No. 07-1486

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Reply Argument

The brief in opposition attempts to avoid the central, important question presented: whether a hand-to-hand transaction of currency for small objects, observed at a known drug-selling corner by an experienced narcotics officer, constitutes probable cause for arrest.

The petition for certiorari notes that drug violations are the most common basis for arrests in the United States, and that narcotics sales most commonly take the form of a street-corner exchange of cash for small objects at specific, established drug-selling spots.

The petition argues that, where such a transaction is observed, police have a reasonable belief that it was a drug sale – even if an innocent explanation is also possible. Accordingly, the petition suggests that it is time for this Court to address the parameters of the probable cause requirement in this common context.

Respondent does not contest that such cases are legion. Nor does he lay out any alternative, exculpatory explanation for such conduct, let alone one sufficiently powerful to extinguish the

reasonable possibility of illegal drug trafficking. Instead, he raises a series of straw-man arguments that lead away from the core issue.

!. The "varying and specific facts of each case."

Respondent contends that the issue presented is not worthy of review because "the determination of probable cause is dependent on the varying and specific facts of each case." Brief in Opposition at 4. He asserts that decisions from several jurisdictions reaching conflicting results on similar fact patterns are not really in conflict, because none of them are exactly alike and therefore present no "simple formula" for approaching probable cause determinations in street-level drug trafficking cases. Brief in Opposition at 10.

Respondent mischaracterizes the cases in question, and misses the point for which they were presented in the petition for certiorari. Of course there are factual differences among the decisions; that is a truism. But the cases themselves placed little reliance on such distinctions, and instead recognized, implicitly and explicitly, the commonality of the issue they were addressing.

Thus in *United States v. Smith*, 2006 U.S. Dist. LEXIS 2814 (D. Del. 2006), for example, in addition to a single exchange of money for small

objects in a known drug-selling area, there was also flight by the seller. But that factor was hardly dispositive, because the court relied for authority on *State v. Moore*, 853 A.2d 903 (N.J. 2004), another cash-for-small-objects case discussed in the petition for certiorari – in which there was no flight. Indeed, the flight factor was significant in *Smith* primarily for the distinct purpose of justifying officers' hot pursuit of the defendant into a private home, without a warrant.

Similarly, respondent attempts to distinguish *Davis v. United States*, 781 A.2d 729 (D.C. App. 2001), on the ground that the seller there concealed the small objects in his hand when he saw the police. Respondent fails to note, however, that in *Davis* the buyer and seller never even completed their exchange; the concealment was significant because it supported the conclusion that an exchange had been attempted, thus allowing a probable cause finding even when there was no actual transaction.[1]

In the same manner, respondent plays down the Massachusetts decision in *Commonwealth v. Santaliz*, 596 N.E.2d 337 (Mass. 1992), because the seller there was seen transferring the buy money to

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[1] "[I]n holding that probable cause existed here, we are taking into account our conclusion that the situation is about as close to a completed transaction as possible without an actual exchange of money or drugs." 781 A.2d at 736.

a third party. But the *Santaliz* court placed no reliance on that fact, instead relying on another case cited in the certiorari petition, *United States v. White*, 655 F.2d 1302 (D.C. Cir. 1981), in which there was no such third party transfer.[2]

Respondent fares no better in his effort to discount the New Jersey precedent, *State v. Moore*, 853 A.2d 903 (N.J. 2004). There, two people at the same time gave money to a third, who in return gave each a small item. Respondent does not explain, however, why such behavior is more obviously criminal than an identical exchange involving one less participant. In any case the *Moore* court failed to note any legal significance in this detail.

A further example of respondent's hairsplitting is his treatment of the New York decision, *People v. Rodriguez*, 828 N.Y.S.2d 62 (App. Div. 2007), which he characterizes as presenting a wild card factor because the buyer "concealed" his purchase in his hand as he walked away after an exchange of cash at a known drug-selling location.

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[2]*See also Commonwealth v. Kennedy*, 690 N.E.2d 436 (Mass. 1998), where, points out respondent, police apparently knew that the seller had prior drug arrests. On the other hand, while they saw small objects handed over, they did not see cash transferred in exchange. Yet the court still found that the case fit "[t]he pattern of street-level drug sales" establishing probable cause. *Id.* at 439.

