No. 18-1577

In The
Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

EDWARD ADAMS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Edward Adams, respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari (hereinafter "Petition"), as the Pennsylvania Supreme Court correctly interpreted and applied clearly established federal law in reversing the Pennsylvania Superior Court and holding that Respondent was subjected to an illegal detention, and thus, the trial court erred by denying Respondent's suppression motion. Contrary to Petitioner's assertion, the Pennsylvania Supreme Court's decision does not conflict with relevant decisions of other states, other circuits or this Honorable Court, as to either issue that Petitioner attempts to present. Petitioner takes a sampling of cases, each distinguishable from the case at hand, and contends that the decision of the Pennsylvania Supreme Court is at odds with the decisions of other jurisdictions. Respondent submits that any lawyer or jurist could find decisions from an appellate court that might be at odds with another decision of the same appellate court.

Petitioner recognizes what it is arguing when it states "[w]hile at first blush, it may seem somewhat fantastic to suggest that a suspiciousness seizure, however brief, could be permissible…" (Petition, p. 25). Respondent submits that such is a fantastic assertion.[1] To the extent that Petitioner is arguing that the detention of Respondent was brief, such is also a fantastic assertion, but such is admittedly a subjective determination. Respondent submits that the detention of him by Officer Falconio was not brief.

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[1] Respondent believes that Petitioner meant to say that it may seem fantastic to suggest that a detention without requisite suspicion, could be permissible, but Respondent is not certain.

This case involves Respondent pulling into the parking area of his own business, when such was closed, attempting to open his door, to have it closed on him by an officer, and made to remain in said vehicle until back-up arrived. (Petition Appendix, pp. 4a – 7a; Pennsylvania Supreme Court Opinion). Petitioner attempts to glean concepts from cases to articulate an argument that even if the act of pulling into a business, which turned out to be Respondent's, after hours, did not create a reasonable suspicion of criminal activity, Respondent was either not detained when his car door was closed and he was forced to remain in his vehicle, or such seizure was not unreasonable. (Petition, pp. 9 – 26). Petitioner alternatively argues that if Respondent was seized, the Pennsylvania Supreme Court did not apply the proper test for determining whether an officer has reasonable suspicion and did not properly credit the officer's experience in reaching the conclusion that Respondent was seized in the absence of reasonable suspicion that criminal activity was afoot. (Petition, pp. 26 – 38).

Petitioner seems to assert that Respondent, when he had his door closed on him as he attempted to exit his vehicle in the parking area of his own business and was directed to stay in said vehicle until back-up arrived, was not seized. (Petition, pp. 9 - 10). Petitioner does not really endeavor to explain how such actions by Officer Falconio towards Petitioner did not amount to a seizure. Rather, Petitioner transitions into an argument that such was not an unreasonable seizure. (Petition, p. 11). Petitioner asks:

> Stated another way, assuming that reasonable suspicion is not yet present under *Terry*, does a momentary protective action taken by a lone

> officer to maintain the status quo of a **consensual encounter** necessarily constitute an unreasonable seizure under the Fourth Amendment, regardless of the degree of intrusion on the citizen's liberty and regardless of the countervailing interests of officer safety that may be present under the specific circumstances of the case?

(Petition, p. 11) (emphasis added). It is difficult to see how Petitioner believes or earnestly contends that the interaction between Respondent and Officer Falconio was a consensual encounter. The interaction between Officer Falconio and Respondent was not a consensual encounter and Petitioner has either misrepresented a key fact, or was momentarily mistaken, when it suggested otherwise to this Honorable Court. Petitioner argues to this Honorable Court that "it is not clear whether Adams had a desire to physically leave the encounter with the officer" when he attempted to open his door. (Petition, p. 14). Respondent assumes that Petitioner means that it is possible Respondent just wanted out of his car but would have remained in the presence of Officer Falconio, once permitted to exit his car. Such is immaterial, however, as to whether Respondent was detained in his vehicle by Officer Falconio.

Petitioner refers to the act by Officer Falconio of compelling Respondent to remain in his vehicle as a "momentary protective action." (Petition, p. 11). It is not clear why Petitioner states that such was momentary. It is clear that any permissible seizure by law enforcement, short of arrest, such as a "Terry stop", is not lengthy in duration. It is debatable, however, as to whether the detention of Respondent was momentary.

Petitioner's argument, regarding the detention, is best understood as a contention that even if Officer Falconio's detention of Respondent for pulling into the

parking area of his own business, in the early morning hours when said business was closed, was not supported by reasonable suspicion, such seizure was a necessary action by the officer for his protection. (Petition, p. 11). Petitioner seemingly argues then that, if said detention of Respondent was necessary for Officer Falconio's protection, the seizure, even if not supported by reasonable suspicion, was nevertheless reasonable. (Petition, pp. 9 - 10). Alternatively, Petitioner seems to argue that the Pennsylvania Supreme Court did not apply the correct standards for determining when an officer has reasonable suspicion, mostly by not properly crediting Officer Falconio's experience, rather than argue that he actually had reasonable suspicion. (Petition, pp. 26 - 30).

