

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re H. W. a Person Coming Under the  
Juvenile Court Law

SUPREME COURT CASE NO: S237415

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiffs and Respondents

v.

H. W.

Defendant and Appellant

SUPREME COURT  
**FILED**

FEB 06 2017

Jorge Navarrete Clerk

Deputy

THIRD APPELLATE DISTRICT CASE NO: C079926  
SACRAMENTO COUNTY SUPERIOR COURT CASE NO: JV137101  
THE HONORABLE STACY BOULWARE EURIE, JUDGE

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**APPELLANT'S OPENING BRIEF ON THE MERITS**

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By Appointment of the Supreme Court of the  
State of California  
Under the Central California Appellate Program  
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Sacramento County Superior Court Case  
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**APPELLANT'S OPENING BRIEF ON THE MERITS**

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**ISSUE PRESENTED**

This case presents the following issue:

Did the Court of Appeal err in holding that a pair of pliers, which the defendant used to remove an anti-theft device from a pair of blue jeans in a department store, qualified as a burglary tool within the meaning of Penal Code section 466?

(see California Rules of Court, rule 8.520(b)(2)(A).)

**INTRODUCTION**

Penal Code<sup>1</sup> section 466 prohibits the possession of specific tools with the felonious intent to break or enter into a building or vehicle. (§ 466.) In addition to

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

the tools enumerated in the statute, section 466 criminalizes the possession of any “other instrument or tool” - with the requisite felonious intent.

On October 13, 2014, appellant, H. W. (hereafter “H. W.”), was arrested after he used a pair of pliers to remove an antitheft tag from a pair of jeans at a Sears department store in Yuba City, California. He was subsequently charged in Count II of an April 14, 2015, juvenile wardship petition, with violating section 466. On July 1, 2015, the Sacramento County Juvenile Court found Count II true beyond a reasonable doubt.

H. W.’s pliers are not specifically enumerated in section 466. The pliers also do not fall within the scope of the statute’s “other instrument or tool” provision. Furthermore, H. W. did not possess the pliers with the requisite “felonious intent” or “burglarious purpose.” Nevertheless, the Third Appellate District affirmed the juvenile court’s judgment sustaining Count II.

As discussed more fully below, the Third Appellate District erred when it held H. W. possessed a “burglary tool”, within the meaning of section 466, with the requisite felonious intent. Accordingly, H. W. respectfully requests this Court reverse the Third Appellate District’s published opinion in case number C079926 – subsequently cited as *In re H. W.* (2016) 2 Cal. App. 5<sup>th</sup> 937.

### **STATEMENT OF THE CASE**

On April 14, 2015, the Sacramento County District Attorney (hereafter “the prosecution”) filed a three-count juvenile wardship petition alleging H. W. violated sections 484, subdivision (a) (Count I - misdemeanor), 466 (Count II -

misdemeanor) and 602.5 (Count III - misdemeanor). (Clerk's Transcript, Volume I<sup>2</sup>, hereafter "CT", pp. 32 – 37.) With respect to Count II, the petition specifically alleged:

On or about October 31, 2014, [H. W.] did commit a misdemeanor namely: a violation of Section 466 of the Penal Code of the State of California, in that [H. W.] did unlawfully have in his/her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water pump pliers, slidehammer, slim jim, tension bar, lockpick, floor safe door puller, master key, and other instrument or tool with intent feloniously to break and enter a building, car, aircraft, vessel, trailer coach, and vehicle.

(CT, p. 34.)

On July 1, 2015, the juvenile court held the contested jurisdiction/disposition hearing. (CT, p. 68.) At the conclusion of the hearing, the juvenile court sustained Counts I and II of the April 14, 2015, wardship petition and found Count III had "not been proven beyond a reasonable doubt." (Reporter's Transcript Vol. I<sup>3</sup>, hereafter "RT", p. 102; CT, p. 69.) The juvenile court declared H. W. a ward, placed him on juvenile probation, committed him to juvenile hall for two days - with credit for time served of two days - and set his maximum confinement time at eight months. (RT, pp. 108 – 110; CT, p. 70.)

On August 4, 2015, H. W. filed a timely notice of appeal, contesting the juvenile court's findings and judgment at the July 1, 2015, jurisdiction/disposition

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<sup>2</sup> There is only one volume of the Clerk's Transcript in the appellate record. Accordingly, the Clerk's Transcript will be referred to as "CT" throughout this brief.

<sup>3</sup> There is only one volume of the Reporter's Transcript in the appellate record. Accordingly, the Reporter's Transcript will be referred to as "RT" throughout this brief.

hearing. (CT, pp. 86 – 87.) On November 19, 2015, H. W. filed his opening brief. Respondent filed its brief on January 13, 2016. On February 1, 2016, H. W. filed his reply brief. Both parties waived oral argument.

On August 9, 2016, the Third Appellate District, in an unpublished opinion, affirmed the juvenile court’s judgment, sustaining Count II of the April 14, 2015, wardship petition. (*In re H. W.*, *supra*, 2 Cal. App. 5<sup>th</sup> at p. 946.) On August 22, 2016, respondent filed a request for publication of the Third Appellate District’s Opinion. On August 25, 2016, the Third Appellate District granted respondent’s request and certified its opinion for publication.

On September 27, 2016, H. W. filed his petition for review, pursuant to California Rules of Court, rule 8.500(b)(1), to “secure uniformity of decision.” On November 22, 2016, this Court granted H. W.’s petition.

## STATEMENT OF THE FACTS

### Jurisdiction/Disposition

The juvenile court held the contested jurisdiction/disposition hearing on July 1, 2015. (CT, p. 68.) Marcus A. Nealy (hereafter “Nealy”), Yuba City Police Officer Joseph William Jackson (hereafter “Jackson”), Yuba City Police Officer Brian Thornton (hereafter “Thornton”), Yuba City Police Officer Todd Wolfe (hereafter “Wolfe”) and Jorge Madrigal (hereafter “Madrigal”) testified. (CT, p. 69.)<sup>4</sup>

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<sup>4</sup> Thornton, Wolfe and Madrigal’s testimony related solely to the allegations set forth in Count III of the April 14, 2015, wardship petition. Accordingly, their

*Testimony of Nealy*

On October 13, 2014, Nealy was employed as a loss prevention agent at the Sears department store in Yuba City, California. (RT, pp. 25 – 26.) His duty that day was “to observe and apprehend thieves, theft, shoplifting.” (RT, p. 26.) The store’s loss prevention manager, Stephanie Garza, (hereafter “Garza”) worked with Nealy that day. (RT, p. 26.)

At 4:30 p. m., Nealy and Garza watched the sales floor, in Nealy’s office, via the store’s closed-circuit television (hereafter “CCTV”.) (RT, p. 26.) Nealy and Garza saw H. W. in the men’s department with an apparently empty backpack, “looking around very suspiciously.” (RT, p. 27.) Garza and Nealy split up and went to the sales floor. (RT, p. 27.)

Nealy was positioned at the end of the men’s department. (RT, p. 28.) He maintained contact with Garza via cell phone. (RT, p. 28.) Garza told Nealy she saw H. W. use a pair of pliers to remove an antitheft ink tag from a pair of jeans. (RT, pp. 28 – 29, 32, 42.) Garza told Nealy H. W. “rolled” the jeans up and put them in his backpack. (RT, p. 29.) Nealy did not personally observe H. W. “conceal anything” when Nealy was on the floor. (RT, p. 44.)

H. W. went to the store bathroom. (RT, p. 29.) Shortly thereafter, H. W. left the bathroom. (RT, p. 30.) Nealy subsequently checked the bathroom and did not find either the jeans or the anti-theft ink tag. (RT, pp. 30 - 31.)

