To be argued by
MARIANA ZELIG
(TIME REQUESTED: 20 MINUTES)

Court of Appeals
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

LANCE RODRIGUEZ,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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Queens County
Indictment Number 334/2015
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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

By permission of the Honorable Eugene M. Fahey, former Judge of the New York Court of Appeals, defendant Lance Rodriguez appeals from a May 19, 2021, order of the Appellate Division, Second Department, which affirmed an October 11, 2016, judgment of the Supreme Court, Queens County (Margulis, J., at suppression hearing; Zayas, J., at plea and sentence). By that judgment, defendant was convicted, by his guilty plea, of Attempted Criminal Possession of a Weapon in the Second Degree (Penal Law §§ 110/265.03[3]). The court sentenced defendant, as a violent felony offender, to a determinate prison term of two years, to be followed by one and one-half years' post-release supervision. Defendant is no longer incarcerated pursuant to this judgment and has been discharged from post-release supervision.

FACTUAL AND LEGAL BACKGROUND

INTRODUCTION

On December 13, 2014, at approximately 10:40 p.m., in Queens County, plainclothes Police Officer Richard Schell was on patrol in an unmarked car, when he saw defendant ahead of him riding his big beach cruiser style bicycle down the middle of the street in a reckless manner, causing several cars to stop or drive around him to avoid hitting him. Defendant rode his bike with one hand on the handlebar, while the other was holding onto a bulky object on his waistband.

Officer Schell, whose window was down, called out to defendant, "Hold up, police." When defendant continued to ride his bike, the police continued traveling behind defendant and Schell repeated his request. After defendant stopped, the patrol car pulled up alongside of defendant and Officer Schell, from inside the car, with the window rolled down, asked defendant if he "had anything on him." Defendant replied that he did. Officer Schell exited the patrol car and asked defendant what he had on him. Defendant responded, "I have a gun in my waistband" and raised his hands in the air. The police frisked defendant and recovered a loaded firearm from his waistband. Later, at the precinct, defendant stated that he had the gun for protection.

Defendant was charged with two counts of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[1][b], [3]) and

Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1]) (Queens County Indictment Number 334/2015).

Defendant moved, *inter alia*, to suppress the gun, as well as his statements, on the ground that the police stop and frisk was unlawful because it constituted a seizure that was not supported by the requisite reasonable suspicion. After a hearing on the matter, and written submissions by the parties, the court denied defendant's motion, concluding that the police conduct was lawful based upon the reckless manner defendant rode his bike and their observation of the bulky item in defendant's waistband. The court held that, not only did the police have the right to approach defendant and request information, they also had a founded suspicion that criminality was afoot in order to conduct a common-law inquiry under the second level of *People v. DeBour*, 40 N.Y.2d 210 (1976) (Margulis, J.).

On September 19, 2016, defendant appeared with counsel before the Honorable Joseph A. Zayas, Supreme Court, Queens County, and pleaded guilty to Attempted Criminal Possession of a Weapon in the Second Degree. As part of the plea agreement, defendant signed a waiver of his right to appeal. On October 11, 2016, the court sentenced defendant as noted above.

Defendant's Direct Appeal

In April of 2019, defendant, through appointed counsel, filed a brief in the Appellate Division, Second Department, claiming that the waiver of appeal was invalid and that the hearing court improperly denied his motion

to suppress because the police had neither founded suspicion to question him, nor reasonable suspicion to stop and frisk him. Furthermore, defendant argued that Officer Schell's testimony at the hearing was incredible as a matter of law.

On June 10, 2019, the People filed an opposing brief, arguing that defendant knowingly, intelligently, and voluntarily waived his right to appeal the court's suppression ruling. Addressing the merits, the People argued that the court correctly held that defendant's riding of his bike in a reckless manner with one hand on the handlebar, while holding onto a bulky object inside of his waistband with the other, gave the police the necessary founded suspicion to approach defendant and make a common-law inquiry. Further, the People argued that, once defendant confessed that he had a gun inside his waistband, the police had reasonable suspicion to frisk defendant and recover the gun. Finally, the People argued that the court properly credited Officer Schell's testimony, which was consistent and highly credible given his training and experience.

In a decision and order dated October 23, 2019, the Appellate Division affirmed defendant's conviction, holding that defendant's valid waiver of the right to appeal precluded review of the suppression ruling. *People v. Rodriguez*, 176 A.D.3d 1111 (2d Dept. 2019).

On February 27, 2020, Judge Eugene M. Fahey granted defendant's application for leave to appeal. On December 15, 2020, this Court ruled that defendant's waiver of the right to appeal was invalid and remitted

the matter to the Appellate Division for consideration on the merits. *People v. Bisono*, 36 N.Y.3d 1013, 1033 (2020).

In a unanimous decision dated May 19, 2021, the Appellate Division, Second Department, affirmed defendant's judgment of conviction, holding – as did the suppression court before it – that the officers were justified in making a common-law inquiry based upon their observations of the way defendant was riding his bicycle, as well as their observation of a "bulky" object that the defendant was holding at his waistband. *People v. Rodriguez*, 194 A.D.3d 968 (2d Dept. 2021).

In reaching this conclusion, the Appellate Division applied the four-step analysis enunciated in *DeBour*, correctly noting that, unlike a stop of a motor vehicle, which generally constitutes a seizure requiring reasonable suspicion that a crime has occurred, "case law has uniformly evaluated police encounters with bicyclists under the *Debour* analysis applicable to pedestrians." *Rodriguez*, 194 A.D.3d at 968. Applying that rubric, the court held that under the facts and circumstances of the case, the officer's statement to defendant to "hold up" constituted a level-two encounter under *DeBour* which required only a founded suspicion rather than reasonable suspicion under level-three. *Id.* (citing *People v. Bora*, 83 N.Y.2d 531, 533 [1994]).

Additionally, the court held that the police frisk was lawful based on Officer Schell's observation of the bulky object in defendant's waistband

together with defendant's admission that he had a gun. *Rodriguez*, 194 A.D.3d at 972.

SUMMARY OF ARGUMENT

The hearing court, as well as the Appellate Division, properly found that the police were justified in approaching defendant to conduct a level-two common-law inquiry under *DeBour, supra*. The totality of the circumstances, including the reckless manner defendant rode his bicycle in the middle of the street, coupled with the officer's observation of a "bulky" object defendant was holding in his waistband, provided the police with a founded suspicion that criminality was afoot. As such, the police could exercise their common law right of inquiry and question defendant, or at a minimum gain explanatory information under the first level of *DeBour*.

In approaching defendant and requesting that he stop, the officers did not use force, issue demands, draw weapons, or impede defendant's progress in any way so as to constitute a significant limitation of defendant's freedom of movement rising to the level of a seizure. Rather, the plain-clothed officers pulled up alongside of defendant in an unmarked car, with their badges displayed, and without exiting the patrol car, simply asked defendant to "hold up." Viewed as a whole, the police conduct does not demonstrate that they seized defendant. *See United States v. Drayton*, 536 U.S. 194, 200, 204 (2002) ("ample grounds" for finding no seizure where "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of

weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice"). Of course, once defendant readily admitted to possessing a gun, the police had reasonable suspicion to frisk defendant and recover the weapon.

Because the courts applied the appropriate legal standard and their findings were fully supported by the record, their determination that the police stop was lawful, constitutes a mixed question of law and fact and is, therefore, beyond this Court's further review. C.P.L. § 470.35; *People v Perez*, 31 N.Y.3d 964 (2018); *People v. Francois*, 14 N.Y.3d 732 (2010).

In an effort to circumvent this conclusion, defendant urges this Court to adopt a rule equating stops of moving bicyclists to stops of moving vehicles, which constitutionally constitute a level-three seizure under *De Bour,* requiring the police to have "reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime." *People v. Hinshaw*, 35 N.Y.3d 427, 437 (2020) (quoting *People v. Spencer*, 84 N.Y.2d 749, 753 [1995]). Defendant contends that, like a traffic stop, the police seized him when they stopped him as he rode his bicycle.

Further, defendant argues that, regardless of whether the constitutional implications associated with police/motorists encounters are extended to police/bicycle encounters, the gun and his statements should have been suppressed because the totality of the circumstances established that the

police unlawfully seized him without the requisite reasonable suspicion Defendant's arguments should be rejected.

When confronted with the issue of a bicycle stop, the Appellate Divisions have consistently evaluated police encounters with bicyclists under the *DeBour* analysis applicable to pedestrians.[1] These decisions make sense because police encounters with bicycles are not analogous to cars for purposes of the Fourth Amendment. As this Court's jurisprudence has long established, any analysis into the propriety of police conduct "must weigh the degree of intrusion it entails against the precipitating and attending circumstances." *DeBour*, 40 N.Y.2d at 223; *see People v. Wheeler,* 2 N.Y.3d 370, 374 (2004); *People v. Salaman*, 71 N.Y.2d 869, 870 (1988). Indeed, the essence of the Fourth Amendment is a balancing test in which the individual expectation of privacy is weighed against the governmental interest in investigating and preventing crime. *See generally United States v. Leon*, 468 U.S. 897, 901-14 (1984) (applying balancing test to exclusionary rule); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental

[1]*See People v. Feliciano*, 140 A.D.3d 1776 (2d Dept. 2016); *People v. Lee*, 96 A.D.3d 1522, 1525 (4th Dept. 2012); *Matter of Jamaal C.*, 19 A.D.3d 144, 145 (1st Dept. 2005); *People v. Day*, 8 A.D.3d 495, 496 (2d Dept. 2004); *People v. Ruffin*, 133 A.D.2d 425, 426 (2d Dept. 1987); *see also People v. White*, 35 A.D.3d 1263, 1264 (4th Dept. 2012).

interests."); *Terry v. Ohio*, 392 U.S. 1, 21-27 (1968) (applying balancing test to stop and frisks).

