

**DISTRICT ATTORNEY'S OFFICE**  
By: PATRICIA CUMMINGS  
Assistant District Attorney  
Supervisor, Conviction Integrity Unit

Three South Penn Square  
Philadelphia, PA 19107  
215-686-8747

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
CRIMINAL SECTION TRIAL DIVISION**

**COMMONWEALTH** :  
 :  
 v. : **CP-51-CR-0306311-2002**  
 :  
**JOSEPH TERMAINE HICKS a/k/a** :  
**JERMAINE WEEKS** :

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**COMMONWEALTH'S ANSWER TO  
SECOND AMENDED PCRA PETITION**

TO THE HONORABLE TRACY BRANDEIS-ROMAN:

LAWRENCE S. KRASNER, the District Attorney of Philadelphia County, by his assistant, Patricia Cummings, answers that Mr. Joseph Termaine Hicks ("Hicks") is entitled to relief on at least one of his claims enumerated in his SECOND AMENDED PCRA PETITION and joins Hicks in asking this Court to enter an order vacating his convictions and sentences, and ordering a new trial:

**OVERVIEW AND SHORT FACTUAL SUMMARY**

1. Based on the pleadings and the stipulated factual record (Joint Stipulations of Fact of Petitioner Joseph Termaine Hicks and Respondent

Commonwealth of Pennsylvania, filed on December 15, 2020), the Commonwealth concedes that Hicks is entitled to relief on his claims filed pursuant to 42 Pa.C.S. Section 9541 *et seq* and *Napue v. Illinois*, 360 U.S. 264 (1959).

2. During this post-conviction investigation, the parties discovered new DNA evidence as well as evidence of *Napue* violations—both of which are claims specifically pled in Hicks’ Amended PCRA Petition. The requisite facts that form the basis for relief are established and proven through the parties’ joint stipulations.

3. The overwhelming evidence developed pre-trial and post-trial establishes that the underlying crimes in this case were committed by a male assailant, who at the time of the crime, was wearing a gray hoody/hat and a black jacket. However, despite having those specific details regarding the assailant’s clothes, the prosecutor stipulated at the very beginning of the trial that there were not any civilian witnesses that could identify Hicks as the assailant. As a result, the Commonwealth relied on the testimony of several police officers to meet its burden of proof.

4. At approximately 5:00 am on November 27, 2001, 40-year-old W.L. left her home to walk to work. She was walking on the 1500 block of Mifflin Street in Philadelphia and turned onto the 1900 block of South 15<sup>th</sup> Street.

5. As she began to walk on South 15<sup>th</sup> Street, she was approached from behind by a black male wearing a black jacket and a gray hoody. The male began to punch her in the face and struck her several times in the face with a gun, causing significant bleeding from her face and head.

6. As she screamed for help, the assailant then dragged W.L. into an alleyway behind Saint Agnes' Hospital, where he pulled down her pants and raped her.

7. W.L. never saw the assailant's face and could not identify him.

8. During the assault, the Philadelphia Police Department ("PPD") received three 911 calls reporting a rape in progress behind Saint Agnes' Hospital.

9. PPD Police Officers Martin Vinson and Dennis Zungolo arrived on scene and went into the alley. Officer Vinson entered the alley first, followed close behind by Officer Zungolo.

10. When the officers entered the alley, they encountered both W.L. and Hicks.

11. At some point in the encounter, Officer Vinson shot Hicks three times – twice in the back and once in the right arm.

12. Officer Vinson called into Police Radio to report the shooting. He stated that he "tried to get the female, uh the male to, uh, you know put his hands where I could see them and he was reaching for something and I couldn't see it."

13. When the dispatcher asked where Hicks was shot, Officer Vinson replied, "Believe in the, uh, in the side . . ."

14. Officer Robert Ellis arrived after the shooting and recovered a .38 caliber Taurus with blood on the handle. Subsequent DNA testing revealed that the blood was W.L.'s.

15. Hicks was transported to Thomas Jefferson University Hospital, where he underwent surgery for his injuries.

16. PPD's Internal Affairs Division ("IAD") reviewed Officer Vinson's firearm discharge. As part of that review and PPD's investigation of the rape, Officers Vinson, Zungolo, and Ellis were all interviewed.

17. Officer Vinson stated that when he entered the alley, he "saw a black male lying on top of a female. I saw that both people on the ground had their pants down and around their ankles. It appeared that the male was having intercourse with the female. I approached the male and shouted, 'police.' I ordered the male to get up and place his hands above his head so I could see them."

