No. 07-1486

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In The

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

NATHAN DUNLAP,

Respondent.

On Petition For Writ Of Certiorari To The Pennsylvania Supreme Court

BRIEF IN OPPOSITION

KARL BAKER
Chief, Appeals Unit
Counsel of Record
267.765.6518

DEFENDER ASSOCIATION
1441 Sansom Street
Philadelphia, PA 19102

Of Counsel:
MARK CICHOWICZ
Assistant Defender
267.765.6552

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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OPINIONS BELOW

The decision of the Pennsylvania Supreme Court, *Commonwealth v. Dunlap*, published at 941 A.2d 671 (Pa. 2007), appears in the Appendix of the Petition for Writ of Certiorari (Pet. App. 1-39).[1] The opinion of the Pennsylvania Superior Court, sitting *en banc*, published at 846 A.2d 674 (Pa. Super. 2004), also appears in the Appendix of the Petition for Writ of Certiorari (Pet. App. 42-71). The opinions of the original Pennsylvania Superior Court panel (Pet. App. 74-81) and the Philadelphia Court of Common Pleas (Pet. App. 87-90) are unpublished.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides as follows:

> 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.

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[1] This notation refers to the Appendix of the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Respondent Nathan Dunlap was arrested May 4, 2001 and charged with purchasing and possessing a controlled substance. On August 16, 2001, respondent appeared before a judge in the Philadelphia Municipal Court, the court with initial jurisdiction over misdemeanor offenses arising in Philadelphia. At that time, a suppression hearing was held.

Officer Sean Devlin testified at the suppression hearing that, while conducting surveillance, he saw respondent standing on a street corner in a residential neighborhood at about 11:00 in the morning. The officer observed respondent approach another male, engage him in conversation, hand him money, and receive small objects which the officer could not identify. Respondent walked off. At Officer Devlin's direction, another officer stopped respondent and confiscated three packets of cocaine from him (Pet. App. 93-95).

Officer Devlin described the area under surveillance as a "high drug and crime area, residential" and stated that he had participated in fifteen to twenty narcotics arrests in that area within his five years of employment, nine months of which was spent on the "Strike Force," as a police officer. He stated that he believed the exchange to be a drug transaction (Pet. App. 95-96).

Following the denial of the suppression motion, respondent immediately proceeded to trial, was convicted and received a sentence of eighteen months

probation (Pet. App. 98-104). Respondent appealed the denial of the suppression motion to the Philadelphia Court of Common Pleas; a court that exercises, *inter alia*, appellate jurisdiction over the Philadelphia Municipal Court. Such an appeal is known locally as a writ of certiorari. The appeal was denied (Pet. App. 87-90).

Respondent appealed to the Pennsylvania Superior Court, the state intermediate appellate court. On March 6, 2003, a three-judge panel of that Court affirmed the judgment of sentence in an unpublished opinion (Pet. App. 74-81). Respondent sought from the Superior Court, and was granted, reargument *en banc*. On March 24, 2004, the Superior Court, sitting *en banc*, affirmed the judgment of sentence by a vote of five to four (Pet. App. 42-71).

Respondent requested and was granted discretionary review in the Pennsylvania Supreme Court, the state high court. On December 28, 2007, that Court reversed the respondent's conviction. Four justices joined the majority opinion, one issued a concurring opinion, and two issued separate dissenting opinions (Pet. App. 1-39).

Subsequent to that decision, on February 14, 2008 (but before the instant Petition for Writ of Certiorari was filed pursuant to an extension, which was requested March 14, 2008 and granted by this Court on March 20, 2008), the case at hand was

denoted in the computer docket for the Philadelphia Municipal Court as being "discharged" (Res. App. 9).[2]

The Commonwealth of Pennsylvania filed a Petition for Writ of Certiorari on May 27, 2008 (which was placed on the docket May 29, 2008) and now seeks review in this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The states are not clearly split on the question of whether the "core fact pattern" depicted by petitioner of a suspected street-level drug sale constitutes probable cause for arrest because the determination of probable cause is dependent on the varying and specific facts of each case.

In the Petition for Writ of Certiorari, the petitioner (the Commonwealth of Pennsylvania) asserts that the "core fact pattern" of a suspected street-level drug sale (*i.e.* "a single transaction of currency for items too small to be identified, in a neighborhood where open-air drug dealing is common") (Pet. 9)[3] has prompted discordant results among the states, some finding probable cause under these facts and others not finding probable cause. In support of this claim,

[2] This notation refers to the Appendix attached to this document, Respondent's Brief in Opposition.

