IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

TONY RICHARD LOW,
Defendant and Appellant.

S151961

First Appellate District, Division Five, No. A112831
Solano County Superior Court No. FCR225077

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

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ISSUES PRESENTED

"The issues to be briefed and argued are limited to the following: 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? Can section 4573 constitutionally apply in such circumstances?" (Cal. Supreme Ct. Order, filed June 13, 2007.)

INTRODUCTION

Penal Code section 4573[1] punishes "any person" who knowingly brings a controlled substance into a state or local penal facility, without legal authorization or the custodian's permission. In this case, police arrested appellant for car theft and took him to jail. Told by the arresting officer that bringing controlled substances into jail was illegal, appellant denied having any. Inside the facility, authorities found methamphetamine on appellant. We argue here that appellant violated section 4573 by knowingly bringing illegal drugs into the jail and that, as applied, the statute is constitutional.

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1. All further statutory references are to the Penal Code, unless otherwise specified.

STATEMENT OF THE CASE

On June 29, 2005, Sacramento County Sheriff's Detective Ronald Jones stopped a truck that appellant had taken from his employer without permission and that the employer had reported stolen. (RT 37-43, 48-49, 88-89, 92.) Appellant put his hands in the air as initially directed, but became uncooperative. He moved around inside the truck (which had tinted windows), had his hands going up and down, and failed to turn off the engine and throw out the keys, as Detective Jones instructed. (RT 49-51, 62, 70, 151.) At one point, appellant put the truck in gear and drove forward a few inches. (RT 51.)

Within five minutes, Officer Christopher Wahl arrived as backup. (RT 51-52.) Wahl used the public address system on a patrol vehicle to order appellant out of the truck, then arrested him. (RT 52, 151.) After Wahl gave a *Miranda* admonition, appellant waived his rights and denied stealing the truck. (RT 152-153.) Wahl pat-searched appellant and found no weapons or contraband. (RT 153.) Wahl drove appellant to the county jail. At the sally port, he told appellant that it was illegal to bring drugs inside the jail and asked if appellant had any. Appellant denied having drugs. (RT 153-154.) When appellant was searched inside the jail, he had methamphetamine concealed in his sock. (RT 131, 173, 176.)

A jury convicted appellant of vehicle theft and bringing drugs into a jail. At a bifurcated trial, the court found appellant had three prior prison terms. (CT 74.) Appellant moved for a new trial, claiming that section 4573 did not apply to his conduct and that he was unconstitutionally punished for exercising his privilege against self-incrimination. (CT 82-90.) The trial court denied the motion for a new trial. (CT 123.) It ruled that the plain language of the statute made it applicable to the case, and that the Fifth Amendment was not implicated because appellant's "remaining silent did not spawn" the drug smuggling crime. (RT [1/20/06] 4-5.)

Appellant appealed and asserted that "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." (Opn. at 3.) The Court of Appeal rejected his 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 otherwise not present." (Opn. at pp. 3-4.) The Court of Appeal found nothing "absurd," as appellant claimed, in finding a smuggling offense if the arresting officer failed to conduct a thorough search. (Opn, at 4.) It noted that its holding did not render drug possession a crime of attempted smuggling since the latter offense would require specific intent to bring drugs into a jail. (Opn. at p. 4.) Additionally, it held that section 4573 requires general criminal intent as opposed to intentional entry of the detention facility, and that its plain language was not limited to "non-inmates." (Opn. at 4-5.)

Finally, the Court of Appeal rejected appellant's claim that he was unconstitutionally compelled to choose between disclosing his possession of illegal drugs as asked by Officer Wahl or else facing harsher punishment for smuggling his drugs into jail, a choice allegedly violating his right to due process, his privilege against self-incrimination, and his right to equal protection. The Court of Appeal found the privilege was not implicated by this case and held that drug smugglers are not similarly situated to mere possessors for purposes of the right to the equal protection of the laws.[2/] (Opn. at pp. 6-8.)

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2. Appellant has not pursued the equal protection claim, so we do not address it.

SUMMARY OF ARGUMENT

Appellant violated section 4573 by knowingly bringing methamphetamine into the county jail. Appellant's focus on his transportation to jail by the police being "involuntary" is misplaced. Appellant personally took concealed drugs into jail, fully aware he was doing so, and thereby committed an additional crime of drug smuggling. His act of bringing the drugs into the jail was precisely the act described by the statute, even though, like most drug smugglers in custody, he presumably preferred not to be incarcerated.

