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No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF PENNSYLVANIA,  
Petitioner

v.

NATHAN DUNLAP,  
Respondent

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On Petition for Writ of Certiorari to the  
Pennsylvania Supreme Court

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PETITION FOR WRIT OF CERTIORARI  
AND APPENDIX

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## QUESTION PRESENTED

An experienced narcotics officer, conducting surveillance of a drug-selling intersection, saw respondent walk up to a man standing on the corner, hand the man currency, receive small items in return, and walk away.

The facts here are typical of the most common and visible way in which illegal drugs are sold, and therefore present perhaps the most commonly arising issue of probable cause for arrest. But the state courts – the courts where this federal constitutional question is most frequently litigated – are in clear conflict on whether such facts make out probable cause, and this Court has never addressed the issue.

Accordingly, the question presented is whether the classic, telltale indicator of an illegal drug sale – a hand-to-hand exchange of currency for small objects, observed on a non-commercial street corner in an urban neighborhood known for high drug trafficking, by an experienced officer who had made numerous drug arrests in the same area – amounts to probable cause for arrest under the Fourth Amendment.

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## **ORDER AND OPINION BELOW**

The order below is the ruling of the highest state court, the Pennsylvania Supreme Court, reversing respondent's conviction on Fourth Amendment grounds. The opinion of the court below, App. 1-39, is reported at 941 A.2d 671.

## **STATEMENT OF JURISDICTION**

The jurisdiction of this Court to review the final judgment of the Pennsylvania Supreme Court, based upon its construction of the federal Fourth Amendment, is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Fourth Amendment to the United States Constitution, which provides:

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.

## STATEMENT OF THE CASE

Respondent was arrested for buying drugs after police saw him exchange cash for small objects on a street corner in a high drug trafficking area.

The intersection in question was in a neighborhood of row houses, without vendors or other legitimate commercial activity. On May 4, 2001, the Narcotics Strike Force of the Philadelphia Police department set up a plain-clothes surveillance of the corner to investigate illegal drug sales.

The surveilling officer had five years of experience with the department, and had been a member of the Narcotics Strike Force for nine months. During that time he had made fifteen to twenty narcotics arrests in the vicinity.

The officer observed respondent walk up to a man who had been standing on the corner. After only a brief conversation, respondent handed the man United States currency, and received small items in return. Respondent then immediately left the area.

Based on what he had seen, the officer believed that he had just witnessed a drug sale. He contacted another member of the surveillance team, who stopped respondent a short distance away. A

search incident to arrest recovered three yellow-tinted ziplock packets containing an off-white chunky substance. Field-testing of the substance was positive for crack cocaine. App. 92-96.

Respondent came to trial on August 16, 2001, in the Philadelphia Municipal Court, which has jurisdiction over misdemeanor offenses. Respondent moved to suppress the drugs on the ground that he was arrested without probable cause. The court denied the motion and the case proceeded directly to trial before the judge. Respondent was convicted of the purchase and possession of a controlled substance. He was sentenced to twelve months of reporting probation to be followed by six months of non-reporting probation. App. 97-104.

Respondent appealed the judgment of sentence to the court of general jurisdiction for Philadelphia County, the Philadelphia Common Pleas Court. In local practice such an appeal is called a petition for writ of certiorari. On October 23, 2001, after argument on the suppression claim (the only issue raised), the Common Pleas judge ruled that police had probable cause for arrest and denied the petition. App. 82-90.

Respondent appealed again, to the Pennsylvania Superior Court, which is the intermediate state appellate tribunal. On March 6, 2003, a panel of the Superior Court ruled that police

had probable cause for arrest, and affirmed the conviction. App. 74-81.

Respondent sought reargument before the *en banc* Superior Court. On May 7, 2003, the court granted reargument and vacated the panel opinion pending further consideration. App. 72-73. On March 24, 2004, however, the *en banc* court ruled that police had probable cause for arrest, and again affirmed the conviction. App. 42-71.

Respondent sought discretionary review in the Pennsylvania Supreme Court. On June 26, 2006, the court granted review. App. 40-41. On December 28, 2007, a divided court voted 4-3 to throw out the conviction, App. 1-39, holding that “probable cause was lacking in the instant case, in violation of the Fourth Amendment to the United States Constitution.” App. 2.

