IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RAFAEL CEJA,

Defendant and Appellant.

S157932

Fourth Appellate District, Division One, No. D049566
San Diego County Superior Court No. SCE262242
The Honorable Christine K Goldsmith, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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ISSUES PRESENTED

A defendant may not be convicted of both stealing and receiving the same property. If that nonetheless happens, must the reviewing court always dismiss the receiving count, or may it dismiss the theft count instead if that would result in greater punishment?

INTRODUCTION

The trial court in this case did not instruct the jury that the charges of petty theft and receiving stolen property were made in the alternative. (See CALJIC No. 17.03; CALCRIM No. 3516; *People v. Black* (1990) 222 Cal.App.3d 523, 525; see also *People v. Garza* (2005) 35 Cal.4th 866, 881.) As a result, appellant was convicted of both stealing and receiving the same property, a result prohibited by Penal Code section 496, subdivision (a). (CT 81-84; 2 RT 177-178, 219.)

By analogy to case law involving convictions for both greater and lesser included offenses, the Court of Appeal in this case concluded that where a defendant has been convicted of both the theft and receipt of the same property, the greater offense must stand and the lesser must be reversed. (*People v. Ceja*

(2007) 155 Cal.App.4th 1246, 1250.) It therefore reversed appellant's conviction for petty theft because, as a misdemeanor, it was a less serious offense than the receiving stolen property conviction. (*Ibid.*)

In *People v. Recio* (2007) 156 Cal.App.4th 719, a different division of the Court of Appeal confronted the same issue and reached a different result. It concluded that where a defendant is convicted of both theft and receipt of the same property, the receiving stolen property conviction must always be reversed regardless of whether it is the greater or lesser offense. (*Id.* at pp. 722-726.)

The Court of Appeal in this case reached the correct result. It properly determined that the appropriate remedy was to reverse the lesser offense. By so doing, it respected the jury's determination that appellant was guilty of a more serious offense than petty theft. While Penal Code section 496, subdivision (a) provides that dual convictions for theft and receipt of the same stolen property are improper, it does not contain language evidencing a preference for one conviction over the other. The only remedy implied by the statute is for the court to reverse one of the jury's two guilty findings so the defendant does not stand "convicted" of stealing and receiving the same property. (*People v. Ceja, supra,* 155 Cal.App.4th at p. 1250.)

Applying the rule of greater and lesser included offenses in the instant case implemented section 496, subdivision (a) by protecting appellant from dual convictions. At the same time, it respected the jury's assessment of the seriousness of appellant's actions. It would have been strange to permit appellant to receive a lower sentence than would otherwise be possible simply because he was convicted of an additional crime.

Because the Legislature in 1992 abrogated the broad application of common law rule that a thief cannot stand convicted of receiving property he stole, and because there is no statutory preference for one offense over the other, there is no statutory basis on which to require that the theft conviction

control regardless of which offense is greater.

Moreover, as demonstrated below, statements in this court's opinions do not evidence a preference for upholding the theft conviction whenever a defendant is convicted of both theft and receipt of the same property.

This case also touches upon a jury instruction issue. As appellant points out, in cases where the prosecution charges theft and receipt of stolen property in the alternative, jurors are not given any guidance on how to choose between the two offenses in the event they find the defendant guilty of both. (See CALJIC No. 17.03; CALCRIM No. 3516.) However, if there is a preference for the greater offense over the lesser as respondent suggests, and if it is the jury that must make that choice, then it should be instructed on how to do so. A solution would be for the court, as with lesser included offenses, to specify an order in which the jury is to evaluate the charges in question, and to stop if it finds the defendant guilty of the first designated charge. In the instruction, the court would specify the order of adjudication based upon which offense, in the context of the defendant's case, is the greater offense.

STATEMENT OF THE CASE

A jury in El Cajon convicted appellant of receiving stolen property (Pen. Code, § 496, subd. (a)) and petty theft (Pen. Code, § 484). (CT 81-84; RT 219.) Appellant then admitted serving a prior prison term. (Pen. Code, § 667.5, subd. (b)). (CT 80; RT 216-218.) On September 26, 2006, the trial court sentenced him to three years in prison, which consisted of the midterm of two years for receiving stolen property, plus one year for the prior prison term enhancement. The trial court stayed a 180-day sentence for the petty theft conviction. (CT 60, 85; RT 503-504.)

