IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY 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

By appointment of the Court of
Appeal under the Appellate
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Following a jury trial, appellant was convicted of the misdemeanor offense of petty theft in violation of Penal Code[1] section 484, and the felony offense of receiving stolen property in violation of section 496, subdivision (a). Both convictions related to the same property, a result respondent concedes was legally impermissible. (RBOM 1, 5.)

The issue presented by this case is whether a conviction for theft precludes a conviction for receiving the same property regardless of which offense carries the more severe penalty.

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

Appellant submits the following brief in reply to respondent's brief on the merits. If appellant does not address a specific point raised by respondent, it should not be considered a concession of the validity of respondent's argument. Rather, it reflects appellant's view that the matter was adequately addressed in his brief on the merits.

ARGUMENT

I.

THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEAL AND AFFIRM APPELLANT'S CONVICTION FOR PETTY THEFT AND REVERSE HIS CONVICTION FOR RECEIVING STOLEN PROPERTY

In its answer brief on the merits, respondent makes a number of arguments, summarized below, in support of the proposition that where, as here, a defendant is improperly convicted of stealing and receiving the same property, the conviction carrying the more severe penalty should be affirmed and that with the less severe penalty should be reversed.

Respondent also suggests a proposed jury instruction to be given in situations in which a jury requests guidance in deciding whether a defendant is guilty of theft or receiving. (RBOM 16-18.)

A. A Conviction for Theft Precludes a Conviction for Receiving the Same Property

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."

Respondent argues first that the 1992 amendment to section 496, subdivision (a) only prohibits dual convictions for stealing and receiving the same property; it does not express a preference for a conviction of one offense over the other. (RBOM 5-6.)

The assertion that the 1992 amendment does not evidence a preference for a conviction of one offense over the other falls in the category of true but irrelevant. Whether a particular defendant should be convicted of theft or receiving (or neither) will depend upon the facts of the case. It is true that the amendment itself does not specify which conviction should be affirmed should a person be improperly convicted of both. Nonetheless, this court and the lower appellate courts of the state have consistently held that where a defendant is convicted of stealing and receiving the same thing, the receiving conviction must be reversed and the theft conviction affirmed. (See, e.g., *People v. Garza* (2005) 35 Cal.4th 866, 887-882 [reviewing history of the rule that where a conviction for violating Vehicle Code section 10851 is based upon the ***theft*** of the vehicle, as opposed to a post-theft driving, a conviction for receiving the same vehicle cannot stand].)

Next, respondent argues that previous decisions of this court do not support the proposition that where a defendant is convicted of stealing and receiving the same property the conviction for theft precludes or bars the conviction for receiving. (RBOM 11-15.)

For example, in *People v. Jaramillo* (1976) 16 Cal.3d 752, a case involving dual convictions for violating Vehicle Code section 10851

and receiving stolen property with respect to the same vehicle, this 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.) 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.)

Respondent attempts to distinguish *Jaramillo* by pointing out that it "was decided in 1976, well before the 1992 amendment which abrogated the broad application of the common law rule that a defendant could not be convicted of receiving property if the evidence suggested he was a principal in the theft." (RBOM 15.)

While it is true that *Jaramillo* was decided before the 1992 amendment to section 496, subdivision (a), and that the amendment abrogated the "broad" application of the common law rule, *Jaramillo* did not employ the broad application of the rule to decide the case. Rather, it anticipated the 1992 amendment by applying the narrow version of the rule to the facts of the case, the court stating that it was "a fundamental principle that one may not be convicted of stealing and of receiving the same property." (*People v. Jaramillo, supra,* 16 Cal.3d at p. 757.) As a result, the fact that the case was decided before the 1992 amendment to section 496, subdivision (a) eliminated the broad application of the rule is irrelevant.

Similarly, in *People v. Garza, supra,* 35 Cal.4th 866, another dual conviction for violating Vehicle Code section 10851 and receiving stolen property, the court made this statement, "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.)

Respondent asserts that the court's holding in *Garza* that a conviction for theft[2] ***bars*** a conviction for receiving the same property (*People v. Garza, supra,* 35 Cal.4th at p. 881), is nothing more than a recognition that "a defendant can be convicted of only one charge arising from the theft and receipt of the same property" (RBOM 13).

