, 86 F.3d 820, 822 (8th Cir. 1996) (treating stop of a bicyclist under the framework for pretextual traffic stops of cars).

Other jurisdictions, while not explicitly equating bicycle stops to car stops, have nonetheless analyzed them as police seizures because a reasonable person would not have felt free to leave, or to ignore an officer's command. For instance, in *Jones v. State*, 572 A.2d 169 (Md. 1990), the high court of Maryland relied in part on the lawful-order doctrine to rule that an officer's statements to a passing bicyclist—"Hey, could you come here" or "Hold on a minute"—amounted to commands a reasonable person would not feel free to disregard. As the court explained, the defendant "was operating a bicycle on a public highway and it would be an offense under the Maryland Vehicle Law for him willfully to disobey any lawful order or direction of any police officer." *Id.* at 170, 172–73. Similarly, in *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002), the Supreme Court of Tennessee applied state law on seizures (that is strikingly similar to New York's) to determine that a police stop of a cyclist, accompanied by lights and verbal commands, amounted to a seizure under a totality analysis. *Id.* at 336–38; *see also State v. Johnson*, 316 S.W.3d 390, 397 (Mo. Ct. App. 2010) (bicycle stop was seizure because officers stopped a bicyclist, told him they "th[ought]" he had a warrant, and physically stood in his way before confirming the warrant was active); *Commonwealth v. Williams*, 444 A.2d 1278, 1279–80 (Pa.

Super. Ct. 1982) (patrol car stop of cyclist was seizure under totality analysis).

Still others have assumed, without further discussion, that bicycle stops require reasonable suspicion. *See, e.g.*, *Morgan v. United States*, 121 A.3d 1235, 1237, 1239 (D.C. 2015); *State v. Parks*, 95 A.3d 42, 46–49 (Del. Super. Ct. 2014); *State v. Abraham*, 720 S.E.2d 491, 493–94 (S.C. Ct. App. 2011); *Williams v. State*, 32 So. 3d 1222, 1226–27 (Miss. Ct. App. 2009); *United States v. Banks*, 553 F.3d 1101, 1103–04 (8th Cir. 2009); *Ross v. State*, 844 N.E.2d 537, 540, 541–42 (Ind. Ct. App. 2006); *Joseph v. State*, No. A-7365, 2000 WL 1818486, at *1–2 (Alaska Ct. App. Dec. 13, 2000).

In sum, courts in a significant number of jurisdictions have ruled expressly that bicycle stops are the same as car stops, have reached the same conclusion under a totality analysis, or have assumed that bicycle stops are governed by car-stop rules. They have recognized that bicycle stops are as intrusive as car stops, cited the lawful order doctrine, and relied on statutory provisions granting bicyclists the same privileges and duties as motorists. But regardless of how they arrived at their conclusions, courts across the country have ruled that bicycle stops are constitutional seizures—persuasive evidence that this Court should rule similarly.

Furthermore, the Appellate Division's conclusion to the contrary notwithstanding (A4), New York courts have already applied the car-

stop framework to bicycle stops. In *People v. Hickman*, 185 A.D.3d 407 (1st Dept. 2020), for instance, the police had "reasonable suspicion to stop" a man on a bicycle and pat him down. *Id.* at 408; *see also People v. Morris*, 138 A.D.3d 1239, 1240 (3d Dept. 2016) (evaluating bicycle stop under reasonable suspicion). In *People v. Varn*, 182 Misc. 2d 816 (Cnty. Ct., Rensselaer 1999), the Rensselaer County Court specifically held that "the same constitutional rules and rationale applicable to police/motorist encounters" should apply to "police/bicyclists encounters," and the "stop of the defendant on his bicycle [wa]s a seizure implicating constitutional limitations." *Id.* at 821 (citing *Spencer*, 84 N.Y.2d at 752). And while some courts have analyzed police "encounters" with cyclists under *De Bour* Level 2, not all "encounters" are actual *stops*. *See, e.g.*, *People v. Day*, 8 A.D.3d 495, 495–96 (2d Dept. 2004) (officer possessed founded suspicion for common-law right to inquire when he saw the defendant on a bicycle, but before officer acted on it, it was transformed into reasonable suspicion by radio run); *People v. Ruffin*, 133 A.D.2d 425, 425–26 (2d Dept. 1987) (no seizure when bicyclist initiated the encounter with police).