18. Officer Vinson stated that after the male initially did not comply, the male

started to turn away from me and at the same time reached into his right coat pocket. I gave him another verbal command in a loud voice and said, 'put your hands where I can see them.' I said this several times. At this time I drew my weapon and ordered him again, 'put your hands where I could see them.' He then turned toward me quickly and drew a gun from his jacket, the barrel of the gun was pointing in my direction. At this time I discharged my gun two times at him striking him in the chest area. The male lowered the hand that was holding the gun and then raised it again at me. At this time I fired one more shot at the suspect. The male then placed the gun into his coat pocket, before eventually collapsing.

19. Officer Vinson then stated that after the male collapsed, "I approached him and retrieved the gun from his coat pocket. I saw the male was shot in the chest area."

20. Officer Zungolo was also interviewed as part of PPD's investigation into the rape. Officer Zungolo stated that when he and Officer Vinson entered the alley, he saw a male lying on top of the complainant with his pants down. The officers then ordered the male to stand up and put his hands up.

21. Officer Zungolo stated that the male began to walk away from the officers,

Then he turned sideways on us and he put his right hand in his right pocket of his blue/dark color jacket (waist length jacket). Both of us screamed at the defendant to let us see his hands, but the defendant would not take his hand out of his jacket pocket.

22. According to Officer Zungolo, when the male continued to refuse to show his hands,

Me and my partner at this point thought the male was about to pull a weapon out of his jacket. My partner fired approximately three rounds at the defendant and the defendant dropped to the ground [ . . . ] While the defendant was on the ground me and Officer Ellis were talking to the defendant and both of us searched the defendant for weapons. Officer Ellis found a gun in the defendant's right jacket pocket.

23. Officer Ellis was interviewed about the circumstances under which he recovered the gun. He stated that he arrived after the shots had been fired. He

[O]bserved P/O Zingolo [sic] #1690 standing over a black male, which was lying down on the ground, at that time, myself and P/O Zingolo [sic] began to search the black male. At that time I recovered a weapon from his right side jacket pocket.

24. At trial, the Commonwealth argued that Officer Vinson shot Hicks in the chest then Officer Ellis recovered the firearm from Hicks' right jacket pocket.

25. The defense argued that Hicks was shot in the back, he never had the gun in his pocket, and the Officers were lying about the nature of the shooting and recovery of the gun.

26. During his testimony, Officer Vinson again stated that when he and Officer Zungolo entered the alley, they saw a male on top of a female, both with

their pants down, and “it appeared that they were having intercourse.” Officer Vinson shouted, “Rise to your feet,” and the male stood up. According to Officer Vinson, “it appeared as though [the male] was pulling his penis out of her vagina” in the process of getting up.

27. Vinson then testified that he shot Hicks in the chest after Hicks pointed a gun at him:

[H]e reaches into his pocket, and then he lunges around. I could see off the light a gun coming towards me . . . . When he was almost to where he was fully facing me, I discharged two shots. He stepped back and hesitated, and then he went to come back up again. When he went to bring the gun back up again, that’s when I had a reactionary shot, and I stepped back.

28. On cross-examination, Officer Vinson reiterated that Hicks was directly facing him when he discharged his firearm: “He was just about around and almost just about had it pointed at me, directly at me.” In addition, he claimed that the male put the gun back in his jacket pocket after he had been shot. Further, when other officers came to search the suspect, Officer Vinson “said, ‘His gun in his right pocket,’ and they went in and actually recovered the gun. They actually took the gun out of his pocket.”

29. Officer Zungolo—called as a defense witness—similarly testified that when he and Officer Vinson entered the alley, they “observed the Defendant on top of the female with his pants down about his knees, as well as the Complainant.” When the officers commanded the assailant to get off of the woman, “He picked his pants up. He started walking backward, with his eyes on us the whole time.”

30. After Hicks refused to show his hands, Officer Zungolo testified that he “just saw him coming out, like his arm, his right arm coming out. Then, the next thing I know, I heard approximately three shots.”

31. Defense counsel questioned Officer Zungolo further about the position of Hicks’ hand:

Q. When that hand was coming out of that pocket, could you see the hand itself?

A. No.

Q. You didn’t see the hand?

A. No.

Q. Pretty much what you saw was his arm, right?

A. Right.

32. Officer Zungolo was clear that the assailant was directly facing the officers when he was shot:

Q. At the time those three shots were fired, was my client facing you and Officer Vinson? Was his chest, his stomach and the front of his body facing the two of you?

A. Yes, I believe so.

[...]

Q. So, are you saying that by the time the shots rang out, my client turned about 90 degrees away from Officer Vinson? He had turned all the way back so he’s facing Officer Vinson; is that what you’re saying?

A. Yes.

33. After the shooting, Officer Zungolo stated he administered first aid while Officer Ellis began searching Hicks for a firearm. Officer Ellis said he found a gun, then Officer Zungolo “Saw him take it out of the Defendant’s pocket,” by putting one finger through the trigger slot.