And while a special rule applies to motor vehicles, that rule should not be expanded. A person on a bicycle, albeit moving, is completely open to public view and, therefore, does not have the same expectation of privacy as would a driver or occupants of a moving car, with its enclosed passenger compartment. Indeed, cars often have darkened rear windows, as well as trunks, and the passenger compartment can rarely be seen with any clarity while the vehicle is moving. And what could be a more significant intrusion and interruption of one's liberty of movement than stopping a moving car, which usually requires lights and sirens in order to effectuate it? Thus, the automatic rule for motor vehicles should not be extended to bicycle riders, who expose all they do to the public and therefore have, at best, a reduced expectation of privacy, travel at best at much lower speed, and, as here, can often be approached without the substantial, even dramatic, intrusion of an ordinary car stop.

And it would be an absurd rule indeed to outlaw any response where the police observe suspicious conduct by a bicycle rider in plain view providing an articulable reason to believe criminality is afoot but the defendant's conduct does not by itself furnish reasonable suspicion. This would unnecessarily endanger police officers and civilians alike and base the constitutional protection against an unreasonable search and seizure on an

untenable bright-line rule. Indeed, defendant's rule would fail to capture the reality of street encounters and would severely undermine the authority of the police to deal with hazardous conduct and even potential criminal behavior committed by bicyclists on the street. Based on both law and logic, therefore, the court should reject defendant's rule and affirm the Appellate Division's determination.

In any event, regardless of defendant's proposed rule, the police investigatory encounter here did not constitute a seizure and was permissible because it was relatively non-intrusive, non-confrontational, and entirely reasonable given the totality of the circumstances. Indeed, given defendant's hazardous conduct of riding his bicycle recklessly down the middle of the street in the midst of vehicular traffic, holding a bulky item in his waistband, it is difficult to imagine how the police could have been expected to any act differently.

Accordingly, the decision of the Appellate Division should be affirmed.

STATEMENT OF FACTS

THE *MAPP*/*HUNTLEY*/*DUNAWAY* HEARING

The People's Case[2]

At around 10:40 p.m., on December 13, 2014, plainclothes Police Officer *Richard Schell*, a nine-year veteran, was on patrol, riding in the front

[2]Numbers in parenthesis refer to pages of the Appendix.

passenger seat of an unmarked car, with his sergeant and another police officer. Schell's car window was rolled down. As they drove southbound down a well lit residential area on Beach 25th Street,[3] Schell observed defendant about twenty to twenty-five yards in front of him, riding a big beach-cruiser style bicycle in the middle of the street in a "reckless" manner; defendant had one hand on the handlebar, while the other was holding a "bulky" item in his waistband.[4] Two or three cars had to either stop or move out of defendant's away to avoid hitting him. Defendant wore sweatpants and a short puffer jacket. Based on the way defendant held his waistband, which was visible below his jacket. Schell could tell defendant was holding an object and not holding his pants up (A034-37, A042, A047-52, A054, A068, A073-75).

As defendant turned right on Camp Road, Schell called to defendant to, "Hold up, police, or stop police." There were two or three cars on the road, and one car was between the police car and defendant. Defendant continued to ride his bike. The police continued driving behind defendant for a short distance, and Schell yelled louder, "Hold up, police, or stop the bicycle please" (A035-36, A051, A058). Thirty-seconds to a minute later, defendant stopped and the police pulled up alongside of him. Without exiting the police car, Officer Schell identified himself as a police officer, and asked defendant "if he had anything on him." Defendant replied that "he did" (A036, A051-52,

[3]Beach 25th Street is a two-way street, with no designated bike lane or center-lane markings (A045-46, A054).

[4]The bicycle had large tires, a wide seat and wide handlebars (A045, A048).

A059). Caught "off-guard" by defendant's response, Schell asked defendant to repeat himself. Defendant stated, "I do" (A037).

Schell asked defendant, who stood straddling his bike about a foot away from the police car, to move so that Schell could open the car door. Schell's badge was visibly displayed and he did not have his hand on his weapon, which was not drawn. Schell got out of the car and asked defendant "What do you have on you?" Defendant replied that he had a gun in his waistband, and put his hands up. Schell walked behind defendant and held his arms so that defendant could not move them. As the sergeant got out of the car, Schell told him that defendant had a gun in his waistband. The sergeant recovered a loaded firearm, which was tucked into the defendant's waistband, the same place the defendant had been holding while riding his bicycle. At that point, the defendant was placed under arrest. The "fairly quick interaction" took about a minute (A037-39, A048, A058-61, A064-67, A075).

At the precinct, while taking defendant's fingerprints, Officer Schell commented to defendant, "You know, you haven't really been arrested for anything serious. You haven't ever been in trouble" (A040-41). Defendant replied that he had the gun for protection (A041, A077-78).

Defendant's Case

Defendant testified that, on December 13, 2014, at around 10:00 p.m., he was hanging out at the home of his friend Shanay, smoking a cigarette, when he left to go to his friend Khalil Baldwin's house (A087, A091). As

defendant rode his bike down Beach 25th Street, he had his right hand on the handlebar and his left hand on his cell phone, between his waistband and his chest, listening to music, when defendant noticed a silver car behind him (A092, A109, A116-17, A126). As the car drove alongside of defendant and then passed him, defendant saw that it was the police. There were no other cars around and defendant was riding straight, not swerving (A093, A127).

The police waited for defendant to make a turn onto Camp Road, and they followed behind. The officer in the front passenger seat, not Officer Schell, asked defendant what he was doing. Defendant replied, "Nothing." The officer told defendant to stop, which he did. The officer, without his gun drawn, got out of the car. Officer Schell, who was seated in the back seat, got out at the same time. The first officer walked up to defendant unzipped defendant's jacket and patted him down, asking defendant if he had anything on him. Defendant did not respond. Schell stood behind defendant and restrained him by placing his hands under defendant's arms and around defendant's neck in a "chokehold." When the other officer reached defendant's waistband he yelled gun and they removed the gun (A093, A099-100, A102-104, A119-20).

On cross-examination, defendant admitted that he did not know the last name, phone number, or address of his friend Shanay, who he testified had been his friend for six years (A111-12). Defendant further admitted that at the time of the incident he wore low-hanging sweatpants, as such there was

a space between his jacket and his pants (A120-21). Defendant denied that the gun was his, and asserted that he had found it underneath a garbage can on Beach 25th Street, but could not recall when or for how long he possessed the gun. Defendant denied telling police that he had the gun for protection (A122, A128).

Post-Hearing Arguments

In papers dated January 26, 2016, defendant, through counsel, argued that the repeated police command to stop his bicycle and ensuing "pursuit" constituted a level three seizure under *De Bour,* requiring reasonable suspicion of criminal activity, which the police lacked. Defendant equated the bicycle stop to a seizure of a motorist during a traffic stop, and posited that the same constitutional rules and rationale applicable to police/motorist encounters must be applied to police/bicyclist encounters. Defendant claimed that, because the police did not observe him commit a traffic infraction or violate a provision of the Vehicle and Traffic Law, they did not have reasonable suspicion to conduct a traffic stop of a "moving" bicycle. Accordingly, defendant concluded that the ensuing frisk was illegal, requiring suppression of the gun and defendant's statements (A132-151).

Additionally, defendant argued that Officer Schell's testimony regarding his observation of the bulky object on defendant's waistband was incredible as a matter of law (A152-56).

In responding papers dated March 2016, the People argued that the initial police stop did not constitute a seizure. As such, the police did not require reasonable suspicion to stop defendant. Rather, the People asserted that, based on the police observations of the defendant riding his bike with one hand on the handle bars and his other hand holding something on his waistband, as well as defendant riding in a manner that disrupted traffic, Officer Schell had a common-law right to approach defendant and inquire if he had something on him (A163).

Further, the People argued that Officer Schell's testimony was credible. The People highlighted that Schell was riding in the passenger seat of the police car, with the window down, giving him an unobstructed view of defendant, except for one moving car in between them. Additionally, the area was a fairly well-lit residential area, and, while Schell candidly admitted that he could not see what defendant was holding in his waistband, he could tell that it was a bulky object. The People pointed out that Schell also testified that defendant was not holding up his pants with his hand. The People emphasized that defendant corroborated Schell's testimony to the extent that defendant testified that he wore sweat pants that sat lower than his jacket, creating a space between his jackets and pants, thus making his waistband visible (A165). The People concluded that the police conduct was reasonable and lawful and the court should deny defendant's motion to suppress (A166).

In a reply, defendant reiterated his argument that the police stop was unlawful. Defendant argued that the stop would have been proper only if the police had reasonable suspicion that defendant had committed, was committing, or was about to commit a crime under level three of *De Bour,* or if defendant had committed a traffic infraction, or violated some provision of the Vehicle and Traffic Law. Defendant asserted that because that was not the case, the gun and any alleged statements had to be suppressed (A172-73).