Because all of these cases involve small objects, however, which by their nature fit in the palm of the hand, it is unclear why there was any more "concealment" here than in any of the other decisions.[3]

Finally, respondent wishes to minimize the Rhode Island decision in *State v. Castro*, 891 A.2d 848 (R.I. 2006). He states that the buyer there, acting in "a rushed manner," made a phone call before meeting the seller and quickly exchanging money for a small white bag. But none of that was important to the state supreme court, which instead relied on three cases – all discussed in the petition for certiorari – that did not depend on these ancillary details.[4]

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[3]Moreover, respondent ignores the *Rodriguez* court's own observations about its holding: "Although there was only one transaction, any person observing defendant, using good common sense, would have, in the totality of the circumstances, concluded that defendant was involved in the sale of narcotics. . . . This transaction was not susceptible of an innocent explanation, such as the possibility of a sale of a lawful commodity; defendant's conduct was hardly of the type of behavior engaged in by legitimate street vendors, who advertise their wares openly." *Id.* at 63.

[4]*See Castro*, 891 A.2d at 855:

> Other jurisdictions appear to be in agreement, and have held probable cause to exist in circumstances similar to the case at bar. *See, e.g., United States v.*

(continued...)

While factual variations are inevitable, the common denominator in all these cases is the transfer of currency for small objects, on the street, in a specific location known for prior drug sales rather than for legitimate commercial transactions. In these circumstances many jurisdictions have found probable cause, while others, such as California, Colorado, and Pennsylvania, have not.

The paradigm presented by these cases is significant not because it establishes some mechanistic formula for the determination of probable cause, but because it can serve to provide guidance on a frequently litigated issue. The real world will produce countless variations on this

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[4](...continued)
White, 211 U.S. App. D.C. 72, 655 F.2d 1302, 1303-04 (D.C. Cir. 1981) (holding that probable cause was established when an officer experienced in narcotics investigations saw a woman who was a passenger in an automobile receive from the driver a small, unidentified object in exchange for money); *Commonwealth v. Santaliz*, 413 Mass. 238, 596 N.E.2d 337, 339-40 (Mass. 1992) (finding probable cause existed when an experienced narcotics investigator observed an exchange of an object for money outside of a taxicab in a place of high incidence of drug traffic); *People v. Jones*, 90 N.Y.2d 835, 683 N.E.2d 14, 600 N.Y.S.2d 549, 550 (N.Y. 1997) (finding probable cause that a narcotics transaction occurred when an experienced officer observed an exchange of an unidentified object for currency in a drug-prone location).

theme. As the level of suspicious behavior rises (*e.g.*, multiple identical transactions) or falls (*e.g.*, a one-way rather than two-way transfer), the probable cause decision will become easier. But "easy," outlying cases seldom get this far. The present case is worthy of review precisely because it is an archetype of the open-air drug sales that police confront every day, without, to date, clear direction on the manner in which the Fourth Amendment applies.

2. The "import of an officer's experience."

Respondent argues that review should be denied because the Pennsylvania Supreme Court "has not 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." Brief in Opposition at 10. The court below, declares respondent, properly declined to "abdicate the determination of probable cause to an expression of an opinion by a police officer." Brief in Opposition at 12.

This is a false issue. Petitioner has not advocated any such abdication, nor sought some special rule of deference to the views of police officers. On the contrary, the question is simply whether, under "a flexible, common-sense standard, . . . the *facts available* to the officer would warrant *a man of reasonable caution* to believe" that a crime

had been committed. *Texas v. Brown*, 460 U.S. 730, 742 (1983) (emphasis supplied); Petition for Certiorari at 13-14.

In this case, the person who witnessed the suspicious transaction happened to be a police officer who had seen many similar illegal transactions in the same place. But the necessary observations could as well have come from any person who was in a position to know what he was seeing: a pastor, for example, whose drug counseling center is plagued by traffickers setting up shop across the street, or a grandmother whose stoop has become a stash for the local drug cartel.

The inquiry remains the same – would a reasonable person have grounds to suspect a drug transaction if he learns that, on a residential block of row homes, where numerous drug arrests have occurred, an individual walks up to another and, with little or no conversation, hands over an amount of currency, receives small items in return, and walks away?

That is the question that respondent declines to address. He suggests that *more* information would make things easier – flight, perhaps, or multiple sales. But he never explains why the "*facts available*" were insufficient. If this was not a drug deal, what was it? And, whatever else it might have been, how would that eliminate the reasonable possibility that it was a drug deal?