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testimony is irrelevant to the issue before this Court and will not be referenced any further herein.

H. W. walked out of the store. (RT, pp. 30 - 31.) He did not stop at any of the cash registers, or attempt to pay for the jeans he carried. (RT, p. 31.) H. W. passed “all points of sale without paying.” (RT, p. 31.)

Garza told Nealy H. W. was leaving the store. (RT, p. 31.) Nealy pursued H. W. (RT, p. 31.) Nealy confronted H. W. when he left the store. (RT, p. 31.) Nealy identified himself, told H. W. he “knew about the jeans that were concealed” and asked H. W. to come with him. (RT, p. 31.)

Nealy brought H. W. to his office. (RT, p. 31.) He did not search H. W. (RT, p. 31.) Nealy did not recall whether he or Garza called the police. (RT, pp. 31 - 32.)

Nealy told the court when an antitheft ink tag is “released by force without the unlocking device, the ink sprays out.” (RT, p. 43.) He added the tags are not “easy to cut off.” (RT, p. 32.) In fact, Nealy believed it was impossible for a person to remove an antitheft tag with his or her bare hands. (RT, p. 32.) In his experience, it is common for people who steal items with “antitheft tags...to bring tools to remove the ink tag.” (RT, p. 32.) Nealy opined H. W. had to use the pliers to remove the tag from the jeans. (RT, pp. 32 – 33.)

After the police arrived, H. W.’s backpack was opened. (RT, p. 33.) Nealy saw a \$68.00 pair of Levi 501 jeans in the backpack. (RT, p. 33.) He was not certain where the pliers were discovered. (RT, p. 33.) H. W. had no form of payment on his person. (RT, pp. 33 – 34.) H. W. did not have permission to take the jeans. (RT, pp. 34 – 35.) Nealy gave the pliers and the CCTV DVD of the

incident to the police. (RT, p. 35.)

After the incident, Nealy watched H. W.'s actions on the store's CCTV. (RT, pp. 29, 44, 46.) He saw H. W. select the jeans and enter the restroom. (RT, pp. 29 – 30, 47.) H. W. entered the restroom, carrying the jeans outside of his backpack. (RT, p. 30.) Nealy did not see the jeans when H. W. left the restroom. (RT, pp. 30, 43.) Nealy searched the men's restroom and did not find any jeans. (RT, pp. 30 - 31.) Nealy concluded H. W. "concealed the jeans." (RT, p. 30.)

The CCTV DVD was then played for the court. (RT, p. 36.) Nealy described the images depicted on the DVD. (RT, pp. 36 - 38.) H. W. held a "balled up" pair of jeans. (RT, pp. 36 – 37.) H. W. entered the men's bathroom. (RT, p. 37.) H. W. exited the bathroom. (RT, p. 38.) The jeans were not visible. (RT, p. 38.) H. W. exited the store without attempting to pay for the jeans. (RT, p. 38.) Nealy followed H. W. (RT, p. 38.)

#### *Testimony of Jackson*

Jackson was employed by the Yuba City Police Department. (RT, p. 48.) He was on patrol on October 13, 2014. (RT, p. 48.) Jackson was dispatched to the Sears store in Yuba City "to a call of a shoplifter who was in custody." (RT, p. 49.) He contacted Garza and Nealy. (RT, p. 49.)

Jackson searched H. W. (RT, p. 50.) H. W. had no wallet or money on his person. (RT, pp. 50, 53.) Jackson received a CCTV DVD, a receipt for the jeans, an empty backpack and a pair of pliers from loss prevention. (RT, pp. 50, 54.) In his experience, pliers are "commonly used as a tool to remove tags from clothing

items that have a metal pin-type securing device.” (RT, p. 52.) Jackson issued H. W. a citation for possession of burglary tools and petty theft. (RT, p. 53.)

## **ARGUMENT**

### **I.**

**THE THIRD APPELLATE DISTRICT ERRED WHEN IT AFFIRMED THE JUVENILE COURT’S JURISDICTION ORDER, SUSTAINING COUNT II OF THE WARDSHIP PETITION, BECAUSE H. W. DID NOT POSSESS A “BURGLARY TOOL”, WITHIN THE MEANING OF SECTION 466, WITH THE REQUISITE “FELONIOUS INTENT” OR “BURGLARIOUS PURPOSE”**

### **A.**

**H. W.’S PLIERS WERE NOT ENUMERATED IN SECTION 466 AND DID NOT QUALIFY AS AN “OTHER INSTRUMENT OR TOOL” WITHIN THE MEANING OF THE STATUTE**

H. W. did not possess a tool specifically enumerated in section 466. Accordingly, to qualify as a “burglary tool”, within the meaning of section 466, H. W.’s pliers must fall within the scope of the statute’s “other instrument or tool” provision.

In its August 9, 2016, opinion, the Third Appellate District erroneously determined H. W.’s pliers qualified as an “other instrument or tool” within the

meaning of section 466 because he used them for a “burglarious purpose”:

We...conclude ‘the plain import of ‘other instrument or tool,’ and the only meaning that effectuates the obvious legislative purpose of section 466 includes tools that the evidence shows are possessed with the intent to be used for burglary.’ [Citation] Such an interpretation is consistent with the purpose of the statute which is to prevent the crime regardless of whether the tool is used to gain entry, to break into the building, or to effectuate the theft....a person need not use the tool or instrument he or she possesses to break into the building so long as he or she procured that tool or instrument intending to use it ‘for a burglarious purpose.’ [Citation].

(*In re H. W.*, *supra*, 2 Cal. App. 5<sup>th</sup> at p. 944 – 945.) The Third Appellate District’s opinion expressly adopted the “burglarious purpose” interpretation of “other instrument or tool” propounded by the First Appellate District in *People v. Kelly* (2007) 154 Cal. App. 4<sup>th</sup> 961, 967 - 968 [“‘other instrument or tool,’ includes tools that the evidence shows are possessed with the intent to be used for burglary”.] (*Kelly*). (*In re H. W.*, *supra*, 2 Cal. App. 5<sup>th</sup> at p. 944.)

In doing so, the Third Appellate District rejected the “*eiusdem generis*” construction of “other instrument or tool” advanced by the Fourth Appellate District in *People v. Gordon* (2001) 90 Cal. App. 4<sup>th</sup> 1409, 1412, superseded by statute as stated in *People v. Diaz* (2012) 207 Cal. App. 4<sup>th</sup> 396, 401 - 402 [Division One] (*Gordon*) and *People v. Diaz*, *supra*, 207 Cal. App. 4<sup>th</sup> at pp. 403 – 404 [Division Three] (*Diaz*)<sup>5</sup>. The *Diaz* Court specifically disapproved of the *Kelly* Court’s reasoning and held:

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<sup>5</sup> The *eiusdem generis* canon of construction applies when general terms follow a list of specific items or categories, or vice versa. (*Gordon*, *supra*, 90 Cal. App. 4<sup>th</sup> at p. 1412.) Under this rule, application of the general term is “‘restricted to those things that are similar to those which are enumerated specifically.’” (*Ibid.*)

...section 466 is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466. That the perpetrator breaks into or enters property, or attempts to do so, *and* happens to have access to a tool that may be used in the course of the burglary is not enough. The tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property.

(emphasis in original) (*Diaz, supra*, 207 Cal. App. 4<sup>th</sup> p. 404.)

There was no evidence H. W.'s pliers could be used to "break into or gain access to property in a manner similar to the items enumerated in section 466."

