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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 Court of Appeal No. A112831 (Solano County Superior Court No. FCR225077)

SUPREME COURT
FILED

APR 19 2007

Frederick K. Ohlrich Clerk

Deputy

APPELLANT'S PETITION FOR REVIEW

After a decision by the Court of Appeal
for the First Appellate District, Division Five

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Project's assisted-case system

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PETITION FOR REVIEW

To: The Chief Justice, and to the Associate Justices of the California Supreme Court:

Appellant respectfully petitions this Court to review the March 14, 2007, unpublished opinion of the Court of Appeal (First Appellate District, Division Five) affirming appellant's convictions and sentence (Appendix ("App.") A.)

Appellant requests that this Court review the case because the Court of Appeal's ruling was erroneous, and the case involves important legal issues which this Court should resolve, and to create uniformity of authority.

* * * *

QUESTIONS PRESENTED

1. Is an accused guilty of bringing drugs into jail if he or she entered the jail only due to being arrested and brought there in custody?

2. Pursuant to *People v. Leal* (1966) 64 Cal.2d 504, may an accused be guilty of possessing a "usable quantity" of a controlled substance in the absence of any lay or expert testimony as to whether the substance was a usable quantity, and where the only testimony about the substance was that it was 20 milligrams of crystal-like substance containing a controlled substance?

STATEMENT OF THE CASE AND FACTS

Appellant was arrested for driving a truck reported as stolen. He was searched and placed in a patrol car. After appellant arrived on jail grounds the arresting officer asked him if he possessed any unlawful drugs. appellant said no, but during a booking search, a one inch by one inch baggie containing 20 milligrams of a substance containing methamphetamine was found on appellant's person.

Appellant was tried and convicted of smuggling drugs onto a jail facility in violation of Penal Code section 4573. At trial there was expert testimony from a toxicologist that the substance found contained methamphetamine, but the expert explicitly denied knowing whether it was sufficient to be used. There was no testimony as to whether the substance was a usable quantity.

At a hearing on a motion for a new trial, the trial court judge noted that the application of section 4573 in these circumstances was unique in his experience and encouraged the parties to appeal to seek clarification on the proper application of the statute.

Appellant appealed his conviction and sentence to the First District Court of Appeal, Division Five which denied the appeal in an unpublished decision. (See Appendix A.)

WHY REVIEW SHOULD BE GRANTED

The California Rules of Court provide for review in this Court "where it appears necessary to secure uniformity of decision or the settlement of important questions of law." (Cal. Rules of Court, Rule 29(a).) This case meets both those criteria.

In the opinion below, the Court of Appeal held that an appellant could be convicted of bringing drugs into jail even though the only reason he was in jail was due to being arrested and brought there in custody. At the time the court issued its unpublished opinion no published decision had considered the proper application and construction of Penal Code section 4573. 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 opinion that contradicts 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 stated 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. Thus review is necessary to both to secure uniformity of decision and to settle an important question of law as to application of Penal Code section 4573.

The second issue for review is likely to recur frequently in the lower courts and centers on the rule articulated in *People v. Leal* (1966) 64 Cal.2d

504 that conviction for possession of drugs requires proof of a "usable quantity."[1]

The question here is whether a defendant may be convicted in the absence of any testimony - lay or expert - that the substance was a "usable quantity" of drugs or was in an amount sufficient to be used in any manner customarily employed by users of the substance. The Court of Appeal assumed that the jury could simply infer from looking at a one inch by one inch baggie containing a clear crystal-like substance that there was a usable quantity. (App. A, at pp. 9-10.) However, only one published California opinion has affirmed the sufficiency of the evidence in a possession case in the absence of direct testimony about whether the substance was a usable quantity. The Court of Appeal cited *People v. Perry* (1969) 271 Cal.App.2d 84 in support of its opinion that the jury could infer a usable quantity from the circumstances; yet crucial to the *Perry* court's decision was that there was "quantitatively...a substantial amount" of the substance, almost *100 milligrams after testing.* In contrast, appellant was found with *20 milligrams of a substance containing methamphetamine before testing*, a quantity less than that found in a number of cases where convictions were reversed for insufficient evidence of a usable quantity. (See *Leal, supra*, 64 Cal.2d 504 (32 milligrams of a substance containing heroin); *People v. McCarthy* (1966) 64 Cal.2d 513 (96 milligrams of a residue containing

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[1] Penal Code section 4573, requires proof of a usable quantity, just as for conviction or simple possession,. (*People v. Leal* (1966) 64 Cal.2d 504; *People v. Piper* (1971) 19 Cal.App.3d, 248; see also CALJIC 12.32; CALCRIM 2304.)

heroin); *People v. White* (1964) 231 Cal.App.2d 82 (60 milligrams of powdery residue containing heroin); *People v. Villalobos* (1966) 245 Cal.App.2d 561, 568-569 (50 milligrams of marijuana crumbs in defendant's pocket).)

