No. _____

In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

MICHAEL J. HICKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Pennsylvania Supreme Court's decision in this case is contrary to this Court's precedent and established framework for the analysis of reasonable suspicion where the Pennsylvania Court did not analyze the totality of the circumstances as perceived by the police officer and instead imagined innocent scenarios to delimit those factors and ultimately decided that the stop was unconstitutional.

2. Whether the Pennsylvania Supreme Court's outright rejection of the element-or-defense test to determine whether reasonable suspicion exists when an individual is carrying a firearm in public as unconstitutional is error when this test has been widely accepted by other federal and state jurisdictions.

PARTIES TO THE PROCEEDINGS

Petitioner, the Commonwealth of Pennsylvania, was the Appellee before the Pennsylvania Supreme Court. Respondent, Michael J. Hicks, was the Appellant before the Pennsylvania Supreme Court.

STATEMENT OF RELATED CASES

Commonwealth v. Hicks, CP-39-CR-5692-2014, Court of Common Pleas of Lehigh County, Pennsylvania. Judgment entered January 11, 2016.

Commonwealth v. Hicks, 510 EDA 2016, Superior Court of Pennsylvania. Judgment entered March 29, 2017.

Commonwealth v. Hicks, 286 MAL 2017, Supreme Court of Pennsylvania. Judgment entered October 2, 2017.

Commonwealth v. Hicks, 56 MAP 2017, Supreme Court of Pennsylvania. Judgment entered May 31, 2019.

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ORDERS AND OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania entered on May 31, 2019, is published at *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019). A copy of that Opinion is attached hereto in the Appendix; A-1-93.

The Order of the Supreme Court of Pennsylvania entered on October 2, 2017, granting the Respondent's Petition for Allowance of Appeal is attached hereto in the Appendix; A-94.

The Opinion of the Superior Court of Pennsylvania filed on March 29, 2017, affirming the Respondent's judgment of sentence, is unpublished but can be found at *Commonwealth v. Hicks*, 2017 WL 1176412 (Pa.Super. 2017). A copy of that Opinion is attached hereto in the Appendix; A-95-106.

The Order and Opinion of the Court of Common Pleas of Lehigh County, Pennsylvania, Criminal Division, filed on April 7, 2016, denying the Respondent's appeal, is unpublished. A copy of that Opinion is attached hereto in the Appendix; A-107-109.

The Order of the Court of Common Pleas of Lehigh County, Pennsylvania, Criminal Division, entered on September 18, 2015, denying the Respondent's Motion to Suppress Physical Evidence, is attached hereto in the Appendix; A-110-111.

STATEMENT OF JURISDICTION

The judgment for which review is sought is *Commonwealth of Pennsylvania v. Michael J. Hicks*, No. 56 MAP 2017, 208 A.3d 916 (Pa. 2019). The Opinion of the Pennsylvania Supreme Court was entered on May 31, 2019. Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, the petition for writ of certiorari was due to be filed on or before August 29, 2019. In accordance with Rule 13.5, Petitioner requested and was granted an extension of its petition for writ of certiorari. The petition was due September 27, 2019 and was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The **Fourth Amendment to the United States Constitution** provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 Pa.C.S.A. § 6106. Firearms not to be carried without a license

(a) Offense defined. –

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

(2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

18 Pa.C.S.A. § 6108. Carrying firearms on public streets or public property in Philadelphia

No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

(1) such person is licensed to carry a firearm; or

(2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

18 Pa.C.S.A. § 6109. Licenses

(a) Purpose of license. – A license to carry a firearm shall be for the purpose of carrying a firearm concealed on or about one's person or in a vehicle throughout this Commonwealth.

STATEMENT OF THE CASE

Procedural History

On June 28, 2014, Respondent, Michael J. Hicks, was charged with Possession of a Small Amount of Marijuana, Disorderly Conduct, and Driving Under the Influence (DUI).

On April 8, 2015, Hicks' counsel, Kathryn R. Smith, Esq., of the Lehigh County, Pennsylvania, Office of the Public Defender, filed an Omnibus Pretrial Motion to Suppress based upon the argument that Hicks was seized and arrested unlawfully in violation of the Fourth Amendment.

On July 14, 2015, a suppression hearing was held before a Judge in the Court of Common Pleas of Lehigh County, Pennsylvania – Criminal Division. Following testimony and argument, the trial court denied the suppression motion. A-108.

On January 11, 2016 following a non-jury trial, the trial court found Hicks guilty of DUI and sentenced him to thirty (30) days to six (6) months imprisonment.

On February 9, 2016, Hicks (through counsel) filed a Notice of Appeal to the Superior Court of Pennsylvania, which was docketed at No. 510 EDA 2016. A-108. On March 29, 2017, a three-judge panel of the Pennsylvania Superior Court issued an unpublished Memorandum Opinion affirming the judgment of sentence and the denial Hicks' Motion to Suppress. A-95.