(*Ibid.*) Thus, the pliers were not "similar" to the tools listed in section 466. (*Ibid.*)

Pursuant to the *ejusdem generis* canon of construction, the pliers cannot be included within the definition of "other instrument or tool." (*Ibid; Gordon, supra*, 90 Cal. App. 4<sup>th</sup> at p. 1412.) Accordingly, they did not qualify as a "burglary tool" within the meaning of section 466.

By accepting the *Kelly* Court's broad interpretation of "other instrument or tool", the Third Appellate District expanded the reach of section 466 far beyond the Legislature's intent and criminalized the possession of virtually any common object – including a stick or a rock – so long as it could potentially be used for a "burglarious purpose." By contrast, the *Gordon* and *Diaz* decisions clearly and concisely define the scope of section 466 and are more consistent with the statute's Legislative intent.

#### Section 466

Section 466 prohibits the possession of "burglary instruments or tools" and provides:

Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, *or other instrument or tool*<sup>6</sup> with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument named above so that the same will fit or open the lock of a building, railroad car, aircraft, vessel, trailer coach, or vehicle as defined in the Vehicle Code, without being requested to do so by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in Section 459 shall be deemed to be a building within the meaning of this section.

(emphasis added) (§ 466.)

To sustain a conviction for possession of burglary tools, in violation of section 466, the prosecution must establish three elements: (1) possession by the defendant; (2) of a tool within the purview of the statute; (3) with the intent to use the tool for the felonious purpose of breaking or entering into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle. (§ 466; *People v. Southard* (2007) 152 Cal. App. 4th 1079, 1084 – 1085.) (*Southard*)

The items specifically listed as burglary tools in section 466 are typically keys, key replacements or “tools that can be used to pry open doors, pick locks, or

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<sup>6</sup> As relevant here, the Merriam-Webster’s Dictionary defines “instrument” as: an “implement...designed for precision work.” (*Merriam-Webster.com*. Merriam-Webster, n.d. Web. <<https://www.merriam-webster.com/dictionary/instrument>> (as of January 19, 2017.) Meanwhile, Merriam-Webster defines “tool” as “a handheld device that aids in accomplishing a task.” (*Merriam-Webster.com*. Merriam-Webster, n.d. Web <<https://www.merriam-webster.com/dictionary/tool>> (as of January 19, 2017.)

pull locks up or out.” (*Gordon, supra*, 90 Cal. App. 4th at p. 1412.) The offense is a “general intent” crime, meaning it is not necessary to prove the defendant specifically intended to use the burglar tools in “a particular place, or for a special purpose, or in any definite manner.” (*Southard, supra*, 152 Cal. App. 4th at p. 1088.) Instead, “[t]he offense is complete when tools...[are] procured with intent to use them for a burglarious purpose.” (*Ibid.*)

It is undisputed H. W. possessed pliers when he was arrested.<sup>7</sup> Ordinary pliers are not specifically identified in section 466. The statute specifically refers only to “vise grip pliers”<sup>8</sup> and “water pump pliers”<sup>9</sup> (§ 466.) There is no evidence

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<sup>7</sup> The Merriam Webster Dictionary offers three definitions of “pliers”: (1) “small pincers for holding small objects or for bending and cutting wire”; (2) “a tool that is used for holding small objects or for bending or cutting wire” and (3) “small pincers with long jaws used for bending or cutting wire or handling things.” (*Merriam-Webster.com*. Merriam-Webster, n.d. Web. <<https://www.merriam-webster.com/dictionary/pliers>> (as of January 19, 2017.)

<sup>8</sup> The Merriam Webster Dictionary does not offer a definition of “vise grip pliers. However, Wikipedia defines “vise grip pliers” as “...pliers that can be locked into position, using an over-center action. One side of the handle includes a bolt that is used to adjust the spacing of the jaws, the other side of the handle (especially in larger models) often includes a lever to push the two sides of the handles apart to unlock the pliers. ‘Mole’ and ‘Vise-Grip’ are trade names of different brands of locking pliers.” (Locking pliers, [https://en.wikipedia.org/w/index.php?title=Locking\\_pliers&oldid=756988180](https://en.wikipedia.org/w/index.php?title=Locking_pliers&oldid=756988180) (last visited Dec. 28, 2016).)

<sup>9</sup> The Merriam Webster Dictionary does not offer a definition of “water pump pliers.” However, Wikipedia defines “water pump pliers” as follows: “Tongue and groove pliers also known as water pump pliers, adjustable pliers, groove-joint pliers, arc joint pliers, Multi-Grips, tap or pipe spanners, gland pliers and Channellocks - are a type of slip-joint pliers They have serrated jaws generally set 45 to 60 degrees from the handles. The lower jaw can be moved to a number of positions by sliding along a tracking section under the upper jaw. An advantage of this design is that the pliers can adjust to a number of sizes without the distance in

the tool recovered from H. W. was identified as either “vise grip pliers” or “water pump pliers.” Accordingly, to qualify as a burglary tool under section 466, H. W.’s pliers must fall within the scope of the statute’s “other instrument or tool” provision. (§ 466.) As set forth more fully below, they did not.

### Standard of Review

“As in any case involving statutory interpretation” a reviewing court’s “fundamental task is to determine the Legislature’s intent so as to effectuate the law’s purpose.” (*People v. Cole* (2006) 38 Cal. 4<sup>th</sup> 964, 974.) Statutory interpretation begins with an analysis of the language of the governing statute. (*Beal Bank SSB v. Arter & Hadden, LLP* (2007) 42 Cal. 4<sup>th</sup> 503, 507; see also, *People v. Woodhead* (1987) 43 Cal. 3<sup>d</sup> 1002, 1007.) Words are afforded their ordinary and usual meaning, as the words the Legislature chose to enact are the most reliable indicator of its intent. (*Vasquez v. California* (2008) 45 Cal. 4<sup>th</sup> 243, 251.)

The reviewing court: must consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part. (*Renee J. v. Superior Court* (2001) 26 Cal. 4<sup>th</sup> 735, 743.) “Significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.” (*Ibid.*) The elements of a statute should be harmonized by consideration

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the handle growing wider. These pliers often have long handles - commonly 9.5 to 12 inches long for increased leverage.” (Tongue-and-groove pliers, [https://en.wikipedia.org/w/index.php?title=Tongueandgroove\\_pliers&oldid=674735526](https://en.wikipedia.org/w/index.php?title=Tongueandgroove_pliers&oldid=674735526) (last visited Aug. 5, 2015).

of the particular clause or section in the context of the statutory framework as a whole. (*Ibid*; see *Valov v. Tank* (1985) 168 Cal. App. 3d 867, 874)

Furthermore, a statute should generally not be interpreted in a manner which renders portions thereof mere surplusage. (*People v. Smith* (2000) 81 Cal. App. 4th 630, 641; *Dyna-Med Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal. 3d 1379, 1386 - 1387; see also *In re Jerry R.* (1994) 29 Cal. App. 4th 1432, 1437.) It is also inappropriate to read into a statute language it does not contain or elements that do not appear on its face. (*Vasquez v. California, supra*, 45 Cal. 4th at p. 253)

If the text evinces an unmistakable plain meaning, an appellate court need go no further. (*Beal Bank SSB v. Arter & Hadden LLP, supra*, 42 Cal. 4th at p. 508; *Microsoft Corp. v. Franchise Tax Board* (2006) 39 Cal. 4th 750, 758; *People v. Traylor* (2009) 46 Cal. 4th 1205, 1212. As this Court stated in *People v. Albillar* (2010) 51 Cal. 4th 47, 55:

If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.' [Citation]

(*Ibid*; *People v. Gray* (2014) 58 Cal. 4th 901, 906.)