In a published opinion filed on October 3, 2007, the Court of Appeal reversed the petty theft conviction and affirmed the conviction for receiving

stolen property. Appellant filed a petition for rehearing, which was denied on October 11, 2007. On January 16, 2008, this court granted review.

STATEMENT OF FACTS

On June 18, 2006, at approximately 3:30 a.m., La Mesa Police Officer Hans Warren received a call reporting two Hispanic males with shaved heads and dark clothing involved in suspicious activity in a parking lot on Spring Street in La Mesa. (1 RT 27-29.) He then saw two men walking in an alley in the area who matched that description. (1 RT 29, 41.)

Officer Warren turned the spotlights from his patrol vehicle onto the men. (1 RT 46.) One of the men, later identified as appellant, was carrying a black object. The other man, later identified as Ricardo Torres, was walking ahead of appellant. (1 RT 30-32, 42, 55.) Appellant and Torres looked in Officer Hans's direction. Appellant then ran eastbound behind a garage. (1 RT 29-30.) Torres started to run, but put his hands up when Officer Warren ordered him to get down. (1 RT 31.) Officer Warren patted down Torres and found screwdrivers, a hammer, and a flashlight in his pants pockets. (1 RT 33, 47.) Appellant was found and arrested in a parking area near a speaker box and a stereo. (1 RT 36-37.)

During a subsequent investigation, Officer Warren discovered an orange/rust colored 1971 Chevy Blazer. Its top had been taken off and the driver's side door was open. The stereo had been removed and severed speaker wires were exposed. (1 RT 38-39.)

Juan Castro, the registered owner of the Blazer, testified that early on June 18th, his car was parked in the alley near his house between Spring Street and Palm Avenue. (1 RT 39, 60.) At 4:00 a.m., officers came to his door and took him to his car. His car door was open and his speaker box and stereo were gone. He did not give anyone permission to take those items. (1 RT 61, 63.)

ARGUMENT

I.

THE COURT OF APPEAL PROPERLY AFFIRMED APPELLANT'S CONVICTION FOR FELONY RECEIVING STOLEN PROPERTY AND REVERSED HIS CONVICTION FOR MISDEMEANOR PETTY THEFT

The trial court in this case did not instruct the jury that the charges of petty theft and receiving stolen property were made in the alternative. (See CALJIC No. 17.03; CALCRIM No. 3516; *People v. Black, supra,* 222 Cal.App.3d at p. 525; see also *People v. Garza, supra,* 35 Cal.4th at p. 881.) As a result, appellant was convicted of both petty theft and receipt of the same property. (CT 81-84; 2 RT 177-178, 219.) This result is barred by Penal Code section 496, subdivision (a).

Appellant contends the Court of Appeal should have upheld his misdemeanor petty theft conviction and dismissed the receiving conviction. He maintains a conviction for the theft of a particular item of property should always take precedence over a conviction for receiving the same property, regardless of which conviction constitutes the greater offense or would result in a greater sentence. (Appellant's Brief on the Merits "ABOM" 5-21.) Appellant's argument must be rejected. The Court of Appeal properly determined that the appropriate remedy was to reverse appellant's petty theft conviction, which was the lesser of the two offenses.

A. Penal Code Section 496, Subdivision (a) Provides That Dual Convictions For Theft And Receipt Of The Same Property Are Improper; It Does Not Contain Any Language Evidencing A Preference For One Conviction Over The Other

Before the Legislature's 1992 amendment to Penal Code section 496, subdivision (a), California law was governed by the common law rule that a person could not be convicted of stealing and receiving the same property.

(*People v. Garza, supra,* 35 Cal.4th at p. 875.) There was a "broad" and a "narrow" interpretation of this rule. The narrow application precluded only dual convictions for stealing and receiving the same property. (*People v. Allen* (1999) 21 Cal.4th 846, 857, 853.) The broad application precluded not only dual convictions, but also convictions for receiving stolen property whenever there was evidence implicating the defendant in the theft. (*Ibid.*; see also *People v. Smith* (2007) 40 Cal.4th 483, 522.)

