IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	S157932
Plaintiff and Respondent,	Supreme Court No.
v.	Court of Appeal No. D049566
RAFAEL CEJA,	Superior Court No. SCE26224
Defendant and Appellant.	

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

PETITION FOR REVIEW

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By appointment of the Court of Appeal under the Appellate Defenders, Inc. assisted case system

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

INSTRUCTIONS

TREATISES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Court
Plaintiff and Respondent,	) No.
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APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

Honorable Christine K. Goldsmith, Judge

PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Rafael Ceja, defendant and appellant, respectfully petitions this court for review following the published 2-1 decision of the Court of Appeal, Fourth Appellate District, Division One, D049566, filed on October 3, 2007, reversing his conviction for petty theft (Pen. Code, § 484)[1] and affirming his felony conviction for receiving (§ 496, subdivision (a)) the same property he was convicted of stealing. A copy

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

of the Court of Appeal's opinion is attached to this petition as Appendix "A." Appellant filed a petition for rehearing in the Court of Appeal. Appellant's petition was denied on October 11, 2007, Justice McDonald dissenting.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE APPELLATE REMEDY WHERE A PERSON IS IMPROPERLY CONVICTED OF PETTY THEFT AND FELONY RECEIVING STOLEN PROPERTY WITH RESPECT TO THE SAME PROPERTY SHOULD BE TO AFFIRM THE UNDISPUTED PETTY THEFT CONVICTION OR THE RECEIVING STOLEN PROPERTY CONVICTION.

NECESSITY OF REVIEW

Review of this issue is necessary to secure uniformity of decision and settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

Appellant was convicted following a jury trial of the misdemeanor offense of petty theft in violation of section 484, and of the felony offense of receiving the same property in violation of section 496, subdivision (a). Respondent concedes that appellant was improperly convicted of both charges. The issue is what the appellate remedy should be, given the facts of the case.

The Court of Appeal affirmed appellant's conviction for receiving stolen property and reversed his conviction for petty theft. The majority held that the reasoning behind affirming the conviction for the greater offense where a defendant is convicted of both an offense and a lesser

and necessarily included offense (*People v. Cole* (1982) 31 Cal.3d 568; *People v. Moran* (1970) 1 Cal.3d 755) should apply in this situation, even though neither theft nor receiving are lesser, necessarily included offenses of the other. The court held that since a felony offense is greater than a misdemeanor, the receiving conviction should be affirmed.

On October 31, 2007, the Court of Appeal, Fourth Appellate District, Division Three, filed a published opinion involving the exact issue presented by this case, reaching the opposite conclusion. (*People v. Recio* (Oct. 31, 2007, G038054) ___Cal.App.4th ___ [2007 Cal.App. Lexis 1795].) In *Recio*, the defendant was charged with robbery and receiving stolen property. The same property was involved in both charges. The trial court failed to instruct the jury that it could not convict the defendant of robbery and receiving stolen property in these circumstances. The defendant was convicted of petty theft and of felony receiving stolen property. The trial court vacated the defendant's conviction for petty theft and sentenced him on his conviction for receiving stolen property. The Court of Appeal reversed, holding that the defendant's conviction for receiving stolen property was foreclosed by his conviction for petty theft. (*Id.* at pp. 14-15.)

Until the decision in *Recio*, there were several decisions of this court in which the issue was whether a defendant could properly be convicted of committing a "theft-related" felony offense and of receiving the same property as a felony and what the remedy should be if the defendant is improperly convicted of both. (See, e.g., *People v. Smith* (2007) 40 Cal.4th 483 [defendant convicted of robbery and of receiving property taken in robbery; conviction for receiving stolen

property reversed]; *People v. Garza* (2005) 35 Cal.4th 866 [if defendant's conviction for violating Vehicle Code section 10851 was based upon ***taking*** the victim's vehicle with the requisite intent, then conviction for receiving stolen property must be reversed]; *People v. Allen* (1999) 21 Cal.4th 846 [defendant properly convicted of burglary and receiving stolen property with respect to the same property].) However, there was no reported case involving the situation presented here, in which the defendant was convicted, not of a felony theft-related offense and receiving the same property, but of misdemeanor theft and felony receiving stolen property.