Treating bicycle stops like car stops is not only the correct legal approach, but the right conclusion as a matter of public policy. Bicycling is not just an alternative to driving. It can be a person's only means of nonpublic transportation, especially for young people and others with limited financial means, which often includes communities of color. This

is particularly true in parts of New York City where car ownership is very expensive or not feasible.

If police stops of bicycles are not seizures, officers can pull over bicyclists without having to articulate any significant grounds for suspecting them of wrongdoing. *See De Bour*, 40 N.Y.2d at 213, 220 (crossing the street to avoid police supplied Level 2 "founded suspicion"); *People v. Moore*, 176 A.D.2d 297, 298–99 (2d Dept. 1991) (suggesting "totally innocuous" behavior authorized detective to exercise *De Bour* Level 2 "common-law right of inquiry"). Entirely different rules will govern police conduct directed at different modes of transportation on the same roadways. And, once stopped on less than reasonable suspicion, bicyclists would risk the encounter escalating for any number of reasons. *See* Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 St. John's L. Rev. 535, 536–37 (2002) (describing the cascading possibilities arising out of a vehicle stop, such as intrusive searches and arrests).

Police stops can be stressful, alarming, and even dangerous, and people who rely on bicycles as their primary mode of transportation should not be made more vulnerable to intrusive police encounters simply because their mode of transportation is not a car. Any increased likelihood of invasive encounters with police officers will require cyclists to navigate the difficult terrain of "voluntary" versus "compulsory" police commands, as well as the potential ramifications of refusal—what

one commentator has called the "gamesmanship" model of criminal procedure, which places the burden of protecting rights on the individual rather than the state. *See* Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 Buff. L. Rev. 1483, 1484–89 (2007).

By contrast, the rule urged by Mr. Rodriguez, which would grant bicyclists the same protection from seizures as drivers of cars, will encourage the ongoing embrace of the bicycle as a clean, sensible, and affordable mode of transportation. The timing could not be better, as "[c]oncern over climate change, increased gasoline prices, the obesity epidemic, and the global economic meltdown have given rise to a renewed interest in bicycle transportation among citizens and, especially, public officials." Ryan Seher, Comment, *I Want to Ride My Bicycle: Why and How Cities Plan for Bicycle Infrastructure*, 59 Buff. L. Rev. 585, 586 (2011). Communities across the state have invested extensive resources into making cycling more appealing, both as a leisure activity and as a substitute for driving motor vehicles. *See, e.g.*, Claire Bryan, "New Albany bike/pedestrian plan unveiled with a focus on equity," Albany Times Union, May 21, 2021, 2021 WLNR 16518375; Editorial, "Bike paths: build them and cyclists will come," Long Island Herald, Dec. 10, 2020, https://www.liherald.com/stories/bike-paths-build-them-and-cyclists-will-come,129204. A contrary rule that diminishes bicyclists' civil rights on the roadways might very well impede greater adoption of

bicycling as a means of daily transportation while delaying the societal acceptance of bicyclists as shared users of the road.

In sum, granting bicyclists the same legal protections as motorists during police encounters will promote the public interest by, among other things, mitigating the impact of poverty, increasing the appeal of cycling, easing traffic congestion, improving public health, empowering young people, and diminishing environmental degradation. David Pimentel, *Cycling, Safety, and Victim-Blaming: Toward A Coherent Public Policy for Bicycling in 21st Century America*, 85 Tenn. L. Rev. 753, 755–76 (2018). Public policy and the public interest both favor a constitutional rule that treats a bicycle stop as a *De Bour* Level 3 seizure.

* * *

Accordingly, for the reasons set forth above, police investigative stops of moving bicyclists should be treated as *De Bour* Level 3 constitutional seizures, just like the law has treated stops of cars for over 40 years. The only difference between Mr. Rodriguez's encounter with police and that of a driver of a car or motorcycle was that Mr. Rodriguez's vehicle, his bicycle, was self-powered. He experienced the same level of intrusion, the same curtailing of his freedom of movement, and the same requirement that he submit to authority that would have been faced by a motorist. And, as a bicyclist on a public roadway, he would

not have been nearly as free to disregard a direct police order as would a pedestrian traveling on a sidewalk at a much slower speed.