Petitioner now seeks this Court’s review to resolve this frequently arising issue of law.

## REASONS FOR GRANTING THE PETITION

- I. **The street corner drug sale in this case typifies the open-air, retail narcotics trade, and raises a prevalent issue of probable cause that should be resolved by this Court.**

This Court has observed that there is no fixed formula for calculating probable cause on a given set of facts. *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003). The Court of course cannot address every possible permutation under the Fourth Amendment. Nevertheless, the question presented in this case has broad impact: there may be no probable cause question more common than that raised by the classic street corner drug sale. The issue calls for this Court's review.

As statistics show, there are more arrests in the United States for narcotics offenses than for any other crime.<sup>1</sup> And as courts have recognized, the usual form drug sales take is the hand-to-hand exchange, on the street, of small objects for cash. *See, e.g., United States v. Mills*, 485 F.3d 224, 226

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<sup>1</sup>*Crime in the United States 2006*, U.S. Department of Justice, Federal Bureau of Investigation, Table 29. Available online at [http://www.fbi.gov/ucr/cius2006/data/table\\_29.html](http://www.fbi.gov/ucr/cius2006/data/table_29.html).

(4<sup>th</sup> Cir. 2007) (“what looked to be a classic street-level drug transaction”); *Commonwealth v. Kennedy*, 690 N.E.2d 436, 439 (Mass. 1998) (observed behavior fit “pattern” or “archetype” of street-level drug sale).

Researchers have described the incidence of such exchanges:

“[T]he majority of sales occurred on the street or in open access settings.... Small amounts were the norm.”<sup>2</sup>

“[C]urbside sellers ... serve a small set of compulsive smokers responsible for more than 70% of all cocaine consumption.”<sup>3</sup>

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<sup>2</sup> *Street Gangs and Drug Sales in Two Suburban Cities*, Cheryl L. Maxson, National Institute of Justice, July 1995, at 6-7. Available online at <http://www.ncjrs.gov/pdffiles/strtgang.pdf>.

<sup>3</sup> *Dealing Crack: The Social World of Streetcorner Selling*, Bruce A. Jacobs, Northeastern Univ. Press (1999), at 6. “On average, arrestees obtained crack almost twice a day every day.... [A] relatively small proportion of arrestees – 8 to 19 percent – generated more than half of all drug transactions.” *2000 Arrestee Drug Abuse Monitoring: Annual Report*, National Institute of Justice, April 2003, at 73. Available online at <http://www.ncjrs.org/pdffiles1/nij/193013.pdf>.

“Certain typical patterns of street activity are commonly associated with illegal street sales of drugs.... [C]ustomers walk up to such groups and exchange money for drugs in hand-to-hand transactions.... To the untrained eye, such contacts may appear to be innocent encounters.”<sup>4</sup>

The nature of such traffic is shaped by the operation of market forces. Sellers must be available in the open, at known locations, so that buyers can find them; but they must be circumspect because of the danger of apprehension. Buyers must be able to make purchases quickly and frequently to serve their dependency; but they will have sufficient money to buy only minimal quantities on each occasion.<sup>5</sup>

For law enforcement officers, the result is an unusual mix of considerations. On the one hand,

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<sup>4</sup> *Drug Rehabilitation Clinics*, Statement of Robert J. Cramer, Managing Director, Office of Special Investigations, before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, July 6, 2004, at 1-2.. Available online at <http://www.gao.gov/new.items/d04946t.pdf>.

<sup>5</sup> *Drug Dealing in Open-Air Markets*, Alex Harocopos & Mike Hough, U.S. Department of Justice, Office of Community Oriented Policing Services, January 2005, at 1, 5, 9. Available online at <http://www.cops.usdoj.gov/files/ric/Publications/e07063420.pdf>.

they can readily find and observe those engaging in criminal activity. On the other hand, they cannot approach close enough to identify the contraband.<sup>6</sup>

The retail marketing of narcotics, therefore, presents a singular set of probable cause issues, affecting a myriad of cases. As such street-level drug sales have been endemic for at least two decades, the question presented here is worthy of this Court's review.