The majority opinion issued by Division One is legally and logically unsound. Legally, it relies upon a principle that is inapposite to the present situation. Logically, it puts the analytical cart before the horse, reasoning, not from cause (conviction) to effect (sentence), but from effect to cause. Division Three's opinion in *Recio* and the dissenting opinion in this case correctly state the law. This court should grant review to resolve the conflict created by these two decisions, and to reaffirm the fundamental rule that where a person is convicted of theft, he cannot also be convicted of receiving the property he has been convicted of stealing.

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.)

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 petition. (CT 81-84; RT 219.)

STATEMENT OF FACTS

The Court of Appeal's opinion adequately sets out the facts of the case for purposes of this petition. Briefly, 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, saw appellant and another individual walking in an alley. 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

[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. There was no evidence that the value of the stolen property exceeded

the officer. (RT 30.) He 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.)

ARGUMENT

I.

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

There has long been a common-law rule that one cannot be convicted of stealing and receiving the same property. (*People v. Smith, supra,* 40 Cal.4th 483, 522; *People v. Allen, supra,* 21 Cal.4th 846, 857-858.) ". . . . [O]ne cannot be guilty of 'receiving' stolen goods if he was himself the perpetrator of the larceny." (Perkins on Criminal Law (1957) Receiving Stolen Property, p. 275.)

In 1992, the Legislature codified this rule by amending section 496, subdivision (a) to add 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."

The trial court had a sua sponte duty to instruct the jury that it could not convict appellant of both stealing and receiving the same property. (*People v. Garza, supra,* 35 Cal.4th 866, 881-882.) The Bench Notes to CALCRIM 1750 (relating to receiving stolen property) state: "If the

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$400.00, so the prosecution was limited to charging misdemeanor petty theft with respect to the taking of the property.

defendant is also charged with a theft crime, the court has a **sua sponte** duty to instruct that the defendant may not be convicted of both theft and receiving the same stolen property." (Bench Note to CALCRIM 1750 (August 2006), original boldface.) The trial court failed to instruct the jury to this effect.

In addition, the prosecutor argued repeatedly that appellant had stolen the property from the victim's vehicle and that he was guilty of receiving stolen property ***for that very reason***. In opening argument, the prosecutor told the jury, "By taking the stereo and the speaker box out of [the victim's vehicle], 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.)

Later, in discussing the knowledge element of receiving stolen property, the prosecutor again argued, "considering the fact that he's the one who stole [the property] out of the [vehicle], you can generally assume that he knew it was stolen since he's the one who did it." (RT 178.)

Except for the fact that neither respondent nor the Court of Appeal ever mention the prosecutor's erroneous argument and the effect it must have had on the jury, both parties and the court are in agreement up to this point. 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. This conclusion cannot be supported legally or logically.

A. Neither Petty Theft nor Receiving Stolen Property Is a Lesser, Necessarily Included Offense of the Other, and the Law Relating to such Offenses Is Inapplicable to the Situation Presented by this Case

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," therefore, 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 correctly posits (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, supra,* 31 Cal.3d at p. 582; *People v. Moran, supra,* 1 Cal.3d at p. 763.)

The first problem with this analysis 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.)

In addition, as the dissent in the instant case points out, the reasons for the rule in the lesser, included offense situation and the rule against conviction for stealing and receiving the same property are different, and bear no logical relation to one another. A person cannot be guilty of stealing and receiving the same property because, logically, one cannot receive something from himself. A conviction for the one offense is, for that reason, inconsistent with a conviction for the other. There is no such inconsistency in being convicted of an offense and a lesser, and necessarily included offense. There is no inconsistency, for example, in being convicted of possession of a controlled substance, and of possession of that same substance for purposes of sale.

Finally, affirming the conviction for a greater offense in the lesser-included 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. Simply affirming the conviction with the more severe penalty, on the other hand, ignores the facts of the case, and the jury's intent altogether.