The plain language of section 4573 requires neither the physical act of carrying drugs into a detention facility nor the intent to enter the facility voluntarily. It encompasses the act of any person who, without legal authority and with general criminal intent, knowingly causes a controlled substance to be brought into a penal facility. The statute neither immunizes prisoners, nor conditions the liability of prisoners for knowingly smuggling drugs into the facility to instances where a prisoner's entry into the institution is "intentional." Simply stated, section 4573 contains no words that exclude prisoners,[3] or that limit the liability of prisoners to acts of aiding and abetting or conspiracy, or that require prisoners to formulate specific intent to bring drugs into the facility.

Were section 4573 subjected to statutory construction, it would not favor appellant's argument. He evidently would have the prosecution prove under section 4573 either (1) that the perpetrator of an act of drug smuggling was not

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3. In this brief, the People refer interchangeably to arrestees, detainees and prisoners. Most of appellant's arguments would apply equally to any person in custody who is in the possession of illegal drugs when the individual is transported to a secured penal facility. Appellant was an arrestee driven in a patrol vehicle to a county jail. But our substantive response to his claims would be much the same had he instead been a pretrial detainee moved on foot into a holding cell, or a material witness trans-shipped by boat into a harbor lock-up, an extradited fugitive flown by helicopter into a county farm, or a sentenced felon bussed by paddy-wagon into a state prison.

a prisoner or else (2) that the prisoner intentionally had sought his own arrest or transfer to the facility in order to smuggle drugs into the facility. Imposing such a proof element would amount to rewriting the statute. Any such construction of the statute is wholly unnecessary to its operation and would be highly detrimental to its objective of keeping illegal drugs out of camps, jails, and prisons.

Section 4573 was constitutionally applied in appellant's case. Appellant's argument that the state caused his involuntary commission of the offense does not accurately reflect his actions. Furthermore, the claim extends due process strictures against outrageous government far beyond logic and their jurisprudential parameters.

The argument that appellant was impermissibly forced to choose between revealing his possession of illegal drugs or suffering the penalty for drug smuggling is likewise meritless. The privilege offers no protection in the circumstances of this case. A prisoner is able to avoid the choice of which appellant complains in every case by not possessing illegal drugs. Appellant additionally could have avoided his dilemma by not stealing a vehicle as the result of which he was arrested and transported to jail. Appellant essentially characterizes his punishment as one exacted for failing to make a statement incriminating himself while in custody. But his crime was drug smuggling, not failure to confess his possession of drugs. The privilege is not implicated in punishing drug smuggling by a prisoner who is taken to jail.

ARGUMENT

I.

APPELLANT VIOLATED SECTION 4573 BY KNOWINGLY BRINGING METHAMPHETAMINE INTO COUNTY JAIL AFTER HIS ARREST ON ANOTHER CHARGE

Appellant claims his conduct did not violate section 4573. (AOB 4-5.) He asserts that he did not commit "the affirmative act of bringing drugs into jail," (AOB 6), because "he was brought into jail involuntarily" (AOB 8). He argues further that he did not harbor what he characterizes as "general intent to commit the crime, because there is no evidence that [he] intended to go into the jail." (AOB 10.) Appellant's arguments should be rejected.[4/]

A. The Plain Language Of Section 4573 Encompasses Appellant's Conduct

Section 4573 reads in its entirety:

> Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give the authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison, prison road camp, prison forestry camp, or other prison camp or prison farm or any other place where prisoners

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4. In his opening brief, appellant references, and at one point quotes, reasoning from the opinion of the Court of Appeal in *People v. Gastello*, review granted June 13, 2007, S153170. (AOB 3, 8, fn. 7, 10.) This Court's grant of review in *Gastello* determined that the Court of Appeal's opinion in that case was not to be published unless ordered otherwise. (Cal. Rules of Court, rule 8.1105(e)(1); *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 709, fn. 12.) An unpublished opinion may not be cited or relied upon, subject to certain exceptions not applicable here. (Cal. Rules of Court, rule 8.1105(a); *People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4.) Accordingly, respondent disregards appellant's references to the lower court's opinion in *Gastello*.

of the state are located under the custody of prison officials, officers or employees, or into any county, city and county, or city jail, road camp, farm or other place where prisoners or inmates are located under custody of any sheriff, chief of police, peace officer, probation officer or employees, or within the grounds belonging to the institution, any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code,[5] any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a 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.

