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)

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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ARGUMENT

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

A. Appellant Did Not Commit the Required Act of Bringing Controlled Substances Into the Jail

Respondent claims that appellant's acts fit the plain language of section 4572, but this claim has merit only if the Court indulges in creative re-writing of the record. The only relevant acts with support in the record are that appellant possessed some minute quantity of methamphetamine, that he was brought in custody against his will into a jail facility for a non-

drug related crime, and that, when asked, he did not surrender the drugs to the arresting officer.

1. Appellant's Acts Did Not Violate the Plain Language of the Statute

Appellant did not voluntarily cause the drugs to enter prison, because the causing of the act was not subject to his control. Unlike respondent's hypothetical disgruntled soldier, dilatory student or sycophantic employee, appellant did not merely dislike going to jail, he had no ability to do otherwise. The very hallmark of the will - free choice - was not in play here.

Respondent's argument assumes a significant fact that is nowhere in the record: that appellant secreted drugs on himself in anticipation of going into jail and for that purpose. On the contrary, all we know is that appellant possessed the drugs; there is no evidence in the record of when or how he came to possess them. There are other, more reasonable inferences that could be drawn. We may assume that appellant possessed the drugs at the time he was stopped by the police as there was no other opportunity for him to obtain them between the time of the stop and his booking search at the jail. What we do not know from the record is whether appellant was carrying the drugs in his sock before being stopped or whether he placed them in his sock at the time of the stop. If the former, it stretches reason to say that appellant's earlier-formed intent to possess drugs could then miraculously transform into intent to carry drugs in jail. Even if the evidence were sufficient from the record to infer that appellant placed the

drugs into his sock at the time of the stop, this would be inadequate to support respondent's theory. Appellant may very well have placed it there to prevent the officer from arresting him for possession, unaware that he was to be arrested for auto theft. In other words the act of placing the drugs in his sock to escape detection during a traffic stop is not the same act as secreting drugs for the purpose of bringing them into jail. In any event, the record lacks sufficient evidence of the circumstances of appellant's possession to infer his intent.

Respondent also offers a *reductio ad absurdum* - that if appellant did not bring the drugs into the jail, then *nobody* brought the drugs into the jail. The fatal premise in this argument is respondent's assertion that the police did not bring the drugs into the jail, because they "knew nothing" about the drugs when bringing appellant to jail. (RB 9.) This claim proves too much. It was precisely the police who brought the drugs into jail, along with all of appellant's other possessions. Just as the express delivery worker brings packages without knowing of their content, the police brought appellant and his drugs into jail. Respondent assumes that one cannot "bring" something without knowing what it is. This is false, or there would be no need for the statute to penalize those who "knowingly bring" drugs into jail facilities. Just as the police committed the act of bringing drugs to jail, but lacked the intent to do so, appellant failed to commit the act of bringing, because he committed no voluntary act, regardless of whether he knew he possessed the drugs.

Respondent suggests that appellant's interpretation of section 4573 requires it to apply to persons other than prisoners. This is merely a straw man. Section 4573 by its terms applies to any person who knowingly, voluntarily brings drugs into jail facilities or knowingly causes others to commit such an act. The section excludes those who unintentionally bring such substances into jail facilities, on the basic principal that the criminal law requires both act and intention. (Pen. Code § 20.) Appellant's status as an arrestee is highly significant here, because it goes directly to the voluntary nature of his act. Respondent's hypothetical prison transferee who brings drugs from one facility to the next is more like the hypothetical solider than appellant, in that both the transferee and the solider would prefer to be elsewhere, but nonetheless are voluntarily committing the act of bringing their belongings with them. In contrast, appellant in no sense is voluntarily entering jail.

2. Respondent Fails to Distinguish the Cited Cases

In order to distinguish the cases appellant cited in support, respondent engages in a creative writing exercise to make the completely unsubstantiated claim that appellant "could have avoided liability before entering the facility by discarding the methamphetamine or by notifying Officer Wahl that he possessed narcotics." (RB 13.) Respondent further claims that Officer Wahl's admonition that bringing drugs into jail was a crime was actually an offer of amnesty "the clear import of which was that [appellant] was not subject to the penalty by disgorging any narcotics." (RB 13.) This assumption is unsupported by evidence in the record or by

common sense and demonstrates at best a startling unfamiliarity with the realities of criminal procedure and practice.