34. However, on cross-examination, Officer Zungolo clarified that the gun was not in Hicks' pocket when Officer Ellis recovered it:

Q. All right, did you see him actually in the process of pulling that out of his jacket pocket?

A. The weapon was already out of the pocket.

Q. Oh, it was already out of the pocket?

A. Right.

35. Officer Zungolo then noted that he saw blood on the grip of the weapon.

36. Meanwhile, Officer Ellis testified that he found the bloody gun in Hicks' jacket pocket. When shown the gun by the Commonwealth while on the stand, he identified it as follows: "This is a gun I recovered from the gentleman's pocket. That would be the right-hand pocket."

37. Officer Ellis testified he noticed that "there was blood on the handle of the gun."

38. On cross-examination, Officer Ellis elaborated that when he first secured the gun, he did not have gloves on, and he "secured this gun by putting it in my waistband area." "What I did was went right to the jacket. What I did was completely pat him down. Once my hand got right to the pocket, that's when I went right into it."

39. PPD chemist Marianne Scafidi-Magee testified that she examined Hicks' clothing to search for blood and or/seminal fluid before passing the clothing to another chemist for DNA testing. In her analysis, she did not note the presence of any blood in cuttings she made from Hicks' right jacket pocket.



40. Hicks testified in his own defense. Hicks was clear about the direction of his body when he was shot:

Q. Now, was your back facing the officers when you were shot?

A. Yes.

41. Defense counsel then had Hicks lift his shirt and show the jury his various scars from the bullet wounds while the he reiterated several times that he had been shot in the back.

42. After the conclusion of Hicks' testimony, defense counsel entered a stipulation into the record, by way of reading a letter from Dr. Murray Cohen, who operated on Hicks' gunshot wounds. The stipulation, in full, read:

I performed surgery on a Tremaine Hicks on November 27th, 2001, for injuries sustained from multiple gunshot wounds. I was told that my testimony is being sought with respect to the direction in which Mr. Hicks was shot, from the front or from the back. I can answer unequivocally that it is beyond my expertise to determine the direction in which the bullets were fired; thus, I cannot testify to those facts.

43. Besides the entry of Mr. Hicks' medical records into evidence, Mr. Hicks' testimony regarding the circumstances of the shooting, and the above stipulation, defense counsel did not present any further evidence regarding the shooting.

44. During closing argument, defense counsel argued that the police officers were lying regarding the circumstances of the shooting, and therefore their testimony regarding the rape should be discredited. In particular, he argued that Hicks was shot in the back and that Officers Vinson and Zungolo lied when they stated Hicks was shot in the front. In addition, he pointed to Scafidi-Magee's

testimony that she did not observe blood in Hicks' jacket pocket to discredit Officers Vinson, Zungolo, and Ellis' contentions that Hicks had the bloody gun in his pocket, from which they recovered it.

45. The Commonwealth argued that the officers were truthful, stating:

There is no conspiracy here. There is no planning. There is no opportunity to plan. [Officer Vinson] saw this Defendant on top of this woman. He said "Get off of her, off of her."

You know how you know he said that? Because Vinson said he said it, and he was under oath just like everybody else. He's just a Police Officer, but he was under oath just like everybody else.

Officer Zungolo said that's what they said. "We both said it." Officer Zungolo's under oath just like all the other witnesses.

46. The Commonwealth then spent extensive time discussing the circumstances of the shooting to argue that the officers did not lie. In addition, the Commonwealth stated that ***"There is no credible medical testimony presented that could tell you that this Defendant was shot in the back."***

47. After deliberations, the jury found Hicks guilty of Rape, Aggravated Assault, Possession of an Instrument of Crime, and Terroristic Threats.

48. After the Court denied Hicks' post-trial motion for relief—based on the post-trial discovery of a surveillance video that captured the assailant dragging W.L. into the alley—on February 27, 2003 the Court sentenced Hicks to an aggregate of 12-and-a-half to 25 years' incarceration.

49. On November 10, 2015, Hicks, through newly-retained pro bono counsel, filed a motion for post-conviction DNA testing. On February 3, 2017, this Court granted the motion. DNA testing was performed on the physical evidence collected in the case. Based, in part, on the results of the testing, Hicks filed a

(current) second PCRA, amended December 5, 2018.

50. At trial, the Commonwealth relied on the presence of W.L.'s blood on the "inside front upper panel" of Hicks' boxers and the outside front leg of Hicks' sweatpants to corroborate Officer Vinson's testimony that he saw Hicks attacking W.L. when he arrived at the scene.

51. DNA testing recently performed on a stain on W.L.'s pants on the top leg, below the front pocket (which had tested presumptively positive for blood at the time of trial) showed male DNA belonging to Hicks.