Alternatively, defendant argued that the hearing evidence failed to establish that he rode his bike recklessly and was not in compliance with the Vehicle and Traffic Law applicable to bicyclists. As such, defendant asserted that the police lacked even a founded suspicion of criminality to approach defendant and conduct a common-law inquiry under level two of *De Bour.* Defendant continued that, in any event, the police conduct was more intrusive than a level-two encounter because he was "driving" his bike (A173-75) (citing to *People v. May*, 81 N.Y. 725 [1992], ["car stop" of a moving vehicle required more than a founded suspicion of criminality]). In support of his argument, defendant asserted that the stop of a motorist or, for that matter a bicyclist, was distinguishable from a pedestrian encounter and required reasonable suspicion (A175-76).

The Court's Decision

In a March 21, 2016, decision and order, the court denied defendant's motion to suppress the gun and statements. The court credited

Officer Schell's testimony and found that Schell had a sufficient basis to approach defendant and make a common-law inquiry. Specifically, the court held that Schell's observation of defendant riding his bike in a reckless manner, causing a disruption in traffic, provided Schell with an objective, credible reason to ask defendant to stop in order to request information. The court also found that Schell's observation of defendant holding a bulky object in his waistband provided the officer with a founded suspicion that criminality was afoot, which justified the officer asking defendant if he had anything on him (A181-82). The court continued that once defendant admitted that he had a gun, Officer Schell had reasonable suspicion to detain defendant and recover the gun (Decision: A182).

Finally, the court held that defendant's statement that he had a gun in his waistband was voluntarily made during a temporary roadside detention that did not amount to custody, and, thus, was not subject to *Miranda* warnings (Decision: A183).

POINT ONE

THE APPELLATE DIVISION'S DECISION, AFFIRMING THE LOWER COURT'S DETERMINATION THAT THE POLICE OFFICER'S STOP OF DEFENDANT WAS PROPER UNDER LEVEL TWO OF *DE BOUR*, WAS AMPLY SUPPORTED BY THE RECORD, AND, AS A MIXED QUESTION OF LAW AND FACT, IS BEYOND FURTHER REVIEW.

The determination of both lower courts that the police lawfully approached and questioned defendant under level two of *DeBour* was amply supported by the record and, as a mixed question of law and fact, is not subject to further review. The police observations of defendant's reckless behavior on his bicycle and his interference with traffic, along with defendant's clutching a bulky object in the telltale waistband area, fully warranted exercising their common law right to inquire by driving alongside defendant and telling him to "hold up." Indeed, the police would have been remiss in failing to take these minimal actions after observing defendant's conduct. Nor were the actions of the police tantamount to a stop requiring reasonable suspicion. This Court has held that a request to stop does not by itself constitute a seizure requiring reasonable suspicion, *see People v. Bora*, 83 N.Y.2d 531, 534–36 (1994), and the benign police pursuit here, if one were to call it that, with no show of force, did little to add to that request.

Nevertheless, defendant argues that this Court should adopt a rule that a police stop of an individual on a moving bicycle, like a moving car, always constitutes a seizure under the third level of *DeBour*, necessitating

reasonable suspicion of criminality. By applying this rule, defendant asserts that the police illegally seized him without reasonable suspicion and without any indicia that defendant rode his bicycle in violation of the Vehicle and Traffic Laws, which is equally applicable to bicycles on a public roadway. In defendant's view, there is no material difference between moving cars and moving bicycles.

This Court should reject defendant's rule because it is inconsistent with this Court's and the Supreme Court's search and seizure jurisprudence which, at its core, centers on the reasonableness of any police action in a given situation – whether that relates to an encounter with a driver of a car, a bicyclist, or a pedestrian – and the level of that police intrusion on the privacy rights of the individuals involved. Additionally, the categorical nature of defendant's rule precludes consideration of the many factors that this Court, and the Appellate Divisions, have regularly used to determine the reasonableness of police conduct. Nor is the analogy to moving motor vehicles justified. Traffic stops routinely carry much stronger indicia of a seizure, including flashing lights and sirens, and bicyclists, who expose their conduct to the public, do not have the same expectation of privacy as those in a closed vehicle, where much of the interior and the actions of the occupants are obscured from view. Because the defendant's proposed rule finds no support in law or logic, this Court should affirm the Appellate Division's ruling.

A. Whether Police Had Founded Suspicion to Approach Defendant and Initiate a Common-Law Right of Inquiry Constitutes a Mixed Question of Law and Fact and Is Subject to Limited Review in this Court to Determine Whether There Is Record Support for the Lower Courts' Determinations.

Mixed questions of law and fact are not reviewable in this Court when there is record support for the determination made by the lower courts. *See People v. Porter*, 9 N.Y.3d 966, 967 (2007); *People v. Shabazz*, 99 N.Y.2d 634, 636 (2003); *People v. Scott*, 86 N.Y.2d 864 (1995). This is so because "questions of reasonableness of conduct can rarely be resolved as a matter of law even when the facts are not in dispute." *People v. Harrison*, 57 N.Y.2d 470, 478 (1982); *see People v. Morales*, 42 N.Y.2d 129, 137-38 (1977). This "rule applies 'where the facts are disputed, where credibility is at issue or where reasonable minds may differ as to the inferences to be drawn.'" *People v. Sivertson*, 20 N.Y.3d 1006 (2017). Indeed, "unless there is no possible view of the evidence that would support the determination of the lower courts," this Court is "bound by the findings of the suppression court." *People v. Damiano*, 87 N.Y.2d 477, 486 (1996); *see also, People v. Williams*, 17 N.Y.3d 834, 836 (2011).

Because the question of whether the Appellate Division correctly held that the police had a founded suspicion to justify Officer Schell's common-law inquiry under level two of *DeBour*, or whether, as defendant contends, the police stop constituted an unlawful seizure under level three of *DeBour*, is a mixed question of law and fact, it is subject to limited review in

this Court. *See People v. Perez*, 31 N.Y.3d at 966; *People v. Garcia,* 20 N.Y.3d 317 (2012) (issue of founded suspicion mixed question). Indeed, in *People v. Francois,* 14 N.Y.3d at 733, this Court specifically held that the lower courts' determination that an officer's conduct did not elevate his encounter with defendant from a common-law inquiry to a seizure necessitating reasonable suspicion constituted a resolution of a mixed question of law and fact subject to limited review. Thus, this Court may review defendant's current contention only to determine whether there exists record support for the lower courts' findings.

Here, the suppression court rejected the notion that defendant was seized and determined that the police encounter constituted a level-two common-law right of inquiry requiring only a founded suspicion that criminality was afoot. The Appellate Division affirmed this finding. Accordingly, so long as there is support in the record for the lower courts' findings defendant's claim is unreviewable.

As is explained below, the record sufficiently supports the lower courts' conclusions. This Court, therefore, lacks jurisdiction to conduct a further review.

B. The Appellate Division's Finding That the Encounter Was Lawful Is Supported By the Record

Based on the facts credited by the hearing court, Officer Schell lawfully approached defendant to request information and conduct a common-law inquiry upon seeing defendant riding his bicycle in a reckless manner in

the middle of the street and holding his hand over a bulky object in his waistband. This confrontation was reasonable, and the officer's simple, open-ended, question of asking defendant, "Do you have anything on you?" was justified based on the officer's specific observations. When defendant subsequently responded that he had a gun, the officer acquired reasonable suspicion to frisk defendant and properly remove the weapon from defendant's waistband.

When assessing the legality of a street encounter under the Fourth Amendment and its New York counterpart, the ultimate touchstone of the analysis is the "reasonableness" of the police conduct. U.S. Const. amend. IV; N.Y. Const., art. I, § 12; *Florida v. Jimeno*, 500 U.S. 248, 250 (1991); *People v. Wheeler,* 2 N.Y.3d 370, 374 (2004). Police intrusion will be deemed reasonable so long as there is a proper basis justifying it at its inception, and it is fairly related in scope to the circumstances as known to the police. *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968); *People v. DeBour*, 40 N.Y.2d 210 (1976). Reasonableness is determined on a "case-by-case" basis, *People v. Intru*, 79 N.Y.2d 181, 192 (1992), considering the totality of the circumstances and keeping in mind that police-citizen encounters are "dynamic situation[s]" in which the basis for suspicion may escalate as events unfold before the officer's eyes. *DeBour*, 40 N.Y.2d at 225.

Recognizing the need to balance an individual's constitutional guarantee to be free from unreasonable searches and seizures with society's

need for safe and effective law enforcement, this Court, in *DeBour*, defined four escalating levels of police action in street encounters, each corresponding to a different predicate needed to justify a specific type of intrusion. Under the first level, a police officer may approach a citizen to request information if there is "some objective credible reason for that interference not necessarily indicative of criminality." *Id.* at 223. The Court has defined this level of intrusion as limited to "basic, nonthreatening questions regarding, for instance, identity, address or destination." *Hollman*, 79 N.Y.2d 181, 185 (1992).

At the second level, an officer has a common-law right to inquire when there is a founded suspicion that criminality is afoot. *DeBour,* 40 N.Y.2d at 223. Under this level, police are permitted to interfere with a citizen's liberty "to the extent necessary to gain explanatory information, but short of a forcible seizure." *Id; see also Hollman,* 79 N.Y.2d at 18. In this regard, the police can issue some verbal commands and ask questions that may be extended and accusatory in tone so that the individual stopped may believe that he or she is suspected of some wrongdoing. *DeBour,* 40 N.Y.2d at 223.