3. The impact on "economically depressed neighborhoods."

Respondent asserts that review should be denied because a finding of probable cause here would require "this Court to announce that any person in an economically depressed (*i.e.*, 'high crime') neighborhood" is subject to virtually random search and seizure. Such a ruling would create "a regime" that discriminates against "residents of most minority inner-city neighborhoods." Brief in Opposition at 16-17.

This is yet another issue manufactured by respondent to avoid the real questions. No one has argued here for a general power of arrest in troubled neighborhoods. The argument for probable cause was limited to one particular location: the southeast corner of Warnock and Somerset Streets in the City of Philadelphia. The officer – focusing *on a specific block* – testified that this was an area with a particular type of crime – high drug sales – in which he personally had recently made as many as 20 narcotics arrests. App. 92-96.

That is the whole point about the nature of street-level drug operations. They do not drift randomly throughout the city – not even randomly throughout the "economically depressed" or "minority" sections of the city. Market conditions require that sellers set up shop in particular

locations, so that their customers can quickly find them for frequent, small transactions. When police learn of such a location, they are entitled, as reasonable persons, to direct their efforts there when attempting to enforce the law.

Thus respondent's contrived concern for the freedom of residents to solicit "bus, train or trolley" money, Brief in Opposition at 17, is misplaced. People who ask others for money on the street do not normally hand back change. But even if they did – and if these "solicitations" happened to occur on a particular block, over and over and over again, where numerous recent drug arrests had been made – then police and other reasonable observers would be justified in suspecting the transactions may not be so innocent.

4. The "mootness" of this case.

Respondent argues that review must be denied because the case is moot. He avers that, at a point after the decision of the state supreme court, the case was discharged by the common pleas (trial) court.

This claim is more than just diversionary; it is disingenuous. Respondent has misrepresented the information on a computerized docket that is intended to summarize, for public access, events that are officially recorded in the formal court file

maintained by the Philadelphia Clerk of Quarter Sessions.

As respondent concedes, however, the official Quarter Sessions file contains absolutely no reference to any discharge. Nothing has happened in the trial court since the state supreme court's decision. If it had, respondent's counsel would have been present, or would have been notified, and would have so stated in the brief in opposition.

Nevertheless, respondent points to an entry on the computerized docket: "Order of Lower Reversed - Appellant Ordered Discharged." He states that this order is dated February 14, 2008.

In reality, however, the entry in question contains *two* dates: February 14, 2008, and December 28, 2007. The explanation is as follows. December 28, 2007 is the date of the state supreme court decision for which petitioner seeks a writ of certiorari. February 14, 2008, is just the date that the trial court recorded the supreme court's ruling, following remittal of the record from the supreme court. Thus, no disposition occurred on February 14; the notation made on that date was merely a housekeeping measure describing the ruling of the higher court.[5]

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[5]An appendix to respondent's brief in opposition (continued...)

Unfortunately, that description contains a clerical error: the state supreme court did "reverse" on the probable cause issue, but it did not order a "discharge." App. 18. Court officials have advised the Commonwealth that they are aware of the error and will be correcting the docket. In any case, the

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[5](...continued)
purports to reproduce the computerized docket in question, but it is laid out incorrectly. A true and correct version of the docket is available in "pdf" format online at http://ujsportal.pacourts.us/PublicReporting/PublicReporting.aspx?rt=1&&ct=4&dkt=103862373&arch=0&ST=7/31/2008%2010:23:50%20AM.

The relevant entry is found at page 6 of the docket. The date of 12/28/07 appears under a column labeled "Document Date," which refers to the date that the order in question – the supreme court's order -- was created. The date of 2/14/08 appears under a different column, labeled "CP Filed Date," which refers to the date that the supreme court order was received and recorded by the common pleas court.

These events are also confirmed by a separate computerized docket, maintained by the state supreme court, and available online at http://ujsportal.pacourts.us/PublicReporting/PublicReporting.aspx?rt=1&&ct=1&dkt=33%20EAP%202006&ST=7/31/2008%205:49:02%20PM.

Page 6 of that docket shows that the supreme court entered judgment on December 28, 2007, and remitted the record to the Philadelphia common pleas court on February 7, 2008.

discrepancy in no way furthers respondent's "mootness" claim. Even if the supreme court had ordered a discharge, that would not make the case moot. Petitioner has sought timely review of the state supreme court's judgment. That is all that was required to keep the case alive. Respondent's attempt to avoid further review by interposing a specious suggestion of procedural defect should be rejected.

Conclusion

For the reasons set forth above and in the certiorari petition, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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