As other jurisdictions and some lower New York courts have already concluded, Mr. Rodriguez should be afforded the very same protections during police encounters that New York has long given motorists. This Court should thus hold that bicycle stops are *De Bour* Level 3 constitutional seizures, and overturn the Appellate Division's explicit holding to the contrary that police-bicyclist encounters are *per se* governed by *De Bour* Level 2.

D. Alternatively, under the totality of the circumstances, the record compels a finding that this bicycle stop was a Level 3 *De Bour* seizure requiring reasonable suspicion.

Even if the Court declines to adopt a rule that bicycle stops are *De Bour* Level 3 seizures, a traditional seizure analysis leads to the same conclusion: under a totality of the relevant circumstances, the bicycle stop *in this case* was a seizure. The police impeded Mr. Rodriguez's freedom of movement, pursued him, and forced his submission to their authority. No reasonable person would have felt free to disregard the police and leave. Thus, under a totality analysis, Mr. Rodriguez was seized.

As explained above, a person is seized under *De Bour* when the police action or intrusion results in a significant interruption of the per-

son's liberty of movement. *De Bour*, 40 N.Y.2d at 216. A significant interruption communicates to a person that he is not free to leave, *Bora*, 83 N.Y.2d at 535, and is assessed based on "all of the circumstances surrounding the incident" in "each individual case." *Michigan v. Chesternut*, 486 U.S. 567, 572–73 (1988) (quotation marks and citations omitted).

While federal law now focuses on submission to authority or the use of physical force, *Hodari D.*, 499 U.S. at 626, New York law acknowledges that a "significant interruption" of liberty can occur even if there is no physical restraint or actual submission to authority. *Bora*, 83 N.Y.2d at 534. Relevant factors under New York's test include, but are not limited to, the extent of the show of authority, whether the person was prevented from moving, the tone used, the number of officers involved, how many verbal commands were given, and the location of the encounter. *Id.* at 535. The command "Freeze, police" from an officer with a drawn gun is a seizure, as is the command to "Just keep your hands where I can see them." *Id.* (citing *People v. Townes*, 41 N.Y.2d 97, 99 (1976); *People v. Boodle*, 47 N.Y.2d 398, 401 (1979)). Similarly, police pursuit can be a seizure in New York. *See People v. Martinez*, 80 N.Y.2d 444, 447 (1992) (pursuit "restricts an individual's freedom of movement" and is a seizure).

Here, "taken as a whole," *Chesternut*, 486 U.S. at 573, the relevant factors compel the finding that the police encounter with Mr. Rodriguez

was, in fact, a seizure. The whole picture reveals that while bicycling on a public road in the late evening, Mr. Rodriguez was being followed by police officers in an unmarked car. The car pulled up alongside him—itself jarring for a bicyclist—and Officer Schell twice commanded Mr. Rodriguez in a loud voice to either "stop" or "hold up," each time identifying himself as "police" (A35, 58, 65). Between the first and second command, when Mr. Rodriguez did not stop, the officers continued to follow him in their car; after the second, Mr. Rodriguez acquiesced, bringing his bike to a stop a few yards into the upcoming intersection (A35–36, 58).

The police car then again pulled up immediately beside him—so close, in fact, that Officer Schell eventually had to ask Mr. Rodriguez to move so that Officer Schell could open the car door and get out (A64). And, since Officer Schell's window was rolled down, Mr. Rodriguez would have been able to see that there were *three* officers in the car (A37, 47).

Under state and federal law, the totality of these circumstances compels the finding that this police encounter resulted in a seizure. In particular, Mr. Rodriguez submitted to the "authority of the badge" by pulling his bike over to the side of the road and coming to a halt after being commanded to do so twice by police, amounting to a significant "interruption of [his] liberty of movement." *Bora*, 83 N.Y.2d at 534–55

(internal quotation marks, citation, and alterations omitted); *see Hodari D.*, 499 U.S. at 626.

This conclusion is bolstered by the power of the individual factors at issue in this case, all of which have been recognized as supporting a seizure even taken in isolation.

