IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

TOMMY GASTELLO,

Defendant/Appellant.

No. S153170 (5th District Court Of Appeal No. F050325, Kings County Superior Court No. 05CM4995)

ON REVIEW FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE
COUNTY OF KINGS

Honorable Louis F. Bissig, Judge

Appellant's Answer Brief on the Merits

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MISCELLANEOUS

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Appellant's Brief on the Merits

ISSUE PRESENTED

In its order of June 13, 2007, this court granted review, on its own motion, to address the following question: Did the defendant violate Penal Code section 4573 by knowingly having methamphetamine in his possession when he was brought into county jail after his arrest on other charges?

INTRODUCTION

There was nothing voluntary about Tommy Gastello's entering the King's County jail. He was handcuffed, placed under arrest for being under the influence of a controlled substance, and involuntarily transported to the jail, which Officer Machado directed him to enter.

This court should not infer that appellant's failure to disclose and disgorge his possession of methamphetamine was a voluntary act which satisfied the actus reus of this offense, and from which an inference of scienter can be drawn. This court should either interpret the statute to avoid constitutional questions, or reform the statute so that it will be applied in a constitutional manner. Applying the statute in this manner will also advance the intent of the Legislature, as manifested in the legislative history of Penal Code section 4573.

STATEMENT OF THE CASE

On March 27, 2006, a jury convicted Tommy Gastello of two felonies and one misdemeanor, respectively: possessing the controlled substance of methamphetamine, in violation of Health and Safety Code section 11377, subsection (a); bringing drugs into the Kings County Jail, in violation of Penal Code section 4573 of the Penal Code; and being under the influence of a controlled substance, in violation of Health and Safety Code section 11550, subdivision (a). (1 C.T. pp. 47, 49-51.) Following the jury's verdict, Mr. Gastello waived his constitutional rights and admitted a 1994 prior conviction for first degree burglary as a strike, and as a Penal Code section 667.5, subdivision (a), prior. (1 C.T. pp. 46-47.)

On April 25, 2006, the court sentenced Mr. Gastello to the middle term of three years for bringing a controlled substance into the jail, doubled for the strike prior, plus one year for the prior conviction, for a total sentence of seven years. The court also imposed a concurrent four-year term (the middle term of two years doubled for

the strike prior) for the possession count, and a one-year concurrent term for the misdemeanor conviction. (1 C.T. p. 136.) The court imposed fines and fees and awarded 150 days credits. (1 C.T. pp. 136-137.)

Mr. Gastello filed a notice of appeal on May 5, 2006. (1 C.T. p. 143.) On April 13, 2007, the Court of Appeal for the Fifth Appellate District reversed Mr. Gastello's conviction for bringing a controlled substance into the jail. On June 13, 2007, this court granted review on its own motion. On that same day, this court granted review in *People v. Low*, S151961, in which the Court of Appeal for the First Appellate District affirmed a conviction for the same offense and under similar, but not identical, circumstances.[1]

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[1] The issue in the *Low* grant of review was described by this Court as:

> 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?

(*People v. Low* (June 13, 2007), 2007 Cal. LEXIS 5959.)

STATEMENT OF FACTS

On the evening of November 24, 2005, at approximately 10:47 p.m., Hanford City Police Officer Jennifer Machado noticed two men riding bicycles without lights, which she knew to be a violation of the traffic laws. Accordingly, she initiated a traffic stop during which she learned that one of the men was Tommy Gastello, and the other was his son, Johnny. (3 R.T. pp. 217-219.) During the traffic stop, Officer Machado observed Mr. Gastello to be "extremely agitated." In response to her questioning, Officer Machado observed Mr. Gastello to be fidgety and agitated, behavior that indicated to her that he might be under the influence of a controlled substance. (3 R.T. pp. 221-222.) In fact, Mr. Gastello was so angry Officer Machado thought he was trying to hide something. (3 R.T. p. 222.)

Officer Machado also related that Mr. Gastello made several statements, such as that his pants did not belong to him, and kept asking questions, such as "Why am I here?" and "What am I doing?" To Officer Machado, this behavior was not consistent with someone who was under the influence, but rather it was consistent with the behavior of someone who was trying to hide something or who had something in his possession that he should not have. (3 R.T. p. 30.)

Officer Machado conducted a drug evaluation of Mr. Gastello based on his speedy talking, his overall nervousness, and his constricted pupils, and concluded Mr. Gastello was under the influence. Officer Machado placed appellant under

arrest,[2] but she did not read him his *Miranda* rights at that time. (3 R.T. p. 231, 251.) Instead, she conducted a search incident to arrest, which was more in depth, and involved pocket and waistband searching, and feeling the pant legs. (3 R.T. p. 252.) Officer Machado did recall that after she conducted the second search, she no longer thought Mr. Gastello was hiding something. (3 R.T. p. 253.) Officer Machado then asked Mr. Gastello when he had last used meth. Although Mr. Gastello initially replied that he did not know what meth was, he then admitted that the previous day he had smoked marijuana that had been laced with "ice," which Officer Machado understood to be methamphetamine that had been soaked in acetone and had crystalized. (3 R.T. p. 232.) Officer Machado described Mr. Gastello as uncooperative because he kept insisting there was no reason for the stop, and that he was just trying to join his family for Thanksgiving Day. (3 R.T. p. 234.)

When Officer Machado was transporting Mr. Gastello to the jail, before they entered the jail parking lot, she advised him that it was a felony to bring any narcotics, drugs or weapons into the jail. (3 R.T. p. 237.) Officer Machado then stopped her car, asked Mr. Gastello if he understood, and Officer Machado testified that Mr. Gastello told her that he did understand. (3 R.T. pp. 237-238.) Other than that, Mr. Gastello remained silent.

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[2] Officer Machado testified that sometime before Mr. Gastello's arrest, during the detention, she patted him down for weapons, removed a knife, but otherwise did not put her hands in his pockets. (3 R.T. p. 251.)

Officer Machado then escorted Mr. Gastello into the jail[3] and began the prebooking process, which required him to shed layers of clothing so that he wore only a T-shirt on top, and one layer of clothing over his underwear on the bottom. (3 R.T. p. 238.) She seated Mr. Gastello next to a table, where he placed his clothing and personal items to be inventoried. Mr. Gastello then began to warn Officer Machado that he had fleas, and that she shouldn't go through his stuff. To Officer Machado, it again sounded like Mr. Gastello was trying to hide something. (3 R.T. p. 239.)

As Officer Machado picked up the last clothing article on the table, a sweatshirt, and before she had even lifted it up, Mr. Gastello asked: "What's that?" She moved the sweatshirt to see what he was talking about. She saw a small bindle wrapped in a torn plastic grocery bag. (3 R.T. p. 240.) Officer Machado looked at Mr. Gastello, who then said "You planted that on me." (3 R.T. pp. 240-241.) Mr. Gastello never claimed ownership of the bindle, and the prosecution did not elect to have the bindle tested for fingerprints. (3 R.T. p. 258.)

The contents of the bindle weighed 0.32 of a gram, and contained methamphetamine. (3 R.T. pp. 262-263.) Mr. Gastello's blood sample contained a mix of methamphetamine and an opiate. (3 R.T. pp. 269-270.)

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[3] Machado later described this part of the jail as the prebooking facility, a small area about 20 feet across. There is a side room that leads to a restroom, there are about three benches, and a desk-table type unit that contains forms an officer may need during the booking process. (3 R.T. pp. 241, 254-255.)

SUMMARY OF ARGUMENT

Respondent's Contention

I. A PERSON WHO IS ARRESTED AND ENTERS THE JAIL WHILE HIDING DRUGS ON HIS PERSON BRINGS A CONTROLLED SUBSTANCE INTO THE JAIL IN VIOLATION OF SECTION 4573

A. Appellant Committed A Voluntary Act By Bringing Methamphetamine Into The Jail

B. The Legislature Patently Intended, By The Statute's Terms, To Punish Any Person Who Brings Drugs Into A Penal Institution

C. Appellant's Knowledge That He Was Bringing Drugs Into The Jail On His Person, After Being Warned To Do So Was A Felony, Satisfies The Mens Rea Requirement For General Criminal Intent

Appellant's Contentions

I. TOMMY GASTELLO DID NOT VIOLATE PENAL CODE SECTION 4573 WHEN OFFICER MACHADO HANDCUFFED HIM, PLACED HIM UNDER ARREST FOR BEING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE, AND BROUGHT HIM INTO THE BOOKING AREA OF THE JAIL, WHERE SHE SEIZED A BINDLE THAT FELL FROM MR. GASTELLO'S SWEATSHIRT DURING THE BOOKING SEARCH

A. Mr. Gastello Committed No Voluntary Act

B. Penal Code section 4573 Requires the Act of "Bringing" a Controlled Substance Into the Jail To be a Voluntary Act

C. The Record Fails to Show Mr. Gastello Had Any Intent To "Bring" a Controlled Substance Into the Jail

D. Mr. Gastello's Intent to Possess Methamphetamine Is Insufficient to Satisfy the Scienter of Penal Code section 4573, or the Requirement of the Concurrence of the Act and the Intent

II. THE LEGISLATIVE HISTORY OF PENAL CODE SECTION 4573 DEMONSTRATES THAT ARRESTEES WHO HAVE NOT COMPLETED THE BOOKING PROCESS ARE NOT THE TARGETS OF THIS STATUTE BUT THAT VENDORS, EMPLOYEES OF THE PRISON, AND VISITORS TO THE PRISON ARE

A. The Requirement that the Actus Reus Be Voluntary and Concurrent with the Scienter, Coupled with the Legislative History and the Construction of the Statute in Pari Materia with the Rest of Chapter 3, Creates an Ambiguity, and Makes the Statue Susceptible of More than One Reasonable Construction

B. The Legislative History of Penal Code section 4573, Construed in Pari Materia with the Rest of Chapter 3, Demonstrates That the Targets of this Statute Are Vendors, Employees of the Prison, and Visitors, and Not Arrestees Who Have Not Completed the Booking Process

1. Courts may examine the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the statute that implements the intent of the Legislature

2. The statutory scheme, of which Penal Code section 4573 is a part, as informed by the legislative history, defines two distinct groups that are the target of Chapter 3