Respondent's assertion simply cannot be squared with the court's holding in this regard. In fact, it flies in the face of the court's language in an almost Orwellian fashion. The court's language can only mean

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[2] The court pointed out that a conviction for violating Vehicle Code section 10851 can be based either upon taking a vehicle with the intent to steal it (theft), or driving it with the intent to deprive the owner temporarily of its possession (joyriding). (*People v. Garza, supra,* 35 Cal.4th at p. 876.) If a defendant's conviction for violating Vehicle Code section 10851 is for ***theft***, his conviction for receiving is barred. (*Id.* at p. 881.) This case presents the issue more squarely and simply. Appellant was charged with and convicted of petty theft in violation of section 484. In addition, the evidence at trial revealed that appellant was caught virtually in the act of stealing the victim's property from his vehicle.

that a person convicted of stealing something ***cannot*** also be convicted of receiving it.

In *People v. Allen* (1999) 21 Cal.4th 846, this court traced the history of the 1992 amendment to section 496, subdivision (a), ruling that it "abrogat[ed]" the "broad" application of the common law rule against dual convictions for stealing and receiving the same property [one cannot be convicted of receiving stolen property if he stole it], and codified the "narrow" application of the rule [one cannot be ***convicted*** of both offenses]. (*Id.* at pp. 856-857.) Explaining this historical context, the court said that the first sentence of the 1992 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.)

Respondent attempts to distinguish the court's use of the phrase quoted in the previous paragraph, "provided he has not actually been convicted of the theft" by arguing (as it did with respect to *Garza*) that the cited passage is nothing more than a recognition that a defendant cannot be convicted of stealing and receiving the same property. According to respondent, the cited passage does "not discuss or even contemplate the appropriate remedy where a defendant has been improperly convicted of both offenses." (RBOM 12.)

On the contrary, the plain meaning of this passage is that even though a person may have stolen certain property he still may be convicted of receiving it, ***but only on the condition that he has not***

been convicted of its theft. "The court's use of the word 'provided' unmistakably means the thief may be convicted of receiving the property he stole 'on condition that' he has not been convicted of theft. (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 937 [defining 'provided'].) Conversely, if the thief has been convicted of the theft, he may not be convicted of receiving the property he stole." (*People v. Recio* (2007) 156 Cal.App.4th 719, 725.)

In *People v. Smith* (2007) 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 court noted that the defendant had been convicted both of the theft of a gun during a robbery and receiving stolen property by his continued possession of the same gun at the time of his arrest. The court ruled that such a result was impermissible and that, "[a]ccordingly, defendant's conviction on the charge of receiving stolen property must be reversed." (*Id.* at p. 522.)[3]

Respondent argues that the court's disposition of the receiving charge in *Smith* has no bearing on the outcome of this case because

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[3] While the case was decided in 2007, the offenses to which the decision relates occurred in 1991, before the 1992 amendment to section 496, subdivision (a) was enacted. (*People v. Smith, supra,* 40 Cal.4th at p. 491.) As in *Jaramillo*, however, this should make no difference to the analysis of the present case, because the court in *Smith* used the "narrow" version of the rule against dual convictions ultimately enacted in the 1992 amendment. "Common law has long established that 'a person may not be convicted of [both] stealing and receiving the same property.' [Citation.]" (*People v. Smith, supra,* 40 Cal.4th at p. 522.)

there was no discussion in that case about whether the theft offense (robbery) carried a greater or lesser sentence than the receiving charge. (RBOM 14.) Respondent makes the same argument with respect to *Jaramillo* (RBOM 15) and *Garza* (RBOM 13) as well.

This argument is a red herring. There was no discussion in those cases about sentence because the subject of sentence was irrelevant to the outcome. The issue in all these cases was the defendant's ***conduct***, not his potential sentence.

In *Garza*, for example, this court found that the trial court had committed error by failing to instruct the jury that the defendant could not be convicted of stealing and receiving the same property. (*People v. Garza, supra,* 35 Cal.4th at p. 881.) "To determine whether this error caused prejudice to defendant amounting to a miscarriage of justice, we 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 violating both section 10851(a) and section 496(a)." (*Id.* at pp. 881-882.) This is a factual inquiry. The defendant's potential sentence simply does not enter into the analysis defined by the court.

