No. H029254

In the Court of Appeal

Of the State of California

Sixth Appellate District

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALBERT SANCHEZ

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Appeal from Santa Clara County
Superior Court Case No. EE504255
The Honorable C. Randall Schneider

SIXTH DISTRICT APPELLATE PROGRAM
In association with

PAUL KLEVEN (SB# 95338)
LAW OFFICE OF PAUL KLEVEN
1604 Solano Avenue
Berkeley, CA. 94707
(510) 528-7347

Attorneys for Appellant
Albert Sanchez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES, RULES & CONSTITUTION:

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment including sentencing of the defendant and is appealable pursuant to Penal Code section 1237.

STATEMENT OF THE CASE

In an Information filed on May 24, 2005, the District Attorney charged appellant Albert Sanchez with resisting an officer in violation of Penal Code[1] section 69, possession of controlled substance in violation of Health & Safety Code section 11377, subdivision (a), displaying false registration in violation of Vehicle Code section 4462.5, and misdemeanor battery of a peace officer in violation of section 242/243, subdivision (b). (Clerk's Transcript on Appeal ("CT") 41-42.) At trial, Count 4 was amended to conform to proof to allege a misdemeanor violation of section 242/243, subdivision (c)(1). (3 Reporter's Transcript ("RT") 241-42.)

---

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

Sanchez filed a *Pitchess* motion and a motion to dismiss pursuant to section 995, which were heard together on June 27, 2005. (CT 52-117, 119; June 20, 2005 Notice of Motion and Motion to Dismiss Pursuant to P.C. Section 995;[2] Augmentation Reporter's Transcript ("ART") 3-10.) The trial court granted the *Pitchess* motion following an *in camera* hearing, but denied the section 995 motion. (CT 119; ART 4-5, 8-10.)[3]

A jury trial was held from July 12-15, 2005. The jury found Sanchez guilty of Counts 1 and 2 (resisting an officer and possession of controlled substances), not guilty of Counts 3 and 4, and guilty of the lesser-included charge on Count 4 of battery of an officer without causing injury in violation of section 242/243, subdivision (b). (CT 206-07, 210-11; 5 Reporter's Transcript ("RT") 392-93.)

---

[2] Deemed part of the record on appeal by order of this Court on June 5, 2005.

[3] The trial court, however, ultimately excluded the testimony of Vincent Sayles, the witness disclosed following the *Pitchess* motion, pursuant to Evidence Code section 352. (1 RT 36-37; 2 RT 217, 227-28.)

Following receipt of a Report of Probation Officer (CT 214-37), the Court on August 25, 2005 denied probation, and sentenced Sanchez to the aggravated term of three years on Count Two (possession), along with a consecutive sentence of one-third of the two year mid-term on Count One (resisting arrest), for a total sentence of three years, eight months, with credit for time served of 205 days. (CT 238-40, 6 RT 400-03.)[4] In addition, the trial court ordered him to pay a restitution fine of $800, mandatory restitution fine of $800 suspended pursuant to section 1202.45, an AIDS education fine of $70 plus a penalty of $164.50, and $1,500 in attorney's fees pursuant to section 987.8. (CT 238, 240; 6 RT 403.)

Sanchez timely appealed. (CT 241-42.)

STATEMENT OF FACTS

On April 11, 2005, Albert Sanchez asked his boss at West Coast Auto Body, Frank de Santiago, if he could

---

[4] The court also sentenced Sanchez to 205 days on the misdemeanor Count 4, which was deemed served. (6 RT 403.)

borrow one of the vehicles owned by the shop so that he could go out to lunch at Taco Bell. (2 RT 190-91, 196; 3 RT 247.) De Santiago, who had employed Sanchez at his auto body shop for several weeks prior to the incident, owned a number of cars that he loaned to customers at no charge. (2 RT 188-90.) De Santiago agreed to let Sanchez borrow a car and Sanchez chose a red Tercel; Sanchez knew nothing about the car, and noticed nothing unusual about it. (2 RT 194; 3 RT 247-48.)

The Tercel was not registered at the time, but de Santiago did not warn Sanchez of this, and did not know whether there were any registration or insurance papers in the vehicle. (2 RT 191-93, 195-196, 199-200.) A mechanic who had been working on the car to get it registered had told de Santiago that, in order to test-drive the Tercel, he had taken the registration sticker from a Chrysler le Baron also owned by the shop and put it on the Tercel. (2 RT 193-95.) By the time the mechanic told him this, de Santiago had already advised the police that the le Baron sticker had been stolen.

(2 RT 196, 198.)

At an intersection near the Taco Bell, Sanchez noticed a police car behind him. (3 RT 248-49, 268.) As he turned into the parking lot he realized that the officers were pulling him over, so he parked in a stall next to an island and a tree. (3 RT 249.)