On April 28, 2017, Hicks (through counsel) filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was granted on October 5, 2017 and docketed at No. 56 MAP 2018. Following briefs and oral argument, the Pennsylvania Supreme Court issued a published opinion on May 31, 2019, that reversed the order of the Pennsylvania Superior Court. A-1. The Pennsylvania Supreme Court vacated Hicks' judgment of sentence holding that Hicks was deprived of the protections of the Fourth Amendment of the United States Constitution when he was stopped and seized by police.

The Commonwealth now files this petition for writ of certiorari.

Factual History

On June 28, 2014, at approximately 2:45 am, members of the Allentown Police Department were dispatched to the Pace Mart located at a Gulf Station at 640 N. 7th Street in Allentown, Pennsylvania in response to a report from the monitor of a city owned surveillance camera that an individual driving a silver Chevy Impala displayed a firearm to another patron at

the station. A-115-117, 123-124. The camera operator indicated that, after making sure the other patron saw the firearm, the suspect placed the firearm into his waistband, covered it with his shirt, and entered the Pace Mart. Responding Police Officer Kyle Pammer testified that the Gulf Station is located in a high crime neighborhood, where police regularly receive calls regarding drug dealing, people with weapons and loitering. A-116-117; *Id*. at 7.

Upon arriving at the scene, police pulled behind a silver Chevy Impala parked at the gas pumps. A-117-118; *Id.* at 8. Defendant, Hicks, was in the driver's seat. A-117-118; *Id.* Police ordered defendant to stop moving his hands around the vehicle and instead to show them his hands. A-118; *Id*. at 9-10. Hicks complied and police removed a firearm defendant had holstered on his person. A-118-119; *Id*. at 10. Hicks was removed from the vehicle at that time where he was handcuffed for officer safety while an officer patted him down for additional weapons. A-118-120; *Id*. at 10-11. As police interacted with defendant, they noted an odor of alcohol. A-118-120; *Id*. Hicks was subsequently transported to the DUI center where a blood test confirmed that defendant was Driving Under the Influence of Alcohol. It was later determined that Hicks possessed a valid license to carry a concealed firearm. A-120; *Id.* at 11.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court has wrongly decided an important question of Fourth Amendment law in a way that conflicts with relevant decisions of this Court, as well as other states and circuits.

Correction by this Court is required for two principal reasons:

I. The holding and analysis employed by the Pennsylvania Supreme Court departs from this Court's framework for Fourth Amendment inquiries and defies common sense on an important and recurring Fourth Amendment question about "judgments and inferences" that law enforcement officers make every day. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); and

II. The element-or-defense test, which was rejected as unconstitutional by the Pennsylvania Supreme Court, has been adopted by the majority of jurisdictions that have considered this issue and which is consistent with the Fourth Amendment.

I. THE PENNSYLVANIA SUPREME COURT'S DECISION AND ANALYSIS OF AN IMPORTANT FOURTH AMENDMENT ISSUE IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Pennsylvania Supreme Court wrongly decided a matter of federal constitutional law. Despite

the Court's assertion otherwise, its decision and analysis is directly contrary to *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny.

Under the Fourth Amendment, "a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly" in order to ascertain his or her identity and gather additional information as related to "the circumstances that provoke suspicion." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brignoni–Ponce*, 422 U.S. 873, 881 (1975)); *Terry v. Ohio*, 392 U.S. 1, 23 (1968). This Court has repeatedly instructed that reasonable suspicion is a "minimal" standard that is "considerably less than preponderance of the evidence" as well as a "less demanding standard than probable cause," which only requires "a fair probability that . . . evidence of a crime will be found." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

Reasonable suspicion must simply be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. It need not "be based on the officer's personal observation"; rather an officer may rely on information supplied by third parties, including information received over the police radio or from concerned citizens. *Navarette v. California*, 572 U.S. 393, 402 (2014); *Adams v. Williams*, 407 U.S. 143, 147 (1972).

Reasonable suspicion also does not require an officer to "rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002). Even where an individual's conduct may be consistent with innocence, the police may conduct a brief detention and limited investigation, as the information known to the officer need only provide the "minimal level of objective justification" for a stop. *Sokolow*, *supra*. *See Terry*, 392 U.S. at 22 (innocent facts, when taken together, may establish reasonable suspicion).

Accordingly, this Court has instructed reviewing courts to consider the totality of the circumstances from the perspective of a police officer, as opposed to an ordinary citizen or the court's own hindsight evaluation. *Arvizu, supra*. The reviewing court should give "due weight . . . to the specific reasonable inferences [the officer] is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27. Furthermore, "[a] court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (citations and quotations omitted).

A. The Pennsylvania Supreme Court misapplied *Terry* and its progeny.

The Pennsylvania Supreme Court here demonstrated a misunderstanding of "reasonable suspicion." Even more troubling, the Pennsylvania Supreme

Court ignored its standard of review and this Court's oft repeated framework for Fourth Amendment inquiries.