In 1992, the Legislature amended Penal Code section 496 by adding:

> 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.

(Stats. 1992, ch. 1146, § 1, p. 5374; *People v. Allen, supra,* 21 Cal.4th at p. 857.)

The first sentence of this amendment abrogated the "broad" application of the common law rule. (*People v. Allen, supra,* 21 Cal.4th at p. 857.) It now allows a defendant to be convicted of receiving stolen property even if the evidence shows beyond a reasonable doubt that he actually stole the property. The second sentence of the amendment codified the "narrow" application of the rule prohibiting dual convictions for theft and receipt of the same property. (*Ibid.*)

Nothing in the statute, as amended, evidences a preference for one conviction over the other. Thus, where two convictions have for some reason occurred, the statute demands nothing more than that the reviewing court reverse *one* of them so the defendant does not stand "convicted" of stealing and receiving the same property. (*People v. Ceja, supra,* 155 Cal.App.4th at p. 1250.)

B. The Court Of Appeal Properly Reversed The Lesser Offense

Where a defendant has been convicted of both a greater and lesser

included offense,[1] the conviction of the greater offense is controlling, and the conviction of the lesser offense must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763; *People v. Cole* (1982) 31 Cal.3d 568, 582.) This reflects a policy of holding a criminal liable for the full extent of his behavior. By analogy to this rule, the Court of Appeal in this case concluded that where a defendant has been convicted of both the theft and receipt of the same property, the greater offense must stand and the lesser must be reversed. (*People v. Ceja, supra,* 155 Cal.App.4th at p. 1250.)

This principle was previously applied to dual convictions for theft and receipt of the same property in *People v. Black, supra,* 222 Cal.App.3d at p. 523. There, the defendant was seen by police officers driving a stolen truck. He was subsequently arrested and convicted of unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851, subdivision (a), and of receiving stolen property in violation of Penal Code section 496. (*Id.* at p. 524.) The *Black* court reversed the defendant's receiving stolen property conviction, explaining, "for the sake of judicial economy reviewing courts faced with the problem raised here *have reversed the conviction of a lesser offense and let the conviction of the greater offense stand.*" (*Id.* at p. 525, emphasis added.)

It is true, as appellant points out, that most of the cases applying this principle have involved convictions for greater and lesser *included* offenses, and neither theft nor receiving stolen property is included in the other. Appellant argues that the lesser included offense analogy is not persuasive here. (ABOM 16; *People v. Ceja, supra,* 155 Cal.App.4th at pp. 1251-1252.) Respondent disagrees.

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1. "Under California law, a lesser offense is necessarily included in a greater offense 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.)

Because Penal Code section 496, subdivision (a) does not contain language evidencing a preference for one conviction over the other, there is no statutory basis on which to require that the theft conviction control regardless of whether it is the greater or lesser offense. However, there is a public policy basis for applying the rule of greater and lesser included offenses.

Ideally, criminal prosecutions produce accurate results. One way of ensuring accuracy is to offer the jury a choice from the full range of crimes established by the evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 196-197.) Thus, prosecutors may charge a defendant with a greater offense, a lesser included offense, or both. (Pen. Code, § 954; *People v. Fields* (1996) 13 Cal.4th 289, 308; *People v. Moran, supra,* 1 Cal.3d at p. 763, see also *People v. Cole, supra,* 31 Cal.3d at p. 582; *People v. Allen, supra,* 21 Cal.4th at p. 857.) Similarly, they may charge a defendant with receiving stolen property, theft, or both. (See *People v. Adams* (1974) 43 Cal.App.3d 697, 707 ["There can be no question but that discretion permeates the entire process of bringing charges against a person suspected of having committed a crime."].)

Where offenses are included in other offenses, the court may, and in certain instances, must, offer the lesser offense to the jury for consideration. (*People v. Barton, supra,* 12 Cal.4th at p. 196.) The same rule does not (and cannot) apply, however, for non-included offenses, such as theft and receiving. (*People v. Birks, supra,* 19 Cal.4th at p. 136.) However, much the same result can be achieved by the prosecutor's charging choices.

