To Be Argued By: Paul B. Watkins, Esq.
Time Requested: 25 Minutes

COURT OF APPEALS OF THE STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	Court Of Appeals Docket No. **APL-2022-00116** Appellate Division Docket No. **KA 18-01957** Monroe County Indictment No.**2015-0800**

BRIEF FOR DEFENDANT/APPELLANT TYQUAN JOHNSON

Date Completed: October 24, 2022

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PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	**RULE 500.13(A) STATEMENT** Court Of Appeals Docket No. **APL-2022-00116** Appellate Division Docket No. **KA 18-01957** Monroe County Indictment No.**2015-0800**

Per Rule 500.1(f), Defendant/Appellant Tyquan Johnson is not a corporate entity. Per Rule 500.13(a), there is no related litigation as of the date this brief is completed.

Dated:

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SUMMARY OF THE CASE

A. Summary

On April 15, 2015, Defendant/Appellant Tyquan Johnson ("Defendant") was stopped and frisked by Rochester Police Department ("RPD") Officer Bradley Pike. As a result, Officer Pike found some crack cocaine, heroin and marijuana in Defendant's possession. Defendant was ultimately indicted on two counts of Criminal Possession 3rd (Intent to Sell).

The issue for this is appeal is whether Officer Pike had justification to stop and frisk Defendant under the *People v. De Bour*, 40 N.Y.2d 216 (1976) four level analysis. Initially, Officer Pike first decided to approach Defendant for a Level One information inquiry based on his observation that Defendant moved from the driver seat to the passenger seat of a parked Ford Explorer**.** This clearly did not provide the justification necessary for the Level One approach.

After Defendant exited the Ford Explorer, Officer Pike believed he saw Defendant adjust his pants, and followed Defendant for a Level Two "common law" inquiry. Again, Defendant pulling up his pants did not provide the required justification for this.

Defendant kept on walking, Officer Pike followed him and told him to "hold up". When Officer Pike got next to Defendant, Defendant stopped, and Officer

Pike thought Defendant appeared nervous. In response to Officer Pike's questioning, Defendant said he was not nervous, and said he had nothing when Officer Pike asked him if he had a weapon. However, Officer Pike then immediately stood in front of Defendant and frisked him for weapons. Again, there was no justification for Officer Pike to do this Level Three stop and frisk.

Officer Pike did not find a weapon during the stop and frisk, and in fact, it is undisputed that Defendant did not have a weapon on him. However, Office Pike did feel a bulge in Defendant's front pocket, and Defendant eventually pulled out some bags which later were found to contain the crack cocaine, heroin and marijuana.

A probable cause hearing was held, and the Trial Court denied Defendant's motion to suppress. Defendant was then found guilty after a Bench Trial. The Fourth Department affirmed the guilty verdict and the Trial Court's denial of the motion to suppress, and this Court granted leave to appeal. *People v. Johnson*, 206 A.D.3d 1702 (4th Dept. 2022), *lv. granted* 38 N.Y.3d 1151. See Defendant/Appellant's Rule 500.14 (b) Appendix (hereinafter "A") 3-5.

However, it is clear that Officer Pike did not have the required justification to approach Defendant for a Level One or Two inquiry/questioning, and no justification to do a Level Three stop and frisk. All evidence seized from the

Defendant should have been suppressed and the indictment dismissed.

B. Jurisdiction

This Court has jurisdiction to consider this appeal as leave to appeal was granted by Associate Justice Hon. Rowan D. Wilson of this Court, who determined that questions of law are involved which ought to be reviewed by the Court of Appeals. *People v. Johnson*, 38 N.Y.3d 1151 (2022). (Also, see A.3).

C. Preservation

Defendant had made a motion to suppress all statements made by Defendant and all evidence seized by Officer Pike (A.11, 27-30), the People opposed it (A.32) and the Trial Court ordered a suppression hearing which was held on January 14, 2016. The Trial Court addressed all of the Level One to Three issues in its Decision And Order (A.44), and they were addressed in the Fourth Department's Memorandum And Order. *People v. Johnson*, *supra* 206 A.D.3d at 1702-1703. The issues are preserved for this Court's review.

STATEMENT OF QUESTIONS PRESENTED

1. Did Officer Bradley Pike have the required justification to approach Appellant/Defendant Tyquan Johnson for a Level One *People v. DeBour*, 40 N.Y.2d 210 (1976) inquiry?

2. Did Officer Bradley Pike have the required justification to make a Level Two *People v. DeBour*, 40 N.Y.2d 210 (1976) inquiry?

3. Did Officer Bradley Pike have the required justification to make a Level Three *People v. DeBour*, 40 N.Y.2d 210 (1976) stop of Appellant/Defendant Tyquan Johnson?

4, Did Officer Bradley Pike have the required justification to perform a pat/frisk of Appellant/Defendant Tyquan Johnson?

STATEMENT OF THE CASE

Defendant was indicted on two counts of Criminal Possession of a Controlled Substance 3rd (Intent to Sell), Penal Code 220.16 (1) and one count of Unlawful Possession of Marijuana, Penal Code 221.05 as a result of the stop and frisk. (A.7).

The issues for this appeal arise out of the January 14, 2016 probable cause hearing, the transcript of which begins at A.56. The only witness at the hearing was Rochester Police Department (RPD) Officer Bradley Pike.

A. Testimony Bradley Pike

Officer Pike had been with the RPD for nine years, and had been involved in prior narcotics arrests. (A.59-60).

The stop and frisk of Defendant occurred on April 15, 2015 at about 5:10 p.m. on Harvest Street in Rochester. Officer Pike was in uniform in a marked vehicle with Darrel Schultz, another RPD Officer. They were patrolling the area because there had been a reported uptick in violence there. (A.60-61). The People did not call Officer Schultz as a witness to corroborate Office Pike's testimony.

As he was driving up Harvest Street, Officer Pike noticed a parked Ford Explorer about fifty feet in front of him. He did not recall if it was engaged. There was only one occupant in the Explorer (whom he later identified in Court as the

Defendant). (A.62). While he testified he could not recall whether the Explorer was parked illegally, Officer Pike admitted there was nothing in the report he prepared stating that it was. (A.71-72).

When he saw the Explorer from the fifty foot distance, it appeared the Defendant jumped or moved into the passenger seat. (T.62, 72). After he saw Defendant jump/move into the passenger seat, Officer Pike immediately stopped the police car behind the Explorer and turned on his overhead lights. When asked why he stopped, Officer Pike testified:

> At that point I wanted to see what was going on inside the vehicle. It's not common for someone to jump from the driver's seat to the passenger seat. (A.63:11-13).