The key flaw in Petitioner's argument is that *Terry* sets forth a procedure, which has prevailed as law and has served law enforcement and citizens well. That procedure contemplates that an officer may have to take protective action with a suspect that he or she has briefly detained, if the officer has reasonable grounds to believe the suspect is armed and dangerous. Here, Petitioner wants this Honorable Court to permit detentions without reasonable suspicion, and protective actions with no reasonable basis. Here the basis was Officer Falconio's claim that Respondent was "not a short guy." (Petition Appendix, p. 5a; Pennsylvania Supreme Court Opinion). What is reasonable about a detention without reasonable suspicion, justified as a protective action based on a claim that the suspect is "not a short guy?"

I. THE PENNSYLVANIA SUPREME COURT CORRECTLY DECIDED THAT RESPONDENT WAS SEIZED IN THE ABSENCE OF REASONABLE SUSPICION THAT RESPONDENT WAS ENGAGED IN UNSPECIFIED CRIMINAL ACTIVITY.

The Pennsylvania Supreme Court engaged in a thorough and thoughtful analysis in concluding that Respondent was seized when he attempted to exit his vehicle, in the parking area of his own business, and Officer Falconio closed the door and insisted that he stay in his vehicle until back-up arrived.

It is important to note that Petitioner never advanced the precise arguments that it advances here to either the Pennsylvania Superior Court or the Pennsylvania Supreme Court. Before the Pennsylvania Superior Court, Petitioner argued that the encounter between Respondent and Officer Falconio was a mere encounter. (Petition Appendix, p. 33a; Pennsylvania Superior Court Opinion). Before the Pennsylvania Supreme Court, Petitioner argued that the interaction between Respondent and Officer Falconio was a mere encounter that ripened into an investigatory detention. (Petition Appendix, p. 9a; Pennsylvania Supreme Court Opinion). As part of its argument, Petitioner did contend that once the encounter ripened into an investigatory detention, Officer Falconio possessed reasonable suspicion, an argument that it did not set forth before the Pennsylvania Superior Court. (Petition Appendix, p. 12a; Pennsylvania Supreme Court Opinion).

Petitioner did allude to the fact that Officer Falconio should have been able to detain Respondent for safety concerns before the Pennsylvania Supreme Court. (Petition Appendix, p. 12a; Pennsylvania Supreme Court Opinion). Before the Pennsylvania Supreme Court, Petitioner made mention of Officer Falconio's

experience, but that experience was limited to Falconio's testimony that he did not usually see vehicles where Respondent was at 3:00 a.m. (Petition Appendix, p. 23a; Pennsylvania Supreme Court Opinion). That is essentially what Petitioner argues to this Honorable Court as far as Officer Falconio's experience. Respondent, however, disagrees and submits that it is more common sense that vehicles are not seen in the parking lots of businesses, such as a pizza shop, when the pizza shop is closed, than it is the result of an officer's experience gained as a police officer. It is certainly not the type of experience on display by the police officer in *Terry v. Ohio*, 392 U.S. 1, 4 – 7 (1968).

The Supreme Court's handling of the issue was thorough and thoughtful. The Pennsylvania Supreme Court stated or referenced that:

> 1. "Not every encounter between a law enforcement officer and a citizen constitutes a seizure warranting constitutional protections. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968))." (Petition Appendix 10a; Pennsylvania Supreme Court Opinion).
>
> 2. "A mere encounter does not constitute a seizure, as the citizen is free to choose whether to engage with the officer and comply with any requests made or, conversely, to ignore the officer and continue on his or her way. (citation omitted). The second type of interaction, an investigative detention, is a temporary detention of a citizen. *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); (Pennsylvania case citation omitted.) This interaction constitutes a seizure of a person, and to be constitutionally valid police must have a reasonable suspicion that criminal activity is afoot. *Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)." (Petition Appendix 10a – 11a; Pennsylvania Supreme Court Opinion).

3. "The test, often referred to as the "free to leave test," requires the court to determine "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Bostick*, 501 U.S. at 437, 111 S.Ct. 2382 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988)). [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry*, 392 U.S. at 16, 88 S.Ct. 1868." (Petition Appendix 11a; Pennsylvania Supreme Court Opinion).

4. "We agree with Adams that he was "seized" for Fourth Amendment purposes when Officer Falconio would not allow Adams to exit his vehicle, closing the door as Adams opened it. This action, constituting both an act of physical force and a show of authority, is precisely the type of escalatory factor that compels a finding that a seizure occurred. Officer Falconio confined Adams to his vehicle, and no reasonable person in Adams' shoes would have felt free to leave. In fact, under these circumstances, not only would a reasonable person not feel free to leave, Adams actually could not leave his vehicle and "go about his business." *See Bostick*, 501 U.S. at 437, 111 S.Ct. 2382." (Petition Appendix 12a – 13a; Pennsylvania Supreme Court Opinion).

5. "That the detention was only temporary is irrelevant to our analysis of whether a seizure occurred. An investigative detention, by definition, encompasses only a "brief detention." *See United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)." (Petition Appendix 13a; Pennsylvania Supreme Court Opinion).