A prosecutor may choose to charge both theft and receipt of stolen property or both a greater and lesser included offense in situations where there is some doubt about which crime the defendant committed. Offering 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. (See *People v. Barton, supra,* 12 Cal.4th at pp. 196-197.)

As set forth above, in the case of greater and lesser included offenses, if a defendant is convicted of both offenses, the conviction of the greater offense will control and the conviction of the lesser offense will be reversed. (*People v. Moran, supra,* 1 Cal.3d at p. 763; *People v. Cole, supra,* 31 Cal.3d 568, 582.)

If the same rule does not apply for theft and receipt of stolen property (and the receiving conviction is always reversed), prosecutors will have a disincentive to charge both offenses in the alternative. Instead, they will have a motive to charge only the most serious offense, with a potential loss to accurate factfinding. (See *People v. Barton, supra,* 12 Cal.4th at pp. 196-197.)

Moreover, the failure to apply the rule of greater and lesser included offenses could result in irrational results. For example, if a defendant is charged with and convicted of felony receiving stolen property alone, the trial court may send him to prison as a felon. (Pen. Code, §§ 18, 496.) Under appellant's theory, however, if a defendant is *additionally* charged with and convicted of misdemeanor petty theft, the receiving conviction would be automatically reversed and he would receive a misdemeanor sentence. In other words, his additional conviction would lessen his liability.

It is

> `anomalous to permit a person to receive a lower sentence than would otherwise be possible simply because the person was convicted of *two* crimes--one with a longer sentence than the other--rather than only *one* crime--the one with the longer sentence.'

(See *People v. Kramer* (2002) 29 Cal.4th 720, 723, quoting *People v. Norrell* (1996) 13 Cal.4th 1, 15 (conc. & dis. opn. of Arabian, J.).)

In other scenarios, the Legislature has evidenced an intent to hold a defendant liable for the greatest offense committed. For example, Penal Code section 654 provides in pertinent part:

> An act or omission that is punishable in different ways by different provisions of law shall be punished *under the provision that provides for the longest potential term of imprisonment* . . . .

(Pen. Code, § 654.)

Furthermore, as set forth above, where a defendant has been convicted of both a greater and lesser included offense, the conviction of the greater offense is controlling, and the conviction of the lesser offense must be reversed. (*People v. Moran, supra,* 1 Cal.3d at p. 763; *People v. Cole, supra,* 31 Cal.3d at p. 582.) Moreover, Penal Code section 1170.1, subdivision (a) provides that when a defendant is convicted of more than one offense carrying a determinate term, and the trial court imposes consecutive sentences, the term *with the longest sentence is the principal term.* (Pen. Code, § 1170.1, subd. (a); *People v. Felix* (2000) 22 Cal.4th 651, 655; *People v. Miller* (2006) 145 Cal.App.4th 206, 213-214.)

By affirming appellant's conviction for felony receiving stolen property, the Court of Appeal in this case effectuated the purpose of section 496 to prevent a defendant from standing convicted of dual convictions for receiving and stealing the same property, and, at the same time, acted in accordance with the general policy of holding a defendant liable for the greatest offense he committed.

Nevertheless, appellant contends that "[s]imply affirming the conviction with the more severe penalty in the situation presented by this case . . . ignores the facts of the case, and the jury's intent altogether." (AOB 16.) Respondent disagrees. The facts in this case supported appellant's convictions for both offenses. Accordingly, upholding his conviction for receiving stolen property does not ignore the facts of the case. Furthermore, the jury obviously believed that appellant committed both petty theft and receiving stolen property. Affirming either offense would effectuate the jurors' intent to hold appellant liable for his actions.

To the extent appellant suggests the jury would have chosen to convict him of theft over receiving stolen property if it had been given a choice, respondent submits that is impossible to know at this point. (See *United States v. Brown* (10th Cir. 1993) 996 F.2d 1049, 1053-1055 [where a defendant is alternatively charged with theft and possession of the same stolen property and no instructions are given or required which would require the jury to consider whether the defendant was guilty of theft first, it would be impossible to know on which charge a properly instructed jury would have convicted].) Moreover, Evidence Code section 1150, subdivision (a) "excludes evidence of the subjective reasoning processes of jurors to impeach their verdicts." (*People v. Steele* (2002) 27 Cal.4th 1230, 1264.)