After testifying the move to the passenger seat was the reason for the stop, Officer Pike stated that before stopping, he also saw Defendant make an additional motion from the driver's seat to the passenger's seat. The Defendant moved his upper torso, mainly his shoulders and head, back toward the driver's seat. Officer Pike testified that he thought there was the potential that Defendant was trying to stash a weapon, or putting a weapon on his person.(A.63-64).

Officer Pike then exited the police vehicle as the Defendant was getting out of the Explorer on the passenger side:

Q. You indicated there came a time that you exited your vehicle?

A. Yes.

Q. And where was the individual that you saw inside the Ford Explorer located when you exited your vehicle?

A. He was getting out of the passenger seat and I was getting out of the driver seat of my vehicle as he was headed to the sidewalk. (A.64:13-20).

As above, Officer Pike's decision to pull over and stop behind the Explorer was based on the movement in the Explorer. His decision to approach Defendant was made before he saw Defendant get out of the Explorer and walk away, as Officer Pike was already exiting the cruiser when he saw Defendant exiting.

In any case, when he exited the cruiser, Officer Pike saw that Defendant's pants were unbuttoned and his belt was undone, and Defendant was trying to pull them up as he walked away. Officer Pike thought this was suspicious because some suspects hide weapons, and a belt is used to secure them. (A.64-65).

Officer Pike then immediately asked Defendant to hold up a minute. However, the Defendant kept on walking, and Officer Pike followed and got right next to him. (A.65-66). Under cross exam, Officer Pike testified that by saying "hold up", he meant that Defendant should stop, and Defendant stopped when Officer Pike caught up with him. (A.74).

It then appeared to Officer Pike that Defendant was nervous. Officer Pike asked Defendant if he had any weapons, and Defendant said the word "nothing". (A.66 and 70). Officer Pike then asked Defendant if he was nervous, and Defendant said he wasn't. Officer Pike then immediately started a pat/frisk of Defendant. (A.66).

Officer Pike performed the pat/frisk to make sure Defendant wasn't concealing a weapon, and stood right in front of Defendant to do this. (A.67 and 76). Officer Pike started the pat/frisk at Defendant's waistband, and then ran his hands down the front of Defendant's pockets. (A.66-67). The pat/frisk showed that, in fact, Defendant did not have a weapon, and Officer Pike did not see a gun on him. (A.77).

Officer Pike did feel an object in one of Defendant's pockets that he thought felt like a bag of drugs. (A.67). Officer Pike asked Defendant what he had in his pocket, and Defendant said nothing. However, Defendant began to empty his pocket, and threw down on the ground what Officer Pike thought were two bags of marijuana and some dollar bills. He could also see a sandwich baggie in Defendant's hands. (A.67-68).

While the sandwich baggie was still in Defendant's hands, Office Pike thought he could see what he suspected were bags of heroin. He then placed

Defendant in custody, and retrieved he bag from Defendant's hand. He looked at the contents, and testified there were fifteen bags of heroin and one bag of crack cocaine. (A.68-69).

B. Trial Court Decision And Trial

After Officer Pike's testimony, both sides rested and gave Closing Arguments, and the matter was submitted. (A.78-83). The Trial Court then issued its January 17, 2017 Decision And Order denying the motion to suppress (A.44), and the case proceeded to a Bench Trial. (Bench Trial 2/21/17: A.84).

The Trial Court took testimony from the People's witnesses, Officer Pike and RPD Investigator Charles Burgoon. Defendant did not testify, and the case was submitted. On February 28, 2017, the Trial Court issued its oral decision, finding Defendant guilty of Criminal Possession of a Controlled Substance 3rd as charged in Counts One and Two of the indictment. (Transcript: Decision 2/28/17: A.146-147).

Sentencing took place on April 4, 2017. Defendant was given a sentence of five years on each of the first two counts of the indictment, to run concurrent to one another, but consecutive to sentences in a separate burglary conviction.. Defendant was also given a one year conditional discharge on the third count of the indictment (possession of marijuana).(Transcript: Sentencing 4/4/17:A.155-

156).(Also see A.9 &10).

C. Fourth Department Memorandum And Order

On appeal, the Fourth Department found that the evidence at the suppression hearing established that the action taken by Officer Pike was justified in its inception, and every subsequent stage of the encounter, *People v. Johnson*, *supra,* 206 A.D.3d at 1702-1703 (4th Dept.2022).

However, as argued below, contrary to the Trial Court's and Fourth Appellate Division's decision, Officer Pike's actions in approaching Defendant were not justified at any of the first three *People v. DeBour*, 40 N.Y. 2d 210 (1976) levels, and there were no objective criteria that would have justified his pat/frisk of the Defendant.

Defendant respectfully requests this Court find that all evidence seized by Officer Pike should have suppressed, and dismiss the indictment filed against Defendant.

POINT ONE: OFFICER PIKE WAS NOT JUSTIFIED IN INITIATING A LEVEL ONE INQUIRY

A. Introduction

This Court summarized the four tiered *De Bour* test in *People v. Moore*, 6 N.Y.3d 496, 498-499 (2006):

> In *De Bour*, we set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime (*De Bour*, 40 N.Y.2d at 223, *see also People v. Hollman*, 79 N.Y.2d 181, 184–185[1992]).

This part of Defendant's argument concerns Officer Pike's initiating a Level One inquiry. The Trial Court found that based on his observing Defendant move between the seats in the Explorer, and then get out of the Explorer and walk away, Officer Pike had an objective, credible reason not necessarily indicative of criminal activity to approach Defendant and request information. (A.50). However, that finding is not supported by the law or the record in this case.

B. Time Line Of The Encounter

Initially, it is important to note the time line involved. Officer Pike testified that he made the decision to stop behind Defendant's vehicle after he saw Defendant's movement from the driver's seat to the passenger's seat in the Explorer. He then saw Defendant lean back to the driver's seat. Then, after he stopped and was exiting the police cruiser, Officer Pike saw Defendant exiting the Explorer.

It is clear from the Record that Officer Pike made the decision to stop the police cruiser before he saw Defendant exit the Explorer. As to deciding to approach Defendant, as noted in the Summary Of The Facts, Officer Pike's decision to exit the police cruiser and confront Defendant was made before he saw Defendant walking away, as Officer Pike was already exiting the cruiser when he saw Defendant get out of the Explorer.

However, regardless of whether Officer Pike made the decision to approach Defendant based solely on Defendant's movements in the Explorer, or based on those movements and Defendant's exiting the Explorer, there was no basis for Officer Pike to approach Defendant for a Level One inquiry as the Trial Court found.

It should also be noted that there is nothing in the Record to show that Defendant was even aware that he was being observed by Officer Pike when he changed seats in the Explorer. Officer Pike was fifty feet away when he saw Defendant change seats, and did not turn on the overhead lights in the police cruiser until he pulled up and stopped behind the Explorer. The People presented no evidence that Defendant saw the police cruiser before he changed seats, and there is nothing in the Record to support a supposition that Defendant changed seats, or made any movement in the Explorer due to the presence of the police.