Beginning with the command by police to "stop" or "hold up," an unambiguous order to stop directed at a moving bicyclist should be enough to trigger a seizure because it "convey[s] a message that that compliance with [the police's] requests is required." *Florida v. Bostick*, 501 U.S. 429, 435 (1991). A coercive command to stop creates a seizure even before a person has complied. *See People v. May*, 81 N.Y.2d 725, 727 (1992) (seizure when officers ordered defendant to pull his car over, using red lights and a loudspeaker). In fact, many courts have ruled that a direction to "stop" or "hold up" itself can amount to a seizure, even without the person then submitting to authority. *See Jones*, 575 A.2d at 172 (command to stop directed at bicyclist was itself a seizure); *State v. Poock*, No. 19-0750, 2020 WL 564812, at *3 (Iowa Ct. App. Feb. 5, 2020) (collecting cases; "[a] uniformed officer's command that someone walking away 'hold up' or 'hang on' would likely constrain a reasonable person to stop"); *State v. Edmonds*, 145 A.3d 861, 877 (Conn. 2016) (collecting cases; "reasonable citizen would not feel free to disregard a verbal command to stop" from police). And a police command that is repeated after being initially disregarded or ignored has even stronger co-

ercive force, because it indicates that declining to comply is not an option. *See State v. Hudson*, 290 P.3d 868, 876–77 (Or. Ct. App. 2012) (repeated orders to leave house were a seizure before compliance, because "a reasonable person would believe that his liberty or freedom of movement had been significantly restricted").

Here, not only did the police issue a "yelled" command twice, the second time louder (A58), but, since Mr. Rodriguez was on a bicycle, the police order carried additional weight due to the lawful-order doctrine. *See* V.T.L. § 1102. The verbal command did not "stand[] alone," but was "coupled with other behavior": it was directed at a moving bicyclist in the flow of traffic, repeated at a louder volume, had the force of the lawful order doctrine, and led to a clear submission to authority. *Bora*, 83 N.Y.2d at 535. So while a yelled direction to "hold up" or "stop" might not always amount to a seizure of a pedestrian of a sidewalk, a bicyclist on a public road would not feel at liberty to disregard that command.

Even if Officer Schell's initial request to stop was not itself a seizure, the decision to continue following alongside Mr. Rodriguez, while again commanding him to stop, elevated the encounter into a pursuit that significantly impeded his freedom of movement. *Martinez*, 80 N.Y.2d at 447. While the *initial* period where the police were following Mr. Rodriguez, and had not yet commanded him to stop, could reasonably be called "unobtrusive," *Rodriguez*, 194 A.D.3d at 972 (A4), this was clearly no longer true once Officer Schell "yelled" out (A58) and contin-

ued to pursue him from a position adjacent to his bicycle. There was no evidence that Mr. Rodriguez sped up or sought to evade the police after he was commanded to stop; instead, he simply ignored them until they again told him to pull over. The police clearly would not take "no" for an answer, even though New York law permits a person to disregard a police inquiry. *See People v. Jones*, 164 A.D.3d 1363, 1366–67 (2d Dept. 2018) (pursuit after defendant disregarded a command to "hold on" was a seizure).

When Mr. Rodriguez obeyed the officer's order by bringing his bike to a stop, he "submitted" to a show of authority by complying with the officer's demand, making this a classic seizure even under the more stringent federal test. *Brendlin*, 551 U.S. at 262; *Hodari D.*, 499 U.S. at 627, 629. There is no doubt that the police action *caused* the stop, because Mr. Rodriguez was on a moving bicycle and showed no signs of independently coming to a halt. This also demonstrated that the police action "result[ed] in a significant interruption of [his] liberty of movement." *Bora*, 83 N.Y.2d at 534.