Sunnyvale police officers James Boone and Bradley Militano had been patrolling in the area when they saw a maroon Tercel with a license registration tab that appeared to be glued on or askew. (1 RT 12-13, 89-91, 118.) The officers followed the Tercel and, based on a computer check on the vehicle, initiated a traffic stop by turning on their patrol car's emergency lights. (1 RT 13-14, 61-62, 91-92, 118.) When the Tercel pulled into the Taco Bell parking lot, the officers parked their patrol car behind it so the driver could not back out. (1 RT 14, 62-63, 71-73, 92, 118-19.) At that point, the driver was detained and was not free to leave. (1 RT 82-83, 94.)

Both officers approached the vehicle, and Boone noticed that the driver, who turned out to be Sanchez,

was sweating and acting nervously. (1 RT 14-15, 63, 71-73, 93.) Sanchez denied that he was sweaty or nervous, because he had a valid driver's license and was not on probation or parole at the time. (3 RT 250, 268-70, 281, 296-97.) He had never encountered either of the officers before, but had been hassled by other officers in the past. (3 RT 268-70, 286.)

Sanchez testified that Boone came up to the door and asked for his driver's license, registration and insurance. (3 RT 250, 268-70, 281, 296-97.) Boone did not immediately say why Sanchez was being stopped. (3 RT 270.) Sanchez found registration and insurance information and provided everything to the officer. (3 RT 251.) Boone could not recall asking Sanchez for registration, but would have noted in his report if Sanchez had been asked and could not produce any registration. (1 RT 66-67.)

Boone said he would just run Sanchez's name, and Sanchez told him to go ahead. (3 RT 251-52.) The officers claimed that after handing over the license, which was valid, Sanchez began complaining about being

hassled. (1 RT 15-17, 64, 68, 120.) Sanchez testified that he complained because the officers, particularly Boone, did begin hassling him after the radio dispatcher said that he was gang-related and had a tattoo of the number "14" on his wrist, along with a tattoo of a strike bird from Caesar Chavez' farm worker's movement. (3 RT 252-53, 271-72.)

According to Sanchez, the officers asked to see his hands and wrists, and Sanchez explained that he had removed the tattoo due to his work, and was not gang-related. (3 RT 253-54, 272, 299, 303.) The officers got upset when he said he was being harassed, and after they discovered that he no longer had the "14" tattoo described by the dispatcher, tried to find some way to get him on a five-to-ten-year gang enhancement. (3 RT 265, 293-94.) Boone asked him about the tattoo quite a few times. (3 RT 273-74.)

Boone testified that he did not recall receiving information from the dispatcher about a "14" tattoo or asking Sanchez about one, and Militano also did not recall any questioning about a tattoo. (1 RT 64-65,

131.) According to a transcript of the dispatch tape that was read into the record, the dispatcher had advised the officers that the suspect "should have a tattoo of XIV on his right wrist." (3 RT 303-04; 4 RT 319; Exhibit E.)[5]

Boone said that he told Sanchez the reason for the stop was a false tag, and asked him to get out of the car to see it. (1 RT 16, 65; 3 RT 251, 271.) Sanchez told him it was his boss's vehicle, and that he knew nothing about the tags. (1 RT 16, 65; 3 RT 251-52.)

After Boone asked him to step out of the vehicle, Sanchez became more agitated and put his hands in the front pockets of his black, baggy pants. (1 RT 17-18, 56, 93-95, 120.) According to Militano, Sanchez complained about having been stopped and hassled previously. (1 RT 94-95.) Sanchez acknowledged putting his hands in his pocket to protect his rights, probably more than once, though the officer said not to do that. (3 RT 275-77, 280.)

---

[5] The dispatch tape also stated that Sanchez had a "narco reg," meaning that he had a narcotics record. (4 RT 319-20; Exhibit E.)

Boone testified that, concerned for his safety, he ordered Sanchez to take his hands out of his pockets, but Sanchez remained agitated and, after taking his hands out, put them back into the pockets. (1 RT 18, 95-96, 120.) Militano was also concerned. (1 RT 96.) Asked if there was anything illegal in the vehicle, Sanchez responded that he did not know, and complained about being hassled because that was not the reason for the stop. (1 RT 18; 3 RT 254, 274.)

Sanchez testified that he had given the officers permission to search him and the vehicle, but Boone said he was getting hostile, and the officers put his hands in wrist locks. (3 RT 254-55, 274-75.) Because the officers were taller, Sanchez's arms were at a 45 degree angle. (3 RT 277-78.)

The officers stated that, after Sanchez pulled out and put back his hands a second time, they became alarmed and lunged for the defendants' arms, with Boone taking the right arm and Militano the left. (1 RT 18-20, 68, 96-98.) By that time, Sanchez had brought his hands back out of his pockets and, according to the

officers, thrown some paper on the ground. (1 RT 20, 98-99, 121.) Boone did not know whether anyone retrieved the paper and did not mention it in the initial police report or in the preliminary examination hearing, but came to believe it was meant as some kind of diversion. (1 RT 66, 85-88.) An officer who arrived later said that he did not see any errant papers around either vehicle, and none was pointed out to him. (2 RT 162, 185.) Sanchez denied dropping any papers. (3 RT 279-80.)

