In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JEFFREY ALLEN WHITMER,

Defendant and Appellant.

Case No. S208843

Second Appellate District, Case No. B231038
Los Angeles County Superior Court, Case No. GA079423
The Honorable Candace J. Beason, Judge

ANSWER BRIEF ON THE MERITS

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Was appellant properly sentenced on multiple counts of grand theft or did his multiple takings constitute a single offense under *People v. Bailey* (1961) 55 Cal.2d 514?

INTRODUCTION

Appellant, the manager of a power-sports vehicle dealership, defrauded the dealership out of 20 vehicles by making fraudulent sales to fictive buyers in 20 separate transactions over the course of several months, via falsified financing agreements and credit card sales. A Los Angeles County jury convicted appellant of 20 counts of grand theft. The trial court subsequently sentenced appellant to a total of 12 years in state prison, consisting of consecutive terms on 12 counts, and concurrent terms for those counts committed on the same day as any other transaction for which the trial court had already imposed a consecutive term of imprisonment. (1CT 259-295; 4RT 1213-1217.)

The Court of Appeal rejected appellant's claim that he was erroneously convicted of multiple counts of grand theft under a rule enunciated by this Court in *People v. Bailey*, *supra*, 55 Cal.2d 514, which concerns the circumstances under which individual thefts of property or money, which would constitute petty thefts if considered individually, may be aggregated to constitute a single offense of grand theft. (See *People v. Whitmer* (2013) 213 Cal.App.4th 122, 139-146.) The Court of Appeal concluded that under *Bailey* and the cases cited therein, a defendant who repeatedly takes property exceeding the requisite amount for grand theft from a victim through separate transactions – but pursuant to a single scheme or overarching misrepresentation – commits more crimes than a defendant who takes such property only once, and may be separately convicted and punished for each of his offenses. (*Id.* at pp. 145-146.) The

Court of Appeal concluded that appellant had committed each of his offenses in separate transactions, and that he was therefore properly convicted of, and sentenced on, 20 counts of grand theft. (*Id.* at p. 146.)

As will be explained below, the Court of Appeal correctly determined that appellant was properly convicted of multiple counts of grand theft because separate and distinct takings, each involving money or property in excess of the threshold value for grand theft, should not be aggregated into a single count of grand theft.

PROCEDURAL HISTORY

A Los Angeles County jury found appellant guilty of 20 counts of grand theft (Pen. Code, § 487, subd. (d)(1); counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, and 41), and 20 counts of making false financial statements (Pen. Code, § 532a, subd. (1); counts 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, and 42).[1] The jury found true an allegation that appellant took, damaged, and destroyed property exceeding $200,000 in value (Pen. Code, § 12022.6, subd. (a)(2)). (1CT 82-99, 160-200, 203-224.)

The trial court sentenced appellant to a total of 12 years in state prison, comprised of a middle base term of two years in count 3, plus a consecutive two-year enhancement pursuant to Penal Code section 12022.6, subdivision (a)(2), and consecutive eight-month terms in counts 7, 9, 13, 19, 21, 23, 25, 27, 29, 35, 39, and 41. The court imposed concurrent two-year midterms in counts 5, 11, 15, 17, 31, 33, and 37. The court imposed and stayed sentence for the counts involving appellant's acts of making false financial statements. (1CT 259-295.)

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[1] The trial court granted the prosecutor's motion to dismiss counts 1 and 2 of the information. (1CT 111.)

Appellant appealed, alleging, among other claims, that he could only be sentenced on one count of grand theft because his acts were committed pursuant to one general plan. In a published opinion, the Court of Appeal reversed 14 counts of making false financial statements based on evidentiary insufficiency, but otherwise affirmed the judgment. (See *People v. Whitmer*, *supra*, 213 Cal.App.4th at pp. 149-152.)

Respondent filed a petition for rehearing pertaining to the counts reversed by the Court of Appeal. The Court of Appeal denied the rehearing petition.

Appellant filed a petition for review in this Court. This Court granted the petition.

STATEMENT OF FACTS

A. The People's Case

Jerome Gilding owned Temple City Power Sports in San Gabriel, a dealership that sold and serviced motorcycles, motorized dirt bikes, all terrain vehicles ("ATVs"), and jet skis. (2RT 323-324.) Gilding also owned Temecula Motor Sports and three other dealerships. (2RT 410, 430.) Gilding's five dealerships sold a total of 600 to 700 vehicles each month. (2RT 430.)

In January or February of 2009, Gilding hired appellant to work as the general manager of Temple City Power Sports. Appellant's duties included ordering and maintaining inventory, as well as hiring and managing both a sales staff and a financing staff. (2RT 325-326.)

When a customer came to Temple City Power Sports to purchase a vehicle, the customer met with a salesperson to work out a price and manner of payment. (2RT 420.) Customers could purchase vehicles by cash, check, credit card, or dealer financing. (2RT 325.) Once a customer reached an agreement with a salesperson, the terms of agreement were

presented to the general manager for approval. The general manager was presented with the customer's personal information including a driver's license and a second form of identification, along with information concerning the vehicle being purchased, and the method of payment. (2RT 325-326, 424.) If the general manager approved the deal, the finance department accepted payment or worked out a financing plan with the customer. (2RT 325-326, 421-422.) After payment was received and all of the paperwork was completed, the dealership released the vehicle to the customer. (2RT 334.)

Temple City Power Sports had a policy to sell vehicles only to people who presented identification. The dealership also sold vehicles to individuals who made purchases through brokers, but the actual buyer was required to be present and needed to show two forms of identification when signing the purchase agreement and receiving delivery of the vehicle. (2RT 435-438, 467, 470.)

When a customer paid by credit card, a salesperson first verified that the credit card belonged to the customer by comparing it to a driver's license. (2RT 354.) The salesperson would then slide the credit card through a credit card reader, which communicated with a credit card processing company to provide an approval code or a denial for the purchase. (2RT 355, 424.) The credit card reader allowed someone to perform a "forced transaction" or "offline sale" by disconnecting the machine and processing a credit card through the machine. Although the machine processed the sale in offline mode, it did not communicate with the processing company or bank, and did not provide an approval code or a decline message. (2RT 355-357, 435-438.) All of the forced transactions or offline sales were transmitted to the credit card processing company together at the end of the day. (2RT 361.) Gilding did not permit his

employees to accept credit card payments using offline credit card sales. (2RT 424-425.)

In 2009, Richard Carlos began working as the finance manager at Temple City Power Sports. (2RT 442-443.) Appellant was Carlos's superior in the dealership. Between September 16, 2009, and December 8, 2009, appellant brought paperwork pertaining to 18 separate vehicle purchase agreements directly to Carlos, and directed him to process the transactions. Appellant and Mordichi Mor, a vehicle broker who regularly frequented the dealership and often went to lunch with appellant, provided Carlos with all of the information needed to process the transactions, including information about the individual buyers such as their employment and residential addresses.[2] (2RT 445-449.)

Specifically, appellant brought paperwork pertaining to the following purchase agreements to Carlos and told him to process the vehicle sales through the financing department: a 2009 Honda CRF 450 R9 motorcycle sold to purported buyer Jacob Cohen on September 16, for $9,500 (2RT 342-343); a 2009 Honda TRX 450 ER9 ATV sold to purported buyer Yakobi Sigalit on October 9, for $9,100 (2RT 346); a 2009 Honda TRX 450 ER9 ATV sold to purported buyer Tigran Mkryan on October 9, for $9,600 (2RT 350-353); and a 2009 Honda CRF 450 R9 dirk bike sold to purported buyer Nissim Malul on November 20, for $9,700 (2RT 371-372).

