IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court) No. S157932
Plaintiff and Respondent,	)
v.	) Court of Appeal) No. D049566
RAFAEL CEJA,	) Superior Court) No. SCE262242
Defendant and Appellant.	)

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT
HONORABLE CHRISTINE K. GOLDSMITH, JUDGE

APPELLANT'S BRIEF ON THE MERITS

RICHARD DE LA SOTA
State Bar No. 45003
P.O. Box 77757
Corona, CA 92877
(310) 406-5752

Attorney for Appellant,
Rafael Ceja

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APPELLANT'S BRIEF ON THE MERITS

Appellant was improperly convicted of petty theft (Pen. Code, § 484)[1] and receiving stolen property (§ 496, subd. (a)) with respect to the same property. The prosecutor argued that because appellant had stolen the property in question, he was guilty of receiving it as well. The trial court had a sua sponte duty to instruct the jury that it could not convict appellant of both charges, but failed to do so.

Appellant and respondent agree that appellant was improperly convicted of both charges, but differ on the appropriate remedy. The

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

principal issue presented by this case is whether, when a criminal defendant is improperly convicted of theft and receiving stolen property with respect to the same property, the theft conviction or the conviction for receiving stolen property should be reversed. A related issue is whether the level of the conviction, or the penalty, should be relevant or even dispositive.

The Court of Appeal, Fourth Appellate District, Division One, held, 2-1, in a published opinion filed October 3, 2007, that since appellant's receiving stolen property conviction was a felony, and his theft conviction was a misdemeanor, the receiving conviction was the more serious charge, and it should be affirmed, while the theft conviction should be reversed.

In a published opinion filed October 31, 2007, Division Three of the Fourth Appellate District addressed the identical issue presented by this case and held that it is the theft conviction that must be affirmed and the receiving conviction reversed, regardless of which is the "greater" or "lesser." (*People v. Recio* (2007) 156 Cal.App.4th 719, 726 (*Recio*).)

This court has held in a number of cases that a conviction for theft precludes a conviction for receiving the same property that one has been convicted of stealing. That principle does not depend upon the level of the crime or the punishment. The decision of the Court of Appeal misapplied well-established precedent. The dissent below and the unanimous court in *Recio* came to the correct conclusion. The judgment in the instant case should be reversed.

STATEMENT OF THE CASE

In an amended Information dated August 15, 2006, the San Diego County District Attorney charged appellant in Count 1 with taking and driving another's automobile in violation of Vehicle Code section 10851; in Count 2 with buying and receiving a stolen vehicle in violation of section 496d; in Count 3 with burglary from a motor vehicle in violation of section 459; in Count 4 with receiving stolen property in violation of section 496, subdivision (a); and, in Count 5, with petty theft in violation of section 484. It was further alleged, pursuant to sections 667.5, subdivision (b) and 668, that appellant had suffered a prior felony conviction for which he had been imprisoned in the state prison. (CT 4-6.)

Appellant's case was tried to a jury. The first three counts were dismissed pursuant to appellant's section 1118.1 motion. (CT 77; RT 76-77.) Appellant admitted the truth of the prior conviction that had been alleged against him. (CT 80; RT 216-218.) The jury convicted appellant of the two remaining counts, receiving stolen property and petty theft, that are the subject of this appeal. (CT 81-84; RT 219.)

Appellant was sentenced to the middle base term of two years for receiving stolen property and an additional one year for his prior conviction, for a total prison term of three years. Appellant was sentenced to 180 days for the theft conviction, but that sentence was stayed pursuant to section 654. (CT 60, 85; RT 503-504.)

Appellant appealed from the judgment. In a published opinion filed October 3, 2007, the Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment, 2-1. Appellant petitioned for a

rehearing. The petition was denied, 2-1, on October 11, 2007. On January 16, 2008, this court granted appellant's petition for review.

STATEMENT OF FACTS

At about 3:30 a.m. on June 26, 2006, an officer of the La Mesa Police Department, responding to a call regarding suspicious activity in a parking lot on Spring Street in La Mesa, saw appellant and another individual walking in an alley in that area. (RT 29.) Appellant was carrying a speaker box that had just been stolen from a vehicle parked about 50 yards north of that location in the same alley.[2] (RT 30, 37-39, 55, 62.) Appellant ran when he saw the officer. (RT 30.) The other person, Ricardo Torres, started to run, but stopped on the officer's command. (RT 31.) Torres had a hammer, screwdrivers, and a flashlight in his pants pocket. (RT 33, 47.) Appellant was found a short distance away hiding under a parked vehicle. (RT 37, 144.) The stolen speaker box was found nearby. (RT 37, 48-49.)