The officers testified that, with Sanchez facing away from them, they put his hands behind his back, using a controlling technique known as a rear wrist twist lock that puts pressure on the shoulder and arm. (1 RT 20-22, 69.) While the technique affords a certain amount of control, a suspect can break out of it. (1 RT 22.) The whole procedure took about 60-90 seconds. (1 RT 20.)

The wrist lock was effective, prompting Sanchez to say he did not know why the officers were doing that to him, and that he was not going to fight with them. (1

RT 23-24, 69-70.) Boone instructed Militano to release Sanchez, intending to use his hands around Sanchez' interlocked fingers to control him while doing a cursory pat search. (1 RT 24-26, 70, 99-100, 121-22.) As he reached for Sanchez' pocket, Sanchez broke free and began to run east through the parking lot. (1 RT 26, 70, 99-100, 122-24.) When Boone felt Sanchez pulling away he reached for his handcuffs and advised Sanchez that he was being detained. (1 RT 26, 70.) The officers gave chase. (1 RT 26, 83-84, 100.)

The officers testified that after Sanchez ran for 15-20 feet he entered some ivy on the eastern side of the Taco Bell, where he appeared to trip and run into a tree with the left portion of his body. (1 RT 26-27, 71-76, 83-84, 100-01, 124.) After Sanchez hit the tree Boone tackled him, and both landed in the ivy, with Sanchez facing down. (1 RT 27, 76-77, 101, 124-25.)

According to Officer Boone, while they were wrestling Sanchez said, "I'm not going back to prison." (1 RT 81.) Sanchez has never been to prison, denied making the statement, and denied that he had said he

did not want to go back to jail. (3 RT 263, 293-95, 300.)[6]

The officers said that Sanchez struggled to get away, and while Boone was able to get control of Sanchez' left hand, Militano could not get control of the right arm, which was tucked under Sanchez' body. (1 RT 27-28, 77, 102, 125-28.) Sanchez denied struggling. (3 RT 283.)

Sanchez also denied that he had run, testifying that after he asked the officers why they were harassing him, Boone pulled out handcuffs, said Sanchez was being detained pending further investigation, and put the handcuffs on behind his back. (3 RT 255, 278, 280.)

Sanchez said that, whether accidentally or on purpose, Boone had pushed him 5 to 6 feet, and his shoulder collided with a tree; Sanchez's knees hit the

---

[6] The court, which had previously ruled that Sanchez could not be impeached by any prior convictions (1 RT 37-38), found that this put Sanchez's character at issue. (3 RT 263.) Sanchez admitted that he had been to jail quite a bit, and knew the difference between prison and jail. (3 RT 263, 295.)

ivy on the levee or island, and due to the handcuffs he had to push off the tree to pick himself up, sustaining injuries to the inside of his left arm, shoulder, wrist and ear. (3 RT 255-58, 266-67, 280-82, 289-91, 300.)

As Sanchez got back on his feet, Boone came rushing toward him and hit him, causing him to fall down on his stomach and face, with his hands cuffed behind him. (3 RT 258-59, 283.)

All parties agreed that the officers called for backup. (1 RT 28, 126; 3 RT 291.) The officers said they repeatedly told Sanchez to quit resisting and bring out his hand; Militano, who was next to Sanchez, struck Sanchez with fists and, when that was ineffective, an expandable baton or asp, but not on the head or upper part of his torso. (1 RT 28-29, 101-05, 126-28.) Militano said that Sanchez was kicking him in the torso, arms and calf, though Boone did not see that. (1 RT 28-29, 104, 130.) After 3-4 minutes, the officers were able to subdue Sanchez. (1 RT 105.) Sanchez pulled out his right hand, which had nothing in it. (1 RT 30, 78, 106-07; 2 RT 157-59.)

Sanchez said that while he was on the ground, Boone put his foot on Sanchez's back, and Militano began pounding him with an asp and fists, while Sanchez yelled that he was not resisting. (3 RT 259, 290-91.) These blows caused additional injuries. (3 RT 259-61, 287-89, 301-02.) Sanchez had no explanation for why the officers struck him, except that they were trying to get him on the gang enhancement. (3 RT 265, 293.)

After Sanchez was subdued, Crime Scene Investigator David Chong and others arrived, and the officers picked him up and Sanchez hopped back over to the police car. (1 RT 29-30, 42, 78, 105-07, 126; 2 RT 152-53, 157-59, 176-78; 3 RT 260, 291.)

According to Sanchez, Boone did a pat search, but found nothing, and Chong did not do a search. (3 RT 261-62, 292.) Militano testified that he searched Sanchez, who had no contraband or weapons on him. (1 RT 106-07, 137-38.) Chong testified that he also searched Sanchez and found a red rag and three gas lighters, which could be used to heat glass smoking pipes to ingest amphetamines, but did not discover any

pipes. (2 RT 160, 179, 183.)