The record also compels the finding that no reasonable person would feel free to leave. Mr. Rodriguez had just been stopped at 10:40 p.m. in a residential area (A33, 35). The police car drew up close alongside him (A64), and "parking the police cruiser in close proximity to a defendant's vehicle" is a showing of authority that signals a person is not free to leave. *State v. Burroughs*, 955 A.2d 43, 50 (Conn. 2008) (in-

ternal alterations omitted). The police did not have to communicate explicitly what was implicit in the command to stop and the subsequent police approach; the test is whether a "reasonable person" would have "believed" he was not free to leave, not whether the officers explicitly said "you can't leave." *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). While obstructing a person with a police vehicle also amounts to a seizure, *see People v. Jennings*, 45 N.Y.2d 998, 999 (1978), courts do not generally require that a person be fully obstructed in order to be seized. *See Edmonds*, 145 A.3d at 873–74 (collecting cases; partially blocking is seizure when "reasonable person" would conclude that his exit is blocked); *United States v. Smith*, 794 F.3d 681, 685 (7th Cir. 2015) ("[O]fficers need not totally restrict a citizen's freedom of movement in order to convey the message that walking away is not an option"); *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982) ("intercepting" person to prevent progress "is a consideration of great, and probably decisive, significance"). The fact that Mr. Rodriguez was confronted with the "threatening presence of several officers" in the car, *Mendenhall*, 446 U.S. at 554, late at night and on the road alone, served only to heighten that a reasonable person would not believe he was free to leave.[5]

[5] While some courts have rejected consideration of race in a reasonable-person analysis—*see, e.g.*, *United States v. Mercado-Gracia*, 989 F.3d 829, 837 (10th Cir. 2021)—the fact that Mr. Rodriguez was a young person of color out late at night is far from irrelevant.

In sum, the totality of the circumstances shows that Mr. Rodriguez was seized when he submitted to police authority and pulled over by the side of the road, before any allegedly incriminating statements and the search that uncovered the gun. So even if the Court does not adopt a rule that bicycle investigative stops are *per se* seizures triggering *De Bour* Level 3, this stop was a seizure.

E. Because the police lacked reasonable suspicion to seize Mr. Rodriguez, the stop was illegal, and the fruits—the gun, magazine, and statements—must be suppressed.

Because Mr. Rodriguez was seized, the police intrusion was lawful only if they possessed "reasonable suspicion" *at the time* they conducted their investigative stop. *Hinshaw*, 35 N.Y.3d at 431; *see De Bour*, 40 N.Y.3d at 215–16 ("The police may not justify a stop by a subsequently acquired suspicion resulting from the stop."); *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt Cty.*, 542 U.S. 177, 185 (2004) (requiring justification at inception).

Although the suppression court did not directly resolve this issue, having erroneously analyzed the encounter under *De Bour* Level 2—and the People did not independently argue the existence of reasonable suspicion in their post-hearing submissions (A164)—the undisputed record does not support reasonable suspicion. The purportedly "suspicious" circumstances identified by Officer Schell, taken together, provide no

reasonable basis for suspecting Mr. Rodriguez "ha[d] committed, [wa]s committing or [wa]s about to commit a felony or misdemeanor." *De Bour*, 40 N.Y.2d at 223; *see* C.P.L. § 140.50(1); *Cantor*, 36 N.Y.2d at 112–13 (reasonable suspicion is the "quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand"). Accordingly, because there was no reasonable suspicion, the stop was unlawful, and its fruits must be suppressed.

Reasonable suspicion requires an assessment of the totality of the relevant circumstances—the "whole picture." *Navarette v. California*, 572 U.S. 393, 397 (2014) (internal quotation marks and citations omitted). It cannot be based on a mere "hunch," *id,* or on innocuous behavior alone, *De Bour*, 40 N.Y.2d at 216. Instead, officers must possess a "particularized and objective basis" for "suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotation marks and citation omitted). Factors can include the time of day, a place's status as a high-crime area, reports of criminal conduct in a particular area, and activities by the defendant that appear suspicious in context. *See People v. Martinez*, 80 N.Y.2d 444, 448 (1992); *see also United States v. Weaver*, 9 F.4th 129, 140 (2d Cir. 2021) ("'mosaic'" of factors includes "the suspect's behavior, the context of the stop, and the crime rate in the area") (quoting *Ornelas v. United States*, 517 U.S. 690, 698 (1996)).

Officer Schell's testimony was very limited. He said little about the area of Far Rockaway beyond describing it as primarily residential (A35, 43). There were no radio runs reporting a crime having been committed in that vicinity by a suspect who was on a bicycle or met Mr. Rodriguez's description. And neither Officer Schell nor his two fellow officers had ever encountered Mr. Rodriguez before.