Appellant also brought paperwork pertaining to the following purchases agreements to Carlos and instructed him to process the sales via credit card with the credit card reader in the offline mode, which Carlos

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[2] Gilding had instructed appellant not to do business with Mor due to problems concerning fraud and theft. (2RT 405-407, 426-427.)

did: a 2010 Kawasaki KX450 dirt bike sold to purported buyer Varsenik Karapetyan on November 10, for $9,145 (2RT 353-354, 357-359); a 2010 Kawasaki KX 450 EAF dirt bike sold to purported buyer Sara Nashnasaz on November 10, for $9,700 (2RT 363-365); a 2010 Kawasaki KX 450 EAF dirk bike sold to purported buyer Tigran Mkryan on November 10, for $9,700 (2RT 366-368); a 2010 Polaris RZR 800-S off-road vehicle sold to purported buyer Yakobi Sigalit on November 19, for $16,600 (2RT 369-371); a 2009 Honda CBR 10 REPL9 motorcycle sold to purported buyer Yakobi Sigalit for $14,531.33 (2RT 374-376); two identical Yamaha YZ 450 FZL dirt bikes sold to purported buyer Yakobi Sigalit on November 24, for $10,000 each[3] (2RT 377-379); a 2008 Aprilia RSV 1000 motorcycle sold to purported buyer Yakobi Sigalit on November 25, for $18,000 (2RT 380-381); a Honda CBR 20 RRL9 motorcycle sold to purported buyer Yakobi Sigalit on November 27, for $14,755.20 (2RT 387-388); a 2009 Honda 2009 CBR 600 RRL9 motorcycle sold to purported buyer Yakobi Sigalit on November 27, for $11,819.20 (2RT 390-392); a Honda CBR 600 RRL9 motorcycle sold to purported buyer Yakobi Sigalit on November 27, for $11,755.22 (2RT 393-394); a 2010 Aprilia RSVR motorcycle sold to purported buyer Sarah Nashnasaz on November 28, for $21,479.80 (2RT 395-396); a 2010 Aprilia RSV 4 motorcycle sold to purported buyer Tigran Mkryan on November 29, for $18,900 (2RT 397-398); a 2009 Honda CRF 450 R9 dirt bike sold to purported buyer Tigran Mkryan on December 2, for $9,664.21 (2RT 400-402); and a 2010 Polaris RZR 800 ATV sold to

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[3] The bills of sale pertaining to the transactions on November 24 originated from Temecula Motor Sports rather than from Temple City Motor Sports. Appellant personally facilitated the transactions by calling Gilding and asking if he could sell the vehicles to a friend of his. (2RT 428-429.)

purported buyer Avishay Weinberg on December 8, for $18,142.66 (2RT 403-404).[4]

Carlos never met the named buyer listed on any of these transactions. In each instance, appellant told Carlos to process the financing paperwork and credit cards. Appellant then took the paperwork away and returned it to Carlos at a later date with customer signatures. (2RT 448-450, 469.) Carlos thought it was odd that he had not met any of the buyers personally, but he did not have a lot of experience in a vehicle dealership's financing department, and he was following appellant's directions. (2RT 449.)

Appellant directed salesmen Albert Martinez and Ryan Morgan to deliver each of the previously described vehicles to Mor at his home. Although appellant had told the salesmen that company policy was to obtain a signature from the buyer on each contract, Mor was the only person present when the vehicles were delivered. (2RT 468-469; 3RT 665-668.)

Late in the fall of 2009, the dealership's financing company began calling Carlos to inquire about the financing deals that appellant had directed him to process. The financing company told Carlos that each of the buyers had defaulted on their loans by failing to make their first payment. (2RT 450.) When Carlos told appellant about the calls, appellant told Carlos that he should forward any future calls on the subject to appellant and that appellant would "take care of it." (2RT 451-

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[4] Two additional transactions at issue in appellant's case occurred before Carlos was hired as the finance manager: two identical 2009 Honda CRF 450 R9 motorcycles sold to purported buyer Itaya Hashay on August 4, for $9,500 each, via dealer financing. Eric Van Hek was the finance manager listed on those transactions. (2RT 330-331, 415-416, 442-444).

452.) Carlos thereafter forwarded numerous similar calls to appellant. (2RT 452.)

In December of 2009, Gilding received a telephone call from the dealership's credit card processing company regarding declined payments on invalid credit cards that were being charged back to the dealership. (2RT 408.) Gilding also learned that the dealership's financing company had determined that numerous purchases in the fall of 2009 had been fraudulent and that they were refusing to honor the financing agreement with the dealership, leaving the dealership responsible for all of the financial loss on the transactions. (2RT 336-338, 429.) Gilding called appellant and told him to call the police. (2RT 409.)

Los Angeles County Sheriff's deputies responded to Temple City Power Sports and spoke with appellant. (2RT 453; 3RT 618.) Appellant was equivocal when asked if he knew Mor, and he told the deputies that Mor had not previously made any purchases from the dealership. (2RT 453-455.)

Angela Wilcox, a Temple City Power Sports employee, heard appellant tell the deputies that he was not sure of Mor's name, and she saw that appellant was acting as if he did not know Mor. (3RT 620.) Wilcox believed appellant was lying to the deputies. She called Gilding and informed him of her suspicions. (3RT 621.)

On December 15, 2009, Detective David Swanson went to the dealership and spoke with appellant. (3RT 604-605.) Detective Swanson asked appellant what he knew about the fraudulent vehicle purchases. Appellant told Detective Swanson that Mor had brought each of the buyers into the dealership to purchase the vehicles. Appellant said he had personally met each of the buyers named in the transactions. (3RT

607.) He also said that he did not have a personal friendship with Mor and that he did not have any contact information for Mor.[5] (3RT 607.)

Detective Swanson determined that the driver's licenses of the purported buyers in each of the purchase agreements were fraudulent. The individuals depicted in the photographs on the driver's licenses contained in the purchase agreements did not correspond to the individuals contained in the Department of Motor Vehicle's database for the respective license numbers. (3RT 608-614.) Meanwhile, Gilding began looking into the sales agreements concerning each of the aforementioned sales, and determined that all of the sales had involved appellant and Mor. (2RT 328, 409.) Gilding provided all of the dealership's documentation on the sales to the police. (2RT 328.) The dealership's losses totaled more than $200,000. (2RT 409; 3RT 672-673.)

When Gilding checked the files pertaining to each of the deals, he discovered that the original manufacturer statements of origin ("MSOs") were missing from the files. There is no reason that the original MSOs should have been missing from the dealership's files, as none of the purported sales involved dealer to dealer transactions, and none of the purported sales involved an out of state purchaser.[6] (2RT 334-335, 341, 343-344, 346-348, 352, 357-358, 364-365, 368, 371-374, 376-379, 381, 389, 392-399, 401-402, 404, 411; 3RT 627.)

Sometime after Detective Swanson spoke with appellant, Carlos saw appellant shredding documents pertaining to the aforementioned deals in

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[5] Mor had previously purchased numerous motorcycles from the dealership and his contact information was maintained in the dealership's computer database, to which appellant had access. (3RT 626-630.)

[6] If someone wanted to ship a vehicle obtained with a fraudulent credit card out of the country on the day after he had obtained it, he would need the original MSO. (2RT 432-435.)

the finance office. Appellant told Carlos not to throw the shredded paper away in the dealership's dumpster, but to dispose of the shredded paper elsewhere. (2RT 456-458; see also 3RT 624, 628.)