1. Appellant Committed The Required Act Of Bringing Controlled Substances Into The Jail

Appellant argues that his being brought into the jail under arrest while he possessed drugs is not an "affirmative act that can be called bringing drugs into jail." (AOB 6.) He asserts the prohibited act is entry of a facility with drugs by a person who enters voluntarily. (AOB 7-8.)

Appellant's argument ignores the plain language of section 4573. "The first principle of statutory interpretation requires that we turn initially to the words of the statute to ascertain the Legislature's intent. '[I]f "the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature."' [Citation.]" (*People v. Palacios* (2007) 41 Cal.4th 720, 728, internal quotations omitted.)

Section 4573 punishes "any person who knowingly brings . . . into any

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5. Methamphetamine is a Schedule II controlled substance. (Health & Saf. Code, § 11055, subd. (d)(2).) Its possession is prohibited by Health and Safety Code section 11377, subdivision (a).

county . . . jail . . . any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code," without having authorization. The word "voluntarily" does not appear. There is no reason to imply a limitation that creates an exemption for prisoners or that requires special proof elements for detainees. Neither the statutory language nor the legislative objective requires that result.

To assert, as appellant does, that a person who is "involuntarily" brought into a penal facility cannot "bring" drugs into the facility ignores the ordinary meaning of the word "brings." To "bring" is "to convey, lead, carry, or cause to come along from one place to another" or "to take or carry along with one." (Webster's 3d New Internat. Dict. (2002) p. 278.) Appellant personally conveyed methamphetamine into the jail. By the same token, his concealed carrying of the drug is the very act that caused the drugs to come along with him into the jail. The act of a person who knowingly "brings" controlled substances into a jail describes appellant's conduct not marginally, but precisely.

As a matter of ordinary English, appellant's focus on the involuntariness of his trip to jail is misplaced. Obviously, a person can "bring" something into a place they enter involuntarily. The inducted and mutinous soldier brings a gun into battle. The student brings lunch into school even if she much prefers being home in bed. And the employee at a boss's wedding or the job-seeker at a politician's inaugural might bring gifts despite their purely obligatory appearances at the function.

That appellant never *chose* jail means he did not "bring" drugs into jail only if it means he never brought his sock (or his pants or his shirt) into jail either. That the police delivered him to jail simultaneously with his bringing the drugs is irrelevant. It may be typical of drug smuggling that a prisoner in transit supplies locomotion. It may even be the most frequently observed form of the

phenomenon. But the ordinary meaning of "brings," as just shown, includes the act not only of conveying something, but also of causing a thing to come along from one place to another. Consequently, no person physically has to carry drugs into a facility to violate section 4573.[6]

As respects voluntariness, appellant intentionally did the act that caused the drugs knowingly to be brought into the facility. "An act is an occurrence which is an exertion of the will manifested in the external world." (Perkins & Boyce, Criminal Law (3d ed. 1982), p. 610.) It is a misnomer to view the particular result inhering in appellant's carrying concealed drugs into the jail as having to accord with some further actual or inferred purpose, intention, desire, or motive. To the extent he seeks a contrary interpretation of section 4573, his argument lacks support in the statute. Appellant carried his drugs inside the jail, by concealing those drugs upon his person, knowing it would cause them to be brought along with him. His bringing the drugs into jail by such means manifests the required exertion of his own will. As he lacked authorization to possess controlled substances, all the elements of the offense conjoined.

Put another way, if appellant did not "bring" his drugs into the jail, it is hard to see who did. It was not the police, who knew nothing about the drugs in taking him to jail. And it was not correctional staff, who did not know about the drugs when they allowed appellant to enter the jail. By process of elimination, appellant's actus reus argument implies *nobody* brought drugs into the jail. Indulging that fiction is a highly unlikely reading of section 4573, since nothing in the plain words of the statute allows it.

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6. Consider Robert Stroud, better known as the Birdman of Alcatraz. He obtained equipment from authorities ostensibly to market medications he developed using birds (actually the equipment was used to construct a still). (See http://www.alcatrazhistory.com/stroud.htm (last visited Oct. 9, 2007).) Had Stroud been the Birdman of San Quentin and marketed to inmates narcotics air-supplied via carrier pigeon, he would have violated section 4573 without his moving anywhere, except perhaps to a cell window.