In *Martin v. State* (Ala.App. 1944) 17 So.2d 427, Martin "manifested a drunken condition by using loud and profane language." Martin at least committed the affirmative act of using loud and profane language. Here, appellant was arrested, handcuffed and brought onto jail grounds. Unlike Martin, he committed no affirmative act, and certainly could not have avoided liability. Officer Wahl did not admonish appellant that bringing drugs into the facility was illegal until *after appellant was already on jail grounds*. Thus even if one gives credence to respondent's "amnesty" theory, appellant did not have an opportunity to disgorge the drugs until he had already entered jail grounds and thus, on respondent's theory, was already in violation of the statute.

People v. Newton (1973) 340 N.Y.S.2d 77, 79-80 and *People v. Shaughnessy* (1971) 319 N.Y.S.2d 626, 628 are also both appropriate to inform this Court's analysis. Respondent attempts to distinguish *Newton* (where the defendant's plane made an unscheduled stop in New York and Newton was convicted of possessing an unlicensed firearm on the plane) on the basis that "New York law required a 'voluntary act' before the imposition of criminal liability." (RB 13.) Respondent may surprised to learn California law, too, requires a voluntary act before the imposition of criminal liability.[1] (Pen. Code § 20 ("In every crime or public offense there

[1] The notable possible exception being the limited area of strict liability offenses, a category to which section 4573 does not belong.

must exist a union, or joint operation of act and intent, or criminal negligence"); 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 [some act, committed or omitted in violation of law forbidding or commanding it, is necessary for there to be crime].)

Respondent also tries to distinguish *Newton* and *Shaughnessy* on the grounds that the defendants there arrived in a place through misfortune or accident. (RB 14.) According to Respondent "the jail was no unanticipated layover [for appellant] or wrong turn on the way to somewhere else" (Id.) The implication then, is that appellant *intended* to enter the jail. On the contrary, appellant was driving on the highway, stopped by police, physically restrained and forced to enter the jail. His detour to jail is analogous to that of the defendants in *Newton* and *Shaughnessy*, both of whom found themselves somewhere they were not supposed to be, and not of their own volition.

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

Respondent states the obvious, that section 4573 does not require proof that a person physically and personally moved drugs from outside the jail facility to inside the facility. A person who causes drugs to enter the jail by, for example, paying someone else to do it would be liable under the statute. However, what is required is that the person *intend that the drugs*

enter the facility. There is insufficient evidence here that appellant harbored that intent.

Respondent's citation to *People v. James* (1969) 1 Cal.App.3d 645 is both incomplete and inapposite. In *James*, the defendant kept a pistol in jail overnight and handed it to another inmate for disposal. (Id. at pp. 647-648.) The passage respondent cites is prefaced by this very important qualification: "The question of whether a person confined in jail can be convicted under this section for bringing a firearm into a jail even though he did not voluntarily enter the jail *need not be answered at this time. It is sufficient from the facts of this case that respondent knowingly possessed a firearm while in jail*, after he had ample time to surrender it to the jailer." (Id. at p. 650 [emphasis supplied].) Thus *James* does not provide authority for respondent's position and should be disregarded.

Respondent's discussion of superseding and intervening causes is misplaced. What is fatal to appellant's conviction that there was no joint operation of act and intent as required by Penal Code section 20. At most, appellant had the earlier intent to possess drugs, but not the intent to bring them into jail. Under section 20, the defendant's wrongful intent and his physical act must concur in the sense that the act must be motivated by the intent. (*People v. Green* (1980) 27 Cal.3d 1, 53 *overruled on other grounds by People v. Martinez* (1999) 20 Cal.4th 225, 233-237 and *People v. Hall* (1986) 41 Cal.3d 826, 834 fn. 3.) If the act here was placing the drugs in his sock, then to violate the statute the act must have motivated by the intent

to bring them into jail.[2] The record does not shed light on why the drugs were in appellant's sock or when they arrived there. Appellant's intent to evade detection from the police at an earlier time is not the same as intent to smuggle drugs into jail.

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

Application of section 4573 to appellant creates two distinct constitutional problems: violation of due process and infringement of the privilege against self-incrimination.

A. Application of Section 4573 to Arrestees in Appellant's Position Violates Due Process

Respondent urges the Court to adopt a position that subjects any arrested person who possesses drugs to higher penalties unless he or she (1) discloses the existence of the drugs before entering a jail facility or (2) the drugs happen to be discovered before entering the facility. Notably, respondent does not suggest that persons in appellant's position would receive the same alleged offer of amnesty that Officer Wahl supposedly made.