El Monte Police Detectives Armando Valenzuela and Brian Villa were assigned to investigate this case as part of a vehicle theft task force comprised of various law enforcement agencies. Detective Valenzuela received all of the information in Detective Swanson's possession concerning the sales at issue. (3RT 635-636.) Detective Valenzuela determined that the information listed on the sales and financing agreements for each of the purported buyers was false, and that the individuals listed as buyers did not exist. (3RT 637-646.) Detective Valenzuela determined that many of the vehicles involved had been shipped to Israel, but some were recovered before they were shipped. (3RT 646-647.)

On February 16, 2010, Detectives Valenzuela and Villa interviewed appellant. (3RT 648.) Appellant told the detectives that all of the vehicles had been sold to buyers of Middle Eastern descent who had personally come into the dealership upon the recommendation of "somebody named Mordichi." (3RT 650.) Detective Valenzuela told appellant he was aware that appellant knew Mor personally, and that the detectives had information contradicting appellant's story. Appellant became "very upset and agitated." He yelled, "Am I under arrest?" (3RT 650.) Detective Valenzuela handcuffed appellant and placed him under arrest. (3RT 650-651.)

Detective Valenzuela read appellant his *Miranda*[7] rights. Appellant waived his rights and agreed to speak to the detectives. (3RT 651-652.)

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[7] See *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Appellant admitted that he had participated in the fraudulent transactions. Appellant said that Mor was the one who had "got the ball rolling," and that the prior finance manager, Van Hek, had taught him how to process offline credit card transactions. (3RT 652.) Appellant stated that he had been going through "hard times" financially. Appellant told the detectives that none of the purported buyers had ever come into the dealership, and he admitted that he had lied to Detective Swanson when he claimed that he did not really known Mor and that the individual buyers had come into the dealership. (3RT 652-653.) Appellant also admitted that he had directed Carlos to process the offline credit card sales. (3RT 654.)

Alex Barrera was listed as the salesman on each of the 20 transactions. (2RT 415, 463.) Appellant and Barrera received a commission on all of the sales. Van Hek received commission on two of the sales, and Carlos received a commission on 18 of the sales. (2RT 415-417, 435, 463.)

B. The Defense Case

Appellant testified on his own behalf. Appellant had no knowledge that any of the 20 sales transactions were fraudulent. (3RT 753-754.) Appellant opined that Mor was solely responsible for the dealership's loss, and that Mor committed the offenses without assistance from anyone at the dealership. (3RT 754-755, 766.) However, appellant believed that he had been targeted by others in the dealership to take responsibility for the loss to the dealership. (3RT 779-780.)

Appellant was the sales manager at the dealership and oversaw the sales and financing departments.[8] (3RT 679-680.) Once a salesperson and

[8] Appellant received five and one-half percent commission on all profit generated by the sales and finance departments, in addition to his salary. (3RT 743.)

a customer reached an agreement on a deal, the salesperson would submit all of the paperwork to appellant for approval. Appellant would then send the agreement to the financing department where Carlos would submit and process the financing agreements, or accept cash or credit card payments for purchases. (3RT 381-684.) When a sales agreement called for a vehicle to be delivered, the vehicle could only be delivered to the person whose name appeared on the sales contract and the buyer was required to present two forms of identification. (3RT 693.)

Carlos, as finance manager, prepared all of the paperwork for internal record keeping purposes. A file generally included a bill of sale, the buyer's driver's license, a second form of identification, a sales contract, DMV paperwork, and any credit applications. (3RT 685-686.) Following the sale of a vehicle, the file was sent to Temecula Motor Sports, where the administrative department would review the entire file to ensure that all of the necessary documentation was present before generating a commission voucher to any sales or finance personnel on the deal. (3RT 687.) Then the file was returned to Temple City Power Sports to be maintained there. (3RT 688.) Everyone in the sales and financing departments had access to all sales and inventory records at the dealership. (3RT 680-681.) Appellant was responsible for the contents of the sales files, and he had access to the original MSOs, but he did not have time to review each file to ensure that everything was present. (3RT 691, 768-769.)

Appellant was introduced to Mor, a vehicle broker, by Van Hek, the former finance manager of the dealership, or by Morgan, a salesperson at the dealership. Appellant and Mor were not friends. Gilding never warned appellant that he should not do business with Mor. (3RT 738, 743, 762.)

Carlos began working at the dealership in September of 2009. (3RT 689-690.) In this same month, appellant learned that some finance agreements from sales at the dealership had been defaulted upon. (3RT

746-747, 756-757, 761.) In November of 2009, appellant learned that various vehicles had been sold to Mor, and he expressed concern about the agreements to Gilding. (3RT 748, 759.)

On December 12, 2009, appellant received a telephone call from the dealership's credit card processing company requesting additional information on a number of transactions. Appellant directed Carlos to deal with the request. (3RT 694-695.) A few days later, appellant received a telephone call from Gilding, who told appellant that the dealership's credit card processing company was charging back numerous transactions due to fraud. Gilding was upset and he asked appellant if he knew about any of the transactions, all of which had involved vehicles delivered to customers. Appellant and Gilding decided to call the police. (3RT 692-693, 696-697.) Appellant personally called the sheriff's department, and he provided the responding deputies with information from the dealership's files pertaining to all of the credit card transactions at issue.[9] (3RT 698, 723-724.)

Detective Swanson subsequently came to the dealership and spoke with appellant. Appellant gave Detective Swanson copies of the identification cards that the dealership had on file for each of the purported buyers in the transactions. Appellant told Detective Swanson that he was unsure of Mor's actual name, because he had heard Mor called numerous names, including Morty, Mordichi, Multi, and Israel. (3RT 726, 731-732.) Appellant told Detective Swanson that Mor had personally brought each of the named buyers into the dealership because appellant had been told so by members of his staff. (3RT 726.) Appellant denied telling Detective Swanson that the credit card processing machine had prompted

[9] Appellant testified that he did not learn about any of the fraudulent transactions involving dealer financing agreements until much later. (3RT 756, 761.)

him to call and verify information concerning the transactions at the time of the offline transactions, or that he had received approval on each transaction after speaking with a live agent from the credit card processing company. Instead, appellant testified that Carlos had told him that he had verified each offline credit card sale with the credit card processing company at the time of the transactions and had received an approval on each of the transactions. (3RT 726, 729-730.)

Appellant never told Detectives Valenzuela and Villa that he had participated in any fraud against the dealership. Instead, appellant told the detectives that he had directed Carlos to call the credit card companies on each of the deals because he was suspicious about the sales at the time they occurred. Appellant told the detectives that he had directed the sales staff to ensure that vehicles were only delivered to the named buyers, and to check the sales contract against two forms of identification at the time of delivery. (3RT 733-739.) Appellant never shredded any documents at the dealership, and he never directed Carlos to dispose of any shredded documents away from the dealership. (3RT 732-733.)

Ryan Morgan, a salesperson at the dealership, delivered at least 10 of the vehicles pertaining to this case. Morgan delivered the vehicles to Mor at his residence. Mor signed for the delivery on each occasion even though each contract had a different buyer's name on it. Morgan delivered the vehicles to Mor at appellant's direction. (3RT 709, 712-713, 716-719.) When Morgan returned to the dealership following a delivery, he would provide the signed paperwork to appellant or to Carlos. (3RT 715.) Morgan never saw any of the vehicles that he had previously delivered to Mor's residence when he would drop off the next vehicle. (3RT 713, 716.)