The Court of Appeal also erroneously reasoned that simply because since the toxicologist testified that there was a sufficient quantity for testing, the jury could infer that there was a sufficient quantity for use.

The usable quantity requirement should only be satisfied by testimony that the amount is a usable quantity or where the amount of the substance is quantitatively substantial.

This case presents an important issue of law that will affect how the numerous prosecutions for drug possession will proceed in this State. If prosecutors are not required to adduce testimony as to whether a substance is a usable quantity, this could profoundly affect the way such cases are prepared and tried. Moreover, it raises questions about the application of CALCRIM 2304 which does not specify how usable quantity may be proved. Thus the Court should grant review on this issue as well.

ARGUMENT

I. PENAL CODE SECTION 4573 DOES NOT APPLY TO APPELLANT BECAUSE HE ENTERED THE JAIL ONLY DUE TO BEING ARRESTED AND BROUGHT THERE IN CUSTODY

Appellant's prosecution and conviction for smuggling under section 4573 was improper, because section 4573 cannot be applied to a person involuntarily brought into jail as an arrestee. (*People v. Gastello* (2007) 2007 Cal. App. LEXIS 542, Slip Op. No. F050325 (5th Dist. April 13, 2007).) 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 relevant part:

> As is relevant, section 4573 states, "Except when otherwise authorized by law . . . any person, *who knowingly brings* or sends into . . . any state prison . . . or any other place where prisoners of the state are located under the custody of prison officials . . . or into any county, city and county, or city jail . . . or any other place where prisoners or inmates are located under custody of any sheriff . . . 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.)

The issue is whether a person who is arrested with a controlled substance on his person and brought *involuntarily* into a detention facility "knowingly brings" the substance into the facility within the meaning of section 4573. As the court in *Gastello* stated, "the answer has to be no." (*Gastello*, supra, 2007 Cal. App. LEXIS 542 at *1-2.)

A. A Person Who is Arrested with Controlled Substances on His Person and Brought to Jail Does Not Knowingly Bring the Substances into Jail Within the Meaning of Section 4573.

Section 4573 does not apply to arrestees such as appellant who have controlled substances on their person, are involuntarily brought into jail and the controlled substances are discovered during the initial booking search because they have not committed the actus reus of affirmatively bringing drugs onto jail grounds. (See Penal Code § 20 (union, or joint operation of act and intent, or criminal negligence required for criminal act).)

The Court of Appeal failed to address the question appellant raised below - in what sense did he "bring" the alleged drugs into jail? The plain language of the statute imposes penalties on anyone who "knowingly brings" the substances onto jail grounds. Only a tortured reading of the statute is compatible with the notion that a person who is involuntarily moved from one place to another 'brings' his possessions with him. Such an interpretation is fundamentally unfair, and thus application of section 4573 to appellant was improper and violated due process.

Moreover, a crucial fact here, and one overlooked by the opinion below, is that appellant was arrested, brought on to jail grounds and *then* informed that if he brought drugs into jail he would be committing a crime. However, according to the Court of Appeal's interpretation of section 4573, appellant had already violated the statute the moment he was brought onto jail grounds. Under the Court of Appeal's theory, a police officer could

subject a simple possessor of drugs to much higher penalties[2] by simply driving the possessor onto jail facilities, then searching him and accusing him of "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 unnecessary and unfair to turn all arrested drug possessors into smugglers subject to much more severe penalties.

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 arrestees forces them to relinquish their Fifth Amendment right to remain silent (by producing controlled substances prior to the booking search) or otherwise face increased punishment for

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[2] Illegal possession under 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.

"smuggling."[3] Such a Hobesian choice is unconstitutional. (*In re Lewallen* (1979) 23 Cal.3d 274, 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 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 the doubts about the constitutionality of its application.

The court below relied on several federal appellate decisions[4] construing a federal smuggling to 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 that required disclosure of marijuana imported from outside the country. (*Witt v. United States*, *supra*, 413 F.2d 303.) None of the cases the court relied on considered the circumstance of appellant where

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[3] Producing drugs in response to custodial questioning undoubtedly 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).)

