IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TONY RICHARD LOW, Defendant and Appellant.	S151961 Court of Appeal No. A112831 (Solano County Superior Court No. FCR225077)

APPELLANT'S OPENING BRIEF ON THE MERITS

After a decision by the Court of Appeal

for the First Appellate District, Division Five

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By Appointment of the
Supreme Court of California

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER CASES

STATUTES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TONY RICHARD LOW, Defendant and Appellant.	S 151961 Court of Appeal No. A112831 (Solano County Superior Court No. FCR225077)

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QUESTIONS PRESENTED

1. Did defendant violate Penal Code section 4573 by having methamphetamine in his possession when he was brought into county jail after his arrest on other charges?

2. Can section 4573 constitutionally apply in such circumstances?

STATEMENT OF THE CASE

An information filed August 17, 2005, charged appellant Tony Richard Low in count one with unlawful driving or taking of a vehicle (Veh. Code, § 10851(a)) and in count two with smuggling drugs into jail (Pen. Code, § 4573). (CT 17.) After a 3 day jury trial, the jury convicted him of both counts on October 18, 2005. (CT 74.)

On January 20, 2006, the court sentenced appellant to the aggravated term of four years for Count 2 (the section 4573 conviction) with a consecutive eight months for Count 1, and imposed one year for each of the prior prison terms found true for a total of sentence of seven years, eight months. (CT 123.)

Appellant filed his timely notice of appeal on January 30, 2006. (CT 127.) On appeal appellant raised several arguments against his conviction under section 4573.[1] Appellant first argued that because appellant was involuntarily brought to jail, he did not violate section 4573, because the statute requires that someone knowingly bring drugs into jail. Appellant also argued that since the correct crime was a violation of Health and Safety code section 11377 (simple possession), appellant was denied due process because he was convicted of crime he did not (and legally could not)

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[1] Appellant challenged the denial of a lesser included offense instruction as well as the sufficiency of the evidence as to whether there was a usable quantity of methamphetamine, an issue not before this Court. Appellant also raised these issues in his motion for a new trial in the trial court; the motion was denied. (CT 82-83, 88-89; 1/20/06 RT 6.)

commit.[2] Appellant further argued that application of section 4573 to his situation would infringe his Fifth Amendment right against self-incrimination, as it would require him to disclose his possession of drugs or face increased penalties.

In the opinion below, the Court of Appeal held that an defendant could be convicted of bringing drugs into jail even though the only reason he was in jail was due to being arrested on other charges and brought there in custody. At the time the Court of Appeal issued its unpublished opinion no published decision had considered the proper application and construction of Penal Code section 4573 in this context. Subsequent to the court's decision, the Court of Appeal for the Fifth District, in a case with very similar facts to this one, issued a published[3] opinion that contradicted the opinion below. In *People v. Gastello* 2007 Cal.App.LEXIS 542, Slip Op. No. F050325 (5th Dist. April 13, 2007) the Court of Appeal unequivocally held that a person (such as appellant) who brings drugs to jail only due to his being arrested and brought to jail in custody cannot violate section 4573. This Court granted review of *Gastello* and the instant case on June 13, 2007.

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[2] Appellant also challenged the trial court's failure to instruct the jury on the lesser included offense of simple possession.

[3] This Court's subsequent grant of review, of course, served to de-publish the opinion, and *Gastello* is herein cited solely for the persuasiveness of its reasoning and not for precedential value.

STATEMENT OF FACTS

On June 29, 2005, a Highway Patrol officer arrested appellant just outside of Davis, California after he was stopped by local police for driving his employer's pick-up truck that had been earlier reported stolen. (RT 10/17/05 149-151.) The officer advised appellant of his *Miranda* rights, searched him for weapons and transported him to Solano County Jail. (RT 10/17/05 152.) The officer testified that once they arrived on jail grounds, they pulled into the sally port outside the booking facility, and he advised appellant that it was illegal to bring any controlled substances inside the jail facility. (RT 10/17/05 153.) The officer asked appellant if he had any controlled substances, and appellant said he had nothing. (RT 10/17/05 154.) A Solano County Sheriff's Deputy searched appellant in the booking area. (RT 10/17/05 130-131.) During the search, the deputy located a small plastic baggie containing a clear crystal substance in appellant's sock. (RT 10/17/05 131-132.) The twenty milligram substance was later determined to contain a detectable quantity of methamphetamine. (RT 10/17/2005 176.)