6. "In the cases that have followed *Terry* over the last fifty years, the high Court has emphasized that considerations of officer safety must be preceded by a finding that the individual was lawfully subjected to an investigative detention, i.e., that the officer had reasonable suspicion that criminal activity was afoot. In *Arizona v. Johnson*, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), for example, the Court reaffirmed its decision in *Terry* as follows:

> Th[is] Court upheld "stop and frisk" as constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police

> officer must reasonably suspect that the person stopped is armed and dangerous.

Id. at 326-27, 129 S.Ct. 781 (emphasis added). *See also Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) (prior to pat down search, the officer must have reasonable suspicion of criminal activity); *Michigan v. Long*, 463 U.S. 1032, 1051-52, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (*Terry* search for weapons of area of vehicle in reach of the individual permissible during lawful vehicle stop where the officer has reasonable suspicion to believe that the individual may be armed and dangerous).

Accordingly, during an investigative detention, police officers may take action, when appropriate, for their own safety or that of the public. Both this Court and the high Court have repeatedly stated that officer safety is a legitimate governmental interest that is worthy of protection. *See, e.g., Terry*, 392 U.S. at 24, 88 S.Ct. 1868; *Mimms*, 434 U.S. at 110, 98 S.Ct. 330; *Long*, 463 U.S. at 1052, 103 S.Ct. 3469; (Pennsylvania case citation omitted). Importantly, however, an investigatory detention may not be premised on officer safety. Instead, safety considerations are relevant only within the confines of a lawful investigative detention based upon the police officer's reasonable suspicion that the person being stopped is committing or has committed a criminal offense. In the absence of such reasonable suspicion (or probable cause), police may not initiate an investigatory detention." (Petition Appendix 19a – 20a; Pennsylvania Supreme Court Opinion).

7. "Officer Falconio's testimony evinced only generalized concerns about the possibility of criminal activity occurring, based solely upon time and place, i.e., behind closed businesses at night. He provided no specific or articulable facts to support a belief that Adams was engaged or going to be engaging in criminal activity. Rather, in his testimony, he expressed more of a curiosity about what the driver was doing behind the closed businesses. *See* N.T., 8/25/2016, at 6, 9 (Officer Falconio testifying that he followed the vehicle behind the businesses because he wanted "to see what the occupant or occupants of the vehicle were doing," "to see why a car drove behind two dark, closed businesses at [three] o'clock in the morning," and to ensure that "there wasn't drug activity or an attempted burglary"). As in *DeWitt*,[2] here Officer Falconio offered no testimony that he observed Adams commit any criminal offense or that Adams took any actions that might suggest that he was

[2] *Commonwealth v. DeWitt*, 608 A.2d 1030 (Pa. 1992).

about to commit any criminal offense. Officer Falconio merely observed a man sitting in his car at night." (Petition Appendix 25a – 26a; Pennsylvania Supreme Court Opinion).

An officer can only check for weapons with a suspect properly detained if he or she has reasonable grounds to believe the suspect is armed and dangerous. Here, Petitioner wants this Honorable Court to permit Officer Falconio's detention of Respondent for his safety, because Respondent was "not a short guy." (Petition Appendix, p. 5a; Pennsylvania Supreme Court Opinion).

A. The decision that Petitioner wants this Honorable Court to reach would effectively overturn *Terry v. Ohio*.

At the heart of Petitioner's argument is an attempt to either overturn *Terry v. Ohio*, or dramatically change over fifty (50) years of established law that has been developed since the decision of this Honorable Court in *Terry*. While Petitioner mentions that the Pennsylvania Supreme Court wrongly held that Petitioner was detained, it does not advance any argument or authority in support of its position. (Petition, pp. 9 – 10). As already mentioned, Petitioner quickly transitions into an argument that the seizure of Respondent was not unreasonable. Petitioner states "this case presents the important and difficult question of what constitutes an *unreasonable* seizure under the Fourth Amendment in an encounter between an officer and a citizen where reasonable suspicion under *Terry*, *infra*, may not yet exist, but where a reasonable jurist could find that an objective possibility of danger to the officer was manifest under the specific circumstances of the case." (Petition, p. 11).

Terry establishes that where an officer possesses reasonable suspicion that criminal activity is afoot, he or she may briefly detain the suspect to investigate. *See*

Terry v. Ohio, 392 U.S. at 30. *Terry* held that such a brief detention was not unreasonable. *Id.* Petitioner nonetheless asks this Honorable Court to expand on what is reasonable, as determined in *Terry*.

Here, Petitioner argues that the detention can take place without reasonable suspicion, as the officer may need to detain the suspect for his or her own safety. (Petition, pp. 25 - 26). While Respondent can imagine some situations where an officer may not justifiably need to detain someone during a mere encounter, to ensure his or her own safety, such would be few and far between. What officer could ever be faulted for calling for back-up?

Petitioner does not endeavor to address where its position would lead us. That position is that an officer can detain someone during a mere encounter, if the officer feels the need to call for back-up, or essentially do some act that requires the detention. Putting aside the call for back-up, and focusing solely on the act of keeping Respondent in his vehicle, what was Officer Falconio going to do during what Petitioner asserts was a mere encounter, other than call for back-up? Petitioner's position here is that officers may, in some instances, detain suspects during mere encounters. (Petition, pp. 25 - 26). Such a position renders the term "mere encounter" an anomaly. A "mere encounter" should not be called "mere" from that point on.