C. As a Matter of Statutory Interpretation, Arrestees who have not Completed the Booking Process are not the Subject of Penal Code section 4573 Because They Are Not Prisoners or "Insiders," but Are Also Not Vendors, Visitors or Employees, or "Outsiders"

III. MR. GASTELLO'S SILENCE, FOLLOWING OFFICER MACHADO'S WARNING, IS NOT SUFFICIENT TO PROVE A VIOLATION OF PENAL CODE SECTION 4573

A. **The Prosecution's Reliance on Mr. Gastello's Silence to Satisfy the Actus Reus and the Scienter of Penal Code section 4573 Violates Mr. Gastello's Right to Freedom from Self-Incrimination Under the Fifth Amendment to the United States Constitution**

B. **If Penal Code section 4573 is Construed to Compel Disclosure of the Possession of Material That is Illegal for Both Prison Inmates and Civilians to Possess, the Statute, as Applied Here, Compelled Mr. Gastello, an Arrestee, to Incriminate Himself In Violation of the Fifth Amendment In Order to Avoid Harsher Charges**

C. **The Choices Officer Machado Implicitly Offered in the Warning she gave Mr. Gastello Before She Brought him into the Jail Implicated Mr. Gastello's Fifth Amendment Rights under the United States Constitution**

D. **Mr. Gastello's Post-Arrest Silence, Whether Pre-*Miranda* or Post-*Miranda*, Cannot be Used Against Him as Substantive Evidence of Guilt of Any of the Elements of the Offense in the Prosecution's Case-in-Chief**

E. **Without Relying on the Inferences Drawn from Mr. Gastello's Post-Arrest Silence, the Prosecution has Failed to Prove the Actus Reus or the Scienter Required to Prove a Violation of Penal Code section 4573**

IV. **THIS COURT SHOULD CONSTRUE PENAL CODE SECTION 4573 TO AVOID AN UNCONSTITUTIONAL CONSTRUCTION, OR SHOULD REFORM THE STATUTE TO AVOID AN UNCONSTITUTIONAL RESULT**

ARGUMENT

I.

TOMMY GASTELLO DID NOT VIOLATE PENAL CODE SECTION 4573 WHEN OFFICER JENNIFER MACHADO HANDCUFFED HIM, PLACED HIM UNDER ARREST FOR BEING UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE, AND BROUGHT HIM INTO THE BOOKING AREA OF THE JAIL, WHERE SHE SEIZED A BINDLE THAT FELL FROM GASTELLO'S SWEATSHIRT DURING THE BOOKING SEARCH

Tommy Gastello's entrance into the King's County jail can hardly be characterized as voluntary. He was handcuffed, placed under arrest, and involuntarily transported to the jail, which he entered at Officer Machado's direction. The most that can be said of Mr. Gastello's actions is that he submitted to Officer Machado's lawful authority.

Nonetheless, respondent argues that once Officer Machado warned Mr. Gastello that bringing drugs into the jail is a felony, Mr. Gastello's failure to disclose and disgorge were voluntary acts, from which his voluntary intent to bring the drugs into the jail can be inferred. (Respondent's Opening Brief on the Merits [hereinafter ROBOM], pp. 7-8.) Framed differently, what respondent is really arguing is that Mr. Gastello's invocation of his Fifth Amendment right to remain silent can be used by the prosecution as substantive evidence of guilt of the offense of bringing drugs into the jail.

A. Mr. Gastello Committed No Voluntary Act

In order for Mr. Gastello to have violated Penal Code section 4573, he must

have voluntarily entered the jail in possession of a controlled substance. This act of entry, while in possession of the controlled substance, is the criminal act that must be voluntary. It was not. Mr. Gastello did nothing but submit to the lawful authority of the police officer, who brought him into the jail. While his act of possessing methamphetamine was voluntary, he did not "voluntarily" bring it into the jail. While Mr. Gastello's possession of methamphetamine was a criminal act, he committed no additional affirmative criminal act of bringing the controlled substance into the jail. The methamphetamine was only "brought" into the jail incidental to Mr. Gastello's submission to the lawful authority of the police.

There is persuasive precedent for finding an action committed in submission to the lawful authority of the police to be involuntary. As the Court of Appeal below noted, Mr. Gastello's position in this case is even stronger than the defendant's position was in *Martin v. State* (1944) 31 Ala. App. 334 [17 So. 2d 427], which the appellate court denominated a "criminal-law classic on the subject of actus reus" and a favorite of casebooks and law review articles. (See, e.g., Kadish & Schulhofer, *Criminal Law and Its Processes: Cases and Materials* (6th ed. 1995) p. 171; Nourse, *Reconceptualizing Criminal Law Defenses* (2003) 151 U.Pa. L.Rev. 1691, 1728; Kelman, *Interpretive Construction in the Substantive Criminal Law* (1981) 33 Stan. L.Rev. 591, 603.)

In *Martin,* the defendant was arrested in his house. Police officers then took him out onto the street. There, he "manifested a drunken condition by using loud and

profane language." (*Martin v. State, supra*, 17 So. 2d at p. 427.) The Alabama Court of Appeals reversed Martin's conviction for public drunkenness, because:

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

(*Ibid.*)

Respondent claims *Martin* is distinguishable because: (1) Martin's intoxication was not illegal until the police took him to a public place, and (2) Martin did not have the ability to "preclude liability" under the statute he violated because he could not relieve himself of his own inebriation. Respondent's attempt to distinguish *Martin* lacks merit.

First, these two facts were not part of the *Martin* court's ratio decidendi, which turned on the involuntariness of the criminal act. Second, respondent has not addressed the infringement of Mr. Gastello's privilege against self-incrimination, which is implicated by what respondent characterizes as Mr. Gastello's "ability to preclude liability." (ROBOM, p. 11.) Respondent's use of this language conceals the constitutional infringement involved: that Mr. Gastello's only means of "precluding liability" was to incriminate himself by disclosing and disgorging. Third, respondent has instead advanced an argument that has no support in the record, when he argued that "the clear import" of Officer Machado's warning about bringing

drugs into the jail was that "he was not subject to the penalty if he discarded the controlled substance before entering the facility." (ROBOM p. 11.) It is unclear whether respondent is claiming that Mr. Gastello would have avoided all criminal liability by disclosing and disgorging, or that he would simply have incriminated himself on the methamphetamine violation "to preclude criminal liability" on the Penal Code section 4573 charge.

This "immunity theory" has been raised by respondent for the first time in this court, and this court should refuse to consider it because the facts in the record on appeal are inadequate to decide the issue:

> "It is the general rule that a party to an action may not, for the first time on appeal, change the theory of the cause of action. (*Ernst v. Searle*, 218 Cal. 233, 240 [22 P.2d 715]; *Gray v. Janss Investment Co.*, 186 Cal. 634, 641 [200 P. 401].) There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. (See *Schirmer v. Drexler*, 134 Cal. 134 [66 P. 180].) But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal." (*Panopulos v. Maderis*, 47 Cal.2d 337, 340-341 [303 P.2d 738].)

(*Bernson v. Bowman* (1960) 182 Cal.App.2d 697, 706.)

There is nothing in this record to even hint that Officer Machado was empowered to grant any type of immunity to Mr. Gastello,[4] or that it was her intention

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[4] A superior court may grant statutory transaction and/or use immunity at the request of the prosecuting agency. (Pen. Code § 1324.) A district attorney also has the inherent power to grant general or limited immunity without

to do so. For either or both of those reasons, this court should reject respondent's attempt to avoid the Fifth Amendment issues by claiming Mr. Gastello was offered immunity. If, on the other hand, respondent is merely contending that Mr. Gastello could have inculpated himself on the possession charge by disclosing and disgorging, in exchange for "precluding criminal liability" under Penal Code section 4573, this "exchange" does not avoid a Fifth Amendment infringement.

In support of its position that the ability "to preclude criminal liability" is a relevant part of the inquiry, respondent has cited *In re David W.* (1981) 116 Cal.App.3d 689. However, *David W.* actually supports Mr. Gastello's position that the voluntariness of the act is the dispositive factor, and not whether the actor can take action "to preclude criminal liability."

In *David W.*, the minor's mother called the police because she was concerned that the minor could not care for himself and that someone might get hurt. When the police arrived, the minor was in his own bedroom, violently attacking his brother. The minor's brother and a couple of friends were restraining the minor. The officers handcuffed the minor, who could not walk without assistance. They assisted him down the stairs, and took him to the hospital in the police car. Although a packet containing pills appearing to be Tuinal fell on the floor during the minor's treatment at the hospital, and the minor was arrested for this offense, the juvenile petition was

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complying with the formalities of Penal Code section 1324. (*People v. Superior Court (Crook)* (1978) 83 Cal.App.3d 335, 339-341.)

filed under Penal Code section 647, subdivision (f). Penal Code section 647 provides that "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor" and subdivision (f) defines the act as being found "in any public place under the influence of . . . any drug . . . in such a condition that he is unable to exercise care for his own safety or the safety of others . . . ." (*Id.* at p. 692.)

The court concluded that while the officers acted properly in taking custody of the minor and transporting him to the hospital, that fact should not justify prosecuting the minor for a crime he did not voluntarily commit. (*Id.* at p. 692.) The court pointed out that while the minor was in his own home, he was not in violation of section 647, subdivision (f), and that while the police had proper grounds for removing him and transporting him to the hospital, "the fact remains that he was compelled by the police to go to a public place."

In reaching this conclusion, the *David W.* court distinguished *People v. Olson* (1971) 18 Cal.App.3d 592, and *People v. Perez* (1976) 64 Cal.App.3d 297, which involved arrests for violations of Penal Code section 647, subdivision (f), that were upheld. In *Olson,* an intoxicated person gained entry into another's home to use the phone. While there, the defendant fell asleep, and the home owner requested assistance of the police in removing the defendant from her home. After escorting the defendant from the house, the police arrested her for a violation of section 647, subdivision (f), and transported her to the police station where they found heroin in

her purse. The appellate court upheld the arrest for a violation of section 647, subdivision (f). As the *David W.* court observed, the defendant had originally been in a public place, and although she sought temporary refuge in someone else's home, she had no business remaining there when the home owner's consent was withdrawn. (*In re David W., supra,* 116 Cal.App.3d at p. 693.)