Because the evidence in this case supports both convictions and because the only way to determine which offense the jury would have preferred would be to delve into their mental processes, which is prohibited, this is not a situation where a typical harmless error analysis is possible. (See *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 18, 36.) Moreover, because the jury here convicted the defendant of both offenses, we know they believed he committed both offenses. Therefore, the question here is a legal one - what is the remedy when a defendant is convicted of stealing and receiving the same property?

C. Statements In This Court's Opinions Do Not Evidence An Intent To Uphold The Theft Conviction Whenever A Defendant Is Convicted Of Both Theft And Receipt Of The Same Property

In *People v. Allen, supra,* 21 Cal.4th at p. 857, this court stated that the 1992 amendment to Penal Code section 496, subdivision (a) "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." (*Ibid.*) Like the Court of Appeal in *People v. Recio*, *supra*, 156 Cal.App.4th at pp.

724-726, appellant contends this sentence demonstrates this court's intent to uphold the theft conviction whenever a defendant is improperly convicted of both theft and receipt of the same property, regardless of which conviction carries the greater penalty. (ABOM 10.)

As the Court of Appeal in this case explained, appellant has taken that sentence out of context. (*People v. Ceja, supra,* 155 Cal.App.4th at p. 1250.) After that sentence, this court 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.]

(*People v. Allen, supra*, 21 Cal.4th at p. 857.)

Taken together, these sentences simply recognize that a defendant can be convicted of only one charge arising from the theft and receipt of the same property. They do not discuss or even contemplate the appropriate remedy where a defendant has been improperly convicted of both offenses. (*People v. Ceja, supra,* 155 Cal.App.4th at p. 1250.)

Respondent notes that in *Allen*, the defendant argued that the first sentence of the 1992 amendment did not wholly abrogate the "broad" application of the common law rule, but rather limited it. He contended that the sentence allowed the actual thief to be convicted of receiving the stolen property only if the statute of limitations had run on the charge of theft. If the statute had not run, he argued, the common law rule continued to prohibit a conviction for receiving. This court rejected Allen's proposed limitation *because it did not appear on the face of the statute.* (*People v. Allen, supra*, 21 Cal.4th at pp. 858-861.) Similarly, the proposed limitation appellant relies upon (that a conviction for theft takes precedence over a conviction for receiving) does not appear on the face of the statute and therefore should not be read into it.

Appellant next relies upon a sentence in *People v. Garza, supra,* 35 Cal.4th at p. 866, to support his argument. (ABOM 13.) In *Garza*, this court addressed the issue of whether a conviction under Vehicle Code section 10851, subdivision (a) for unlawful taking or driving of a vehicle, bars a conviction under Penal Code section 496, subdivision (a) for receiving the same vehicle as stolen property. (*Id.* at p. 871.) This court concluded that if the evidence is sufficient to establish a conviction for post-theft driving -- that is, "it is not reasonably probable that a properly instructed jury would have found that the defendant took the vehicle but did not engage in any posttheft driving," a reviewing court may construe the conviction as one for post-theft driving and on that basis uphold the conviction for receiving stolen property. (*Id.* at p. 872.)

In the course of that opinion, this court stated,

> 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.)

This sentence does not support appellant's position that a reviewing court must reverse the receiving count in all cases, regardless of which is the greater offense. There is no analysis in *Garza* as to whether the receiving offense was the greater or lesser offense in that case. (See *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1534, fn. 2 [the sentencing ranges for Vehicle Code section 10851 and Penal Code section 496 are essentially the same]; see also *People v. Kramer, supra,* 29 Cal.4th at p. 723 [the determination of the potentially longest term of imprisonment for purposes of Penal Code section 654 includes enhancements].) Moreover, like the sentence appellant relies upon in *Allen*, the sentence in *Garza* goes no further than recognizing the rule that a defendant can be convicted of only one charge arising from the theft and receipt of the same property.

Appellant also relies upon *People v. Smith, supra,* 40 Cal.4th at p. 483, to support his argument. (ABOM 13.) In *Smith*, the defendant argued that his conviction for receiving stolen property had to be reversed because he was improperly convicted of both stealing a gun in the course of a robbery and receiving the same gun as stolen property. The People conceded that the trial court should have dismissed the receiving count and this court accepted the People's concession. (*Id.* at pp. 490-491, 521-522.)