SUMMARY OF ARGUMENT

In *People v. Bailey*, *supra*, 55 Cal.2d 514, this Court determined the propriety of aggregating multiple counts of petty theft committed pursuant to a single intention or plan into a single count of grand theft. The issue presented in *Bailey* did not concern the propriety of aggregating multiple counts of grand theft into a single count. But *Bailey* suggested, by its reliance on prior cases of this Court, that multiple counts of grand theft be aggregated into a single count only when multiple takings are accomplished pursuant to a single transaction, i.e., one involving a single act constituting the taking which then results in the subsequent receipt of money or property from a victim without the necessity of further efforts by the defendant.

Assuming, however, that *Bailey* requires that multiple counts of grand theft be aggregated into a single count whenever a defendant acts pursuant to a single intention or plan, this Court should disapprove that portion of the opinion. The perpetuation of such a rule would encourage a defendant who has committed one taking that constitutes grand theft to commit additional takings in a similar or identical matter, secure in the knowledge that he will never be punished for his additional acts. Thus, this Court should affirm appellant's grand theft convictions because he committed 20 takings in 20 separate transactions, each in excess of the threshold value required for the offense of grand theft.

ARGUMENT

APPELLANT WAS PROPERLY CONVICTED OF MULTIPLE COUNTS OF GRAND THEFT AS THE RULE ARTICULATED IN *BAILEY* DOES NOT APPLY TO MULTIPLE COUNTS OF GRAND THEFT WHERE THE OFFENSES ARE COMMITTED IN SEPARATE AND DISTINCT TRANSACTIONS

Relying on this Court's opinion in *People v. Bailey*, *supra*, 55 Cal.2d 514, appellant contends that his act of taking 20 motorcycles, ATVs, and dirt bikes from Temple City Power Sports, via 20 separate transactions, were all "part of a common scheme or plan," and as such, he "should only have been convicted of a single count of grand theft." (AOB 2-21.) Respondent disagrees. The question at issue in *Bailey* was the propriety of aggregating multiple counts of petty theft committed pursuant to a single intention or plan into a single count of grand theft, not whether multiple counts of grand theft committed pursuant to a single intention or plan must be aggregated into a single count. *Bailey* does not require that multiple counts of grand theft be aggregated into a single count whenever a defendant acts pursuant to a single intention or plan, but instead, suggests, by its reliance on prior cases of this Court, that such aggregation occur only when multiple takings are accomplished pursuant to a single transaction, i.e., one involving a single act constituting the taking which then resulted in the subsequent receipt of money or property from a victim without the necessity of further efforts by the defendant. Assuming, however, that *Bailey* requires that multiple counts of grand theft be aggregated into a single count whenever a defendant acts pursuant to a single intention or plan, this Court should disapprove that portion of the opinion.

A. *People v. Bailey*

In *Bailey*, the defendant received welfare payments after making fraudulent representations on an application for public assistance. Each

payment was less than the sum required for a charge of grand theft, but in aggregation, the amounts received exceeded the required threshold. (See *People v. Bailey*, *supra*, 55 Cal.2d at pp. 515-516.) The trial court instructed the jury that if several acts of taking are done pursuant to an initial design to obtain property having a value exceeding $200, and if the value of the property so taken does exceed $200, there is one crime of grand theft, but that if there is no such initial design, the taking of any property having a value not exceeding $200 is petty theft.[10] (*Id.* at p. 518.) The jury convicted the defendant of a single count of grand theft. (*Id.* at p. 515.)

On appeal, this Court noted that the "question presented is whether [the defendant] was guilty of grand theft or of a series of petty thefts since it appears that she obtained a number of payments, each less than $200 but aggregating more than that sum." (*People v. Bailey*, *supra*, 55 Cal.2d at p. 518.) *Bailey* noted that in several cases involving theft by false pretenses courts had held that "where as part of a single plan a defendant makes false representations and receives various sums from the victim the receipts may be cumulated to constitute but one offense of grand theft." (*Id.* at pp. 518-519, citing *People v. Robertson* (1959) 167 Cal.App.2d 571, 576-577, *Dawson v. Superior Court* (1956) 138 Cal.App.2d 685, 686, and *People v. Lima* (1954) 127 Cal.App.2d 29, 34.) *Bailey* stated:

> The test applied in these cases in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. The

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[10] At the time of the defendant's trial in *Bailey*, grand theft was committed when the value of the property taken exceeded $200. In 2009, when appellant committed the instant offenses, grand theft was committed when the value of the property taken exceeded $400. In 2011, the Legislature increased the threshold requirement to $950. (See Pen. Code, § 487, subd. (a); *People v. Wade* (2012) 204 Cal.App.4th 1142, 1150-1153.)

> same rule has been followed in larceny and embezzlement cases, and it has been held that where a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft.

(*People v. Bailey*, *supra*, 55 Cal.2d at p. 519.)

The *Bailey* court then stated:

> Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed to one intention, one general impulse, and one plan. (*People v. Stanford* [(1940)] 16 Cal.2d 247, 250-251.) In the following cases it was held that each receipt of property obtained by false pretenses constituted a separate offense for which the defendant could be separately charged and convicted. (*People v. Ashley* [(1954)] 42 Cal.2d 246, 273; *People v. Rabe* [(1927)] 202 Cal. 409, 413-414; *People v. Barber* [(1959)] 166 Cal.App.2d 735, 741-742; *People v. Caldwell* [(1942)] 55 Cal.App.2d 238, 250-251; *People v. Ellison* [(1938)] 26 Cal.App.2d 496, 498.) Although none of these decisions discussed the rule set forth above, it does not appear that the convictions would have been affirmed had the evidence established that there was only one intention, one general impulse, and one plan. [¶] *People v. Scott* [(1952)] 112 Cal.App.2d 350, 351; *People v. Serna* [(1941)] 43 Cal.App.2d 106, 107; and *People v. Miles* [(1940)] 37 Cal.App.2d 373, 378-379, are disapproved insofar as they are inconsistent with the views expressed herein. [¶] In the present case the material facts are not in dispute, and the jury was properly instructed.

(*People v. Bailey*, *supra*, 55 Cal.2d at pp. 519-520.)

In the aftermath of *Bailey*, many courts of appeal construed *Bailey*'s holding to require aggregation of multiple counts of grand theft into a single count where the defendant acted with a single intention or plan, irrespective of whether the defendant committed his takings through separate transactions. (See *People v. Kronemyer* (1987) 189 Cal.App.3d

314, 324, 363-364 [defendant's act of withdrawing funds from victim's savings account on four consecutive days, each in excess of the threshold required for grand theft, constituted a single count of grand theft]; *People v. Brooks* (1985) 166 Cal.App.3d 24, 30-31 [defendant's theft of auction proceeds stemming from sale of 14 separate items, each in excess of the threshold value for grand theft, constituted a single count of grand theft]; *People v. Packard* (1982) 131 Cal.App.3d 622, 625-627 [obtaining multiple payments for non-existent work allegedly preformed on behalf of victim over numerous years constituted a single count of grand theft]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 858-866 [attempt to obtain four separate pay warrants in excess of $800,000 each constituted a single count of attempted grand theft], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682.)