ARGUMENT

I. APPELLANT'S MERE POSSESSION OF METHAMPHETAMINE AT THE TIME OF HIS ARREST ON OTHER CHARGES DOES NOT VIOLATE PENAL CODE SECTION 4573

Appellant's prosecution and conviction for smuggling under section

4573 was improper, because he did not violate the statute. Section 4573 prohibits smuggling controlled substances into any jail or correctional facility. (See, e.g., *People v. Fenton* (1993) 20 Cal.App.4th 965 (referring to section 4573 as prohibiting "smuggling").)

Section 4573 reads in relevant part:

> "Except when otherwise authorized by law . . . any person, *who knowingly brings* or sends into . . . any county, city and county, or city jail . . . or *within the grounds belonging to the institution*, any controlled substance . . . is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. []The prohibitions and sanctions addressed in this section shall be clearly and prominently posted outside of, and at the entrance to, the grounds of all detention facilities under the jurisdiction of, or operated by, the state or any city, county, or city and county." (Emphasis supplied.)

When construing a statute, we begin with its plain language. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658.) Section 4573 proscribes knowingly bringing drugs into a jail facility. Thus it proscribes both an intention and an act. (Penal Code § 20)["A crime requires the joint union of act and intention"].) The combination of the *mens rea* (knowingly) and the *actus rea* (bringing) works to define the universe of prohibited behavior.

It is elemental that a person who lacks the *mens rea* does not violate the statute regardless of whether he commits the prohibited act.[4] (*In re Jennings* (2004) 34 Cal.4th 254, 267 [mens rea requirement "fundamental

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[4] The notable exception is so-called strict liability offenses. See, e.g., *People v. Calban* (1976) 65 Cal.App.3d 578. However, where - as here - a statute has "knowledge" as an element, there is no strict liability. (*People v. Martin* (1989) 211 Cal.App.3d 699, 713.)

to our criminal law"]; *Morissette v. United States* (1952) 342 U.S. 246, 251.) It is just as true that one who does not commit the prohibited act cannot violate the statute regardless of whether he possesses the requisite *mens rea*.[5] (Pen. Code §15 [definition of crime includes act, law forbidding or commanding it, and prescribed punishment]; *People v. Crutcher* (1968) 262 Cal.App.2d 750, 754 [a crime requires some act that is committed or omitted in violation of law].) There was insufficient evidence that appellant either committed the affirmative act of bringing drugs into jail or had the intention to do so.

A. Appellant Did Not Violate Section 4573 Because He Did Not Commit the Act Of Bringing Drugs into Jail

Section 4573 prohibits the affirmative act of bringing drugs into jail. Here, there was insufficient evidence that appellant committed an affirmative act that can be called bringing drugs into jail. Appellant arrived at jail involuntarily; he was arrested, searched, transported in a police car to the jail facility and then to the booking area. (RT 10/17/2005 151-152.) In other words, appellant was brought to jail while he possessed drugs, but he himself did not bring drugs into jail. His simple possession of drugs while being brought into jail is not a sufficient act to violate section 4573.[6]

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[5] Under some circumstances (not present here) a person with the specific intent to commit the act could be liable for attempt. (See Pen. Code § 21a.)

[6] Appellant acknowledges that he could have been prosecuted for simple possession. Indeed, trial counsel requested - and was denied - a jury instruction on the lesser included offense of simple possession. (10/17/04 RT 221-222.)