In sum, a conviction for stealing a particular item precludes a conviction for receiving it. A series of decisions by this court going back at least 30 years makes that clear. It is simply not true that these cases furnish no guidance with respect to which conviction should be affirmed should a defendant be improperly convicted of stealing and receiving the same property. Indeed, these cases have provided abundant relevant guidance with respect to the resolution of the issue presented by this case. As a result, the court should affirm appellant's

conviction for petty theft and reverse his conviction for receiving stolen property.

B. The Provisions of Law Suggested by Respondent as Furnishing Guidance in the Resolution of the Issue Presented by this Case Are Inapposite

In rejecting the guidance of plainly relevant precedent, respondent argues that since neither the statute nor the cases interpreting it furnish any guidance with respect to which conviction should be affirmed, this court should analogize to other provisions of case law and the Penal Code and affirm the conviction for the offense carrying the more severe penalty. Respondent cites certain purported public policy considerations to justify this result. (RBOM 6-11.) The examples cited by respondent are inapposite.

First, respondent argues (and the majority of the Court of Appeal in this case held) that the situation in this case is analogous to that which occurs when a defendant is convicted both of an offense and of a lesser-included offense. (RBOM 6-9.) In that situation, the appellate solution is to reverse the conviction for the lesser offense and affirm the conviction for the greater. (*People v. Cole* (1982) 31 Cal.3d 568, 582; *People v. Moran* (1970) 1 Cal.3d 755, 763.) Appellant has already argued the legal inapplicability of this principle to the situation presented by this case (ABOM 14-16) but will repeat it briefly here.

A lesser offense is necessarily included within a greater "if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, 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.)

Under this definition, petty theft is not a lesser, included offense of receiving stolen property. (*In re Greg. F.* (1984) 159 Cal.App.3d 466, 470.)

Further, the rule affirming the conviction for the greater offense in the lesser-included offense context recognizes that the jury has found all the necessary elements of the lesser offense, plus the additional elements necessary to constitute the greater, true beyond a reasonable doubt. The rule, therefore, validates the jury's findings and its verdict by taking into account the jury's apparent intent.

Affirming the conviction for the more serious offense in the context of this case would, on the other hand, ignore the effect of the court's improper instruction and the prosecutor's improper argument on the jury's verdict. The jury's findings were tainted by these errors, and the verdict cannot be validated because it is contrary to law.

Finally, as Justice McDonald's dissent in the present case pointed out, the origins of the rule affirming the conviction for the greater offense in the lesser, included offense context, and the origin of the rule forbidding dual convictions for stealing and receiving the same property are quite different, and there is no logical connection between the reasoning behind these two distinct rules.

Respondent also argues that sections 654 and 1170.1 provide support for the proposition that the court should affirm the conviction for the more serious charge in this case.

Section 654 provides that a single act punishable under different provisions of the law is to be punished under the provision providing

"the longest potential term of imprisonment." Section 1170.1 provides that where a person is sentenced consecutively, the principal term is the term with the longest sentence.

Respondent turns these provisions on their heads. Both sections become applicable ***only*** when a ***properly*** instructed jury ***properly*** convicts a defendant of both offenses based upon sufficient evidence.

By contrast, appellant in this case was ***improperly*** convicted of both offenses by a jury that was ***improperly*** instructed by the court and misled by the prosecutor. While it is appropriate to select a sentence based upon a defendant's properly proven conduct, it is inappropriate to use the sentence for an offense improperly chosen by an erroneously instructed jury to select the offense. Simply put, the conduct determines the sentence; the sentence does not determine the conduct.

Nonetheless, respondent makes a number of policy arguments that purport to justify the use of these provisions to affirm the conviction for the greater offense.

The first of these arguments is that affirming the conviction for the offense with the more severe sentence will give the jury a choice "from the full range of crimes established by the evidence," and that, "[o]ffering the jury this choice assures greater accuracy in the jury's verdict. It also assures that the defendant is convicted of the greatest crime a jury believes he committed." (RBOM 8.)