However, the question at issue in *Bailey* was the propriety of aggregating multiple counts of petty theft committed pursuant to a single intention or plan into a single count of grand theft, and not whether multiple counts of grand theft committed pursuant to a single intention or plan must be aggregated into a single count. (See *People v. Bailey*, *supra*, 55 Cal.2d at p. 518.) A close reading of *Bailey*, including the cases it relies upon, demonstrates that *Bailey* did not intend to require that multiple counts of grand theft be aggregated into a single count whenever a defendant acts pursuant to a single intention or plan; instead, *Bailey* suggests such aggregation only when multiple takings are accomplished pursuant to a single transaction. And even assuming that *Bailey* requires that multiple counts of grand theft be aggregated into a single count whenever a defendant acts pursuant to a single intention or plan, this Court should disapprove that portion of the opinion, as the perpetuation of this rule would "give a 'felony discount' to the thief who perfects a scheme to

commit multiple acts of grand theft." (*People v. Whitmer*, *supra*, 213 Cal.4th at p. 145.)

B. *Bailey* Does Not Require That Multiple Acts of Grand Theft Committed Pursuant to a Single Intention or Plan be Aggregated into a Single Count Where the Defendant's Takings Were Based on Separate and Distinct Transactions

Assuming that appellant acted pursuant to a single intention or plan, *Bailey* does not require that multiple counts of grand theft committed pursuant to a single intention or plan must be aggregated into a single count. In *Bailey*, the issue before this Court was the propriety of aggregating multiple counts of petty theft committed pursuant to a single intention or plan into a single count of grand theft. In rejecting the defendant's claim that the jury had been improperly instructed that it could convict her of a single count of grand theft if it concluded that the defendant committed her takings pursuant to an initial design to obtain property in value of excess of the threshold requirement for grand theft, this Court relied upon three decisions: *People v. Robertson*, *supra*, 167 Cal.App.2d 571, *Dawson v. Superior Court*, *supra*, 138 Cal.App.2d 685, and *People v. Lima*, *supra*, 127 Cal.App.2d 29. (*People v. Bailey*, *supra*, 55 Cal.2d at pp. 518-519.) In each case, the defendant had committed a series of petty thefts from a single victim, which, when considered in the aggregate, exceeded the threshold necessary to constitute grand theft. (See *People v. Robertson*, *supra*, 167 Cal.App.2d at pp. 574-575; *Dawson v. Superior Court*, *supra*, 138 Cal.App.2d at pp. 686-687; *People v. Lima*, *supra*, 127 Cal.App.2d at pp. 30-31.) On appeal, the appellate court affirmed the propriety of aggregating multiple counts of petty theft or the purpose of charging a single count of grand theft, based on the principle that "where a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and

one plan, the offense is grand theft." (*People v. Bailey*, *supra*, 55 Cal.2d at p. 519; see *People v. Robertson*, *supra*, 167 Cal.App.2d at p. 577; *Dawson v. Superior Court* (1956) 138 Cal.App.2d 685, 688, and *People v. Lima*, *supra*, 127 Cal.App.2d at p. 34.)

The *Bailey* court then addressed an issue not presented by the facts of the case before it, namely, whether multiple counts of grand theft committed pursuant to a single intention or plan must be aggregated into a single count. To support the statement that a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses "are separate and distinct and were not committed to one intention, one general impulse, and one plan," the court relied upon *People v. Stanford* (1940) 16 Cal.2d 247, 250-251. (*People v. Bailey*, *supra*, 55 Cal.2d at p. 519.) The *Bailey* court went on to note that in the following cases, *People v. Ashley* (1954) 42 Cal.2d 246, 273, *People v. Rabe* (1927) 202 Cal. 409, 413-414, and *People v. Barber* (1959) 166 Cal.App.2d 735, 741-742, "it was held that each receipt of property obtained by false pretenses constituted a separate offense for which the defendant could be separately charged and convicted." (*People v. Bailey*, *supra*, 55 Cal.2d at p. 519.) The court noted that although "none of these decisions discussed the rule set forth above, it does not appear that the convictions would have been affirmed had the evidence established that there was only one intention, one general impulse, and one plan." (*Ibid.*)

Finally, the *Bailey* court disapproved three cases, *People v. Scott* [(1952)] 112 Cal.App.2d 350, 351, *People v. Serna* [(1941)] 43 Cal.App.2d 106, 107, and *People v. Miles* [(1940)] 37 Cal.App.2d 373, 378-379, "insofar as they are inconsistent with the views expressed herein." (*People v. Bailey*, *supra*, 55 Cal.2d at pp. 519-520.)

Initially, respondent notes that any discussion in *Bailey* concerning the propriety of aggregating multiple counts of grand theft into a single

count constituted dictum and is not binding upon this Court. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 286-287; *Severns v. Union Pacific Railroad Co.* (2002) 101 Cal.App.4th 1209, 1226; *Quackenbush v. Superior Court* (2000) 79 Cal.App.4th 867, 874.) "[P]recedent cannot be overruled in dictum, of course, because only the ratio decidendi of an appellate opinion has precedential effect." (*Trope v. Katz*, *supra*, 11 Cal.4th at p. 287.) Accordingly, this Court's opinion in *People v. Stanford*, *supra*, 16 Cal.2d at pp. 250-251, and its other cases predating *Bailey*, remain binding precedent on the issue concerning the aggregation of multiple counts of grand theft. (See *Trope v. Katz*, *supra*, 11 Cal.4th at p. 287.)

In *Stanford*, the defendant, a lawyer, persuaded his client to convey to him, in trust for her life, all of her property. On three occasions, appellant wrote checks on the trust account to purchase property for himself. Each check exceeded the threshold amount for grand theft. (See *People v. Stanford*, *supra*, 16 Cal.2d at pp. 248-250.) The defendant was convicted of three counts of grand theft. (*Id.* at p. 250.) This Court rejected the defendant's claim that the entire transaction could not constitute more than one offense, and that he was erroneously convicted of three separate offenses, stating:

> There is no merit in [the defendant's] contention that the entire transaction could not constitute more than one offense, and that the conviction of three separate offenses was error. The question of whether a series of wrongful acts constitutes a single or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case. In the present case the evidence showed that the thefts referred to in the first three counts of the indictment were separate and distinct transactions, which occurred on different dates, and involved the taking of different sums of money. Such separate transactions constituted separate offenses.

(*Id.* at pp. 250-251; see also *People v. Ashley*, *supra*, 42 Cal.2d at p. 273 [defendant properly convicted of four counts of grand theft for taking

money exceeding the requirement for grand theft from two victims, on two separate occasions, in identical manners].)

Similarly, in *People v. Rabe*, *supra*, 202 Cal. at p. 413, this Court rejected the defendant's claim that he could not be convicted of three counts of obtaining money and property by false pretenses because he had obtained the money and property at issue by selling stock in a fictitious company to the same victim on three separate occasions. The *Rabe* court held:

> It is true that the identical person is alleged to have been defrauded by the accused by employing the same false representations in each count, but this does not reduce the three separate acts to one act. In each count of the indictment the property obtained by [the defendant] was obtained at a different time and was different in character and value from the property alleged to have been acquired by the false representations set out in the other counts of the indictment.

(*Ibid.*)

Thus, in this Court's cases predating *Bailey*, there was no requirement that a defendant harbor multiple intentions before he could be convicted of multiple counts of grand theft based on a series of acts committed in separate transactions. Because *Bailey* itself did not present this question, any statement suggesting such a requirement should be considered dictum. (See *Trope v. Katz*, *supra*, 11 Cal.4th at p. 287; see *People v. Washington* (1996) 50 Cal.App.4th 568, 574-575 [describing *Bailey*'s discussion regarding the aggregation of grand theft as dictum]; but see *People v. Sullivan* (1978) 80 Cal.App.3d 16, 20 [concluding that *Bailey*'s discussion concerning the aggregation of multiple counts of grand theft is not "mere dicta"].) Thus, *Stanford*, *Rabe*, and *Ashley* remain binding precedent in the wake of *Bailey*.