[2] The owner of the vehicle testified that he had chopped its top off, and could not lock it. (RT 61.) As a result, the auto burglary charged in Count 3 was dismissed pursuant to appellant's section 1118.1 motion. (CT 77; RT 76-77.) Since there was no evidence that the value of the stolen property exceeded $400.00, the prosecution was limited to charging misdemeanor petty theft with respect to the taking of the property.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR RECEIVING STOLEN PROPERTY MUST BE REVERSED, AND HIS CONVICTION FOR PETTY THEFT AFFIRMED

In 1992, the Legislature amended section 496, subdivision (a) by adding the following language: "A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." This amendment codified a longstanding common law rule that one cannot be convicted of stealing and receiving the same property. (*People v. Allen* (1999) 21 Cal.4th 846, 857-858; *People v. Smith* (2007) 40 Cal.4th 483, 522.)

Respondent concedes that appellant was improperly convicted of both offenses, but urged in the Court of Appeal that because appellant's conviction for receiving stolen property (a felony) was for the more serious offense, it should be affirmed, and his conviction for petty theft (a misdemeanor) should be reversed because it was the lesser offense. A majority of the Court of Appeal so held.

The decision of the majority below is legally unsound. A conviction for the theft of a particular item of property ***precludes*** a conviction for receiving it. (*People v. Smith, supra,* 40 Cal.4th at p. 522; *People v. Garza* (2005) 35 Cal.4th 866, 881; *People v. Allen, supra,* 21 Cal.4th at p. 857; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) That principle applies regardless of the level of the conviction or the penalty. (*People v. Stewart* (1986) 185 Cal. App. 3d 197, 209 (overruled on other

grounds in *People v. Allen, supra,* 21 Cal.4th at p. 866); *People v. Recio, supra,* 156 Cal.App.4th at p. 723.) The decision of the Court of Appeal in this case must be reversed.

A. Proceedings in the Trial Court

After the prosecution had rested, but before the defense case started, the trial court and the parties discussed jury instructions. Neither party had any comment with respect to CALCRIM 1750 (receiving stolen property) or 1800 (petty theft). (RT 89.) The trial court instructed the jury on those charges by reading those two instructions without modification. (CT 20-21; RT 173-174.)

Neither the prosecutor, appellant's trial counsel, nor the trial court seemed aware that the court had a sua sponte duty to instruct the jury that it could not convict appellant of both charges. (*People v. Garza, supra,* 35 Cal.4th at p. 881.) The issue was never discussed. Consequently, the trial court did not instruct the jury, as it should have, that it could not convict appellant of both charges.

Moreover, during opening argument the prosecutor argued that appellant had ***stolen*** the stereo and speaker box from the victim's vehicle and argued, as follows, that he was guilty of receiving stolen property for that very reason:

> Well, lo and behold, the other officers who found Mr. Ceja hiding underneath the truck, found also in that area the speaker box and the stereo; not coincidence. They were near him because he was the one carrying them and ***he was the one who took them out of [the victim's] truck***. It's commonsense [*sic*].
>
> Ladies and gentlemen, ***by taking the stereo and the speaker box out of [the victim's] Blazer, the defendant committed the two crimes that you are to decide upon and that's the receiving stolen***

property and the petty theft.

(RT 177, emphasis added.)

The prosecutor then went on to discuss the elements of receiving stolen property, telling the jury that appellant had received the property, meaning that "he was holding it, he had received that property. He took possession or control over it." (RT 178.) The prosecutor then described the knowledge element of receiving stolen property:

> So the second element, and there is [*sic*] only two to this crime, is that when he received this property, he knew it was stolen. Well, ***considering the fact that he's the one who stole it out of the Blazer, you can generally assume that he knew it was stolen since he's the one who did it.*** This isn't a case where some buddy of his handed him a speaker and it's like, "Hey, man. I'll give you this for $10." And a logical person might think, oh, that's a really good deal on a really nice speaker. This is a case where he's right there. He's right next to the car where the speaker and the stereo were ripped out of. Clearly, he knows it's stolen property.

(RT 178, emphasis added.)