Finally, it should be noted that even though Officer Pike testified that he was patrolling in the area because there had been an uptick of violence, nothing in his testimony indicated the "uptick" of violence was a reason he approached Defendant. Also, the Trial Court did not find that the uptick in violence was one of the factors that justified a Level One approach. (A.50).

In any case, as argued below, whether there might have been violence in the neighborhood, is not sufficient to justify a Level One inquiry.

Given the above, it is clear from the decisions of this Court, and Appellate Divisions, that Officer Pike did not have justification to approach Defendant for a Level One inquiry.

C. Officer Pike Was Required To Have An Articulable Basis, Supported By An Objective, Credible Reason, To Approach Defendant For A Level One Request For Information

This Court set out what is needed to justify a Level One request for information in *People v. Hollman*, 79 N.Y.2d 181, 190 (1992) "[t]hus, *De Bour* suggests that even in their law enforcement capacity, police officers have fairly broad authority to approach individuals and ask questions relating to identity or destination, provided that the officers do not act on whim or caprice and have an articulable reason not necessarily related to criminality for making the approach (citation omitted)."

Additionally, "[i]n determining the legality of an encounter under *De Bour* and *Hollman*, it has been crucial whether a nexus to conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. The fact that an encounter occurred in a high crime vicinity, without more, has not passed *De Bour* and *Hollman* scrutiny (*cf., People v. Holmes*, 81 N.Y.2d 1056, 1058)." *People v. McIntosh*, 96 N.Y.2d 521, 526-527(2001).

In *People v. Ocasio*, 85 N.Y.2d 982, 985 (1995) this Court held that the Level One standards apply to a parked car:

> In the case of a car that has been approached but not seized, as we recently noted in *People v Spencer* (84 NY2d 749), the police must possess an articulable basis for requesting information. That is supplied by an objective, credible reason not necessarily indicative of criminality (see, e.g., *People v Hollman*, 79 NY2d 181, 187, 194 [defendant's placement of bag at distance from himself]; *People v Harrison*, 57 NY2d 470, 475, *supra* [dirty condition of rental car]; *People v Moore*, 47 NY2d 911, *revg for reasons stated in dissenting opn* 62 AD2d 155, 157-160 [bleeding defendant carrying television in pillow case]; *People v De Bour*, 40 NY2d 210, 220, supra [defendant's crossing of street upon sighting of officers]).

Appellate Division cases have applied this Court's standards to particular situations where police approach individuals in parked cars for a Level One inquiry.

In *People v. Laviscount*, 116 A.D.3d 976 (2nd Dept. 2014), *lv. denied* 24 N.Y.2d 962:

> According to the testimony of Police Officer Michael Ranolde, at 2:45 a.m. on November 7, 2008, the defendant was sitting in his car, which was parked legally, with a female passenger. Noticing the defendant's car, Ranolde drove his unmarked police car toward the defendant's car. As Ranolde was maneuvering his car to stop parallel to the defendant's vehicle, he saw the defendant move something from the dashboard and throw it below him. Ranolde and his partner then exited their vehicle and approached the defendant's car. *Id.* at 977.

Under those facts, the Court found:

> Here, that branch of the defendant's omnibus motion which was to suppress the physical evidence seized should have been granted, as Ranolde lacked an objective, credible reason for approaching the defendant's car and shining his flashlight into the car (citation). At the hearing, Ranolde failed to articulate any reason for approaching the defendant's car other than that

> the car was parked in the early morning in an area where cars usually were not parked, and that the defendant may have moved something from the dashboard and thrown it on the floor of his car. Neither reason was a sufficient basis for the officers to have approached the defendant's vehicle and requested information (citation). *Id.* at 978-979.

If throwing something on the floor of the car was not sufficient for a Level One inquiry, then Defendant moving into the passenger seat, and leaning back, is not sufficient, even when combined with the innocuous action of exiting the Explorer.

Also, the defendant in *Laviscount* threw the object on the floor as the police pulled up next to the car. As above, there is nothing in the Record to show that Defendant was even aware of Officer Pike's approaching police car when he moved.

In *People v. Rutledge*, 21 A.D.3d 1125, 1126 (2nd Dept.2005), *lv denied* 6 NY3d 758 (2005), the Court found that "[c]ontrary to the People's contentions, from his vantage point of "50 yards at the most" away, the arresting officer's alleged observation of the defendant, seated in a parked car at night, smoking something, provided the officer with no basis to approach the defendant's car (citations)."

If an officer's observation from fifty yards away of the *Rutledge* defendant smoking something was not sufficient for an approach, then Officer Pike

observing Defendant change seats from fifty feet away cannot be either. Again, even accepting that Defendant left the vehicle before Officer Pike decided to approach him, that act is not sufficient to provide the required justification.

In *People v. Stover*, 181 A.D.3d 1061 (3rd Dept.2020), a police officer testified that, on the night of the incident, he and his partner were surveilling the parking lot of a private club, an area he described as a "hot spot" for crimes. A vehicle was parked in the same location where the officers had seen it earlier, and was occupied by defendant, whom the officers believed they had seen earlier driving the car and entering the club. Defendant was alone in the car and was engaged in a loud, "heated argument" on his cell phone. The officers then approached, asked defendant what he was doing in the car, if everything was okay, and requested identification. *Id.* at 1062.

The Court found that:

> "it has been crucial whether a nexus to conduct existed, that is, whether the police were aware of or *observed conduct which provided a particularized reason to request information"* beyond mere presence in an area where others had been known to commit crimes (citation).Here, there was no such nexus between the presence of defendant's vehicle in a high-crime area and any conduct on his part. (emphasis in the original). *Id*. at 1063.

If a defendant having an argument on his phone did not provide the required nexus to request information in what was described there as a "high crime area",

then Defendant moving in the Explorer, even if there was an uptick in violence where the Explorer was parked, did not provide the required nexus. Defendant's action in exiting the Explorer also did not provide the required nexus.

In *People v. King*, 199 A.D.3rd 1454 (4th Dept. 2021), the officer involved testified that he approached the vehicle in question because the apartment complex at which it was parked was in a high crime area and because the vehicle was not running and had three occupants. *Id*. at 1454. The Court then found

> The hearing record is devoid, however, of evidence that the officer was "aware of or observed conduct which provided a particularized reason to request information" from the occupants of the vehicle (*People v McIntosh*, 96 NY2d 521, 527 [2001]). We therefore conclude that the officers lacked the requisite articulable, credible reason for approaching the vehicle (see *id*.; *People v Rutledge*, 21 AD3d 1125, 1126 [2d Dept 2005], *lv denied* 6 NY3d 758 [2005]). *Id.* at 1454.