However, in light of its disparate appellate interpretations, the meaning of the phrase "other instrument or tool" – within the context of section 466 - is inherently ambiguous. (see *Gordon, supra*, 90 Cal. App. 4th at p. 1412; *Diaz, supra*, 207 Cal. App. 4th at p. 401, 403 – 404; *Kelly, supra*, 154 Cal. App. 4th at pp. 967 – 968.) Accordingly, to properly discern the Legislature's intent, it is

necessary to consider section 466's Legislative history, statutory context, and the *ejusdem generis* canon of construction. (see *Gordon, supra*, 90 Cal. App. 4<sup>th</sup> at p. 1412; *Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at p. 401, 403 – 404.)

Reviewing courts employ a *de novo* analysis when considering questions of statutory construction. (*People v. Blackburn* (2015) 61 Cal. 4<sup>th</sup> 1113, 1123; *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal. 4<sup>th</sup> 381, 387.)

### Legislative History

After its original enactment in 1872, the Legislature amended section 466 seven times. (Code Am.1873-74, c. 178, p. 463 § 1; Stats.1977, c. 725, p. 2309, § 1; Stats.1977, c. 1147, p. 3685, § 2; Stats.1984, c. 82 (A.B. 1895), § 1; Stats.2001, c. 854 (S.B.205), § 28; Stats.2002, c. 335 (A.B.2015), § 1; Stats.2008, c. 119 (S.B.1554), § 1.) As relevant here, the Legislature amended section 466 four times since 1984.

In 1984, the Legislature enacted A. B. 1895 to add “various tools and devices” to the category of “specified” tools used for the “intent of breaking or entering a building, car, railroad car, etc.” (Stats.1984, c. 82, § 1; Legis. Analyst Rep. to Assem. Finance Department Analysis of Assem. Bill No. 1895, (1983 - 1984 Reg. Sess.); Sen. Democratic Caucus, Analysis of Assem. Bill No. 1895 p. 1 (1983 - 1984 Reg. Sess.))<sup>10</sup> The Legislature specifically expanded the list of

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<sup>10</sup> Prior to the Legislature's 1984 amendment, former section 466 read, in pertinent part: “Every person having upon him or in his possession a picklock, crow, keybit, or other instrument or tool with intent to feloniously break or enter into any building, railroad car, aircraft, or vessel, trailer coach or vehicle defined in the

enumerated tools and devices proscribed by section 466 to include: “screwdrivers, vice grip pliers, water-pump pliers, slidehammers, slim jims, tension bars, lock pick guns, floor-safe door pullers and master keys.” (Sen. Jud. Comm., Rep. on Assem. Bill 1895 p. 1 (1983 - 1984 Reg. Sess.))

Significantly, despite adding two specific types of pliers, the Legislature did not add generic “pliers” to the list of prohibited items. (Stats.1984, c. 82, § 1; see *Brown v. Kelly Broadcasting Company* (1989) 48 Cal. 3d 711, 725, citing *Ford Motor Company v. County of Tulare* (1983) 145 Cal. App. 3d 688, 691 [“It is a well-recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it another, it should not be implied where excluded.”].)

In 2001, the Legislature enacted S. B. 250 to modify section 466 by correcting the spelling of “vise grip pliers.” (Stats. 2001 Ch. 854 §28 (S.B. 205).)

One year later, in response to the Court of Appeal’s decision in *Gordon, supra*, the Legislature enacted A. B. 2015, to add “ceramic or porcelain spark plug chips or pieces” to the prohibited list of tools enumerated in section 466. (Stats. 2002 Ch. 335 §1 (A.B. 2015).) The Legislature specifically identified its intent when it amended section 466:

Existing law makes it a misdemeanor for any person to have upon him or her in his or her possession any specified instrument or tool with the intent to break or enter into any building, railroad car, aircraft or vessel, trailer coach, or vehicle, as defined. This bill would add to the list of instruments

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Vehicle Code...is guilty of misdemeanor.” (§ 466.)

or tools ceramic or porcelain spark plug chips or pieces. *The bill would state the Legislature's intent to add only ceramic or porcelain spark plug chips or pieces, not other common objects such as rocks or pieces of metal, to the list of burglary tools.*

(emphasis added) (*Ibid.*) The Legislature further emphasized the limited scope of its 2002 amendment:

It is the intent of the Legislature in enacting this measure to add only ceramic or porcelain spark plug chips or pieces, *not other common objects such as rocks or pieces of metal that can be used to break windows*, to the list of burglary tools in Section 466 of the Penal Code.

(emphasis added) (Stats. 2002 Ch. 335 § 2 (A.B. 2015)); see also Sen. Rules Com. Off. Of Sen. Floor Analyses, 3d reading analyses of Assem. Bill No 2015 (2001 – 2002 Reg. Sess.) as amended June 25, 2002, p. C.)

Finally, in 2008, the Legislature enacted S. B. 1554 to add “bump keys” to the list of illegal tools, identified in section 466. (Stats. 2008 Ch. 119 § 1 (S.B. 1554).) The Legislature succinctly expressed its intent in enacting S. B. 1554: “This bill would add bump keys to the list of tools and other items the possession of which is an element of the offense.” (*Ibid.*)

The evolution of section 466 provides important insight into the Legislature’s intent with respect to the statute’s scope. Each time the Legislature amended section 466 since 1984, it added tools specifically designed for the purpose of “breaking or entering” to the list of prohibited items. Indeed, when the Legislature enacted A. B. 2015 in 2002, it unequivocally excluded “other common objects such as rocks or pieces of metal that can be used to break windows.” (Stats. 2002 Ch. 335 § 2 (A.B. 2015).)

The Legislature’s decision to selectively and carefully expand the list of prohibited items evinces its intent to limit the scope of section 466 to tools designed for the purpose of breaking or entering. There is no indication the Legislature intended “other instrument or tool” as a catch-all provision to expand the list of prohibited tools to include any common item which could potentially be used for a “burglarious purpose” or to “effectuate a theft.” (see *In re H. W.*, *supra*, 2 Cal. App. 5<sup>th</sup> at p. 944.)

Statutory Context

Current section 466 is found within Part 1, Title 13, Chapter 3 (“Burglarious and Larcenous Instruments and Deadly Weapons”) of the Penal Code<sup>11</sup>. The other statutes set forth in Chapter 3 of Title 13, prohibit the possession, sale, manufacture or duplication of enumerated tools designed for “gaining access” into property (see *Diaz*, *supra*, 207 Cal. App. 4<sup>th</sup> at p. 404):

- § 466.1 “Sale or provision of lock pick, tension bar, lock pick gun, tubular lock pick, or floor-safe door puller”;
- § 466.3 “Possession of tool, device, etc., designed to open, break into, tamper with or damage coin-operated machine with intent to commit theft”;
- § 466.5 “Motor vehicle master key; motor vehicle wheel lock master key; unlawful possession”;

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<sup>11</sup> “Head notes are an integral part of the codes and are to be given effect according to their import.” (*Sharon v. Sharon* (1888) 75 Cal. 1, 16; *Matter of Wilson* (1916) 30 Cal. App. 567, 568.)

- § 466.6 “Keys capable of operating motor vehicle or personal property registered under Vehicle Code; making other than by duplication of existing key”;
- § 466.65 “Possession of device, ignition or tools designed to bypass factory-installed ignition, start motorcycle”;
- § 466.7 “Motor vehicle keys; possession; knowledge of making without consent”;
- § 466.8 “Keys capable of opening entrance to residence or commercial establishment”;
- § 466.9 “Code grabbing devices; possession or use”;
- § 469 “Unauthorized making, duplicating or possession of key to public building.”