Moreover, it ignores the impact on the jury's intent of the court's failure to instruct the jury properly and the prosecutor's erroneous argument. The issue in this case is whether the trial court's error (compounded by the prosecutor's argument) prejudiced appellant and resulted in a miscarriage of justice. (*People v. Garza, supra,* 35 Cal.4th

at p. 881.) To determine whether there was a miscarriage of justice in the context of this case, the reviewing court must ask 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]." (*Id.* at p. 882.) In failing to perform this analysis, the majority fails to acknowledge the basis for the rule it relies upon.

Appellant was caught in the act of committing the theft in this case. The prosecution argued correctly that he was guilty of the theft. It is at least reasonably probable, therefore, that appellant would not have been convicted of receiving stolen property at all had his jury been properly instructed and had the prosecutor not made such an obviously erroneous argument. Affirming the conviction carrying the more severe consequences under these circumstances cannot be justified.

B. The Sentence a Criminal Defendant Receives Is a Consequence of the Crime He or She Commits; the Crime is not a Consequence of the Sentence

The majority opinion does not meaningfully address the error that occurred in the trial court. Both parties and the court agree that the trial court committed error by failing to instruct the jury that it could not convict appellant of both stealing and receiving the same property. However, the majority opinion does not address what the trial court should have done. When one does consider that issue, the unsoundness of the majority's remedy becomes apparent.

The trial court had a sua sponte duty to instruct the jury that appellant could not be convicted of both stealing and receiving the same property. (*People v. Garza, supra,* 35 Cal.4th at pp. 881-882.) In

other words, the jury should have been instructed that if it returned a guilty verdict as to one charge, it would have to return a not guilty verdict as to the other.

The factual nature of the question that should have been put to the jury demonstrates the fallacy in the majority's conclusion that where a jury erroneously returns a guilty verdict as to both offenses the remedy is to affirm the conviction with the more severe sentence and reverse the conviction with the less severe sentence.

The jury is the sole judge of the facts of the case. (§ 1127.) However, 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 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.)

The 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)? Because appellant's jury was forbidden from considering penalty or punishment in determining whether to convict him, and of what, a reviewing court should not consider penalty in fashioning a remedy where the jury improperly returned guilty verdicts as to both charges.

To illustrate, suppose that the jury in this case ***had*** been properly instructed. 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 it should convict appellant of the crime that carried the more severe penalty? Or should the court have told the jury that it should convict appellant of the charge that best described his conduct as revealed by the evidence? It is absurd to suggest that the former would be correct, yet that is the message the majority would send to courts and attorneys facing similar situations in the future.

California Supreme Court precedent, moreover, dictates that it is the facts of the case, not the penalty, which should guide the analysis of prejudice and, therefore, the remedy when there is an improper conviction for stealing and receiving the same property. The majority does not mention *People v. Garza, supra,* 35 Cal.4th 866, noted not only in the Bench Notes to CALCRIM 1750 but in appellant's briefing. In *Garza*, the Supreme Court wrote, "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." (*People v. Garza, supra,* 35 Cal.4th at p. 881, original italics.)

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 violating Vehicle Code section 10851 and section 496, subdivision (a). There is no such issue in this case. Appellant was charged with, and convicted of, violating section 484, petty theft. In fact, the prosecutor argued to the jury that appellant was guilty of receiving stolen property ***because*** he was the thief.

Similarly, 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 was erroneously convicted of receiving stolen property. 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.)[3]

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[3] While robbery carries a more severe penalty than receiving stolen property, there is no mention of that either in the description of the People's concession, or the Supreme Court's recitation of the familiar rule that where one is convicted of stealing and receiving the same property, the receiving conviction must be reversed. In fact, one wonders what respondent's position would have been in the instant case had the evidence shown that the victim's property was worth over $400.00 and appellant had been convicted of grand theft and receiving, both of which carry identical sentences. It is inconceivable that respondent would have urged a reviewing court to affirm appellant's

In *People v. Allen, supra,* 21 Cal.4th 846, the court reviewed the history of the rule that one could not be convicted of stealing and receiving the same property and the 1992 amendment to section 496, subdivision (a) codifying the rule. "The [amendment] . . . 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.)