The reported case law dealing with circumstances such as appellant's is sparse, but nonetheless the stuff of case books. One notable example is *Martin v. State* (Ala.App. 1944) 17 So.2d 427. Martin was arrested in his house and taken out onto the street. There, he "manifested a drunken condition by using loud and profane language...." and was convicted of public drunkenness. (*Id.*, at p. 427.) The Alabama Court of Appeals reversed, holding:

> "Under the plain terms of this statute, a voluntary appearance [in a public place] is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer." (*Id.*)

This unusual circumstance surfaced again in *Commonwealth v. Meyer* (1981) 288 Pa.Super. 61, 431 A.2d 287, 290. There the defendant had an argument with the bartender in a private club, and the police were called to the club. (*Id.* at p. 288.) The police took Meyer outside the bar into a public area and then arrested him for public drunkenness. (*Id.*) The Pennsylvania court followed the *Martin* case and held that since Meyer had been brought into public involuntarily, he had not committed the proscribed act; the conviction was reversed for insufficiency of the evidence as to the *actus reus*. (*Id.* at 291.) Other cases have reached the same result: (*People v. Newton* (1973) 340 N.Y.S.2d 77, 79-80, 1973 N.Y. Misc. LEXIS 2269 [no *actus reus* to support conviction under New York law of possessing unlicensed firearm where defendant was on flight—scheduled to fly from Bahamas to Luxembourg with no stops in United States—that made unscheduled landing in New York]; *People v. Shaughnessy* (1971) 319

N.Y.S.2d 626, 628, 1971 N.Y. Misc. LEXIS 1759 [no *actus reus* to support conviction of trespassing where defendant was passenger in car that entered property and therefore lacked control over entry].) Just as in those cases, here appellant did not commit the requisite act because he was brought into jail involuntarily.

The fact that appellant denied possessing drugs when the deputy questioned him does not change the argument for two reasons. First, *appellant was already on jail grounds*, and thus according to the court below's interpretation, he must have already violated section 4573. Second, denying that he possessed drugs (or refusing to incriminate himself) is not itself an affirmative act prohibited by section 4573. Moreover, section 4573 does not impose any affirmative obligation on arrested persons to inform arresting officers of drugs on their person. At most, appellant avoided confessing to possession of drugs, but this is insufficient to prove he committed the act of affirmatively bringing drugs into prison. There is no evidence in the record that, but for having been forcibly brought to jail appellant would have entered the jail anyway.[7]

Thus, there was no proof beyond a reasonable doubt of the *actus reus*. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; see generally *In re Winship* (1970) 397 U.S. 358, 364.) Such a denial of due process mandates reversal of the conviction. (*Thompson v. Louisville* (1960) 362 U.S. 199,

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[7] Appellant acknowledges, as did the *Gastello* court, that *conceivably* one might violate section 4573 by intentionally getting arrested in order to bring drugs into jail. However, as described above, there is no evidence to support such a fanciful prosecution here, since there is no indication in the record that appellant intentionally got arrested.

205; *Jackson v. Virginia* (1979) 443 U.S. 307, 314.) Moreover, when, as here, the statute under which the defendant is charged does not prohibit his conduct (because he did not commit the act), his conviction is a "legal impossibility." (*People v. Jerome* (1984) 160 Cal.App.3d 1087, 1094.) Where a defendant is convicted of a legally impossible offense, the trial court acts in excess of its jurisdiction when it imposes sentence, and the conviction must be reversed. (*People v. Mutch* (1971) 4 Cal.3d 389, 395-396.)

B. Appellant Did Not Violate Section 4573 Because He Lacked the Necessary *Mens Rea*

The statute prohibits "knowingly" bringing drugs into jail. "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456-457; see also *People v. Davis* (1995) 10 Cal.4th 463, 518-519, fn.15.) By its plain words, in order to violate the statute, appellant must only have intended to bring drugs into jail, but need not have intended some further act. Thus, section 4573 is a general intent crime. (*Hood, supra*, 1 Cal.3d at pp.456-457.)

