IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ALLEN WHITMER, Defendant and Appellant.	)	No. S208843

Second District Court of Appeal, Division Four, Case No. B231038
Los Angeles County Superior Court Case No. GA079423
Honorable Candace J. Beason, Judge Presiding

DEFENDANT'S REPLY BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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Defendant files the following Reply Brief on the Merits to respondent's Answer Brief on the Merits. The failure to respond to any particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects defendant's view that the issue was adequately addressed in Defendant's Opening Brief on the Merits.

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ARGUMENT

I

BECAUSE ALL OF DEFENDANT'S TAKINGS WERE PART OF A COMMON SCHEME OR PLAN, HE SHOULD ONLY HAVE BEEN CONVICTED OF A SINGLE COUNT OF GRAND THEFT

A. The Portion Of The *Bailey* Decision Addressing The Crime Of Grand Theft Was Not Mere Dictum

In arguing this Court should not apply the rule it set forth in *Bailey*, respondent first contends that the portion of *Bailey* addressing the crime of grand theft "constituted dictum and is not binding upon this Court." (Resp. Brief p. 22-23; *People v. Bailey* (1961) 55 Cal.2d 514 ("*Bailey*").) Respondent contends that instead, *People v. Stanford* (1940) 16 Cal.2d 247, 250-251 and other cases predating *Bailey* "remain binding precedent on the issue." (Resp. Brief pp. 22-23.) Respondent is incorrect for two reasons.

First, this Court is not bound by any of its own prior decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [this Court's decisions are binding on lower courts].) The issue before this Court is whether to continue to apply the rule set forth in *Bailey* or to announce a new rule.

Second, as recognized by the Court of Appeal herein, and as repeatedly held by myriad other Courts of Appeal over the past fifty years, the

portion of this Court's decision in *Bailey* addressing multiple acts of grand theft constitutes the current state of the law, not mere dicta. (See Slip Opn. p. 25; *People v. Jaska* (2011) 194 Cal.App.4th 971, 979-985 [recognizing *Bailey* as governing law and applying the rule as set forth therein]; *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1148 [concluding under *Bailey* that the defendant could not remain convicted of multiple grand theft offenses in light of jury finding that defendant committed thefts pursuant to a "'single, overall plan or objective'"]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363-364 [reversing all but one grand theft conviction pursuant to *Bailey* because the several takings committed over the course of several days were all committed pursuant to a single plan]; *People v. Brooks* (1985) 166 Cal.App.3d 24, 31 [reversing 13 of 14 counts of grand theft under *Bailey* because they were the product of a general intent or overall plan, with but a single ultimate object]; *People v. Packard* (1982) 131 Cal.App.3d 622, 626-627 [reversing all but one grand theft conviction pursuant to *Bailey* because the several takings were all committed pursuant to a single plan]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 48 [reversing three of four counts of grand theft under *Bailey* because defendant acted pursuant to a single purpose and objective]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [reversing all but one of the defendant's attempted grand theft conviction

under *Bailey* because the several attempted takings were all committed pursuant to a single objective, i.e., to steal $3.2 million from the city]; *People v. Sullivan* (1978) 80 Cal.App.3d 16, 20 [holding the trial court erred in refusing to instruct the jury in a grand theft case pursuant to *Bailey* and expressly rejecting the Attorney General's argument that *Bailey* was dicta].)

Although multiple acts of petty theft were directly at issue in *Bailey*, this Court's opinion setting forth the same applicable test for multiple acts of both petty theft and grand theft was necessarily not dicta as to the crime of grand theft because in doing so, this Court expressly overruled *People v. Scott* (1952) 112 Cal.App.2d 350, 351, which had adopted a contrary rule of law for the crime of grand theft. (*People v. Bailey, supra,* 55 Cal.2d at pp. 519-520.)

"A precedent cannot be overruled in dictum, of course, because only the ratio decidendi of an appellate opinion has precedential effect [Citation]; to hold otherwise, ..., would be to conclude that a statement by this court that *is not* a precedent can somehow abrogate an earlier statement by this court that *is* a precedent. This is not the law." (*Trope v. Katz* (1995) 11 Cal.4th 274, 287, emphasis in original.) Thus, as aptly stated by the Court of Appeal in *Sullivan*, and equally applicable to respondent's argument herein: "In short, the *Bailey* court specifically disapproved the very case

which upheld the position now asserted by respondent. In view of the disapproval of *Scott*, we cannot dismiss the *Bailey* language as mere dicta." (*People v. Sullivan, supra,* 80 Cal.App.3d at p. 20.)