[4] *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.

he 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 that are implicated when a person in custody is asked to incriminate himself or face more severe punishment, or at least to construe the statute to as to avoid constitutional doubt. California courts must adopt an interpretation of a statutory provision which, "consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (*In re Kay* (1971) 1 Cal.3d 930, 942.) Section 4573 should not be applied in appellant's circumstances.

C. *People v. Gastello* Should Control the Outcome Here

In *Gastello*, the defendant was arrested on suspicion of being under the influence of a controlled substance. (*Gastello, supra*, 2007 Cal. App. LEXIS 542 at *3.) The arresting officer searched Gastello and found no drugs. (Id.)

> Defendant was handcuffed and placed in [arresting Officer] Machado's car and she drove him to the Kings County Jail. On the way, Machado told defendant that it was a felony to bring drugs or weapons into the jail. She asked if he understood and he said yes.
>
> Inside, defendant was booked. He was instructed to take everything out of his pockets and remove all of his clothing except for a t-shirt, pants, and underpants. As he obeyed, he recommended that Machado not look at the items he was removing too closely, as he had fleas. Machado searched them anyway and found in defendant's sweatshirt a small plastic bag containing a crystalline substance. Defendant accused Machado of planting it. Chemical testing showed that the substance was a usable quantity of methamphetamine.

(Id.)

The court found that "from the time of his detention during the traffic stop to the time when the drugs were discovered, defendant did nothing that can be regarded as the affirmative act of bringing something into a jail." (Id. at *5.)

Appellant's case here is even stronger as he was not informed that it was a felony to bring drugs onto jail grounds until *after he had already been brought onto jail grounds*. In any event the reasoning of the *Gastello* court comports with common sense and fundamental fairness and should be applied in this case.

II. THERE WAS INSUFFICIENT EVIDENCE THAT THE METHAMPHETAMINE RESIDUE FOUND ON APPELLANT WAS A USABLE QUANTITY AS REQUIRED BY *PEOPLE V. LEAL*

A lawful conviction under section 4573 requires the prosecution prove that the controlled substance (in this case methamphetamine) was of a usable quantity. (*People v. Leal* (1966) 64 Cal.2d 504; *People v. Piper* (1971) 19 Cal.App.3d, 248; see also CALJIC 12.32; CALCRIM 2304.) The rule was first stated definitively in *Leal* that a mere residue or useless trace is insufficient to support a narcotics possession conviction. (*Leal, supra*, 64 Cal.2d at p. 512.) In the more recent case of *People v. Rubalcaba* this Court re-examined the usable quantity rule, in the context of ruling on whether the whether the trial court abused its discretion in sustaining relevance objections to "questions regarding the purity of the cocaine, and the amount of cocaine needed to get 'high.'" (*People v. Rubalcaba* (1993) 6 Cal.4th 62, 66.) The Court reaffirmed the essential holding of *Leal* that a

mere residue or useless trace is insufficient to support a narcotics possession conviction. (*Id.*; *Leal*, *supra*, 64 Cal.2d at p.512; see also *People v. Fein* (1971) 4 Cal.3d 747, 754 ("It is now well established that evidence of useless traces or residue of narcotic substances do[es] not constitute sufficient evidence to sustain a conviction for possession of narcotics.").) In *Leal*, the court held that a "minute, crystalline residue" of a *substance containing heroin* weighing approximately *32 milligrams* found on a spoon was insufficient evidence of a usable quantity. The court reversed the conviction, finding the evidence insufficient.[5] (*Leal*, *supra*, 64 Cal.2d at p.512.) *Leal* was no mere aberration; see also *People v. McCarthy* (1966) 64 Cal.2d 513 (narcotics possession conviction reversed where 96 milligrams of a residue containing heroin found); *People v. White* (1964) 231 Cal.App.2d 82 (60 milligrams of powdery residue containing heroin insufficient for narcotics possession charge) *People v. Villalobos* (1966) 245 Cal.App.2d 561, 568-569 (50 milligrams of marijuana crumbs in defendant's pocket insufficient for possession conviction).)

Here, appellant was convicted for having *20 milligrams* of a *substance containing methamphetamine*[6] in a baggie. (10/17/2005 RT 176.) The officer who discovered the baggie described the contents as a "crystal-

[5] In addition to vacating the conviction, the *Leal* court actually remanded the case to the trial court for a factual finding on whether the quantity was usable. Such a procedure would now be foreclosed by *Burks v. U.S.* (1978) 437 U.S. 1, 11 where the United States Supreme Court held that when a conviction is reversed for insufficiency of the evidence, jeopardy attaches and the accused may not be retried for that offense.