Under the third level of *DeBour*, an officer can forcibly stop or detain a person when the officer has a reasonable suspicion that the person has committed, or is about to commit, a crime. *DeBour*, 40 N.Y.2d at 223. Reasonable suspicion is "that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand." *Id*. *See People v*. *Sobotker*, 43 N.Y.2d 559

(1978). Finally, at the fourth level, an officer may arrest a person once the officer acquires probable cause. *DeBour*, 40 N.Y.2d at 223.

Additionally, if during a lawful inquiry an officer entertains an independent and reasonable suspicion that the suspect is armed and may pose a danger to the officer or the public, the officer may conduct a "frisk" of the suspect. *See People v. Batista*, 88 N.Y.2d 650, 654 (1996). While generally a frisk accompanies a level-three stop, thus requiring reasonable suspicion of criminality as a predicate, courts have routinely upheld frisks conducted during level-two common-law inquiries where the police observe a "bulge" on the suspect or otherwise develop reason to believe he may be armed. *See People v. Robinson*, 278 A.D.2d 808 (4th Dept. 2000); *People v. Guarino*, 267 A.D.2d 324 (2d Dept. 1999); *People v. Daniels*, 190 A.D.2d 858 (2d Dept. 1993); *People v. Stone*, 86 A.D.2d 347 (1st Dept. 1982). And, under these circumstances, a frisk will be particularly warranted if the bulge – though undefined in shape – is in the "telltale" location of the suspect's waistband. *See DeBour*, 40 N.Y.2d at 221 ("[t]he location of the bulge is noteworthy because unlike a pocket bulge which could be caused by any number of innocuous objects, a waistband bulge is telltale of a weapon").

Under these standards, the police conduct here was reasonable throughout their encounter with defendant. As noted, this Court has qualified the perennial "bulge" as a factor supporting police action when viewed in an area of the body where weapons are typically worn. Thus, at the very least,

Schell had a founded suspicion to conduct a common-law inquiry regarding the bulky item in the "telltale" waistband area. *DeBour*, 40 N.Y.2d at 221; *see People v. Garcia*, 20 N.Y.3d at 324; *People v. Benjamin,* 51 N.Y.2d 267, 271 (1980) ("[I]t is apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband"); *see also*, *People v. Casey*, 149 A.D.3d 770, 770-71 (2d Dept. 2017) (officer's observation of bulge in defendant's pocket that caused pants to sag established grounds to ask defendant whether he had weapon); *In re Jamaal C*., 19 A.D.3d 144, 145 (1st Dept. 2005) (common-law inquiry justified where defendant was observed riding bicycle holding heavy object underneath his jacket at the waistband).

Notably, Officer Schell's observation of defendant riding his bike in a reckless manner in the middle of the street added to the need to approach defendant. The encounter was justified both to eliminate the traffic hazard that defendant was causing and to investigate whether a charge of reckless endangerment could have been warranted.

Next, Officer Schell's request to defendant to "hold-up,"and or "stop" as he drove behind defendant and remained in the unmarked patrol car until defendant stopped his bicycle, was not a significant intrusion on defendant's liberty of movement constituting a seizure. *See, People v. Bora*, 83 N.Y.2d at 534–36 (command to "stop" did not constitute seizure requiring reasonable suspicion); *People v. Hicks*, 68 N.Y.2d 234 (1986); *In re Jamaal C*.,

19 A.D.3d at 145 (demand that defendant "stop" his bicycle did not elevate encounter beyond a common-law inquiry). Indeed, police officers do not need reasonable suspicion to merely follow and surveil a defendant, provided that they do so unobtrusively and do not limit his freedom of movement. *People v. Howard*, 50 N.Y.2d 583, 585 (1980); *People v. Mack*, 89 A.D.3d 864, 865 (2d Dept. 2011); *People v. Thornton*, 238 A.D.2d 33, 36 (1st Dept. 1998).

Here, the plainclothes officers merely drove behind defendant for a brief time, in an unmarked police car, without their lights or sirens activated. Officer Schell made the investigatory inquiry while he sat in his patrol car, with his window rolled down. As such, he did not impede defendant's movement in any way. It was only when defendant responded that he had something on him that Schell exited his car and approached defendant to inquire further. Even then, Schell's gun was holstered, the other two police officers remained in the car, and Schell's inquiry was unaccompanied by any other police conduct. This momentary encounter did not rise to the level of a seizure. *See People v. Giles*, 223 A.D.2d 39 (1st Dept. 1996) (holding that announcement of "police" by police officer in plainclothes exiting his unmarked vehicle did not escalate the encounter into a level two).

Based on Officer Schell's observations, he was justified in asking defendant if he had anything on him. The open-ended question, by itself, was neither accusatory nor intrusive in nature. Indeed, based on the bulky item in defendant's waistband, Schell was entitled to ask an even more pointed

question – namely, whether defendant was in possession of a weapon. Such a question is a classic component of a level-two common-law inquiry. *See Garcia,* 20 N.Y.3d at 322*; People v. Harris,* 122 A.D.3d 942, 944 (2d Dept. 2014) (waistband bulge permitted officer to ask defendant if he was carrying a weapon); *People v. Winchester,* 14 A.D.3d 939, 941 (3d Dept. 2005) (defendant's conduct provided founded suspicion to inquire whether he had any weapons); *People v Park*, 294 AD2d 887, 888 (4th Dept 2002) (same). Here, the officer merely repeated his initial inquiry asking defendant if he had anything on him.

Once defendant admitted that he possessed a gun, the police had reasonable suspicion to frisk defendant and recover the weapon from his waistband. *Batista*, 88 N.Y.2d at 654; *see also Casey*, 149 A.D.3d at 770; *Guarino*, 267 A.D.2d at 324.

Because the evidence established that the officer's conduct was appropriate and reasonable under the circumstances, the hearing court correctly denied defendant's motion to suppress the gun and statements. The Appellate Division's affirmance of the hearing court's decision was thus properly supported by the record.

Defendant, however, argues that the police illegally "seized" him based on the combined effect of the police restricting his freedom of movement, pursuing him, and forcing him to submit to their authority by commanding him to stop. Defendant contends that in that situation, no

reasonable person would have felt free to disregard the police and leave (DB:42-44). This claim lacks merit because viewed in totality, the police conduct did not amount to a seizure until the police restrained defendant to recover the gun.

When determining whether a street encounter constituted a level-two investigatory inquiry or a level-three forcible seizure, a court should conduct a detailed and subtle analysis of the attendant circumstances. *Bora*, 83 N.Y.2d at 535. For example, consideration should be given to whether the officer's gun was drawn, whether verbal commands were given, the content and tone of any such verbal commands, whether the person was prevented from moving, how many officers were involved in the encounter, and where that encounter took place. *Id.* at 535-536. The ultimate test of whether an encounter has risen to the level of a seizure is "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a *significant* limitation on his or her freedom." *Id*. at 535 (emphasis added).

First, the United States Supreme Court has held that the mere approach by a police officer, either in a police car or on foot, does not alone constitute a show of authority sufficient to cause the subject of the officer's attention reasonably to believe that he or she is not free to leave. *See Florida v. Royer*, 460 U.S. 491, 497 (1983). Further, in conducting the investigatory inquiry, the officers did not significantly interfere with defendant's freedom of movement here: the encounter was momentary, the officer did not use his

car to cut off defendant, did not activate his emergency lights, and only issued a couple of verbal requests to stop. And Schell remained in his car and merely pulled up alongside defendant while defendant stood straddling his bike. *See Michigan v. Chesternut*, 486 U.S. 567 (1988) (conduct that consists of brief acceleration to catch up with pedestrian, followed by short drive alongside him or her, does not communicate to a reasonable person an attempt to restrain the pedestrian's liberty, and thus is not a seizure). Indeed, a minor interruption or limitation on an individual's liberty of movement is permissible on a level-two inquiry and does not elevate the intrusion to a seizure. *DeBour,* 40 N.Y.2d at 223. *See Harrison*, 57 N.Y.2d at 470 (initial inquiry and minimal intrusion was not equivalent to a stop in which the individual's freedom of movement is significantly impaired); *People v. Carrasquillo,* 54 N.Y.2d 248 (1981).

Furthermore, contrary to defendant's suggestion, there was no indication on the record that defendant did not feel he could have proceeded on his way. The standard is what a reasonable man, *innocent of the crime*, would believe in the defendant's position. *People v. Joy*, 114 A.D.2d 517 (2d Dept. 1985) (emphasis added) (citing *People v. Yukl*, 25 N.Y.2d 585,589 (1969). *See also Florida v. Bostick*, 501 U.S. 429, 438 (1991). The encounter was devoid of harassment or intimidation and the police did not act in a threatening or abusive manner. The police did not suggest defendant had to answer the question, nor did they indicate in any way that defendant was not free to leave. Notably, Officer Schell testified that he was "caught off guard"

when defendant admitted that he had something on him and even asked defendant to repeat himself before Schell took any further action. Because there was no actual or constructive restraint of defendant, the initial encounter by the police was a justifiable approach to conduct a common-law right of inquiry. Under the circumstances, no reasonable person, innocent of wrongdoing, would feel they were not free to leave.

Next, according to defendant, because a reasonable person hearing an officer's authoritative command to stop or hold up would not feel free to leave, this conduct was tantamount to a seizure (DB:45). Defendant is wrong because the nature of the show of authority in this case did not transform the encounter into a seizure.

This Court has made clear that "a verbal command, standing alone, will not usually constitute a seizure" unless "coupled with other behavior." *Bora*, 83 N.Y.2d at 535. Indeed, the right of the police officers "to stop an individual for questioning necessarily includes directing that a person stop moving." *People v. Thomas*, 20 Misc.3d 1108(A) (Sup. Ct. Bx. Cty. 2008) (citing to *Bora*, *supra*).