Again, there was no discussion in *Smith* as to whether the receiving offense was the greater or lesser offense in that case. Respondent notes that, standing alone, robbery carries a longer potential term of imprisonment than receiving stolen property. (Pen. Code, §§ 18, 213, 496, subd. (a).) Accordingly, the conviction for receiving stolen property may have been the lesser offense in that case. Therefore, the fact that this court reversed the receiving conviction provides no evidence of an intent by this court to uphold a theft conviction whenever a defendant is convicted of both theft and receipt of the same property, regardless of which conviction carries the greater penalty.

Finally, appellant relies upon *People v. Jaramillo* (1976)16 Cal.3d 752. (ABOM 12.) In *Jaramillo*, this court reversed the defendant's convictions for unlawfully taking or driving a vehicle (Veh. Code, §§ 10851, subd. (a)), and receiving the identical vehicle as stolen property. (*People v. Jaramillo, supra,* 16 Cal.3d at pp. 757-760.)

This court gave the People the option of retrying the defendant if it could produce evidence supporting both charges. However, if the People chose not to retry the case, this court directed the trial court to reinstate the Vehicle Code section 10851 conviction. (*People v. Jaramillo, supra,* 16 Cal.3d at p. 760.) According to appellant, the fact that this court directed the trial court to reinstate the Vehicle Code section 10851 conviction, rather than the receiving conviction, demonstrates a preference for upholding the theft conviction

whenever a defendant is convicted of both theft and receipt of the same property, regardless of which conviction carries the greater penalty. (ABOM 12.) Appellant's reliance on *Jaramillo* is misplaced.

Jaramillo 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. Furthermore, like those cases cited above, there is no analysis in *Jaramillo* regarding which was the greater and which was the lesser offense.

Thus, contrary to appellant's contention, statements in this court's opinions do not evidence an intent to uphold the theft conviction in every case where a defendant is convicted of both theft and receipt of the same property. (See ABOM 10-11.)

D. *People v. Recio* Improperly Relied Upon *People v. Stewart*

In *People v. Recio, supra,* 156 Cal.App.4th at p. 719, the Court of Appeal concluded that where a defendant is wrongly convicted of both theft and receipt of the same property, the receiving stolen property conviction must be reversed regardless of whether the receipt conviction is the greater offense or results in a greater sentence. (*Id.* at pp. 722-726.)

In support of its conclusion, the court in *Recio* relied in large part upon the 1986 opinion in *People v. Stewart* (1986) 185 Cal.App.3d 197. (See *People v. Recio, supra,* 156 Cal.App.4th at p. 723.) In *Stewart*, the defendant was convicted of burglaries and of receiving property that he stole during the burglaries. (*Id.* at p. 199.) The Court of Appeal in that case held it was required to reverse and vacate the receiving convictions and affirm the burglary

convictions.[2] (*People v. Stewart, supra,* 185 Cal.App.3d at pp. 203-205.) Because the Court of Appeal in *Stewart* relied upon the pre-1992 version of Penal Code section 496, and upon the broad application of the common law rule that a defendant could not be convicted of receiving stolen property if the evidence suggested he was the person who stole the property, *Stewart* sheds no light on the proper remedy where a defendant is convicted of both theft and receipt of the same property following the 1992 amendment to Penal Code section 496 which abrogated the broad application of the common law rule. Accordingly, *Recio's* reliance on *Stewart* was misplaced.

E. CALCRIM No. 3516 Should Be Modified To Instruct The Jury To Determine The Defendant's Guilt On The Greater Crime First

As appellant points out (ABOM 18), in cases where the prosecution charges theft and receipt of stolen property in the alternative, jurors are not given any guidance on how to choose between the two offenses in the event they find the defendant guilty of both. (See CALJIC No. 17.03[3]; CALCRIM

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2. In *People v. Allen, supra*, 21 Cal.4th at p. 846, this court held that dual convictions for burglary and receiving stolen property are not prohibited. (*Id.* at p. 862-865; see also *People v. Carr* (1998) 66 Cal.App.4th 109, 112-115.)