52. Those new DNA test results from W.L.'s pants are significant because there is no physical evidence that either proves or disproves Hicks was bleeding before he was shot. However, there is evidence that Hicks was bleeding profusely after the police shot him.

53. Given the trial testimony regarding the crime scene and how evidence was handled and collected in this case, Hicks' blood may have been transferred to W.L.'s pants after police arrived on the scene and shot Hicks.

54. Hicks' *pro bono* counsel also retained the expert services of a forensic pathologist, Dr. Michael Baden, to review Hicks' medical records to determine whether he was shot in the back. In an affidavit dated January 24, 2019, Dr. Baden concluded that Hicks was indeed shot from behind. Dr. Baden's conclusion served as one of the bases for Hicks' amended PCRA.

55. In response, the Commonwealth submitted Hicks' medical records to Dr. Samuel Gulino, Chief Medical Examiner for the City of Philadelphia.

56. In an amended consultation report dated April 25, Dr. Gulino

concluded that, based on Hicks' remaining medical records alone, a dispositive determination could not be made regarding the directionality of two of the bullets.

57. Based, in part, on Dr. Gulino's April 25, 2019 conclusions, on July 9, 2019, the Commonwealth filed the now-withdrawn Motion to Dismiss Hicks' amended PCRA.

58. Subsequently, in December 2019, the clothing Hicks wore on the day of the crime and shooting was received at the medical examiner's office for review by Dr. Gulino. After reviewing the clothing, Dr. Gulino issued an addendum to his amended report. In the addendum, Dr. Gulino stated that the clothing showed bullet holes in the back and buttocks but no corresponding bullet holes in the front of the clothing. On this basis, Dr. Gulino changed his scientific opinion and concluded that Hicks was indeed shot from behind.

59. All parties now agree that Hicks was shot from behind, contradicting the testimony of Officers Vinson and Zungolo at trial.

60. If this Court agrees with the Commonwealth that Hicks is entitled to relief on any one of his claims, his remaining claims are moot. The Commonwealth respectfully requests that this Court defer judgment (and any evidentiary hearing) on any remaining claims not agreed to in this Answer, in the interest of judicial economy and justice.<sup>1</sup>

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<sup>1</sup> Although the merit of these potentially moot claims may not be resolved, their existence is not surprising as the majority of documented wrongful convictions are the result of multiple constitutional and systems-level errors. *See generally*, Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, (Harvard University Press 2012) (discussing the cases of the first 250 wrongfully convicted people exonerated by DNA testing).

61. In the event this Court denies relief as to the agreed-upon claims, an evidentiary hearing is warranted.

### **PROCEDURAL HISTORY**

62. On December 12, 2002, Hicks filed a Motion for Judgment of Acquittal, Arrest of Judgment, or New Trial, and then on January 6, 2003, the motion was re-filed as a Motion for Extraordinary Relief in the Form of Judgment of Acquittal, Arrest of Judgment or New Trial. The Court denied the motion on February 27, 2003.

63. On March 21, 2003, Hicks filed a timely appeal of both his judgment of sentence and the denial of his Motion for Extraordinary Relief. On January 31, 2005, the Superior Court denied the appeal on all grounds and affirmed the judgment of sentence. Hicks filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on March 2, 2005. The Court declined review on December 28, 2005.

64. On April 20, 2006, Hicks filed a pro se PCRA petition alleging ineffectiveness of trial counsel. Court-appointed counsel filed an amended petition on March 23, 2007, which was denied on September 21, 2007. Hicks filed a timely notice of appeal, and on April 23, 2009, the dismissal was affirmed. Hicks filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court on May 28, 2009, which the Court rejected as untimely.

65. On June 5, 2009, Hicks filed a Petition for Leave to File Petition for Allowance of Appeal, Nunc Pro Tunc, to the Pennsylvania Supreme Court. The

Court denied that request on August 10, 2009.

66. Hicks filed a Federal Habeas petition on September 10, 2009. On March 31, 2010, the Magistrate Judge issued a recommendation, approved by the district judge, that the petition be dismissed.

67. And as noted above, on November 10, 2015, Hicks, through newly-retained pro bono counsel, filed a motion for post-conviction DNA testing. On February 3, 2017, this Court granted the motion.

#### **NO MATERIAL FACTS TO DISPUTE**

68. In order to facilitate this Court's review (and consistent with its ethical duties), the Commonwealth has entered into and filed a joint stipulation of facts with Hicks. *Commonwealth v. Mathis*, 463 A.2d 1167, 1171 (Pa. Super. Ct. 1983) (noting that "[i]t is axiomatic that parties may bind themselves by stipulations" in criminal proceedings) (quoting *Marmara v. Rawle*, 399 A.2d 750 (Pa. Super. Ct. 1979)).