Specifically, the Pennsylvania Court reviewed the facts in this case not in their totality from the officer's perspective at that time, but rather, in isolation. More troubling was the Court's insistence on placing undue emphasis on any potential innocent explanations it could imagine for those factors as assessed by the responding police officer. The Court claimed to be applying *Terry*, but yet it did precisely what *Terry* and its progeny instruct against – ***review the facts in isolation without consideration for the officer's prior experience, imagine possible innocent explanations for the suspect's actions and eliminate these actions from the reasonable suspicion analysis***.

The evidence presented here, and the facts found by the trial court, was that a city camera operator advised police that Hicks showed a firearm to another patron in a manner ensuring the other patron knew what it was. Hicks then put the firearm in his waistband, covered it with his shirt, and walked into the store. A-95-96; A-110-111. This incident occurred at 2:45 am in a high crime neighborhood where police regularly receive calls for narcotics trafficking and weapons offenses. A-102; A-116-117.

The Court, unwilling to accept these findings, rewrote the facts:

> *a man stopped at a gas station to fuel his vehicle, greeted an acquaintance, paid for his*

> *gasoline, and then was seized at gunpoint by numerous police officers, forcibly restrained, removed from his vehicle, and handcuffed.*

Commonwealth v. Hicks, 208 A.3d 916, 945 (Pa. 2019); A-56-57. Comparing the concealing of a firearm in public to the act of driving of a car, the Court concluded that Hicks' seizure was unconstitutional because just as police cannot determine that a driver may be unlicensed based on the act of driving, officers had no way of determining from Hicks' conduct or appearance that he was likely to be unlicensed and, thus, engaged in "criminal wrongdoing." *Id*.

The Pennsylvania Supreme Court's myopic analysis fundamentally conflicts with this Court's framework for review. This Court has repeatedly rejected such second-guessing of police officers and speculation by a reviewing court as to possible innocent reasons for a suspect's conduct. *See*, *e.g.*, *Sharpe, supra* (directing reviewing courts not to indulge in unrealistic second-guessing and observing "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."). It has likewise prohibited reviewing courts from engaging in a "divide-and-conquer analysis" that evaluates the suspect's conduct in isolation, invents possible innocent explanations, and then impugns the officer's reasonable assessments.

In *Ornelas v. United States*, 517 U.S. 690 (1996), this Court reaffirmed that a reasonable suspicion

analysis requires a court to analyze a "mosaic" of facts. *Id*. at 698. Furthermore, although the determination of reasonable suspicion is subject to de novo appellate review, the appellate court should "give due weight to inferences drawn from th[e] facts by resident judges and local law enforcement officers." *Id*. at 699. Here, the Pennsylvania Supreme Court ignored the facts found by the trial court and perceived by responding police officers. Instead, it replaced these considerations with its own hindsight review of the evidence, in isolation, so as to justify its holding.

In *Illinois v. Wardlow*, 528 U.S. 119 (2000), this Court held that flight from the police in a high-crime area may provide reasonable suspicion to justify a stop, notwithstanding the fact that flight alone is not illegal and there could be an innocent explanation for it. The Court rejected the Illinois Court's insistence that some conduct must be considered innocent as a matter of law and reaffirmed that an officer may give weight to ambiguous conduct when making "commonsense judgments and inferences" about the likelihood that illegal activity is occurring. *Id*. at 122-25 (citing *United States v. Cortez*, 449 U.S. 411 (1981)). The Pennsylvania Supreme Court here, like the Illinois Court, held that certain conduct is innocent as a matter of law in Pennsylvania. This Court must once again instruct a state court against such folly.

In *United States v. Arvizu*, 534 U.S. 266 (2002), this Court found similar analysis employed by the Ninth Circuit also warranted reversal. In so doing, this Court observed, "In the course of [the Ninth Circuit's]

opinion, it categorized certain factors relied upon by the District Court as simply out of bounds in deciding whether there was 'reasonable suspicion' for the stop. We hold that the Court of Appeals' methodology was contrary to our prior decisions and that it reached the wrong result in this case." *Arvizu*, 534 U.S. at 268. The Pennsylvania Supreme Court has engaged in the same methodology this Court deemed erroneous in *Arvizu*.

In *Arvizu*, this Court reiterated that appellate review of reasonable suspicion requires review of the "totality of the circumstances" with deference to the police officer. *Arvizu*, 534 U.S. at 273. The Court highlighted the Ninth Circuit's failure to give proper weight to the officer's suspicions, which included familiarity of the area and his own prior experiences. It also noted with disfavor the appellate court's insistence on finding innocent explanations for the conduct that arose the officer's suspicions. *Arvizu*, 534 U.S. at 275-77. The Court found error in the appellate court's determination that those explanations with innocent possibilities were entitled "no weight" when determining whether reasonable suspicion existed for the stop. *Arvizu*, 534 U.S. at 274. In condemning that approach, this Court reminded, "*Terry*, however, precludes this sort of divide and conquer analysis." *Arvizu*, 534 U.S. at 274 (citing *Terry*, 392 U.S. at 22).