Appellant's trial counsel argued, in essence, that Mr. Torres stole the stereo and the speaker box, that Torres was the one carrying the stolen property, and that the arresting officer was mistaken in his testimony that appellant was carrying the speaker box when the officer first observed him. (RT 183-205.)

In rebuttal, the prosecutor again argued that appellant stole the stereo and the speaker box.

> What really happened that night? What really happened? What is the reasonable version of events that you've heard? These two guys, criminals, riding around together in a car with a bunch of high school girls, ***stealing stuff out of cars***. That's exactly what was happening. I'm not saying the defendant's the only one who was stealing the stuff out of that orange Blazer

> that had the rooftop chopped off of it. Certainly they were both in on it. The other guy had the tools, cuts the wires, and the defendant's running off with the speaker box in his hand . . . . What's logical is that they were working together. They were both actively there. ***They were both taking things out of the car.***

(RT 210, emphasis added.)

The prosecutor thus consistently, and correctly, argued that the evidence showed that appellant was guilty of the theft of the items from the victim's vehicle and that the jury should so find. However, the prosecutor also consistently, but incorrectly, argued that ***because*** appellant was guilty of the theft, the jury should also find appellant guilty of receiving stolen property. The jury was never instructed otherwise. As a result, appellant was improperly convicted of both charges, as respondent concedes.

B. Where a Defendant Is Convicted of Theft, that Conviction Precludes His Conviction for Receiving the Same Stolen Property

Until 1992, there was a dispute in California over the precise meaning of the common law rule that, at a minimum, a person could not be convicted of stealing and receiving the same property. Some cases held that a person could not be convicted of violating section 496 if there was evidence that he stole the subject property. In other words, a person could not ***be*** both the thief and receiver of the same property. (*People v. Tatum* (1962) 209 Cal.App.2d 179, 183; *People v. Bausell* (1936) 18 Cal.App.2d 15, 18 ["Obviously, if a person is actually a thief he cannot possibly be guilty of receiving the very property which he

himself stole."].) This is what has been called the "broad" application of the rule. (*People v. Allen, supra,* 21 Cal.4th at p. 853.)

Other cases held that a person could not be ***convicted*** of stealing and receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) This is the "narrow" application of the rule. (*People v. Allen, supra,* 21 Cal.4th at p. 853.)

Relying on the "broad" application, some defendants "stretched the rule to its limit" (*People v. Allen, supra,* 21 Cal.4th at p. 853) by arguing that they could not be convicted of receiving stolen property unless the prosecution proved beyond a reasonable doubt that they had ***not*** stolen the property they were accused of receiving. While these arguments were rejected (*People v. Price* (1991) 1 Cal.4th 324, 464; *People v. Williams* (1967) 253 Cal.App.2d 952, 958), the fact that they were made illustrates the unsettled and confused state of the law that existed before 1992.

In 1992, the Legislature added the following language to section 496, subdivision (a): "A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."

In a decision that should have been the last word on this topic, this court ruled that the first sentence of the 1992 amendment "effectively abrogat[ed]" the "broad" application of the rule, and the second codified the "narrow" application. (*People v. Allen, supra,* 21 Cal.4th at pp. 856-857.) The first sentence of the amendment "thus authorizes a conviction for receiving stolen property *even though the defendant also stole the property*, **provided he has not actually been convicted of**

the theft. After the 1992 amendment, 'the fact that the defendant stole the property no longer bars a conviction for receiving, concealing or withholding the same property.' [Citation.]" (*Id.* at p. 857, original italics, boldface added.)

For the purposes of this case, the two sentences from *Allen* cited above are crucial. The majority opinion in the court below misread the passage, and, as a result, decided this case wrongly.

The majority opinion cited this passage but concluded that it "did not compel a dismissal of the receiving stolen property conviction in favor of the petty theft conviction. It only recognizes the defendant can be convicted of only one charge arising from the theft and unlawful possession of the same property." (Opn. p. 5.)

On the contrary, the cited passage means precisely that appellant's conviction for theft ***precludes*** his conviction for receiving stolen property and compels the reversal of the receiving conviction.

The *Allen* court's use of the phrase "provided he has not actually been convicted of the theft" can only mean that the person who steals an item of property can be convicted of receiving the same property ***only*** if he has not also been convicted of its theft. Conversely, if the person who stole who stole the property ***is*** convicted of its theft, he ***cannot*** be convicted of receiving that same property.