[6] There was no evidence regarding the purity of the methamphetamine or its concentration in the substance in which it was detected.

like substance." (10/14/2005 RT 131.) The chemist's testimony on the issue of usable quantity was as follows:

"Q. [by prosecutor] Is it a usable quantity?

[objection by defense as legal conclusion overruled]

A. Let me explain what is usable for me *as a chemical analyst.* When I can manipulate a substance, when I can test it, and there is still leftover if someone wants to do the retest, it is usable for me. So I could take it out from the bag. I could take the net weight. I could manipulate it. I could perform the tests and there is still leftover. Yes, *it is usable.*"

(10/17/05 RT 174 (emphasis supplied).)

On cross-examination, trial counsel asked:

"Q. The substance that you tested here, you don't know whether or not that is a quantity that is normally or regularly used or sold on the street, do you?

A. I don't understand the question.

Q. Well, for purposes of the lab, you said you can test with very minute amounts because of the sophistication of your tests?

A. That's correct.

Q. But you don't know the necessary quantity or have experience with what quantities would be usable or sellable on the streets, for instance, as opposed to usable in the laboratory?

A. I don't study how much, you know, there is on the street to be sold."

(10/17/05 RT 177.)

On re-direct, the prosecutor asked:

"Q. Is it correct by your testimony, then, that there is enough of that substance remaining at this time to be retested?

A. That's correct.

Q. Okay. I have nothing further."

(10/17/05 RT 177.)

The record demonstrates that the chemist specifically denied any knowledge of whether the quantity or form was sufficient to be usable as a user of the drug and acknowledged that the laboratory tests were sophisticated enough to test with minute amounts. (Id.) There was no testimony as to whether this *20 milligram* crystal was a usable quantity or form as a controlled substance. The fact that there was sufficient quantity to be tested is not evidence of whether there was sufficient quantity to be usable as a controlled substance. Thus this case is on all fours with *Leal*, where the court held that "since the prosecution proved no more than the defendant's possession of traces of narcotics and did not show that such residue was usable for either sale or consumption" the conviction should be reversed. (*Leal*, *supra*, 64 Cal.2d at p. 512.)[7]

The jury was given CALJIC 12.32 which states:

Proof that the controlled substance possessed, if any, was in an amount sufficient to be used as a controlled substance may be established:

1. By expert testimony, or

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[7] Also, as in *Leal*, the defendant denied possessing any drugs. (Id. at p. 505; (RT 10/17/05 154.)

2. By evidence that the amount possessed, if any, was sufficient to be used in any manner customarily employed by users of the substance. (CT 61.)

In closing argument, the prosecution erroneously informed the jury that the chemist (Ms. Jackowski) "testified that this is a usable quantity." (10/18/05 RT 289.) The chemist only testified that the substance was a usable quantity *to be tested in the lab*. (Cf. *People v. Gossett* (1971) 20 Cal.App.3d 230, 234 (expert testimony about both typical street use and actual quantity).) However, this cannot be the standard for determining whether the substance is capable of being used, for

> [i]t is not scientific measurement and detection which is the ultimate test of the known possession of a narcotic, but rather the awareness of the defendant of the presence of the narcotic. Guilt or innocence on a charge of illegal possession may not be determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant.

(*People v. Aguilar* (1963) 223 Cal.App.2d 119, 122-123; *cited with approval by Leal, supra*, 64 Cal.2d at p.509.)

The Court of Appeal in the opinion below apparently adopted a rule that usable quantity can be inferred simply from the appearance of the substance. This Court should reject that rule and instead hold that where the issue of usable quantity is in doubt, testimony that the substance is a usable quantity is required for conviction unless the substance is present in such substantial quantity that no trier of fact could doubt its usability.

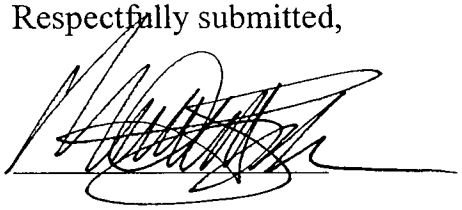
Here no trier of fact could find beyond a reasonable doubt that this 20 milligram substance was a usable quantity, and therefore the conviction must be reversed.

CONCLUSION

For the above-stated reasons, this petition for review should be granted, appellant's conviction on Count 2 should be reversed, or remanded for re-sentencing for simple possession.

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 4,695 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:

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 April 19, 2007 I served a true copy of the attached PETITION FOR REVIEW on each of the following, by placing same in an envelope or envelopes addressed respectively as follows:

Arthur P. Beever
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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.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed on April 19, 2007, at San Francisco, California.

Declarant

APPENDIX A

Filed 3/14/07

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY RICHARD LOW,

Defendant and Appellant.