69. Where parties stipulate as to particular facts, the stipulation does away with the necessity for introducing evidence of the fact stipulated. *In re Shank's Estate*, 161 A.2d 47 (Pa. 1960). This is so even if the evidence contains otherwise inadmissible hearsay statements. *Jones v. Spidle*, 286 A.2d 366 (Pa. 1971).<sup>2</sup>

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<sup>2</sup> "A stipulation is a declaration that the fact agreed upon is proven." *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). "Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and

70. A stipulation is part of the evidentiary record and “binds the Commonwealth, and the Court[.]” *Commonwealth v. Phila. Elec. Co.*, 372 A.2d 815, 821 (Pa. 1977); *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003) (noting that stipulations “become the law of the case”); *Park v. Greater Delaware Valley Savs. & Loan Ass’n*, 523 A.2d 771, 773 (Pa. Super. 1987) (“[S]tipulated facts are binding upon the court as well as the parties”); *Tyson v. Commonwealth*, 684 A.2d 246, 251 n.11 (Pa. Cmmw. Ct. 1996)).

71. This Court need not conduct an evidentiary hearing to grant relief because no material facts remain in dispute. Pa. R. Crim. P. 907(2); *Commonwealth v. Morris*, 684 A.2d 1037, 1042 (Pa. 1996) (“when there are no disputed factual issues, an evidentiary hearing [on PCRA petition] is not required under the rules.”); *Commonwealth v. Smith*, 234 A.3d 576, 585 n.10 (Pa. 2020) (“stipulation obviated the need to make a record to prove certain underlying facts”); *see Commonwealth v. Martinez*, 147 A.3d 517, 524 (Pa. 2016) (affirming grant of relief where “[t]he trial court held a hearing” at which “[n]o evidence was offered . . . as the

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convenience of the court they become the law of the case.” *Id.* at 73 (quoting *Paronese v. Midland National Ins. Co.*, 706 A.2d 814, 815 (Pa. 1998)) (alterations in original).

The use of stipulations is described in a number of Pennsylvania practice guides. *E.g.*, *Facts as to Which no Evidence is Needed*, 8 Standard Pennsylvania Practice 2d § 49:6; *Use of Stipulations to Excuse Proof of Facts*, 11 West’s Pa. Prac., Trial Handbook § 10:4 (3d ed.); *Stipulations to Facts*, 16B West’s Pa. Prac., Criminal Practice § 29:30. Although the practice of stipulating to agreed-upon facts is common, there is limited caselaw on the issue—because stipulations necessarily involve agreement by the parties, they are rarely the subject of appellate disputes.

Commonwealth was willing to stipulate to the facts as stated in Martinez’s petition.”).

72. In light of the parties’ stipulation, the Commonwealth submits that the record establishes Hicks’ entitlement to relief. *Commonwealth v. Cox*, 204 A.3d 371, 387 (Pa. 2019) (“confessions of error by the Commonwealth are not binding on a reviewing court but may be considered for their persuasive value”).

**THIS COURT HAS JURISDICTION TO RESOLVE HICKS’ CLAIMS**

73. The PCRA generally deprives courts of jurisdiction over any petition that is not “filed within one year of the date the judgment becomes final unless the petition alleges and the petitioner proves” one of three exceptions. 42 Pa. C.S. § 9545(b)(1)(i)-(iii).

74. Here, Hicks pleads (and the Commonwealth concedes) that he has satisfied both the government interference exceptions under 42 Pa. C.S. § 9545 (b)(1)(i) and new evidence exception under 42 Pa. C.S. § 9545 (b)(1)(ii).

75. The government interference exception requires proof that:

the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States

42 Pa. C.S. § 9545 (b)(1)(ii). In *Commonwealth v. Hawkins*, 953 A.2d 1248, 1253 (Pa. 2006), the Pennsylvania Supreme Court held that a *Brady* violation falls within the *government interference exception* where a petitioner pleads and proves that the information could not have been obtained earlier with the exercise of due diligence.

76. The newly discovered evidence exception requires proof that “the



facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.” 42 Pa. C.S. § 9545 (b)(1)(ii). In *Commonwealth v. Lambert*, 884 A.2d 848, 852–53 (Pa. 2005), the Pennsylvania Supreme Court held that a PCRA court has jurisdiction under the *newly discovered evidence exception* to review a *Brady* claim so long as the facts supporting the *Brady* claim were known to the police and not known to the petitioner until the PCRA petition was filed.<sup>3</sup>

77. The PCRA’s jurisdictional requirements have been satisfied in this case. The evidence upon which Hicks relies—the results of modern forensic DNA testing and new assessments by the Chief Medical Examiner for the City of Philadelphia—“could not have been ascertained by the exercise of due diligence.” 42 Pa. C.S. § 9545 (b)(1)(ii). And because the prosecution argued at trial, “*there is no credible medical testimony presented that could tell you that this Defendant was shot in the back*” when the Commonwealth was, at that time, in possession of the physical evidence that ultimately lead its own Chief Medical Examiner to conclude that Hicks was shot in the back not once, but twice—the government interference exception likewise applies here. 42 Pa. C.S. § 9545 (b)(1)(ii).