The majority opinion of the Court of Appeal in this case asserted that the decision in *Allen* does not compel the conclusion that appellant's conviction for receiving stolen property must be reversed; it only means that he could not be convicted of both stealing and receiving the same property. (Opn. p. 5.) The unspoken assumption in this assertion is that *Allen* furnishes no guidance with respect to

whether appellant's theft conviction or his receiving conviction should be reversed. The majority seems to be saying that since the second sentence of the crucial passage from *Allen* authorizes the conviction of the thief for receiving the property he has stolen, the first sentence does not mean that a conviction for theft bars a conviction for receiving the same property in all cases, and a reviewing court could affirm either conviction in the situation presented by this case depending upon the penalties prescribed for the respective offenses.

On the contrary, as the dissent in this case and the decision in *Recio* point out, the plain meaning of the cited passage from *Allen* is that where, as in this case, a person is convicted of theft, he ***cannot*** also be convicted of receiving the same property that he was convicted of stealing.

Moreover, the second sentence of that passage has to be read in the context of the history of the common law rule barring dual convictions for stealing and receiving the same property that the *Allen* court was reviewing. (*People v. Allen, supra,* 21 Cal.4th at pp. 851-857.) That sentence merely states that a person may ***be*** the thief and still be convicted of receiving the property he stole. The 1992 amendment to section 496, subdivision (a) eliminated the "broad" statement of the common law rule. In fact, the next sentence in the decision makes that clear. "Indeed, evidence that the defendant is the thief cannot be exculpatory regardless of its strength: before the amendment . . . we said he may be convicted of receiving although the evidence 'strongly suggests' he is the thief [citation]; after the amendment, the evidence of that fact may even rise to the level of proof beyond a reasonable doubt." (*People v. Allen, supra,* 21 Cal.4th at p. 857.)

This language throws the last shovelful of dirt on the "broad" application of the rule's coffin. Even if the proof that a person stole certain property would be sufficient to convict him of its theft, he may still be convicted of receiving that same property. However, the fact remains that he cannot be ***convicted*** of both offenses, and that, if he is, his theft conviction bars his conviction for receiving the same property. To assert otherwise, as the majority opinion in the court below does, is to ignore both *Allen's* plain language, and the context in which it was written.

The majority opinion also ignores a line of decisions by this court, both before and after the decision in *Allen*, that hold that a theft conviction precludes a conviction for receiving the same property.

For example, in *People v. Jaramillo, supra,* 16 Cal. 3d 752, the defendant was convicted of violating both Vehicle Code section 10851, and section 496 with respect to the same vehicle. (*Id.* at p. 756.) After pointing out that a violation of Vehicle Code section 10851 may be proved either by evidence that the defendant stole the vehicle or drove it after it had been stolen, the court said, "[i]t is clear, of course, that when an accused is convicted of a violation of Penal Code section 487, subdivision 3, which *necessarily* requires a finding that the accused intended to steal, he **cannot** also be convicted of receiving that same stolen property." (*Id.* at p. 758, original italics, boldface added.) Ultimately, the court held that since it "appear[ed] that the fact finder *may have* found that the defendant intended to steal the vehicle, a second conviction based on a further finding that the defendant received that same stolen property is **foreclosed**." (*Id.* at p. 759, original italics, boldface added.)

The defendant in *People v. Garza, supra,* 35 Cal.4th 866, was similarly convicted of violating both Vehicle Code section 10851 and section 496. The court phrased the issue in the following manner, "where, as here, a defendant's dual convictions for violating section 10851(a) and section 496(a) relate to the same stolen vehicle, the crucial issue usually will be whether the section 10851(a) conviction is for a theft or a nontheft offense. If the conviction is for the *taking* of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction that **bars** a conviction of the same person under section 496(a) for receiving the same vehicle as stolen property." (*Id.* at p. 881, original italics, boldface added.)

Finally, in *People v. Smith, supra,* 40 Cal.4th 483, the defendant was convicted of taking a gun in a robbery, and of receiving stolen property with respect to the same gun. The People conceded that the defendant's conviction for receiving stolen property was error. In accepting the People's concession, the Supreme Court noted, "defendant was convicted of both stealing [the victim's] gun and of receiving that gun as stolen property. During defendant's guilt phase trial, the prosecution argued that the robbery charged in . . . the information encompassed the taking of [the victim's] gun. The criminal act charged in count 8 [as receiving stolen property] was defendant's continued possession of [the victim's] gun at the time of his arrest. Accordingly, defendant's conviction on the charge of receiving stolen property must be reversed." (*Id.* at p. 522.)

