No. 19-426

# 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 the Pennsylvania**

## Brief in Opposition for Respondent Michael J. Hicks

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## STATEMENT OF THE CASE

### Procedural History

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

A timely Omnibus Pretrial Motion requesting, *inter alia*, suppression of physical evidence based on a violation of the Fourth Amendment to the United States Constitution was filed by counsel for Hicks on April 8, 2015, and a hearing on the Motion was held before a Judge of the Court of Common Pleas on July 14, 2015. By Order dated September 18, 2015, the Judge granted Hicks' Omnibus Pretrial Motion in part but denied the Suppression Motion.

A Non-Jury Trial was held January 11, 2016, after which the Defendant was found guilty of DUI and sentenced to thirty (30) days to six (6) months imprisonment.

A timely Notice of Appeal to the Superior Court of Pennsylvania was filed on February 9, 2016 and docketed at No. 510 EDA 2017. A three-judge panel of the Superior Court, by unpublished Memorandum Opinion filed March 29, 2017, denied the appeal and affirmed the judgment of sentence and denial of Hick's Suppression Motion.

On April 28, 2019, Hicks, through counsel, filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which was docketed at 56 MAP 2018 and granted on October 2, 2017. Following briefs and oral argument, the Pennsylvania Supreme Court issued a published Opinion reversing the decision of the Superior Court, holding that Hicks was deprived of his protections under the Fourth Amendment to the United States Constitution, and vacating Hicks' judgment of sentence.

Petitioner, the Commonwealth of Pennsylvania, now seeks review of this decision by the United States Supreme Court by petition for writ of certiorari, in opposition to which this brief is filed.

## Factual History

Officer Kyle Pammer of the Allentown Police Department ("APD") testified at the suppression hearing on July 14, 2015 that police units were dispatched to the Pace Mart store in Allentown, a "high crime area," for a report of a male with a firearm. A-116-117. Officer Pammer testified that Officer Alles of the APD was the first officer on the scene and the first to approach the male, Michael J. Hicks, who was driving a silver Chevy Impala. A-117-118. Officer Alles ran up to Hicks' vehicle with his weapon drawn "due to the nature of the call." A-118. As Officer Pammer approached the vehicle, Officer Alles was giving verbal commands to Mr. Hicks to show his hands, and Officer Pammer observed Hicks "moving his hands around in the car." A-119. Officer Pammer grabbed both of Hicks' hands as Officer Alles secured a firearm from Hicks' right side where it was held in a holster. *Id.* Hicks was then removed from the vehicle and handcuffed, at which time Officer Pammer noticed that he "smelled like alcohol." *Id.* He was subsequently searched and found to be in possession of a small amount of marijuana. *Id.* Officers subsequently confirmed that Hicks had a valid concealed weapon permit and was the registered owner of the firearm. A-120.

## ARGUMENT

### I. THE PENNSYLVANIA SUPREME COURT PROPERLY APPLIED TERRY AND ITS PROGENY IN ITS DECISION AND ANALYSIS.

Under the Fourth Amendment, "a policeman who lacks probable cause but whose 'observations lead him to reasonably 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. MacCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brignone-Ponce*, 422 U.S. 873, 881 (1975))(emphasis added); *Terry v. Ohio*, 392 US 1, 23 (1968). As the Pennsylvania Supreme Court correctly points out, the *Terry* Court was careful to maintain the distinctions between the separate events of the "stop" (or "arrest" or seizure") and the "frisk" (or "search") of an individual, and stressed that analysis thereof cannot "isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen." *Id.* At 17; *See also Arizona v. Johnson*, 555 U.S. 323, 326-327 (2009); *Commonwealth v. Hicks*, 208 A.3d 916, 931 (Pa. 2019); A-28.

This Court, in *Arizona v. Johnson*, articulated the distinct standards for "stop" and "frisk" stating:

> The [*Terry*] 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.