**HICKS HAS PROVEN NUMEROUS CONSTITUTIONAL VIOLATIONS WHICH  
ENTITLE HIM TO RELIEF**

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<sup>3</sup> *Lambert* held that the Court’s jurisdiction does not otherwise depend on the merits of a *Brady* claim; there is jurisdiction even if the withheld information is not material for *Brady* purposes. *Lambert*, 884 A.2d at 852-53. In any event, the Commonwealth concurs with Hicks that the withheld evidence was material and concedes that *Brady* was violated here.

The law of *Napue v. Illinois*

78. It is well settled that the Commonwealth may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. *Commonwealth v. Hallowell*, 383 A.2d 909, 911 (Pa. 1978) (citing *Napue v. Illinois*, 360 U.S. 264 (1959)). A conviction obtained through the knowing use of materially false evidence/testimony may not stand. *Id.* It is an axiomatic principle of the criminal justice system that the knowing use of false testimony violates a defendant's due process rights.

79. In *Napue v. Illinois*, 360 U.S. 264 (1959), the United States Supreme Court pronounced that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269 (internal citations omitted).

80. Thirteen years later, the High Court, in *Giglio v. U.S.*, 405 U.S. 150 (1972), discussed the importance of this principle, stating that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" 405 U.S. at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

81. A prosecuting attorney has an affirmative duty to correct the testimony of a witness which he knows to be false. *Hallowell*, 383 A.2d at 236-237 (quoting *Commonwealth v. Carpenter*, 372 A.2d 806, 810 (Pa. 1977) and collecting cases). The prosecutor may not present testimony that it knows is false without correcting the error as soon as it becomes known. The knowledge of one prosecutor is attributable to all the prosecutors in the same office. *Napue*, 360 U.S. at 238.

82. The Supreme Court of Pennsylvania has clarified that a prosecutor need not know herself that evidence is false for its presentation to violate a defendant's due process rights because "[i]t is the effect on the right to a fair trial, not the prosecutor's state of mind, that results in reversible error." *Commonwealth v. Jenkins*, 383 A.2d 195, 198 (Pa. 1978); *see also Commonwealth v. Hallowell*, 383 A.2d 909, 911 (Pa. 1978) (extending *Jenkins* to the presentation of false testimony). This is because "the concern is not punishment of society for misdeeds of the prosecutor, but avoidance of a fair trial to the accused." *Commonwealth v. Wallace*, 455 A.2d 1187, 1190 (Pa. 1983) (internal citations omitted).

83. Sworn police officers—who investigate crimes, make arrests, and routinely testify to their observations under oath in court—are most assuredly "representatives of the State." *Napue*, 360 U.S. at 269. Thus, their awareness that testimony proffered at trial—including their own—is false satisfies *Napue*'s threshold requirement that the "State" knows of the testimony's falsity. 360 U.S. at 269.

84. *Napue* and its progeny also make it clear that false testimony deprives a defendant of due process even if it solely implicates a witness' credibility:

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

*Id.*; see also *Giglio*, 405 U.S. at 154 (“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.”) (quoting *Napue*, 360 U.S. at 269).

85. A strict standard of materiality is applied such that the false testimony is material—and a new trial is required—if it could in *any reasonable likelihood* have affected the judgment of the jury.” *Commonwealth v. Wallace*, 455 A.2d 1187, 1190–91 (Pa. 1983) (citations and quotations omitted).

86. Courts must apply this strict standard of materiality in assessing potential *Napue* violations, “not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.” *U.S. v. Agurs*, 96 S.Ct. 2392, 2397 (1976).

New evidence demonstrates that officers testified falsely

87. The Commonwealth proffered and relied on testimony from PPD Officers to identify Hicks as W.L.’s assailant. This testimony was critical because W.L. was unable to identify her attacker and no other civilian witnesses were able to make an identification. If the jury did not credit the officers’ account, Hicks could not have been convicted of W.L.’s assault.

88. But, as discussed above, the scientific evidence now available to the defense, the Commonwealth, and the Court demonstrates that—contrary to the trial testimony of Officers Vinson, Zungolo, and Ellis —Officer Vinson shot Hicks from behind and Hicks most likely never had the bloody gun in his pocket. The parties have stipulated that several specific statements from these officers, made under oath during the trial, were false.

