

No. 19-426

**In The
Supreme Court of the United States**

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COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

MICHAEL J. HICKS,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania**

—◆—
**AMICUS CURIAE BRIEF OF THE
PENNSYLVANIA DISTRICT ATTORNEYS
ASSOCIATION IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

—◆—
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Dated: October 31, 2019

STATEMENT OF QUESTION PRESENTED

Whether the Pennsylvania Supreme Court's decision and analysis of an important Fourth Amendment issue is in conflict with decisions of this Court.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT.....	2
I. THE PENNSYLVANIA SUPREME COURT MISAPPLIED THIS COURT'S STAND- ARD FOR ASSESSING REASONABLE SUSPICION AND, IN DOING SO, MADE IT HARDER TO INVESTIGATE AND STOP GUN VIOLENCE.....	2
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
CASES	
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	3
<i>INS v. Delgado</i> , 466 U.S. 210 (1984).....	4
<i>Navarette v. California</i> , 572 U.S. 393 (2014).....	4
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	3, 4, 6
<i>United States v. Arvizu</i> , 534 U.S. 266 (2002).....	4, 5
<i>United States v. Sokolow</i> , 490 U.S. 1 (1989).....	4
STATUTES	
18 Pa.C.S.A. § 6106	3
18 Pa.C.S.A. § 6122	3
OTHER AUTHORITIES	
<i>Scarred by school shootings</i> , The Washington Post (March 21, 2018), https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?utm_term=.460fc11e64dd	7
<i>‘Generation Columbine’ has never known a world without school shootings</i> , USA Today (February 22, 2018), https://www.usatoday.com/story/news/2018/02/22/generation-columbine-has-never-known-world-without-school-shootings/361656002	7
<i>Parkland School Shooting 208th Since Columbine: The Tragic List</i> , Westword (February 15, 2018), http://www.westword.com/news/parkland-to-columbine-school-shootings-list-9993641	7

INTEREST OF *AMICUS CURIAE*¹

The Pennsylvania District Attorneys Association is the only organization representing the interests of all District Attorneys and their assistants in the Commonwealth of Pennsylvania. This Court's review of constitutional questions in criminal matters is of special interest to district attorneys throughout Pennsylvania.

**SUMMARY OF THE ARGUMENT**

The Pennsylvania Supreme Court held that the police lacked reasonable suspicion to stop Michael J. Hicks. He was seen on live surveillance showing a gun to someone, tucking it into his waistband, and entering a convenience store. That specific location was known for drug and gun crimes. In reversing the trial and intermediate appellate courts, the Pennsylvania Supreme Court failed to use the proper standards for determining whether reasonable suspicion existed.

¹ Pursuant to Supreme Court Rule 37.2(a), James B. Martin, Counsel of Record for Commonwealth of Pennsylvania, Petitioner and Kathryn Rose Smith, Counsel of Record for Michael J. Hicks, Respondent have both consented to the filing of this *amicus curiae* brief. In addition, both named counsel were served with a Notice of Intent to File *Amicus* Brief by first class and electronic mail on October 21, 2019.

Pursuant to Supreme Court Rule 37.6, no counsel or a party or any entity other than *amicus curiae* authored this brief in part or in whole, and no counsel, party or any entity other than *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

Rather than review the information known to the police in the totality of the circumstances, it disregarded important facts and viewed others in artificial isolation without considering the overall context of the situation. Applying the proper constitutional standards, there was reasonable suspicion to investigate a potential gun crime. The lower court thus committed reversible error that, if left standing, risks dangerous repercussions.

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ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT MISAPPLIED THIS COURT'S STANDARD FOR ASSESSING REASONABLE SUSPICION AND, IN DOING SO, MADE IT HARDER TO INVESTIGATE AND STOP GUN VIOLENCE.

The police had reasonable suspicion that Hicks was armed and may have been involved in criminal activity when they stopped him. While there seems to be no dispute as to the officers' belief that Hicks was armed at the time, there is great disagreement whether the police had a reasonable belief that he was involved in any criminal activity leading to a seizure for the purpose of investigation. Your *amicus* submits that whenever the police have reliable information that a person is carrying a concealed firearm in public in a manner inconsistent with state firearm laws, they possess reasonable suspicion to conduct an investigation related to firearms offenses, and, given that they believe the person is armed, are further empowered to

take such steps as are necessary to retrieve the weapon before conducting the investigation. The Pennsylvania Supreme Court's decision otherwise contradicts this Court's precedent and establishes a new, impractical standard for reasonable suspicion.