Boone testified that he searched the vehicle, and noticed that the license plate on the front did not match the one on the rear. (1 RT 43-44; 2 RT 161.) The rear license plate was registered to a 1983 Subaru, whose owner Boone could not locate. (1 RT 44-45.) Sanchez knew nothing about the front license plate or the registration tag on the back of the Tercel. (3 RT 264, 297.)

Boone and Chong searched the ivy area, and Boone located a white crystalline substance in a plastic baggie where the ivy was compressed from the struggle, and where, according to Boone, Sanchez's right hand had been tucked under him. (1 RT 31, 41-42, 78-79.) Boone said he directed Chong to pick up the baggie (1 RT 41-42, 78-79), but Chong testified that Boone had found the baggie and picked it up before Chong saw its position in the ivy or had a chance to photograph it, contrary to standard procedure. (2 RT 154-55, 179-81.) Militano said that Boone found the baggie and directed Chong to collect it. (1 RT 107-08.)

Boone believed the substance was a usable quantity, over 1.5 grams, of methamphetamine.[7] (1 RT 41-42, 80-81.) Chong also recognized it as amphetamines. (2 RT 155-56.) The substance actually weighed 6.5 grams, enough for 65 doses, and testing performed by Chong confirmed that it was presumptively methamphetamine or amphetamine. (2 RT 165-68.) Cordelia Willis, a criminalist, tested a sample from the materials taken at the scene, and determined that the substance was methamphetamine. (2 RT 202, 205-08.)

Sanchez testified that, after talking to the other officers, Militano advised him in the back of the car that he was being arrested for false tags, resisting arrest and possession of a controlled substance. (3 RT 261, 295-96.) That was the first Sanchez knew about the possession charge, and nobody showed him a bindle. (3 RT 295-96.) Sanchez had no drugs in his possession,

---

[7] Methamphetamine in a crystalline form is almost clear or white in color, like salt, but sometimes can be yellowish. (1 RT 39-40.) It is packaged in bindles and ingested through smoking using a glass pipe. (1 RT 40.)

and knew nothing about the drugs found in the bushes; he asked why he was being charged with possession when they had found nothing during the pat search. (3 RT 262-63.)

Boone could not recall whether he had advised Sanchez at the scene that drugs had been found, but believed Militano might have done so. (1 RT 87-88.) Militano testified that, during booking, Sanchez said that the officers would not be able to pin the drugs on him. (1 RT 113, 132.) Militano could not recall whether he had previously advised Sanchez that drugs were collected in evidence, and had not heard anyone advise Sanchez of that. (1 RT 113-14.)

Sanchez sustained abrasions to his left shoulder and hand, among other minor injuries, but declined medical attention. (1 RT 53-59, 115-18, 133-37; 2 RT 163.) Sanchez did not strike Boone, who was not injured. (1 RT 29-30, 61.) Militano sustained pain and scratches, for which no treatment was required. (1 RT 108-12, 132-33.)

ARGUMENT

I. THE TRIAL COURT'S PRECLUSION OF TESTIMONY FROM A *PITCHESS* WITNESS THAT BORE DIRECTLY ON CREDIBILITY OF OFFICER WAS ERROR

Although the trial court granted Albert Sanchez's *Pitchess* motion to discover evidence contained in the personnel files of the officers involved in his arrest (CT 52-106, 119; ART 3-10), it erroneously precluded testimony by the witness identified in the file that was disclosed, pursuant to Evidence Code section 352. (1 RT 36-37; 2 RT 217, 227-28.) This testimony bore directly on the credibility of one of the principal officers, Bradley Militano, and its exclusion violated Sanchez's rights under the Sixth and Fourteenth Amendments, as well as his right to fundamental due process under the California Constitution.

A. Testimony of Vincent Sayles Demonstrated Officer Militano's Willingness To Lie in the Performance of His Duties

During an Evidence Code section 402 hearing, Vincent Sayles testified that officer Bradley Militano had pulled him over in 2001 while he was driving in his small pickup truck with his dog. (2 RT 216-18.)

Militano gave no reason for the stop initially, but then said he had done it because the dog was riding on a tool box in the back of the truck. (2 RT 218.) The dog was riding on a tool box, but was secured by a harness that wrapped around her chest and neck and was attached to both sides of the tool box. (2 RT 218, 220-21; Exhibit 402A.) Militano cited Sayles for having an untethered animal, and kept Sayles' license. (2 RT 219-20, 224.)

Sayles had never before received a citation regarding the dog, who had ridden like that for years, and did not know the exact number of the code section he had allegedly violated. (2 RT 223, 226-27.) At a hearing contesting the ticket, Militano falsely testified that the dog was on the end of a 12-foot rope, after originally claiming she was not tied at all. (2 RT 219-21.) Sayles was emotionally upset and frustrated at the hearing, and was found guilty. (2 RT 222-23, 225.) Sayles complained to the city about Militano, but the officer was not punished, though Sayles did recover the cost of a new driver's license.

(2 RT 219, 226.)