[3] This notation refers to the Petition for Writ of Certiorari.

the petitioner cites cases in which it asserts that state courts and some federal courts have found probable cause based upon this "core fact pattern" in conflict with the result reached by the Pennsylvania Supreme Court in the case at hand (Pet. 9-12).

An examination of these cases, however, will reveal that it was not the "core fact pattern" that was analyzed differently by these courts. Rather, in each case there were one or more additional factors that, in the totality of the circumstances, informed the probable cause determination. Also, it must be noted that several of the cases cited by the petitioner derive from trial level federal district courts or intermediate state appellate courts. As such, these cases do not fairly denote either a conflict between federal appellate law and the decision in the case at hand, or a split among the highest courts of the states.

The petitioner presents the following cases, which are here summarized to demonstrate the additional facts in each case beyond the "core fact pattern" cited by the petitioner:

Delaware – state court

Darling v. State, 786 A.2d 463, 464-65, 466 (Del. 2001) (known drug-crime area, defendant and others wore bandanas as masks, police observed transaction, men in masks approached undercover police as police drove further into area, officer saw defendant make a second "deal" the same day with another person); *Baker v. State*, 531 A.2d 1235 (Del. 1987) (known drug-crime

area, police observed transaction, defendant jumped into car driven by another person at approach of police and fled).

Delaware – federal district court

United States v. Smith, 2006 U.S. Dist. LEXIS 2814, *1-*2 (D. Del. 2006) (known drug-crime area, police observed transaction, defendant fled upon police officers identifying themselves); *Jamison v. Wilmington Police Dept.*, 2005 U.S. Dist. LEXIS 3184, *2-*3 (D. Del. 2005) (surveillance of suspected drug house, occupant of house engaged in two "drug transactions" with other persons, then, after conversation with defendant, defendant waited about five minutes on street while occupant of house went back into house before reemerging to conduct transaction with defendant).

District of Columbia – local court

Davis v. United States, 781 A.2d 729, 731-33 (D.C. App. 2001) (known drug-crime area, defendant displayed something in his hand to a woman in manner consistent with someone displaying drugs for sale, woman had money in her hand, woman known to police from experience and citizen complaints as suspected of illegal activities, defendant secreted items upon approach of police); *Prince v. United States*, 825 A.2d 928, 929-30, 933 (D.C. App. 2003) (known drug-crime area, police observed person approaching cars and making transactions in manner

consistent with drug sales, defendant arrived in car and engaged in transaction with this person, defendant made U-turn and left area); *Tobias v. United States*, 375 A.2d 491, 492 (D.C. App. 1977) (known drug-crime area, defendant pulled item from bag, approached person and made transaction, defendant approached another person, pulled item from bag and made second transaction, defendant then pulled item from bag and while approaching group of men, was warned of police behind him, at which point defendant put item back in bag, defendant ran when officer identified himself).

District of Columbia – circuit court

United States v. White, 655 F.2d 1302, 1303 (D.C. Cir. 1981) (known drug-crime area, police watching car they recognized from numerous prior occasions when car had been visited by known drug addicts in high narcotics areas, woman in car counted substantial sum of money and received small item from driver, woman then exited car and engaged in transaction with defendant).

Massachusetts – state court

Commonwealth v. Santaliz, 596 N.E.2d 337, 338-39 (Mass. 1992) (surveillance of known drug house, defendant and woman on porch of house, at arrival of taxi, woman removed item from her waistband and gave item to defendant, defendant then engaged, without conversation, in transaction with woman in

taxi, defendant gave money from woman in taxi to woman on porch); *Commonwealth v. Kennedy*, 690 N.E.2d 436, 438 (Mass. 1998) (known drug-crime area, complaints from citizens about a particular intersection, defendant in car at that site approached by person who was subject of citizen complaints and had been previously arrested for drug sales, after conversation with defendant, person ran off and returned in about one minute, police then observed transaction).

New Jersey – state court

State v. Moore, 853 A.2d 903, 905, 907 (N.J. 2004) (known drug-crime area, three people separated themselves from a larger group and moved to the back of a vacant lot, defendant and a second person gave money to the third person, defendant and second person each received small item from third person).