In *People v. Perez, supra,* 64 Cal.App.3d 297, the police arrived at defendant's apartment to investigate a domestic disturbance. They knocked on the door, and the defendant opened the door and stepped out into the hallway, swinging an empty whisky bottle and otherwise displaying symptoms of intoxication. The defendant was arrested for being drunk in public. In upholding the arrest, the appellate court noted that the defendant came voluntarily into the hallway. (*Id.* at p. 299.) In both *Perez* and *Olson,* the defendant's convictions were for possession of heroin discovered at the jail during the booking search. The *David W.* court also cautioned that regardless of how an intoxicated person comes into a public place, the police must necessarily have the authority to arrest and remove that person from the public place in order to protect both the offender and the public. But just because such an arrest is proper does not necessarily mean that a conviction would be proper. (*In re David W.*, supra, 116 Cal.App.3d at p. 694.) And it appears that in neither of those cases was the defendant convicted of, or even prosecutor for, bringing drugs into the jail, even though that occurred in each of those cases, albeit involuntarily.

Martin and *David W.* are not the only cases focusing on the voluntariness

requirement. There are other cases that are often cited for reaching a similar result. In *People v. Newton* (1973) 72 Misc. 2d 646 [340 N.Y.S.2d 77, 79-80], Mr. Newton brought a habeas action to challenge the legality of his detention, contesting New York's jurisdiction over his person. He was on a flight which departed from the Bahamas with its destination being Luxembourg. No stops were scheduled in the United States; however, the aircraft made an unscheduled landing in New York, where the Port Authority Police Department Officers boarded the plane. They approached Mr. Newton and asked if he had a weapon in his possession. He confirmed his possession of the weapon and allowed it to be removed from his person. He was then arrested for violating a New York statute which prohibits the possession of a loaded firearm, or a firearm and ammunition, after Mr. Newton admitted to the officers that he had no license to possess or carry the weapon. Even though intent was not an element of this crime, the court held that a "minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing." (*Id.* at p. 647.) Even if the doing of an act is made criminal by statute without regard to the actor's intent or knowledge, the act is still not criminal if it was involuntary.

Respondent has attempted to distinguish *Newton*, because respondent contends that Mr. Newton's temporary arrival in New York was occasioned through misfortune or accident, while Mr. Gastello's was occasioned by his arrest for being

under the influence of drugs. (ROBOM, pp. 11-12.) Respondent is incorrect for two reasons. First, what brought Mr. Newton to New York was not part of the ratio decidendi. It was the fact that Mr. Newton was not flying the plane, and had not boarded knowing he would land in New York, that led the court to conclude Mr. Newton committed no voluntary act which interrupted the flight and caused it to land in New York. Second, while the opinion acknowledges that Mr. Newton's conduct could have played a part in causing the captain to decide to land in New York, it dismissed its significance as a relevant factor. In its opinion, the court acknowledged that the captain of the flight had become aware that Mr. Newton might have a firearm, and that there was evidence that Mr. Newton had caused himself to be unruly. Nonetheless, the court dismissed the significance of these factors when it wrote:

> Suffice it to say that the captain of flight No. 101, for reasons best known to himself, saw fit to interrupt the course of the plane which was flying over international waters and effected a landing in the County of Queens at the John F. Kennedy International Airport.

(*People v. Newton, supra,* 72 Misc.2d at p. 647.)

If respondent is correct, and the actor's conduct leading to the involuntary action is somehow relevant to the voluntariness inquiry, then Mr. Newton's conduct in causing the captain to decide to land in New York would have been relevant to the *Newton* court's decision; however, the foregoing excerpt belies that claim. Nonetheless, the opinion does demonstrate that Mr. Newton likely played some part in prompting the captain's decision to make an unscheduled stop in New York,

because in response to a radio transmission, Port Authority Police Officers boarded the plane, approached Mr. Newton, and inquired whether he had a weapon. If the actor's conduct is relevant to the voluntariness inquiry, this is not a feature which distinguishes *Newton* from the instant case.

A similar conclusion was reached in another New York case in which the defendant was a passenger in a vehicle that trespassed on private property. There the court held that the "very first and essential element in criminal responsibility is missing, an overt voluntary act or omission to act and, accordingly, the defendant is found not guilty." (*People v. Shaughnessy* (1971) 66 Misc. 2d 19 [319 N.Y.S.2d 626, 628].)

Reasoning by analogy, respondent contends that the cases decided under Penal Code section 4574 compel this court to affirm Mr. Gastello's conviction under section 4573. Citing *People v. James* (1969) 1 Cal.App.3d 645, respondent claims section 4574 has been correctly applied to detainees, and that a defendant's lack of choice in going to jail is irrelevant. (ROBOM, p. 9.) Respondent's reliance on this line of cases is misplaced, however, because the offenses are not, as respondent claims, analogous.

While the current version of Penal Code section 4574 is parallel to the version of Penal Code section 4573 at issue here, and criminalizes "bringing" firearms, deadly weapons, and explosives into a prison or jail, the version of Penal Code section 4574 at issue in *James* in 1969 was different. That predecessor statute

criminalized possession while confined in a jail. And it was for that reason that the court decided it need not answer whether a person confined in a jail can be convicted under this section for bringing a firearm into a jail, even though he did not voluntarily enter the jail. It was sufficient from the facts that Mr. James knowingly possessed a firearm while an inmate at the jail. He was in possession of the firearm after he had ample time to surrender it to the jailer. He possessed it after he had completed the booking process, including the booking search. (*People v. James, supra,* 1 Cal.App.3d at p. 650.)

Respondent's reliance on *People v. Grayson* (2000) is also similarly misplaced. First, while the statute at issue in *Grayson* is the firearm counterpart to section 4573, the excerpt from *Grayson*, upon which respondent relies, was taken out of context. Had respondent included the sentence preceding the excerpt he relied on, it would have been clear that the authority relied on referred to the precedessor statute banning straight possession. (ROBOM, p. 9-10.)

> "SECTION 4574 HAS A CLEAR PURPOSE: proscribing inmate possession of tangible items capable of use for armed attack and posing a serious threat to jail security." (*People v. Rodriquez* (1975) 50 Cal.App.3d 389, 399 [123 Cal.Rptr. 185].) Total proscription is necessary if inmates and officers are to be protected. (*Id.* at p. 396; *People v. Talkington* (1983) 140 Cal.App.3d 557, 561 [189 Cal.Rptr. 735]; *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].) The statute does not require any specific intent on the part of a defendant. (*Talkington, supra,* 140 Cal.App.3d at p. 561.) "Section 4574 is a stringent statute governing prison safety and serves an objective demanding relative inflexibility and relatively strict liability to problems compounded by inmate ingenuity." (*Talkington, supra*, 140 Cal. App. 3d at p. 563.) [footnote omitted]

(*People v. Grayson, supra,* 83 Cal.App.4th 479, 486.)

Second, *Grayson* is not a case in which the arrestee's silence was used to infer that "bringing" ammunition into the jail was voluntary because Grayson admitted what she had done. After the officers had arrested Grayson, they found her gun hidden behind the passenger's seat in the patrol vehicle. Grayson admitted the gun was hers and said it had been "embedded into her crotch area," but informed the officers that she did not have the magazine for the gun. But because the officers had been informed otherwise by the victim, they instructed personnel at the jail to search Grayson. In response to their questions, Grayson told the jail officers that she had secreted the clip in her vagina, and she retrieved it. The jury convicted Grayson of bringing explosives into the jail. (*People v. Grayson, supra,* 83 Cal.App.4th at p. 483.)

Grayson is also factually and legally distinguishable. The officers apparently did not warn Grayson against bringing ammunition into the jail, and Grayson did not remain silent. Accordingly, the prosecution did not rely on her silence to infer the act or intent. Grayson disclosed and disgorged, and she was prosecuted and convicted for bringing ammunition into the jail. Grayson's disclosure and disgorgement was not rewarded with any immunity.

Mr. Gastello did nothing after police officers took custody of him except that he omitted to confess to having drugs and submitted to being taken to jail. For these reasons, the evidence did not support the essential element of actus reus: the

commission of a voluntary act.

B. Penal Code section 4573 Requires the Act of "Bringing" a Controlled Substance Into the Jail To be a Voluntary Act

In California, the commission of a criminal act also generally requires the commission of an affirmative act. Penal Code section 20 states: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Respondent has conceded that criminal liability requires commission of a voluntary act, and that voluntary conduct is conduct that is within the control of the actor. (ROBOM, pp. 6-7.)

Nonetheless, it is the case that not all criminal acts are affirmative:

> (2) Unusual Types of Acts. Criminal "acts" are usually affirmative and voluntary physical manifestations of the defendant's will. But the following also satisfy the requirement:
>
> > (a) A verbal act, e.g., perjury in a murder case resulting in execution of an innocent person (see 2 Cal. Crim. Law (3d), Crimes Against Governmental Authority, §57).
> >
> > (b) A negative act, i.e., a forbearance or omission (see infra, §22).
> >
> > (c) Solicitation of another to commit a crime (see infra, §31).
> >
> > (d) The act of agreement, in conspiracy (see infra, §75).
> >
> > (e) The act of possession of prohibited property (see infra, §30).
>
> In rare instances, the crime does not appear to involve an act at all; e.g., being a race track tout (see 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §277).

(1 Witkin & Epstein, Cal. CRIMINAL LAW (3d ed. 2000) Elements §. 21, pp. 227-228.)

Criminal offenses that are predicated on a failure to act, however, are limited to certain narrowly prescribed circumstances. For example, a failure to act, often referred to as a "negative act," may be punishable in certain situations where the defendant is under a duty to act, such as where a parent owes financial support for a child. (See *People v. Jones* (1967) 257 Cal.App.2d 235, 237.) (See also 1 Witkin & Epstein (3d ed. 2000), CAL. CRIM. LAW Elements § 22.) "There is no criminal liability for failure to act unless there is a legal duty to act. (1 Witkin, Cal. Crimes, § 67, p. 71.)" (*Barber v. Superior Court* (1983) 147 Cal.App.3d 1006, 1017.)