Likewise, as above, Defendant moving between seats in the Explorer did not give Officer Pike the particularized reason to request information from Defendant.

In contrast, in *People v. Dixon*, 203 A.D.3d 1726 (4th Dept.2022) while the Court found "the officer had an objective, credible reason for approaching the parked vehicle and requesting information, thereby rendering the police encounter lawful at its inception (citation)" *Id.* at 1728, that was because:

> Not only was defendant's vehicle located in a high-crime area and parked at an establishment around which criminal activity was known to occur, but the police also had an active trespass affidavit on file for the cocktail lounge that allowed them to deal with the issues that occurred there, the parking lot was governed by a visible no loitering sign, and defendant was observed, albeit briefly, sitting in the lone occupied vehicle without making any attempt to go inside the establishment, thereby suggesting the possibility that defendant lacked a legitimate reason to be there (citations omitted). *Id.* at 1728.

These factors were not present in Defendant's case. There was not a "no loitering" sign where Defendant had parked, the Explorer was not parked where criminal activity was known to occur and the police did not have an active trespass affidavit on file that allowed them to deal with the issues which might have occurred where Defendant was parked.

Defendant's moving from the driver's seat to the passenger's seat, and then leaning back, even combined with his exiting the Ford Explorer, does not give the objective, credible reason, not necessarily indicative of criminality, to justify Officer Pike's approaching Defendant for a Level One inquiry.

D. The Cases Cited By The Trial Court And Appellate Division Are Not On Point

In its Decision And Order (A.50), the Trial Court cited *People v. Hill*, 302 A.D. 2d 958, 959 (4th Dept.2003), *lv denied* 100 N.Y.2d 539 (2003) and *People v. Bracy*, 91 A.D.3d 1296, 1297 (4th Dept.2012), *lv. denied* 20 N.Y.3d 1060 (2013) to support its finding that Officer Pike's Level One approach was justified. However,

neither case is on point for the facts in this matter.

In *People v. Hill*, *supra*, 302 A.D. 2d at 959 "Defendant and two other suspects were observed suspiciously loitering together in an area known for illegal drug activity, and the officers observed drug paraphernalia on the ground at the feet of two of the suspects. The officers thus were entitled to ask defendant his identity and other pedigree information, as well as his business at that location. (citations)." Here, Defendant was in a parked car, and not loitering, and Office Pike did not see any drug paraphernalia when he made the decision to make the approach.

In *People v. Bracy*, *supra,* 91 A.D.3d at 297 the Defendant and another person were standing next to a parked occupied vehicle in the street that forced any passing vehicle to drive around them into opposing traffic. Here, the Defendant was inside the vehicle, and there was no testimony about any other vehicles or traffic going around Defendant's vehicle.

In its decision, *People v. Johnson*, 206 A.D.1702, 1702-1703 (4th Dept.2022), the Fourth Department stated only that "[h]ere, the evidence at the suppression hearing established that the action taken by the police officer was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest (see *People v Simmons*, 30 NY3d 957, 958 [2017]; *People v*

White, 117 AD3d 425, 425 [1st Dept 2014], *lv denied* 23 NY3d 1044 [2014]; *People v Carter*, 109 AD3d 1188, 1189 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976])", without differentiating which case applied to which *De Bour* level. An examination of the three cases the Fourth Department particularly referenced show that they do not apply to a Level One approach, or the facts of this case.

In *People v. Simmons*, 30 N.Y.3d 957, 958 (2017), this Court affirmed the Fourth Department's decision in *People v. Simmons*, 149 A.D.3d 1464 (4th Dept.2017). In that case, the police had observed the defendant and other men in the middle of the street, who then walked away when the police car pulled up. The arresting officer approached defendant, asked him to show his hands, and then observed a gun. *Id.* at 1465. That case not only did not involve a parked car, it concerned only a Level Two inquiry. *Id*. at 1465-1466.

In *People v. White*, 117 A.D.3d 425 (1st Dept.2014), the First Department stated only that"[l]ate at night, in a particularly robbery-prone area, the police saw defendant and his two companions engaging in a pattern of movements that was sufficiently unusual to attract the officers' attention (citation omitted)." *Id* at 425. There is nothing in that statement to indicate that defendant was in a parked car.

However, the First Department then went on to state that "[i]n any event, at this point, regardless of their subjective intentions, the police did nothing more than stop their car and get out. Defendant and a companion turned and fled immediately upon seeing the plainclothes officers, who reasonably believed they had been recognized as the police (citation omitted)." *Id*. at 425, making it clear that Defendant was not in a car. The police then saw Defendant clutching his waste band, and found a gun. *People v. White* did not involve a Level One inquiry with a parked car.

The Fourth Department's own case that it cited, *People v. Carter*, 109 A.D.3d 1188, 1189 (4th Dept.2013), involved a pat and frisk after a traffic stop, and did not involve a Level One inquiry, much less a parked car.

F. Conclusion

Defendant's move to the passenger's seat and then leaning back to the driver's seat, even when combined with his exiting the Ford Explorer, did not give Officer Pike an objective, credible reason not necessarily indicative of criminal activity to approach Defendant and request information.

"Inasmuch as the police action was not justified in its inception (*see People v De Bour*, 40 NY2d 210, 215 [1976]), the physical evidence seized from defendant, as well as defendant's subsequent statements to the officers, must be

suppressed (see *People v Mobley*, 120 AD3d 916, 919 [4th Dept 2014]). As a result, defendant's guilty plea must be vacated and the indictment must be dismissed (see *People v Williams*, 191 AD3d 1495, 1498 [4th Dept 2021]; *Mobley*, 120 AD3d at 919).”*People v. King*, *supra* 199 A.D.3rd at 1454-1455.

Likewise, since Officer Pike’s Level One approach was not justified at the inception of the case, all the evidence taken from Defendant should be suppressed, the guilty verdict vacated and the indictment dismissed.

POINT TWO: OFFICER PIKE WAS NOT JUSTIFIED IN INITIATING A LEVEL TWO INQUIRY

A. Officer Pike Made Both A Level Two And Level Three Inquiry

After Defendant exited the Explorer, Officer Pike followed him, made a Level Two inquiry, and then forcibly stopped Defendant for a Level Three inquiry, and performed a pat/frisk. In determining whether the Level Two inquiry was justified, it is important to determine at what point Officer Pike’s actions changed from a Level One to a Level Two, and then to a Level Three inquiry.

As set out in the Statement of Facts, when Defendant exited the Explorer, Officer Pike saw that his pants were undone, and he was trying to buckle his belt. As he walked away, Defendant was trying to pull his pants up. Officer Pike thought this was suspicious as some suspects hide weapons in the belt area..