B. *Bailey* Meant What It Said

Respondent next contends that even if not dictum, "it does not appear that *Bailey* intended the rule it promulgated with respect to the aggregation of multiple counts of petty theft to be identical to the rule pertaining to the aggregation of multiple counts of grand theft." (Resp. Brief pp. 24-25.)

This Court's decision in *Bailey* was clear. As stated by this Court: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (*People v. Bailey, supra,* 55 Cal.2d at p. 519.)

This Court provided even further clarity when it expressly overruled *Scott*, which as noted above, was a case that had adopted a directly contrary rule of law. (*People v. Bailey, supra,* 55 Cal.2d at pp. 519-520.)

Thus, prior to the Court of Appeal's decision in this case, the rule of law set forth in *Bailey* has been consistently applied according to its terms.

(See *People v. Tabb, supra,* 170 Cal.App.4th at 1149 [recognizing *Bailey* has been "consistently applied" in theft cases involving the same victim]; *People v. Washington* (1996) 50 Cal.App.4th 568, 575 [*Bailey* has been "consistently applied"].)

Respondent suggests *Bailey* did not mean what it said, and contends that the Court's decision to overrule *Scott*, but not *Stanford*, *Ashley*, and *Rabe* is "puzzling." (Resp. Brief pp. 29-30.) Defendant disagrees. This Court did not need to overrule the above cases because none of them discussed the rule of law set forth in *Bailey* and because this Court found them to appear to be distinguishable on their facts.[1] (See *People v. Bailey, supra,* 55 Cal.2d. at p. 519 ["Although none of these decisions discussed the rule set forth above, it does not appear that the convictions would have been affirmed had the evidence established that there was only one intention, one general impulse, and one plan."].) In contrast, this Court did overrule *Scott* because it had

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[1] Respondent also contends "these decisions" found factually distinguishable in *Bailey* included *Ashley* and *Rabe*, but not *Stanford*, even though all three decisions were discussed above in the same paragraph of *Bailey*. (Resp. Brief pp. 25-27.) Defendant disagrees. However, even if respondent were correct on that point, it is ultimately of no moment because *Stanford* did not address the "one intention, one general impulse, and one plan" aspect of the *Bailey* decision, because it did not announce a rule of law contrary to *Bailey*, because *Bailey* did not otherwise discuss the facts in *Stanford*, and because the rule of law subsequently promulgated in *Bailey* was clear. It appears respondent's real complaint is that *Bailey* was decided incorrectly.

adopted a rule of law for grand theft that was contrary to the *Bailey* decision. (See *Id.* at pp. 519-520.)

The rule of law set forth in *Bailey* was clear.

C. This Court Should Not Overrule *Bailey* For Public Policy Reasons

Respondent next contends that assuming *Bailey* does correctly state the law applicable to grand theft, it should be overruled for what amount to public policy reasons. (Resp. Brief pp. 28-32.)

In this vein, respondent contends *Bailey* should be overruled because a defendant who commits multiple takings in excess of the statutory minimum for grand theft is more culpable than one who commits a single taking, and should therefore be punished more harshly. (Resp. Brief pp. 28-31.) However, this argument is misplaced in the context of the crime of grand theft. (See, e.g., *People v. Neder* (1971) 16 Cal.App.3d 836, 852 [recognizing that application of the *Bailey* rule to theft cases is appropriate because "[i]f a certain amount of money or property has been taken pursuant to one plan, it is most reasonable to consider the whole plan rather than to differentiate each component part."].)

For example, a defendant who commits a series of twenty-five individual $1,000 takings on twenty-five consecutive days from a single victim pursuant to the same scheme and plan is not necessarily more culpable

than another defendant who commits a single $50,000 taking from that same victim that took several months to plan and execute. Yet, under respondent's suggested interpretation of the law, the defendant who stole less money would be subject to a maximum prison term of three years for his first taking plus one-third the mid-term, or eight months, for each of the additional 24 takings, or a total sentence of 19 years in prison, whereas the defendant who stole twice as much money would be subject to a maximum term of only three years in prison. (See Pen. Code, § 489.)