Mr. Gastello's failure to disclose and/or disgorge here is not a criminal act because he was under no legal duty to act. Being under a legal duty to act is a requirement where the failure to act triggers criminal liability:

> Unlike the imposition of criminal penalties for certain positive acts, which is based on the statutory proscription of such conduct, when an individual's criminal liability is based on the failure to act, it is well established that he or she must first be under an existing legal duty to take positive action. (See *Barber v. Superior Court* (1983) 147 Cal.App.3d 1006, 1017 [195 Cal.Rptr. 484, 47 A.L.R.4th 1]; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Elements of Crime, § 115, pp. 135-136; Perkins & Boyce, Criminal Law (3d ed. 1982) Imputability, p. 660, and cases cited; see also Beale, The Proximate Consequences of an Act (1920) 33 Harv. L.Rev. 633, 637 ["The non-action of one who has no legal duty to act is nothing."].)

(*People v. Heitzman* (1994) 9 Cal.4th 189, 197-198.)

Penal Code section 4537 does not expressly include a duty to disclose or disgorge. It therefore cannot be said to create a duty to disclose or disgorge. What Penal Code section 4527 does include, however, is a requirement that a notice be

posted:

> 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.

(Pen. Code §4573.)

Such a notice, however, simply warns those who enter of the consequences of bringing prohibited material into the facilities. It does not explicitly require anyone who enters to make a disclosure of any kind. Moreover, the legislative history shows that this notice requirement was added to the bill at the request of the Assembly Public Safety Committee, but without any explanation as to the reason for including the notice provision. (See Author's File Materials, SB No. 2863 (1989-1990 Reg. Sess.), pp. 118 of 207 in the materials appended to Mr. Gastello's pending judicial notice motion.)

The legislative history fails to demonstrate that the addition of this notice provision was to create in an arrestee, or any target of the amendments contained in SB 2863, a duty to disclose and/or disgorge.

Respondent has argued that the notice Officer Machado gave Mr. Gastello permits the fact-finder to infer that the required intent was formed when Mr. Gastello, knowing he possessed drugs, decided to enter the institution in possession, rather than disclosing or disgorging. (ROBOM pp. 7-8.) In fact, that is precisely the function such a notice was held to perform in a federal appellate case construing the portion of 18 U.S.C. section 1791, which is the federal counterpart to Penal Code

section 4573.6. In prosecuting a prisoner for possessing contraband in violation of section 1791, the court held that the defendant's intent could be inferred from this failure to disclose his possession of the narcotics:

> We need not address whether section 1791 requires actual knowledge of the proscribed items because we hold that even if it does, there was sufficient evidence that McMurray was notified of the rules and regulations prohibiting the introduction of cocaine into the prison. Although McMurray was apparently not told of the prison rules before he entered the penitentiary or before the September 10, 1983, search which disclosed cocaine in his walking cane, there is evidence that he was told of the rules later that day, and before the September 11, 1983, search of his artificial leg which uncovered the additional cocaine. Record, vol. 2, pp. 51-52. Nonetheless, McMurray did not disclose the presence of the narcotics discovered after notice had been given him of the prison rules, reasoning that the prison authorities failed to find it the first time, and that he would be better off if the additional contraband was not discovered. Record, vol. 2, p. 41. This second cache of cocaine provides sufficient grounds upon which to base McMurray's conviction under section 1791.
>
> We reject the implication in McMurray's brief that a defendant must be informed of the rules prohibiting narcotics before he enters prison. Instead, we hold that if the defendant fails to surrender his contraband after he is informed of the prison rules prohibiting it there is sufficient evidence to establish the intent requirement of section 1791.

(*United States v. McMurray* (11th Cir. 1984), 747 F.2d 1417, 1422.)

The difference here, of course, is that Mr. Gastello had not yet been booked, and was not a prisoner when he failed to disclose or disgorge. Moreover, the federal statute does not require disclosure–it simply allows the failure to disclose as a basis for inferring the intent to possess the contraband in the prison–as opposed to what respondent seeks to do here, which is to infer the intent to bring drugs into the prison.

The federal law punishes whoever:

(1) in violation of a statute or a rule or order issued under a statute, provides to an inmate of a prison a prohibited object, or attempts to do so; or

(2) being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object . . . .

(18 U.S.C. § 1791.)

Basically, this statute criminalizes the conduct of a prisoner who was successful in secreting contraband during the booking process, and the contraband is discovered after the arrestee has completed booking and has become a prisoner, as was the case in *James*. In that sense, it is analogous to the Penal Code section 4573.6, which criminalizes possession in a prison. But it is also worthy of note that what Mr. Gastello did here would not constitute a violation of section 1791, subdivision (a)(2), and could not constitute a violation of subdivision (a)(1) unless respondent could prove Mr. Gastello had an intent to provide the contraband to an inmate.

So, even assuming, arguendo, that respondent is correct, and that the voluntary formation of the required intent is sufficiently proved by Mr. Gastello's decision not to disclose and disgorge, it does not make the act of bringing the drugs into the jail, in handcuffs and under arrest, voluntary. Similarly, it does not show the concurrence of the act with the intent. The only voluntary act Mr. Gastello committed was when he concealed the controlled substance on his person, which occurred before he was placed under arrest and transported to the jail. Any intent that can be

inferred was necessarily formed after the only act that was voluntary had been committed. The only concurrent act and intent formed here was the decision to remain silent, which was Mr. Gastello's decision not to disclose and disgorge. This statute creates no duty to disclose and disgorge.

Moreover, when Officer Machado informed Mr. Gastello of the statute criminalizing the act of bringing a controlled substance into the jail, she asked him if he understood, but she did not ask him if he had any such contraband on his person. Mr. Gastello simply answered that he understood what she had explained.

The statute at issue here is not a disclosure statute. It does not require an arrestee to disclose his possession of any contraband prior to entering the jail for booking. Such statutes exist, and they have been uniformly stricken down as violative of an arrestee's Fifth Amendment right to freedom from self-incrimination.

> The Fifth Amendment prohibits only compelled testimony that is incriminating. See *Brown v. Walker*, 161 U.S. 591, 598, 40 L.Ed. 819, 16 S. Ct. 644 (1896) (noting that where "the answer of the witness will not directly show his infamy, but only tend to disgrace him, he is bound to answer"). A claim of Fifth Amendment privilege must establish "'reasonable ground to apprehend danger to the witness from his being compelled to answer. . . . [T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,--not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.'" *Id.*, at 599-600, 40 L.Ed. 819, 16 S.Ct. 644 (quoting *Queen v Boyes*, 1 B. & S. 311, 330, 121 Eng. Rep. 730,738 (Q. B. 1861) (Cockburn, C. J.)).
>
> As we stated in *Kastigar v. United States*, 406 U.S. 441, 445, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), the Fifth Amendment privilege against compulsory self-incrimination "protects against any disclosures

> that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Suspects who have been granted immunity from prosecution may, therefore, be compelled to answer; with the threat of prosecution removed, there can be no reasonable belief that the evidence will be used against them. See *id.*, at 453, 32 L.Ed.2d 212, 92 S.Ct. 1653.

(*Hiibel v. Sixth Judicial Dist. Court* (2004) 542 U.S. 177, 190.)

Here, the record fails to show that the prosecutor or the court granted any immunity from prosecution to Mr. Gastello. Any disclosure by Mr. Gastello would have subjected him to prosecution for possession of methamphetamine. The issue is whether Mr. Gastello could be compelled to give evidence against himself without violating his Fifth Amendment rights.

> The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See, e. g., *Carnley v. Cochran*, 369 U.S. 506. Compare *Johnson v. Zerbst*, 304 U.S. 458; and *Glasser v. United States*, 315 U.S. 60. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation." Morgan, The Privilege against Self-Incrimination, 34 Minn. L.Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither.

The Court held in both *Kahriger* and *Lewis* that the registration and

> occupational tax requirements are entirely prospective in their application, and that the constitutional privilege, since it offers protection only as to past and present acts, is accordingly unavailable. This reasoning appears to us twice deficient: first, it overlooks the hazards here of incrimination as to past or present acts; and second, it is hinged upon an excessively narrow view of the scope of the constitutional privilege.

(*Marchetti v. United States* (1968) 390 U.S. 39, 51-52 [19 L.Ed.2d 889, 88 S. Ct. 697].) See also *Grosso v. United States* (1968), 390 U.S. 62 [19 L.Ed 2d 906, 88 S.Ct. 709], *Haynes v. United States* (1968), 390 U.S. 85 [19 L. Ed. 2d 923 , 88 S.Ct. 722], and *Leary v. United States* (1969) 395 U.S. 6 [23 L.Ed. 2d 57, 89 S.Ct. 1532].)

Moreover, this is not one of the "rare" cases where a duty arises based on a special relationship, a contract, or the circumstances. Indeed, to read a duty to disclose and/or disgorge into the statute would create substantial constitutional problems. A reasonable reading of the statute, which requires the posting of a notice of warning to all who enter, suggests that the statute is intended to deter this behavior, by permitting anyone who might otherwise freely enter in violation of the statute, to retreat without apprehension. To do otherwise would compel self-incrimination.

C. The Record Fails to Show Mr. Gastello Had Any Intent To "Bring" a Controlled Substance Into the Jail

Mr. Gastello's conviction for straight possession is not at issue. Rather, it is Mr. Gastello's intent to possess methamphetamine which respondent argues was transformed into an intent to bring methamphetamine into the jail. This occurred, according to respondent, when he failed to disclose or disgorge in response to

Officer Machado's warning before she brought him onto the jail property.

It is fair to say that the record is devoid of any showing that when Mr. Gastello put the methamphetamine in his sweatshirt before he went on his bike ride and was arrested by Officer Machado, he intended to go to jail, and to bring the methamphetamine with him.

D. Mr. Gastello's Intent to Possess Methamphetamine Is Insufficient to Satisfy the Scienter of Penal Code section 4573, or the Requirement of the Concurrence of the Act and the Intent

The act of possessing methamphetamine while being escorted into the jail in lawful submission to law enforcement authority, does not constitute the act of "bringing" methamphetamine into the jail. Moreover, this act of possession in forced transit did not operate jointly with any intent on Mr. Gastello's part to bring methamphetamine into the jail. Such concurrence of act and intent is required by Penal Code section 22:

> The act, moreover, cannot be independent of the intent; the two must concur, for a crime requires a "joint operation of act and intent." (P.C. 20.) Thus, there is no burglary if the entry is without the required specific intent to commit larceny or a felony, even though this intent is formed afterwards and the felony is committed. (See 2 Cal. Crim. Law (3d), Crimes Against Property, §127.)