Officer Pike then immediately asked Defendant to hold up a minute. However, Defendant kept on walking away, and Officer Pike followed him, When Officer Pike caught up with Defendant, he asked Defendant if he had any weapons on him. Defendant said he had nothing.

After Officer Pike had caught up with Defendant and Defendant had stopped, it appeared to Officer Pike that Defendant was nervous. When Defendant said he wasn't, Officer Pike immediately started the pat/frisk by standing in front of him.

In *People v. DeBour*, 40 N.Y.2d 210, 223 (1976) this Court first set out the difference between a Level One and Level Two inquiry justification.

> The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality (People v De Bour, supra). The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure (*People v Cantor*, 36 NY2d, at p 114, *supra*; *People v Rosemond*, 26 NY2d 101; *People v Rivera*, 14 NY2d 441, 446, and authorities cited therein).

This Court expanded on the difference in *People v. Hollman*, 79 N.Y.2d 181, 185 (1992):

> We conclude, as a general matter, that a request for information involves basic, nonthreatening questions regarding, for instance, identity, address or destination. As we stated in *De Bour*, these questions need be supported

only by an objective credible reason not necessarily indicative of criminality. Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.

As to when the transition from a Level Two to Level Three inquiry takes place, this Court held:

> As the Appellate Division recognized, the anonymous tip triggered only the police officers' common-law right of inquiry. This right authorized the police to ask questions of defendant—and to follow defendant while attempting to engage him—but not to seize him in order to do so. Thus, defendant remained free to continue about his business without risk of forcible detention (see *People v May*, 81 NY2d 725, 728 [1992] ["The police may not forcibly detain civilians in order to question them . . . without a reasonable suspicion of criminal activity and once defendant indicated . . . that he did not wish to speak with the officers, they should not have forced him to stop without legal grounds to do so. Any other rule would permit police seizures solely if circumstances existed presenting a potential for danger" (citation omitted)]). *People v. Moore*, 6 N.Y.3d 496,500 (2006).

As to what constitutes a seizure, as noted in *People v. Howard*, 147 A.D. 2d 177, 180 (1st Dept.1989) *appeal dismissed*, 74 N.Y.2d 943:

> "Whenever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized within the meaning of the Fourth Amendment .... This is true whether a person submits to the authority of the badge or whether he succumbs to force". (*People v Cantor*, 36 NY2d 106, 111.)

> The actions of the police officers in issuing an authoritative directive to defendant to "Halt", with which he immediately complied, followed by the officers approaching, and without any preliminary inquiry, taking defendant's arm and subjecting him to a frisk, constituted nothing less than a forcible seizure. (*See, People v Silvestre*, 119 AD2d 601.).

Given the above, the time line for when Officer Pike's inquiries transitioned between the three levels is as follows:

1. **Level One**:

As above, Defendant contends that Officer Pike did not have justification for a Level One inquiry, but as the Trial Court noted, Officer Pike's justification for inquiry was his observation of Defendant's movement in the Explorer, and Defendant's exit from it.

2. Level Two

After Defendant exited the Explorer, Officer Pike saw him adjust his pants, and then decided to follow the Defendant as he walked away. When Officer Pike caught up with Defendant, he asked him a pointed question as to whether Defendant had a gun. As per *People v. Hollman*, *supra* 79 N.Y.2d at 185, this was not just a request for information, as the question was accusing Defendant of wrongdoing. The case then become a common-law inquiry that had to be supported by a founded suspicion that criminality was taking place.

3. Level Three

. In *People v. Howard*, *supra* 147 A.D. 2d at 180, the Court found that defendant stopping after the police officer said "halt", and then being subjected to a frisk was a seizure. Likewise, this case became a Level Three inquiry when Defendant stopped after being ordered to do so by Officer Pike, and Officer Pike walked in front of him and began the pat and frisk. Officer Pike needed the justification required for a Level Three inquiry to make this seizure of Defendant. As argued below, that justification did not exist, and additionally, there was no justification for the pat/frisk.

The issue for this part of the Brief is whether Office Pike had a founded suspicion that criminality was afoot for the Level Two inquiry. In its Decision And Order, the Trial Court found he did as "[t]he officer's further observation of Defendant, including his unbuttoned pants, unbuckled belt and efforts to secure his pants to his person as he walked away from the office in a high crime neighborhood justifiably heightened the officer's suspicion and support a more intrusive common law inquiry", and then cited *People v. Hollman, supra* 79 N.Y.2d at 184 to justify the finding. (A.50-51). However, the Trial Court's finding is not supported by case law.

B. Officer Pike Did Not Have Justification For The Level Two Inquiry

As per *People v. Hollman*, *supra* 79 N.Y.2d at 185 (1992), in order to make the Level Two common-law inquiry, Officer Pike must have had the founded suspicion that criminal activity was taking place. Officer Pike's observation of Defendant adjusting his pants in what Officer Pike described as an area that had an "uptick" in violence does not provide that.

The Fourth Department's decision in *People v. Riddick*, 70 A.D.3d 1421, 1422-1423 (4th Dept.2010) is on point for this case:

> It is further well settled that actions that are "at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality" (*People v Powell*, 246 AD2d 366, 369 [1998], *appeal dismissed* 92 NY2d 886 [1998]; see *De Bour*, 40 NY2d at 216). Here, the fact that defendant reached for his waistband, absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime (see *Sierra*, 83 NY2d at 930; *Powell*, 246 AD2d at 369; *People v Howard,* 147 AD2d 177, 178-181 [1989], *appeal dismissed* 74 NY2d 943 [1989]; *cf. People v Forbes*, 283 AD2d 92, 93-94 [2001], *lv denied* 97 NY2d 681 [2001]). The mere fact that defendant was located in an alleged high crime area does not supply that requisite reasonable suspicion, in the absence of "other objective indicia of criminality" (*Powell*, 246 AD2d at 370; *see People v Cornelius*, 113 AD2d 666, 670 [1986]), and no such evidence was presented at the suppression hearing. Thus, although the police had a valid basis for the initial encounter, we conclude that "there was nothing that made permissible any greater level of intrusion" (*People v Howard*, 50 NY2d 583, 590 [1980], *cert denied* 449 US 1023 [1980]).

Initially, it is undisputed that Defendant did not have a gun, or any weapon, in his possession, as Officer Pike admitted he did not find any when he frisked him. Officer Pike could not have observed a bulge of a gun or a click of a weapon, because none existed. And while Officer Pike testified he was patrolling the area because of an uptick of violence, that does not supply the required reasonable suspicion of criminal activity.