*Johnson* at 326-27; *Hicks* at 933; A-29-30. Petitioner argues to erase this distinction, or at the least, to reverse its requirements: because an individual is armed, and therefore potentially dangerous, he can be legally stopped. Pet. for Cert., *passim*. In applying *Terry* to the facts of *Hicks*, the

Pennsylvania Supreme Court recognized that "[p]rior to the acquisition of any evidence arising from an investigative detention, the seizure of the person must be 'justified at its inception." *Hicks* at 931(quoting *Terry* at 20); A-28. The Court, applying the first, "stop" prong of the *Terry* analysis, held that the mere possession of a concealed firearm in a state which licenses this very conduct, absent any other suspicious behavior, is not indicative of criminal conduct. *Hicks* at 936-937; A-37.

Contrary to the assertions of Petitioner, in coming to its decision in the instant case, the Pennsylvania Supreme Court, aware of its well-settled standard of review, accepted the factual findings of the Trial Court. *Id.* at 922, 925, 950-951; A-3-5; A-11; A-69-71. The assertion by Petitioner that the Pennsylvania Supreme Court was "unwilling to accept" the Suppression Court's findings of facts or "ignored the facts found by the trial court and perceived by the responding police officers" is incorrect and misleading. Pet. for Cert. at 10, 12. While the Court restated the facts of the case in its own words, the Court nonetheless explicitly accepted the findings of fact of the Lower Court and reversed its decision based on erroneous conclusions of law made therefrom. *Hicks* at 922, 925, 950-951; A-3-5; A-11; A-69-71.

Nonetheless, Petitioner attempts to obfuscate this analysis in claiming that the Court ignored the "totality of the circumstances" standard of review and instead reviewed the facts "in isolation without consideration to the officer's prior experience." Pet. For Cert. at 10. The Pennsylvania Supreme Court, however, considered the Suppression hearing testimony of the officer regarding the time of day (approximately 2:30 a.m.) and that Hicks was seized in what the officer described, in his experience, to be a high crime neighborhood. *Hicks* at 950; A-70. Notably, and as *Hicks* majority correctly points out, the Suppression Court did **not** consider the time of day or the "high crime" nature of the neighborhood in coming to its decision. *Hicks* at

950; A-71. The Suppression Court held (and the record supports the conclusion) that Hicks was seized "solely due to the observation of a firearm concealed on his person." *Id.*; *see also* A-111.

The Petitioner likewise mischaracterizes the Pennsylvania Supreme Court's decision as holding that "certain conduct is innocent as a matter of law in Pennsylvania" and misstates the legal conclusion of the Court. Pet. for Cert. at 12. As the Court correctly asserts, the Pennsylvania legislature has established through the Pennsylvania Uniform Firearms Act of 1995 (18 Pa.C.S. §§ 6101-27) that in the Commonwealth, firearms lawfully may be possessed by individuals not prohibited from doing so under 18 Pa.C.S. § 6105 or otherwise barred by federal law. Except in Philadelphia, no license is required to carry a firearm openly on one's person. A county-issued license to carry a firearm is required for the carrying of a firearm "in any vehicle" or "concealed on or about one's person," and carrying in such a manner "without a valid and lawfully issued license" constitutes a criminal offense. 18 Pa.C.S. § 6106(a). A license to carry further authorizes an individual to carry a firearm openly or concealed within the City of Philadelphia. 18 Pa.C.S. § 6108. As such, "in all parts of Pennsylvania, persons who are licensed may carry concealed firearms." *Commonwealth v. Hawkins*, 692 A.2d 1068 1071 n.4 (Pa. 1997)(plurality); *Hicks* at 925-926; A-12-13.