Here, the Pennsylvania Supreme Court engaged in such "divide and conquer analysis" that required reversal in *Arvizu*. The Pennsylvania Court not only failed to consider Officer Pammer's prior experience and knowledge of the area as relevant to the

assessment of reasonable suspicion to warrant further investigation, it outright dismissed it. The Court then declared that because Hicks' conduct was not presumptively illegal and, thus, possibly innocent, no weight be given it. *Hicks*, 208 A.3d at 948-51; A-61-71.

The Pennsylvania Supreme Court's prodigious efforts to delimit Officer Pammer's experience and consideration of certain factors denigrates the "totality of the circumstances" principle which governs the existence *vel non* of "reasonable suspicion." *Ornelas*, 517 U.S. at 699. If permitted to stand, the standard for reasonable suspicion as set forth by the Pennsylvania Court would now be: ***An officer has reasonable suspicion to detain an individual, only if he or she can identify objective facts showing that a suspect IS involved in criminal activity and where there is no objectively innocent explanation that could be determined by a reasonable jurist.*** This defies *Terry* and its progeny as cited above.

Indeed, this Court has repeatedly instructed that the Fourth Amendment does not impose a "more likely than not" standard. It does not "deal with hard certainties, but with probabilities," nor does it demand that an officer's reasonable belief of possible criminal activity "be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion). Rather, only minimal objective justification is necessary for a stop to be deemed "reasonable" and an officer is not required to rule out all possibility of innocent conduct or wait until criminal activity actually occurs before responding to a suspicious set of circumstances.

Id. See also Arvizu, 534 U.S. at 277-78; *Adams v. Williams*, 407 U.S. at 145-46. The Pennsylvania Supreme Court's overly strict interpretation of the Fourth Amendment and improper analysis of reasonable suspicion requires review and correction by this Court.

B. The Pennsylvania Supreme Court's decision is unreasonable and creates uncertainty for police officers on an issue and factor that is a common occurrence.

The "central requirement" and the "touchstone" of the Fourth Amendment is reasonableness. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). It is NOT reasonable to require officers to wait until criminal activity occurs, and perhaps until innocent bystanders are physically harmed, before taking reasonable, preventive measures. Directly on topic, this Court explained:

> *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable

> cause, the individual must be allowed to go on his way.

Wardlow, 528 U.S. at 126.

It is certainly reasonable in today's society that the report of a gun, under circumstances presented here, justify minimal police intervention notwithstanding that carrying a concealed firearm in public is not presumptively illegal in Pennsylvania. Contrary to the Court's concern, consideration of such a factor does not create a "firearm exception" to the requirements of *Terry*. Rather, consideration of an individual's possession of a concealed firearm as relevant to a determination of reasonable suspicion strikes a proper "balance between the public interest and the individual's right to personal security." *Brignoni–Ponce*, 422 U.S. at 878.

The Pennsylvania Supreme Court's divergence from settled law and rejection of this Court's authority and guidance with regard to reasonable suspicion is not inconsequential. As this Court recognized in *Ornelas*:

> the legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.
>
> Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined set of rules which, in most instances, makes it

> possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.

Ornelas, 517 U.S. at 697-98 (internal quotations and citations omitted).

Here, if permitted to stand, the Pennsylvania Supreme Court's decision would create the instability of which this Court has warned, particularly with regard to what is unfortunately not an uncommon occurrence – a person showing and concealing a firearm in public in the manner in which Hicks did, at night, and in a neighborhood known to officers for criminal conduct.

Importantly, this question is bound to reoccur countless times not only in Pennsylvania, but throughout our nation, as law enforcement officers investigate potential, but not yet revealed, danger. Society encourages such minimal investigation, but *Hicks* now tells us that officers must now forego a reasonable intrusion and instead sit back and wait for a crime to occur. This is simply not what this Court has repeatedly held the Fourth Amendment to require. Rather, it is that there be a *reasonable* balance based upon the circumstances of the case that allow for an officer to take a strictly curtailed protective action to maintain the status quo of the situation to conduct a brief investigation.

The Pennsylvania Supreme Court's decision in *Hicks* removes the tools police officers have come to rely upon to prevent crime and protect themselves as well as the public. To do so, the Pennsylvania Court has employed a framework for reviewing Fourth

Amendment issues, specifically reasonable suspicion, that is overly restrictive and is in conflict with this Court's decisions. Review and correction by this Court is necessary.

II. THE ELEMENT-OR-DEFENSE TEST WHICH WAS REJECTED AS UNCONSTITUTIONAL BY THE PENNSYLVANIA SUPREME COURT HAS BEEN ADOPTED BY THE MAJORITY OF JURISDICTIONS THAT HAVE CONSIDERED THIS ISSUE AND IS CONSISTENT WITH THE FOURTH AMENDMENT.