Moreover, not every request that a citizen "stop"constitutes a seizure. For example in *People v. Reyes*, 83 N.Y.2d 945 (1994), this Court upheld the lower courts' level-one determination where the officer "yelled" at the defendant, "Hey, stop, excuse me' or 'Stop, hey, stop, police,' or words to that effect."*Id*. at 946. Notably in *Reyes*, unlike in the case at bar, the two

officers approached the defendant with their hands on their holstered guns, and positioned themselves on either side of him. *Id*. *See also People v. Boland*, 89 A.D.3d 1144, 1145 (3d Dept. 2011) (command to "stop" did not constitute seizure); *People v. Montero*, 284 A.D.2d 159, 160 (1st Dept 2001) ("Police. Can you hold up a minute?" was only level-one request for information); *People v. Mitchell*, 223 A.D.2d 729, 730 (2d Dept. 1996) ("Fellows, could you hold it up" and "just stop there, fellows, don't leave" constituted "no more than request for information").

The cases upon which defendant relies (DB:45-46), are distinguishable, for they either involve a level of intrusiveness far surpassing the one at issue here or they were not analyzed under the *DeBour* framework applicable only in New York. *See, e.g., Jones v. State*, 319 Md. 279 (1990) (police stop of bicyclist for investigatory purposes, without reasonable articulable suspicion, was seizure under the state constitution).[5] Notably, the Court of Appeals in *Jones* rejected a bright-line test, and instead applied a totality-of-the circumstances approach in its determination of what constituted a seizure. *Id* at 285-87 (citing to *U.S. v. Mendenhall*, 446 U.S. 544 [1980], and *Michigan v. Chesternut*, 486 U.S. 567 [1988]).

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[5]In *Jones*, defendant was observed riding his bicycle in an area where recent burglaries occurred, with a grocery bag hanging from the handlebars and carrying grocery bags across his shoulders, traveling from the general direction of a dry-cleaning store. Only *after* the police directed Jones to stop did they see a bulge in Jones' jacket pocket that appeared to be a handgun. A pat down search confirmed Jones' possession of a gun. Arguably, even under the *DeBour* analysis, the encounter would not have been authorized because the police had no basis to approach defendant and even conduct a common-law inquiry.

Defendant next contends that even if the initial request to stop did not constitute a seizure, Officer Schell's second request to stop taken together with the police car following alongside of defendant, constituted a pursuit that impeded defendant's freedom of movement because the police "clearly would not take no for an answer" (DB:46-47).

Contrary to defendant's contention, the brief police pursuit here, if indeed it can even be called that, did not amount to a seizure. An officer may use his or her vehicle to unobtrusively follow and observe an individual, as Officer Schell did here, without elevating the encounter to a level-three pursuit. *People v. Moore*, 191 A.D.3d 1415 (4th Dept. 2021). And, as this Court has specifically held, the common-law right to inquire "authorized the police to ask questions of defendant, *and to follow defendant while attempting to engage him*." *People v. Moore*, 6 N.Y.3d 496, 500 (2006) (emphasis added); *Mack*, 89 A.D.3d at 864 (act of following defendant to finish proper inquiry was unobtrusive and did not limit movement); *People v. Becoate*, 59 A.D.3d 345 (1st Dept. 2009) (officers actions of approaching, following and positioning selves in front and behind defendant, directing defendant to stop and asking him if he had anything on him not seizure).

Additionally, it was manifestly reasonable for Officer Schell to call out of the car window for defendant to "stop," and to identify himself as a police officer. That Schell may have "yelled" for defendant to stop (Schell: 30), does not alter the appropriateness of his inquiry. After all, Schell testified

that he was in a car, twenty to twenty-five yards behind defendant, with a car between them, as well as other vehicular traffic (A035-36, A053, A057). Moreover, defendant testified that he was listening to loud music as he rode his bike (A116-17). Thus, it is likely that defendant did not even hear Schell's first request to stop. Schell necessarily had to speak loudly and clearly enough to attract defendant's attention and ensure that defendant heard him. Indeed, a request to stop is a prerequisite for information when a person is ahead of an officer, walking away, unaware that the officer wishes to speak to him. *Reyes*, 83 N.Y.2d at 946. *See People v. Feliciano*, 140 A.D.3d 1776, 1777 (4th Dept. 2016) (officer engaged in mere observation, and was not in pursuit, when he followed defendant after defendant ignored the officer's question and continued to ride away on the bicycle).

And the fact that Officer Schell opened the door so close to defendant that he had to move away (DB:44), by itself, did not elevate the encounter beyond a level-two request for information because that act did not obstruct defendant's movement. Defendant had already stopped, and it was certainly reasonable for the police to pull up alongside of defendant to speak to him. *See People v. Lawrence*, 188 A.D.3d 1095, 1097 (2d Dept. 2020) (that officer opened door of police vehicle, by itself, did not elevate the encounter beyond level-one request for information)*; People v. Burnett*, 126 A.D.3d 1491 (4th Dept. 2015) (officers pulled up next to defendant and, without exiting the vehicle, asked to see defendant's identification, asked where he was going and

where he was coming from, permissible level-one intrusion). Moreover, although two other officers were nearby when Officer Schell spoke to defendant, there is no evidence that the context of the encounter was coercive. The other officers did not exit the car until Schell announced defendant had a gun. *See People v. Diaz*, 180 A.D.2d 415 (1st Dept. 1992) (no intrusion of one citizen stopped by two officers). Thus, even if defendant found the police approach unsettling – and there is no evidence that it did – on this record it cannot be said the police conduct was even remotely "intimidating." *Hollman*, 79 N.Y.2d at 192.

Given the totality of these circumstances, which is the appropriate standard of review, the courts' determination that the stop was lawful under level two of *DeBour* is well-supported and should be upheld. *See People v. Chestnut*, 51 N.Y.2d 14, 23 (1980) (Courts must view interactions as a whole and refrain from "dissect[ing] each individual act by the policemen.").

Finally, in concluding that the encounter here constituted a seizure, defendant argues that it was unlawful because the police lacked the requisite reasonable suspicion (DB:49). But this issue is academic because the People never claimed, nor do they do so now, that the police possessed reasonable suspicion sufficient to effect a seizure. While defendant acknowledges that the suppression court did not "directly resolve this issue" (DB:49), the court was not required to decide if reasonable suspicion existed because it correctly determined the police conduct did not rise to a seizure such

that reasonable suspicion was required. *Rodriguez*, 194 A.D.3d at 972. Accordingly, this Court need not consider whether the police possessed reasonable suspicion.

C. Defendant's Conclusion that There Is No Material Difference Between Investigative Stops of a Moving Motor Vehicle and Stops of a Moving Bicycle Cannot Be Reconciled with the Rationale or Results of this Court's Search and Seizure Jurisprudence

The Appellate Division, Second Department, applied well-settled law in evaluating the police encounter with defendant under the *DeBour* analysis applicable to pedestrian street encounters. As such, the court correctly determined that police conduct constituted a lawful level-two stop.

To support his conclusion that he was seized unlawfully, defendant advocates for the adoption of a rule that any police-bicyclist encounter should be treated like a police stop of moving vehicles, which constitutes a seizure under the third level of *DeBour,* necessitating reasonable suspicion. Defendant suggests that analogous to a moving car, stops of moving bicycles inhibit the riders' freedom of movement, interrupt momentum, and compel submission to authority at a level exceeding what a pedestrian faces when stopped by the police (DB:22). This per-se rule is, however, inconsistent with search and seizure jurisprudence because the categorical nature of defendant's rule precludes consideration of the many factors courts have regularly used to determine whether the police encounter in a given situation was "reasonable," the cornerstone of the Fourth Amendment and the New York Constitution.

As the Supreme Court and this Court have repeatedly affirmed, the ultimate touchstone of the Fourth Amendment "is always the reasonableness in all of the circumstances of the particular governmental invasion of a citizen's personal security," and "that reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by officers." *Maryland v. Wilson*, 519 U.S. 408 (1997) (citations omitted); *see Heien v. North Carolina*, 574 U.S. 54, 60 (2014); *People v. Wheeler*, 2 N.Y.3d 370, 374 (2004). Indeed, the constitution itself provides no general guarantee against searches or seizures – only against unreasonable ones. U.S. Const. 4th Amdmt; NY Const. Art. I. §12; *see also People v. Rivera*, 14 N.Y.2d 441 (1964). And the Fourth Amendment's commands are "practical and not abstract" and must be interpreted "[i]n a commonsense and realistic fashion." *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

A seizure is a "violent or forcible apprehension," *DeBour*, 40 N.Y.2d at 217, or a "forceful and intimidating" show of official power sufficient to interrupt the individual's liberty of movement. *Bora*, 83 N.Y.2d at 534; *see also De Bour* 40 N.Y.2d at 216. As a general rule, the stop of an automobile constitutes a level-three seizure and must be supported by either reasonable suspicion that the person stopped has engaged in criminal activity or probable cause that the person committed a traffic violation. *People v.*

Hinshaw, 35 N.Y.3d 427 (2020); *see also Brendlin v. California*, 551 U.S. 249 (2007).