B. The Trial Court's Exclusion of Testimony Was An Abuse of Discretion, and Violated Sanchez's Constitutional Rights

The trial court ruled that the Sayles evidence addressed a "collateral issue of very little relevance" which had been decided against Sayles twice, noted that Sayles could not identify the precise code section, and excluded the testimony under Evidence Code section 352 as involving an undue consumption of time. (2 RT 227-28.) This was error.

Evidence Code section 352 gives trial courts the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." While broad, the discretion "is not unlimited" (*People v. Ross* (1979) 92 Cal.App.3d 391, 407), and "the trial court's authority under Evidence Code section 352 to exclude relevant evidence must yield to [defendant's] constitutional right to present

a defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

The Sixth Amendment gives a criminal defendant the right to present a defense (*Crane v. Kentucky* (1986) 476 U.S. 683, 690), and that right is an element of the due process afforded by the Fourteenth Amendment. (*Washington v. Texas* (1976) 388 U.S. 14, 19.) A defendant's right to present a defense includes "the right to present all relevant evidence of *significant* probative value to his or her defense." (*People v. Cunningham* (2001) 25 Cal.4th 926, 999, citing *Babbitt* (emphasis in original).)

The trial court abused its discretion in refusing to allow Sayles to testify on behalf of Sanchez. Sayles' inability to recall the precise number of the code section allegedly violated had no bearing on the remainder of his testimony, and the jury was entitled to draw its own conclusions as to Sayles' credibility.

The purported concern with the consumption of time was belied by the record. The entire Sayles testimony is contained in 10 pages of the reporter's transcript

(2 RT 217-27), out of a total trial transcript of 389 pages. In *People v. Harris* (1998) 60 Cal.App.4th 727, the challenged testimony occupied 25 pages of transcript, and the Court found that the "only factor favoring admitting the evidence is that it did not consume much time. (*Id.* at 739-40.) As the Supreme Court warned in *Cunningham*, "A trial court must be careful not to permit its proper concern with the expeditious conduct of the trial to lead to an improper acceleration of the proceedings." (*Cunningham*, 25 Cal.4th at 998.)

The trial court's conclusion that the Sayles testimony dealt only with a collateral issue having little relevance to the case is contrary to the rationale behind the landmark decision in *People v. Pitchess* (1974) 11 Cal.3d 531, and its codification in Evidence Code sections 1043 and 1045.

The right of a defendant to discover the personnel files of officers is "based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and

reasonably accessible information." (*Pitchess*, 11 Cal.3d at 535.) Discovery is not limited to cases involving altercations with the officers (*People v. Memro* (1985) 38 Cal.3d 658, 679), but must also be provided where information can be used to impeach or cross-examine the police, because "*Pitchess* motions are proper for issues relating to credibility." (*People v. Hustead* (1999) 74 Cal.App.4th 410, 417.)

Hustead held that the defendant had met his burden under *Pitchess* as to prior complaints of dishonesty against the arresting officer; the defendant was contesting the police officer's account of his driving before a traffic stop, "which led to a reasonable inference that the officer may not have been truthful. Therefore, it becomes relevant whether the officers have been accused of falsifying reports in the past." (*Hustead*, 74 Cal.App.4th at 418.)

According to Sayles, Militano had misrepresented facts regarding the stop of his vehicle by originally claiming his dog was untethered, and then falsely claiming she was on the end of a rope, when she was

actually tethered properly using an elaborate harness. (2 RT 218-21, Exhibit 402A.)

Sanchez, of course, was contesting Militano's account of what happened after the stop in this case. It was critical to Sanchez's defense that he be able to cast doubt on Militano's credibility – he testified repeatedly that Militano was either incorrect or lying (3 RT 270, 278, 286-87, 288, 292-93, 298), and at one point stated that Militano was "making up the majority of what he was saying." (3 RT 278.)

As discussed at greater length in section II.D. *infra*, Militano was the only witness as to Count 4, battery of a peace officer, so the jury necessarily had determined that his testimony was credible in finding that Sanchez was guilty of battery of a peace officer. (5 RT 392-93.) Sayles' testimony that Militano in the past had misrepresented the facts following a traffic stop went to the heart of the prosecution's case on Count 4.

Even with respect to the rest of Militano's testimony pertaining to Counts 1 and 2, which to some

extent was corroborated by the other officers, Sanchez's defense was based entirely on calling into question the credibility of the officers as to the "14" tattoo, whether Sanchez had been pushed into the tree, and how the controlled substance was discovered, all as discussed at more length in section II.D, *infra*.

Sayles' testimony would have provided relevant information about Militano for the jury to consider in arriving at its verdict, and the trial court abused its discretion in excluding it.

C. The Trial Court's Unconstitutional Exclusion of Testimony Prejudiced Sanchez

Because the exclusion of this important testimony impaired Sanchez's rights under the Sixth and Fourteenth Amendments, the error should be considered prejudicial unless the prosecution can establish beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The prosecution could never meet this burden as to Count 4, which depended entirely on Militano's testimony. Sanchez admittedly never struck Boone, and

Boone, who was right there, did not see Sanchez kick Militano, which Sanchez denied doing. (1 RT 28-30, 61; 3 RT 264, 283-85.) Since the jury's finding that Sanchez was guilty of battery of a peace officer (5 RT 392-93), was based solely on the testimony of Militano, the exclusion of Sayles' testimony casting doubt on Militano's credibility could not have been harmless beyond a reasonable doubt.