The majority opinion in the court below ignores the plain language of these cases. In fact, it ignores them altogether. This case cannot be decided without dealing with the principles enunciated in *Jaramillo*,

Garza, and *Smith.* But that is just what the majority of the court below did. Those cases establish that where one is convicted of stealing a particular item, he may not also be convicted of receiving it. His conviction under those circumstances is "foreclosed." (*People v. Jaramillo, supra,* 16 Cal. 3d at p. 759.) It is "barred." (*People v. Garza, supra,* at p. 881.) However one wishes to phrase it, if a defendant is convicted of stealing and receiving the same property, his conviction for receiving must be reversed. (*People v. Smith, supra,* 40 Cal.4th at p. 522.)

Appellant was improperly convicted of stealing and receiving the same property. The appropriate appellate remedy is to reverse the receiving conviction and affirm the theft conviction. A thief may be convicted of receiving the property he has stolen ***only*** if he has not also been convicted of stealing it. As a result, "'it is the conviction for the theft or theft-related offense which has the preclusive effect and not vice versa.' [Citation.]" (*People v. Recio, supra*, 156 Cal.App.4th at p. 723.) The Court of Appeal erroneously concluded that appellant's theft conviction should be reversed and his receiving conviction affirmed. This court should reverse the decision of the Court of Appeal.

C. A Conviction for Theft Bars a Conviction for Receiving the Same Property Regardless of the Level of the Conviction or the Potential Penalty

Respondent concedes, and the Court of Appeal holds, that appellant was improperly convicted of stealing and receiving the same property. However, the majority opinion, without analyzing the facts of the case, holds that since the felony offense of receiving stolen property is

"greater" than the misdemeanor offense of petty theft, appellant's conviction for petty theft must be reversed, and his conviction for receiving stolen property must be affirmed. For a number of reasons, this conclusion cannot be supported, either legally or logically. The principle that a conviction for theft bars a conviction for receiving the same property applies regardless of the level of the conviction or the penalty prescribed for those offenses.

Theft and receiving stolen property are separate, independent crimes. In the abstract, neither is more serious than the other. Either the thief or the receiver can present the greater danger to society depending upon the circumstances of the particular case.

The majority opinion uses the term "greater," however, in the sense that one offense carries a more severe penalty than the other. "By any definition in criminal law, a felony is the 'greater' offense as compared to a misdemeanor." (Opn. pp. 5-6.)

The majority justifies its conclusion that the conviction for the offense with the more severe penalty should be affirmed by equating the situation in this case with the situation in which a defendant is convicted of committing an offense and of committing a lesser and necessarily included offense as well.

In that context, the greater offense includes all the elements of the lesser offense, plus the additional elements necessary to constitute the greater. The appellate remedy in that situation, as the majority points out (Opn. p. 5), is to affirm the conviction for the greater offense and to reverse the conviction for the lesser. (*People v. Ortega* (1998) 19 Cal.4th 686, 700; *People v. Cole* (1982) 31 Cal.3d 568, 582; *People v. Moran* (1970) 1 Cal.3d 755, 763.)

The first problem with the majority's analysis in this regard is that petty theft is not a lesser and necessarily included offense of receiving stolen property. (*In re Greg F.* (1984) 159 Cal.App.3d 466, 470.)

More importantly, affirming the conviction for the greater offense in that context recognizes that the trier of fact has found all the elements of the lesser offense, plus the additional elements necessary to constitute the greater offense, true beyond a reasonable doubt. Affirming the greater offense, therefore, is rationally related to the evidence and the jury's apparent intent in reaching its verdict. In fact, it effectuates the verdict. Simply affirming the conviction with the more severe penalty in the situation presented by this case, on the other hand, ignores the facts of the case, and the jury's intent altogether. It also fails to consider the obvious issues presented in this case by the court's failure to instruct the jury properly, and the prosecutor's improper argument.