Likewise, in *People v. Haynes*, 115 A.D.3d 676, 676-677 (2nd Dept.2014), the Court found that "[u]nder the circumstances of this case, the defendant's "grabb[ing]" of his "waistband area" in such a way that it "[s]eemed" to the detectives that the defendant "had a bulge or something heavy that he was holding on the outside of his garments," did not constitute specific circumstances indicative of criminal activity so as to establish the reasonable suspicion that was necessary to lawfully pursue the defendant, even when coupled with the defendant's having made eye contact with the detectives and his flight from the detectives (citations omitted)."

Finally, in *People v. Sierra*, 83 N.Y.2d 928, 930 (1994), this Court held that "[b]y contrast, in *Robbins*, the officers knew only that, after exiting from the back seat of a livery cab that had been stopped for defective brake lights, defendant grabbed at his waistband and then fled, facts which provided them with no

information regarding criminal activity."

Defendant's grabbing his pants and pulling them up after he exited the Ford Explorer, especially in light of the fact that it is undisputed he did not have gun in his possession, did not provide the required founded suspicion that criminal activity was taking place. Officer Pike was not justified in pursuing Defendant for a Level Two inquiry.

C. The Cases Cited By The Trial Court And Appellate Division Are Not On Point

The Trial Court's citation to *People v. Hollman, supra*, 79 N.Y.2d at 184, to support its finding the Level Two inquiry was justified (A. 50-51) is not on point. There, this Court summarized the four levels this Court set out in *People v. De Bour.* That citation does not consider the issue here: Did Officer Pike seeing Defendant adjust his waistband provide the justification for a Level Two inquiry.

Again, as set out in the Level One argument, the cases cited by the Fourth Department in its decision, *People v. Johnson*, *supra* 206 A.D.3d at1702-1703, do not support its finding that a Level Two inquiry was justified. In *People v. Simmons*, 30 N.Y.3d 957, 958 (2017), this Court found there was sufficient indicia of criminality to warrant a Level Two inquiry as "[b]ased on the police officer's experience handling gun cases, the high crime rate and gang violence in the patrol area, the recent reports of gunshots fired near the location where defendant was

first observed, and defendant's clutching of his waistband, there is record evidence to support a finding of founded suspicion."

Here, there is nothing in the record that there was a high crime rate, gang violence or reports of shots fired near the location. The only thing supporting Officer Pike's decision for the Level Two inquiry was Defendant pulling up his pants. *People v. Simmons* is not on point.

As to *People v. White*, 117 A.D.3d 425 (1st Dept.2014), after the police saw Defendant making movements which attracted their attention, and the officers stopped their car and got out, "Defendant and a companion turned and fled immediately upon seeing the plainclothes officers, who reasonably believed they had been recognized as the police (citation omitted). As defendant ran, other members of the police team, who were in another car, saw defendant "clutching" at his waistband in a manner that indicated the presence of a weapon." *Id.* at 425.

In this case, Defendant did not run away from Officer Pike, and was not clutching at his waistband. He only walked away from Officer Pike after he adjusted his pants. Also, as above, Defendant did not even possess a weapon. *People v. White* is not on point.

People v. Carter, 109 A.D.3d 1188, 1189 (4th Dept.2013) involved a pat and frisk after a traffic stop, and not a *People v. De Bour*, 40 N.Y.2d 210 (1976)

street encounter. In any case, a stop and frisk is a Level Three encounter.

D. Conclusion

Defendant grabbing his pants and pulling them up after he exited the Ford Explorer, especially in light of the fact that it is undisputed he did not have gun in his possession, did not justify Officer Pike pursuing Defendant for a Level Two inquiry. If this Court does not otherwise find that all evidence taken from Defendant should have been suppressed, the guilty verdict should be vacated and the indictment dismissed for the above reasons alone.

POINT THREE: OFFICER PIKE HAD NO BASIS TO STOP DEFENDANT FOR A LEVEL THREE INQUIRY, AND NO JUSTIFICATION TO PERFORM A PAT/FRISK

A. Introduction

As above, as per *People v. Howard*, *supra* 147 A.D. 2d at 180, Defendant stopping after being ordered to do so by Officer Pike, and Officer Pike then walking in front of him to begin the pat and frisk, constituted a seizure. This case then became a Level Three inquiry, and Officer Pike needed the Level Three justification to make the seizure. To perform the pat/frisk, Officer Pike had to have a reasonable suspicion he was in danger.

In its Decision And Order, the Trial Court found the Level Three inquiry was justified since:

> As Officer Pike got closer to Defendant and saw his chest moving up and down rapidly, as if he was engaged in some sort of strenous activity that would cause one's heart to race, the officer recognized Defendant from previous interactions and noticed that he seemed to be very nervous. These additional observations, combined with the officer's knowledge that armed individuals commonly use belts to secure weapons to the waistband of their pants, along with Defendant's seemingly inconsistent responses to the officer's inquiry, reasonably elevated the officer's level of suspicion (citations omitted).
>
> Under these circumstances, Officer Pike had a reasonable basis to suspect Defendant posed a threat to his safety (citation omitted) and did not need to "await the glint of steel" before taking reasonable measures to protect himself (citations omitted). The pat-frisk of Defendant's outerwear for weapons was reasonably responsive and did not exceed the scope of permissible interference. (citations omitted). (A.51-52).

The Trial Court's findings are not supported by case law. There was no justification for the Level Three stop and inquiry, and no basis for the pat/frisk.

B. Officer Pike Did Not Have The Required Justification To Stop And Seize Defendant For A Level Three Inquiry, Or Perform The Pat/Frisk

As above, Officer Pike followed Defendant to make a Level Two inquiry based on his observation that Defendant was adjusting his pants after exiting the Explorer. When he caught up with Defendant, Officer Pike asked Defendant if he had a weapon, which Defendant denied.

Officer Pike also thought Defendant appeared to be nervous, and asked Defendant if he was. When Defendant denied being nervous, Officer Pike then immediately got in front of him and started the pat/frisk.

It is clear from case law that Officer Pike's belief that Defendant was nervous, and his unfounded suspicion that Defendant had a weapon, in no way presented sufficient justification for the Level Three stop and inquiry.

As this Court noted "...level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor....." *People v. Moore*, 6 N.Y.3d 496, 498-499 (2006). This Court then referenced *People v. May*, 81 N.Y.2d 725, 728 (1992) and found that "[t]he police may not forcibly detain civilians in order to question them ... without a reasonable suspicion of criminal activity and once defendant indicated ... that he did not wish to speak with the officers, they should not have forced him to stop without legal grounds to do so. ..." *People v. Moore, supra* 6 N.Y.3d at 500.