While a traffic stop significantly curtails the freedom of movement of the driver and the passengers, if any, of the detained vehicle, the compelling interest can be identified as the scope of the intrusion – a traffic stop is no mere approach by police on the sidewalk. It involves flashing lights, occasionally sirens, and a forced deviation from one's travel path. Certainly few 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. *See Delaware v. Prouse*, 440 U.S. 648 (1979) ("[T]hese stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway[] by means of a possibly unsettling show of authority[[,] ... interfere with freedom of movement, are inconvenient, ... consume time[[,] ... [and] may create substantial anxiety."); *see also* Erica Flores, Comment, *People, Not Places: The Fiction of Consent, the Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops*, 7 U. Pa. J. Const. L. 1071, 1074 (2005) ("Of the countless encounters between citizens and the police, perhaps the most common is the dreaded traffic stop. Everyone knows the sinking feeling in the pit of the stomach that accompanies flashing lights in the rearview mirror.").

But other than automobile stops, courts have refused to adopt per se rules in the area of Fourth Amendment seizure jurisprudence. *See United*

States v. Drayton, 536 U.S. 194, 201 (2002) ("[F]or the most part per se rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of all the circumstances surrounding the encounter." (internal quotation marks omitted); *Florida v. Bostick*, 501 U.S. at 439-40 ("[A] court must consider all the circumstances surrounding the encounter . . . . The Florida Supreme Court erred in adopting a per se rule."). *See, e.g., United States v. Comstock*, 531 F.3d 667, 678 (8th Cir. 2008) (reading *Bostick* and *Drayton* to foreclose per se rules in seizure analysis); *United States v. Romain*, 393 F.3d 63, 75 (1st Cir. 2004) (same); *United States v. Esparza-Mendoza*, 386 F.3d 953, 959 (10th Cir. 2004) (same); *United States v. Robertson*, 305 F.3d 164, 171 (3d Cir. 2002) (same) (repeating that no one factor should emerge as dispositive when evaluating whether a casual encounter has escalated into a seizure.)

Similarly, even within the *DeBour* framework, this Court has also routinely rejected bright-line rules in deciding whether a particular governmental interference is reasonable. Instead, the Court has relied on a test which attempts to balance – on a case-by-case basis – the state's interest in making a particular inquiry against the individual's interest in being free from arbitrary governmental interference. More specifically, the Court has held that "[c]ommon sense and a firm grasp of the practicalities involved compel us to reject an all or nothing approach. The crucial factor is whether or not the police behavior can be characterized as reasonable which, in terms of accepted

standards, requires a balancing of the governmental interests involved in the police inquiry." *DeBour*, 40 N.Y.2d at 217-18 (citing *People v. Ingle*, 36 N.Y.2d 413, 419 [1975]; *see Terry v. Ohio*, 392 U.S. 1, 20-21 [1968]; *People v. Cantor*, 36 N.Y.2d 106 [1975]; *People v. Kuhn*, 33 N.Y.2d 203, 209 [1973]).

In short, the greater the intrusion of individual privacy rights, the greater justification required by the police. Thus, because the level of intrusiveness of the privacy rights of a pedestrian is significantly less than that of a moving car, this Court has articulated a different standard for police encounters by allowing for the common-law right of inquiry and the right to request information as long as the stop does not constitute a seizure. *Spencer*, 84 N.Y.2d at 752; *DeBour*, *supra*.

Police encounters with bicyclists have followed the rule for pedestrians, applying *DeBour*'s four level analysis, rather than the per se rule for motorists. There is good reason for this kind of analysis. Fundamentally, a bicycle is not a "motor vehicle" within the meaning of the Vehicle and Traffic Law. *See* V.T.L. § 125.[6] Additionally, a bicyclist travels at a much lower speed than a motor vehicle, and generally not on a public highway, thus, a police encounter with a bicyclist would be much less restrictive of its movement than a car. But more important, by its very nature, a bicycle does not implicate the same constitutional concerns as a car under the cornerstone

[6]Section 125 of the Vehicle and Traffic Law defines "Motor Vehicle" as: "every vehicle operated or driven on a public highway that is propelled by any power other than muscular power." A bicycle is separately defined under Section 102 of the Vehicle and Traffic Law.

of the Fourth Amendment. Police encounters with bicyclists are not analogous to cars because bicyclists, like pedestrians, have virtually no expectation of privacy to the extent that they are completely exposed and open to public view, unlike a citizen in a car, riding in an enclosed compartment.[7] *See United States v. Mendenhall*, 446 U.S. at 556-57 ('stopping or diverting an automobile in transit, with the . . . opportunity for a visual inspection of . . . passenger compartment, . . . is materially more intrusive than a question . . . to a passing pedestrian.'). As the Supreme Court has noted, "Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian *or other modes of travel*." *Delaware v. Prouse*, 440 U.S. at 662 (emphasis added). Indeed, much of the interior of a car is hidden from public view, not to mention the trunk of the vehicle. And motorists often store personal belongings in a way akin to what they might do in their home. In fact, one can even live in their car. And certainly, an officer would not be able to see the "telltale" sign of a gun in a passing motorist's waistband, as Officer Schell did here. Thus, a bicyclist is no different than a pedestrian walking on the street, clearly open and exposed to the public and should continue to be treated as such.

Comparing this case to *DeBour* itself is instructive. In *DeBour*, after initially approaching the defendant to request information, the police

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[7]By analogy, a driver does not have any reasonable expectation of privacy under the Fourth Amendment in the license plate number of his vehicle, *nor would any expectation in such publicly exposed information be recognized as reasonable by society*. *People v. Bushey*, 29 N.Y.3d 158, 161-162 (2017) (emphasis added).

observed a bulge in his waistband. This prompted the police to ask the defendant to unzip his jacket, after which the police saw the butt of a gun protruding from defendant's belt. This Court held that the police "should have been expected to request clarification as to the source of the waistband bulge." *DeBour*, 40 N.Y.2d at 221.

Similarly, in the instant case, Officer Schell saw a bulky item in defendant's waistband, which combined with Schell's observation of defendant riding his bike in an erratic manner, gave Schell ample reason to approach defendant and request clarification of the waistband bulge. The only distinguishing factor here is that the defendant was riding a bicycle at the time. But at its core, the critical issue is that what defendant carried was exposed to public view. By adopting defendant's rule, it would require a police officer, who, like Officer Schell, observes an individual with the "telltale" sign of a weapon in his waistband, but who lacks the precise level of reasonable suspicion necessary to "seize" defendant, to simply shrug his or her shoulders and allow the individual to proceed with a potentially dangerous weapon. *See Adams v. Williams*, 407 U.S. 143, 145 (1972). On the contrary, because the reasonable expectation of privacy is far less for a bicyclist than for a motorist, it is the essence of good police work to better analogize the stop to a pedestrian encounter: a brief stop of a potentially suspicious individual in order to either request information or to ask for explanatory reasons based on a founded suspicion that criminality was afoot, may be most "reasonable" in light of the

circumstances known to the officer at the time. Additionally, "unrealistic restrictions on the authority to approach individuals would hamper the police in the performance of their other vital tasks." *De Bour*, 40 N.Y.2d at 225; *see People v. Battaglia*, 82 A.D.2d 389, 442 N.Y.S.2d 316 (4th Dept. 1981), *order rev'd on other grounds*, 56 N.Y.2d 558 (1982).

Here, the police would have been derelict to let defendant just ride away when public safety was possibly threatened. And some minimal investigation is encouraged by our society to protect people and property, but where reasonable suspicion may not yet exist. Defendant's actions of impeding the flow of traffic with his erratic bike riding down the middle of a street, coupled with defendant's hand on a bulky item in his waistband, not only justified further exploration, but actually required it, since "[p]rompt inquiry into suspicious or unusual street action" is "indispensable" in preventing crime, and because it is "a prime function of city police to be alert to things going wrong in the streets." *People v. Rivera*, 14 N.Y.2d 441, 444-45 (1964), *cert. denied*, 379 U.S. 978 (1965). Thus, "[tjhe police can and should find out about unusual situations they see, as well as suspicious ones." *People v. Rosemon*, 26 N.Y.2d 101, 104 (1970).

Given the minimally intrusive stop here and the conspicuous absence of the typical displays of authority attendant to traffic stops – sirens, flashing lights, signals to pull off the highway – this Court should not treat this case as akin to a typical traffic stop. Indeed, it is difficult to imagine how these

officers could have investigated less intrusively than they did. Their conduct did not transform a lawful inquiry into a seizure simply because defendant was riding a bicycle. Officer Schell's conduct toward defendant and his non-coercive request for defendant to stop his bicycle, free of any other indicia of restraint on defendant's liberty of movement, is more akin to an encounter with a pedestrian than a motor vehicle. Logically, a car, unlike a pedestrian, cannot even be stopped simply by verbally calling out to the motorist.

Further, there was nothing in the record to suggest that the police conveyed to defendant that he was not free to go. In contrast, few motorists in the flow of traffic 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. This is true especially in light of the fact that a traffic stop of a motor vehicle often results in longer detentions for the police to run a driver's license and registration and the possible issuance of a ticket which effects points on a license. A bicycle stop, on the other hand, rarely results in the same ramifications and usually concludes in verbal admonitions. Thus, common sense dictates that there is an inherent difference between traffic stops of motor vehicles and stops of individuals on bicycles – especially considered in light of the degree of intrusion of the individual's privacy rights. *See e.g., United States v. Adegbite*, 846 F.2d 834, 838 (2d Cir. 1988) (holding that where a vehicle "had barely started [driving] in a parking lot, moved only fifteen to twenty yards, and was waved to a halt by DEA agents on foot," the situation

was "more analogous to the cases of pedestrians" and recognizing that the "normal circumstances of a vehicle stop," which "generally involve abundant displays of authority, including police uniforms, sirens and flashing lights, and signals to pull off the highway[,]" were not present).[8]

Accordingly, the Court's ruling should turn not on a rigid rule that every encounter with a bicyclist is a per se stop but, in line with this Court's and the Supreme Court's rulings, on whether the police conduct was reasonable under the totality of circumstances. To accept defendant's proposed rule would negate the reasonableness analysis and impact the practical ways in which police conduct their citizen interactions. Rather, this Court should continue to focus on whether the police conduct was consistent with the limits imposed by the state and federal constitutions, that the police were not "motivated by whim or caprice" but by the level of suspicion required for the intrusion made.