There was no evidence that appellant intended to go to jail, and thus he could not have intended to bring drugs into jail with him. People who commit an act through misfortune or by accident with no intention or culpable negligence are not normally criminally responsible for the act.

(Pen. Code § 26; *People v. Calban* (1976) 65 Cal.App.3d 578, 584.) Moreover, even assuming *arguendo* that appellant knew he possessed the drugs, this knowledge of possession is not sufficient *mens rea* to show he intentionally brought them into jail, because there was no evidence that he intentionally entered the jail. "[T]roublesome questions of causation may arise when the act occurs in a manner different from that previously intended...." (*People v. Green* (1980) 27 Cal.3d 1, 53-54, overruled on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225.) As the *Gastello* court put it, "[t]he intent to possess drugs and the purported act of going into the jail did not concur in the required sense in this case." (*Gastello*, *supra*, Slip Op. No. F050325 at 8-9.) Similarly, the fact that appellant denied possessing drugs is not evidence that he intentionally entered jail or tried to get arrested. Thus, regardless of whether appellant knowingly possessed drugs, a smuggling conviction cannot stand because he did not intentionally enter the jail, nor did he intentionally get arrested. "[Appellant] could not have had an intent to bring drugs into jail where the going in was not pursuant to his intent at all." (*Id.* at p. 7.)

There was insufficient evidence that appellant had the general intent to commit the crime, because there is no evidence that appellant intended to go into the jail. Without evidence of the required *mens rea* for violating section 4573, appellant's conviction must be reversed.

II. PENAL CODE SECTION 4573 CANNOT CONSTITUTIONALLY APPLY IN APPELLANT'S CIRCUMSTANCE

The application of section 4573 to appellant raises troubling constitutional issues. Consistent with the doctrine of avoiding constitutional doubt, the Court should construe the statute not to apply to appellant's circumstance. (*Jones v. United States* (1999) 526 U.S. 227, 239; *People v. Davis* (1981) 29 Cal.3d 814, 828.) Otherwise, the Court should find the application of the statute to appellant is unconstitutional.

A. Applying Section 4573 to Appellant Violates Due Process Because the State Caused Him to Involuntarily Commit the Proscribed Act

The essence of due process of law is fundamental fairness. There can be no more fundamentally unfair procedure than for the government to cause a person to commit an act and then criminally prosecute him for it. The analogy here is to the outrageous government conduct doctrine, which recognizes that due process prohibits a conviction when the government's own actions are in large part responsible for the commission of the offense.[8] Both this Court and the United States Supreme Court have left open the

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[8] Justice Werdegar noted in her concurrence to *People v. Smith* (2003) 31 Cal.4th 1207, 1229 that the outrageous government conduct doctrine is a bar to prosecution, cognizable in motion practice, rather than an affirmative defense presented to the jury (such as entrapment). "The constitutional bar of outrageous law enforcement conduct, moreover, may be invoked against police or prosecutorial conduct that does not involve inducement to crime and therefore cannot serve as the basis for an entrapment defense. [citations]." (*Id.*, at pp. 1228-1229.) The analogy is thus all the more appropriate in appellant's case, where an entrapment defense is inapposite.