(1 Witkin & Epstein, CAL. CRIMINAL LAW (3d ed. 2000) Elements § 21, p. 227.)

Mr. Gastello has challenged his conviction because the voluntary criminal act he committed was the possession of methamphetamine. While it was Mr. Gastello's choice to possess the methamphetamine on his person, it was not his choice to enter the jail. The voluntary criminal act here was possession. The involuntary act

was entering the jail, and it is the involuntary act of entering the jail upon which the prosecution must rely to uphold Mr. Gastello's conviction for this offense.

II. THE LEGISLATIVE HISTORY OF PENAL CODE SECTION 4573 DEMONSTRATES THAT ARRESTEES WHO HAVE NOT COMPLETED THE BOOKING PROCESS ARE NOT THE TARGETS OF THIS STATUTE BUT THAT VENDORS, EMPLOYEES OF THE PRISON, AND VISITORS TO THE PRISON ARE

A. The Requirement that the Actus Reus Be Voluntary and Concurrent with the Scienter, Coupled with the Legislative History and the Construction of the Statute in Pari Materia with the Rest of Chapter 3, Creates an Ambiguity, and Makes the Statue Susceptible of More than One Reasonable Construction

Where the language of a statute contains no ambiguity, a court should presume the Legislature's intent was correctly expressed in the statute, and should interpret the statute according to its plain meaning. But where the statutory language is susceptible of more than one reasonable construction, a court may turn to the legislative history to divine the Legislature's intent:

> " ' "[A]s with any statute, we strive to ascertain and effectuate the Legislature's intent." ' [Citations.] 'Because statutory language "generally provide[s] the most reliable indicator" of that intent [citations], we turn to the words themselves, giving them their "usual and ordinary meanings" and construing them in context [citation].' [Citation.] If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs. [Citation.] If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 1106, 1111 [99 Cal.Rptr.2d 120, 5 P.3d 176].)

(*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th 704, 708-709.)

At first blush it would appear that the language of Penal Code section 4573 is clear and unambiguous in stating that it prohibits "any person" from bringing

controlled substances into the jail.[5] However, it is not the term "any person" that creates an ambiguity. It is the legal requirement that the actus reus be voluntary, and that the actus reus and scienter be concurrent, that restricts its meaning; moreover, considering this construction of the statute, in pari materia with the rest of the statutes constituting Chapter 3, and with the legislative history, imports a more restrictive application than would normally be inferred according to the plain meaning

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[5] Penal Code section 4573 provides:

> 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 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, 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.

(Pen. Code § 4573.)

of "any person."

> "One who contends that a provision of an act must not be applied according to the natural or customary purport of its language must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning." (2A Sands, STATUTES AND STATUTORY CONSTRUCTION (4th ed. of Sutherland, STATUTORY CONSTRUCTION, 1973) § 46.01, p. 49.)

(*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438 [115 Cal.Rptr. 761, 525 P.2d 665] (*Leroy T.*).)

B. The Legislative History of Penal Code section 4573, Construed in Pari Materia with the Rest of Chapter 3, Demonstrates That the Targets of this Statute Are Vendors, Employees of the Prison, and Visitors, and Not Arrestees Who Have Not Completed the Booking Process

1. Courts may examine the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the statute that implements the intent of the Legislature

The architecture of the statutory scheme, of which Penal Code section 4573 is a part, demonstrates what the legislative history discloses: that each statutory component of this comprehensive title is directed to individual target groups. And while this court may not infer that from the title of the statute,[6] it may certainly reach

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[6] In construing Penal Code section 4573.6, an appellate court refused to consider its chapter heading to guide its interpretation. It did not do so, however, because a chapter heading may never be considered to guide an interpretation of a statute; rather, it did so because it found the statute to be clear and unambiguous, thereby negating the need to rely on any other rules of statutory construction. (When there is "no ambiguity, uncertainty or doubt about the meaning of a statute and its words unequivocally express a certain definite

that conclusion from its analysis of the overall architecture of the statutory scheme, as informed by the legislative history.

> When a statute is ambiguous, the courts typically consider evidence of the Legislature's intent beyond the words of the statute. The courts may examine a variety of extrinsic aids, which could include the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, "in an attempt to ascertain the most reasonable interpretation of the measure." (*Watts* v. *Crawford* (1995) 10 Cal.4th 743, 751; *Freedom Newspapers, Inc.* v. *Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 828; *People* v. *Woodhead* (1987) 43 Cal.3d 1002, 1008; and *Building Industry Assn.* v. *City of Camarillo* (1986) 41 Cal.3d 810, 816-817.

(*Hughes* v. *Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776.)

But this may also be done, even if the statute is not ambiguous:

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thought," there is no need to apply rules of statutory construction. (*Stockton Savings & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 207.)

> Section 4573.6 is clear and unambiguous. It specifically applies to "Any person," which includes an inmate, having in his possession the forbidden articles in any of the described institutions. It is subject to no other construction. We may not restrict the plain terms of the section merely because it appears in a chapter headed "Unauthorized Communications With Prisons and Prisoners" or because, forsooth, the other sections in chapter 3 may apply only to persons who are not inmates.

(*People v. Trout* (1955) 137 Cal.App.2d 794, 796.)

Even more importantly, the court in *Trout* reached this conclusion by relying on *Cavalli v. Luckett* (1940) 40 Cal.App.2d 250, 256. The authority for this conclusion found in *Cavalli* was based on a statutory provision of the Vehicle Code which does not apply to the case at bar. Section 7 of the Vehicle Code states: "Division, chapter, and article headings do not in any manner affect the scope, meaning, or intent of the provisions of this code." The Penal Code does not appear to include a similar provision.

> This court has stated that resort to extrinsic aids to interpret a constitutional provision is justified only when the Constitution's language is ambiguous. (*Delaney v. Superior Court, supra*, 50 Cal.3d 785, 798; *ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 868 [210 Cal.Rptr. 226, 693 P.2d 811].) Although we find no ambiguity in article VI, section 11, nevertheless, in an abundance of caution, we shall test our construction against those extrinsic aids that bear on the enactors' intent.

(*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93.)

2. The statutory scheme, of which Penal Code section 4573 is a part, as informed by the legislative history, defines two distinct groups that are the target of Chapter 3

Penal Code section 4573 was originally enacted in 1941, and it has been amended six times since then: in 1943, 1949, 1959, 1970, 1984, and most recently in 1990. It is part of Chapter 3, governing unauthorized communications with prisons and prisoners, which is also part of Title 5, defining offenses relating to prisons and prisoners. All ten of the offenses defined in Chapter 3 denominate, as the subjects of the prohibited conduct, "any person."

However, a closer analysis, informed by the legislative history, discloses that each of these ten sections targets one of two groups: those confined in the jail or prison (prisoners or "insiders") and those who are not confined in the institution (employees, vendors and visitors, or "outsiders"). For example, section 4570 punishes unauthorized communication with a prisoner, and section 4570.1 criminalizes unauthorized communications with prisoners in transit. Section 4570.5 prohibits an outsider from using false identification to gain admission to a jail or prison, and 4571 punishes any ex-convict who enters the grounds of a prison or jail

without permission. Although the language of the these statutes state that they apply to "any person," a reasonable reading of the statute demonstrates that the purpose of this statute is to prohibit "outsiders" from unauthorized communication with prisoners.[7] As the prison already has authority to discipline its prisoners, it is rational to construe the focus of individual statutes included in this chapter as targeting "outsiders." Moreover, it is the "outsiders" who breach the public trust when they violate such a statute, and this justifies the imposition of a harsher penalty, according to Senator Presley, the author of the 1990 amendments to Chapter 3. Moreover, it is outsiders who are more likely to be deterred by a harsher prison sentence. (Letter from Senator Robert Presley, Chairman of the California Legislature's Joint Committee on Prison Construction and Operations, to Governor George Duekmejian, dated August 31, 1990, re SB No. 2863 (1989-1990 Reg.

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[7] See *Davis v. Superior Court of Marin County* (1959) 175 Cal.App.2d 8, in which the use of Penal Code section 4570 to prosecute Caryl Chessman's attorney, his literary agent, and the publishing company (but not Chessman) for conspiracy to violate Penal Code section 4570, was challenged on constitutional grounds. The appellate court granted the writ to enjoin the prosecution:

> In summary, the indictment in its full sweep, based upon the theory that the state acquires an automatic ownership in a prisoner's creativity, attempts a novel and unsupportable innovation in the law. But even if we exculpate from it the narrower construction that it applies to a conspiracy to effect an unpermitted taking of the manuscript from the prison, we must, to uphold it, contrive the facts, compound inference upon inference and rely upon associational guilt. We cannot conceive that an indictment for a felony should rest upon such artificiality.

(*Davis v. Superior Court of Marin County, supra,*175 Cal.App.2d at p. 26.)

Sess.), included in the appendix to Mr. Gastello's pending judicial notice motion, p. 131.)

For these same reasons, Mr. Gastello contends that Penal Code section 4573, and by parity of reasoning, Penal Code sections 4573.5, and 4574,[8] should be interpreted as part of this group of Chapter 3 statutes that targets outsiders, because all three prohibit "bringing" certain items into the jail:

> Penal Code section 4573.5 is one of three statutes prohibiting the bringing of drugs or liquor into jails or possessing them within a jail. Section 4573 prohibits the bringing thereto of "any narcotic, the possession of which is prohibited by Division 10 of the Health and Safety Code, or any alcoholic beverage." Section 4573.5 with which we are directly concerned proscribes the bringing into jails of "drugs, other than narcotics." Section 4573.6 forbids the possession of "any narcotics, or drugs . . . or alcoholic beverage." (All of these sections except the bringing in or keeping of these articles where permission has been obtained.) These sections are in pari materia and should be construed together. *McNeil v. Board of Retirement*, 51 Cal.2d 278 [332 P.2d 281]; *County of Placer v. Aetna Cas. etc. Co.*, 50 Cal.2d 182, 188-189 [323 P.2d 753]; *People v. Trieber*, 28 Cal.2d 657 [171 P.2d 1].)