The Pennsylvania Supreme Court, rather than holding "certain conduct innocent as a matter of law in Pennsylvania" as Petitioner suggests, properly applies the requirements of *Terry* with regard to reasonable suspicion: that a police officer may stop an individual based upon "specific and articulable facts" and "rational inferences from those facts" that warrant a belief that the individual is involved in criminal activity. *Terry* at 21. Petitioner herein seeks to eliminate the "criminality predicate" of *Terry*, and argues that because firearms and those carrying them may be dangerous, possession of a concealed weapon alone should provide reasonable suspicion of

criminal behavior. This argument directly contradicts the statutorily regulated framework established by the Pennsylvania legislature for the legal carrying of firearms. It further obfuscates that two distinct requirements for a "stop" and "frisk" under *Terry* and its progeny. *Id.* at 17; *Johnson* at 326-327.

Petitioner's reliance on *Illinois v. Wardlow*, 528 U.S. 119 (2000) (holding that unprovoked flight in a high crime area is sufficient to satisfy the reasonable suspicion requirement of *Terry*) is unfounded. As the Court in *Wardlow* points out, "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion," and "[h]eadlong flight – wherever it occurs – is the consummate act of evasion." *Id.* at 124. Petitioner here seeks to label concealed firearms as *per se* "suspicious," despite a legislative statutory framework which establishes the contrary. Legally possessing a firearm pursuant to Pennsylvania's Uniform Firearm Act can hardly be considered "nervous, evasive behavior" or an "act of evasion."

Nor does the Pennsylvania Supreme Court's decision create instability within the law or require officers to "sit back and wait for a crime to occur." Pet. for Cert. at 17. Rather, it requires only what this Court has already required through *Terry*, that prior to stopping an individual for an investigative detention, officers have reasonable suspicion that a particular person ***has committed, is committing, or is about to commit a crime***. *Terry* at 23(emphasis added). Nothing in the Pennsylvania Supreme Court's holding prevents officers from engaging in a mere encounter under similar circumstances, nor requires anything greater of law enforcement than is already required by *Terry* – "*something* suggestive of criminal activity before an investigative detention can occur." *Hicks* at 940; A-46. Petitioner seeks to establish a presumption of criminality for an entire class of persons who are legally exercising rights given them by the U.S. Constitution and its Amendments and by the Pennsylvania legislature. The "government may not target and seize

specific individuals without any particularized suspicion of wrongdoing, then force them to prove that they are *not* committing crimes." *Hicks* at 942; A-49; *Delaware v. Prouse*, 440 U.S. 648, 662-663 (1979). Because the Pennsylvania Supreme Court properly applies the law of *Terry* and its progeny, the petition for writ of certiorari in this matter must be denied.

## II. THE PENNSYLVANIA SUPREME COURT PROPERLY APPLIED FOURTH AMENDMENT JURISPRUDENCE TO REJECT THE ELEMENT-OR-DEFENSE TEST IN ITS NARROW APPLICATION TO SEIZURES BASED SOLELY ON THE POSSESSION OF A CONCEALED FIREARM IN PENNSYLVANIA.

The majority opinion of the Pennsylvania Supreme Court in this matter characterizes the element-or-defense test as a "seize now, sort it out later" approach to seizures, antithetical to the Fourth Amendment. *Hicks* at 944; A-55. The Court's holding with regard to the element-or-defense test, however, is specifically limited to "the lawfulness of seizures based solely upon the possession of a concealed firearm," conduct in which hundreds of thousands of Pennsylvanians are lawfully licensed to engage. *Hicks* at 945; A-56. While Petitioner argues that the Court "rejected the element-or-defense analysis wholesale," this mischaracterizes the holding of the majority in this case. The Court limits its holding to a very specific factual circumstance, seizures based **solely** on the presence of a concealed weapon in Pennsylvania, and further declines to hold "all element-or-defense distinctions irrelevant for Fourth Amendment purposes." *Id.*