The Legislature placed section 466 within the same Title and Chapter as statutes prohibiting the possession, manufacture or use of key or key replacement tools specifically designed to unlawfully gain access into property – not any random tool or instrument which could potentially be employed for a “burglarious purpose” or to “effectuate” a “theft.” (see *In re H. W.*, *supra*, 2 Cal. App. 5<sup>th</sup> at p. 944.) Given its placement within the statutory context of Chapter 3 of Title 13, it is reasonable to conclude the Legislature intended to limit the scope of section 466 to tools designed to break or enter into property. (see *Renee J. v. Superior Court*,

*supra*, 26 Cal. 4<sup>th</sup> at p. 743; *People v. Albillar, supra*, 51 Cal. 4<sup>th</sup> at p. 55; *People v. Gray, supra*, 58 Cal. 4<sup>th</sup> at p. 906.)

*Ejusdem Generis*

In 2001, Division One of the Fourth Appellate District held a ceramic piece from a spark plug did not fall within the meaning of “other instrument or tool.”<sup>12</sup> (*Gordon, supra*, 90 Cal. App. 4<sup>th</sup> at p. 1412.)

In *Gordon*, an auto burglary victim discovered the defendant pulling a car stereo speaker out of his vehicle. (*Id.* at p. 1411.) The rear passenger window of the car had been shattered into small pieces. (*Ibid.*) Approximately six weeks later, a police officer saw the defendant standing near another vehicle in which two men were either removing or installing a stereo. (*Ibid.*) The officer found two small pieces of porcelain from a spark plug in the defendant’s pants pocket. (*Ibid.*) At trial, the officer testified thieves used pieces of ceramic spark plugs to shatter car windows because it made less noise than entry by other means. (*Ibid.*)

The Court determined the meaning of the phrase “other instrument or tool” in section 466 “was restricted to a form of device similar to those expressly set forth in the statute.” (*Ibid.*) The Court explained why the ceramic piece of a spark plug did not come within the meaning of “other instrument or tool”:

The items specifically listed as burglar’s tools in section 466 are keys or key replacements, or tools that can be used to pry open doors, pick locks, or pull locks up or out. None of the devices enumerated are those whose

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<sup>12</sup> As noted above, in 2002, the Legislature after the *Gordon* decision amended section 466 to specifically include “ceramic or porcelain plug chips or pieces.” (Stats. 2002, ch. 335, § 1.)

function would be to break or cut glass—e.g., rocks, bricks, hammers or glass cutters, and none of the devices listed resembles ceramic spark plug pieces that can be thrown at a car window to break it. Nevertheless, the People liken a ceramic spark plug piece to a ‘shaved’ key because both provide for quiet breaking and entering, and argue that a spark plug piece is an ‘other instrument or tool’ which satisfies the statutory definition in section 466 because ‘it operates as effectively in breaking into a vehicle as unlocking the vehicle door with a metal tool....’ *However, the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466; rather, the device itself must be similar to those specifically mentioned.* Here, a ceramic piece of a spark plug that can be thrown at a car window is not similar to the burglar’s tools listed in the statute. [Citation] Accordingly, [the defendant’s] conviction for possession of burglar’s tools under section 466 cannot stand.

(emphasis added) (*Id.* at pp. 1412 – 1413)

In making its determination, the Court was guided by the *ejusdem generis* rule of statutory construction - which applies when general terms follow a list of specific items or categories, or vice versa. (*Id.* at p. 1412; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal. 4th 116, 141, superseded by statute on other grounds as stated in *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 977.) Under this rule, application of the general term is “restricted to those things that are similar to those which are enumerated specifically.” (*Gordon, supra*, 90 Cal. App. 4th at p. 1412; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1160, fn. 7, superseded by statute on other grounds as stated in *Munson v. Del Taco* (2009) 46 Cal. 4th 661, 689 - 690.)

The *ejusdem generis* canon:

...presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage.

(*Kraus v. Trinity Mgmt. Services, Inc.*, *supra*, 23 Cal. 4th at p. 141.) When “construing criminal statutes, the *ejusdem generis* rule of construction is applied with stringency. [Citation.]” (*Gordon, supra*, 90 Cal. App. 4th at p. 1412; *People v. Thomas* (1945) 25 Cal. 2d 880, 899.)

Six years later in 2007, Division Two of the First District Court of Appeal affirmed a conviction, under section 466, finding the defendant possessed both enumerated and non-enumerated tools with the requisite “burglarious purpose.” (*Southard, supra*, 152 Cal. App. 4th at pp. 1082, 1090.)

Significantly, the *Southard* Court did not attempt to expand the scope of section 466 by including the defendant’s non-enumerated tools within the “other instrument or tool” provision. (*Ibid.*) Instead, it considered the defendant’s possession of the non-enumerated items as evidence to establish his “felonious intent”:

Here, defendant was found in possession of numerous tools that clearly fall within the scope of section 466...At the same time defendant was also in possession of two black sweatshirts, a ski mask, a pair of binoculars, multiple walkie-talkie radios, a flashlight, and a strap-on head light, *items without the ‘other instrument or tool’ category contemplated by section 466.* [*Gordon, supra*] Since they are, defendant’s possession of these items can be considered when evaluating the purpose for which defendant possessed the tools within the scope of section 466. That evaluation strongly supports the inference that defendant possessed the ‘burglary tools’ with a felonious intent.

(emphasis added) (*Ibid.*)

However, that same year in *Kelly, supra*, Division Three of the First Appellate District disagreed with the *Gordon* Court’s analysis and significantly

expanded the scope of section 466. (*Kelly, supra.* 154 Cal. App. 4<sup>th</sup> at pp. 966 – 968.)

In *Kelly*, a police officer responded to a report of an automobile burglary in progress. (*Id.* at p. 963.) The officer found the defendant near a van with a shattered rear passenger window. (*Ibid.*) The defendant’s backpack contained a slingshot, a box cutter and a flashlight. (*Id.* at pp 964, 968.) The investigating officer opined:

...the slingshot was a burglary tool and testified that slingshots are used by burglars to break into vehicles by propelling porcelain chips at vehicle windows. He further testified that burglars use box cutters to cut the wires of car stereos. This is sufficient evidence to conclude that the slingshot and box cutters were instruments or tools within the scope of section 466.

(*Id.* at p. 968.)

The Court of Appeal affirmed the conviction, finding there was “sufficient evidence to conclude that the slingshot and box cutters were instruments or tools within the scope of section 466.” (*Ibid.*) Significantly, the Court did not find section 466 “inherently ambiguous” and questioned the *Gordon* Court’s approach to statutory construction:

We...believe *Gordon's* analysis is problematic. We interpret statutes to ascertain and effectuate the Legislature’s overriding purpose. [Citations] To that end we look first to the words of the statute, giving the statutory language its plain and ordinary meaning and construing it in context; only where a statute is ambiguous may we look beyond the Legislature’s language to ascertain its intent. [Citations] When we must resort to rules of statutory construction such as *ejusdem generis* to clarify ambiguous language, we do so to effectuate the Legislature’s intent, not to defeat it. [Citation]

(*Id.* at p. 967.) Thus, the Court determined, it was unnecessary to apply the *ejusdem generis* rule. (*Ibid.*)

Furthermore, the Court concluded the *Gordon* Court's interpretation conflicted with the statute's intent:

...*Gordon* thwarts, rather than effectuates, the plain legislative purpose to deter and prevent burglaries. [Citation]...The 'major consideration in interpreting a criminal statute is the legislative purpose,' and the court 'will usually inquire into the evils which prompted its enactment and the method of elimination or control which the Legislature chose.' [Citation] Under *Gordon's* interpretation, section 466 authorizes law enforcement to apprehend only burglars and would-be burglars who employ a limited set of means to achieve their nefarious ends, while malfeasants who use other means to break and enter are immunized from punishment even where the evidence establishes their intent to use the tool or instrument in their possession to commit burglary. We see nothing in the statute that indicates this is what the Legislature intended. To the contrary, we think the plain import of 'other instrument or tool,' and the only meaning that effectuates the obvious legislative purpose of section 466 includes tools that the evidence shows are possessed with the intent to be used for burglary.