(*People v. Buese* (1963) 220 Cal.App.2d 802, 807.)

Insiders, in contrast, are the targets of Penal Code sections 4573.6, and 4573.8, which criminalize the straight possession of controlled substances, alcoholic beverages, drugs other than controlled substances, and paraphernalia.

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[8] This statute is the third one included in Chapter 3 that criminalizes the bringing or sending of specified contraband into any place where inmates are in custody. This statute specifically prohibits firearms, deadly weapons, explosives, tear gas or tear gas weapons in a place where prisoners are in custody (Pen. Code § 4574.)

Although Mr. Gastello has included section 4573.9 in the grouping that targets outsiders, section 4573.9 also stands alone in two respects: first, it is the only individual statute in Chapter 3 that criminalizes selling or furnishing controlled substances to prisoners; but more importantly, it also stands alone in that it is the only section in Chapter 3 that explicitly excludes prisoners from its targeted coverage. Mr. Gastello contends that the exclusion of prisoners was included in the newly created section 4573.9, but was not added to the previously enacted statutes included in Chapter 3, because it is only section 4573.9 that could otherwise apply to both "insiders" and "outsiders." Because the Legislature clearly intended the application of this statute to be limited to "outsiders," and there was no other feature of the statute that would so limit its application, the exclusion was necessary.

Penal Code section 4573.9 was first enacted in 1990 as part of SB 2863. It was the only new statute added to Chapter 3 by SB 2863. All the changes and additions to Chapter 3 were made "to provide more stringent penalties for the importation, sale, and possession of illicit substances and implements in state prisons, **in order to deter such activities on the part of visitors and correctional personnel**." [emphasis added] (Senate Committee on Judiciary, Statement of Purpose, SB No. 2863 (1989-1990 Reg. Sess.), p. 49 of the 1990 Legislative History appended to Mr. Gastello's pending judicial notice motion.)

Penal Code section 4573.9 explicitly restricts its application to "any person, other than a person held in custody." The legislative history makes clear that this is

because the targets of this legislation are outsiders: visitors, employees of the institution, and vendors. This limitation does not, however, prevent a prisoner from being named as a co-conspirator and prosecuted for a conspiracy to violate Penal Code section 4573.9. In *People v. Lee* (2006) 136 Cal.App.4th 522, the appellate court harmonized this exclusion through use of its legislative history:

> It is apparent that, by seeking to deter illicit activities on the part of visitors and correctional personnel (see Sen. Com. on Judiciary, Analysis of Sen. Bill No. 2863 (1989–1990 Reg. Sess.) as introduced, p. 2), the Legislature sought to reduce the flow of drugs into the prison system. Although the increased penalty for the substantive offense of in-prison sale, etc., of controlled substances is restricted to noninmates, nothing in the legislative history of section 4573.9 or in the overall statutory scheme suggests the Legislature intended to exempt from this increased penalty those inmates who actively join with noninmates in a criminal conspiracy to introduce controlled substances into prison. To hold otherwise would lead to the absurd result of an incarcerated drug kingpin, using noninmate "mules" to smuggle into prison contraband that is then sold to other inmates in a profit-making business enterprise, and yet escaping the increased penalties to which the "mules," who operate at his or her direction, are subject.

(*People v. Lee, supra*, 136 Cal.App.4th at p. 538.)

The court did hold that the legislative history and intent provided a rational basis for punishing "outsiders" for this substantive offense, rather than "insiders:"

> In sum, we conclude that, while the Legislature reasonably could (and did) determine that, in order to deter the introduction of controlled substances into prisons, only noninmates should be subject to increased penalties for commission of the substantive offense proscribed by section 4573.9, the more lenient related statutes are not controlling with respect to a person in Lee's situation, and there is no affirmative legislative intent that such a participant go unpunished or be punished less severely. The situation shown by the evidence in the present case is precisely the type in which collaborative criminal activities pose a greater potential threat than the individual substantive

> offense; hence, there is no logical reason why the Legislature would want conspiracy to violate section 4573.9 and a violation of the statute itself to be merged for prosecution and punishment. (See *Iannelli v. United States, supra,* 420 U.S. at pp. 778–779, 784; *People v. Tatman, supra,* 20 Cal.App.4th at p. 8.) Since we do not find "from all of the circumstances that there was an affirmative legislative intent to create an exception to the general rule of liability of ... conspirators" (*Hutchins v. Municipal Court* (1976) 61 Cal.App.3d 77, 84 [132 Cal. Rptr. 158]), it follows that Lee was properly charged with, and convicted of, conspiracy to violate section 4573.9. [footnote omitted]

(*Ibid.*)

It is not Mr. Gastellos' contention that "any person," as used in Penal Code section 4573, should be construed to include only outsiders because of a legislative drafting error. Mr. Gastello does not contend that the Legislature mistakenly failed to add to the the previously enacted parts of Chapter 3, the same language excluding inmates that the Legislature included in its 1990 enactment of Penal Code section 4573.9. Rather, it is Mr. Gastello's contention that the interpretation which requires a voluntary act, and the concurrence of act and scienter, as advocated in Argument I, *supra*, qualifies "any person" so that arrestees, who have not completed the booking process, are excluded from the statute. It is also Mr. Gastello's contention that this interpretation and application of the statute furthers the intent of the Legislature.

But even assuming, arguendo, that "any person" as used in Penal Code section 4573 could be construed to include an arrestee who has not completed the booking process, this would not end the court's inquiry. When would such an arrestee be "in" the jail for purposes of the statute? Would he be "in" the jail when

he is in the parking lot? Would be he "in" the jail when he walks through the door? Would he be "in" the jail when he enters the booking area? Or would he only be "in" the jail when he has completed the booking, including the booking search, and is placed behind bars as a prisoner? Neither the statute nor the legislative history addresses these questions, because the application of these statutes to an arrestee in the booking process does not appear to have ever been contemplated by the Legislature.

This statutory construction issue arises only because a statute targeting outsiders is being applied to a target group that was not contemplated by the authors of the statute. Senator Presley envisioned the targets of Penal Code section 4573 as: visitors to the institution, vendors, and employees of the institution. "Currently there are 90,424 prisoners in the California prison system. About 22% (20,000) are in for drug offenses, yet, visitors and correctional department employees continue to bring drugs into institutions to give to these prisoners who have drug problems." (See Author's File Materials, SB No. 2863 (1989-1990 Reg. Sess.), pp. 118 of 207 in the materials appended to Mr. Gastello's pending judicial notice motion.) Moreover, when Senator Presley wrote to the Governor asking him to sign SB 2863, he indicated that information had been provided to the Joint Committee on Prison Construction and Operation, which he chaired, that showed the drugs are being brought into prisons on a regular basis, not only by visitors, but also by employees of CDC, and that by increasing penalties for these offenses, people in this position

of public trust will think twice before bringing drugs into prisons and jails. (Letter from Senator Robert Presley, Chairman of the California Legislature's Joint Committee on Prison Construction and Operations, to Governor George Duekmejian, dated August 31, 1990, re SB No. 2863 (1989-1990 Reg. Sess.), included in the appendix to Mr. Gastello's pending judicial notice motion, p. 131.)

When any visitor, vendor, or employee is on the institution's grounds, or inside the institution, and brings drugs, s/he is in violation of the statute. An arrestee, however, presents a different situation, because, unlike the vendors, employees, and visitors to the institution, the arrestee is in the legal custody of law enforcement personnel when s/he is brought into the jail, and does not have the option of leaving the institution to avoid violating the statute.

C. As a Matter of Statutory Interpretation, Arrestees who have not Completed the Booking Process are not the Subject of Penal Code section 4573 Because They Are Not Prisoners or "Insiders," but Are Also Not Vendors, Visitors or Employees, or "Outsiders"

At the time Penal Code section 4573 was most recently amended, a definition of "prisoner" was contained in Government Code section 844, for purposes of defining liability in police and correctional activities. That definition, however, did not address when an individual becomes a prisoner. It merely stated: "As used in this chapter, "prisoner" includes an inmate of a prison, jail, or penal or correctional facility." Because the statute did not further refine the definition, that was accomplished through judicial decision. The case law filled that void and defined a

prisoner as an arrestee who had completed the booking process:

> Thus, a person who has been booked is considered a prisoner (*Datil v. City of Los Angeles, supra*, 263 Cal.App.2d 655, 659) . . . . Here, Sahley was a preconviction detainee awaiting trial; he had been booked and arraigned; he was a 'prisoner' for purposes of governmental immunity (see *Datil v. City of Los Angeles, supra*, 263 Cal.App.2d 655)."
>
> . . . .
>
> Notwithstanding a certain amount of deprivation of liberty attendant upon an arrest, all the cases do seem to recognize a distinction between persons who are simply under arrest and therefore are not prisoners and those persons who have become "confined in a correctional facility or institution under the authority of law enforcement authorities or legal process." (*Patricia J. v. Rio Linda Union Sch. Dist., supra,* 61 Cal.App.3d at p. 287.) From the cases discussed above, specifically *Sahley v. County of San Diego, supra*, 69 Cal.App.3d at page 349; *Larson v. City of Oakland, supra*, 17 Cal.App.3d at page 97; and *Datil v. City of Los Angeles* (1968) 263 Cal.App.2d 655, 658-659 [69 Cal.Rptr. 788], it appears the line of demarcation between status as an arrestee and as a confined person is the completion of the booking process. Once an arrestee has been booked, the status of the arrestee changes since he or she has become confined to a correctional facility under the authority of law.

(*Zeilman v. County of Kern* (1985) 168 Cal.App.3d 1174, 1180-1181.)

In 1996, after the Legislature made its 1990 amendment to Penal Code section 4573, the Legislature appears to have found itself in disagreement with the judicially adopted definition of when an arrestee becomes a prisoner, and it changed the statutory definition so that the definition of "prisoner" read (with the amendment included in bold print):

> As used in this chapter, "prisoner" includes an inmate of a prison, jail, or penal or correctional facility. **For the purposes of this chapter, a lawfully arrested person who is brought into a law enforcement**

> **facility for the purpose of being booked, as described in Section 7 of the Penal Code, becomes a prisoner, as a matter of law, upon his or her initial entry into a prison, jail, or penal or correctional facility, pursuant to penal processes.**

(Gov't. Code §844.)