Instead, Officer Schell testified that the stop was primarily motivated by Mr. Rodriguez's "riding his bike holding an object in his waistband" (A35). But Officer Schell freely admitted that he had no idea what the object was: "[a]ll I could tell [is] that it was a bulky object" (A75). At no point did Officer Schell suggest he thought the object was a gun, and his actions on the scene implied that he did *not* suspect Mr. Rodriguez might be holding a weapon, since Officer Schell confessed being "caught . . . off guard" when Mr. Rodriguez allegedly admitted having something "on him" (A36–37). Only after Officer Schell asked Mr. Rodriguez to repeat what he had said did Officer Schell then decide to get out of the car and ask, specifically, what Mr. Rodriguez was holding (A37, 61)—an unnecessary question if Officer Schell harbored any suspicion that Mr. Rodriguez possessed a firearm. Even then, Officer Schell took no steps to secure Mr. Rodriguez and seize the weapon until after Mr. Rodriguez explicitly admitted to having a gun (A37).

Officer Schell's on-the-scene conduct shows not only that he could not tell what the object in Mr. Rodriguez's waistband might be, but that

he did not actually suspect that it was a weapon. This cannot support reasonable suspicion, because the mere fact that an officer sees a person holding something near his waistband is insufficient to justify a seizure unless there is some "indication of a weapon, such as the visible outline of a gun." *In re Jaquan M.*, 97 A.D.3d 403, 406–07 (1st Dept. 2012) (collecting cases); *cf. People v. Carver*, 147 A.D.3d 415, 415 (1st Dept. 2017) (reasonable suspicion when officer testified that a bulge appeared to have the shape of a revolver). While this Court has acknowledged that a waistband bulge can be "telltale of a weapon," *De Bour*, 40 N.Y.2d at 221, cases making that connection have required some additional reason for thinking that a person could be holding a gun. *See id.* (officer explicitly testified that he thought the bulge was a gun, in the context of justifying a protective search); *see also Matter of Jose R.*, 88 N.Y.2d 863, 864–65 (1996) (radio run supported suspicion that bulge in waistband was a gun).

Other courts have similarly demanded more than the mere presence of an unknown bulge or other object. *See, e.g.*, *United States v. Jones*, 606 F.3d 964, 967 (8th Cir. 2010) (no reasonable suspicion when officer was "unable to see the size or shape" of object, especially as "nearly every person has, at one time or another, walked in public using one hand to 'clutch' a perishable or valuable or fragile item being lawfully carried in a jacket or sweatshirt pocket in order to protect it from falling to the ground"); *United States v. Arrington*, 440 F. Supp. 3d 719,

730 (E.D. Mich. 2020) (bulge in pocket not enough to yield reasonable suspicion); *In re Tyreke H.*, 89 N.E.3d 914, 931–32 (Ill. App. Ct. 2017) (acknowledging that "a bulge in the defendant's clothing, by itself, does not create reasonable suspicion," but finding reasonable suspicion because officer saw outline of a handgun); *Williams v. Commonwealth*, 364 S.W.3d 65, 69–70 (Ky. 2011) (myriad factors supported reasonable suspicion in addition to bulge in clothing); *cf. People v. Harris*, 122 A.D.3d 942, 944 (2d Dept. 2014) (unidentified bulge not sufficient to give rise to a pat-down search).

Thus, because Officer Schell did not know what the object was and did not claim to believe it was a gun, this fact cannot support reasonable suspicion. And while Officer Schell mentioned two other factors in his testimony, neither contributes to a finding of reasonable suspicion.

First, Officer Schell described Mr. Rodriguez as a "male Hispanic" whom he noticed "riding a bicycle down the middle of the street" (A34). Officer Schell did not explain why ethnicity mattered, as there was no evidence police were investigating a crime by a young Hispanic man. Regardless, "courts agree that race, when considered by itself and sometimes even in tandem with other factors, does not generate reasonable suspicion for a stop." *United States v. Swindle*, 407 F.3d 562, 569–70 (2d Cir. 2005) (collecting cases); *see People v. La Borde*, 66 A.D.2d 803, 804

(2d Dept. 1978) (ethnic identity was "an insufficient basis upon which to premise reasonable suspicion").