(*Id.* at pp. 967 – 968.) Finally, the Court asserted the:

Legislature disagreed with the decision in *Gordon* and amended section 466 the following year to specifically include 'ceramic or porcelain spark plug chips or pieces' among the enumerated burglary tools. The legislative response to *Gordon* undermines its conclusion that section 466 was intended to encompass only items that can be used to unlock, pry, or pull something open.

(*Id.* at pp. 966 – 967.)

The *Kelly* Court's construction of section 466 placed great emphasis on the intended use of the tool to commit a burglary – not its similarity to the items enumerated in the statute. (*Id.* at pp. 966 – 968.) The key to the *Kelly* Court's reasoning was the connection between the tool and the perpetrator's burglarious

intent. Hence, the slingshot's established purpose of propelling a porcelain chip to break a car window and the box cutter's utility in cutting the wires of car stereos - *after breaking into a vehicle* - elevated the items to burglary tools, within the meaning of section 466. (*Id.* at p. 968.)

Five years after the *Kelly* decision, Division Three of the Fourth Appellate District in *Diaz, supra*, reversed the defendant's conviction because the latex gloves and large bag found in her possession did not qualify as burglar's tools, under section 466. (*Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at p. 400, 405.)

In *Diaz*, the defendant was convicted on charges of residential burglary and possession of burglar's tools. (*Id.* at p. 398.) On appeal, she argued her latex gloves and large bag were not burglar's tools. (*Id.* at pp. 398 – 399.) The Court of Appeal agreed with the defendant and reversed her conviction, based in part on the *Gordon* Court's "*ejusdem generis*" analysis:

A bag containing latex gloves is not similar to the items enumerated in section 466. As exemplified in *Gordon*, the *ejusdem generis* canon of construction presumes that if the Legislature intends a word or words to be used in an unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would constitute surplusage.

(*Id.* at p. 401.)

Significantly, the *Diaz* Court analyzed the Legislative history of A. B. 2015 and determined the 2002 amendment to section 466 was a clarification - not a repudiation - of the *Gordon* decision:

When the Legislature added 'ceramic or porcelain spark plug chips or pieces' in 2002 in response to *Gordon*, legislative analyses noted the bill

was intended to resolve a conflict between *Gordon* and another opinion, subsequently superseded by the Supreme Court's grant of review, which held ceramic chips *could* constitute a burglary tool. One analysis noted *Gordon* 'found that an instrument is not a burglar tool just because it can accomplish the same purpose as the listed tools, but that the device must be similar to those specifically listed.... *This bill resolves the conflict ... by adding ceramic or porcelain spark plugs [or pieces] to the enumerated list of 'burglar's tools' within...[s]ection 466.*' [Citation]<sup>13</sup>

(emphasis in original) (*Id.* at p. 403.) Indeed, the amendment was consistent with the *Gordon* Court's *ejusdem generis* construction of "other instrument or tool":

Another analysis noted the Supreme Court will likely 'consider the effect of the general reference to 'other instrument or tool' in the burglary tool statute, in light of the very specific items that are defined as burglary tools.' [Citation]<sup>14</sup> Additionally, another analysis noted, 'AB 2015 will allow justice to be served *without opening section 466 to include an overly broad range of generic objects, such as rocks or pieces of tile, that could be used to break windows.*' [Citation]<sup>15</sup> The legislation and associated analyses demonstrate the Legislature accepted *Gordon's* application of *ejusdem generis* in interpreting section 466. The Legislature did not resolve the conflict concerning section 466 by amending the statute to eliminate *Gordon's* requirement of similarity of purpose and design. Rather, it added an item to the list without supplanting the usual *ejusdem generis* canon that applies when specific and general words are used together in a statute.

(emphasis in original) (*Id.* at pp. 403 – 404.)

The *Diaz* Court flatly disagreed with *Kelly's* expansive definition of burglary tools and concluded:

...section 466 is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466. That the perpetrator breaks into or enters property, or attempts to do

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<sup>13</sup> (Assem. Com. On Pub. Safety Rep. on Assem. Bill No. 2015 (2001 – 2002 Reg. Sess.) April 2, 2002, pp. 2 – 3.)

<sup>14</sup> (Sen. Com. On Pub. Safety Rep. on Assem. Bill No. 2015 (2001 – 2002 Reg. Sess.) June 11, 2002, p. F.)

<sup>15</sup> (Sen. Rules Com. Off. Of Sen. Floor Analyses, 3d reading analyses of Assem. Bill No 2015 (2001 – 2002 Reg. Sess.) as amended June 25, 2002, p. C.)

so, *and* happens to have access to a tool that may be used in the course of the burglary is not enough. The tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property...

(italics in original) (*Id.* at p. 404.) Significantly, the Court added:

We have no authority to add gloves and bags to the statute by judicial decree, which would expand potential criminal prosecution to possession of a broad range of generic objects, contrary to legislative intent.

(*Ibid.*; see also *Vasquez v. California*, *supra*, 45 Cal. 4<sup>th</sup> at p. 253.)

*H. W.'s Pliers did not Qualify as an "Other Instrument or Tool"*

The Third Appellate District's reliance upon the *Kelly* Court's interpretation of section 466 fails because the meaning of "other instrument or tool" - in light of the provision's disparate appellate construction - *is* inherently ambiguous. (see *Gordon*, *supra*, 90 Cal. App. 4<sup>th</sup> at pp. 1412 – 1413; *Diaz*, *supra*, 207 Cal. App. 4<sup>th</sup> at pp. 403 – 404 ["other instrument or tool" provision limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466"]; *Kelly*, *supra*, 154 Cal. App. 4<sup>th</sup> at pp. 967 – 968 ["other instrument or tool" includes tools "the evidence shows are possessed with the intent to be used for burglary."].) Accordingly, the Legislature's intent must be discerned from extrinsic sources.

Based upon the statute's legislative history, context and appellate court construction, it is logical to conclude section 466's "other instrument or tool" provision includes only items *similar* to the tools designed for breaking or entering specifically enumerated in the statute. (see *Gordon*, *supra*, 90 Cal. App. 4<sup>th</sup> at pp.

1412 – 1413; *Southard, supra*, 152 Cal. App. 4<sup>th</sup> at p. 1090; *Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at pp. 403 – 404.)

Notwithstanding its open-ended nature, the phrase “other instrument or tool” should not be construed as a catch-all provision, prohibiting the possession of any item which could conceivably be employed to effectuate a theft. Despite amending section 466 four times since 1984, the Legislature declined to expand the scope of the statute so broadly. Instead, it incrementally added specific tools to section 466 which were *similar* to the breaking or entering tools already identified in the statute.

H. W.’s pliers were not “similar” to the tools listed in section 466. There was no evidence H. W.’s pliers could be used for the purpose of “breaking, entering or otherwise gaining access” *into* a building, vehicle or other type of property. (*Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at p. 404; *Gordon., supra*, 90 Cal. App. 4<sup>th</sup> 1412 – 1413.) In fact, the record established pliers were “commonly” used to remove anti-theft security devices from items of clothing. (RT, pp. 32 – 33, 52.) The anti-theft device is not a “lock” to prevent a person from gaining access into property. Instead, the device is designed to discourage theft by irreparably damaging the merchandise with ink - if it is “released by force.” (RT, p. 43.) Accordingly, pursuant to the *ejusdem generis* canon of construction, H. W.’s pliers do not fall within the scope of section 466’s “other instrument or tool” provision. (*Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at p. 404; *Gordon., supra*, 90 Cal. App. 4<sup>th</sup> 1412 – 1413.)