1. Defendant Adjusting His Pants Did Not Supply The Necessary Justification

Again, as with the Level Two inquiry, Defendant adjusting his pants after exiting the Explorer does not provide justification for the Level Three stop and inquiry, as was noted in *People v. Riddick, supra*, 70 A.D. 3d at 1422-1423, *lv. denied* 14 N.Y.3d 844:

> It is further well settled that actions that are "at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality" (*People v Powell*, 246 AD2d 366, 369

> [1998], *appeal dismissed* 92 NY2d 886 [1998]; see *De Bour*, 40 NY2d at 216). Here, the fact that defendant reached for his waistband, absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime (citations omitted).

Also see *People v. Williams*, 191 A.D.3d 1495, 1498 (4th Dept.2021), "[a] suspect's action in grabbing at his or her waistband, standing alone, is insufficient to establish reasonable suspicion of a crime (citations omitted)" and *In Re Jaquan M.*, 97 A.D.3d 403, 406-407 (1st Dept.2012), *appeal dismissed* 19 N.Y.3d 1041, "[t]his Court has specifically held that the mere fact that an officer sees a person holding something near his waistband is not enough to form a reasonable suspicion, 'absent any indication of a weapon, such as the visible outline of a gun' (citations omitted)."

As above, not only did Officer Pike not see a bulge or outline of a weapon, Defendant did not even have a gun in his possession that would create a bulge.

2. Defendant's Alleged Nervousness Did Not Justify The Stop

As to Defendant's alleged nervousness justifying a Level Three stop, "[i]n light of the recognized "unsettling" aspect of a police-initiated inquiry of citizens (*People v Hollman, supra*, at 192; *People v Giles, supra*), we reject the People's suggestion that defendant's allegedly nervous reaction to this questioning authorized a greater intrusion." *People v. Powell*, 246 A.D.2d 366,369 (1st

Dept.1998), *appeal dismissed* 62 N.Y.2d 886.

In *People v. Hollman, supra*, 79 N.Y.2d at 192, this Court found that "[i]t is certainly unsettling to be approached by a police officer and asked for identification. Even though we term this a request for information, we do not mean to suggest that a reasonable person would not be taken aback by such a request."

Given that Officer Pike approached Defendant in the street and began questioning him, Defendant appearing to be nervous did not give Officer Pike the justification to stop him for a Level Three stop.

3. Officer Pike Did Not Have A Reasonable Basis For Suspecting Defendant Was Armed And Dangerous

As to the issue of whether the pat/frisk was justified because Officer Pike feared for his safety, the Court held in *People v. Burnett,* 126 A.D.3d, 1491, 1493-1494 (4th Dept.2015), that

> [w]e thus must determine "whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger" (*Terry v Ohio*, 392 US 1, 27 [1968]). In making that determination, we must give "due weight . . . , not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience" (*id*.; see *People v Batista*, 88 NY2d 650, 653-654 [1996]; *People v Russ,* 61 NY2d 693, 695 [1984]).

The Court then found that Defendant having his hand in his pocket did not, standing alone provide a reasonable basis for suspecting Defendant was armed,

and also that "[m]oreover, unlike in other cases where we have sanctioned a frisk for weapons, there was no evidence in this case that defendant refused to comply with the officers' directives or that he made any furtive, suspicious, or threatening movements (citations)." *Id.* at 1494.

Likewise, in this case, there was no evidence that Defendant failed to comply with Officer Pike's directions. He stopped once Officer Pike came up beside him, and answered Officer Pike's questions about whether he had a weapon and was nervous. Defendant made no threatening movements.

Also see *People v. Howard*, 147 A.D.2d 177, 181-182 (1st Dept.1989), *appeal dismissed*, 74 N.Y.2d 943:

> Moreover, in order to justify a frisk under the statute, the alleged apprehension or fear felt by an officer must be reasonable under the circumstances. (See, *People v Santiago*, 64 AD2d 355, 361.)In this situation there were no objective factors that could reasonably be said to warrant such apprehension when the officers detained and approached the defendant. There was no describable outline of a gun or any other reason to believe that defendant was armed or dangerous. On the contrary, defendant did not engage in any furtive movements, he immediately stopped when ordered, raised his arms and, complying with the officers' request, walked towards them without reaching inside his jacket. Significantly, the officers acknowledged that they did not have their guns drawn when they approached defendant. The unsupported conclusory statements by the officers at the hearing that they were afraid for their lives appears to have been little more than a rote recital of the words deemed necessary to retroactively validate a patently improper search.

Again, Officer Pike did not see an outline of a gun, Defendant did not make any furtive movements and stopped when Officer Pike caught up with him. There was no testimony from Officer Pike that he drew his gun when he approached Defendant. Also as set out in the Statement of the Facts, there was no testimony or corroboration from Officer Darrel Schultz (Officer Pike's partner) to support Officer Pike's testimony that a fear for his safety was reasonable. Officer Pike's testimony that he feared for his life was a rote recital to retroactively justify his actions.

As the Court noted in *People v. Mobley*, 120 A.D.916, 918 (4th Dept. 2014), "[b]ecause the officer lacked reasonable suspicion that defendant was committing a crime and had no reasonable basis to suspect that he was in danger of physical injury, we further conclude that the ensuing pat frisk of defendant was unlawful (citations omitted)." Likewise, given that Officer Pike did not a reasonable suspicion that Defendant was committing a crime and had no reasonable basis to believe he was in physical danger, the pat/frisk of Defendant was unlawful.

C. The Cases Cited By The Trial Court And Appellate Division Are Not On Point

1. Trial Court Cases

The Trial Court first cited this Court's findings in *People v. Moore*, 6 N.Y.3d 496, 500-501 (2006), *People v. Chestnut*, 51 N.Y.2d 14 (1980) and *People*

v. Townes, 41 N.Y.2d 97 (1976) to support its finding that the Level Three stop was justified. (A.52).However, those cases are not on point.

In fact, *People v. Moore* actually supports Defendant's case. In *Moore*, the police had received an anonymous tip of criminal activity, and this Court held:

> [T]o elevate the right of inquiry to the right to forcibly stop and detain, the police must obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior. Had defendant, for example, reached for his waistband prior to the gunpoint stop or actively fled from the police, such conduct, when added to the anonymous tip, would have raised the level of suspicion. However, "[w]e have frequently rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause. It is equally true that innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand" *(De Bour*, 40 N.Y.2d at 216, [citations omitted]). *People v. Moore, supra* 6 N.Y.3d at 500-501 (2006).

Here, there was no anonymous tip, Defendant had only adjusted his pants upon exiting the Explorer, and not just prior to the stop, and he never fled from Officer Pike. His actions were susceptible of an innocent explanation. *Moore* is not on point.