**II. The states are split on the question of whether the common scenario presented here constitutes probable cause for arrest.**

Despite the frequency of street-level hand-to-hand drug sales, no clear answer has emerged on the legality of arrest in circumstances like those here. Because smaller-scale drug offenses are seldom prosecuted federally, and because state court search-and-seizure issues are seldom cognizable on federal habeas corpus review, *see Stone v. Powell*, 428 U.S. 465 (1976), most of the relevant decisions are from the state courts.

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<sup>6</sup>“[E]nforcement of the drug laws ... is the area in which problems of the kind under discussion most frequently arise.” LaFave, *Search and Seizure*, § 3.6(b), at 330 (4<sup>th</sup> ed. 2004).



But those courts are divided. Some of this variation may be attributable to factual differences; naturally, no two cases are exactly alike. Even on the core fact pattern, however – a single transaction of currency for items too small to be identified, in a neighborhood where open-air drug dealing is common – the decisions differ. A significant majority holds that the exchange of cash for small objects, observed by an experienced officer in a high drug-trafficking area, provides a basis for probable cause. A number of federal courts have agreed. But several states, including Pennsylvania, are to the contrary.

#### **Jurisdictions finding probable cause:**

##### **Delaware – state court**

*Darling v. State*, 768 A.2d 463, 467 (Del. 2001) (“personal observations by an experienced police officer at a known open-air drug sale area constituted sufficient probable cause”); *Baker v. State*, 531 A.2d 1235 (Del. 1987) (exchange of money for small objects, high crime area, and flight “present a compelling case for a finding of probable cause”)

##### **Delaware – federal court**

*United States v. Smith*, 2006 U.S. Dist. LEXIS 2814, \*5 (D. Del. 2006) (“experienced police officers watched a hand-to-hand transaction ... in a section

of the city with a reputation as an open-air drug market,” then chased and caught seller; citing *Darling v. State*); *Jamison v. Wilmington Police Dept.*, 2005 U.S. Dist. LEXIS 3184 (D. Del. 2005) (two exchanges of small item for money near suspected drug house)

#### **District of Columbia – local court**

*Davis v. United States*, 781 A.2d 729 (D.C. App. 2001) (in high drug area, defendant appeared to offer small object in palm to person holding currency, but stopped when police appeared); *Prince v. United States*, 825 A.2d 928, 933 (D.C. App. 2003) (“it is not necessary that the police officer be able to see clearly that the small object being handed from one person to another is contraband”); see *Tobias v. United States*, 375 A.2d 491, 494 (D.C. App. 1977) (“The exchange of small objects for currency is an important and sometimes decisive factor in determining the existence of probable cause”)

#### **District of Columbia – circuit court**

*United States v. White*, 655 F.2d 1302 (D.C. Cir. 1981) (exchange of currency for small object in high narcotics area)

**Massachusetts – state court**

*Commonwealth v. Santaliz*, 596 N.E.2d 337 (Mass. 1992) (exchange of small object from waistband for money; citing *United States v. White*); see *Commonwealth v. Kennedy*, 690 N.E.2d 436, 439 (Mass. 1998) (“While more thorough testimony would have been preferable,” probable cause still established where defendant, who had been previously arrested for drug sales, exchanged unidentified objects through car window in high drug area)

**New Jersey – state court**

*State v. Moore*, 853 A.2d 903 (N.J. 2004) (money given in exchange for small objects in neighborhood known for heavy drug trafficking; dissent relies on Pennsylvania precedent)

**New York – state court**

*People v. Jones*, 683 N.E.2d 14 (N.Y. 1997) (even single exchange of object for money in drug-prone location, without telltale sign of drug packaging, established probable cause); *People v. Rodriguez*, 828 N.Y.S.2d 62, 63 (App. Div. 2007) (after brief conversation in drug-prone location, exchange of money for object fitting in hand; “any person ... using good common sense” would have known defendant was selling drugs)

**Rhode Island – state court**

*State v. Castro*, 891 A.2d 848, 855 (R.I. 2006)  
(exchange of money for small white bag in area of frequent narcotics transactions; following *United States v. White*; *Commonwealth v. Santaliz*; *People v. Jones*, which presented “circumstances similar to the case at bar”)