It is beyond peradventure that the Constitution protects an individual's right to bear arms, but that right, like all rights, is not unlimited. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited.").

In Pennsylvania, the Pennsylvania legislature outlawed the possession of concealed firearms without a license. To lawfully carry a firearm concealed on one's person or in a vehicle, an individual licensed to carry a firearm must produce the license for inspection upon lawful demand of a law enforcement officer. 18 Pa.C.S.A. § 6122. As a result, while a person may have a right to possess a firearm openly, he does not have a right to concealed possession without first complying with the statute and obtaining a concealed carry license. 18 Pa.C.S.A. §§ 6106, 6122.

The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures. Relevant here, an individual's Fourth Amendment rights are triggered, among other situations, when a police officer initiates an "investigative detention." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The Fourth Amendment requires "some minimal level of objective justification" for an investigative detention—

specifically, reasonable suspicion. *INS v. Delgado*, 466 U.S. 210, 217 (1984). An officer’s reasonable suspicion must be “supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989). This standard considers “the totality of the circumstances—the whole picture.” *Navarette v. California*, 572 U.S. 393, 397 (2014). “And in determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Terry*, 392 U.S. at 27. “A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.” *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

For the reasons more fully explained in the Commonwealth’s petition, the Pennsylvania Supreme Court misapplied clear precedent of this Court. It failed to consider the totality of the facts giving rise to the officer’s conclusion that there was reasonable suspicion, and it presumed innocent explanations for Hicks’s conduct. This flawed approach led to a warped assessment of reasonable suspicion. The facts on the ground, as assessed by the police making the street-level assessment of reasonable suspicion in the first instance, are as follows:

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.

Petition for Writ of *Certiorari* at 10.

On appeal in the state's highest court, however, the circumstances changed. The Pennsylvania Supreme Court, applying a restricted lens and offering defendant-friendly inferences, disregarded the officer's experience with this location as a high gun and drug crime area, and minimized Hicks's showing of the gun to someone and his tucking it into his waistband as he entered the convenience store. It also assumed innocent explanations on behalf of Hicks and used those assumptions to negate reasonable suspicion. Yet this Court has already rejected this sort of selective and artificial reconstruction of the police officer's street-level assessment of reasonable suspicion. *See, e.g., Wardlow*, 528 U.S. at 122-25 (explaining that legal conduct may contribute to a police officer's assessment of whether criminal activity may be afoot); *see also Arvizu*, 534 U.S. at 268 (same). The Pennsylvania Supreme Court's decision was not just a misapplication of the constitutional standard for reasonable suspicion, but the formulation of a new one that will negatively impact law enforcement in efforts to thwart violent crime going forward—it essentially requires facts showing that a

suspect *is* involved in criminal activity and there is no possible innocent explanation for his conduct.²

Not only is the Pennsylvania Supreme Court's decision inconsistent with this Court's precedent, but it also risks dangerous repercussions. Because of the potential severity of the consequences of a person carrying a concealed firearm in public, it is reasonable that the police be allowed to conduct a brief investigation to ascertain that the individual is not unlawfully possessing the firearm. This Court has observed as follows:

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Terry, 392 U.S. at 24.

Sadly, these concerns have only grown over the years. Since the 1999 Columbine school massacre, there have been well over 150 shootings at grade schools, high schools, and colleges in this country, 88 of

² The *Amicus* similarly agree with the Commonwealth on its second point about the element or defense test. It will rely on its discussion of the issue in its petition.

which involved at least one fatality. Many of that number, however, involved multiple fatalities. *See Scarred by school shootings*, The Washington Post (March 21, 2018), https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?utm_term=.460fc11e64dd; *'Generation Columbine' has never known a world without school shootings*, USA Today (February 22, 2018), <https://www.usatoday.com/story/news/2018/02/22/generation-columbine-has-never-known-world-without-school-shootings/361656002>; and *Parkland School Shooting 208th Since Columbine: The Tragic List*, Westword (February 15, 2018), <http://www.westword.com/news/parkland-to-columbine-school-shootings-list-9993641>.

Because of this frightening reality, we should, at a bare minimum, enforce the gun restrictions that already exist. Before this Court is the opportunity to give effect to a long-standing provision of our criminal law regarding the carrying of concealed firearms. Surely it is not unreasonable to ask those whom we have hired and trained to protect us to be permitted to act before the first shot is fired.

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CONCLUSION

For the foregoing reasons, the Pennsylvania District Attorney's Association, as *amicus curiae*, respectfully requests this Honorable Court to grant

the petition for a writ of *certiorari* filed by the Commonwealth of Pennsylvania.

Respectfully submitted,

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