The evidence regarding Count 2 for possession was also in conflict, and there was an important discrepancy in the testimony of the officers (Militano and Boone versus CSI Chong) that cast doubt on how the controlled substance was found. Militano corroborated the testimony of Boone, who claimed that, during a search of the area where the ivy had been compressed by the struggle, he and CSI Chong had found the baggie, he directed Chong to pick it up, and Chong had done so. (1 RT 31, 41-42, 78-79, 107-08.)

The testimony of CSI Chong was very different. According to Chong, Boone suggested to him "that in the area where [Sanchez] was seated and where he was

arrested that there might be evidence that the suspect might have abandoned in that area." (2 RT 154.) Boone then found the baggie and picked it up himself. (2 RT 155.) On cross-examination, Chong acknowledged that he normally would have photographed evidence such as the baggie before it was moved, but Boone had picked up the baggie so quickly that Chong could not photograph it, and did not even see where it had been located in the ivy. (2 RT 179-80.)

Sanchez, of course, denied ever having possession of any controlled substance, and never saw the baggie containing the crystalline substance that the officers testified to finding in the ivy. (3 RT 262-63, 295-96.) To the extent that Chong's testimony suggested that Boone had possibly planted the baggie, it reinforced Sanchez's denial of possession. Chong contradicted both Militano and Boone on critical issues regarding the discovery of the contraband, and once again, the exclusion of Sayles' testimony casting doubt on Militano's credibility could not have been harmless beyond a reasonable doubt.

Turning to Count 1, the testimony was again contradictory. Sanchez asserted that the officers began harassing him after they learned about his "14" tattoo from the dispatcher (3 RT 253-54, 265, 272-74, 293-94, 299, 303), and had knocked him into the tree just before the altercation in the ivy; he did not attempt to run away. (3 RT 255-59, 266-67, 278, 280-83, 289-91, 300.) Neither Militano nor Boone could recall anything about a tattoo (1 RT 64-65, 131), but the dispatch tape supported Sanchez and contradicted the officers. (4 RT 319; Exhibit E.)

Sanchez's defense that the officers were harassing him and falsely claiming that he ran away would have been bolstered by the Sayles testimony undermining Militano's credibility; once again, the prosecution cannot establish that its exclusion was harmless beyond a reasonable doubt.

If the Court concluded that the Sayles testimony involved only a minor or subsidiary right, the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, would be applicable. (*People v. Cunningham* (2001) 25

Cal.4th 926, 999.) But even under that standard, a more favorable verdict on Counts 1, 2, and particularly 4, was reasonably probable following admission of the testimony. The jury necessarily relied exclusively on Militano's testimony in convicting Sanchez on Count 4, and a different outcome was reasonably probable if doubts were raised about that testimony. Similarly, for the reasons stated above, admission of the Sayles testimony made a more favorable verdict on the other counts reasonably probable due to conflicts in the testimony, including conflicts between the arresting officers and CSI Chong regarding Count 2 for possession.

II. THIS COURT SHOULD EXAMINE *PITCHESS* MATERIAL AND, IF APPROPRIATE, ORDER FURTHER PROCEEDINGS

In addition to the complaint by Sayles, the City of Sunnyvale may have produced documentation of other complaints against the officers involved in this case during the *in camera* hearing held pursuant to Sanchez's motion under *People v. Pitchess* (1974) 11 Cal.3d 531.

(ART 8-10.) At this time, of course, neither Sanchez nor his appellate counsel has reviewed any such documentation, but appellant asks the Court to examine the transcript of the *in camera* proceeding and materials produced, which the Court ordered part of the record on December 22, 2005, and determine whether additional records should have been produced. If appropriate under Evidence Code sections 1040-1047, appellant asks the Court to allow him at that time to provide further briefing on the issue. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 418-23.)

III. DEFENSE COUNSEL'S FAILURE TO REDACT DISPATCH TAPE TO REMOVE REFERENCE TO "NARCO REG," COUPLED WITH FAILURE TO OBJECT TO TESTIMONY OF OFFICER AND TO CLOSING ARGUMENT OF DISTRICT ATTORNEY THAT "NARCO REG" MADE POSSESSION COUNT MORE LIKELY, WAS INEFFECTIVE ASSISTANCE OF COUNSEL

Although defense counsel properly obtained a ruling prior to trial that the prosecution could not impeach Sanchez with his prior convictions under Health & Safety Code section 11377 for possession of controlled substances (1 RT 37-38), she played the dispatch tape for the jury without redacting it to exclude a reference to Sanchez having a "narco reg" (3 RT 303-04; 4 RT 319-20; Exhibit E.)

Defense counsel then made no objection when the prosecution called Officer Richard Patel to testify that "narco reg" meant that Sanchez was a narcotic registrant who had to register within his city of residence because he had either been arrested for a drug-related offense, or was on parole for conviction of a drug-related offense. (4 RT 319-20; Exhibit E.)