New York – state court

People v. Jones, 683 N.E.2d 14 (N.Y. 1997) (known drug-crime area, police observed transaction, suspected buyer handled item received in manner drugs would be handled, suspected seller then removed plastic bag from his person and secreted it among cinder blocks at a construction site); *People v. Rodriguez*, 828 N.Y.S.2d 62, 63 (N.Y. App. Div. 2007) (known drug-crime area, police observed transaction, purchaser concealed item in his hand as he walked

away and also held and glanced at item in his hand in manner consistent with a drug sale).

Rhode Island – state court

State v. Castro, 891 A.2d 848, 851 (R.I. 2006) (known drug-crime area, person in truck, acting in rushed manner, made phone call and then rendezvoused with defendant in car, exchange of money for small white bag through windows while both remained in respective vehicles, manner and speed of transaction consistent with drug transaction).

Virginia – state court

Brandon v. Commonwealth, 2002 Va. App. LEXIS 553, *5-*6 (Va. App. 2002) (search warrant issued upon probable cause where affidavit alleged that defendant, in known drug-crime area, seen reaching into bag and removing small white object, and seen exchanging small objects for cash in possibly multiple transactions; focus of court not on factors supporting probable cause but on alleged discrepancies in earlier testimony with statements in affidavit).

A closer examination of each case reveals significant additional factors such as flight, or that the individuals involved in the transactions were known by the police to engage in drug crimes, or unusual or complex transactions, or multiple transactions, or secretive and furtive behavior. These factors weigh in favor of a finding that the police possessed probable

cause to believe that a drug crime had occurred. Petitioner has not, therefore, demonstrated a disparity among the states as to whether the "core fact pattern" depicted in its petition constitutes probable cause. Rather, these cases indicate reluctance by the courts to adopt a simple formula such as that proposed by the petitioner (*i.e.* the exchange of money for small objects) for approving street level searches and seizures. With these cases, the petitioner has only demonstrated that different facts lead to different results.

Consequently, given the absence of a conflict over whether this "core fact pattern" is alone sufficient to validate the arrest and accompanying search of a citizen, no strong or compelling reason exists to grant certiorari.

2. The Pennsylvania Supreme Court in the case at hand has neither disregarded, nor regarded in a manner inconsistent with this Court's jurisprudence, the import of an officer's experience in the determination of probable cause.

In its petition, the petitioner appears to suggest that the Pennsylvania Supreme Court failed to properly allot due weight to the experience of the police officer in considering the existence of probable cause. The petitioner signals this suggestion by its reference to an "experienced" police officer in its Question Presented (Pet. i), by its reference to case law in which the experience of an officer played a part in the

determination of probable cause (Pet. 9-12), and by its suggestion that the Pennsylvania Supreme Court ignored, by its holding, matters that police officers or others know from their experience to be true (Pet. 15-16).

This Court has clearly stated that the experience of a police officer must play a role in the determination, at least, of reasonable suspicion, if not probable cause as well. In *United States v. Cortez*, 449 U.S. 411 (1981), this Court noted that, based upon a consideration of all the observed circumstances, "a trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person." *Id.* at 418. However, it is not the expertise that provides the justification for a stop or a search. Thus, *Cortez* adds that when using this expertise the "assessment of the whole picture must yield a particularized suspicion." *Id.*

In the case at hand, the Pennsylvania Supreme Court recognized this obligation when it stated:

> Thus, we hold that police training and experience, *without more,* is not a fact to be added to the quantum of evidence to determine if probable cause exists, but rather a "lens" through which courts view the quantum of evidence observed at the scene. We do not seek to minimize the experience gained through years serving on the police force. Quite to the contrary, we recognize that many officers, particularly those with specialized training, are able to recognize trends

> and methods in the commission of various crimes. For instance, an officer who has specialized in drug crimes may be more suspicious that a package contains illegal narcotics because of the form of packaging used to conceal those drugs. [citation omitted] He or she may recognize criminal activity where a non-police citizen may not. However, a court cannot simply conclude that probable cause existed based upon nothing more than the number of years an officer has spent on the force. Rather, the officer must demonstrate a nexus between his experience and the search, arrest, or seizure of evidence. By doing so, a court aware of, informed by, and viewing the evidence as the officer in question, aided in assessing his observations by his experience, may properly conclude that probable cause existed. This is true even where the court may have been unable to perceive the existence of probable cause had the court viewed the same evidence through the eyes of a reasonable citizen untrained in law enforcement.