Respondent also contends that continuing to apply the rule set forth in *Bailey* would encourage a defendant to commit more takings "confident in the knowledge that he will never be punished for any of his additional offenses." (Resp. Brief p. 29.) This argument should also be rejected for several reasons. First, *Bailey* has been the law of this state for over 50 years and respondent offers no evidence that it has had this effect. Second, the rule advocated by respondent would instead have the perverse effect of encouraging a defendant to commit one very large taking, confident not only in the knowledge that if successful he will have obtained more profit at the victim's expense but also in the knowledge that if caught he will be subject to minimal punishment. Third, the premise of respondent's argument is also faulty because the law currently allows for a court to consider the fact that

there were multiple takings in choosing between a lower, middle, or upper term sentence (see *People v. Sandoval* (2007) 41 Cal.4th 825, 848), and because Penal Code section 12022.6 also currently provides for enhanced punishment for a defendant who commits multiple takings that in combination result in a loss in excess of several different statutorily delineated amounts.

D. There Is No Statutory Basis To Impose Different Rules For Grand And Petty Theft

As noted in Defendant's Opening Brief on the Merits, there is no statutory basis to impose a different rule of aggregation for petty theft and grand theft, and thus applying the same rule of aggregation for both as set forth in *Bailey* is consistent with the statutory scheme. (DOBM pp. 9-10.)

Respondent does not identify any specific statutory basis for imposing a different rule for grand theft. Respondent instead contends that while aggregating multiple acts of petty theft into a single felony count based on the value of the property is appropriate, "grand theft may not be aggregated into anything greater than itself." (Resp. Brief p. 30.)

In addition to not being founded on any statutory authority, this argument is overly simplistic and overlooks the fact that, for example, a grand theft in excess of $65,000 is greater than, and subject to greater punishment

than, a grand theft of less than that amount. (See Pen. Code, § 12022.6, subd. (a)(1).)

Respondent also does not consider the anomalies that would result in applying a different rule for the greater offense of grand theft than for the lesser included offense of petty theft. For example, consider a hypothetical case in which the defendant committed a series of 10 takings pursuant to a common plan and scheme, for which the value of each taking was uncertain but was somewhere between $900 and $1,000. Under the law advocated by respondent, a district attorney might elect to file 10 felony grand theft charges, while the jury would appropriately be instructed on the lesser included offense of petty theft as to each charge based on the evidence. If the jury found in favor of the lesser included offense as to each, then the defendant would not be convicted of any felony offense even though his takings in the aggregate exceeded at least $9,000 and he was clearly guilty of a felony grand theft.

Consistent with the statutory scheme, this Court should not apply a different rule of aggregating offenses for the greater and lesser included offenses of grand and petty theft.

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E. Principles Of Stare Decisis Support The Continued Application Of The *Bailey* Rule

Respondent contends principles of stare decisis are irrelevant because "*Bailey* never articulated the rule [defendant] has attributed to it" and "the fact that lower courts of appeal misconstrued *Bailey's* holding does not trigger concerns regarding stare decisis." (Resp. Brief p. 31.) For the reasons set forth above, the rule set forth in *Bailey* was clear and respondent's interpretation of it is incorrect.

Moreover, principles of stare decisis are highly relevant to this now 53-year-old decision that has been uniformly applied by all Courts of Appeal prior to this case. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 ["It is, of course, a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices."]; *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 921 [principles of stare decisis are entitled to "special force" in matters of statutory construction].)

In accordance with fundamental principles of stare decisis, the rule set forth by this Court in *Bailey* should continue to be applied as it has in this State for the past 53 years.

F. The Fact That The Legislature Has Never Acted To Overrule *Bailey* In The Past 53 Years Indicates The Legislature's Support For That Interpretation Of The Law

Respondent contends that the fact that the Legislature has never acted over the past 53 years to overrule *Bailey* "is irrelevant ... because *Bailey* does not stand for the proposition that appellant attributes to it." (Resp. Brief p. 31.) This argument misses the point and should be rejected.