There are several problems with this argument. First, there is no logical connection between affirming the conviction for the more serious offense and giving a jury a choice from the "full range of crimes established by the evidence." If the case is appropriately charged, and the jury is properly instructed, the jury will have the

choice respondent purports to favor, and it will be able to fulfill its fact-finding function.

Moreover, the assertion that giving the jury a choice assures that it will convict the defendant of the most serious crime the jury believes he committed is a non sequitur. Careful charging and proper instruction will assure that goal. In any event, a jury's choice should be based upon the ***facts*** of the case, not the various punishment alternatives prescribed for the crimes the prosecutor has chosen to charge. Punishment is a function of the offense or offenses found true by a properly instructed jury.

Finally, even if there were some logical connection between affirming the more serious charge and the jury's fact-finding function, respondent's argument in this regard ignores the real problem in this case. Had the jury been properly instructed, it would have had the choice the law requires—a choice between convicting appellant either of petty theft or of receiving stolen property, but not both. However, the trial court and the prosecutor tainted the fact-finding process with respect to that choice; the court by failing its duty to instruct the jury that it could not convict appellant of stealing and receiving the same property (*People v. Garza, supra,* 35 Cal.4th at pp. 881-882), and the prosecutor by repeatedly and erroneously arguing that appellant was guilty of the receiving charge ***because*** he was guilty of the theft (RT 177-178, 210.)[4]

[4] Remarkably, respondent has never so much as mentioned the prosecutor's argument in any of its briefing in this case, let alone dealt with the effect that argument must have had on the jurors.

Respondent also argues that affirming the greater offense would promote prosecutorial discretion in the charging process because if the theft charge were always to prevail in the situation presented by this case, a prosecutor would have a disincentive to charge theft and receiving in the alternative, and would have a motive to charge only the more serious (assuming there was a difference in sentence).

First, appellant does not challenge the prosecutor's decision to charge him with both offenses. It remains an open question (one the court need not reach) whether the first sentence of the 1992 amendment authorizes the prosecution to file a felony charge of receiving stolen property in every petty theft case as a way to elevate the charge to a felony. However, since the prosecutor charged both offenses in this case, appellant does not raise it here.[5]

In any event, while a prosecutor faced with deciding whether to charge a defendant with theft or receiving (or both) should be guided by the facts of the case, not the potential sentence. Of course, a prosecutor will charge the most serious offense the evidence will support, but the crucial factor in that decision is the defendant's conduct, not his potential sentence.

Finally, the filing prosecutor should be able to rely on the trial prosecutor to argue, and the court to instruct, according to the law

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[5] A prosecutor might be dissuaded by other factors from filing the more serious receiving stolen property charge in every case similar to this one as respondent fears. For example, should a defendant be charged with felony receiving stolen property as a way to elevate a routine shoplifting case to a felony, a court could exercise its discretion to reduce the charge to a misdemeanor pursuant to section 17, subdivision (b)(5). A misdemeanor receiving conviction will not support a felony conviction for violating section 666.

applicable to the charge. The filing decision should not depend on the potential result of appellate review should the trial prosecutor and the court blunder, as they did in this case.

Respondent's final argument is that the court should affirm the receiving charge as the more serious because, "the jury obviously believed that appellant committed both petty theft and receiving stolen property." (RBOM 10.) Given the factual and procedural history of the case, this is an astounding statement. The jury was not told that it could only convict appellant of one of the two offenses, as it should have been. Further, the prosecutor repeatedly and erroneously argued that appellant was guilty of receiving stolen property ***because*** he had stolen it. (RT 177-178, 210.) The jury's belief, therefore, was fatally compromised.

Moreover, respondent's reasoning is circular. Respondent concedes that appellant's conviction for theft and receiving stolen property was error. The error occurred because the court failed to instruct the jury properly and because the prosecutor erroneously argued that ***because*** appellant was guilty of stealing the victim's property, he was guilty of receiving it as well. Had the jury been properly instructed and had the prosecutor argued in accord with the law, appellant could not have been convicted of both offenses. Yet respondent argues that this court should affirm appellant's conviction for the more serious offense ***because*** the jury convicted him of both. In essence, respondent seeks to penalize appellant for the court's improper instruction and the prosecutor's improper argument.