In Pennsylvania, carrying a concealed firearm without a valid license is a crime. 18 Pa.C.S.A. § 6106. Prior to the Pennsylvania Supreme Court's decision in *Hicks*, knowledge that an individual possessed a concealed firearm established reasonable suspicion to justify a *Terry* stop. *Commonwealth v. Robinson*, 600 A.2d 957 (Pa.Super. 1991). *Hicks* overruled *Robinson*. In doing so, the Pennsylvania Supreme Court also rejected the widely accepted analysis in reasonable suspicion cases where the suspicion involves carrying a concealed firearm in public – i.e., the "element-or-defense" test. The Pennsylvania Supreme Court's rejection of the use of this test is out of step with the vast number of jurisdictions who employ it, creates confusion, and results in significant ramifications for law enforcement in Pennsylvania.

To determine whether the presence of a concealed firearm gives rise to reasonable suspicion, most jurisdictions examine whether the fact of non-licensure is

an *element* of a crime of carrying a concealed weapon, or if licensure serves as an *affirmative defense* thereto. Employing this "element-or-defense" test, the overwhelming majority of jurisdictions consider the elements of the offense, as established by the applicable legislature, to determine whether carrying a concealed firearm justifies a *Terry* stop. Where non-licensure is an element of the crime, courts generally have held that a stop based solely on the possession of a concealed firearm is unlawful. Conversely, where licensure is an affirmative defense, the stop is permissible.[1]

In the instant case, the Pennsylvania Supreme Court rejected the element-or-defense analysis wholesale, concluding that the test itself violates the Fourth Amendment to the United States Constitution. As the concurring opinion by Justice Dougherty discusses, however, the majority's conclusion is against the great weight of authority, and wrongly concludes the test is unconstitutional. Moreover, the majority's rejection of this test has far-reaching implications for law enforcement, and improperly impedes the legislature's

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[1] *See*, *e.g.*, *United States v. Pope*, 910 F.3d 413, 416 (8th Cir. 2018) (discussing Iowa law); *United States v. Rodriguez*, 739 F.3d 481, 487-88 (10th Cir. 2013) (discussing New Mexico law); *United States v. Lewis*, 674 F.3d 1298, 1304 (11th Cir. 2012) (discussing Florida law); *United States v. Gatlin*, 613 F.3d 374, 378 (3d Cir. 2010) (discussing Delaware law); *United States v. Bond*, 173 Fed.Appx. 144, 146 (3d Cir. 2006) (discussing Pennsylvania law); *GeorgiaCarry.Org, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, No. 1:09-CV-594-TWT, 2009 WL 5033444, at *5 (N.D. Ga. 2009) (discussing Georgia law); *State v. Timberlake*, 744 N.W.2d 390, 395 (Minn. 2008) (discussing Minnesota law).

authority to craft criminal laws and establish affirmative defenses.

The majority opinion in the instant case explicitly limited its analysis to the "stop" aspect of *Terry*, that is, whether police had reasonable suspicion that criminal activity was afoot based on knowledge that the actor was armed with a concealed firearm. Settled Pennsylvania law, as set forth in *Robinson*, held that possession of a concealed firearm in public "is sufficient to create a reasonable suspicion that the individual may be dangerous," and thus permitted a police officer to conduct a brief stop to determine whether the person was properly licensed to carry the firearm. *Robinson*, 600 A.2d at 959. In *Robinson*, a police officer saw an actor bending over into a van with a gun sticking out of the back of his shorts. Noting the presence of children in the area, officers stopped the van, asked the suspect to exit, and patted him down, discovering a holster in the back of his shorts and the gun on the floor of the van. *Id.* at 958. Holding the stop was fully lawful, the Pennsylvania Superior Court concluded that "[t]he need to conduct an investigatory detention under the present facts clearly outweighs any harm which the stop and frisk entails. . . . We find that the initial restraint of appellee's freedom was warranted under the circumstances and consequently find the stop to be legal under the Fourth Amendment." *Id.* at 960.

Robinson thus settled the matter in Pennsylvania for nearly 28 years, until it was rejected by *Hicks* in the instant case. *Hicks* overruled *Robinson*, concluding it improperly conflated the "stop" and "frisk" elements

of *Terry* and that dangerousness does not establish reasonable suspicion for the stop. *Hicks*, 208 A.3d at 933 (noting that "'dangerous' is not synonymous with 'criminal'. . . . Mere 'dangerousness' is simply an insufficient basis upon which to conduct a *Terry* stop"); A-30. Averring that the extent to which an armed person is necessarily dangerous is inapposite to the matter at hand, the court observed that in states which permit *open* carrying of firearms, doing so does not, on its own, establish reasonable suspicion. *Hicks*, 208 A.3d at 934. Incorrectly viewing the police assessment of reasonable suspicion to be based solely on Hicks' carrying of a concealed firearm in public, and forgetting the additional various factors delineated by Officer Pammer, the Pennsylvania Supreme Court determined that the stop and seizure of Hicks was in contravention of *Terry* and, thus, unconstitutional.