In light of Petitioner's argument, it is important to point out that this Honorable Court, in *Terry*, found that Terry had indeed been seized by the officer, who lacked probable cause to justify a formal arrest, or a much lengthier detention than what Terry had been subjected to. *Terry*, 392 U.S. at 17 - 20. In *Terry*, this

Honorable Court was called upon to address the difficult situation faced by an officer who sees a suspicious person, or a person engaged in suspicious activity, who might be armed and dangerous, where said officer lacks probable cause. *Id*. at 21. In *Terry*, this Honorable Court spoke at length about the goals of the exclusionary rule and how such would not be furthered by suppressing the gun eventually found on Terry. *Id*. at 11 – 14. However, Respondent does not believe that, in the end, the purpose of the exclusionary rule was particularly relevant to this Honorable Court's decision. It might appear that this Honorable Court may have relied on the principal that the exclusionary rule is aimed at illegal searches, seizure and tactics used to gather evidence and not the prevention of police actions which are aimed at protecting the officer and society as a whole, such as the stop of Terry. *Id*. at 13-14. Most stops justified by *Terry* seek to prevent crimes in progress.

Respondent believes that the issue in *Terry* was the reasonableness of the limited seizure and eventual pat-down of Terry for weapons. In the end, this Honorable Court stated that:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 31-32.

Thus, following *Terry*, seizures limited in duration, including vehicle stops which are supported by reasonable suspicion that criminal activity is afoot, are reasonable seizures, and thus do not violate the Fourth Amendment. Moreover, where the officer has reasonable grounds to believe the person so detained is armed and dangerous, he or she may conduct a limited pat-down of the suspect for weapons. *Terry*, 392 U.S. at 30-31. This type of police-citizen interaction has become known as a "Terry stop" or "stop and frisk" search. It has become clear that where an officer has reasonable suspicion to believe that criminal activity is afoot, he or she may briefly detain the suspect and, if the officer has reasonable grounds to believe the suspect is armed and dangerous, he or she may pat the suspect down as a check for weapons. Such police-citizen interaction is reasonable under the Fourth Amendment. *Id*. at 31.

Here, Petitioner argues that even if Respondent had been detained without reasonable suspicion, his detention would nevertheless have been a reasonable seizure, as Officer Falconio needed to detain him as a safety measure, while he carried out the detention. (Petition, p. 26). This type of circular logic would turn *Terry* on its head. The detention, that under *Terry* needs supported by reasonable suspicion, becomes a safety measure that seemingly justifies that very detention. There is no longer a need for reasonable suspicion if the detention itself is a safety measure that police can employ during mere encounters. This argument ignores the fact that *Terry* establishes a set of circumstances that this Honorable Court has found to be a reasonable seizure. *Terry* addressed a detention that was not supported by probable

cause, and concluded that one, short in duration, supported by reasonable suspicion, was reasonable. *See Terry*, 392 U.S. at 30-31.

T*erry* permits the limited seizure based on reasonable suspicion. 392 U.S. at 31-32. For the somewhat unobtrusive pat-down search to be justified, the officer must have reasonable grounds to believe the suspect is armed and dangerous. *Id*. Thus, for the protective measure of a pat-down to be lawful, the officer must have reasonable grounds to believe the suspect is armed and dangerous. *Id*. Here, Petitioner argues that Officer Falconio had to take the precautionary measure, during a mere encounter, of confining Respondent in his vehicle, because of the time of the day and some purported large size of Respondent. (Petition, p. 26). Officer Falconio felt that Respondent was "not a short guy." (Petition Appendix, p. 5a; Pennsylvania Supreme Court Opinion). Such are not reasonable grounds comparable to any that would justify a pat-down under *Terry*.

B. The Pennsylvania Supreme Court's decision is not at odds with any decisions of other states, other circuits, or this Honorable Court.

Petitioner mentions that this Honorable Court has considered where the encounter took place, citing *United States v. Mendenhall*, 446 U.S. 544 (1980) which has almost nothing to do with the actions of Officer Falconio. (Petition, pp. 14-15). In *Mendenhall*, agents wearing no uniforms, displaying no weapons, approached Mendenhall at an airport concourse and asked, but did not demand, that Mendenhall show them her identification and airline tickets. 446 U.S. at 544. There was no restriction on Mendenhall's movement and no demands made of her. *Id*.

Similarly, in *Florida v. Bostick*, 501 U.S. 429 (1991), Bostick, who was a passenger on a bus, was approached and asked by officers to see his identification. (Petition, p.14). He was eventually asked for consent to search his luggage. 501 U.S. at 429. This Honorable Court held that the "free to leave" test did not apply where factors preventing freedom is limited, but not due to actions caused by the officers. *Id*. at 430. At no time was anything else done to Bostick, other than a request to see his identification and a request for consent to search his luggage.

Petitioner mentions that this Honorable Court has examined whether a show of authority was used by the officer contrasting *Terry v. Ohio* with *California v. Hodari D.*, 499 U.S. 621 (1991). (Petition, p. 13). Is Petitioner suggesting that the Pennsylvania Supreme Court did not consider whether Officer Falconio demonstrated a show of authority to Respondent when he closed his car door on him, and demanded that he remain in the vehicle? Is Petitioner asking this Honorable Court to conclude that Officer Falconio did not display a show of authority?