Second, in addition to noting that Mr. Rodriguez was biking in the middle of the street, Officer Schell claimed that he was "riding in a somewhat reckless manner causing cars having to either stop so they didn't hit him or go around him" (A34). While Officer Schell clarified that only "[t]wo or three" cars had to move out of the way (A36), he agreed that cars had to go around Mr. Rodriguez's bike because they "needed to pass" (A54–55).[6]

It is unclear what Officer Schell meant in saying Mr. Rodriguez was riding in a "reckless manner." Officer Schell appeared to be using that label informally, not legally, *see United States v. Sheffey*, 57 F.3d 1419, 1425–26 (6th Cir. 1995) (addressing issue of lay witness offering impermissible legal conclusion), but it did not fit what Officer Schell actually described, and his testifying to legal conclusions could not "usurp the court's decision-making function." *People v. Prado*, 2 Misc. 3d 1002(A), 2004 N.Y. Slip Op. 50082(U), *1 (Sup. Ct., N.Y. Co. 2004); *see also Edmonds*, 145 A.3d at 867 (disregarding officers' characterization

[6] The Appellate Division interpreted this testimony to mean that cars were "swerv[ing]" to avoid hitting Mr. Rodriguez, *Rodriguez*, 194 A.D.3d at 969 (A2), but Officer Schell did not use that word and, as above, testified that cars were just passing Mr. Rodriguez. The suppression court also never made that leap (A178–79, 181).

of defendant's "loitering," when conduct did not actually violate loitering ordinances).

In any event, "reckless biking" is not a criminal offense that could justify a police stop; the misdemeanor called "reckless driving" does not apply to bicycles. *See* V.T.L. § 1212. And that two or three cars had to pass Mr. Rodriguez or slow down to avoid hitting him is immaterial. Being overtaken and passed by faster vehicles is a simple fact of being on a bicycle, and is amply covered by the Vehicle and Traffic Law. *See, e.g.*, V.T.L. § 1122-a ("Overtaking a bicycle"). A driver is required to "keep a reasonably vigilant lookout for bicycles" and to drive with "reasonable care to avoid colliding" with them. *Palma v. Sherman*, 55 A.D.3d 891, 891 (2d Dept. 2008).

That Mr. Rodriguez was described as biking in the "middle" of the street similarly could not support reasonable suspicion because, as Officer Schell conceded, Beach 25 Street lacked a bike lane or center divider, and sometimes featured parking on both sides (A44–46). It was thus completely appropriate for Mr. Rodriguez to be riding in the street, rather than the sidewalk. N.Y.C. Rules & Regs. §§ 4-07(c)(3)(i) (prohibiting biking on sidewalks unless permitted by sign), 4-12(p)(1) (requiring bicyclists to use bike lane only where one has been provided, except when turning or reasonably necessary to avoid conditions); N.Y.C. Administrative Code § 19-176 (prohibiting bicycling on the sidewalk). Nothing in Officer Schell's characterization implied anything other than

that Mr. Rodriguez was traveling in the appropriate flow of traffic; there was no claim that he was riding on the *wrong* side of the street, or toward incoming traffic. There also appears to be no rule prohibiting cycling in the middle of the roadway, especially in evening conditions. Section 1234(a) of the Vehicle and Traffic Law, which directs bicyclists to stay near the right edge of a roadway unless "reasonably necessary" to avoid dangerous or unsafe conditions, does not apply in New York City. *See* N.Y.C. Rules & Regs. § 4-02(e).

Finally, Officer Schell cited Mr. Rodriguez's single hand on the handlebars (A34). But having at least one hand on the handlebars is all the law requires. N.Y.C. Rules & Regs. § 4-12(e); V.T.L. § 1235. Officer Schell did not claim that, at any point, Mr. Rodriguez had *no* hands on the handlebars, and he did not observe Mr. Rodriguez riding out of control or swerving because he was biking one-handed.