The concurrence in *Hicks* did not disagree with the majority's conclusion in this regard. However, it did so based on the "element-or-defense" test. The concurrence reviewed the relevant Pennsylvania firearm statute and opined that the majority reached the right conclusion in this case regarding *Robinson*, because non-licensure is an element of Pennsylvania's Firearm statute.

Unwilling to resolve *Hicks* simply based on a myopic review of the facts and instead, based on an improper application of *Terry*, the Hicks' majority responded to the concurrence and pronounced that even if licensure was an affirmative defense rather than an element of section 6106 of Pennsylvania's Firearm Act, Hicks' stop

was unconstitutional because, despite its widespread acceptance, the element-or-defense test is unconstitutional. In making this widespread pronouncement, the majority relied on *Delaware v. Prouse*, 440 U.S. 648 (1979).

In *Prouse*, this Court held that, without particularized suspicion that a driver is unlicensed, police may not stop a vehicle and detain the driver solely to check his driver's license. *Id.* at 663. The majority here analogized firearms to driver's licenses, and declared that *Prouse* stands for the proposition that "it is immaterial whether non-licensure is an element of the crime or licensure is an affirmative defense." *Hicks*, 208 A.3d at 943; A-51-52.

The majority's reliance on *Prouse* is misplaced. As correctly recognized by the concurrence, in most jurisdictions, the entire question of whether a stop based on the concealing of a firearm in public comports with *Terry* turns on whether non-licensure is an element to be proven by the prosecution, or whether licensure is an affirmative defense. The test recognizes that in affirmative-defense situations, the legislature shifts the burden of proof to the defendant to show he holds a valid license. This is fully permissible. Indeed, this Court has long held that legislatures are permitted to "reallocate burdens of proof by labeling affirmative defenses at least some elements of the crimes now defined in their statutes." *Patterson v. New York*, 432 U.S. 197, 210 (1977).

While ostensibly recognizing that it is the legislature's "prerogative to define the elements of crimes and to set forth affirmative defenses," the majority denigrates the element-or-defense test because it would permit the legislature to do precisely that. According to the majority, permitting the legislature to actually exercise such authority where firearms are concerned in a jurisdiction where the element-or-defense test was accepted would be "delegating to the legislature the judicial prerogative to assess the constitutionality of searches and seizures in particular cases." *Hicks*, 208 A.3d at 943 n.17; A-53-54.

The majority's outright rejection of the element-or-defense test improperly interferes with the separation and authority of the legislature. Additionally, it impedes the ability of the legislature to effectuate its intent when drafting criminal statutes so as to be constitutional and consistent with this Court's pronouncements. Indeed, regardless of the legislative intent, according to the majority, in Pennsylvania, a stop based on the presence of a concealed firearm is impermissible regardless of whether non-licensure is an element of the crime or licensure is an affirmative defense. Such interference with the independence of a legislative body simply cannot stand.

It is axiomatic that the Pennsylvania legislature has the right to define crimes and establish affirmative defenses. *Commonwealth v. Church*, 522 A.2d 30, 35 (Pa. 1987) ("It is recognized that the legislature has the exclusive power to pronounce which acts are crimes, to define crimes, and to fix the punishments for all

crimes"); *Hicks*, 208 A.3d at 943 ("it is certainly the legislature's prerogative to define the elements of crimes and to set forth affirmative defenses"). Once the legislature has established the elements of a crime, "it is the elements of those crimes that officers must consider when determining whether there is 'reasonable, articulable suspicion that criminal activity is afoot.'" *Hicks*, 208 A.3d at 954 (Dougherty, J., concurring) (quoting *Wardlow*) (citing *Terry*); A-79. Thus, a police officer must consider those very elements in deciding, in real time, whether criminal activity may be afoot. This Court has recognized this is no simple task, noting that "reasonable suspicion" and "probable cause" are "commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas*, 517 U.S. at 695. This is why a reviewing court must give "due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 699.

Far from "dilut[ing] the protections of the Fourth Amendment," *Hicks*, 208 A.3d at 944; A-54, the element-or-defense test is actually protective, making clear that where non-licensure is an element to be proven by the prosecution, the mere presence of a concealed firearm is not enough to justify a stop. But where licensure is an affirmative defense, carrying a concealed weapon is presumptively criminal. *See United States v. Pope*, 910 F.3d 413, 416 (8th Cir. 2018) (cert. filed 9/18/19). In such a case, the prosecution has no burden to prove non-licensure by any standard, let alone beyond a

reasonable doubt. To suggest that a police officer – whose standard for a stop is only reasonable suspicion – has a burden to ascertain whether an affirmative defense may apply, is both impracticable and nonsensical. As the concurrence points out, employing the element-or-defense test "avoids the perverse situation where the government has less to prove at a criminal trial than an investigating officer has a duty to consider during an investigation." *Hicks*, 208 A.3d at 954 (Dougherty, J., concurring); A-80-81.