Respondent dismisses the potential for abuse that affirmance of the decision below would invite by assuring the Court that trained police officers will always search a subject for their safety before transporting the person. (RB 23.) This may be so, but ignores the reality any trained officer would acknowledge, that there is a difference between a pat search for

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[2] This analysis does not convert section 4573 into a specific intent crime.

officer safety and a thorough search of a person for contraband. Thus it remains the case that should the Court affirm the decision below an officer could subject an arrestee to a higher penalty if he suspects the person of possessing narcotics by simply waiting to perform a thorough search until they have reached the jail facility. Indeed, in this case, Officer Wahl did perform a pat search upon arresting appellant, but did not find the drugs. (RT 10/17/05 152.)

Appellant does not argue that punishment for possession is inappropriate, but additional punishment for smuggling when he and the drugs were brought there involuntarily violates fundamental fairness and implicates the Due Process Clause.

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

Respondent repeats the baseless claim that Officer Wahl's warning "was an offer of benefit – the chance to avoid liability for the present offense – rather than a demand for incriminating evidence." (RB 21.) Respondent does not provide any evidence to support its theory of immunity, and cannot do so because there is no basis in the record for such an assertion.

Respondent's citation to *Schmerber v. California* (1966) 384 U.S. 757 also misses the mark. Appellant was in custody and asked whether he possessed drugs. Appellant was restrained and thus could only give a verbal answer to officer's question, and such an answer is the type of

compelled testimonial statement the Fifth Amendment prohibits. The privilege also protects against the forced production of physical evidence.[3] Cases regarding the compelled production of person's personal physical characteristic, such as *Schmerber*,[4] are not relevant here where the issue is the forced production of physical evidence. Even the act of producing the drugs in response to questioning could constitute a testimonial act in that it would be acknowledging dominion and control over the subtance. (See *United States v. Hubbell* (2000) 530 U.S. 27, 36-38 [Fifth Amendment protects against compelled production of documents where the act of producing such documents has testimonial aspects, e.g., by acknowledging possession of the documents.])

Respondent also fails to distinguish *Marchetti v. United States* (1968) 390 U.S. 39 and *Grosso v. United States* (1968) 390 U.S. 62, and relies solely on the fact that there were different offenses in play in those cases. Respondent argues that "appellant was punished for bring drugs into a jail, not for refusing to provide incriminating information." (RB 23.) Yet respondent also urges that had appellant simply offered up the drugs in response to Officer Wahl's question, he could have avoided liability. In

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[3] This is merely common sense. The accused murderer cannot be compelled to confess the location of the murder weapon; otherwise the privilege would be meaningless.

[4] *Schmerber* dealt with a forced blood draw, not compelled questioning.

other words, appellant was subjected to criminal penalties *precisely because he did not provide incriminating information.*[5] Thus *Marchetti* and *Grosso* are right on point here; the Fifth Amendment prohibits such Hobbesian choices.

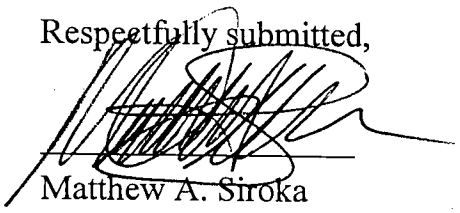
Notwithstanding respondent's suggestion that the Fifth Amendment is somehow suspended when police officers have a duty to investigate and prevent the completion of crimes (RB 24), *Miranda v. Arizona* (1966) 384 U.S. 436 and its progeny have long since established that the Constitution still protects those under arrest.

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: November 13, 2007

Respectfully submitted,



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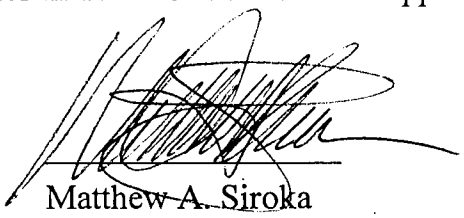
[5] This is so regardless of respondent's "amnesty" theory because, (1) the theory is erroneous and (2) even were it not, appellant would still be subject to punishment for simple possession, and thus the privilege against self-incrimination is still applicable.

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 3278 words in Appellant's Reply Brief on the Merits.



Matthew A. Siroka
Counsel for Appellant Tony R. Low

DECLARATION OF SERVICE BY MAIL

Re: People v. Tony R. Low Court No: S151961

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 November 13, 2007 I served a true copy of the attached APPELLANT'S REPLY 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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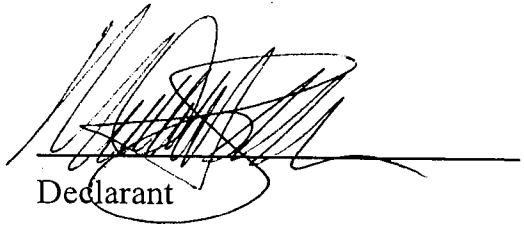

Declarant