The plain meaning of that passage, as both the dissent in the instant case and the *Recio* court point out, is that where, as in this case, a defendant ***is*** convicted of theft, he ***cannot*** also be convicted of receiving the same property. The second sentence of the cited passage does not modify the first in the way the majority opinion asserts. It merely states that a defendant may ***be*** the thief and still be convicted of receiving the property he stole.[4] However, the fact remains that he

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receiving conviction at the cost of the theft conviction. This is another illustration, if another were needed, of the dubious and limited utility of the majority's "greater/lesser" analysis.

[4] Before the 1992 amendment to section 496, subdivision (a), there was a split of authority regarding the precise meaning of the rule regarding dual convictions for stealing and receiving the same property. The "broad" interpretation of the rule was that if a person stole the property, he could not be convicted of receiving it. The "narrow" interpretation was that even if there was evidence that the defendant stole the property, he could be convicted of receiving it, so long as he was not also convicted of the theft. The 1992 amendment codified the narrow interpretation. (*People v. Allen, supra,* 21 Cal.4th at p. 857.) The second sentence of the cited passage from *Allen* has to be read in that context.

cannot be ***convicted*** of both offenses, and that, if he is, the theft conviction bars a conviction for receiving stolen property.

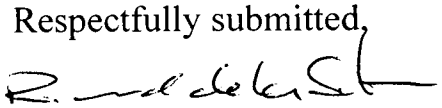
The jury that heard appellant's case should have been instructed that it could not convict appellant of stealing and receiving the same property, ***and***, that if it found appellant guilty of the theft, it was required to return a verdict of not guilty as to the receiving. It is the nature of the offenses and the facts, not the penalty, which should dictate a jury's verdict, and which should dictate a reviewing court's decision. The majority puts the cart before the horse. The ultimate sentence should be derived from the facts as found by a properly instructed jury. The offense should not be selected by the more severe penalty provided for an offense found by an improperly instructed jury. As a result, this court should grant appellant's petition, or, in the alternative, return this case to the Court of Appeal for reconsideration in light of this court's opinions cited herein and *Recio, supra.*

CONCLUSION

For the reasons set forth above, appellant respectfully submits that his petition for review should be granted. In the alternative, appellant respectfully requests that this court grant review and transfer the case to the Court of Appeal for reconsideration in light of this court's opinions and *Recio, supra.*

Dated: November 2, 2007

Respectfully submitted,

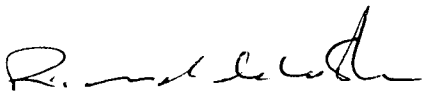


Richard de la Sota
Attorney at Law
State Bar No. 45003

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 petition for review contains 3,666 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 2, 2007, at Corona, California.



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DECLARATION OF SERVICE

Case Name: RAFAEL CEJA No. D049566

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 PETITION FOR REVIEW 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:

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Executed on November 5, 2007, at Corona, California.

Richard de la Sota

APPENDIX "A"

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL CEJA, Defendant and Appellant.	D049566 (Super. Ct. No. SCE262242)

APPEAL from a judgment of the Superior Court of San Diego County, Christine K. Goldsmith, Judge. Affirmed in part and reversed in part.

Richard De La Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Rafael Ceja of petty theft (Pen. Code, § 484)[1] and receiving stolen property (§ 496, subd. (a)). Ceja admitted serving a prior prison term. (§ 667.5,

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1 All statutory references are to the Penal Code.

subd. (b).) The court sentenced him to prison for three years: the two-year middle term for receiving stolen property enhanced one year for the prior prison term. It imposed, but stayed execution of, a 180-day sentence for petty theft (§ 654.) Ceja contends he cannot be convicted of theft and receiving stolen property he obtained in the theft and his conviction of receiving stolen property must be reversed.

FACTS

At approximately 3:30 a.m. on June 18, 2006, La Mesa Police Officer Hans Warren responded to a report that two males were observed acting suspiciously in a parking lot of an apartment complex. Warren saw two males who matched the description of the suspects. The male later identified as Ceja was carrying a speaker box. When Ceja saw Officer Warren, he dropped the box and ran. He was found nearby hiding under a pick-up truck. The speaker box Ceja dropped had been removed from a nearby parked vehicle.