The various departments of the Appellate Divisions have uniformly evaluated police encounters with bicyclists under the *DeBour* analysis applicable to pedestrian-street encounters. In *People v. Feliciano*, 140 A.D.3d 1776 (4th Dept. 2016), for example, the Fourth Department concluded that the conduct of the officer in asking defendant to stop his bicycle for a

[8]The approach of a parked vehicle by a police officer is governed by the same rules that govern police-civilian street encounters. *See People v. Garcia*, 20 N.Y.3d at 319-20 ("the graduated framework set forth in *People v. De Bour* and *People v. Hollman* for evaluating the constitutionality of police-initiated encounters with private citizens applies with equal force to traffic stops").

moment did not elevate the encounter beyond a level one intrusion. *See also People v. Lee*, 96 A.D.3d 1522, 1525 (4th Dept. 2012) (police justified in stopping bicyclist to conduct a common-law inquiry under level two of *DeBour*); *People v. White*, 35 A.D.3d 1263, 1264 (4th Dept. 2006) (same).

In *Matter of Jamaal C.*, 19 A.D.3d 144, 145 (1st Dept. 2005), the First Department concluded that no seizure occurred when the police directed defendant to stop as he rode his bicycle, at night, while holding what appeared to be heavy object underneath his jacket, at his waistband, and appeared to be attempting to conceal the object by pushing it down his pants. The court held that these observations "suggested the presence of a weapon and justified, at least, a common-law inquiry." *Id*. at 145 (citing to *DeBour* and *People v Pines*, 281 A.D.2d 311 [2001], *aff'd* 99 NY2d 525 [2002]).

In *People v. Day*, 8 A.D.3d 495, 496 (2d Dept. 2004), the police observed the defendant riding a bicycle, who matched description of radio run of a suspect in an attempted burglary. The Second Department held that the detective had, at a minimum, a common-law right to inquire based on initial observation of defendant, coupled with information received in radio run. *See also People v. Ruffin*, 133 A.D.2d 425, 426 (2d Dept. 1987) (police action of pulling up alongside defendant riding bicycle late at night, asking him to stop, and inquiring as to his reason for being in area, held proper under the second level of *DeBour*).

Likewise, courts in other states, regardless of whether they ultimately concluded that the police action constituted a seizure, have evaluated stops of bicyclists as analogous to police/citizen encounters. *See, e.g.*, *Com. v. Lopez,* 887 N.E.2d 1065 (Mass. 2008) (two uniformed officers in two marked patrol cars followed defendant on his bicycle, emerged from their cars and one officer asked, "Can I speak with you," and defendant agreed to stop and talk, did not amount to seizure); *Commonwealth v. Sykes,* 867 N.E.2d 733 (Mass. 2007) (no seizure where police pulled vehicle alongside defendant's bicycle and asked if he would speak with them); *State v. Young*, 104 N.E.3d 128 (Ohio Ct. App. 2018) (stop of bicyclist to request identification and information by stating "hey, can I talk to you?" not seizure); *A.L. v. State*, 133 So. 3d 1239 (Fla. Dist. Ct. App. 2014) (no bright-line test for distinguishing consensual encounter from a *Terry* stop and evaluating bicycle stop under totality of the circumstances); *State v. Tehero,* 147 P.3d 506, 508 (Utah Ct. App. 2006) (bicycle stop was voluntary, "level one" encounter, rather than a "level-two" investigatory stop, therefore Fourth Amendment protections not implicated); *State v. Soto,* 179 P.3d 1239 (N.M. Ct. App. 2008) (employing "totality of the circumstances" analysis to encounter between a citizen on a bicycle and police); *State v. Randolph*, 74 S.W.3d 330, 332 (Tenn. 2002) (seizure where officer made show of authority by stopping defendant riding a BMX-style bicycle by activating lights and pursuing defendant for one and one-half blocks after defendant continued to ride away); *State v. Davis*, 543

So.2d 375, 376 (Fla. Dist. Ct. App. 1989) (consensual encounter where officer drove alongside bicyclist riding down the street and asked if he might speak with him for minute).

Thus, rather than adopting the rule advanced by defendant, when considering the lawfulness of bicycle stops, this Court should take a similar approach of that taken during a lawful citizen encounter outside of the traffic-stop context, on a case-by-case basis, considering the totality of the circumstances of the individual encounter. No one factor should be dispositive as to whether an encounter has escalated into a seizure.

Defendant's bright-line rule would essentially treat restraints on the mode of transport as the key fact in determining whether a seizure has occurred (DB:39). But neither the lawfulness of police conduct nor the constitutional protection of the freedom of individual movement should turn on the means of that movement. And although bicycles and motor vehicles share characteristics of ready mobility, the level of interruption of movement relevant to automotive speeds cannot be reasonably applied to the much lower speeds of bicycles. And certainly a car cannot drive on the sidewalk like a bicycle can, enabling the police to merely approach and inquire.

In defendant's view then, any purposeful interference with a bicyclist's freedom of movement would settle the "seizure" inquiry. But this is not the proper analysis under this Court's precedent. *See Bora, supra*; *see also People v. Howard*, 50 N.Y.2d 583, 585 (1980) (in determining whether

police conduct was proper, courts should evaluate: 1) the nature, scope, and severity of the interference with individual liberty; 2) the public interest served; and 3) the objective facts upon which the officer relied).

Moreover, if one were to accept defendant's theory that stopping all bicycles requires reasonable suspicion because of their movement, then the same would apply to every mode of transport – skateboards, scooters, roller skates, segways, and even pedestrians. And this Court has repeatedly reiterated under *DeBour* that law enforcement officers may approach individuals on the street and question them, request information, and even inquire whether they possess weapons, without effecting an unlawful seizure. So too here, a police officer should be able to constitutionally ask a citizen on a bicycle, like a citizen on the street, questions without automatically effecting a seizure. As demonstrated, a bicycle stop is inherently different than a traffic stop and therefore, compels a different conclusion. Again, a motorist who is seized under color of law is legally obligated to interact with the stopping officer as to matters related to the traffic stop and is not free to leave until the officer permits it. *See Brendlin v. California*, 551 U.S. at 249. A stopped motorist is similarly reasonably inclined to believe he must interact with the officer even as to matters unrelated to the stop. At a minimum, a stopped motorist will reasonably believe that he must comply with the officers' questions and requests. In contrast, a citizen on a bicycle – like a pedestrian – is free to disregard the officers' command to stop and absent independent

reasonable suspicion by the police, can continue on his or her way.

Defendant also posits that a bicycle stop is indistinguishable from a car stop because it necessitates the interference of movement by submission to police authority (DB:30). But any police-citizen encounter, even pursuant to a common-law right of inquiry or a request for information, requires some self-identification by the police, and the necessary show of authority that that entails. Moreover, there is necessarily some interference with a person's interest in being undisturbed inherent in every police citizen encounter. *See* Russell L. Weaver, *The Myth of "Consent*," 39 Tex. Tech L. Rev. 1195, 1199 (2007) ("When a police officer stops an individual..., the individual is inevitably apprehensive about the encounter given that the officer has the power to arrest and to bring charges). But, again, such slight intrusions do not mean that a person has been seized. Rather the nature of the stop and the degree of police authority employed to effect the stop should inform the permissible or reasonable contours of the stop. Defendant's analogy between bicycles and cars for purposes of police encounters is, therefore, flawed.

Next, despite the clear omission of a bicycle within its statutory definition,[9] defendant, nevertheless, seeks support for his proposed rule in the

[9] Contrary to defendant's characterization that the omission of bicycles from the definition of the VTL is due to a "historical quirk" (DB:31, fn. 4), the omission evinces the Legislature's intent that a bicycle is not a motor vehicle under the VTL. *See Kimmel v. State*, 29 N.Y.3d 386, 392 (2017) (Court must "first look to the plain language of the statute[ ] as the best evidence of legislative intent"); *People v. Levy*, 15 N.Y.3d 510, 515 (2010) (the failure of the Legislature to include a matter within the scope of an act is an indication that its exclusion was intended).

Vehicle and Traffic Law. Defendant cites to Vehicle and Traffic Law § 1231, which provides that bicycle riders are granted all of the rights and subject to all of the duties of car drivers on roadways, and Vehicle and Traffic Law § 1102, which provides that it is an infraction for a person to fail to "comply with the lawful order or direction of a police officer . . . or other person duly empowered to regulate traffic." Defendant posits that because a component of a seizure is whether a person feels free to disregard a police request to stop, bicyclists are more likely than pedestrians to perceive commands by police to stop to be "lawful orders" and therefore feel compelled to submit to police authority (DB:31-34). Defendant's argument is not persuasive.