2. Statutory Construction Also Reflects That Appellant's Act Of Bringing Controlled Substances Into The Jail Violated Section 4573

Even if the language of section 4573 were not sufficient answer to appellant's claim, weighty reasons exist against construing the statute in his favor. The fundamental rule when construing a statute is to determine the Legislature's intent. (*People v. Statum* (2002) 28 Cal.4th 682, 689.) "Where more than one statutory construction is arguably possible, our policy has long been to favor the construction that leads to the more reasonable result. [Citation.]" (*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 290, internal quotation marks omitted.) "This policy derives largely from the presumption that the Legislature intends reasonable results consistent with its apparent purpose. [Citation.]" (*Ibid.*) The reviewing court's "task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results." (*Ibid.*)

The least likely interpretation of section 4573 is that it applies only to persons who "voluntarily" bring drugs into a penal facility, by which appellant evidently means persons other than prisoners. First, it is highly dubious the Legislature would employ section 4573's phrase "[e]very person" to signify a choice to treat prisoners as possessors and to treat others as smugglers. If anything, the enhanced punishment applies more logically to prisoners, than to any other person. A central purpose of section 4573 is to deter unauthorized drugs from reaching inmates. The threat is advanced when the smuggler actually will join the inmate population.

Second, had the Legislature intended to exempt prisoners from liability under section 4573, or somehow condition their liability, it easily could have done so. In fact, it did exempt prisoners in a related statute. Section 4573.9

prohibits the furnishing of a controlled substance to an inmate by "any person, *other than a person held in custody*" (emphasis added). When the Legislature employs a limiting condition in one statute and withholds it in a related law on the same general subject, the inference is almost compelled that it meant not to employ the limitation in the second case. Thus, "any person" should be read in its natural sense. A contrary construction, particularly one which would carve out an exception wholly unnecessary and highly detrimental to the operation of the statute, should be avoided. (See *People v. Statum*, *supra*, 28 Cal.4th at pp. 689-690.)

Third, even were section 4573 susceptible of appellant's interpretation, that interpretation remains unsound. When different statutory interpretations are possible, a court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

Section 4573, as is apparent from our previous discussion, is one of a series of statutes regulating controlled substances in jails and prisons. (See e.g., §§ 4573.5, 4573.6, 4573.8, 4573.9.) "The obvious purpose of these statutes is to deter the presence of illicit drugs in custodial institutions; the statutes are deemed necessary to ensure orderly administration and security within such institutions." (*People v. Harris* (2006) 145 Cal.App.4th 1456, 1461, internal quotation marks omitted.) Exempting a large class of persons capable of introducing illegal narcotics into secured facilities would therefore defeat the purpose of the statute.

This case does not involve a peripheral application of section 4573. By introducing methamphetamine into a detention facility, appellant caused precisely the harm sought to be prevented by the statute. Holding section 4573

inapplicable in such cases would therefore defeat its purpose. Because the present matter involves an arrestee whose status is actually no different for present purposes than the status of other prisoners taken into a penal facility, acceptance of appellant's restrictive reading of the statute would have severe detrimental effects on the orderly administration and security of such institutions.

3. The Decisions Cited By Appellant Are Distinguishable And Do Not Support His Construction Of Section 4573

Appellant's actus reus argument attempts to analogize to two decisions involving public intoxication. (AOB 7.) In *Martin v. State* (Ala.Ct.App. 1944) 17 So.2d 427 (*Martin*), the defendant was arrested at his home and taken by police officers onto the highway. (*Ibid.*) He was convicted of manifesting a drunken condition on a public highway. (*Ibid.*) The Alabama appellate court reversed: "Under the plain terms of this statute, a voluntary appearance 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." (*Ibid.*)

In *Commonwealth v. Meyer* (Pa.Super.Ct. 1981) 431 A.2d 287 (*Meyer*), the defendant was arrested in a private club and taken outside by the police. (*Id.* at p. 288.) He was convicted of public drunkenness. (*Id.* at pp. 287-288.) Relying on *Martin*, the Superior Court of Pennsylvania reversed because the defendant was not voluntarily present in public. (*Id.* at pp. 289-290.)

Martin and *Meyer* are distinguishable from the instant case in two ways. First, even before his arrival at the jail, appellant knowingly possessed methamphetamine, a crime. (Health & Saf. Code, § 11377, subd. (a).) On the other hand, there is no indication in *Martin* or *Meyer* that the defendants' intoxication was illegal until the police took them to a public place. Second,

unlike the defendants in *Martin* and *Meyer*, appellant had the ability to preclude liability under the statute he violated. Nobody compelled appellant to bring methamphetamine into the jail. He could have avoided liability before entering the facility by discarding the methamphetamine or by notifying Officer Wahl that he possessed narcotics. Indeed, appellant was explicitly advised of the consequences of bringing a controlled substance into a correctional facility, the clear import of which was that he was not subject to the penalty by disgorging any narcotics.[7] By contrast, the defendants in *Martin* and *Meyer* could not relieve themselves of their own inebriation. (See also *In re David W.* (1981) 116 Cal.App.3d 689, 692 [minor cannot be convicted of being under the influence of drugs in public after officers removed him from his home].) Accordingly, appellant's reliance on decisions addressing public intoxication is unavailing.