Nor does the Pennsylvania Supreme Court's holding, limited in its scope to this narrow set of circumstances, interfere with the legislative power to "reallocate burdens of proof" through relabeling of affirmative defenses and elements of crimes, recognized by this Court in *Patterson v. New York*, 432 U.S. 197, 210 (1977). Rather, the Pennsylvania Supreme Court's holding recognizes that while the legislature has the power to define elements of crimes and set forth affirmative defenses as well as prescribe licensing requirements and procedures, the exercise of these legislative powers cannot be used to erase the protections of the Fourth Amendment. *Hicks*

at 943-944; A-53. The element-or-defense test, as applied in this limited factual scope, would transfer to the legislature the power to "erase Fourth Amendment protections for any individual who seeks to comply with the legislature's own licensing requirement." *Hicks* at 942; A-50.

In seeking the application of the element-or-defense test to the mere possession of a concealed weapon in Pennsylvania, Petitioner seeks to allow the legislature to limit the scope of Fourth Amendment protections as they would apply to anyone who "obtains a license precisely for the purpose of achieving good-faith compliance with the law," resulting in seizures based solely on the conduct which the license permits. *Hicks* at 943-944; A-53-54. This lack of particularized reasonable suspicion has already been held by this Court to violate Fourth Amendment protections. *Prouse* at 662-663. As the *Hicks* majority states:

> *Prouse* does more than illustrate the retention of Fourth Amendment rights despite participation in a licensed and government regulated activity. *Prouse* highlights a first principle that lies at the heart of the Fourth Amendment – that the government may not target and seize specific individuals without any particular suspicion of wrongdoing, then force them to prove that they are *not* committing crimes.

*Hicks* at 942; A-49.

Petitioner's argument that *Prouse* should not apply to firearms due to their dangerous nature is further undermined by the reasoning of the *Prouse* Court . Pet. for Cert. at 26. The *Prouse* Court was well-aware of the dangers attendant to the operation of motor vehicles, yet found this danger to be insufficient justification for the suspension of Fourth Amendment rights for all motorists. *Prouse* at 658; *Hicks* at 943; A-52. This Court has further declined to recognize a "firearm exception" to the requirements of *Terry*. *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

Again, Petitioner seeks to erase and/or reverse the two distinct requirements for a "stop" and "frisk" under *Terry* and its progeny. *Terry* at 17; *Johnson* at 327. Petitioner cites to an Eighth Circuit case, *United States v. Pope*, 910 F.3d 413, 416 (8th Cir. 2018)(cert, filed 9/18/19), for the

proposition that "being armed with a gun necessarily means that the suspect poses a risk to the officer." Even assuming this proposition to be true, the "armed and dangerous" nature of a suspect relates to the second, "frisk" phase of the *Terry* inquiry, which requires that an officer reasonably suspect that person *stopped* is armed and dangerous. *Before* this inquiry is reached, however, a legal "stop" must occur. In order to pass constitutional muster under *Terry*, to effectuate a lawful investigative detention, or stop of an individual, a police officer must reasonably suspect that "the person apprehended is committing or has committed a criminal offense." *Johnson* at 326-327.

In the facts at issue in this case, such a reversal of the distinct requirements for a legal "stop and frisk" produces absurd results. The weapon was observed in Hicks' waistband by a camera operator while he was at a gas pump. Hicks subsequently entered the store, returned to his vehicle and attempted to pull out, at which point he was stopped by several police vehicles with their lights flashing. *Hicks* at 950-951; A-68-69. He is "stopped" for the purpose of *Terry* at this point. It is ridiculous to assert that Mr. Hicks posed a risk to officers *prior* to the stop. Officers only engagement with Hicks occurs *after* the officers effectuate the stop.

The element-or-defense test, rejected with regard to these facts by the majority opinion in *Hicks*, improperly authorizes the legislature to eliminate Fourth Amendment protections and would permit legislatures to characterize as *per se* "criminal" the very activities which they are de-criminalizing through licensure, improperly shifting the burden to the citizen to prove non-criminality, a proposition fundamentally inapposite to *Terry* and the Fourth Amendment.

## CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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