Similarly, Penal Code section 4532, subdivision (b)(1), as enacted in 1941, addressing escape by persons in custody, on authorized leave, on county work project, or in home detention program, defined its application to confined persons who had been charged or convicted. In 1961, the Legislature amended section 4532, subdivision (b)(1), to change its scope to those confined who had been arrested and booked. The subsequent amendments, the most recent of which was in 1998, have not changed that definition.

As a matter of statutory interpretation, this court should defer to the statutory definition of "prisoner," as developed in the case law which was in existence at the time the Legislature enacted its most recent amendment to Penal Code section 4573. As this court has previously found:

> The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897 [231 Cal.Rptr. 213, 726 P.2d 1288].) Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction. (*Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734-735 [43 P.2d 291, 98 A.L.R. 1499].)

(*People v. Harrison* (1989) 48 Cal.3d 321, 329.)

This court should do so, not because the language of section 4573 uses the term prisoner, but because the legislative history targets "prisoners" and "outsiders" in Chapter 3, and an arrestee who has not completed the booking process is neither.

III.

MR. GASTELLO'S SILENCE, FOLLOWING OFFICER MACHADO'S WARNING, IS NOT SUFFICIENT TO PROVE A VIOLATION OF PENAL CODE SECTION 4573

A. The Prosecution's Reliance on Mr. Gastello's Silence to Satisfy the Actus Reus and the Scienter of Penal Code section 4573 Violates Mr. Gastello's Right to Freedom from Self-Incrimination Under the Fifth Amendment to the United States Constitution

This case presents remarkable similarities to the "real and appreciable" hazards of self-incrimination identified by the United States Supreme Court in *Marchetti v. United States, supra,* 390 U.S. 39 [19 L.Ed.2d 889, 88 S.Ct. 697]. There, the court considered whether Mr. Marchetti's Fifth Amendment privilege against self-incrimination was infringed by a federal statutory scheme of wagering tax laws that required those in the business of accepting wagers to pay an occupation tax, to "conspicuously post" the revenue stamp showing payment of the tax or to keep it on their persons and to produce it on demand of Treasury officers, when that same information would be provided to state and federal authorities to use in criminal prosecutions for violations of the gambling laws. The court noted that part of the statutory scheme required the principal internal revenue offices to provide to state and federal gambling prosecutors a listing of those who had paid the tax. Evidence of the payment of the wagering taxes was often admitted at trial in state and federal prosecutions for gambling offenses, and, according to the court, had "doubtless proved useful even more frequently to lead prosecuting authorities to

other evidence upon which convictions have subsequently been obtained." (*Marchetti v. United states, supra,* 390 U.S. at p. 47 [19 L.Ed.2d at p. 897, 88 S.Ct. at p. 702].) Finally, the court also noticed that a former Commissioner of the IRS acknowledged that the IRS makes available to law enforcement agencies the names and addresses of those who have paid the wagering taxes, and fully cooperates with the Attorney General's efforts to suppress organized gambling. (*Marchetti v. United states, supra,* 390 U.S. p. 48 [19 L.Ed.2d at p. 897, 88 S.Ct. at p. 702].)

The high court held that the obligations to register and to pay the occupational tax created "real and appreciable" hazards of self-incrimination that were not merely "imaginery and unsubstantial." Mr. Marchetti was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities and which would prove a significant link in a chain of evidence tending to establish his guilt of violations of a comprehensive system of federal and state prohibitions against wagering. (*Marchetti v. United states, supra,* 390 U.S at. p. 48 [19 L.Ed.2d at p. 897-898, 88 S.Ct. at p. 702].)

The *Marchetti* court did not hold the wagering tax provisions constitutionally impermissible. It held that those who properly asserted the constitutional privilege as to these provisions could not be criminally punished for their failures to comply with the requirements. The court also noted that if a taxpayer was not confronted by substantial hazards of self-incrimination, or was otherwise outside the shield's protection, its decision would not shield that taxpayer from penalties prescribed by

the wagering tax statutes. (*Marchetti v. United states, supra,* 390 U.S. p. 61 [19 L.Ed.2d at p. 905, 88 S.Ct. at p. 708].) In other words, the failure to comply was criminal if the taxpayer had been granted immunity; but, if there was no immunity, a taxpayer could not be criminally prosecuted for refusing to comply.

By analogy, Mr. Gastello's failure to disclose and disgorge could only be criminal if he had been granted immunity. But without immunity, he should not have been prosecuted for this violation. As explained in Argument I, *supra* at p. 13, no grant of immunity was offered to Mr. Gastello, the record is devoid of anything to support this claim, and Officer Machado had no statutory or inherent authority to make such an offer.

B. If Penal Code section 4573 is Construed to Compel Disclosure of the Possession of Material That is Illegal for Both Prison Inmates and Civilians to Possess, the Statute, as Applied Here, Compelled Mr. Gastello, an Arrestee, to Incriminate Himself In Violation of the Fifth Amendment In Order to Avoid Harsher Charges

Mr. Gastello was not a correctional officer, a vendor, an employee of the King's County Jail, or a visitor to the jail. Mr. Gastello was not yet a prisoner, because he had not completed the booking process and had not been placed in the secured lockdown part of the jail.[9]

Mr. Gastello was under arrest for being under the influence of a controlled substance. The prosecution of Mr. Gastello for bringing methamphetamine into the

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[9] See Arg. II, *supra*, for a statutory interpretation of the relevant statutes informed by the legislative history of those statutes.

King's County Jail was premised solely on the fact that he possessed methamphetamine when he was arrested, which was subsequently discovered during booking, after he had been involuntarily transported and brought into the jail in handcuffs. Before entering the grounds of the King's County Jail, Officer Machado informed Mr. Gastello that it was a crime to bring controlled substances and weapons into the jail, and asked him if he understood.

From that warning, the prosecution argues that Mr. Gastello's failure to disclose his possession of the drugs, and his failure to disgorge the drugs, prior to entering the jail, were voluntary acts that do not implicate the Fifth Amendment.

The prosecution would be correct in its analysis if what Mr. Gastello had in his possession were something that it was legal for him to possess as a civilian, but which was illegal to possess in the jail, or bring into the jail, such as an alcoholic beverage or some cough syrup. (See Pen. Code §§ 4573.5, 4573.8.) He could then have disclosed his possession and disgorged without subjecting himself to criminal liability. Here, however, the act of disclosure and/or disgorgement would have subjected Mr. Gastello to criminal liability exposure. A disclosure of his possession, and the act of disgorging the drugs would each be statements for Fifth Amendment purposes:

> We would conclude that the act of retrieving and handing over the cocaine to Officer Williamson was a testimonial act, and therefore when the police obtained this "statement" they did so in violation of *Miranda*. This act communicated, in the most graphic way possible, the incriminating fact that appellant had the cocaine on her person. (Cf. Evid. Code, § 225 [" 'Statement' means . . . nonverbal conduct of a

> person intended by him as a substitute for oral or written verbal expression."].) The cocaine by itself, as evidence, even taken together with appellant's affirmative response to the officer's question as to whether she had any narcotics on her person, would have been virtually meaningless without the evidence that she handed the contraband over to the officer.

(*People v. Whitfield* (1996) 46 Cal.App.4th 947, 958.)

What Mr. Gastello did was to remain silent. Had he admitted possession of a controlled substance, or had he removed the drugs from his pocket, he would have implicated himself, and this kind of compelled disclosure violates the Fifth Amendment freedom from self-incrimination.

In fact, Mr. Gastello exercised his Fifth Amendment right to freedom from compelled self-incrimination. When Officer Machado warned Mr. Gastello that bringing drugs or weapons into the jail was illegal, he signified that he understood what Officer Machado had told him. He then remained silent. In doing so, he refused to give evidence against himself. It is that assertion of Mr. Gastello's Fifth Amendment rights upon which the prosecution relies to infer the criminal intent to bring drugs into the jail and the voluntary act of bringing the drugs into the jail.

There are three flaws in this analysis. First, because Mr. Gastello had the option of disgorging does not mean that his failure to disgorge was voluntary. Second, Mr. Gastello entered the jail handcuffed and in custody, and he had no choice in the matter; accordingly, anything he had on his person, which Officer Machado failed to find in her field search, was not voluntarily brought into the jail. Third, the warning Officer Machado gave Mr. Gastello before entering the jail did not

transform his decision to remain silent, and not to disclose or disgorge, into a voluntary act; accordingly, it is not a sufficient basis from which to infer voluntary intent.

C. The Choices Officer Machado Implicitly Offered in the Warning she gave Mr. Gastello Before She Brought him into the Jail Implicated Mr. Gastello's Fifth Amendment Rights under the United States Constitution

Mr. Gastello had three choices to make before Officer Machado brought him onto the jail property: he could inculpate himself by disclosing and disgorging, he could deny possession and lie to the police, or he could remain silent. Mr. Gastello chose to exercise his Fifth Amendment right to remain silent. Although the prosecution did not make this argument in the trial court or in the Court of Appeal, the prosecution now claims that Mr. Gastello's failure to disclose and disgorge is an affirmative act from which the criminal intent to bring the drugs into the jail can be inferred, and is sufficient proof of both the required act and intent. Respondent posits that the act was voluntary, because Mr. Gastello had a choice, and chose to bring the drugs into the jail. (ROBOM, p. 7.) But Mr. Gastello's only "choice" was between waiving his Fifth Amendment privilege against self-incrimination, asserting his Fifth Amendment privilege against self-incrimination by remaining silent, or giving false information to a police officer and denying his possession. He exercised his only real option: he remained silent.

D. Mr. Gastello's Post-Arrest Silence, Whether Pre-*Miranda* or Post-*Miranda*, Cannot be Used Against Him as Substantive Evidence of Guilt of Any of the Elements of the Offense in the Prosecution's Case-in-Chief

Officer Machado did not Mirandize Mr. Gastello when she placed him under arrest. (1 R.T. p. 251.) The record does not reflect when, if at all, she Mirandized Mr. Gastello. But regardless of whether Officer Machado Mirandized Mr. Gastello before or after she warned him against taking drugs into the jail, the effect is the same: Mr. Gastello's silence cannot be used as evidence against him, and here, his silence, after Officer Machado warned him about taking drugs into the jail, is the sole evidence from which the prosecution asks this court to infer Mr. Gastello's intent.