However, even if *Bailey*'s discussion concerning the aggregation of multiple counts of grand theft does not constitute dictum, it does not appear

that *Bailey* intended the rule it promulgated with respect to the aggregation of multiple counts of petty theft to be identical to the rule pertaining to the aggregation of multiple counts of grand theft. As the Court of Appeal cogently explained:

> As formulated in *Bailey*, the rule appears to specify that there is only one offense when acts of grand theft are committed against a victim pursuant to "one plan" (*Bailey*, *supra*, 55 Cal.2d at p. 519). For this reason, the rule facially resembles the principle that the *Bailey* court applied to the aggregation of petty thefts.
>
> Nonetheless, the cases underlying the [*Bailey*] rule and the principle are in sharp conflict. With respect to the aggregation of petty thefts, the *Bailey* court relied on *Robertson*, *Dawson*, and *Lima*, which stand for the proposition that a defendant is properly convicted of grand theft for committing separate petty thefts pursuant to a single scheme or overarching misrepresentation, provided that the total property taken exceeds the amounts needed for grand theft. In contrast, with respect to the rule regarding grand theft, the court pointed with approval to *Stanford*, *Rabe*, *Ashley*, and other cases, which stand for the proposition that a defendant is properly convicted of multiple counts of grand theft for "separate and distinct" thefts (*Stanford*, *supra*, 16 Cal.2d at pp. 250-251), even though they were committed pursuant to a single scheme or overarching misrepresentation.
>
> In our view, the *Bailey* court intended the rule regarding grand theft to be applied in accordance with *Stanford*, *Rabe*, and *Ashley*, rather than *Robertson*, *Dawson*, and *Lima*, notwithstanding the similarity of language between the rule and the principle governing the aggregation of petty theft. *Stanford*, *Rabe*, and *Ashley* embody the reasonable view that a defendant who repeatedly takes property exceeding the requisite amount for grand theft from a victim through separate transactions (*Stanford*, *supra*, 16 Cal.2d at pp. 250-251) - but pursuant to a single scheme or overarching misrepresentation - commits more crimes than a defendant who takes such property only once. Indeed, a contrary view would give a "felony discount" to the thief who perfects a scheme to commit multiple acts of grand theft. Rather than rejecting the view found in *Stanford*, *Rabe*,

> and *Ashley*, the *Bailey* court identified those cases as consistent with the enunciated rule, while expressly disapproving other decisions. The affirmative discussion by our Supreme Court of its prior holdings in *Stanford*, *Rabe*, and *Ashley* thus constitutes compelling evidence that those cases retained their vitality. To conclude otherwise would be to hold that the *Bailey* court, while expressly purporting to approve of *Stanford*, *Rabe*, and *Ashley*, impliedly overruled them.

(*People v. Whitmer*, *supra*, 152 Cal.App.4th at pp. 144-145.)

Appellant contends that the Court of Appeal's "analysis was flawed for several reasons." (AOB 7.) First, appellant contends that "this Court's statement in *Bailey* was clear, and applying an interpretation directly contrary to what was stated by this Court was inappropriate." (AOB 7.) Respondent disagrees. As noted by the Court of Appeal, the "guidance [*Bailey*] offers regarding the aggregation of grand thefts is difficult to discern." (*People v. Whitmer*, *supra*, 152 Cal.App.4th at p. 146.) This is especially true given that the *Bailey* court was deciding only the question regarding the aggregation of petty thefts into a single count of grand theft, and because of its reliance upon authority expressly authorizing the separate conviction of multiple counts of grand theft committed in distinct transactions irrespective of the intention of the defendant. (See *People v. Bailey*, *supra*, 55 Cal.2d at pp. 519-520.)

Next, appellant asserts that the *Bailey* court's citation to *Stanford* was "entirely consistent with the portion of the *Bailey* opinion at issue" (AOB 7), because it "contains the legal proposition that 'the question of whether a series of wrongful acts constitutes a single or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case'" (*People v. Stanford*, *supra*, 16 Cal.2d at pp. 250-251). (AOB 7.) Appellant's assertion ignores the language surrounding the quotation he selects, which demonstrates that multiple counts of grand theft are proper where a defendant commits them in separate and distinct

transactions, irrespective of his intent. (*People v. Stanford*, *supra*, 16 Cal.2d at pp. 250-251.) As previously set forth, the quotation in its entirety provides:

> There is no merit in [the defendant's] contention that the entire transaction could not constitute more than one offense, and that the conviction of three separate offenses was error. The question of whether a series of wrongful acts constitutes a single or multiple offense must in the last analysis be determined by the peculiar facts and circumstances of each individual case. In the present case the evidence showed that the thefts referred to in the first three counts of the indictment were separate and distinct transactions, which occurred on different dates, and involved the taking of different sums of money. Such separate transactions constituted separate offenses.

(*Id.* at pp. 250-251.)[11]

Appellant also contends that the *Bailey* court "had no reason" to overrule *Stanford*, *Ashley*, or *Rabe* because those decisions were "not necessarily inconsistent with the rule set forth in *Bailey*." (AOB 7-8.) Appellant notes that the *Bailey* court observed that "'[a]lthough none of these decisions discussed the rule set forth above, it does not appear that the convictions would have been affirmed had the evidence established that there was only one intention, one general impulse, and one plan.'" (AOB 7, quoting *People v. Bailey*, *supra*, 55 Cal.App.2d at p. 519.) Initially, appellant is mistaken concerning his assertion that this statement pertained to *Stanford*, as the *Bailey* court cited to *Stanford* prior to stating, "[i]n the *following* cases it was held that each receipt of property obtained by false

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[11] Respondent notes that the portion of the quotation that appellant relies upon is found entirely upon page 251 of *Stanford*, while the entire quote is contained on pages 250 and 251 of *Bailey*. (See *People v. Bailey*, *supra*, 55 Cal.3d at p. 519; *People v. Stanford*, *supra*, 16 Cal.2d at pp. 250-251.) Had the *Bailey* court only intended to rely upon this one sentence in *Stanford*, its citation would have been limited to the page upon which the sentence appeared.

pretenses constituted a separate offense for which the defendant could be separately punished," followed by citations to *Ashley*, *Rabe*, and other cases. (*People v. Bailey*, *supra*, 55 Cal.App.2d at p. 519, italics supplied.) It was only then that the *Bailey* court made its observation that "it does not appear that the convictions would have been affirmed had the evidence established that there was only one intention, one general impulse, and one plan." (*Ibid.*) In any event, the *Bailey* court's statement, properly construed, was simply that *Ashley*, *Rabe*, and the other cases cited therein were not examples of the types of cases requiring a single conviction for a count of grand theft. (*Ibid.*) And each of those cases involved separate convictions for grand theft based on the defendant's commission of distinct transactions committed by identical (or similar) means against a single victim. (See *People v. Ashley, supra*, 42 Cal.2d at p. 273; *People v. Rabe*, *supra*, 202 Cal. at pp. 413-414; *People v. Barber, supra*, 166 Cal.App.2d at pp. 741-742; *People v. Caldwell, supra,* 55 Cal.App.2d at pp. 250-251; *People v. Ellison* (1938) 26 Cal.App.2d 496, 498-499.) Simply put, had the *Bailey* court actually intended to have propounded a rule that discrete acts of grand theft committed pursuant to a single intention or plan must be aggregated into a single count, it would have overruled *Stanford*, *Ashley*, and *Rabe*. The fact that it did not, demonstrates that the *Bailey* court had no such intention.