Indeed, even where an affirmative defense may apply at trial, reasonable suspicion is not defeated unless the officer specifically knows that it does apply. For example, as the concurrence cites, the Sixth Circuit Court of Appeals has noted that "where a reasonable police officer would *conclusively know* that an investigative target's behavior is protected by a legally cognizable affirmative defense, that officer lacks a legal foundation to arrest that person for that behavior. . . . In all other cases, the merits of an alleged affirmative defense should be assessed by prosecutors and judges, not policemen." *Painter v. Robertson*, 185 F.3d 557, 571 n.21 (6th Cir. 1999) (internal quotation omitted) (citing *Linn v. Garcia*, 531 F.2d 855, 861 (8th Cir. 1976) for the proposition that "police officers cannot be required to conduct a trial-like inquiry as a precondition to executing a valid arrest"). *See also Pope*, 910 F.3d at 416 (where licensure is an affirmative defense, "we see no reason why the suspect's burden to produce a permit should be any different on the street than in the courtroom."). It is implausible to suggest that this

framework impermissibly shifts a judicial function – adjudicating the constitutionality of police work – to the legislature.[2] On the contrary, the judiciary will continue to evaluate breaches of the Fourth Amendment; "the judiciary is well equipped to make such determinations on a case-by-case basis." *Hicks*, 208 A.3d at 959 n.5 (Dougherty, J., concurring); A-92.

The majority opinion further fails to afford appropriate deference to the legislature and to the commonsense actions of law enforcement by asserting that guns are akin to driver's licenses. Unlike routine stops to check for driver's licenses, "[t]he presumptive lawfulness of an individual's gun possession in a particular State does next to nothing to negate the reasonable concern an officer has for his own safety when facing an encounter with an individual who is armed with a

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[2] *Prouse*, on which the *Hicks* majority relies, notes that under "certain relatively unique circumstances . . . consent to regulatory restrictions is presumptively concurrent with participating in the regulated enterprise." *Prouse*, 440 U.S. at 662 (internal citation omitted) (citing, inter alia, *United States v. Biswell*, 406 U.S. 311 (1972) regarding federal regulation of firearms). In *Biswell*, this Court held that a federal statute permitting warrantless searches of business premises of gun dealers did not violate the Fourth Amendment. Recognizing that "close scrutiny of [interstate traffic in firearms] is undeniably of central importance to federal efforts to prevent violent crimes" and that the federal regulatory scheme "makes possible the prevention of sales to undesirable customers," this Court concluded it was fully permissible for Congress to permit warrantless searches of gun dealers' premises. *Id.* at 315. Although the instant case does not implicate a regulatory scheme, this Court's recognition of the legislature's authority to regulate search and seizure of firearms, and the important reasons therefor, is instructive here.

gun and whose propensities are unknown." *Pope*, 910 F.3d at 417 (quoting *United States v. Robinson*, 846 F.3d 694, 701 (4th Cir. 2017)). Further, as the Eighth Circuit Court of Appeals observed in *Pope*, this Court has "intimated at least twice that being armed with a gun necessarily means that the suspect poses a risk to an officer." *Pope*, 910 F.3d at 416 (quoting *Terry* for the proposition that a suspect being armed "thus presented a threat to the officer's safety," 392 U.S. at 28; *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) for the proposition that a bulge in a suspect's jacket "permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger").

As these cases illustrate, the element-or-defense test is firmly grounded in the Fourth Amendment.[3] By

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[3] As with *Prouse*, the concurrence correctly noted that the other two cases relied upon by the majority opinion are fully distinguishable, and therefore unpersuasive to the matter at hand. First, in *Commonwealth v. Couture*, the Supreme Court of Massachusetts concluded the presence of an illegally carried handgun was insufficient to establish reasonable suspicion even though licensure was an affirmative defense under state law. 407 Mass. 178, 552 N.E.2d 538 (Mass. 1990). However, as the *Hicks* concurrence discusses, *Couture* preceded all of the other cases applying the element-or-defense test and therefore did not have the benefit of their analyses; and its discussion was "relatively conclusory." *Hicks*, 208 A.3d at 955 (Dougherty, J., concurring); A-81-82. Thus, it is of limited use, and does not overcome the great weight of other jurisdictions' analysis.

Second, the majority relied on *Pinner v. State*, 74 N.E.3d 226 (Ind. 2017). However, a careful reading of *Pinner* and of this Court's decision in *Florida v. J.L.*, on which *Pinner* relied, reveals that *J.L.* in fact held there is no "firearm exception" to the reliability inquiry in cases involving anonymous tips. *Florida v. J.L.*, 529 U.S. 266 (2000). *Pinner*, which is not an anonymous tip case,

rejecting this analysis, the majority opinion not only distances Pennsylvania from the great weight of authority, but also has significant ramifications for enforcing other Pennsylvania laws. For example, although openly carrying a firearm without a license is legal in most of the state a license is required in order to openly carry a firearm in Philadelphia. 18 Pa.C.S.A. § 6108. Section 6108 was enacted in order to address gun violence in Philadelphia.[4] As the concurrence discusses, *Hicks* will frustrate these purposes because, by rejecting the element-or-defense test, the majority fails to afford appropriate deference to the legislature. *Hicks*, 208 A.3d at 957 (Dougherty, J., concurring); A-89-90. If a police officer cannot draw reasonable suspicion from the carrying of a concealed firearm – because it may be licensed – the untenable effect will be that a police officer in Philadelphia will be similarly unable