While it is well settled that a violation of the Vehicle and Traffic Law can serve as the requisite reasonable suspicion for a lawful police stop of either a car or a bicycle (*see Hinshaw,* 35 N.Y.3d 427; *People v. Morris*, 138 A.D.3d 1239, 1240 [3d Dept. 2016]; *People v. Varn*, 182 Misc.2d 816, 821 (Cty. Ct., Rensselear Cty. 1999), other than that, a bicycle is simply not a car. Instead, a bicyclist on a public street operates under a wide array of motor vehicle laws primarily for safety concerns. *See Palma v. Sherman*, 55 A.D.3d 891, 891 (2d Dept. 2008). And, even then, the statute distinguishes bicycle rules "which by their very nature" cannot be applied to motor vehicles. *See* V.T.L. § 1231. For example, "the rules governing bicyclists recognize that bicycles are inherently much slower, more vulnerable and take up less space than cars or motorcycles." *People v. Barrett*, 13 Misc. 3d 929, 945 (Crim. Ct.

NY Co. 2006) (citations omitted). Moreover, to accept defendant's reliance on the Vehicle and Traffic Law, would also require this Court to hold that "in-line skates," which are similarly captioned in VTL § 1231 with bicycles, to be analogous to a car. Because that conclusion is practically and realistically untenable, this argument must fail.

Second, the "lawful order" statute (V.T.L. § 1102), upon which defendant relies, is not limited to motorists, or for that matter bicyclists. Indeed, pedestrians are "traffic" within the purview of the definition contained in Vehicle and Traffic Law § 152, and hence are also subject to lawful orders of police regulating traffic under Vehicle and Traffic Law § 1102. *See* V.T.L. § 152. Thus, the application of the Vehicle and Traffic Law does not support defendant's proffered rule that stopping a bicyclist, like a motorist, should automatically be considered a seizure under the third level of *DeBour*.

Additionally, the cases cited by defendant do not compel the conclusion that there should be a per se rule that bicycle stops are constitutional seizures requiring reasonable suspicion (Defendant's Brief a 34-37). None of the cases were analyzed by New York State standards under *DeBour*. Rather, those courts, where *DeBour* is not applicable, invariably resorted to either their own state law, or a balancing of interests in determining whether a particular stop constituted a seizure that had to be supported by reasonable suspicion under the constitutional rationale enunciated in *Terry v. Ohio*, 392 U.S. 1, 2. *See e.g*, *State v. Turner*, 191 P.3d 697, 700 (Or. Ct. App.

2008) (court looked at the totality of the circumstances in bicycle stop to determine whether police had intentionally and significantly interfered with defendant's liberty); *State v. Swift*, 2016 WL 767764 (Ct. App. Dec. 16, 2016) ("analysis of whether a reasonable person would have concluded that he or she was restrained of his or her liberty under particular circumstances is very fact-sensitive and case-specific."); *In re T.J.B.*, 517 S.E.2d 77, 78 (Ga. Ct. App. 1999) (applying Georgia state law in evaluating bicycle stop like car stop, and holding no objective basis for suspecting criminal activity sufficient to justify an investigatory stop under *Terry*). The courts' reliance on the federal standard in *Terry* belies defendant's bright-line analysis of the cases.

In other cases cited by defendant, courts have treated bicycle stops like car stops where the police had reasonable suspicion that a "traffic violation" occurred, which, as noted, is equally applicable in New York. *See e.g.*, *United States v. Morgan*, 855 F.3d 1122 (10th Cir. 2017) (riding bicycle against traffic and failing to use a headlight in the dark); *United States v. Barker*, 2013 WL 6231282, at *2 (M.D. Fla. Dec. 2, 2013) (riding bicycle not properly equipped with light in the middle of road and against traffic), *aff'd*, 644 F. Appx 1000 (11th Cir. 2016); *United States v. Morris*, 482 F. Appx 779, 780 (4th Cir. 2012) (defendant operated bicycle in violation of Maryland's traffic laws); *State v. Mendez*, No. 34,778, 2017 WL 3484696, at *1 (N.M. Ct. App. July 12, 2017). *See also People v. Morris*, 138 A.D.3d 1239, 1240 (3d Dept. 2016).

And contrary to defendant's assertion, New York courts have not applied the "car-stop framework" to bicycle stops (DB:38). As properly held by the Appellate Division in affirming the lower court's decision, and as demonstrated above, courts have continued to evaluate police encounters with bicyclists under the *DeBour* analysis applicable to pedestrians. *Rodriguez*, 194 A.D.3d at 968. Defendant relies on *People v. Hickman*, 185 A.D.3d 407 (1st Dept. 2020), *People v. Morris*, 138 A.D.3d 1239, and *People v. Varn*, 182 Misc.2d 816, 821 (DB:38). But, in those cases, the courts were not addressing whether the fact that defendant was on a bicycle required reasonable suspicion for the stop, but were evaluating, under the principles set forth in *DeBour*, the totality of the circumstances and whether the police actions were justified at their inception. And specifically in *Varn*, the court properly analogized a bicycle stop to a car stop because the defendant had committed a violation of the Vehicle and Traffic Law. *Id*. at 821. Thus, none of these cases stand for the proposition that reasonable suspicion was a threshold requirement for the bicycle stop.

Finally, it does not make sense to justify defendant's rule on his assertion that if police stops were not seizures, the police could pull over bicyclists ad hoc, without any articulable basis (DB:39). It is, and always has been, that the police need some minimal objective credible reason for interfering with a person's movement. *DeBour* at 223. Then it should be left to the courts to define the level of justification required based on the level of

intrusion at issue in order for the police behavior to be deemed constitutional. *See generally* Emily J. Sack, *Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v DeBour*, 66 NYU L Rev 512 (1991).

In the end, when viewed properly against the cornerstone of Fourth Amendment jurisprudence and this Court's precedent, Officer Schell's conduct in investigating a potentially dangerous situation and simply inquiring whether defendant had anything on him must be seen as reasonable. The law does not require that an officer walk away from a person he or she reasonably believes to be carrying a gun. Both the public safety and that of police officers charged with protecting the public demand precisely the opposite.

Moreover, to conclude that the police conduct in this case was anything less than reasonable would not further the purpose of the exclusionary rule. "The exclusionary rule's primary function is deterrence of future unlawful police activity . . ." *People v. Drain*, 73 N.Y.2d 107, 110 (1989). Where, however, the police act responsibly, further a legitimate state interest, and engage in conduct which leaves them with no discretion, and where the intrusion to an individual's privacy is slight, no deterrent purpose is served by excluding relevant evidence. Indeed, this Court has refused to suppress relevant evidence if little or no deterrent benefit could be anticipated from the exclusion. *Id*. (citations omitted). *See also People v. Young*, 55 N.Y.2d 419, 425 (1982) ("application of the [exclusionary] rule must be restricted to those areas where its remedial objectives are most 'efficaciously served' and not

merely 'tenuously demonstrable'"). Accordingly, because the exclusion of evidence in this case would serve no deterrent function, this Court should reject defendant's per se rule.

Most important, by adopting defendant's mechanical rule, and without any regard to the underlying standard of reasonableness that necessarily permeates the inquiry, the Court would reach an illogical result – where the exclusionary rule is used to penalize police action that was at all times measured, responsive, and reasonable – but also set a precedent that, if followed, would place both the police and the public in danger during ensuing street encounters. This Court should, therefore, decline to formulate a rule that a stop of an individual on a moving bicycle constitutes a per se seizure.

* * *

In sum, the record fully supports the lower courts' determination that the police stop was lawful. Therefore, because defendant's motion to suppress physical evidence and statements was properly denied, this Court lacks jurisdiction to review the mixed question of law and fact.

In any event, this Court should reject defendant's attempt to apply the same constitutional standard to bicycle stops as automobile stops. Rather than carving out a particular category of cases and applying a particular bright-line rule to stops of bicyclists, which are inherently and necessarily fact-intensive situations, this Court should continue to take into account the

totality of the circumstances in evaluating the scope of the police conduct to determine whether the police acted reasonably.

CONCLUSION

The Court should affirm the Appellate Division's order.

Respectfully submitted,

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May 26, 2022

CERTIFICATE OF COMPLIANCE

I certify the following in compliance with section 500.13(c)(1) of the Rules of this Court:

1. The foregoing brief was prepared on a computer.

2. The typeface used is Times New Roman.

3. The point size of the text is 14 point.

4. The brief is double spaced, except for the Table of Contents, point headings, footnotes, and block quotes.

5. The brief contains 13,905 words, exclusive of the Table of Contents, proof of service, and the certificate of compliance, based on the word count of the word-processing system used to prepare this brief.

Dated: Kew Gardens, New York
May 25, 2022

Assistant District Attorney

AFFIDAVIT OF SERVICE
BY EMAIL & MAIL

State of New York)
)ss:
County of Queens)

JILL STORMS, being duly sworn, deposes and states as follows:

1. I am over the age of 18 years and not a party to this action.

2. On May 25, 2022, upon consent of counsel I served the within Respondent's Brief in the case of People v. Lance Rodriguez on the following:

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by emailing a copy to counsel at the email address counsel provided and as noted above and by causing three true and correct copies of the document to be placed in a post-paid wrapper and then deposited in the official depository maintained and controlled by the United States Postal Service located at 8330 Austin Street, Kew Gardens, NY, 11415.

Jill Storms
JILL STORMS

Sworn to before me this
25th day of May, 2022
Rebecca Nealon
Notary Public

REBECCA NEALON
Notary Public - State of New York
No. 02NE6406993
Qualified in Warren County
My Comm. Expires Apr. 27, 2024