The fact of the matter is that this Honorable Court was not presented with a Petition for Writ of Certiorari in *Commonwealth v. Livingstone*, 174 A.3d 609 (Pa. 2017). In that case, a Pennsylvania State Trooper saw Livingstone in her vehicle pulled off on the side of an interstate. The trooper activated his lights and pulled alongside her vehicle primarily for a welfare check. *Id*. at 36. While doing so, the trooper noticed signs of impairment. *Id*. The Pennsylvania Supreme Court held that Livingstone was unlawfully detained. Respondent keeps wondering if there was or will be a case that is better for Petitioner to advance its argument than this one. Such

is the reason that Respondent mentions *Livingstone*. The facts of *Livingstone* will present themselves again.

Petitioner argues that this Honorable Court has considered the importance of the government interest involved in the encounter and its relationship to the degree of intrusion, referencing *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1996) (field sobriety checkpoint) and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (drug interdiction highway checkpoint). (Petition, p. 13). This Honorable Court has found sobriety checkpoints to be permissible whereas the drug interdiction checkpoints at issue in *Edmond* were held to be indistinguishable from the city's general interest in crime control and thus impermissible. 531 U.S. at 47. Respondent submits that Officer Falconio's interaction with Respondent was more consistent with his general interest in crime control unlike the interests at play in a field sobriety checkpoint, which are to stop impaired driving, which is a systemic problem. The checkpoints permitted are limited to brief stops, where a quick determination is to be made that the motorist is or is not impaired. Here, if this Honorable Court holds that Officer Falconio's interaction with Respondent was a seizure but a justifiable one, despite the absence of reasonable suspicion, what limits would be placed on officers conducting similar detentions?

Petitioner expands on *Sitz* by arguing that it stands for the premise that courts must measure "the degree of the intrusion on the citizen's liberty and governmental interests involved." (Petition, p. 14). Petitioner does not address the fact that, with sobriety checkpoints, the degree of intrusion is established by the decision in *Sitz* and

then that degree of intrusion was balanced against the overwhelming governmental interest in not only prosecuting drunk driving but stopping it as it happens. Here, Petitioner presumably is arguing that the interest in police safety equates to the interests in stopping drunk driving. With sobriety checkpoints, there is a desire to stop drunk driving, either by catching those who are doing such, or by the fact that sobriety checkpoints themselves are a deterrence. In this case, however, Officer Falconio was undeniably performing general crime control.

Petitioner cites *Brendin v. California*, 551 U.S. 249 (2007) for the premise that "[w]hen a person 'has no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter[.]" (Petition, p.14, citing *Brendin*, 551 U.S. at 255). It is difficult to see what point Petitioner is making here. It is clear that Respondent had a desire to leave his vehicle. No one in Respondent's position would have felt free to leave. Further, it is abundantly clear that he was not free to leave.

Petitioner, however, claims that "analogous decisions from jurisdictions outside of Pennsylvania, both state and federal support a contrary conclusion to the one reached by the Pennsylvania Supreme Court in this case." (Petition, p.15). In other words, Petitioner contends that other courts have held that those in Respondent's position would have felt free to leave. No reasonable person would feel free to continue to get out of a vehicle, when a police officer makes clear to said person that they are to remain in the car. No person, reasonable or unreasonable, would get

out of a vehicle when a police officer commands him or her not to and physically prevents him or her from doing such, by closing his door.

In support of this position, Petitioner cites *United States v. Barry*, 394 F.3d 1010 (8th Cir. 2005). (Petition, p. 15). In *Barry*, the officer merely knocked on the window of a vehicle parked at night in an alley of a shopping mall, in an area with a high number of burglaries, before he smelled marijuana. Petitioner also cites *United States v. Cook*, 842 F.3d 597 (8th Cir. 2016) where officers parked behind a vehicle and activated their lights. (Petition, p. 17). Neither of these cases rise to the level of detention that was forced upon Respondent. To be sure, Officer Falconio did not just merely activate his lights or knock on Respondent's window. Rather, when Respondent attempted to exit his vehicle, presumably to go into the store he owned, the door was shut on him by Officer Falconio and Respondent was instructed to stay in his vehicle until back-up arrived. The suspects in *Barry* and *Cook* would have had to guess whether they were free to leave. Here, Officer Falconio removed that guesswork.

Petitioner mentions *United States v. Baker*, 290 F.3d 1276, 1278 (11th Cir. 2002) for the premise that "[t]he societal pressure to stop and speak with law enforcement is not a sufficient restraint of liberty to raise the interaction to a level that requires constitutional protection". (Petition, p. 17). This is simply not a case where *Baker* is relevant. This is not a "free to leave" case. This is a case where Respondent was detained and no reasonable person in his shoes would have felt they could leave. Respondent was, quite simply, not free to leave. He physically could not

leave, so even an unreasonable person could not have gotten out of the car.

Petitioner mentions *State v. Wilkins*, 205 P.3d 795, 796 (Mont. 2009), where an officer observed a vehicle parked in an area, at night, where burglaries had occurred. (Petition, p. 17). The officer merely approached the vehicle to ask the driver a few questions. Id. at 797. There is no indication that the officer took any actions that would constitute a detention of Baker, such as closing the door on him and requiring he stay put. *Id*. Respondent was not approached by Officer Falconio in a high crime area.