In sum, Officer Schell's claim that Mr. Rodriguez was biking in a way that was somehow indicative of criminality, or provided reason to believe that he was engaged in or about to engage in criminal conduct, does not stand up to scrutiny. Officer Schell never specified any violation of the Vehicle and Traffic Law, either at the hearing or in any charging documents. Mr. Rodriguez was not weaving or acting in a way that was dangerous, and to the extent that his biking called attention to itself—and drew Officer Schell's notice—there could be no reasonable suspicion of criminality arising out of that fact that he was biking at

night. In any event, since most traffic violations are not misdemeanors, they could not support an independent assessment of felony or misdemeanor criminality, which *De Bour* requires.

The totality of the circumstances here showed that a young Hispanic man was riding a bike in the middle of the street at 10:40 p.m., in a residential area, while holding a totally unidentifiable object in his waistband. Nothing about this can support reasonable suspicion of criminality. To the contrary, the only reasonable conclusion is that Officer Schell was operating on a forbidden "inchoate and unparticularlized suspicion or 'hunch'" that Mr. Rodriguez was up to no good. *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (quoting *Terry*, 392 U.S. at 27); *see also Cantor*, 36 N.Y.2d at 114 ("vague suspicion" impermissible). And while "[s]ubsequent events . . . demonstrate[d] that the officers' hunch may well have been correct," a stop "may not be justified by its avails alone," because "[c]onstitutionally protected rights are not to be dispensed with . . . solely because the results of the improper search and seizure uncovered the fact that one or all of the persons who were its targets were armed with a deadly weapon." *Sobotker*, 43 N.Y.2d at 565.

For the above reasons, the officers' seizure of Mr. Rodriguez was not justified by reasonable suspicion at its inception. Because the gun, magazine, and statements are thus fruits of an illegal stop conducted

without reasonable suspicion, they must all be suppressed. *Sobotker*, 43 N.Y.2d at 560; *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

* * *

The defense's omnibus motion, post-hearing motion to suppress evidence, and reply submission in further support of that motion, as well as the suppression court's decision, preserved the issue of whether police stops of bicycles are Level 3 *De Bour* seizures; whether this stop, in particular, was a Level 3 seizure; and whether a seizure was supported by reasonable suspicion (A6–16, 132–160, 170–184).

As other jurisdictions have recognized, stopping a bicycle is no different than stopping a car under the Fourth Amendment of the United States Constitution. This Court should adopt the same rule, especially given New York's more-protective *De Bour* police-encounter framework that arises out of state common law and Article I, § 12 of the New York Constitution. The restriction of movement and liberty, the anxiety and stress, and the requisite submission to authority—hallmarks of police stops of vehicles—all apply with similar force to stops of bicycles, and New York City and State law otherwise treat bicyclists as more like motorists than pedestrians. Public policy, too, favors giving bicyclists the same protection from unreasonable seizures that is enjoyed by motorists. Bicycles are a low-cost and affordable method of personal transportation in many areas where car ownership is prohibitively expensive or

simply impractical, and bicyclists deserve to be equal citizens on our state's roadways.

In any event, the totality of the circumstances in this case compels the finding that the police stop of Mr. Rodriguez's moving bicycle was a "seizure" requiring reasonable suspicion under *De Bour* Level 3.

The motion to suppress the weapon, magazine, and statements should have been granted and the indictment dismissed. Accordingly, the Court should reverse the Appellate Division decision affirming the denial of the suppression motion, grant the motion to suppress, and dismiss the indictment. *See* C.P.L. § 470.40(1); *People v. Balkman*, 35 N.Y.3d 556, 560 (2020); *Hinshaw*, 35 N.Y.3d at 438–39.

CONCLUSION

THE COURT SHOULD REVERSE THE APPELLATE DIVISION'S DECISION, GRANT THE MOTION TO SUPPRESS, AND DISMISS THE INDICTMENT.

Respectfully submitted,

Patricia Pazner
Attorney for Defendant-Appellant
Appellate Advocates
111 John St., 9th Floor
New York, NY 10038

/s/ David L. Goodwin

DAVID L. GOODWIN
Of Counsel
(212) 693-0085 x262
dgoodwin@appad.org

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New York, NY

CERTIFICATION PURSUANT TO RULE 500.13(c)

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/s/ David L. Goodwin

David L. Goodwin
Of Counsel

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