Indeed, it is not defendant or respondent's interpretation of *Bailey* that is relevant on this point. What is relevant is the interpretation of *Bailey* that has been applied by the courts of the State of California for the past 53 years and the fact the Legislature has never acted to overrule that judicial interpretation of the law.

Bailey states that multiple convictions of grand theft are improper where the takings were committed pursuant to the same plan or scheme, and for the past 53 years, the Courts of Appeal have uniformly interpreted and applied *Bailey* to stand for this exact same proposition of law. (See, e.g., *People v. Jaska, supra,* 194 Cal.App.4th at pp. 979-985; *People v. Tabb, supra,* 170 Cal.App.4th at p. 1148; *People v. Kronemyer, supra,* 189 Cal.App.3d at pp. 363-364; *People v. Brooks, supra,* 166 Cal.App.3d at p. 31; *People v. Packard, supra,* 131 Cal.App.3d at pp. 626-627; *People v.*

Gardner, supra, 90 Cal.App.3d at p. 48; *People v. Richardson, supra,* 83 Cal.App.3d at p. 866; *People v. Sullivan, supra,* 80 Cal.App.3d at p. 20.)

While not necessarily conclusive, the fact that the Legislature has never acted to overrule the interpretation of *Bailey* uniformly and repeatedly applied by the courts of this state for the past 53 years indicates the Legislature's approval of that interpretation of the law. (See *People v. Williams* (2006) 26 Cal.4th 779, 789-790 [legislative inaction is not necessarily conclusive, but indicates acquiescence in the prior judicial interpretation]; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 178 [declining to overrule a judicial interpretation of a statute after decades of legislative inaction and the unanimity of decisions restating that interpretation].)

G. To The Extent This Court Decides To Overrule *Bailey* And Imposes A New Rule For Grand Theft, The Rule Should Be Applied Prospectively Only

In a footnote, respondent contends that any disapproval of *Bailey* should not be applied prospectively only because "any disapproval of *Bailey* would not be 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue,'" and because "where a defendant relies upon 'a mistaken dictum of court, traditional notions of fair play and substantial justice are not offended by applying' the proper rule of

law to that defendant's case." (Resp. Brief p. 32, fn. 12, citations omitted.) This argument is misplaced and must be rejected.

Indeed, defendant is not merely relying on *Bailey*, dicta or otherwise. Rather, as noted above, for the past 53 years, the Courts of Appeal have repeatedly and uniformly applied the interpretation of *Bailey* advocated by defendant herein. Any disapproval of *Bailey* at this time most certainly would be unexpected and unforeseeable in light of the decades of Court of Appeal decisions uniformly approving and applying defendant's interpretation of the law. (See *People v. Blakely* (2000) 23 Cal.4th 82, 91-92 [in determining whether a judicial change in the law was unforeseeable, and therefore applied retroactively to a criminal defendant would be unconstitutional, this Court considers not only its own prior decisions, but also the applicable Court of Appeal opinions existing at the time of the defendant's crimes]; see also *People v. Davis* (1994) 7 Cal.4th 797, 812 [retroactive application improper when this court overturns consistent decisions by Courts of Appeal narrowly construing a criminal statute].)

Thus, in the event this Court decides to overrule *Bailey*, any such new rule should be applied prospectively only, and all but one of defendant's grand theft convictions should be reversed under the rule set forth in *Bailey* and its progeny that was in effect at the time of the crimes herein.

H. An "Automobile" Is Different Than A "Motor Vehicle," And Therefore Defendant Was Not Properly Convicted Of Twenty Violations Of Penal Code Section 487, Subdivision (d)(1)

Finally, respondent contends that regardless of this Court's interpretation of *Bailey*, defendant's convictions should be affirmed because he was properly convicted of twenty counts of grand theft of an automobile pursuant to Penal Code section 487, subdivision (d)(1). Respondent contends this is so because, although Penal Code section 487, subdivision (d)(1), by its terms applies only to the theft of an automobile, it should be interpreted to encompass any and all motor vehicles including motorcycles, dirt bikes, ATVs, and other recreational vehicles. (Resp. Brief pp. 32-35.)