DISCUSSION

Section 496, subdivision (a), which defines the offense commonly known as receiving stolen property, provides:

> "Every person who . . . receives any property that has been stolen . . . , knowing the property to be so stolen . . . shall be punished by imprisonment in a state prison, or in a county jail for not more than one year . . . .
>
> "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."

The People concede that Ceja was erroneously convicted of both receiving stolen property and theft of the same property. The People argue that because receiving stolen property is the greater offense, we should reverse the theft conviction and affirm the conviction of receiving stolen property. (See *People v. Moran* (1970) 1 Cal.3d 755, 763 (*Moran*) ["If the evidence supports a verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed"; *People v. Cole* (1982) 31 Cal.3d 568, 582 (*Cole*).) In *Moran*, possession of LSD was a lesser included offense of sale of LSD. In *Cole* grand theft was a lesser included offense of robbery. "Under California law, a lesser offense is necessarily included in a greater offense if . . . the statutory elements of the greater offense . . . include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Although Ceja correctly points out that theft is *not* a lesser included offense of receiving stolen property that does not compel the result he seeks. (See *In re Greg F.* (1984) 159 Cal.App.3d 466, 469.)

Generally, one convicted of receiving stolen property is acting as a "fence." (*People v. Allen* (1999) 21 Cal.4th 846, 854 (*Allen*).) A thief could not normally be convicted of receiving the same property the thief stole. (*Ibid.*) In 1992, section 496 was amended for the purpose of preventing a defendant who stole property from avoiding criminal conviction for the theft by hiding the property until after the statute of limitations expired on the theft offense and thereafter retaining the property he stole without threat of criminal prosecution because a thief who continued to possess the stolen property could not be convicted of receiving the same stolen property. (Assem. Com. on

Public Safety, Analysis of Assem. Bill 3326 (1991-1992 Reg. Sess.) pp. 1-2; Sen. Judiciary Com., Analysis of Assem. Bill 3326 (1991-1992 Reg. Sess.) pp. 2-3; Cal. Dept. of Finance, Analysis of Assem. Bill 3326 (April 30, 1992) p. 1; Assem. Ways & Means Com., Republican Analysis of Assem. Bill 3326 (May 6, 1992) p. 1; Cal. Youth & Adult Correctional Agency, Analysis of Assem. Bill 3326 (Aug. 19, 1992) p. 2.)

In *In re Kali D.* (1995) 37 Cal.App.4th 381, 386, the court held that the legislative history of the 1992 amendment to section 496 showed the legislative intent to allow a thief to be convicted of receiving the same property the thief stole, only after the statute of limitation on the theft offense had expired. *People v. Reyes* (1997) 52 Cal.App.4th 975, 987 held to the contrary because it concluded the plain meaning of section 496 as amended in 1992 authorized conviction of receiving stolen property regardless of whether the statute of limitations on the theft offense had expired. In *Allen, supra*, 21 Cal.4th 846, 857, the Supreme Court approved the *Reyes* conclusion.

Ceja contends the holding in *Allen, supra,* 21 Cal.4th 846, compels the conclusion that the receiving stolen property conviction must be reversed because he has also been convicted of theft of the same property. Ceja refers to a sentence in the *Allen* opinion at page 857 in which the court says, in part, "The sentence 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." Respectfully, that sentence cannot be read out of context to compel reversal of the receiving count instead of the theft count.

The court in *Allen* continued with the next sentence, "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.]" (*Allen, supra,* 21 Cal.4th at p. 857.)

We interpret the decision in *Allen, supra,* 21 Cal.4th 846, to recognize the fundamental change in the common law brought about by the 1992 amendment. Plainly that amendment permits a person who is the thief to be convicted of receiving the same stolen property. The limitation recognized by the amendment and the court's opinion in *Allen* is that the person cannot be convicted of both offenses. The *Allen* decision does 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.