_____/

A112831

(Solano County Super. Ct. No. FCR-225077)

Tony Richard Low appeals from a judgment entered after a jury convicted him of vehicle theft, (Veh. Code, § 10851, subd. (a)) and smuggling drugs into a jail. (Pen. Code, § 4573.)[1] He contends his conviction on the smuggling offense must be reversed because (1) section 4573 did not apply to his conduct, (2) applying the statute in this instance would violate his due process rights, (3) applying the statute to his conduct would violate his right to equal protection, (4) the evidence was insufficient to support his conviction, (5) the trial court erred when it denied his motion for a new trial, and (6) the court instructed the jury incorrectly. We conclude the court did not commit any prejudicial errors and affirm.

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1 Unless otherwise indicated, all further section references will be to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant worked for a contractor named Christopher Terrell. On June 21, 2005, appellant took Terrell's truck. When appellant failed to return the truck for several days, Terrell called the police and reported it as stolen.

On June 29, 2005, appellant was driving Terrell's truck on Interstate 80 near Davis when he passed Detective Ronald Jones of the Sacramento County Sheriff's Department. Detective Jones ran a registration check on the truck and learned it had been reported as stolen. He pulled appellant over.

Appellant was uncooperative. Detective Jones had to call for help. It was five minutes before another officer arrived. During that time, appellant was moving around inside the truck and moving his hands up and then bringing them back down. Detective Jones had asked appellant to keep his hands in the air several times. Officer Christopher Wahl arrived on the scene. He also saw movement inside the truck through the tinted windows. Officer Wahl used his public address system to order appellant out of the vehicle and with Detective Jones's help, Wahl was able to arrest appellant.

Officer Wahl advised appellant of his *Miranda* rights. Appellant waived those rights and made a statement denying he had stolen the truck. Wahl searched appellant for weapons and contraband, and then drove him to the county jail. When he pulled into a sally port area outside the jail facility, Wahl advised appellant that it was illegal to bring drugs inside. Appellant denied that he had any contraband. After appellant entered the jail, he was searched. A small, one inch square bag containing a visible "clear crystal substance" was found in the ankle portion of his sock. A forensic toxicologist testified the small "coin size[d]" ziplock plastic bag contained 20 milligrams of a "white crystalline powder" containing methamphetamine.

Based on these facts, an information was filed charging appellant with the offenses we have described. The information also alleged appellant had served three prior prison terms within the meaning of section 667.5, subdivision (b).

The case proceeded to trial where a jury convicted appellant on both offenses. In a court trial that followed, the court found the prior prison term allegations to be true.

Appellant filed a motion for new trial. He argued he could not validly be convicted of smuggling under section 4573 because that statute did not apply to his conduct. The trial court disagreed and denied the motion.

Subsequently, the court sentenced appellant to the upper term of four years on his smuggling conviction, plus eight months for vehicle theft, and an additional one year for each of the prior prison term findings.

II. DISCUSSION

A. Does section 4573 apply to appellant's conduct?

Underlying each of appellant's arguments is the contention that section 4573 does not apply to his conduct, and therefore his smuggling conviction must be reversed.

As is relevant, section 4573 states, "Except when otherwise authorized by law . . . any person, who knowingly brings or sends into . . . any state prison . . . or any other place where prisoners of the state are located under the custody of prison officials . . . or into any county, city and county, or city jail . . . or any other place where prisoners or inmates are located under custody of any sheriff . . . 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."

Appellant contends section 4573 must be interpreted as applying only to those who "voluntarily" enter a detention facility to bring illegal drugs into the facility, or non-inmates who assist in such activity. Because he did not enter the jail voluntarily, but was brought there pursuant to his arrest, appellant contends he cannot be convicted of violating the statute.

We reject this argument because that is not what the statute prohibits. The statute states it is illegal for "any person" to "knowingly" bring illegal drugs into a detention facility. The statute does not say that it applies only to those who "voluntarily" enter a detention facility carrying illegal drugs. We may not, under the guise of interpretation,

add language to a statute that is not otherwise present. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632; *People v. Winters* (2001) 93 Cal.App.4th 273, 280.)

Appellant contends that "unintended and absurd" consequences would result if a voluntariness element is not read into the statute. First, he contends that a person who possesses drugs could be found guilty of violating section 4573 if an arresting officer is not able to conduct a thorough search before bringing the person to a jail. We find nothing absurd about this scenario. It is a crime to possess illegal drugs. (Health & Saf. Code, § 11377.) It is also a crime to smuggle drugs into a detention facility. (§ 4573.) It is not absurd to hold a person responsible for a smuggling offense because an arresting officer is unable to prevent the offense from occurring.