Petitioner mentions *United States v. Adegbite*, 846 F.2d 834, 835-838 (2d Cir. 1988). (Petition, p. 19). In *Adegbite*, agents wearing no uniforms or badges and displaying no weapons, waved at an ice cream truck to stop that had moved 15 to 20 feet from its parked position. 846 F.2d at 836. Officer Falconio did much more than wave at Respondent when he closed his door on him. Respondent submits that *Adegbite* was wrongly decided and a wrongly decided case is not a reason to accept this case, which was rightly decided by the Pennsylvania Supreme Court. Regardless, *Adegbite* is factually distinguishable.

II. THE PENNSYLVANIA SUPREME COURT CORRECTLY FOUND THAT OFFICER FALCONIO DETAINED RESPONDENT WITHOUT REASONABLE SUSPICION.

Petitioner next contends that the Pennsylvania Supreme Court did not properly apply the test for determining reasonable suspicion, essentially because it ignored Officer Falconio's experience. (Petition, pp. 29 – 32). The problem with this argument is that Petitioner does not articulate exactly how Officer Falconio's

experience led him to any reasonable belief that criminal activity, perpetrated by Respondent, was afoot. Respondent pulled into a business, which happened to be his own, when his pizza shop and other nearby businesses were closed.

In *Terry*, the experience of the officer was on full display. There, the officer observed Terry and another man walk in front of a store window, peer inside, and then walk a short distance, turn around and walk back, pausing to look inside the same window. 392 U.S. at 6. The officer watched as the men repeated this ritual at least a dozen times. *Id*. The officer suspected the two men of "casing a job, a stick-up," and that "they may have a gun." *Id*. at 7. Thus, the officer approached the men and asked them their names. *Id*. After the men "mumbled something," the officer grabbed Terry, spun him around, and performed a pat-down which revealed a gun. *Id*. The officer testified that "he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years." *Id*. at 5. Furthermore, the officer explained "that he had developed routine habits of observation over the years and that he would stand and watch people at many intervals of the day." *Id*.

What the officer in *Terry* watched was something that his experience told him was a potential burglary in progress. Contrast the experience of the officer in *Terry* with that of Officer Falconio. Specifically, the only "prior experience" that Petitioner mentions is that Officer Falconio "in his patrolling experience, had not seen many cars parked in the rear of the building at 3:00 a.m." (Petition, p. 5). Petitioner goes on to contend that the Pennsylvania Supreme Court ignored Officer Falconio's

experience in concluding that he did not have reasonable suspicion to detain Respondent. (Petition, p. 29). The Commonwealth states that by doing so, the Pennsylvania Supreme Court failed to properly consider the totality of the circumstances. (Petition, pp. 29 – 30). The Commonwealth apparently desires that the Pennsylvania Supreme Court use some sort of magic words for it to conclude that it properly considered all factors that it was required to consider in concluding that Officer Falconio lacked reasonable suspicion. It is not even clear that the Commonwealth is arguing that Officer Falconio had reasonable suspicion, as much as it is arguing that Pennsylvania Supreme Court did not consider all relevant factors in concluding that he did not.

Petitioner, in a somewhat cursory manner, suggests that if the Pennsylvania Supreme Court considered Officer Falconio's experience, it would have reached a different conclusion. (Petition, pp. 37 – 38). However, the Commonwealth does not set forth what exactly Officer Falconio's prior experience was that the Pennsylvania Supreme Court failed to consider, unless it is his observation that vehicles are not often present in the parking areas of businesses after hours. However, the Pennsylvania Supreme Court did note that "the officer knew from his patrolling experience that cars were not usually parked behind the rear of the businesses, particularly at 3:00 a.m." (Petition Appendix, pp. 22a – 23a; Pennsylvania Supreme Court Opinion). The Commonwealth does not suggest any other views or perspectives that Officer Falconio had from his experience that would have given him reasonable suspicion to detain Respondent. It is difficult to see how a police officer has greater

knowledge as to when parking lots are usually occupied over anyone else familiar with the area, or any area where businesses are located.

Petitioner argues that the Pennsylvania Supreme Court did not properly consider Officer Falconio's testimony "that cars were not usually parked behind the rear of the businesses, particularly at 3:00 a.m." and that had the Pennsylvania Supreme Court done so, it would have reached an opposite conclusion. (Petition, p. 32). What Petitioner does not understand is that the experience it wishes to credit Officer Falconio with is trivial compared to the types of experience that officers truly gain from their work in law enforcement. This includes, for instance, the patterns of drug dealers, the lingo of drug dealers, the ways that drugs are packaged for sale as opposed to mere possession, that drug dealers are often armed, that they tend to have multiple cell phones, etc. These are just some of the examples of when the experience of a police officer is true experience that tells him or her something that a person who is not a trained police officer would not know. Here, however, if a person who is not in law enforcement saw a vehicle pull into a business well after said business was closed, it would be appropriate for said person to think for a moment that some nefarious activity might be happening. Such would be a hunch, though, and that is all that Officer Falconio had.