3. CALJIC No. 17.03 [Two Counts--Same Occurrence--Only One Crime] provides:

> The defendant is accused in Count of having committed the crime of and in Count of having committed the crime of . These charges are made in the alternative and in effect allege that the defendant committed an act or acts which constitute[s] either the crime of or the crime of . If you find that the defendant committed an act or acts constituting one of the charged crimes, you then must determine which of the crimes so charged was thereby committed.

No. 3516.[4])

Citing *United States v. Gaddis* (1976) 424 U.S. 544 [96 S.Ct. 1023, 47 L.Ed.2d 222], and *People v. Recio, supra,* 156 Cal.App.4th at p. 726, appellant suggests that in cases where the prosecution charges both offenses in the alternative, trial courts should be required to instruct the jury to either: (1) convict of the charge that best describes the defendant's conduct as revealed by the evidence; or (2) to determine the defendant's guilt on the theft count first, and if it finds the defendant guilty of the theft, to return the receiving verdict unsigned. (ABOM 19-20.)

The former suggestion (to instruct the jury to convict of the charge that best describes the defendant's conduct) would not have provided appellant's jury with much guidance because the evidence showed he was guilty of both offenses. As for the latter suggestion (to instruct the jury to determine the defendant's guilt on the theft count first), Penal Code section 496, subdivision (a), does not contain language evidencing a preference for one conviction over

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> In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find [him] [her] not guilty of the other[.] [, as well as any lesser crime included therein.]
>
> [The court cannot accept any verdict of guilty as to any lesser crime, unless you unanimously find [and return a signed verdict form] that defendant is not guilty as to the greater crime.]

4. CALCRIM No. 3516 [Multiple Counts: Alternative Charges for One Event-Dual Conviction Prohibited] provides:

> The defendant is charged in Count _____ with _____ and in Count _____ with _____. These are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both.

the other. Accordingly, there is no statutory basis for directing a jury to consider the defendant's guilt on the theft charge first.

To ensure that jurors properly select the greater offense, they could be given an instruction similar to CALCRIM No. 3519 (Deliberations and Completion of Verdict Forms: Lesser Offenses--For Use When Lesser Included Offenses and Greater Crimes Are Separately Charged (Non-Homicide)) whenever a defendant is alternatively charged with theft and receipt of the same property. That instruction tells the jury it may find the defendant guilty of a lesser offense only if it finds him not guilty of a greater. (*Ibid.*) It could be modified to provide:

> Now I will explain to you which charges are affected by this instruction: [_____ is the lesser crime in this case and _____ is the greater crime.

(CALCRIM No. 3519.)

Such a modification would not in any way permit the jury to consider punishment or penalty in determining guilt or innocence (ABOM 19), as the decision of which offense is greater in each particular case would be made by the trial court before giving the jury instruction. (See *People v. Jackson* (1986) 177 Cal. App. 3d 708, 714.)

CONCLUSION

Because the 1992 amendment to Penal Code section 496 abrogated the common law rule that a thief cannot be convicted of receiving property he stole, because there is no statutory preference for one offense over the other, and because there is a policy basis for applying the rule of greater and lesser included offenses, respondent urges this court to affirm the Court of Appeal's decision to uphold the greater of the two convictions.

Dated: May 15, 2008

Respectfully submitted,

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Senior Assistant Attorney General

BARRY CARLTON
Supervising Deputy Attorney General

TERESA TORREBLANCA
Deputy Attorney General

Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5548 words.

Dated: May 19, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

TERESA TORREBLANCA
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rafael Ceja**

No.: **S157932**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 19, 2008, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Richard De La Sota (2 copies)
Attorney at Law
P.O. Box 77757
Corona, CA 92877

Appellate Defenders, Inc.
555 W. Beech Street, Suite 300
San Diego, CA 92101

California Court of Appeal
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

The Honorable Bonnie M. Dumanis
District Attorney
San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

Mike Roddy
Executive Officer
San Diego Superior Court
220 West Broadway
San Diego CA 92101-3409

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 19, 2008, at San Diego, California.

Anna Herrera
Declarant

Signature

SD2008XS0004