Appellant further contends that if section 4573 can be applied to persons who are involuntarily brought to a jail, then any person who is caught possessing drugs could be found guilty of attempted smuggling. We disagree. To prove an attempt, "there must be proof of both specific intent to commit the crime and a direct, but ineffectual, act done toward its commission." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1126.) Therefore, a person would not be guilty of attempted smuggling simply because he possessed illegal drugs. The prosecution also would be obligated to prove the person had the specific intent to bring drugs into a jail.

Next, appellant argues section 4573 must be interpreted as applying only to those who "intentionally" bring drugs into a detention facility. According to appellant, this additional element is required by section 20, which states "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." First, as we have noted, the statute does not state that it applies to those who "intentionally" enter a detention facility carrying illegal drugs. Second, appellant misconstrues the statute upon which he relies. Section 20 describes the general criminal intent or "mens rea" that is required for most crimes. (*In re Jorge M.* (2000) 23 Cal.4th 866, 872; see also 1 Witkin, Cal. Criminal Law (3d ed. 2000) Elements, § 1, p. 198.)

The jurors were instructed on that requirement using the standard CALJIC instruction.[2] Appellant has not cited, and we are not aware of, any authority that holds the import of section 20 is that all crimes must be committed "intentionally."

Next, appellant argues that section 4573 must be interpreted as applying only to "non-inmates". To do otherwise, appellant argues, would render the language of the statute mandating that warning signs be posted outside all detention facilities surplusage because such warnings are "of no moment to arrestees . . . who are not voluntarily entering the facilities in the first place and may never see such signs." We reject this argument for two reasons. First, the statute prohibits "any person" from bringing illegal drugs into a detention facility. It is not limited to "non-inmates." Again, appellant urges us to add language that is not present in the statute. We may not do so. (*Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 632; *People v. Winters*, *supra*, 93 Cal.App.4th at p. 280.) Second, applying the statute to persons who are in custody would not render the statute's warning language surplusage. Appellant concedes the statute applies to visitors. Since visitors to a detention facility presumably would see the warning signs, the statutory language is not rendered surplusage because those in custody might not see them.

Finally, appellant contends the conclusion that section 4573 must be applied only to "non-inmates" is supported by the fact that the section is found in Part 3, Title 5, Chapter 3 of the Penal Code, entitled "Unauthorized Communications with Prisoners" rather than Chapter 1 of Part 3, Title 5, entitled "Offenses by Prisoners." However, it is well settled that division, chapter, article and section headings are not indicative of

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[2] The jurors were instructed with CALJIC No. 3.30 as follows:

"In the crime charged in Count Two, namely, BRINGING DRUGS INTO A JAIL, there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful."

legislative intent. (§ 10004,[3] *People v. Trout* (1955) 137 Cal.App.2d 794, 796.) The description of the chapter in which the section is located is not determinative.

B. Due Process

Appellant contends that applying section 4573 to his conduct would violate his due process rights. Appellant's argument on this point is based on his Fifth Amendment right not to incriminate himself. Appellant notes 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.) Appellant appears to argue that refusing to disclose his possession of drugs in response to Officer Wahl's admonition and query whether appellant possessed controlled substances is compelled nonverbal expression. He reasons that because he was arrested with drugs in his possession, he was forced to either disclose his possession of those drugs, or face harsher punishment for smuggling. According to appellant, placing him in that dilemma violated the Fifth Amendment and resulted in a due process violation.

Appellant has not cited any case that holds a person who is forced to make this sort of choice has suffered a violation of his Fifth Amendment rights. The primary case he does cite, *People v. Whitfield* (1996) 46 Cal.App.4th 947, does not so hold. The court in *Whitfield* held that when a police officer asks a suspect whether she has drugs, the suspect's act of producing the drugs, is a "statement" for *Miranda* purposes. (*Id.* at p. 958, fn. 6.) In this case, appellant did not produce drugs in response to questioning by Detective Jones or Officer Wahl. Indeed, appellant was given his *Miranda* rights, he waived them, and then, after he was informed of the no drugs in jail rule, appellant made a statement flatly denying that he had anything. *Whitfield* is not controlling under these very different facts.

More relevant in our view is a line of cases from the federal court. In *Witt v.*

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3 Section 10004 states, "Division, chapter, article, and section headings contained herein shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section hereof."