Moreover, where a penal statute is susceptible of two or more interpretations, courts should generally construe the statute “as favorably to the defendant as its language and the circumstances of its application may reasonable permit.” (*People v. Overstreet* (1986) 42 Cal. 3d 891, 896 [“The defendant is entitled to every reasonable doubt as to the true interpretation of words or the construction of a statute.”]; *Bradwell v. Superior Court (People)* (2007) 156 Cal. App. 4th 265, 270.) Thus, the *Gordon/Diaz* construction of section 466, which limits its scope to items similar to the tools identified in the statute, should control.

If the Third Appellate District/*Kelly* construction of section 466 prevails, the statute’s language, specifically itemizing prohibited tools, would be rendered mere surplusage. (see *People v. Smith, supra*, 81 Cal. App. 4th at p. 641.) Indeed, there would be no need to list any of the various tools and instruments. Section 466 could simply be re-written to prohibit the possession of any tools or instruments “that the evidence shows are possessed with the intent to be used for burglary.” (*In re H. W., supra*, 2 Cal. App. 5<sup>th</sup> at p. 945.)

Under the the Third Appellate District/*Kelly* interpretation, section 466 would be expanded to include “common objects such as rocks or pieces of metal, to the list of burglary tools” so long as they could be used for a burglarious purpose. (Stats. 2002 Ch. 335 §1 (A.B. 2015); Sen. Rules Com. Off. Of Sen. Floor Analyses, 3d reading analyses of Assem. Bill No 2015 (2001 – 2002 Reg. Sess.) as amended June 25, 2002, p. C.) Such a result would be directly at odds with the Legislature’s stated intent. (*Ibid.*)

This Court should reject the Third Appellate District's expansive construction of "other instrument or tool" and limit the statute's scope to items *similar* to the "breaking or entering" tools already enumerated in section 466. Construed in this manner, H. W.'s pliers do not qualify as a burglary tool.

**B.**

**H. W. DID NOT POSSESS THE PLIERS WITH THE REQUISITE "FELONIOUS INTENT" OR "BURGLARIOUS PURPOSE"**

The Third Appellate District erroneously concluded H. W. possessed the pliers with the requisite "burglarious purpose" to support a true finding under section 466:

[H. W.] was found to be in possession of pliers. He concedes he possessed and used those pliers for the purpose of committing theft inside the store. He entered the store with the pliers in an otherwise empty backpack, and had no credit cards, money, or other means to pay for any merchandise. Once inside the store, he used the pliers to remove an antitheft device from the jeans, secreted the jeans in the backpack, and left the store without attempting to pay. That is, he 'procured [the pliers] with a design to use them for a burglarious purpose' [Citation] and did in fact use the pliers for the burglarious purpose of stealing the jeans. Thus...the pliers constituted an 'other instrument or tool' for purposes of section 466. There was, therefore, sufficient evidence to sustain the juvenile court's finding the minor possessed an 'instrument or tool with intent feloniously to break or enter' within the meaning of section 466.

*(In re H. W., supra, 2 Cal. App. 5<sup>th</sup> at p. 945.)*

The Court's error arose, in part, from the mistaken premise H. W. committed a "burglary" when he stole the jeans:

...under circumstances such as those here, it has long been held that a person who enters a store with the intent to commit theft or a felony can be convicted of burglary even though entry is during regular business hours

while the store is open to the general...a person need not use the tool or instrument he or she possesses to break into the building so long as he or she procured that tool or instrument intending to use it ‘for a burglarious purpose.’

*(Ibid.)*

It is undisputed H. W. used a pair of pliers to remove an anti-theft tag from a pair of jeans, valued at \$68.00, from a Sears department store, during normal store hours. (CT, p. 34; RT, pp. 27 – 33, 42.) He then attempted to take the jeans from the store without offering payment. *(Ibid.)* Given the current state of the law, H. W. committed an act of misdemeanor shoplifting – not felony burglary. (see §§ 459, 459.5, subd. (a)(b).) Accordingly, H. W. lacked the requisite “felonious intent” or “burglarious purpose” to sustain a true finding under section 466.

*Felonious Intent to Break or Enter*

To support a conviction under section 466, the defendant must possess a burglary tool with the intent “feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle...” (§ 466; *Southard, supra*, 152 Cal. App. 4<sup>th</sup> at p. 1084.)

In *Southard*, the defendant was apprehended after a high-speed chase arising from a traffic stop. (*Southard, supra*, 152 Cal. App. 4<sup>th</sup> at pp. 1083 – 1084.) A full inventory search of the defendant’s car revealed:

...a myriad of tools, including a steel pry bar, a crow bar, five pairs of pliers, a large pair of bolt cutters, a sledge hammer, an unspecified number of screwdrivers and hammers, and a tool box...three walkie-talkie radios, two black sweatshirts (including one with a hood), a strap-on head light, a flashlight, a ski mask, a pair of binoculars, a bundle of in excess of 100 keys, and an assortment of loose keys. At trial, [the arresting officer]

opined that the items were for possible use in a burglary. While acknowledging on cross-examination that the individual items also had legitimate purposes, [The arresting officer] explained on redirect that although none of the individual items was illegal to possess, the sum of items made them suspicious because, collectively, *the tools would be useful for breaking into a building.*

(emphasis added) (*Id.* at p. 1084.)

The Court of Appeal affirmed the defendant's conviction, noting there was sufficient evidence of the defendant's felonious intent to use the tools for a "burglarious purpose." (*Id.* at p. 1090.) The Court also found the defendant's flight from law enforcement, transportation of the suspect items in his vehicle and "request for the return of his 'burglary tools'" as further indicia of his felonious intent. (*Id.* at pp. 1090 – 1092; see also *Kelly, supra*, 154 Cal. App. 4<sup>th</sup> at p. 968 [Court found defendant's apprehension in close proximity to the crime scene, evasive action upon seeing police, possession of an unrelated woman's driver's license and resemblance to the description of the person seen breaking into the victim's van, "adequate" evidence "taken as a whole" to establish the "requisite felonious intent."])

#### *Shoplifting – Section 459.5*

On November 4, 2014 - five months prior to the juvenile wardship petition in this case - the voters enacted Proposition 47 - which went into effect the next day. (*People v. Rivera* (2015) 233 Cal. App. 4<sup>th</sup> 1085, 1089; *People v. Martin* (2016) 6 Cal. App. 5<sup>th</sup> 666, 672 [review filed (Jan. 12, 2017)].) The Act reclassified certain theft-and drug-related crimes from felonies to misdemeanors unless they

were committed by ineligible defendants. (*People v. Rivera, supra*, 233 Cal. App. 4<sup>th</sup> at p. 1091; *People v. Martin, supra*, 6 Cal. App. 5<sup>th</sup> at p. 672.)

Among its reclassifying provisions, Proposition 47 added a new crime: “shoplifting.” (§ 459.5). Shoplifting is a misdemeanor offense “that punishes conduct that previously would have qualified as a burglary.” (*People v. Martin, supra*, 6 Cal. App. 5<sup>th</sup> at p. 672.) Section 459.5, subdivision (a) defines “shoplifting” and provides:

(a) Notwithstanding Section 459<sup>16</sup>, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950). Any other entry into a commercial establishment with intent to commit larceny is burglary...