89. In sum:

- Officer Vinson falsely testified that Hicks was directly facing him when he discharged his weapon. Officer Vinson also falsely testified that Hicks pulled the bloody gun from his jacket pocket before pointing it at Officer Vinson and that Hicks put the gun back in his pocket after being shot. Finally, Officer Vinson falsely testified that the other officers recovered the gun from Hicks' jacket pocket.
- Officer Zungolo similarly falsely testified by claiming that Hicks was directly facing Officer Vinson when Officer Vinson discharged his firearm.
- Officer Ellis falsely testified that he recovered the bloody gun from Hicks' right jacket pocket.

90. While there is no evidence the prosecutor in this case personally knew that the officers were testified untruthfully, her lack of knowledge is immaterial; representatives of the Commonwealth knowingly and intentionally presented false testimony, and this satisfies *Napue's* threshold "knowledge" requirement.

The false testimony was material

91. The Commonwealth concedes that it is reasonably likely the officers' false testimony could have affected the judgment of the jury. *Wallace*, 455 A.2d at 1190.

92. In this case, several eyewitnesses saw the assailant drag W.L. into the alley; however, neither they nor W.L. could identify the assailant. Likewise,

there is no question whether Hicks was present at the scene.

93. The entire case turned on whether the jury believed the officers' testimony about what they observed when they arrived at the scene—two officers specifically testified that they witnessed Hicks still in the process of raping W.L. when they entered the alley. That account was inextricably intertwined with the officers' testimony about Hicks' actions immediately after arriving—i.e., that he was armed and posed an immediate threat to the officers such that they had no choice but to shoot him repeatedly.

94. The defense's theory of the case was that Hicks was not the assailant and only entered the alley out of curiosity after hearing screams and seeing another man run out of the alley. Impeaching the credibility of those officers was crucial to the defense's case, and the key line of the impeachment inquiry centered around the circumstances of the shooting and recovery of the gun. The defense—and the Defendant himself—repeatedly argued that the officers were lying about those circumstances, and therefore their testimony regarding seeing Hicks rape W.L. should be discredited.

95. The Commonwealth, both in anticipation of, and response to, this line of attack, presented physical evidence, testimony, and argument to bolster the officers' credibility. This served the function of making the officers' credibility key not just to Hicks' case but to the Commonwealth's case against him.

96. Closing arguments from both sides illuminate how central to the trial these issues were. Defense counsel contended that:

There are three victims there at the crime scene:

[W.L.] was the one who suffered the most tragedy, the most pain.

My client was shot three times in the back.

But, then, there was another victim, a victim by the name of Martin Vinson, because I submit to you that Martin Vinson, as he said, was nervous. He was hyped up. He goes back there in the receiving area. It's dark. He shines that flashlight. He sees my client, as he said, standing there, and he admittedly jumped the gun. Vinson shot first and asked questions later.

He shoots my client in the back. Then, when he got on the radio, he had tears in his eyes because he knew what he had done was wrong.

He said, "Yes, I thought he had something, but I didn't see it." I would submit to you that that happened, because based on what Zungolo says, when you use your common sense, Vinson knew he had made a mistake, and he had to live with that.

But, then, after that happened to him, rather than him just saying, "Okay, I made a mistake. I shouldn't have shot this man. I didn't know what this man was doing."

Instead, he turns it into something sinister. He gets together with other officers and Officer Ellis, and he says, "All right, we've got to clean this up. This man will probably die. He's just a rapist. Who cares about him. We've got to worry about our careers."

N.T. 11/7/2002, 202-203.

97. The crux of the defense's theory of the case was that Officer Vinson shot Hicks without justification, and the police framed Mr. Hicks to cover up the shooting. Put another way, the defense intimated that Officer Vinson lied to cover up an unjustified shooting and crafted an account that framed Hicks as *both* a threat to the responding officers *and* W.L.'s assailant. This defense could only succeed if the officers could be adequately impeached.

98. In response, the Commonwealth argued:

There is no conspiracy here. There is no planning. There is no opportunity to plan. [Officer Vinson] saw this Defendant on top of this woman. He said "Get off of her, off of her."

You know how you know he said that? Because Vinson said he said it, and he was under oath just like everybody else. He's just a Police Officer, but he was under oath just like everybody else.

Officer Zungolo said that's what they said. "We both said it."  
***Officer Zungolo's under oath just like all the other witnesses.***

*Id.* at 226 (emphasis added).

99. The Commonwealth ended its summation by stating:

Ladies and gentlemen, ***what connects this Defendant to the scene and to the crime is*** the Complainant, Justin Votta, Joe Christinzio, ***Officer Vinson, Officer Zungolo***, Officer Smith, ***Officer Ellis***, the gun, the blood on the gun, the blood on the Defendant's pants, the blood on the Defendant's underwear, Robert Dillard's testimony, the DNA technician who found a match between the blood of [W.L.] and the blood on the gun, and the photographs.