People v. Chestnut, 51 N.Y.2d 14 (1980), did not involve the *De Bour* four step analysis, but whether the police had probable cause to arrest the defendant when they had received a radio message that a robbery had just occurred at a corner where they saw the defendant, and defendant matched the description of the suspect. This Court also found that the officers had a reasonable suspicion that

another suspect had handed a gun to the Defendant. Given all that, this Court found there was probable cause to arrest the defendant. *Id.* at 22. None of these factors were present in Defendant's case.

People v. Townes, 41 N.Y.2d 97 (1976) also did not involve a *De Bour* Level Three issue, as even the prosecutor in the case acknowledged the police stopping the defendant with a gun drawn and shouting "freeze" was not justified under the *De Bour* analysis. *Id*. at 101. Defendant then drew and fired a gun at the police. The issue was then whether the seizure of the gun was justified. This Court found it was. *Id*. at 101-102. Again, none of these facts were present in Defendant's case.

As to whether the pat/frisk was justified, the cases cited by the Trial Court are also not on point. (A.52). In *People v. Sims*, 106 A.D.3d 1473, 1474 (4th Dept.2013), the defendant had placed his hands in his pockets three times, despite being told not to do so, and even though he had previously told the officers he did not have any identification. That did not happen here. In fact, Defendant correctly told Officer Pike he did not have a gun.

In *People v. Johnson*, 103 A.D.3d 1202, 1203 (4th Dept.2013), the officer saw an outline of a gun when he asked a co defendant to raise his hands, and had reason to believe that the defendant there might have been armed. None of those

factors were present in Defendant's case.

The Trial Court then cited cases for the proposition that pat/frisk of Defendant's outwear was reasonably responsive. (A.52). However, those also are not on point.

In *People v. Carter*, 109 A.D.3d 1188, 1189 (4th Dept.2013), the defendant had turned away from the officer, and placed his hand in his pocket. In *People v. Fagan*, 98 A.D.3d 1270, 1271 (4th Dept.2012), the defendant was in a stopped car, and he kept moving his hands to his waistband despite the officers' request that he stop. In *People v. Robinson*, 278 A.D.2d 808, 809 (4th Dept.2000), Defendant had given the police some identification, but then moved his hand to his pocket three times despite the officers' request he not do so. Again, none of the factors cited in those cases were present in Defendant's case.

The cases cited by the Trial Court do not support a finding that the Level Three stop or the pat/frisk by Officer Pike was justified.

2. Fourth Appellate Division Cases

Again, the cases cited by the Fourth Department in its decision, *People v. Johnson*, *supra* 206 A.D.3d at1702-1703, do not support its finding Officer Pike's action "was justified at its inception and at every subsequent stage of the encounter leading to the defendant's arrest." This would include the Level Three

stop and the pat/frisk.

As above, *People v. Simmons*, 30 N.Y.3d 957, 958 (2017) involved a Level Two inquiry. *People v.White*, 117 A.D.3d 425 (1st Dept.2014, *lv. denied* 23 N.Y.3d 1044 considered only whether the police were justified in pursuing Defendant, and did not involve a Level Three stop and detention.

Also, as above, *People v. Carter*, 109 A.D.3d 1188 (4th Dept.2013), *lv. denied* 22 N.Y.3d 1087, was a pat and frisk after a traffic stop, and not a street approach by an officer. In any case, the Fourth Department held that:

> Given defendant's furtive behavior before and after exiting his vehicle, including being "fidgety" and "evasive" when answering the police officer's questions, turning the right side of his body away from the police officer, and placing his right hand in his jacket pocket, the police officer "reasonably suspected that defendant was armed and posed a threat to [his] safety" (citations omitted). Id. at 1189.

None of those factors existed in Defendant's case. He was not evasive when answering Officer Pike's questions, did not turn his body away from Office Pike and did not reach into his jacket pocket, or any place on his clothing. *People v. Carter* is not on point.

D. Conclusion

As was the case for the Level Two analysis, Defendant grabbing his pants and pulling them up after he exited the Ford Explorer, especially in light of the fact that it is undisputed he did not have a gun in his possession, did not justify

Officer Pike stopping Defendant for a Level Three inquiry. It also did not justify a pat/frisk by Officer Pike. It is also clear that Defendant's alleged nervousness did not justify the Level Three stop.

If this Court does not otherwise find that all evidence taken from Defendant should have been suppressed, the guilty verdict should be vacated and the indictment dismissed for the above reasons alone.

CONCLUSION

For the above stated reasons, Defendant/Appellant Tyquan Johnson respectfully requests that the Order of the Appellate Division, Fourth Department, entered June 10, 2022 be overruled, the Judgment of Conviction and Sentence of the Supreme Court, Monroe County, rendered on April 4, 2017 be vacated, and the indictment dismissed, and for such other and further relief as this Court deems appropriate.

Dated:

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PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	**RULE 500.13 (C) PRINTING SPECIFICATION STATEMENT** Court Of Appeals Docket No. **APL-2022-00116** Monroe County Indictment No.**2015-0800** Appellate Division Docket No. **KA 18-01957**

The attached Appellant Brief For Defendant/Appellant Tyquan Johnson was prepared on a computer using Word Perfect 2020 program with Times New Roman font, 14 point size, double spaced.

The word count, exclusive of the Rule 500.13 (A) Statement, the Table of Contents, Table of Authorities and the Statement of Questions Presented, pursuant to the Word Perfect 2020 word count system, is 9865.

Dated:_____ _____

PAUL B. WATKINS

PEOPLE OF THE STATE OF NEW YORK *Respondent* v. TYQUAN JOHNSON *Defendant/Appellant*	**AFFIRMATION OF SERVICE** Court Of Appeals Docket No. **APL-2022-00116** Monroe County Indictment No.**2015-0800** Appellate Division Docket No. **KA 18-01957**

I, PAUL B. WATKINS, DO AFFIRM UNDER PENALTY OF PERJURY AS FOLLOWS:

1. I am an attorney, licensed to practice in the State Of New York. I am over the age of eighteen years and not a party to the within entitled action. My business address is 115 North Main Street, Fairport, NY 14450. I make this Affirmation pursuant to CPLR Rule § 2106.

2. On October 24, 2022, I served three copies of the following:

BRIEF FOR DEFENDANT/APPELLANT TYQUAN JOHNSON

DEFENDANT/APPELLANT'S APPENDIX ON APPEAL

on the interested parties to said action,, by placing a true copy thereof enclosed in a sealed envelope addressed as follows. I placed the envelope for collection and processing for mailing following this business' ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and

mailing, it is deposited in the ordinary course of business with the United States Postal Service.

Attorney for the People Of The State Of New York
Derrick Harnsberger
Assistant District Attorney
Monroe County District Attorney's Office
47 S. Fitzhugh Street, Ste. 832
Rochester, NY 14614

I declare under penalty of perjury that the foregoing is true and correct.

Dated:_____ _____

PAUL B. WATKINS