Finally, appellant contends that the fact that the *Bailey* court overruled *People v. Scott*, *supra*, 112 Cal.App.2d 350, "made clear its intention that the rule in *Bailey* was as stated." (AOB 8.) The defendant in *Scott* had been convicted of three counts of grand theft based on his act of taking money from three victims on three separate occasions. On appeal, he contended that the jury should have been instructed "as to the difference between grand theft and petty theft," and "that if several acts of taking were done pursuant to one design, the same constitutes only one offense only."

(*Id.* at p. 351.) The Court of Appeal rejected appellant's claim that the trial court had a duty to instruct the jury that it could conclude that appellant had only committed a single offense, stating, "the requested instruction is not the law." (*People v. Scott*, *supra*, 112 Cal.App.2d at p. 351, fn. 4.) The *Bailey* court overruled *Scott*, along with two other cases, "insofar as they are inconsistent with the views expressed herein." (*People v. Bailey*, *supra*, 55 Cal.2d at pp. 519-520.) Because the defendant in *Scott* had requested an instruction regarding petty theft in addition to an instruction concerning the aggregation of the counts against him, and because the Court of Appeal's blanket statement that "the requested instruction is not the law" could have been construed as applying to both the aggregation of multiple counts of petty theft into a single count of grand theft as well as the aggregation of multiple counts of grand theft into a single count (*People v. Scott*, *supra*, 112 Cal.App.2d at p. 351 & fn. 4), this Court should not view the *Bailey* court's disapproval of *Scott* as evidence that it intended to promulgate a rule regarding the aggregation of multiple counts of grand theft. This is especially true given that the two other cases the court overruled in *Bailey* pertained to the aggregation of petty theft into a single count of grand theft. (See *People v. Serna*, *supra*, 43 Cal.App.2d at p. 107; *People v. Miles*, *supra*, 37 Cal.App.2d at pp. 378-379.) In any event, *Bailey*'s disapproval of *Scott* is puzzling given that *Scott* involved the theft of money from three separate victims on three separate occasions (although the circumstances of the takings were not detailed), and because *Bailey* did not disapprove of *Sanford*, *Ashley*, or *Rabe*, which involved multiple takings committed in identical manners from a single victim.

Respondent's interpretation of *Bailey* is consistent with the culpability of a defendant who commits multiple discrete takings in excess of the threshold for grand theft via separate transactions. A defendant should not be rewarded for engaging in multiple discrete acts over the threshold for

grand theft with a single conviction. A defendant who has completed separate takings that constitute grand theft by distinct transactions is more culpable than one who has set in motion a series of takings by virtue of a particular transaction because he has had an opportunity to reflect upon his criminality and abandon his conduct. (See *People v. Perez* (1979) 23 Cal.3d 545, 552 ["an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts" would violate Penal Code section 654's purpose to insure that a defendant's punishment will be commensurate with his culpability]; see also *People v. Harrison* (1989) 48 Cal.3d 321, 338 [an assailant who has the opportunity to reflect between offenses against a single victim is more culpable than one who does not].) The rule espoused by appellant would embolden a defendant who had already committed one completed transaction constituting grand theft to continue committing similar crimes, confident in the knowledge that he will never be punished for any of his additional offenses. It is this result that is inconsistent with common sense and the law. (See AOB 10.)

Appellant engaged in 20 separate transaction in order to obtain the vehicles that he stole from his employer. Those transactions were separated by time, methodology, and property obtained. Appellant stole a variety of different vehicles including motorcycles, ATVs, and motorized dirk bikes. He employed different methods to accomplish the thefts, falsifying financing agreements for some of the vehicles and using forced credit card transactions with separate fraudulent credit card accounts in others. With the exception of two dates, whenever more than one transaction occurred on a single date, the transactions involved distinct fictitious buyers. On the two dates that a fictitious buyer purportedly bought more than one vehicle, the transactions involved separate paperwork and documentation. (2RT 342-404.) And with the exception of the dates upon which multiple vehicles were taken in separate transactions, appellant obtained, or caused

another person to obtain, those vehicles prior to engaging in another offense. (3RT 701-719.) Thus, appellant did not simply engage in a single transaction that resulted in the taking of 20 vehicles. As to each offense, he obtained the vehicle in question and had time to reflect upon his behavior before engaging in a separate and distinct transaction. As noted by the trial court in sentencing appellant, "each of these days was simply another time when [appellant] made a decision in the course of his employment to . . . participate in another significant loss of his employer." (4RT 1209.) Plainly, appellant is more culpable than one who commits a single transaction at a particular point in time, resulting in the taking of multiple items over an extended period. (See *People v. Harrison*, *supra*, 48 Cal.3d at p. 338; *People v. Perez*, *supra*, 23 Cal.3d at p. 552.)

Appellant contends that applying different rules of aggregation for multiple acts of petty theft and grand theft is inconsistent with the statutory scheme governing theft. He posits, "Both conceptually and as a matter of statutory construction, how can multiple small thefts be one big theft, but multiple big thefts not be one bigger theft?" (AOB 9.) Appellant's contention overlooks the fact that while petty theft may be aggregated into a single felony count based on the value of the property taken, grand theft may not be aggregated into anything greater than itself. (Pen. Code, § 487, subd. (a).) Simply put, there is no "bigger theft" to aggregate multiple counts of grand theft into, and a defendant's culpability for committing multiple felony counts of grand theft should be reflected via the imposition of multiple convictions and sentences. (AOB 9.)

Respondent's construction of *Bailey* would proportionally punish the defendant who commits multiple takings via a single transaction with a single count of grand theft. It would also punish more harshly the defendant who commits multiple offenses of grand theft via separate and distinct transactions, preventing him from obtaining a "felony discount" on

all subsequent distinct takings following the first taking in excess of the threshold for grand theft, thereby discouraging future takings. (*People v. Whitmer*, *supra*, 213 Cal.App.4th at p. 145.)

Appellant's contention that the principle of stare decisis supports the continued application of "the *Bailey* rule" (AOB 12-14) is misplaced, as *Bailey* never articulated the rule that appellant has attributed to it. This Court has never expressly held that the multiple counts of grand theft must be aggregated into a single count where committed pursuant to a single intention or plan. Likewise, it is irrelevant that the Legislature has never acted to overrule *Bailey*, because Bailey does not stand for the proposition that appellant attributes to it. (AOB 15-17.) Moreover, the fact that lower courts of appeal misconstrued *Bailey*'s holding does not trigger concerns regarding stare decisis. (See *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) In any event, the doctrine of stare decisis does not "'shield court-created error from correction." (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924.) Rather, the doctrine of stare decisis is "'a flexible one' that permits us 'to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case.'" (*People v. Mendoza* (2000) 23 Cal.4th 896, 924, quoting *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.Rptr. 287, 296.)