possibility that in appropriate circumstances outrageous government conduct would act as a constitutional bar to prosecution or conviction, regardless of whether an entrapment defense would succeed.[9] (*United States v. Russell* (1973) 411 U.S. 423, 441; *Hampton v. United States* (1976) 425 U.S. 484; *People v. Smith* (2003) 31 Cal. 4th 1207, 1224-1225; *See also People v. Holloway* (1996) 47 Cal.App.4th 1757; *People v. McIntire* (1979) 23 Cal.3d 742, 748, fn.1; *but c.f. People v. Thoi* (1989) 213 Cal. App. 3d 689, 696 [outrageous government conduct defense superfluous because of objective nature of California entrapment doctrine].) The doctrine has been accepted by the vast majority of federal circuit courts. (See, e.g., *United States v. Penagiarcano-Soler* (1st Cir. 1990) 911 F.2d 833, 839, fn. 1; *United States v. Rahman* (2nd Cir. 1999) 189 F.3d 88, 131; *United States v. Nolan-Cooper* (3rd Cir. 1998) 155 F.3d 221, 230; *United States v. Osborne* (4th Cir. 1991) 935 F.2d 32, 36; *United States v. Arteaga* (5th Cir. 1986) 807 F.2d 424, 426; *United States v. Quintana* (7th Cir. 1975) 508 F.2d 867, 878; *United States v. Berg* (8th Cir. 1999) 178 F.3d 976, 979; *United States v. Bogart* (9th Cir. 1986) 783 F.2d 1428; *United States v. Mosley* (10th Cir. 1992) 965 F.2d 906, 909; *United States v. Capo* (11th Cir. 1982) 693 F.2d 1330, 1336; *United States v. Kelly* (D.C. Cir. 1983) 707 F.2d 1460, 1468–1469.

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[9] Appellant notes that while the entrapment defense under California law is objective in that it focuses on the police conduct rather than the defendant's propensity, (*People v. Barraza* (1979) 23 Cal.3d 675, 690–691) the outrageous government conduct doctrine is relevant to circumstances such as the case at bar where the formal elements of entrapment may not be met, but due process still precludes conviction.

The analogy here is quite apposite. While the police in this case did nothing wrong, the prosecution's decision to prosecute appellate under section 4573 for bringing drugs into jail when it was the *officer who brought appellant into jail* implicates the same fundamental unfairness the courts have sought to remedy by adopting the outrageous governmental conduct offense. (*See, e.g., United States v. Bueno* (5th Cir. 1971) 447 F.2d 903, *cert. denied*, 411 U.S. 949 [reversal of conviction for drug sales where government provided the drugs for sale to another government agent].)

Just as disturbing, under the interpretation of section 4573 advanced by the Court of Appeal, a police officer could subject a simple possessor of drugs to higher penalties[10] simply by bringing him onto jail facilities, then searching him and charging him with "smuggling." Similarly, any person arrested for any reason, should they happen to possess drugs, could be prosecuted for smuggling if they are brought on to jail grounds before they are searched. There are adequate provisions to punish those who unlawfully possess drugs; it is unnecessary and unfair to turn all arrested drug possessors into smugglers subject to more severe penalties.

In sum, the fundamental fairness guarantee embodied in the due process clauses of the California and federal constitutions prohibits the application of section 4573 to persons in appellant's circumstances.

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[10] Illegal possession (Health and Safety Code section 11377) is a wobbler that can be punished by up to one year in the county jail or 16 months, two years, or three years in prison. (See Pen. Code § 18.) Smuggling under section 4573 carries a sentence of two, three, or four years in prison. Moreover, a person charged with possession may be eligible for various drug diversion or deferred entry of judgment programs; not so for one charged with smuggling.

B. Application of Section 4573 to Arrestees Such as Appellant Impermissibly Forces them to Choose Between Self-Incrimination or Enhanced Penalties for Smuggling

The Fifth Amendment guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own [free] will, and to suffer no penalty...for such silence." (*Malloy v. Hogan* (1964) 378 U.S. 1, 8.) "It is well settled that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort.'" (*In re Lewallen* (1979) 23 Cal.3d 274, 278, quoting *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.)