**Virginia – state court**

*Brandon v. Commonwealth*, 2002 Va. App. LEXIS 553 (Va. App. 2002) (exchange of small objects for cash on street in active open-air drug market)

**Jurisdictions finding no probable cause:****California – state court**

*Cunha v. Superior Court*, 466 P.2d 704 (Cal. 1970)  
(exchange of small object for cash, in area known for frequent narcotics traffic, does not establish probable cause); *People v. Knisely*, 64 134 Cal. Rptr. 3d 110 (Cal. App. 1976) (following *Cunha*)

**Colorado – state court**

*People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989) (hand-to-hand exchange in high drug area insufficient to show probable cause)

**Louisiana – state court**

*State v. Thornton*, 621 So. 2d 173 (La. App. 1993)  
(exchange of white packet for currency in area known for drug trafficking; no probable cause); *but see State v. Sterling*, 479 So. 2d 641 (La. App. 1985)  
(finding probable cause on similar facts)

These decisions show that there is disparate application of the Fourth Amendment, developed over more than twenty years, on one of the most familiar of probable cause issues. This Court should resolve the question, and this case is an appropriate opportunity to do so.

**III. The Pennsylvania Supreme Court wrongly decided this regularly recurring Fourth Amendment issue.**

The Pennsylvania Supreme Court decided this case by working backward, in a process of subtraction. It compared the facts here to other cases where probable cause had been found, and concluded that, because here there was less, probable cause must be lacking.

What the court never addressed, however, was the inquiry that this Court has required: 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). Of course it is always possible to imagine more facts that would make the inquiry easier. The officer here, for example, might have revealed his presence immediately after the transaction, to see if someone fled upon sight of police. Or the officer might have given respondent a free pass altogether, and hoped that another buyer would come along to repeat the suspicious conduct.

But the question still remains: on the facts that the officer *actually* had, was his belief a reasonable one? If this was not a drug deal, what was it? Was the likelihood of some innocuous explanation so great as to defeat the officer's common-sense conclusion that he had just seen a narcotics transaction?

These are questions that the majority below never even recognized, let alone resolved. As the dissent observed, however, "I have yet to come across an innocent explanation of such conduct in a brief or argument in any similar case that is arguably likely, must less equally probable." App. 39.

Indeed, while the facts here are hardly expansive, they are sufficient to eliminate virtually any reasonable explanation other than drugs. There were no stores or street vendors in the area -- so this was not a movie rental or pizza pickup. The officer saw cash -- so this was not a friendly perusal

of family snapshots. The objects paid for were small – so these were not flowers, newspapers, or bottles of spring water.

What is left? One of the judges below suggested the possibility of a condom purchase. App. 77. Respondent in his appellate briefs (although not at trial, where he could have testified) offered up a variety of similar small objects: Bus tokens. Loose cigarettes. Stamps. But what is the chance that a random stranger standing on a residential street corner would happen to be carrying any of these items, and would be immediately willing to part with them?

Perhaps the likelihood of such innocent scenarios is greater than zero. That possibility, however, simply cannot negate a showing of probable cause. As this Court has held, probable cause does not require even that the officer's belief be more likely true than false. *Texas v. Brown*, 460 U.S. at 742. All that is needed is "a reasonable ground of suspicion," *Stacey v. Emery*, 97 U.S. 642, 645-46 (1878), even if non-criminal interpretations are also available. Yet the one explanation here that is most plausible, most obvious – drug sales – is the one to which Pennsylvania and the other minority courts insist judges must close their eyes.

In that event, judges will be the only ones who do not see what is happening. In those areas where drug traffickers set up shop, it is not only the

narcotic strike force officer who can identify an open-air sale. Law-abiding residents, forced off their own pavements and porches, come to know well what a street-level drug deal looks like.<sup>7</sup> When a court tells them that the law cannot recognize what they observe every day, they can only conclude that the legal process is just a game.

Certainly there are times when the law legitimately requires judges to disregard matters that police officers or others know to be true outside the courtroom. But the analysis of probable cause is not one of those times. The decision of the Pennsylvania Supreme Court should be reviewed.

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<sup>7</sup>Such knowledge is now spreading into popular culture as well. *See, e.g.*, <http://googlesightseeing.com/2008/03/21/caught-in-the-act/>.



CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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