Finally, defense counsel made no objection when the prosecutor, in closing argument, suggested to the

jury that the information about Sanchez being a narcotics registrant was something that "was inadvertently put in by the defense," and argues:

> We know he was a narcotics registrant. So doesn't it make sense that he was the person in possession, that he did possess the methamphetamine in this case?

(4 RT 332.)[8]

A criminal defendant has the right to reasonably effective assistance of counsel under both the Sixth Amendment and Article I, section 15 of the California Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

While reviewing courts should "avoid second-guessing counsel's informed choice among tactical alternatives" (*People v. Pope* (1979) 23 Cal.3d 412, 424), an appellate court can determine that the

---

[8] The prosecutor also argues that "we know he's been in jail several times by his own admission." (4 RT 332.) This was also due to the ineffective assistance of defense counsel, but the issue will have to be raised by a separate petition for writ of habeas corpus, which Sanchez intends to file in the near future.

defendant has been denied the effective assistance of counsel if "there can be no satisfactory explanation" for the counsel's action, or inaction. (*People v. Coddington* (2000) 23 Cal.4th 529, 652.)

In *People v. Guizar* (1986) 180 Cal.App.3d 487, defense counsel in a murder prosecution similarly did not seek to redact a tape-recorded statement that referred to "other murders" allegedly committed by the defendant. Although the contention on appeal was that defense counsel was ineffective for failing to discover a mistranslation regarding the other murders, the Court never reached that issue, finding it "inconceivable" that counsel had not at least objected under Evidence Code section 352. (*Guizar*, 180 Cal.App.3d at 492.)

The Court reverse the conviction on the appellate record and in rejecting the Attorney General's suggestion that defense counsel had made a conscious, tactical decision to allow admission of the tape, stated:

> It is inconceivable to us that a defense counsel would make a tactical decision to admit evidence that a defendant, on trial for

> murder, had committed other murders in the past. We can imagine no sound tactical reason why trial counsel would have done this, and the record does not support an assumption that admission of the evidence was a tactical decision.

(*Guizar*, 180 Cal.App.3d at 492 n.3.)

Similarly, there can be no sound tactical reason for allowing the jury to learn that a defendant on trial for possession of controlled substances had been convicted of the same crime in the past, and the inaction here was even worse, because counsel stood by while the prosecution brought in a witness to explain that "narco reg" meant a prior drug conviction, and then argued propensity during closing.

In order to prevail on a claim of ineffective assistance, of course, defense counsel must not only "have failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates" (*Pope*, 23 Cal.3d at 425), but absent counsel's failings, there must be "a reasonable probability of a more favorable outcome." (*In re Cordero* (1988) 46 Cal.3d 161, 180.) Defense counsel's

action in this case was clearly prejudicial. No one ever saw Sanchez in possession of a controlled substance and, as discussed in section II *supra*, the evidence regarding discovery of the contraband was conflicting, even among the officers.

The common law has traditionally excluded evidence regarding prior charges and criminal propensity "'not because it has no appreciable probative value, but because it has too much.'" (*People v. Alcala* (1984) 36 Cal.3d 604, 630-31.) Evidence of other crimes "[i]nevitably" tempts juries to give the record excessive weight, and either biases the jury as to the present charge, or convinces it to punish the defendant "'irrespective of guilt of the present charge.'" (*Alcala*, 36 Cal.3d at 631.) As one court put it, "'The tendency of propensity evidence to "overpersuade' the jury is beyond dispute." (*People v. James* (2000) 81 Cal.App.4th 1343, 1352.)

In this case, the prosecutor took advantage of the "narco reg" evidence to argue that Sanchez, due to his prior conviction, was precisely the type of guy who was

likely to possess a controlled substance. (4 RT 332.) In the absence of any convincing evidence of possession, a more favorable outcome would have been more likely if defense counsel had not handed the prosecution an improper, but compelling, propensity argument.

IV. THE TRIAL COURT ERRONEOUSLY IMPOSED $1,500 IN ATTORNEY FEES ON SANCHEZ DESPITE HIS PRESUMPTIVE INABILITY TO PAY

In addition to the prison term, the trial court erroneously ordered Sanchez to pay $1,500 in attorney's fees pursuant to section 987.8. (CT 238, 240; 6 RT 403.) Such fees can only be imposed following notice and a hearing regarding the defendant's present ability to pay the attorney fees. Ability to pay is defined to include the defendant's present financial position, as well as reasonably discernible future financial position within the six months following the hearing. (Pen. Code § 987.8, subd. (g)(2). Not surprisingly, section 987.8, subdivision (g)(2)(B) provides that:

> Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.

The trial court in this case made no finding regarding Sanchez's present ability to pay attorney fees, and sentenced him to three years and eight months in state prison. (6 RT 399-404.) In the absence of any reason to believe Albert Sanchez had any ability to pay $1,500 in attorney fees, the imposition of this fee was error and should be stricken.