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appears to overlook this central tenet of *J.L.*'s analysis and instead suggests *J.L.* can be used to drawn an analogy that connects the *Pinner* facts to *Prouse*. *Id.* at 233. Because of these inconsistencies, and for the reasons that *Prouse* is not controlling here, *Pinner* is unpersuasive. On the contrary, the element-or-defense test is both constitutionally permissible and practical, affording due deference to the legislature and permitting commonsense approaches to policing.

[4] Specifically, § 6108 was enacted to address the fact that "'as the most populated city in the Commonwealth with a correspondingly high crime rate, the possession of a weapon on a city street, particularly the brandishing of a weapon, can invoke a fearful reaction on behalf of the citizenry and the possibility of a dangerous response by law enforcement officers. . . . [A] coordinate purpose [of Section 6108] is to aid in the efforts of law enforcement in the protection of the public[.]'" *Hicks*, 208 A.3d at 957 (Dougherty, J., concurring) (quoting *Commonwealth v. Scarborough*, 89 A.3d 679, 686-87 (Pa.Super. 2014)); A-89.

to draw reasonable suspicion from the *open* carrying of a firearm, "because it too may be licensed." *Id.*; A-88-89. As the concurrence states, this result is untenable.

The validity of § 6108, enacted to curb gun violence in Philadelphia, is well settled. By establishing an affirmative defense of licensure, § 6108 renders the open carrying of a firearm in Philadelphia presumptively illegal. *See*, *e.g.*, *United States v. Bond*, 173 Fed.Appx. 144, 146 (3d Cir. 2006). In *Bond*, two undercover Philadelphia police officers observed the defendant with a firearm showing in his waistband on a Philadelphia street. He was arrested and ultimately prosecuted in federal court for violating 18 U.S.C. § 922(g)(1), prohibiting possession of a firearm by a convicted felon. Bond challenged the probable cause for his arrest. Affirming his judgment of sentence, the Court of Appeals for the Third Circuit observed that because possession of a license for the firearm is an affirmative defense to § 6108, "[when officers] observed Bond in possession of a firearm on a public street in Philadelphia, *they observed the commission of a completed crime* and had probable cause to arrest him." *Bond*, 173 Fed.Appx. at 146 (emphasis added). Clearly, where police have probable cause to effect an arrest, they necessarily also have reasonable suspicion. *See*, *e.g.*, *Navarette*, 572 U.S. at 397 (quoting *Sokolow*, 490 U.S. at 7, for the proposition that the level of suspicion required to establish reasonable suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.").

Hicks renders enforcement of § 6108 confusing and complicated at best; at worst, it renders § 6108 effectively unenforceable. "The logical endpoint of the majority's refusal to adopt the element-or-defense approach will be the reversal of a long line of precedent holding an officer's observation of an openly carried firearm in Philadelphia justifies an investigative detention or even an arrest." *Hicks*, 208 A.3d at 958 (Dougherty, J., concurring); A-90-91. Indeed, because the Third Circuit Court of Appeals has endorsed the use of the element-or-defense test, an individual stopped in Philadelphia based only on openly carrying a firearm could be successfully prosecuted in federal court; but in state court, the same stop would be deemed unlawful. *Id.* at 959 (citing *Bond, supra*); A-91. Under *Hicks*, police could not lawfully stop the defendant in *Bond* – despite directly observing him violating § 6108, thus giving rise to probable cause to arrest – because the legislature has no power to legislate an affirmative defense. This places law enforcement officers in an impossible position.

Firearms are not the only area of the law affected by the rejection of the element-or-defense test. It also implicates the use of controlled substances. For example, a logical extension of the *Hicks* rationale will frustrate law enforcement efforts to navigate the rising legality of medical marijuana. As the concurrence discussed, *Hicks* casts doubt on longstanding law of Pennsylvania that "the odor of marijuana alone . . . is sufficient to support at least reasonable suspicion." *In Interest of A.A.*, 195 A.3d 896, 904 (Pa. 2018). As

the concurrence notes, several jurisdictions rely on the principle that legal use of medical marijuana is an affirmative defense to marijuana laws, therefore it does not foreclose the ability to search based on the odor of fresh marijuana. *Hicks*, 208 A.3d at 958 n.4 (Dougherty, J., concurring); A-89-90. Rejection of the element-or-defense test, therefore, will hamper the efforts of law enforcement officers to search for, and seize, illegally possessed marijuana.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari* and/or grant a summary reversal.

Respectfully submitted,

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