(Pet. App. 9-10).

In essence, the Pennsylvania Supreme Court, while recognizing the importance of an officer's experience, merely required the relevance of that experience to be made known to the court hearing the suppression motion. In this way, that reviewing court does not abdicate the determination of probable cause to an expression of opinion by a police officer. Rather, by viewing the facts through the eyes of the officer, a

court can properly discharge its duty of determining whether probable cause existed.

No evidence was presented by the government at the suppression motion in this case to demonstrate to the reviewing court how the officer's experience made it more likely, even when viewed through the eyes of a trained police officer, that he had observed a drug transaction (Pet. App. 92-97). Consequently, the Pennsylvania Supreme Court in the case at hand declined to accept the experience of the police officer as an independent factor, standing alone, in the determination of probable cause (Pet. App. 8-13).

This requirement – that the government present evidence demonstrating how an officer's experience adds to the quantum of probable cause rather than making the bald assertion that it simply does – is consistent with federal case law. *United States v. Myers*, 308 F.3d 251, 255, 260 (3rd Cir. 2002) (court refused to view "messy" residence as evidence of physical altercation since officer never testified that this was a condition consistent in his experience investigating domestic abuse with physical altercations).

In those instances where it is demonstrated how the training and experience of a police officer makes it more likely that an officer's opinion that a crime has occurred is correct, the inferences and deductions aided by such training and experience are given due weight. *United States v. Arvizu*, 534 U.S. 266, 269-71 (2002) (border patrol agent knew vehicle to be traveling

at time (in between agent shifts) when alien smugglers were most active, driver of vehicle turned at last point agent knew was available to avoid checkpoint, minivan vehicle was unsuited for rough road towards which it was heading, vehicle was not recognized as local, location vehicle heading unlikely place for picnic outing); *Ornelas v. United States*, 517 U.S. 690, 693 (1996) (officer who had searched over 2000 cars for narcotics recognized loose panel inside car as indicative of hidden contraband); *Texas v. Brown*, 460 U.S. 730, 742-43 (1983) (plurality opinion) (from participation in previous narcotics arrests and from conversations with other officers, officer knew balloon tied in the manner of one possessed by defendant frequently used to carry drugs).

As to the role of the experience of a police officer in the determination of probable cause, the decision of the Pennsylvania Supreme Court in the case at hand does not conflict with federal law. Nor has the petitioner demonstrated any conflict between the Pennsylvania Supreme Court and the law on this matter in other states. The case at hand does not fairly present this aspect of the Question Presented, and for this reason, certiorari should be denied.

3. The Pennsylvania Supreme Court correctly decided the Fourth Amendment issue under the facts of the instant case.

This Court has stated that probable cause to arrest is determined by

> whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964).

The officer in the case at hand testified to having made fifteen or twenty narcotics arrests in the area at issue during his five years as a police officer, nine months of which was spent on the "Strike Force" (Pet. App. 96). He described the area as a "high drug and crime area, residential" (Pet. App. 95).[4] At this location, the officer observed the respondent exchange currency for small objects (Pet. App. 94).

No evidence was presented to the suppression court suggesting other factors which other courts have found to weigh in favor of a finding of probable

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[4] Significantly, although the instant case arose from a transaction that occurred on the street, the area at issue in this matter was not classified by the officer as one regularly supporting an "open-air, retail narcotics trade," a problem the petitioner presents as being typified by the case at hand (Pet. p. 5-8). Nor did the officer indicate what percentage, if any, of his prior fifteen to twenty arrests in that area resulted from open-air retail narcotics transactions (Pet. App. 96).

cause.[5] The transaction was not unusual or complex, the officer did not state that he knew or ever saw before the individuals involved in the transaction, there were no multiple transactions, the behavior of the individuals was not furtive or secretive, nothing in the behavior of either person was noted as being consistent with the behavior of persons involved in a drug transaction, and the respondent did not flee at the approach of the police.

As noted in the preceding section, no testimony was offered to the suppression court regarding how the officer's experience, either as a police officer generally or with respect to this particular area, made him more likely than a lay person to know that what he saw was a narcotics transaction. The officer's experience, with no explanation as to how that experience contributes to the equation, neither adds nor subtracts from the calculus of probable cause.