Appellant relies on two other decisions that are likewise distinguishable, albeit for different reasons. In *People v. Newton* (Sup.Ct. Crim. Term 1973) 72 Misc.2d 646 [340 N.Y.S.2d 77] (*Newton*), the defendant's flight made an unscheduled deviation from international waters to land in New York where he was convicted of possessing an unlicensed firearm on board the plane. (*Id.* at p. 79.) While intent was not an element of that offense, New York law required "a voluntary act" before the imposition of criminal liability. (*Id.* at pp. 79-80.) Accordingly, the trial court granted a writ of habeas corpus, since the defendant's presence in New York was involuntary. (*Id.* at p. 80.)

In *People v. Shaughnessy* (Dist.Ct. Tr. Term 1971) 66 Misc.2d 19 [319 N.Y.S.2d 626] (*Shaughnessy*), the defendant was a passenger in a car heading to a park. (*Id.* at p. 627.) However, instead of entering the park, the driver took

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7. This answers appellant's suggestion that he was already on jail grounds and in jeopardy of violating section 4573 when Officer Wahl advised appellant of the prohibition. (AOB 8.)

the car onto private property across the street. (*Ibid.*) The District Court, Nassau County, Third District, acquitted the defendant of trespassing, because she had not voluntarily entered private property. (*Id.* at pp. 628-629.) *Newton* involved a special statute without parallel to section 4573, and *Shaugnessy* involved no personal act of the defendant. Those distinctions aside, the defendants in both *Newton* and *Shaughnessy* were charged with offenses based on their having arrived in a place temporarily "through misfortune or by accident." (§ 26.) Appellant cannot claim misfortune or accident, since he brought his drugs along knowing that he was entering a jail. And the jail was no unanticipated layover or wrong turn on the way to somewhere else. Accordingly, appellant's reliance on *Newton* and *Shaughnessy* is misplaced, and his argument fails.

B. Appellant's Knowing Act Manifested General Criminal Intent

Appellant contends he lacked the requisite mens rea to sustain his conviction for smuggling drugs into jail, because he did not act intentionally. (AOB 9-10.) Appellant's claim is without merit.

"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. Atkins* (2001) 25 Cal.4th 76, 82 (*Atkins*), quoting *People v. Hood* (1969) 1 Cal.3d 444, 456-457.) As section 4573 makes no reference "to intent to do a further act or achieve a future consequence," it is a general intent crime. (See *Atkins*, *supra*, 25 Cal.4th at p. 82.)

Section 4573 requires drugs to be brought into jail "knowingly." That term is defined in section 7, subsection 5: "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the

provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission."

Substantial evidence supports the jury's conclusion that appellant possessed general criminal intent and knowingly brought the methamphetamine into jail.[8] Appellant's awareness that he possessed methamphetamine was amply shown by the drug's hidden location in his sock and his prior use of the drug. (RT 200, 203-204.) Appellant's knowledge that he was entering jail was shown by his awareness that he was in custody in a patrol vehicle and being transported to a detention facility when Officer Wahl advised him of the prohibition against smuggling.[9] Because appellant brought the drugs into jail knowingly, he possessed the mental element required by section 4573.

Appellant kept his drugs concealed and consequently confronted a difficult choice of revealing them or else bringing them into the facility. Faced with these alternatives (as are all prisoner-drug smugglers in transit to a secured facility), appellant brought the drugs along in the apparent hope they might not be detected. Whatever expectation he harbored, desperation he felt, or motive he bore, it does not negate his general criminal intent in knowingly bringing along concealed drugs into the jail. (See, e.g., *Dixon v. United States* (2006) ___ U.S. ___ [126 S.Ct. 2437, 2441-2442] [defenses of duress and necessity, although capable of nullifying guilt, do not refute existence of mens rea requiring defendant to act knowingly and wilfully].)

Appellant's defective causation argument cannot masquerade as a mens rea issue. His status as a prisoner in transit did not make his bringing drugs into the

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8. The jury was instructed on intent. (RT 259, 260.) Appellant takes no issue with the instructions.