Accordingly, this Court should construe *Bailey* as authorizing multiple convictions for grand theft where a defendant has engaged in separate and distinct transactions, irrespective of whether that defendant acts according to one intention or plan. In the alternative, this Court should disapprove that portion of *Bailey* pertaining to the aggregation of multiple convictions of grand theft, as it would lead to the absurd result that a defendant who has already completed a taking that constitutes grand theft

may commit infinite other takings in a similar manner without fear of additional reprisal.[12]

C. Even Under Appellant's Construction of the Rule Articulated in *Bailey*, He Is Not Entitled to Relief Because He Was Convicted of Grand Theft of Automobiles, and the Taking of a Vehicle Constitutes Grand Theft Irrespective of the Value of the Property Taken

Assuming this Court determines that *Bailey* requires the aggregation of multiple counts of grand theft into a single count where the defendant acts pursuant to a single intention or plan, appellant is not entitled to relief, because he was convicted of grand theft of automobiles pursuant to Penal Code section 487, subdivision (d)(1), and the taking of each vehicle constituted a distinct and separate count of grand theft irrespective of the value of the property taken. Accordingly, there was nothing to aggregate.

As appellant notes, the jury returned a true finding on an allegation that the total value of the property taken by appellant was greater than $200,000 (Pen. Code, § 12022.6). (AOB 2, 18; see 1CT 154-155, 200; 3RT 923-924.) In making this finding, the jury determined that "the losses arose from a common scheme or plan." (1CT 154-155, 200; 3RT 923-924.) The trial court imposed a two-year sentence enhancement upon appellant as a

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[12] Appellant contends that in the event this Court construes *Bailey* as suggested here, this rule should be applied prospectively and should not apply to his case. (AOB 18-20.) Respondent disagrees. For the reasons previously explained, any disapproval of *Bailey* would not be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue." (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 [84 S.Ct. 1697, 12 L.Ed.2d 894]; see also *People v. Escobar* (1992) 3 Cal.4th 740, 752.) Moreover, where a defendant relies upon "a mistaken dictum of court, traditional notions of fair play and substantial justice are not offended by applying" the proper rule of law to that defendant's case. (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 476.)

result of this finding. (1CT 291; 4RT 1214.) Although respondent believes that a reasonable trier of fact could have concluded that appellant did not act pursuant to a single intention or plan within the meaning of *Bailey*, the jury's finding on the enhancement allegation appears to be supported by substantial evidence. (See *People v. Jaska* (2011) 194 Cal.App.4th 971, 984 [a reviewing court reviews the totality of the record to determine whether there is substantial evidence to support a finding that the defendant harbored multiple intentions within the meaning of *Bailey*]; *People v. Tabb* (2009) 170 Cal.App.4th 1142 [same].)

However, appellant did not request that the trial court instruct the jury that it must determine whether his offenses constituted a single offense of grand theft or multiple offenses, in accordance with his interpretation of *Bailey* (see CALCRIM No. 1802 [pertaining to the aggregation of petty thefts into a single count of grand theft]), and the jury received no such instruction. It appears that appellant refrained from requesting such an instruction because he was charged, tried, and convicted upon the theory that he had committed grand theft of automobiles, in violation of Penal Code section 487, subdivision (d)(1) (1CT 84-99, 146, 160-200; 4RT 919), and the theft of an automobile constitutes a separate and distinct count of grand theft regardless of the value of the vehicle taken (see *People v. Roberts* (1959) 167 Cal.App.2d 238, 246). Respondent notes that appellant posed no objection to the charging documents (1CT 82-99), jury instructions (including the instruction that theft of a "motor vehicle" constituted grand theft) (1CT 146-147; 4RT 919), or verdict forms detailing his offenses as grand theft of an automobile pursuant to Penal Code section 487, subdivision (d)(1) (1CT 146, 160-200). Appellant posed no objection to the prosecutor's closing argument informing the jury that the theft of a motorcycle or ATV satisfied Penal Code section 487, subdivision (d)(1), because the statute pertains to the theft of "motor vehicles." (4RT 935.)

During appellant's sentencing hearing, appellant never requested that the trial court impose a single sentence upon him for a single conviction of grand theft, pursuant to his interpretation of *Bailey*. (4RT 1201-1218; 1CT 232-242.)

Irrespective of the contrary conclusion on the part of the Court of Appeal below (*People v. Whitmer*, *supra*, 213 Cal.App.4th at pp. 133-136), respondent does not concede that the term "automobile" as used in Penal Code section 487, subdivision (d)(1), excludes motorcycles. Although the Legislature has provided no current definition of the term "automobile," a closely related provision of the Vehicle Code suggests that the term is to be interpreted consistently with the term "motor vehicle." Vehicle Code section 10851, which prohibits the theft and unlawful driving or taking of a motor vehicle, provides that any person "who has been convicted of one or more previous felony violations of this section, or any felony grand theft of a vehicle in violation of subdivision (d), former subdivision (3) of Section 487 of the Penal Code . . . is punishable as set forth in Section 666.5 of the Penal Code." (Veh. Code, § 10851, subd. (e).) Although the current and prior versions of Penal Code section 487 list only an "automobile" as being exempt from the valuation requirement of grand theft, Vehicle Code section 10851, subdivision (e), suggests that the Legislature intended to include all motor vehicles within the meaning of the "automobile" for the purposes of Penal Code section 487, subdivision (d). (See also Pen. Code, § 186.22, subd. (e)(10) [providing that a pattern of criminal gang activity may be established by the commission of two or more offenses of "grand theft of any . . . vehicle"]; Veh. Code, §§ 166 [defining an "autobroker" or an "auto buying service" as a person who sells any "vehicle subject to registration"], 220 [defining "automobile dismantler" anyone who sells any vehicle subject to a registration requirement for the purpose of dismantling the vehicle].) Motorcycles, motorized dirt bikes, and ATVs are "motor

vehicles" as defined by the Vehicle Code. (Veh. Code, §§ 111, 400, 415, 670, 4000.) It is well established that "statutes related to the same subject matter are to be construed together and harmonized if possible." (*County of Placer v. Aetna Cas. etc. Co.* (1958) 50 Cal.2d 182, 188-189.)

Moreover, as a matter of public policy, it makes little sense to conclude that a four-wheel motor vehicle may be the subject of grand theft irrespective of value, but a two-wheel or three-wheel motor vehicle may not. (See *People v. Sinohui* (2002) 28 Cal.4th 205, 212 [statutes should be construed to avoid an interpretation that would lead to absurd results].) Accordingly, irrespective of this Court's conclusion regarding the propriety of aggregating multiple counts of grand theft into a single count under the rule articulated in *Bailey*, this Court should affirm appellant convictions on the basis that appellant was properly convicted of 20 separate counts of grand theft that are not subject to any rule of aggregation based on the value of the property taken.

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests this Court affirm the judgment.

Dated: January 17, 2014

Respectfully submitted,

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Supervising Deputy Attorney General
MICHAEL C. KELLER
Deputy Attorney General

NOAH P. HILL
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 10,292 words.

Dated: January 17, 2014

KAMALA D. HARRIS
Attorney General of California

NOAH P. HILL
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Jeffrey Allen Whitmer**
Case No.: **S208843**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On January 17, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Eric R. Larson
Attorney at Law
330 "J" Street, #609
San Diego, CA 92101

Alexander Karkanen
Deputy District Attorney
L.A. County District Attorney's Office
El Monte Area Office
11234 East Valley Blvd., Rm. 110
El Monte, CA 91731

Hon. Candace J. Beason, Judge
Los Angeles County Superior Court
Northeast District, Pasadena Courthouse
300 East Walnut Street, Dept. A
Pasadena, CA 91101

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 January 17, 2014, at Los Angeles, California.

K. Amioka
Declarant

Signature

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