*Id.* 262 (emphasis added).

100. The Commonwealth not only argued that Officers Vinson and Zungolo were telling the truth, it went so far as to connect their testimony to the oath they swore before taking the stand. The witnesses the Commonwealth identified as "connect[ing] this Defendant to the *scene* and to the *crime*" conflated the two issues—all of the listed witnesses connected Hicks to the scene (indeed, that fact was never in dispute). But only the testimony of Officers Vinson, Zungolo, and Ellis connected him to the crime itself.

101. As evidenced above, the centerpiece of both sides' arguments was the officers' credibility. The defense argued that they lied, while Commonwealth contended that they were abiding by their oath to tell the truth. The parties now know that Officers Vinson, Zungolo, and Ellis broke that oath by testifying falsely to facts at the heart of the case, and the arguments the Commonwealth presented at



trial were wrong.

102. The Commonwealth is mindful of *Napue*'s teaching that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

103. Given the centrality of the officers' credibility to Hicks' conviction as well as the import of their false testimony, the Commonwealth now concedes that their false testimony could reasonably have affected the judgment of the jury.<sup>4</sup> Accordingly, the Commonwealth respectfully moves this Court to vacate Hicks' conviction.

104. After careful consideration of the individual facts of this case, the relevant law, and the role of the prosecutor as a "minister of justice," *see* Pa. R. Prof. Resp. 3.8 comment 1 (Special Responsibilities of a Prosecutor), the Commonwealth agrees that Hicks is entitled to post-conviction relief in the form of a new trial.

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<sup>4</sup> At the time of trial, the Commonwealth also failed to disclose misconduct committed by Officer Youst and several other officers involved in the case. As to Officer Youst, the Internal Affairs Department of the Philadelphia Police Department sustained a finding against him for denying a suspect the right to counsel. The Commonwealth was obliged to disclose that information pursuant to *Giglio v. U.S.*, 405 U.S. 150 (1972). The Commonwealth also notes that since the time of trial, several of the officers involved in the case been found to have engaged in misconduct and/or have been arrested for criminal conduct.

THEREFORE, the Commonwealth asks this Court to vacate the sentences  
and order a new trial.

Respectfully submitted,



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Patricia Cummings  
Assistant District Attorney  
Supervisor, Conviction Integrity Unit  
Philadelphia District Attorney's Office  
Three South Penn Square  
Philadelphia, PA 19107  
215-686-8747

Date: December 15, 2020

**VERIFICATION**

The facts above set forth are true and correct to the best of the undersigned knowledge, information and belief. I understand the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Respectfully submitted,



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Patricia Cummings  
Assistant District Attorney  
Supervisor, Conviction Integrity Unit

**CERTIFICATE OF SERVICE**

I, Patricia Cummings, Assistant District Attorney, hereby certify that a true and correct copy of the foregoing Commonwealth's Answer to Counseled PCRA Petition was served on the 15th day of December, 2020, to the parties indicated below via hand delivery:

THE HONORABLE TRACY BRANDEIS-ROMAN  
Common Pleas Judge  
Criminal Justice Center  
1301 Filbert Street, Suite  
Philadelphia, PA 19107

VANESSA POTKIN  
The Innocence Project, Inc.  
40 Worth Street, Suite 701  
New York, NY 10013  
Tel.: (212) 364-5359  
vpotkin@innocenceproject.org  
*Admitted pro hac vice*

SUSAN LIN  
Pennsylvania Attorney ID No. 94184  
Kairys, Rudovsky, Messing, Feinberg & Lin LLP  
The Cast Iron Building  
718 Arch Street, Suite 501 South  
Philadelphia, PA 19106  
slin@krlawphila.com  
Tel.: (215) 925-4400

Respectfully submitted,



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Patricia Cummings  
Assistant District Attorney  
Supervisor, Conviction Integrity Unit

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
CRIMINAL SECTION TRIAL DIVISION**

**COMMONWEALTH** :  
 :  
 v. : **CP-51-CR-0306311-2002**  
 :  
**JOSEPH TERMAINE HICKS a/k/a** :  
**JERMAINE WEEKS** :

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**ORDER**

AND NOW, this \_\_\_\_ day of December, 2020, it is hereby **ORDERED**  
that the **PETITIONER’S MOTION FOR A NEW TRIAL IS GRANTED.**

It is further **ORDERED** that:

**JOSEPH TERMAIN HICKS, III;**

**PA INMATE NUMBER: \_\_\_\_\_;**

**PHILADELPHIA POLICE PHOTO NUMBER: \_\_\_\_\_;** is

**GRANTED A NEW TRIAL.**

By the Court:

\_\_\_\_\_  
THE HONORABLE TRACY BRANDEIS-ROMAN  
COMMON PLEAS JUDGE