In addition, as the dissent in the instant case points out, the origins of the rule in the lesser, included offense situation and the common law rule against dual convictions for stealing and receiving the same property are different, and bear no logical relation to one another. There is now a statutory prohibition against convicting a person for stealing and receiving the same property. However, the rule originally developed because, as a conceptual matter, one cannot receive something from oneself. On the other hand, there is no such conceptual difficulty in a conviction for an offense, and for a lesser and necessarily included offense. One offense subsumes the other, but convictions for both are not inconsistent in the sense that convictions for stealing and receiving the same property are.

Moreover, affirming the conviction with the greater penalty fails to address the fundamental error committed by the trial court, an error that was compounded by the prosecutor's argument. Both parties, and the court below, agree that the court had a sua sponte duty to instruct the jury that they it could not convict appellant of both of the offenses remaining against him. In other words, the jury should have been instructed that if it found appellant guilty of one of the offenses, it would have to acquit him of the other.

The trial court failed to instruct the jury properly in this regard. In this context, the proper test on appeal is whether "it is reasonably probable that a properly instructed jury would have reached a result more favorable to defendant by not convicting him of . . . both [offenses]." (*People v. Garza, supra,* 35 Cal.4th at p. 882.)

The issue in *Garza* was whether the defendant's conviction of violating Vehicle Code section 10851, subdivision (a) was for ***taking*** a vehicle with the requisite intent and was thus a theft conviction barring a dual conviction, or for a post-theft driving of the vehicle, in which case a dual conviction would be permissible. The court ruled that the evidence showed the latter and affirmed the defendant's convictions for both offenses. It was the facts of the case, in other words, that drove the analysis of prejudice.

As it happens, appellant was convicted of theft in this case. Appellant was charged with, and convicted of violating section 484, petty theft, as well as receiving the same property he was convicted of stealing. Since appellant was all but caught in the act of committing the theft, and since he was convicted of theft, as opposed to a theft-related crime, there is no need to conduct the same factual analysis of the

record that the *Garza* court conducted. However, *Garza* makes it clear that it is the facts of the case, and not the penalty, that should guide a reviewing court's analysis of prejudice.

To illustrate, suppose that the trial court ***had*** properly instructed the jury that they could not convict appellant of both the charges then pending against him. Suppose further that during deliberations, the jury questioned how they were to decide between the two charges. The instruction itself gives no guidance in that regard. Should the trial court have told the jury that they should convict appellant of the crime that carried the more severe penalty? Or should the court have told the jury that they should convict appellant of the charge that best described his conduct as revealed by the evidence?

This is where the majority's analysis breaks down. The former alternative, the one seemingly dictated by the decision in the court below, not only ignores well-established precedent, but would require the jury to conduct an inquiry it is not authorized to conduct.

A jury is the sole judge of the facts of the case. (§ 1127.) It can only decide factual questions. If the jury is trying a non-capital case it is forbidden from considering the defendant's potential sentence. (*People v. Nichols* (1997) 54 Cal.App.4th 21, 24; CALCRIM No. 200.) "It is improper to tell a noncapital jury about possible punishment because that subject is not only irrelevant to the jury's factfinding function, it has the potential to deflect the jury by inviting discussion and speculation about the results of whatever findings it makes." (*People v. Ruiloba* (2005) 131 Cal.App.4th 674, 692-693.)

As another illustration of the inapplicability of the majority's solution to the problem created by the trial court's failure to instruct the

jury properly and the prosecutor's improper argument, suppose that there was evidence that the property taken from the victim's vehicle was worth more than $400.00 and that appellant had been charged with grand theft and receiving stolen property. As in the previous example, suppose that the jury had been properly instructed that it could not convict appellant of both offenses. Suppose once more that the jury questioned the court how it was to decide between the two. Grand theft and receiving stolen property are both punishable as alternate felony-misdemeanors, with a maximum sentence of three years in the state prison. (§§ 489, subd. (b), 496, subd. (a).) Now what does the trial court do? It cannot instruct the jury to convict appellant of the crime carrying the more severe consequence because, in addition to telling the jury to do something it is not authorized to do, there is no difference in sentence. If the majority's test were the correct one, and penalty were the determining factor, the trial court might as well tell the jury, in this situation, to flip a coin. As a result, "it is *always* the receiving conviction which cannot stand, regardless whether it is the lesser or the greater offense." (*People v. Recio, supra,* 156 Cal.App.4th at p. 723.)