United States (9th Cir. 1969) 413 F.2d 303 (*Witt*), the defendant was convicted of smuggling marijuana into the country. On appeal he argued his conviction must be reversed because "a person bringing [marijuana] into the United States must smuggle it in, because to invoice it and present it for inspection would provide a 'link in the chain' of evidence tending to establish his guilt, and would violate his Fifth Amendment privilege against self-incrimination." (*Id.* at pp. 305-306.) The *Witt* court rejected that argument flatly: "There is about as much logic in that reasoning as there would be in the contention of a bank robber that he was required to shoot the bank guard who ordered him to drop his gun and raise his hands, because to comply with the guard's orders would be self-incriminating and would provide a 'link in the chain' of evidence tending to establish his guilt, all in violation of his Fifth Amendment privilege against self-incrimination. The same claim might be made by the burglar who is accosted by a police officer as he crawls out of the window of a residence at three A.M. and is ordered to submit to an inspection of the luggage he is carrying. To hold that the privilege was available in any of these cases would border on the ridiculous and would effectively frustrate all criminal laws." (*Id.* at p. 306.)

The holding in *Witt* on this point has been followed in many cases including *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. We find these cases to be persuasive and will follow them here.

C. Equal Protection

Appellant contends that applying section 4573 in this context would violate his equal protection rights. His argument is based on what he perceives to be the differing treatments of those who are arrested with drugs on their person. According to appellant, an equal protection violation is established because those who elect to admit they have

drugs will suffer a lower level of punishment than those who say nothing and attempt to smuggle the drugs into jail.[4]

The concept of equal protection means that persons who are similarly situated should receive like treatment. (*In re Eric. J.* (1979) 25 Cal.3d 522, 531.) An essential prerequisite to establishing an equal protection violation is a "showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*Id.* at p. 530.) Here, the state has not adopted a classification system that treats similarly situated persons in an unequal manner. Those who possess illegal drugs and who admit that fact are not similar to those who attempt to smuggle drugs into a jail. The latter not only possess an illegal substance, they attempt to smuggle that substance into a locked and controlled facility. There is no equal protection violation.

D. Sufficiency of the Evidence

Appellant contends his smuggling conviction must be reversed because it is not supported by substantial evidence.

Our role when evaluating this type of argument is "a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not

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4 Illegal possession under 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 § 18.) Smuggling under section 4573 carries a sentence of two, three, or four years in prison.

substitute our evaluation of a witness's credibility for that of the fact finder.' [Citations.]" (*Ibid.* quoting *People v. Jones* (1990) 51 Cal.3d 294, 314.)

Here, appellant contends the evidence was insufficient because it failed to establish he possessed a usable quantity of methamphetamine.

Section 4573 makes it illegal to smuggle into a jail "any controlled substance, the possession of which is prohibited by" the Health and Safety Code. To sustain a conviction for possession, the evidence must establish, among other things, that the substance possessed was an amount that is sufficient to be used as a controlled substance. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 64-65.) The usable quantity element may be proven by circumstantial evidence. (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; cf. *People v. Perry* (1969) 271 Cal.App.2d 84, 97 [the fact that heroin was found in a balloon, protected by a cup, and concealed in a rain gutter, supported the inference it was sufficient to be used].)

Applying these principles, we conclude the evidence was sufficient. The record shows the officer who searched appellant inside the jail found a one-inch square baggie hidden in the ankle portion of appellant's sock. The baggie contained 20 milligrams of what the toxicologist described as a "white crystalline powder" that contained methamphetamine. Several factors support the conclusion that appellant possessed a usable quantity of the drug. First, appellant was a methamphetamine user,[5] and the methamphetamine at issue was found *hidden in his sock.* The jurors examined the bag. They could infer that appellant was knowledgeable concerning the requisite quantity considered usable and that appellant knowingly possessed and secreted the drug because he intended to use it. Second, appellant lied when Officer Wahl asked whether he had any drugs in his possession. The lie shows consciousness of guilt. Third, the packaging

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5 Appellant's friend Lacy Urmberg testified that she used methamphetamine with appellant while he possessed the stolen truck. While Urmberg immediately recanted this aspect of her testimony claiming she had not heard the question correctly, the jury was entitled to decide which version was true. Urmberg also testified while she was staying at the victim Terrell's house, she saw Terrell give appellant a bag with methamphetamine in it shortly before the vehicle theft that is the subject of this case occurred. Terrell denied giving drugs to appellant.

of the drug, a one-inch square ziplock plastic bag, provides some support for the jurors' verdict. It suggests appellant possessed the drug purposefully and not by mistake. Finally, the forensic toxicologist testified that there was enough substance in the bag that she could test it not just once, but twice. The jurors might reasonably conclude that if the toxicologist could manipulate it repeatedly, appellant could use it. We conclude the evidence is sufficient.