(§ 459.5, subd. (a).) Moreover, under section 459.5, subdivision (b):

(b) *Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting.* No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

(emphasis added) (§ 459.5, subd. (b).) Therefore:

...in the typical case, if the conduct leading to a defendant’s burglary conviction would qualify as ‘shoplifting’ under Proposition 47, he or she would have been charged with a misdemeanor had section 459.5 been in

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<sup>16</sup> Section 459 defines burglary and provides, in pertinent part: “Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel...floating home ...railroad car, locked or sealed cargo container...any house car...inhabited camper...vehicle as defined by the Vehicle Code, when the doors are locked, aircraft...or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.... (§ 459.)

place at the time, instead of being charged with burglary. Indeed, one guilty of shoplifting could not have been charged with burglary at all.

(*People v Martin, supra*, 6 Cal. App. 5<sup>th</sup> at p. 673.)

*H. W. Lacked the Requisite Felonious Intent to Violate Section 466*

There was no evidence H. W.'s pliers could be used to break, enter or otherwise gain access into Sears. (see *Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at p. 404.) Instead, the testimony of Nealy and Jackson established the pliers were “commonly” used to remove anti-theft tags. (RT, pp. 32- 33, 52.) Thus, the pliers were designed to effectuate larceny – not burglary.

Unlike the defendants in *Kelly* and *Southard*, H. W. did not carry any other tools or devices which could be used, in conjunction with the pliers, to commit a burglary. (*Southard, supra*, 152 Cal. App. 4<sup>th</sup> at pp. 1084, 1090 [myriad tools identified in section 466]; *Kelly, supra*, 154 cal. App. 4<sup>th</sup> at p. 964, 968 [slingshot, box cutters and flashlight].) The possibility pliers – like the box cutter in *Kelly* or the latex gloves in *Diaz* – could be used to facilitate a theft does not elevate them to the status of a burglary tool, within the meaning of section 466. (§ 466; *Diaz, supra*, 207 Cal. App. 4<sup>th</sup> at p. 404.)

Furthermore, unlike *Southard* and *Kelly*, there was no related evidence, based upon H. W.'s conduct or statements, to support an inference H. W. possessed the pliers with a “burglarious purpose.” (*People v. Southard, supra*, 152 Cal. App. 4<sup>th</sup> at pp. 1082 – 1084, 1088; *People v. Kelly, supra*, 154 cal. App. 4<sup>th</sup> at p. 968.)

Most importantly, unlike *Gordon* and *Kelly*, there was no evidence linking H. W. to an actual or attempted burglary. (*People v. Gordon, supra*, 90 Cal. App. 4<sup>th</sup> at p. 1411; *People v. Kelly, supra*, 154 Cal. App. 4<sup>th</sup> at p. 963.) Instead, H. W.’s conduct fell squarely with the parameters of misdemeanor shoplifting – as defined by section 459.5, subdivision (a).

H. W. entered the Sears store on October 13, 2014, with the intent to commit larceny. (CT, p. 34; RT, pp. 27 – 33, 42.) He used pliers to effectuate a petty theft. (CT, p. 34; RT, pp. 27 – 33, 42.) Accordingly, his actions can only be classified as “shoplifting.” (§ 459.5, subd. (b); *People v. Martin, supra*, 6 Cal. App. 5<sup>th</sup> at pp. 673, 679.)

H. W.’s conduct occurred 23 days before the Legislature enacted section 459.5. However, a defendant generally is entitled to benefit from the enactment of amendatory statutes while his case is on appeal. (*People v. Vieira* (2005) 35 Cal. 4<sup>th</sup> 264, 305 – 306.) In fact, where the amendatory statute mitigates punishment and there is no saving clause, the amendment will operate retroactively so the lighter punishment will be imposed. (*In re Estrada* (1965) 63 Cal. 2d 740, 748.)

The key to retroactivity is the date of final judgment:

‘If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then...it, and not the old statute in effect when the prohibited act was committed, applies.’

(*Id.* at p. 744; *In re Pedro T.* (1994) 8 Cal. 4<sup>th</sup> 1041, 1045 - 1046 [for the purpose of determining retroactive application of an amendment to a criminal statute - a

judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed].)

Section 459.5 was enacted more than five months prior to the April 14, 2015, wardship petition and two years before this Court granted review. (CT, pp. 32 – 37.) The statute precisely defines H. W.’s conduct as misdemeanor shoplifting. (§ 459.5, subd. (a).) Indeed, section 459.5 explicitly precluded a burglary charge. (§ 459.5, subd. (b); *People v. Martin, supra*, 6 Cal. App. 5<sup>th</sup> at p. 673.) Thus, H. W. could not have acted with either a “felonious intent” or a “burglarious purpose.” He should benefit from “lessened punishment” resulting from the enactment of section 459.5. (*People v. Vieira, supra*, 35 Cal. 4<sup>th</sup> at pp. 305 – 306; *In re Estrada, supra*, 63 Cal. 2<sup>d</sup> at p. 748.)

H. W. was a shoplifter – not a burglar. He did not possess the pliers with either a “felonious intent” or “burglarious purpose.” (*Southard, supra*, 152 Cal. App. 4<sup>th</sup> at pp. 1082 – 1084, 1088; *Kelly, supra*, 154 Cal. App. 4<sup>th</sup> at p. 968.) Accordingly, H. W. lacked the requisite intent to sustain a true finding under section 466.

## CONCLUSION

H. W.'s pliers were not a burglary tool within the meaning of section 466. Accordingly, the Third Appellate District erred when it affirmed the juvenile court's order sustaining Count II of the April 14, 2015, juvenile wardship petition.

WHEREFORE, H. W. respectfully requests this Court reverse the Third Appellate District's published decision affirming the juvenile court's order sustaining Count II of the April 14, 2015, juvenile wardship petition.

Dated: February 1, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert McLaughlin", is written over a horizontal line.

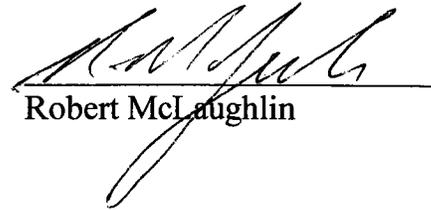
Robert McLaughlin, Esq.  
Attorney for Appellant

## WORD COUNT CERTIFICATION

I, Robert McLaughlin, certify that, based on the word count of the computer program used to prepare this document, there are 9,437 words in Appellant's Opening Brief on the Merits in the case *In re H. W.*, case number S237415, excluding the tables.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at East Longmeadow, Massachusetts.

Dated: February 1, 2017



Robert McLaughlin

**DECLARATION OF SERVICE**

I, the undersigned say: I am over 18 years of age, employed in the County of Orange, California, and am not a party to the subject cause. My business address is 31441 Santa Margarita Parkway, Suite A-135, Rancho Santa Margarita, California 92688. I served Appellant's Opening Brief on the Merits, of which a true and correct copy is affixed, by placing a copy thereof in a separate envelope for the addressee named hereafter by regular U. S. mail addressed and mailed as follows:

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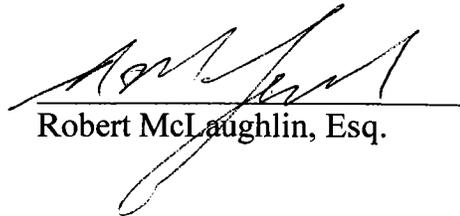
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The envelope was then sealed and, with the postage thereon fully prepaid, deposited in the United States mail by me at East Longmeadow, Massachusetts, on February 2, 2017

I additionally declare that I electronically served a copy of this document with the Third Appellate District on February 2, 2017, before 5:00 p.m. PST via True Filing, in compliance with the court's Terms of Use, as shown on its website.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed by me on February 2, 2017, at East Longmeadow, Massachusetts.



Robert McLaughlin, Esq.