The majority opinion in the court below establishes a test that is inapplicable to the resolution of the issue presented by this case. Appellant's jury should have been presented with a straightforward factual question: Was appellant, on the facts of this case, guilty of theft or receiving stolen property (or not guilty of either)? To aid the jury in resolving the question presented by these illustrations the trial court could have "instruct[ed] the jury to determine [appellant's] guilt on the theft count first, and if it [found appellant] guilty of the theft, to return the receiving verdict unsigned." (*People v. Recio, supra,* 156

Cal.App.4th at p. 726; see also *United States v. Gaddis* (1976) 424 U.S. 544, 550 [96 S.Ct. 1023, 47 L.Ed.2d 222] [where defendant is charged in federal court with robbing a bank and receiving the proceeds of the robbery, "the District Judge . . . must . . . instruct the members of the jury that they may not convict the defendant both for robbing a bank and for receiving the proceeds of the robbery. [The court] should instruct them that they must first consider the [robbery] charges . . . and should consider the [receiving] charge . . . only if they find insufficient proof that the defendant himself was a participant in the robbery."].)

Appellant's potential sentence had nothing to do with the resolution of the issue that should have been presented to his jury. Neither should it have anything to do with the resolution of the appellate issue presented by appellant's concededly improper conviction of stealing and receiving the same property.

Finally, there is a fundamental logical flaw in the disposition reached by the majority in the court below. The majority opinion puts the analytical cart before the horse. The jury that heard appellant's case should have been instructed that it could not convict appellant of both theft and receiving stolen property, ***and***, that if it found appellant guilty of the theft, it was required to return a verdict of not guilty as to the receiving. It was the nature of the offenses and the facts, not the penalty, which should have dictated the jury's verdict.

By the same token, the appellate remedy when a defendant is improperly convicted of stealing and receiving the same property always has been, and should be, subject to an analysis of the facts, not a determination of the penalty. The crime determines the sanction. The sanction does not determine the crime. Rather than reasoning from

cause (conviction) to effect (sentence), in other words, the majority opinion in the court below reasons from effect to cause.

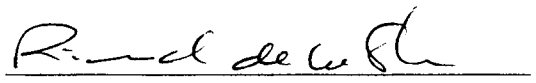
The prosecutor improperly argued that ***because*** appellant stole the subject property, the jury should return guilty verdicts as to both offenses, theft and receiving. The trial court failed to instruct the jury that it could not convict appellant of theft and receiving stolen property with respect to the same property. (§ 496, subd. (a).) As a result, appellant was improperly convicted of both offenses, as respondent concedes. Appellant's conviction for receiving stolen property should be reversed, and his conviction for petty theft affirmed. (*People v. Smith, supra,* 40 Cal.4th at p. 522; *People v. Garza, supra,* 35 Cal.4th at p. 881; *People v. Allen, supra,* 21 Cal.4th at p. 857; *People v. Jaramillo, supra,* 16 Cal 3d at p. 759; *People v. Recio, supra,* 156 Cal.App.4th at p. 726.) This court should reverse the judgment reached by the Court of Appeal.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal, Fourth Appellate District, Division One, should be reversed.

Dated: March 17, 2008

Respectfully submitted,



Richard de la Sota
State Bar No. 45003
Attorney for Defendant and
Appellant Rafael Ceja

CERTIFICATION OF WORD COUNT

I, Richard de la Sota, hereby certify that, according to the word processing program used to prepare this document, appellant's brief on the merits contains 5,730 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 19, 2008, at Corona, California.

Richard de la Sota
State Bar No. 45003

DECLARATION OF SERVICE

Case Name: RAFAEL CEJA No. S157932

I, the undersigned, say: I am over 18 years of age, employed in the County of Riverside, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 77757, Corona, California. I served the APPELLANT'S BRIEF ON THE MERITS of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Attorney General
110 W. "A" St., Ste 1100
P.O. Box 85266
San Diego, CA 92186-5266

Clerk, San Diego Superior Court
Attn: Appeals Division
P.O. Box 120128
San Diego, CA 92112-0128

San Diego County District Attorney
Attn: Appeals Division
330 W. Broadway, Suite 920
San Diego, CA 92101

Appellate Defenders, Inc.
555 West Beech St., Suite 300
San Diego, CA 92101

Rafael Ceja,
Freedom Ranch
1777 Buckman Springs Road
Campo, CA 91906

California Court of Appeal
Fourth District, Division One
750 B Street
San Diego, CA 92101

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Corona, California, on March 20, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 2008, at Corona, California.

Richard de la Sota