Petitioner suggests that a *de novo* review of whether Officer Falconio had reasonable suspicion is required. (Petition, p. 36). Respondent agrees and that is what the Pennsylvania Supreme Court did. The bottom line is that the Commonwealth ignores the detailed analysis the Pennsylvania Supreme Court conducted in this

matter, before accusing it of not doing such. The Pennsylvania Supreme Court relied heavily on *Commonwealth v. Dewitt*, a case in which the Pennsylvania Supreme Court again provided a thoughtful analysis to a situation where it concluded an officer lacked reasonable suspicion for a vehicle stop. (Petition Appendix, pp. 23a – 26a; Pennsylvania Supreme Court Opinion).

The premise here is that Officer Falconio could have properly believed that a burglary was going to take place. The potential for mayhem at a closed business, however, pales in comparison to the mayhem that could occur when an unlawful entry is made into a home. If a citizen pulls into his driveway in the early morning hours, an officer could be justifiably concerned. If the citizen stays in his vehicle momentarily, the officer may be more concerned. And yet, as the citizen walks to his front door, the concern could be even greater. Are we going to allow detention of citizens going home, based on the fact that they are arriving home late at night?

Petitioner goes on to cite *United States v. Watson*, 953 F.2d 895 (5th Cir. 1992), where officers who were patrolling a high crime area at 3:30 a.m. observed the defendant pull a car into the parking lot of an abandoned gas station and turn off his lights and engine. (Petition, p. 34). As the officers exited their patrol vehicle, they observed the defendant move his body as if to conceal something. 953 F.2d at 896. The Fifth Circuit focused on all of those factors in concluding that the officers possessed reasonable suspicion to detain the driver. *Id*. at 898. Here, this case simply does not present those facts. Respondent did not pull into an abandoned business, he did not stop his vehicle in a high crime area, and he did not make any furtive

movements.

Petitioner also cites *United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991), where an officer observed the defendant at 4:00 a.m. in a commercial lot in a high crime area. (Petition, p. 34). When the officer pulled into the parking lot, the defendant quickly pulled his vehicle out. 931 F.2d at 707. The court found that the officer possessed reasonable suspicion and the detention was lawful. *Id*. at 709. Again, this case differs dramatically. Respondent was not in a high crime area and did not attempt to drive away when Officer Falconio arrived. In fact, he exhibited his desire to stay by trying to get out of his vehicle.

Petitioner next attempts to support its position by citing to Professor LaFave's treatise on the Fourth Amendment. (Petition, p. 35). However, even the section of the treatise cited by Petitioner highlights the fact that the nature of the area and what the suspect appears to be doing is of great importance. (Petition, p. 35). Again, in this case, Respondent was merely sitting in his vehicle parked behind his closed business. There was no indication that this area was a high crime area or that Respondent appeared to be doing anything suspicious. Furthermore, it's important to note that Respondent is not arguing that Officer Falconio had no right to further investigate. This case would not be before this Honorable Court had Officer Falconio simply knocked on Respondent's window and asked what he was doing or observed Respondent's actions, over a period of time, to determine whether he was in fact committing any crimes or acting suspiciously.

The crux of this case lies in the fact that Officer Falconio detained Respondent

and prevented him from leaving based on nothing more than the fact Respondent was parked outside of a closed business and he did not feel safe because Respondent was "not a short guy." (Petition Appendix, pp. 4a-6a; Pennsylvania Supreme Court Opinion). That alone does not rise to the level of reasonable suspicion, nor does it justify the seizure of Respondent.

Contrary to Petitioner's assertions that the Pennsylvania Supreme Court did not consider the totality of the circumstances when determining there was no reasonable suspicion present at the time Respondent was seized, the Court thoroughly analyzed all facts in reaching this conclusion. As the Pennsylvania Supreme Court pointed out throughout its opinion, the Commonwealth repeatedly misrepresented key facts in an attempt to legitimize it's argument. (Petition Appendix, p. 5a; Pennsylvania Supreme Court Opinion). Further, the Pennsylvania Supreme Court went through each case the Commonwealth presented and explained why each was inapt. Additionally, the Pennsylvania Supreme Court sufficiently considered Officer Falconio's experience, as well as the time and location of Respondent's vehicle. Based on all of these factors, the Pennsylvania Supreme Court concluded that Officer Falconio lacked reasonable suspicion when he detained Respondent.

III. PETITIONER PRESENTS AN ISSUE THAT WOULD DRAMATICALLY CHANGE THE LAW REGARDING POLICE-CITIZEN ENCOUNTERS.

Petitioner clearly asserts that, even if Officer Falconio lacked reasonable suspicion, he should nonetheless be permitted to detain Respondent for his own

protection. (Petition, pp. 25 - 26). First, it is important to note that Officer Falconio approached Respondent. Then, he decided to detain Respondent because of Respondent's allegedly large size. Officer Falconio gave no other indications as to why he felt unsafe dealing with Respondent. Additionally, the record is devoid of any evidence that Respondent is a large man. Respondent, however, will concede that he is bigger than the average man. Larger men should be given the same rights under the Fourth Amendment as those who are not large. Petitioner is asking this court to grant some sort of exception for officers who approach a person with no reasonable suspicion that this person is doing anything wrong, and then detain that person for any number of reasons under the guise of officer safety, including if the person is large. If Officer Falconio was concerned with his safety, he could have waited in his vehicle until back-up arrived. He would not have allowed a man, possibly armed, to stay in the vehicle. However, Officer Falconio made the decision to approach Respondent, who happened to be a large man, alone in the early morning hours, behind a closed business. Officer Falconio cannot put himself in a situation such as this, and then blame Respondent and detain him.