Applying section 4573 to persons who have been arrested and brought into jail forces them to relinquish their right to remain silent under the Fifth and Fourteenth Amendments (by producing controlled substances prior to the booking search) or otherwise face increased punishment for "smuggling."[11] Such a Hobesian choice is unconstitutional. (*In re Lewallen*, *supra*, 23 Cal.3d at p. 278.) Statutes should be "construed, if their language permits, as to render them valid and constitutional rather than invalid and unconstitutional.'" (*People v. Amor* (1974) 12 Cal.3d 20, 30, citing *Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558.) Moreover, California courts must adopt an interpretation of a statutory provision which, "consistent with the statutory language and purpose, eliminates

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[11] Producing drugs in response to custodial questioning implicates the Fifth Amendment. (*People v. Whitfield* (1996) 46 Cal.App.4th 947; see also *United States v. Hubbell* (2000) 530 U.S. 27 [production of documents implicates Fifth Amendment].)

doubts as to the provision's constitutionality." (*In re Kay* (1971)1 Cal.3d 930, 942). The Court of Appeal's interpretation of section 4573 only reinforced doubt about the constitutionality of its application to appellant.

A defendant cannot, consistent with the privilege against self-incrimination, be guilty of failing to do something the doing of which would require him to incriminate himself. Thus, in *Marchetti v. United States* (1968) 390 U.S. 39 and *Grosso v. United States* (1968) 390 U.S. 62, the United States Supreme Court held that the privilege against self-incrimination is a complete defense to a charge of noncompliance with federal gambling tax and registration laws.

In *Marchetti*, the defendant was charged with conspiring to and evading payment of an occupational tax and engaging in the business of accepting wagers without registering. (*Marchetti*, *supra*, 390 U.S. at p. 40.) The defendant was found guilty and made a motion in arrest of judgment on the ground that payment of the tax or registration would violate his privilege against self-incrimination, because Federal and state law (except Nevada) criminalized gambling. (*Id.* at p. 41.) The Court reversed the conviction, holding that defendant's assertion of his Fifth Amendment rights should have provided a complete defense to the prosecution. (*Id.* at p. 42.)

In *Grosso*, the defendant was convicted of failing to pay the excise and occupational taxes on wagering. (*Grosso*, *supra*, 390 U.S. 62.) The Court reversed Grosso's convictions using the same reasoning as it did in the *Marchetti* case, that the defendant could not be penalized for failing to

provide information where that information would have been incriminating. (*Id.* at p. 70.)

The lesson of *Marchetti* and *Grosso* is that the law may not place a person between the Scylla and Charybdis of facing criminal penalties for failing to provide information, or providing the information which would incriminate him. The Supreme Court has made similar rulings in other contexts. In the case of *Lefkowitz v. Turley* (1973) 414 U.S. 70, the Court considered the situation of publicly licensed architects, who under New York State law, were required to testify before a grand jury regarding possible corruption and conspiracy. If they refused to testify, they were subject to license revocation for failing to testify; if they testified they subjected themselves to possible criminal proceedings. (*Id.* at pp.71-76.) The Court found the New York statutes unconstitutional as they violated the Fifth and Fourteenth Amendments. (*Id.* at p. 76.)

In *Albertson v. Subversive Activities Control Board* (1965) 382 U.S. 70, appellees, members of the Communist Party, were ordered by the Subversive Activities Control Board to register as Party members or risk heavy penalties. The Court reversed the orders noting that since appellees faced real threat of prosecution if they registered as Party members, the orders violated the Fifth Amendment by forcing appellees to incriminate themselves or face criminal consequences for failing to do so. (*Id.* at p. 80.)

In short, United States Supreme Court precedent establishes that application of section 4573 to appellant creates an unconstitutional dilemma, as appellant is forced to choose between incriminating himself by

producing drugs in his possession or risk harsher consequences by way of smuggling charges, should he elect to stand on his Fifth Amendment rights. The cases on which the Court of Appeals relied in the instant case do not indicate otherwise.

The court below relied on several federal appellate decisions[12] construing a federal smuggling statute to dismiss appellant's claim of Fifth Amendment error. The Court of Appeal's reliance on these cases was flawed, however, as those cases considered whether the privilege against self-incrimination could be used as an affirmative defense to an anti-smuggling statute. The law at issue, 21 U.S.C. §176(a) (subsequently repealed) provided criminal penalties for:

> "whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts."