9. Respondent also notes that section 4573 requires that its prohibition "be clearly and prominent posted outside of, and at the entrance to, the grounds of all detention facilities . . . ." It is presumed that such an official duty was regularly performed here. (Evid. Code, § 664.)

detention facility "unintentional." As explained in *People v. Cervantes* (2001) 26 Cal.4th 860 (*Cervantes*):

> "In general, an 'independent' intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be 'independent' the intervening cause must be 'unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.' [Citation.] On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability. 'A defendant may be criminally liable for a result directly caused by his act even if there is another contributing clause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. . . . "The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. []The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act."' [Citation.]"

(*Cervantes*, *supra*, 26 Cal.4th at p. 871.)

Here, appellant had every reason to foresee precisely what occurred. Moreover, he could have avoided the risk of liability under the statute at several points. He could have thrown away the drugs before the truck was stopped. He could have left the drugs while he moved about inside the truck after he was stopped. He could have disgorged the drugs upon exiting the truck. He could have removed the drugs before the pat-search. And at the sally port to the jail, when provided by Officer Wahl with yet another opportunity to avoid liability under section 4573, he could have asked the officer to take his sock.

People v. James (1969) 1 Cal.App.3d 645 (*James*) supports our argument. In that case, the defendant was charged with possessing a firearm in jail, a violation of section 4574. (*Id.* at p. 647.) The trial court set aside the information on the ground that "there is nothing to indicate that the [d]efendant voluntarily took the weapon anywhere. He was under arrest." (*Id.* at p. 649.) The Court of Appeal reversed. It held: "[The defendant] knowingly possessed

a firearm while in jail, after he had ample time to surrender it to the jailer. The fact that [the defendant] had no choice about going to jail is irrelevant. He knew he had the gun and he knew he should have turned it over to the jailer when he was booked. . . . 'To render a person guilty of crime it is not essential to a conviction that the proof should show such person to have entertained any intent to violate law. [Citations.] It is sufficient that he intentionally committed the forbidden act.' [Citations.] The [defendant]'s action comes within that proscribed by . . . section 4574." (*Id.* at p. 650.)

As in *James*, no one compelled appellant to possess contraband or to bring it with him to jail. That was true before appellant was arrested and it remained true afterward. Appellant was driving a stolen vehicle with methamphetamine in his possession. He remained in the truck for five minutes after it was stopped trying to stave off being arrested. He had committed two crimes and knew his physical apprehension was imminent. That he would be taken to jail for the vehicle theft was more than just "a possible consequence which might reasonably have been contemplated" at that time. (*Cervantes, supra*, 26 Cal.4th at p. 871.) Appellant is not excused from liability under section 4573 simply because a "contributing cause" to his transportation into jail was his earlier crime causing his arrest. Appellant's criminal—and intentional—acts resulted in his arrest and transportation to jail, just as it was his criminal and intentional act to keep drugs concealed on his person. Accordingly, his bringing the drugs into the jail was a knowing act accompanied by general intent and sufficient for his conviction under section 4573.

Appellant's contrary construction of the statute seeks a regime very different from the one that exists. Under his conception of section 4573, prisoners generally would have liability only if they aided and abetted or conspired in a non-prisoner's delivery of drugs into a secured detention facility. Presumably, only the prisoner who formulated a specific intent to enter the institution

"voluntarily" to introduce the drugs inside could perpetrate the crime. Appellant fails to support such a limitation in either the language or the history of the statute. Nor is such a limitation required in order to apportion liability appropriately. Accordingly, appellant's argument must be rejected.

II.

SECTION 4573 IS CONSTITUTIONAL AS APPLIED TO APPELLANT

Appellant contends that section 4573 is unconstitutional as applied to him. First, he claims his conviction "violates due process because the state caused him to involuntarily commit the proscribed act." (AOB 11.) Second, appellant asserts that "application of section 4573 to arrestees . . . impermissibly forces them to choose between self-incrimination or enhanced penalties for smuggling." (AOB 14.) These claims lack merit.

A. Application Of Section 4573 To Appellant Does Not Violate Due Process

In contending that his conviction for bringing drugs into a jail violates due process, appellant invokes "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." (AOB 11.) He asserts that the application of section 4573 to arrestees "is unnecessary and unfair" for it could "turn all arrested drug possessors into smugglers subject to more severe penalties." (AOB 13.) Appellant's claims should be rejected.