Appellant contends the evidence was insufficient under *People v. Leal* (1966) 64 Cal.2d 504 where the court stated, "the possession of a minute crystalline residue of narcotic useless for either sale or consumption . . . does not constitute sufficient evidence in itself to sustain a conviction." (*Id.*, at p. 512.) However, in *People v. Rubacalba, supra,* 6 Cal.4th 62, the court clarified its ruling in *Leal*: "The chemical analysis of the material possessed need only establish the existence of a controlled substance." (*Id.* at p. 65.) ". . . [T]he *Leal* usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. . . . No particular purity or narcotic effect need be proven." (*Id.* at p. 66.) The evidence we have discussed supports the conclusion that the methamphetamine at issue could be used. *Leal* is distinguishable.

Alternately, appellant seems to argue that the insufficiency of the evidence is demonstrated by the fact that it failed to satisfy CALJIC No. 12.32. The instruction states:

"Proof that the controlled substance possessed, if any, was in an amount sufficient to be used as a controlled substance may be established:

"1. By expert testimony, or

"2. By evidence that the amount possessed, if any, was sufficient to be used in any manner customarily employed by users of the substance."

Appellant's argument on this point is premised on the assumption that the usable quantity element *can only* be proven by direct evidence. That is not correct. (*People v. Palaschak, supra,* 9 Cal.4th at p. 1242.)

We conclude the evidence was sufficient.

E. New Trial

Appellant contends the trial court erred when it denied his motion for a new trial. His arguments on this point are premised on the statutory, due process, and equal protection arguments that we have discussed above. Since we have rejected each of those arguments, we reject the new trial argument as well.

F. Instruction

Appellant contends his smuggling conviction must be reversed because the trial court failed to instruct on the lesser included offense of possessing methamphetamine. (Health & Saf. Code, § 11377.) The People concede simple possession is a lesser included offense of section 4573, but they argue no other instruction was required here. We agree with the People.

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present . . . but not when there is no evidence that the offense was less than that charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154, internal quotation marks omitted.)

Here, the evidence showed appellant had methamphetamine hidden in his sock and that he knowingly brought that methamphetamine into the county jail. Indeed, appellant brought the methamphetamine into the jail even though Officer Wahl had warned him that doing so was a criminal offense. There is no evidence that appellant committed an offense that was less than that charged. The court was not obligated to instruct on simple possession.

G. Sentencing

Appellant contends his upper term four-year sentence for violating section 4573 must be reversed under the United States Supreme Court's recent decision in *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856 (*Cunningham*).

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the Supreme Court held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Cunningham,* the court ruled California's sentencing procedure is unconstitutional under that standard because it "authorizes the judge, not the jury, to find the facts permitting an upper term sentence . . . ." (*Cunningham, supra,* 127 S.Ct. at p. 871.)

But the rule articulated in *Apprendi* remains subject to an exception. It does not apply to "the fact of a prior conviction. . . ." (*Apprendi, supra,* 530 U.S. at p. 490.) In *Cunningham,* the court expressly recognized the continuing vitality of this exception. (*Cunningham, supra,* 127 S.Ct. at p. 860.)

Here, the trial court imposed the upper term primarily because appellant had a lengthy prior criminal history. As the court noted at the sentencing hearing, appellant had at least 10 prior felony convictions.[6] In our view, this is the type of finding the court was authorized to make under *Apprendi.* We conclude the court did not err when it based its sentencing decision on appellant's prior criminal history.

The court here also said it was imposing the upper term sentence because appellant's prior performance on parole was poor. We need not decide whether the court could validly rely on that factor because the transcript of the sentencing hearing demonstrates that appellant's lengthy prior criminal history was the primary factor that motivated the court's decision. A single factor can support an upper term sentence,

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6 We note the court could not validly rely on three of those prior convictions because they were charged and found true as enhancements. (See Cal. Rules of Court, rule 4.420(c).) However, appellant did not object on this ground in the court below, (*People v. Scott* (1994) 9 Cal.4th 331, 352-353) and even if he had, appellant had at least 7 prior felony convictions on which the trial court could validly rely.

(*People v. Osband* (1996) 13 Cal.4th 622, 728) and it is not reasonably probable the court would have imposed a different sentence, had it known the factor related to appellant's prior performance on parole was improper. (*People v. Price* (1991) 1 Cal.4th 324, 492.) Indeed, the court's comments are so clear we can say any possible error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

III. DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Gemello, J.

Miller, J.*

*Judge of the Superior Court of San Francisco County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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