> Second, *Griffin* prohibited comments that suggest a defendant's silence is "evidence of guilt." 380 U.S. at 615 (emphasis added); see also *United States v. Robinson*, 485 U.S. 25, 32, 99 L.Ed.2d 23, 108 S.Ct. 864 (1988) ("'*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt'" (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 319, 47 L.Ed.2d 810, 96 S.Ct. 1551 (1976)).

(*Portuondo v. Agard* (2000) 529 U.S. 61, 69.)

The majority of the federal courts hold that the use of post-arrest, pre-*Miranda* silence cannot be used as substantive evidence of guilt without violating the Fifth Amendment, and Mr. Gastello urges this court to adopt that position. (See the holdings of the Ninth, Tenth, and D.C. Circuits in *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1028-30 (en banc); *United States v. Whitehead* (9th Cir. 2000) 200 F.3d 634, 637-39; *United States v. Burson* (10th Cir. 1991) 952 F.2d

1196, 1201; and *United States v. Moore* (D.C. Cir. 1997) 104 F.3d 377, 384-90. In fact, the First, Sixth, and Seventh Circuits go even further and hold that the use of pre-arrest silence as substantive evidence of guilt is impermissible under the Fifth Amendment. (See *Coppola v. Powell* (1st Cir. 1989) 878 F.2d 1562, 1567-68; *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, 280-83; *Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, 1017.)[10]

As to post-arrest, post-*Miranda* silence, the United States Supreme Court has adopted a bright line rule against its use. (See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-73 [16 L.Ed.2d 694; 86 S.Ct. 1602] (1966); *Doyle v. Ohio* (1980) 426 U.S. 610, 619 [49 L.Ed.2d 91; 96 S.Ct. 2240](1980); *Wainwright v. Greenfield* (1985) 474 U.S. 284, 291 n.5 [88 L.Ed.2d 623; 106 S.Ct. 634] ("the use of postarrest, post-*Miranda* warnings silence [is] impermissible in federal prosecutions") (citing *United States v. Hale* (1975) 422 U.S. 171 [45 L.Ed.2d 99; 95 S.Ct. 2133].)

For purposes of the Fifth Amendment, silence is the same as a statement invoking the right to remain silent. (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 295 n.13 [88 L.Ed.2d 623, 106 S.Ct. 634].)

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[10] The Fourth, Eighth, and Eleventh Circuits hold that the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt does not violate the Fifth Amendment privilege against self-incrimination (See *United States v. Love* (4th Cir. 1985) 767 F.2d 1052, 1063; *United States v. Rivera* (11th Cir. 1991) 944 F.2d 1563, 1567-68; *United States v. Zanabria* (5th Cir. 1996) 74 F.3d 590, 593 (holding no violation because the Fifth Amendment only protects against compelled statements and arrested defendant was not compelled to speak); and *United States v. Frazier* (8th Cir. 2005) 408 F.3d 1102, 1109-11.

> 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 [12 L.Ed.2d 653, 659, 84 S.Ct. 1489].) "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 [152 Cal.Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823].)

(*Municipal Court v. Superior Court* (1988) 199 Cal.App.3d 19, 26.)

E. Without Relying on the Inferences Drawn from Mr. Gastello's Post-Arrest Silence, the Prosecution has Failed to Prove the Actus Reus or the Scienter Required to Prove a Violation of Penal Code section 4573

Mr. Gastello has not challenged his conviction for possession of methamphetamine. But there is no evidence from which this court can constitutionally infer that Mr. Gastello voluntarily brought the methamphetamine into the jail. There is similarly no evidence from which this court can constitutionally infer that Mr. Gastello intended to bring the methamphetamine into the jail. Finally, there is no evidence from which this court can infer any concurrence of act and intent.

There is only silence, coupled with the sole act of possession.

IV. THIS COURT SHOULD CONSTRUE PENAL CODE SECTION 4573 TO AVOID AN UNCONSTITUTIONAL CONSTRUCTION, OR, IN THE ALTERNATIVE, SHOULD REFORM THE STATUTE TO AVOID CONSTITUTIONAL INFIRMITIES

This Court should refuse to reach the Fifth Amendment constitutional issue because it can resolve the issue on state statutory grounds. In so doing, it would be:

> . . . Mindful of the prudential rule of judicial restraint that counsels against rendering a decision on constitutional grounds if a statutory basis for resolution exists (see, e.g., *Ashwander v. Valley Authority* (1936) 297 U.S. 288, 347 [56 S.Ct. 466, 483, 80 L.Ed. 688] (conc. opn. of Brandeis, J.)), ...

(*NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal.4th 1178, 1190.)

The legislative history contains no indication that this statute was ever intended to be applied to an arrestee who is involuntarily brought into the jail for booking and who has merely submitted to the lawful authority of the police. The targets of this statute were visitors, CDCR employees, including correctional officers, and vendors. Moreover, the statutory and judicially declared definitions of prisoners support this construction. This court could easily interpret the statute as not including arrestees based on the legislative history, the definitions of prisoners in use at the time the legislation was enacted, the lack of voluntariness of the actus reus, the lack of scienter, and the lack of concurrence of act and intent.

> An established rule of statutory construction requires us to construe statutes to avoid "constitutional infirmit[ies]." (*United States v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407-408 [53 L.Ed. 836, 29 S.Ct. 527]; *United States v. Security Industrial Bank, supra,* 459 U.S. 70, 78;

see also *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 727-728 [72 Cal.Rptr.2d 410, 952 P.2d 218] (conc. opn. of Kennard, J.).)

(*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 847.)

The rule of statutory construction that requires courts to construe statutes to avoid constitutional infirmities does not come into play, however, unless there is an ambiguity that raises serious constitutional questions. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1146.) When the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, one of which raises grave and doubtful constitutional questions and the other avoids such questions, the court's duty is to adopt the latter. (*United States v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407-408 [53 L.Ed. 836, 849, 29 S.Ct. 527]; accord, *People v. Davis* (1981) 29 Cal.3d 814, 829.)

Here, the prime ambiguity is whether the actus reus specified in Penal Code section 4573 has to be voluntary. If it does have to be voluntary, the statute cannot apply to arrestees, and the Fifth Amendment privilege issue does not arise. A secondary ambiguity is whether the statute creates a legal duty to disclose and disgorge. If the statute creates no such duty, the Fifth Amendment privilege issue does not arise. Either of those two statutory constructions will avoid the Fifth Amendment constitutional infirmity.

There are also three ways this court could reform the statute to avoid constitutional infirmities. First, this court could construe the statute to require an

arrestee to disclose and disgorge, but at the same time, it could impose restrictions on the use of the disclosure and contraband by requiring the prosecution to grant immunity from prosecution under Penal Code section 4573, and to communicate that grant of immunity before asking the arrestee to disclose and disgorge. Second, this court could hold that the offense of possession of a controlled substance cannot be parlayed into a violation of Penal Code section 4573, because the act of "bringing" the drugs into the jail should only apply to a voluntary act, and it could reform the statute to require that the act be voluntary. Third, this court could hold that in the case of an arrestee in possession of a controlled substance, which officers failed to find before booking, but did find during booking, there was no concurrence of act and intent, and the arrestee could be prosecuted and convicted of possession, but not "bringing" the controlled substance into the jail in violation of Penal Codes section 4573.

In *Marchetti v. United States, supra,* 390 U.S. 39 [19 L.Ed.2d 889, 88 S.Ct. 697], the United States urged the high court to permit continued enforcement of the registration and occupational tax provisions, despite the demands of the constitutional privilege. According to the federal government, it could do so if it would shield the privilege's claimants through the imposition of restrictions upon its use of information obtained as a consequence of compliance with the wagering tax requirements. The court declined to impose such restrictions and reform the statutes because the imposition of use restrictions would directly preclude

effectuation of a significant element of Congress' purposes in adopting the wagering taxes. At the same time, the imposition of such restrictions would necessarily obligate state prosecutors to establish in each case that their evidence was untainted by any connection with information obtained as a consequence fo the wagering taxes. The high court concluded it would be improper for the court to strike a balance among competing values, because there is no way it could know what Congress would choose to strike between the competing interests of taxation and the enforcement of state gambling laws.

There are no competing demands here. Law enforcement personnel are able, during the booking process, to thoroughly search an arrestee, and to confiscate any contraband the arrestee might have on his person. The prosecution is able to prosecute and convict any such arrestee for possessing any contraband that is illegal to possess on the streets. Moreover, should the contraband elude seizure during the booking search, once the arrestee becomes a prisoner, his possession in the prison or jail would be illegal under Penal Code section 4573.6, as well as prison disciplinary rules. As the legislative history here does not demonstrate that arrestees in possession of controlled substances, who are then brought by police into the booking area, are targets of Penal Code section 4573, this court could simply construe the statute as excluding from its coverage arrestees who are involuntarily brought into the jail for booking.

Conclusion

Based on the foregoing, this court should find that Mr. Gastello did not violate Penal Code section 4573, when he was handcuffed, placed under arrest for being under the influence of a controlled substance, and, in submission to lawful police authority, brought onto the jail premises and into the booking area of the jail.

DATED: January 7, 2008

Respectfully submitted,

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Pursuant to rule 8.520(c)(1) of the California Rules of Court

I, Linnéa M. Johnson, appointed counsel for Tommy Gastello, hereby certify, pursuant to rule 8.520(c)(1) of the California Rules of Court, that I prepared the foregoing Answer Brief on the Merits on behalf of my client, and that the word count for this brief is 16,001 which does not include the captions or the tables. This brief does not, therefore, comply with the rule, which limits a brief on the merits to 14,000 words. I certify that I prepared this document in WordPerfect 12.0, and that this is the word count WordPerfect generated for this document, and have accordingly filed, under separate motion, a request to be permitted to file an oversized brief.

Dated: January 4, 2008

_____

Linnéa M. Johnson
Attorney for Tommy Gastello

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On January 8, 2008, I served the attached

APPELLANT'S ANSWER BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 8, 2008, at Sacramento, California.

_____
DECLARANT