"Where . . . a penal statute may be subject to both constitutional and unconstitutional applications, courts evaluate the propriety of the sanction on a case-by-case basis. We have said that a statute is presumed to be constitutional and that it must be upheld unless its unconstitutionality 'clearly,

positively and unmistakably appears.'" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404.)

The Court has explained the "outrageous conduct defense" in the following terms:

> The outrageous conduct defense has been called the "deathbed child of objective entrapment." [Citation.] In [*United States v. Russell* (1973) 411 U.S. 423 (*Russell*)], the Supreme Court reaffirmed the subjective test for entrapment focusing on "the intent or predisposition of the defendant to commit the crime." (*Id.* at p. 429.) However, the high court left open the possibility of an objective constitutional defense based on due process: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction [citation], the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that fundamental fairness, shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment." (*Id.* at pp. 431-432[].) In *Hampton v. United States* (1976) 425 U.S. 484, the high court again left open the possibility that a defendant might successfully invoke an outrageous conduct defense even if the entrapment defense were unavailable to him because of his predisposition to commit the crime.
>
> The vast majority of the federal circuit courts of appeals allow the outrageous conduct defense. [Citations.]
>
> While the test for entrapment in California is objective and focuses on the conduct of law enforcement ([*People v. Barraza* (1979) 23 Cal.3d 675,] 689-690), this court, like the United States Supreme Court, has left open the possibility that we might accept the outrageous conduct defense. In *People v. McIntire* (1979) 23 Cal.3d 742, in the course of rejecting the prosecution claim that entrapment cannot be effected through an unwitting agent, an argument that would have permitted unconscionable law enforcement activity so long as the target of entrapping agents was not reached directly but indirectly through the use of unsuspecting dupes, we observed: "Sufficiently gross police misconduct could conceivably lead to a finding that conviction of the accused would violate his constitutional right to due process of the law. [Citation.]" ([*Id.*] at p. 748, fn. 1.)

(*People v. Smith* (2003) 31 Cal.4th 1207, 1223-1225.)

No analogy to the outrageous government conduct defense is sufficient to render appellant's conviction a violation of due process. Appellant's arrest was supported by probable cause and satisfied the state and federal Constitutions. Appellant makes no claim to the contrary. Accordingly, it was not "misconduct" for the police to have arrested appellant for driving a stolen car and to have transported him to jail. Nor was the manner of appellant's arrest and transportation "outrageous" or "shocking to the universal sense of justice." (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354-355 [apparently typical arrest procedure, although "humiliating," was not unconstitutionally "extraordinary"].) As discussed, *ante*, the police transported appellant to jail as the direct consequence of his earlier crime, and his bringing drugs into the jail was the wholly foreseeable consequence of his decision to possess those drugs even after being apprehended for driving a stolen vehicle. There was nothing "fundamentally unfair" in prosecuting him for bringing his drugs into jail. The assertion that the police made him commit that crime by taking him to jail is the only thing that arguably approaches the outrageous.

Appellant raises a "disturbing" possibility that "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." (AOB 13.) Of course, appellant was searched before he was brought to the jail, so that is not his case. "The rule is well established . . . that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. [Citations.]" (*In re Cregler* (1961) 56 Cal.2d 308, 313.)

If appellant means to imply that the affirmance of the judgment in his case will lead police to forego pre-transportation searches of arrestees in hopes of discovering contraband in a search later at the jail, the argument is specious. A court must be confident that trained police officers will value their own safety more highly than appellant's argument assumes. Even if appellant's premise were indulged, nothing in the due process clause would require a jail smuggling conviction to be invalidated were the arrestee not searched until the booking inside the jail. It is a crime to possess controlled substances without valid authorization and a further crime to bring those drugs into a detention facility. One's retention of the drug after a lawful arrest in hopes of trying to evade detection compounds the illegality should a breach of the security of the facility actually result. Additional punishment is warranted for the more serious harm.

B. Application Of Section 4573 To Appellant Does Not Violate The Fifth Amendment

Appellant contends that "[a]pplying 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.'" (AOB 14.) This claim lacks merit.

Section 4573 does not compel anyone to choose between making an incriminating statement or suffering punishment for remaining silent. Rather, it prohibits bringing a controlled substance into a penal institution. Warned by Officer Wahl of the offense of bringing drugs into a penal institution, appellant could have remained silent, admitted possession, or lied. A booking search was inevitable, so Officer Wahl's warning was an offer of a benefit—the chance to avoid liability for the present offense—rather than a demand for incriminating evidence. Despite the warning, appellant proceeded to bring methamphetamine into the jail. The Fifth Amendment does not immunize that conduct.