A. Sanchez Did Not Waive Right to Object to Imposition of Attorney Fees

The prosecution may contend that Sanchez waived any objections to sentencing by failure to object at the time. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) But as the Supreme Court indicated in *Scott*:

> [T]here must be a meaningful opportunity to object to the kinds of claims otherwise deemed waived by today's decision. This opportunity can occur only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices.

(*Scott*, 9 Cal.4th at 356.)

Courts following *Scott* have determined that due process does not require the trial court to provide some type of tentative decision prior to the sentencing hearing itself:

> The parties are given an adequate opportunity to seek such clarifications or changes if, at *any time* during the sentencing hearing, the trial court describes the sentence it intends to impose and the reasons for the sentence, and the court thereafter considers the objections of the parties before the actual sentencing. The court need not expressly describe its proposed sentence as "tentative" so long as it demonstrates a willingness to consider such objections.

(*People v. Gonzalez* (2003) 31 Cal.4th 745, 752 (emphasis in original).)

In this case, Sanchez was denied a meaningful opportunity to object to the sentence, which is the "'fundamental requisite of due process." (*People v. Zuniga* (1996) 46 Cal.App.4th 745, 758.) The trial court provided no opportunity for Sanchez or his counsel to object to the imposition of the fee, and never even addressed his ability to pay the fees. (6 RT 399-404.)

B. If This Court Determines Sanchez Did Waive Right to Object to Imposition of Attorney Fees, He Was Denied Effective Assistance of Counsel

Although Sanchez believes that he is entitled to challenge the imposition of the attorney's fees on this appeal, if the court determines that he has waived that right he has been denied the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) As was the case regarding the "narco reg" evidence discussed in section III *supra*, there could be no sound tactical basis for trial counsel's failure to raise an objection to the trial court's imposition of the $1,500 in attorney fees. (*People v. Coddington* (2000) 23 Cal.4th 529, 652.) In the event that this court decides that Sanchez has waived his valid objections to the fees, he has suffered prejudice due to the ineffective assistance of counsel, and is entitled to relief on that basis. (*Strickland*, 466 U.S. at 693-94; *People v. Cash* (2002) 28 Cal.4th 703, 734.)

V. THE TRIAL COURT'S IMPOSITION OF THE AGGRAVATED TERM FOR POSSESSION OF A CONTROLLED SUBSTANCE VIOLATED *BLAKELY* AND SANCHEZ'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT

Like many sentences now pending on appeal in California, the trial court's imposition of the aggravated term of three years in this case (6 RT 400-01), violated the Sixth Amendment and due process under *Blakely v. Washington* (2004) 542 U.S. 296. *Blakely* applies to fact finding on aggravating circumstances necessary for imposition of an upper term under California's Determinate Sentencing Law ("DSL").

Appellant recognizes that the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, held that there is no federal constitutional right to a jury trial on fact-finding relating to aggravating factors used to impose the upper term under DSL, and that this Court is bound to follow the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In order to preserve this issue, however, appellant makes the argument at this time. Appellant

notes that the United States Supreme Court is currently considering a petition for writ of certiorari in *Black v. California* (05-6793), and on February 21, 2006, granted certiorari in *Cunningham v. California* (05-6551), an upper-term *Blakely* case presenting the question of whether DSL violates the right to a jury trial and proof beyond a reasonable doubt, by allowing judges to conduct fact-finding on aggravating factors used to impose an upper term sentence.

Because this Court is bound by *Black*, and because this Court is undoubtedly already familiar with the core argument, appellant will forego any extended explanation as to why *Black* was decided incorrectly. Appellant will only briefly summarize the rationale for *Blakely*'s application to California upper terms.

In *Blakely*, the Court held that, where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to jury determination

of those additional facts by proof beyond a reasonable doubt. (*Blakely*, 542 U.S. at 301-05.)

Because the middle term is the presumptive sentence under DSL, and a defendant may only receive an upper term if "aggravating circumstances" are found (Pen. Code § 1170, subd. (b)), the California sentencing scheme for judicial determination of those facts under a preponderance standard suffers from the same constitutional defects as the Washington regime reviewed in *Blakely*.

The trial court violated *Blakely*, 542 U.S. at 301-02, by imposing an upper term based in part on its own finding of aggravating facts not found by the jury; *i.e.*, the amount of the controlled substance that was found. (5 RT 392; 6 RT 401.)

Since the trial court could only impose the aggravated term based on a finding of aggravating factors that have neither been admitted nor determined by a jury, (§ 1170, subd. (b); Rule 4.410), the maximum sentence that could be imposed on Sanchez was two years.

CONCLUSION

For all the above reasons, this Court should reverse Albert Sanchez's conviction. In the alternative, this Court should reduce the sentence on Count Two to two years, and strike the $1,500 in attorney fees.

DATED: June 19, 2006 LAW OFFICES OF PAUL KLEVEN

By:_____
PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Appellant's Opening Brief contains 7358 words, as calculated by my WordPerfect 11 word processing program.

_____
PAUL KLEVEN