The petitioner, however, would like our state and federal courts to go beyond even this simple over-reliance on the assertion of expertise by an officer. It would like this Court to announce that any person in an economically depressed (*i.e.* "high crime") neighborhood is subject to seizure and search for the public act of exchanging money for small objects. All such exchanges would constitute *prima facie* evidence of a narcotics transaction. Under such a regime residents

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[5] See those cases summarized previously under the first argument as to why the petition should be denied.

of most minority inner-city neighborhoods (and many others) would do well to place family members on notice of their need to carry sufficient pocket change at all times lest they be forced to engage in the adventurous behavior of soliciting parking change for a meter, or carfare for a bus, train or trolley. Nor should a family member ever ask a friend on the street for a small object or, under any circumstance, provide just compensation for the exchange. In either context the neighborhood resident would risk subjecting himself to the unrestrained judgment of a police "officer engaged in the often competitive enterprise of ferreting out crime." *Groh v. Ramirez*, 540 U.S. 551, 575 (U.S. 2004) (*quoting Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). The adoption of petitioner's talismanic justification for arrest would undermine the point of the Fourth Amendment, which "is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate. . . . " *Id.* Here the petitioner's mantra of "money for small objects" would remove from the reviewing court its ability to later conduct through the "lens" of the experienced officer an independent evaluation of "the quantum of evidence observed at the scene" (App. 9). *Commonwealth v. Dunlap*, 941 A.2d 671, 675 (Pa. 2007).

Remarkably, the petitioner has pointed to no case that suggests it is proper to arrest and subsequently search an individual based solely upon the limited

facts of the instant case – a single street-level exchange of cash for small items – even when such occurs in an area where drug transactions have been known to occur. The Pennsylvania Supreme Court in the case at hand merely recognized that not every street-level exchange of cash for a small item is indicative of a drug transaction.[6]

The decision below was correct, and for this reason, certiorari should be denied.

4. The computer docket for the instant case indicates that it has been discharged in the local court; as such, the case is moot.

The respondent in this matter was convicted of drug offenses in the Municipal Court of Philadelphia on August 16, 2001. Ultimately, that conviction was reversed by the Supreme Court of Pennsylvania in an opinion issued on December 27, 2007 (Pet. App. 18). A notation in the computer-accessible Criminal Docket of the local court, entered February 14, 2008, states the following: "Order of Lower Court Reversed – Appellant Ordered Discharged" (Res. App. 9). The

[6] A police officer, viewing the facts presented in the instant case, need not be bound to inaction. The Pennsylvania Supreme Court here made no determination as to whether the facts of the instant case amounted to reasonable suspicion. A police officer could pursue further investigation, possibly stop a citizen upon reasonable suspicion, or even just demonstrate more clearly than in the instant case how his training and experience contributes to a finding of probable cause.

Petition for Writ of Certiorari was later filed on May 27, 2008.

The local court file itself, known locally as the Quarter Sessions file, does not indicate, at the time of writing of this brief, that any further action has been taken by the local courts since the December 27, 2007 decision of the Pennsylvania Supreme Court. However, if the computer docket entry of February 14, 2008 is correct, then the instant case was discharged before the Petition for Writ of Certiorari was filed. If no criminal case currently exists against the respondent, then "there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court can operate." *Mills v. Green*, 159 U.S. 651, 653 (1895). *And see* U.S. Const., Art. III. Consequently, the case at hand is moot and certiorari should be denied.[7]

CONCLUSION

In the instant case, the Pennsylvania Supreme Court determined that probable cause was lacking where a police officer observed a single transaction of

[7] If, in fact, the criminal case against the defendant has been dismissed, then this is not a matter of consideration of whether collateral consequences from a conviction might inhere to the respondent, since no conviction exists. *See Minnesota v. Dickerson*, 508 U.S. 366, 371 (1993).

money for small items in the absence of any other indicia that a drug transaction had occurred, even when such observation was made in an area where drug transactions had previously occurred. The Pennsylvania Supreme Court correctly decided this issue on the narrow facts of the instant case, and that decision is not in conflict with other courts' interpretation of federal law. There is no compelling federal constitutional issue that is in need of this Court's exercise of discretionary jurisdiction.

Respectfully submitted,

KARL BAKER
Chief, Appeals Unit
Counsel of Record

Of Counsel:
MARK CICHOWICZ
Assistant Defender