Should this Honorable Court grant Petitioner's request to review this case and then rule in its favor, *Terry* would be effectively abolished. While Respondent can imagine situations where a person would be detained for officer protection, where such an assertion would be deemed unreasonable, we now live in a country where so many of us armed. What alleviates the need for true protection to an officer more than ensuring that the individual they are interacting with is not armed? Ironically

in this case, Officer Falconio never seemed concerned that Respondent was armed. *Terry* was a well-reasoned decision that gave police the right to do their job and then ensure their protection, consistent with what could objectively be considered a reasonable seizure. The Fourth Amendment was adequately guarded by the decision in *Terry*. Reasonable minds can differ, but at the heart of the decision in *Terry* was that any detention not supported by reasonable suspicion, at least, is an unreasonable seizure. How could any detention of a citizen by police, where such occurs without any truly legitimate level of suspicion, ever be reasonable?

Trying to imagine what type of opinion this Honorable Court could write should it agree with Petitioner is difficult. Respondent believes that the only decision this Honorable Court could render would mean that most mere encounters would lawfully turn into investigative detentions, which are not supported by reasonable suspicion.

The issue here also involves what police officers can do when they see people or vehicles at places, during times of the day, where people or vehicles are not often present. Should police ever be able to detain citizens based merely on the presence of that person at a place where people are not usually at a particular time of the day? The danger is that police asked to ignore such a situation may be letting a crime take place. Such, however, is nothing more than a hunch. Here though, Officer Falconio could clearly have stayed in his vehicle to see what Respondent was going to do. If Respondent got out of the vehicle and used his keys to enter his own business, Officer Falconio's purported concerns would have been put to rest. While Officer Falconio did

not know that Respondent had pulled into his own business, such is why we should not allow police to detain citizens merely for lawfully being at a place the officer finds strange. Respondent was essentially detained for pulling into his own business at an odd hour.

The risk, however, that Officer Falconio was expected to ignore, was that Respondent could burglarize a business. Again, Officer Falconio could have ensured that no burglary was going to take place by simply watching Respondent. One must compare the risk of a vehicle in the parking lot of a closed business with that of a vehicle with an occupant in the driveway or the street in front of a residence, in the early morning hours. Clearly more mayhem is possible when an occupied vehicle is merely present near a residence in the early morning hours. Such, however, could be the homeowner, who did not quickly exit the vehicle to walk into his or her own home. Are we going to suggest that a person may be detained for briefly sitting in his or her vehicle before exiting to walk into their own home?

Petitioner states:

> Importantly, this question is bound to reoccur countless times throughout our nation as our law enforcement officers investigate late night activity or clandestine situations where danger may be lurking (but not yet manifest), where some minimal investigation is encouraged by our society to protect property, but where reasonable suspicion may not yet exist. In those situations – particularly where an officer is alone – does the Fourth Amendment require officers to bear all of the danger of the situation in favor of the suspect's unqualified liberty? Or does the Fourth Amendment allow for a *reasonable* balance to be struck based upon the circumstances of the case and that may allow for an officer to take a strictly curtailed protective action to maintain the status quo of the situation or prevent an obvious danger during the encounter? And to be clear, the Commonwealth is only referring to situations where a reasonable jurist could find that the situation presented an objective

> possibility of danger to the officer (*e.g.* a dark alley; a lone officer attempting to speak to a large group of persons; a dark parking lot behind a closed business late at night).
>
> One must remember that if the Fourth Amendment requires an officer to bear all of the danger of the situation in favor of the citizen's unqualified liberty, including the citizen's liberty to immediately confront the officer while simultaneously declining to speak (*e.g.* Adams), then one can easily imagine that such a situation would also put the citizen in serious jeopardy of having their intentions misunderstood by the officer, which could create more danger for both parties.

(Petition, pp. 23 – 24). Petitioner is indeed asking this Honorable Court to allow officers to detain citizens based on hunches. Petitioner suggests that because crime is apparently somehow more clandestine now, that police powers should be increased. If Petitioner is not suggesting that crime is more clandestine or late-night crime more prevalent than it was when *Terry* was decided, then what exactly is Petitioner's point? While crime may be somewhat more clandestine than it was when *Terry* was decided, law enforcement is equally more advanced as well. Respondent is alarmed that Petitioner is making this argument. Petitioner paints a country where police are not just in danger, but they are in grave danger. Ironically, Petitioner knows that curtailing the Fourth Amendment would be nowhere near as safe for police as curtailing the Second Amendment.

Respondent pulled into his own business after having a few drinks. That is the case Petitioner brings before this Honorable Court while advancing this contention that the country is somehow at peril. Petitioner's argument creates a slippery slope that will undoubtedly affect citizens beyond situations such as that presented in this case and will greatly weaken their constitutional rights.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted:

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