In other words, the defendant in *Witt* was charged with smuggling, not failing to register his contraband. Unlike here, *there was no question that Witt voluntarily entered the country.* Had Witt been charged with failure to register, his Fifth Amendment defense would have carried the day. See *Leary v. United States* (1969) 395 U.S. 6, 11 (construing section 176a and

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[12] *Witt v. United States* (9th Cir. 1969) 413 F.2d 303; *United States v. Vaught* (9th Cir. 1970) 434 F.2d 124, 125, fn. 2; *United States v. Lopez* (9th Cir. 1970) 432 F.2d 547, 548, *United States v. Betancourt* (5th Cir. 1970) 427 F.2d 851, 855, and *United States v. Perez* (9th Cir. 1970) 426 F. 2d 799, 800.

related statutes, and finding Fifth Amendment a complete defense to violation of Marijuana Tax Act requiring registration of illegally imported Marijuana). None of the cases the court below relied on considered circumstances analogous to this of appellant, who was *arrested on a totally different charge, and while in custody* was asked to reveal whether he was in possession of controlled substances or face more severe punishment for smuggling.

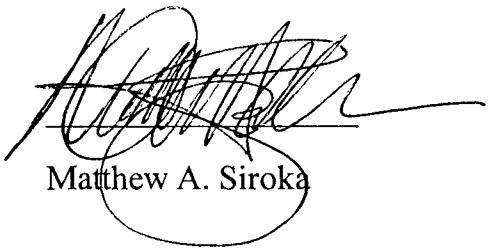
The Court of Appeals failed to properly consider the constitutional issues implicated when a person in custody is asked to incriminate himself or face more severe punishment. It also failed to construe the statute so as to avoid constitutional doubt about the statute's validity. (See, e.g, *In re Kay*, *supra*, 1 Cal.3d at p. 942; *Jones v. United States*, *supra*, 526 U.S. at p. 239.) Section 4573 cannot apply to appellant because it would unconstitutionally place him on the horns of a dilemma of incriminating himself as to drug possession or facing more severe penalties for smuggling.

CONCLUSION

For the above-stated reasons, the Court should reverse appellant's conviction on count two, and hold that section 4573 may not be used to prosecute a person in appellant's circumstance.

Dated:

Respectfully submitted,



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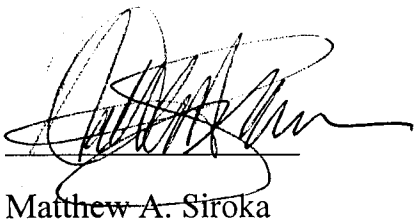
CERTIFICATE OF WORD COUNT

I, Matthew A. Siroka, am counsel for Tony R. Low. I have used the electronic counting mechanism provided for in the Word Perfect X3 software. That software indicates there are 5917 words in Appellant's Opening Brief.



Matthew A. Siroka

Counsel for Appellant Tony R. Low

DECLARATION OF SERVICE BY MAIL

Re: People v. Tony R. Low Court No: S 151961

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 600 Townsend Street, Suite 329, San Francisco, CA 94103. On August 22, 2007 I served a true copy of the attached APPELLANT'S OPENING BRIEF ON THE MERITS on each of the following, by placing same in an envelope or envelopes addressed respectively as follows:

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Deputy Attorney General
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(Personal Service)

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Solano County Superior Court
Hall of Justice
600 Union Avenue
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Attn: Hon. R. Michael Smith

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Each said envelope was then sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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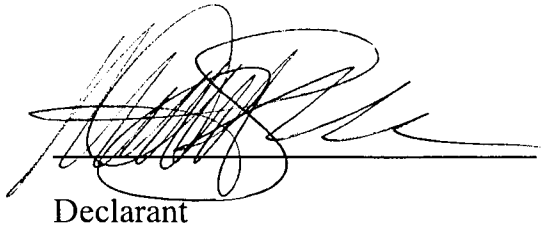

Declarant