In sum, even if the court needed to analogize to other provisions of law to determine this case, respondent's arguments in favor of using these provisions are unpersuasive.

C. There is No Merit to Respondent's Argument Regarding CALJIC No. 17.03 and CALCRIM No. 3516

When a jury is considering crimes charged in the alternative, the court must instruct it that the defendant can only be convicted of one of the charged offenses. (CALJIC No. 17.03; CALCRIM No. 3516.) A jury in this situation will presumably be instructed with respect to the elements of the crimes that have been so charged, but the instructions themselves do not give the jury any guidance in how to choose one offense over the other.

Respondent suggests that a jury required to choose between charges made in the alternative be given an instruction similar to that given a jury considering lesser-included offenses to the effect that the jury cannot convict of the less serious charge unless it acquits of the more serious charge, and that the court could instruct that one offense in the situation presented by this case was the greater offense, and the other was the lesser.

There are several problems with this suggestion.

First, the court is not required to decide this issue. (*People v. Slayton* (2001) 26 Cal.4th 1076, 1084 [court does not issue advisory opinions settling the law on a hypothetical set of facts].) Appellant only mentioned (ABOM 18-19) the lack of guidance in the instructions to demonstrate the inapplicability of respondent's proposed penalty-centered resolution of the issue presented by this case as opposed to the

fact-driven analysis required by the cases. The problem in the instant case is not that appellant's jury was uncertain how to choose between the offenses charged against appellant and what instructions it should have been given had that been the case, but that the jury was not instructed, as it should have been, that it had to choose. (*People v. Garza, supra,* 35 Cal.4th at p. 881.)

In any event, for reasons that have already been explained, this case does not involve a lesser-included offense situation, and the law and instructions related to that situation are, therefore, not applicable or even helpful.

Next, respondent argues that if appellant's jury ***had*** asked how it was to decide between the offenses, an instruction that it convict of the offense best described by the evidence (ABOM 18) would not have aided the jury "because the evidence showed he was guilty of both offenses." (RBOM 17.) On the contrary, the evidence showed that appellant, as the trial prosecutor argued, was guilty of theft. It is difficult to conceive how the jury would have found appellant guilty of receiving on the facts shown by the evidence in this case had the prosecutor not argued that appellant was guilty of receiving ***because*** he was guilty of theft.

Finally, in his brief on the merits, appellant argued that in the situation presented by this case, a jury could be instructed that it should consider the theft count first. If the jury agrees that the defendant is guilty of theft, it would then be required to acquit him of the receiving charge. (See *United States v. Gaddis* (1976) 424 U.S. 544, 550 [96 S.Ct. 1023, 47 L.Ed.2d 222].)

Respondent argues that there is no statutory basis for this suggestion because section 496, subdivision (a) does not specify which offense should be chosen in this situation.

Which offense a jury should select will, of course, depend upon the facts of the case. In this case, the prosecution's theory was that appellant had committed the theft, and the evidence supported that theory. That being the case, the most efficient procedure would be for the jury to consider the theft count first. (*People v. Recio, supra,* 156 Cal.App.4th at p.726.)

CONCLUSION

Appellant was improperly convicted of stealing and receiving the same property. (§ 496, subd. (a).) For the reasons stated in appellant's brief on the merits, his conviction for receiving stolen property should be reversed and his conviction for petty theft affirmed. Respondent's arguments that the opposite result should be reached are not persuasive. This court should reverse the judgment of the Court of Appeal, Fourth Appellate District, Division One.

Dated: June 6, 2008

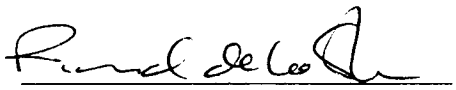
Respectfully submitted,

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

CERTIFICATION OF WORD COUNT

I, Richard de la Sota, certify that, according to the word processing program used to prepare this document, appellant's reply brief on the merits contains 4,076 words.

Executed at Corona, California on June 6, 2008.



Richard de la Sota

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 REPLY 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

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Richard de la Sota