Appellant asserts that "[p]roducing drugs in response to custodial questioning implicates the Fifth Amendment." (AOB 14, fn. 11.) He cites to *People v. Whitfield* (1996) 46 Cal.App.4th 947 (*Whitfield*), in which the Court of Appeal stated that it "would conclude" that handing over drugs to an officer constitutes a testimonial act. (*Id.* at p. 958, fn. 6.) Appellant reasons that he therefore cannot "be guilty of failing to do something the doing of which would require him to incriminate himself." (AOB 15.) However, the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (*Schmerber v. California* (1966) 384 U.S. 757, 764.) Appellant was about to enter jail. The Fifth Amendment offered appellant no protection from officers attempting to ascertain whether he had contraband on his person. Accordingly, appellant's argument fails.

Appellant also relies upon *Marchetti v. United States* (1968) 390 U.S. 39 (*Marchetti*) and *Grosso v. United States* (1968) 390 U.S. 62 (*Grosso*). In *Marchetti*, the defendant was convicted of conspiracy to evade payment of a federal occupational tax on wagering and failure to register and pay such tax. The Supreme Court found that requiring him to pay the tax created "'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." (*Marchetti*, *supra*, 390 U.S. at pp. 48-49.) The high court therefore reversed the defendant's convictions. (*Id.* at p. 60-61.) *Grosso* involved convictions similar to those in *Marchetti* and was issued on the same day. Using *Marchetti*'s reasoning, the court in *Grosso* overturned the

defendant's convictions for failure to pay wagering taxes and conspiracy to evade payment of the taxes. (*Grosso*, *supra*, 390 U.S. at p. 72.)

Marchetti and *Grosso* are distinguishable since the purported crime in those cases consisted of the defendants' failure to provide incriminating statements to the authorities. (See also *Lefkowitz v. Turley* (1973) 414 U.S. 70 [state architects fired for failing to testify without immunity]; *Albertson v. Subversive Activities Control Board* (1965) 382 U.S. 70 [Communist party members convicted of failing to register as Communists].) In this case, appellant was punished for bringing drugs into a jail, *not* for refusing to provide incriminating information. Accordingly, *Marchetti* and *Grosso* do not control here.

More pertinent is a series of federal decisions exemplified by *Witt v. United States* (9th Cir. 1969) 413 F.2d 303 (*Witt*). In *Witt*, the defendant was convicted of smuggling marijuana into the United States. The court opined:

> We are not persuaded by the appellant's argument that the Supreme Court's decisions immunize smugglers from prosecution. The appellant asserts: "In the instant case, appellant Witt was required by Federal law to formally acknowledge possession of property which it was unlawful under State law for him to possess. Providing the Customs Officers with the information as required by law would surely establish a 'link in the chain' of evidence tending to establish his guilt."
>
> The appellant reasons that a person bringing marihuana 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. 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 the 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.

(*Witt*, *supra*, 413 F.2d at pp. 305-306.)

This case closely resembles *Witt*. Appellant complains that he was "forced" either to incriminate himself in drug possession or to bring drugs into a jail. (AOB 14.) Appellant was not put to that choice by state action. To the extent that he makes the assertion on behalf of arrestees who possess narcotics before their arrival on jail grounds, his claim also fails. Those arrestees are in the process of committing a crime—namely, bringing drugs into a jail. Police officers have a duty to investigate and, if possible, prevent the completion of a crime in progress. To hold that the Fifth Amendment prevents a police officer from ascertaining whether an arrestee possessing drugs will imminently complete the crime of bringing drugs into jail "would border on the ridiculous and would effectively frustrate all criminal laws." Accordingly, appellant's Fifth Amendment argument must be rejected.

CONCLUSION

For the reasons given above, respondent respectfully requests that the judgment be affirmed.

Dated: October 22, 2007

Respectfully submitted,

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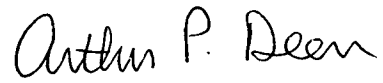

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7486 words.

Dated: October 22, 2007

Respectfully submitted,

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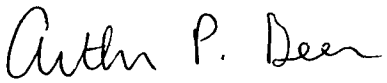

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Tony R. Low**

No.: **S151961**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On October 22, 2007, I served the attached

RESPONDENT'S BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 22, 2007, at San Francisco, California.

S. Agustin
Declarant

S. Agustin
Signature

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