This same contention was previously raised by respondent and rejected by the Court of Appeal. (Slip Opn. pp. 2, 9-14; Resp. Brief in the Court of Appeal pp. 29, 32-34.) Respondent did not file a Petition for Review, and it does not appear this contention is within the scope of this Court's grant of review. (Cal. Rules of Court, rule 8.516.) However, assuming for purposes of argument the issue is properly before this Court, it should be rejected.

Penal Code section 487 defines numerous different types of grand theft. Penal Code section 487, subdivision (a), makes it a grand theft to take money, labor, or property that is of a value exceeding a certain dollar

amount, $400 at the time of defendant's trial, and currently $950. (Pen. Code, § 487, subd. (a).) Penal Code section 487, subdivision (d), also makes it a grand theft to take, irrespective of proof of value, certain specific items of property, including "an automobile." (Pen. Code, § 487, subd. (d)(1).)

Respondent contends that regardless of this Court's interpretation of *Bailey*, and regardless of the fact that defendant did not steal any automobiles, his convictions should nevertheless be affirmed because he stole twenty motor vehicles, including motorcycles, dirt bikes, ATVs, and other recreational vehicles, and therefore committed twenty violations of Penal Code section 487, subdivision (d)(1). (Resp. Brief pp. 32-35.) The Court of Appeal previously rejected this argument, and to the extent this Court considers the issue, it should do the same.

A court's primary task in construing a statute is to determine the Legislature's intent, and this task begins with examining the words themselves for the answer. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724.) "If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls." (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1063.) Only if the language is susceptible to multiple interpretations does the Court resort to extrinsic aids including legislative history. (*Ibid.*)

Based on the plain language of the statute, respondent's contention should be rejected because the term automobile, as commonly understood, does not encompass all motor vehicles. Indeed, motorcycles, dirt bikes, and ATVs are not commonly considered automobiles. The term automobile is commonly understood to mean a particular type of motor vehicle, namely, a four-wheeled self-propelled vehicle intended to transport people on streets and roadways. (Slip Opn. p. 11; Webster's 3d New Internat. Dict. (2002) p. 148.) The term motor vehicle is far broader than the term automobile used in Penal Code section 487, subdivision (d).

Moreover, even if the legislative history were to be considered despite the plain language of the statute, respondent's argument fails. For the reasons set forth by the Court of Appeal herein, the legislative history does not support respondent's interpretation of the statute. (Slip Opn. pp. 12-13.)

Finally, defendant notes that after the Court of Appeal's published decision in this case, the Legislature amended Penal Code section 487, subdivision (d), in other ways, but not in the way advocated by respondent. Specifically, effective January 1, 2014, the Legislature modified the items subject to a grand theft conviction irrespective of value under subdivision (d) to delete the animals that were previously included within that

provision, and to instead include only the theft of either an automobile or a firearm.[2] (See Pen. Code, § 487, subds. (d)(1), (d)(2), amended by Statutes 2013, ch 618 (AB 924), eff. 1/1/14.)

The fact that the Legislature subsequently amended Penal Code section 487, subdivision (d), but did not replace the term automobile with motor vehicle as advocated by respondent demonstrates that the Legislature meant what it said when it limited that provision to automobiles. (See *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 303 [the Legislature is presumed to be aware of existing judicial decisions, and when the Legislature subsequently acts to amend a statute without modifying or overturning the prior decision, we presume the Legislature acquiesced in that prior judicial decision].)

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[2] Theft of the animals specified in former section 487, subdivision (d)(1), is currently addressed within Penal Code section 487a. (Pen. Code, § 487a.)

CONCLUSION

For the foregoing reasons, the additional reasons set forth in Defendant's Opening Brief on the Merits, and in the interests of justice, defendant respectfully requests this Court reaffirm the *Bailey* rule and reverse all but one of defendant's grand theft convictions.

Dated: 3/3/14

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520(c)(1), that according to the Microsoft Word computer program used to prepare this document, Defendant's Reply Brief On The Merits contains a total of 4,817 words.

Executed this 3rd day of March, 2014, in San Diego, California.

Eric Larson

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Supreme Court No.: S208843
Court of Appeal No.: B231038

DECLARATION OF SERVICE BY MAIL

I, Eric R. Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 3rd day of March, 2014, I caused to be served the following document(s):

DEFENDANT'S REPLY BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 3, 2014, at San Diego, California.

Eric Larson