We believe that we can find guidance in resolving this issue by analogy to the principles in *Moran, supra,* 1 Cal.3d at pages 762-763 and *Cole, supra,* 31 Cal.3d at page 582. In both cases the court held that where a person has been convicted of both the greater and lesser offense, the court must sentence on the greater offense. Both cases dealt with offenses, which involved convictions for both the greater and the lesser *included* offenses. From that difference Ceja argues we should not apply the principles of those cases because neither offense here is the lesser *included* offense of the other. Ceja continues that somehow the misdemeanor theft conviction must stand and the felony receiving conviction must fall. We disagree.

In this case petty theft was charged and convicted as a misdemeanor. The receiving charge, while a wobbler offense, was charged, convicted and sentenced as a felony. By any definition in criminal law, a felony is the "greater" offense as compared

to a misdemeanor. We believe the reasoning of *Moran, supra,* 1 Cal.3d 755 and *Cole, supra,* 31 Cal.3d 568, dictate the conviction of the felony offense, receiving stolen property, is the greater offense and must stand, and that the lesser offense, the misdemeanor of petty theft, must fall.

DISPOSITION

The conviction of petty theft is reversed. The conviction of receiving stolen property is affirmed. The trial court is directed to modify the abstract of judgment accordingly, and forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

CERTIFIED FOR PUBLICATION

HUFFMAN, Acting P. J.

I CONCUR:

BENKE, J.

McDONALD, J., dissenting.

I agree with the majority's concise opinion except its conclusion that Ceja's petty theft conviction rather than his receiving stolen property conviction should be reversed. The history of the issue of the defendant's conviction for receiving stolen property that the defendant stole, including the 1992 amendment to Penal Code section 496,[1] leads to the conclusion that if, as here, the defendant is convicted of the theft, he or she cannot be convicted of receiving the property stolen. I would therefore reverse Ceja's conviction of receiving stolen property.

The majority opinion recites the judicial history of the crime of receiving stolen property by the thief of the property following the 1992 amendment to section 496 and includes the relevant quotation from *People v. Allen* (1999) 21 Cal.4th 846 at page 857 that section 496 "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." The plain meaning of this quotation is that because Ceja was convicted of stealing the property he possessed when apprehended, he cannot be convicted of receiving the same stolen property. However, the majority opinion posits that the following sentence in *Allen* at page 857 alters the meaning of the previous statement that conviction of the theft precludes conviction of receiving the stolen property: "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.' (*People v. Strong* (1994) 30 Cal.App.4th

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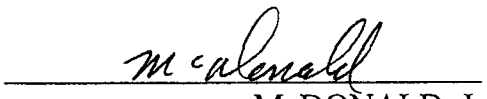
1 All statutory references are to the Penal Code.

366, 373.)" Unlike the majority, I do not conclude this sentence modifies or is inconsistent with the previous statement in *Allen* that permits conviction of receiving stolen property " 'provided [the defendant] has not actually been convicted of the theft.' " (*Allen,* at p. 857.)

The majority opinion analogizes the convictions of theft and receiving stolen property issue to the convictions of an offense and a lesser included offense, in which event the greater offense is upheld and the lesser offense dismissed. Although acknowledging that theft is not a lesser included offense of receiving stolen property, the majority opinion uses that analogy to conclude Ceja's theft, as the offense with the lesser penalty rather than receiving stolen property conviction, should be dismissed.

The lesser included offense analogy is not persuasive because its genesis is not the same as the theft-receiving stolen property issue. At common law one could not be convicted of receiving the same property stolen, not because of any prohibition of dual convictions for the same conduct, but because of the definition and nature of the receiving stolen property offense. In the lesser included offense context, there was no prohibition against conviction of the greater offense. For the reasons set forth in the majority opinion, in the 1992 amendment to section 496, the Legislature decided that the blanket unconditional prohibition of a conviction of receiving the same property stolen should be conditioned to prevent the defendant from avoiding any criminal conviction by secreting the stolen property beyond the statute of limitations for theft. In *Allen,* the California Supreme Court interpreted section 496 to permit conviction of receiving stolen property even if the statute of limitations for the theft offense had not expired but retained

a common law attribute by permitting conviction of receiving the property stolen only if there is no conviction for the theft; if there is a conviction for the theft, then there is no basis for a conviction of receiving the property stolen.



McDONALD, J.