IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re H. W. a Person Coming Under the Juvenile Court Law THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs and Respondents v. H. W. Defendant and Appellant	SUPREME COURT CASE NO: S237415 SUPREME COURT FILED DEC 28 2018 Jorge Navarrete Clerk Deputy

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

APPELLANT'S SUPPLEMENTAL BRIEF

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By Appointment of the Supreme Court of the State of California
Under the Central California Appellate Program Independent Case System

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APPELLANT'S SUPPLEMENTAL BRIEF

Appellant, H. W., ("hereafter "Hadrian") submits his supplemental brief, pursuant to California Rules of Court, rule 8.520(d)(1), addressing "new authorities...that were not available in time to be included" in appellant's opening and reply briefs. Hadrian specifically addresses the persuasive impact the First Appellate District's December 7, 2017, opinion in *People v. Shaw* (2017) 18 Cal. App. 5th 87[1] (*Shaw*) has upon the issues in this appeal.

[1] Pursuant to California Rules of Court, rule 8.1115, subdivision (e): "Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of

On March 14, 2018, this Court in California Supreme Court case number S246465, granted review and deferred further action in *People v. Shaw, supra,* "pending consideration and disposition of a related issue in *In re H. W.* S237415", pursuant to California Rules of Court, rule 8.512, subdivision (d)(2), or "pending further order of the court."[2]

The Shaw Decision

In *Shaw, supra,* the Court of Appeal held a defendant's "foil-lined bag", used to "shoplift several pairs of jeans from a department store", was not an "instrument or tool", within the meaning of Penal Code section 466. (*Shaw, supra,* 18 Cal. App. 5th at p. 88.)

An asset protection detective at a Macy's department store in San Francisco saw the defendant grab "a stack of jeans from the sales counter" and place them in a bag. (*Id.* at p. 89.) The defendant walked "quickly" toward an exit. (*Ibid.*) The detective pursued and stopped the defendant "as soon as he left the building." (*Ibid.*) The detective recovered an H&M bag from the defendant which contained "11 pairs of True Religion jeans." (*Ibid.*) Significantly, within the H & M bag, the

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review and any subsequent action by the Supreme Court." (Cal. Rules of Court, rule 8.1115(e)(1).)

[2]California Rules of Court, rule 8.1105(e)(1)(B) provides: "Grant of review by the Supreme Court of a decision by the Court of Appeal does not affect the appellate court's certification of the opinion for full or partial publication under rule 8.1105(b) or rule 8.1110, but any such Court of Appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted." (Cal. Rules of Court, rule 8.1105(e)(1)(B).)

detective found "a secondary bag" lined with foil. (*Ibid.*) The detective testified the secondary bag was a:

> 'booster bag...used by professionals [to] try to evade the security device at the customer exit/entrance doors' by preventing sensors on the merchandise from setting off an alarm.

(*Ibid.*)

The defendant was subsequently charged with one felony count of second-degree commercial burglary, a felony count of grand theft of personal property, and a misdemeanor count of possession of burglary tools, pursuant to Penal Code section 466. (*Ibid.*) The defendant was subsequently convicted on all charges. (*Ibid.*)

On appeal, the defendant argued there was insufficient evidence to support his conviction under Penal Code section 466 because the statute only "'covers tools or instruments that can be used in the very process of breaking and entering.'" (*Id.* at p. 90.) Division One of the First Appellate District agreed and held "the foil-lined bag falls outside of the definition of burglary tools under section 466." (*Ibid.*)

The Court noted the defendant's foil lined bag was not an enumerated tool within the text of Penal Code section 466. (*Ibid.*) Accordingly, the Court questioned "whether such a bag can be considered to be an 'other instrument or tool [that is possessed] with intent feloniously to break or enter into [property].'" (*Ibid.*)

The *Shaw* Court analyzed the decisions in *People v. Gordon* (2001) 90 Cal. App. 4th 1409 (*Gordon*), *People v. Kelly* (2007) 154 Cal. App. 4th 961 (*Kelly*), *People v. Diaz* (2012) 207 Cal. App. 4th 396 (*Diaz*), and *In re H. W.* (2016) 2 Cal. App. 5th 937 (*H. W.*) and noted the split of authority with respect to the construction of the phrase "other instrument or tool" in Penal Code section 466. (*Id.* at pp. 89 – 92) The Court rejected *Kelly* and *H. W.*'s expansive construction and limited the statute's scope:

> *...an 'instrument or tool' under [Penal Code] section 466 is an item intended for use 'to break into or gain access to property,' not just intended for 'use during the course of a burglary.'* [Citation] Our conclusion is based not only on *Diaz*'s application of the principle of ejusdem generis and analysis of [Penal Code] section 466's legislative history, with which we concur, but also on two additional factors: the statutory language's focus on the element of entry, and the absurd expansion of the statute's scope that would result from interpreting burglary tools to include any item used to facilitate crimes committed once a defendant is inside property.

(emphasis added) (*Id.* at pp. 92 – 93.)

The Court determined the "focus" of the statute's language concerned gaining "access to property" and found it "at odds" with an expansive definition of burglar's tools:

> [Penal Code] section 466 criminalizes possessing instruments or tools 'with intent feloniously to break or enter into' property. Had the Legislature intended to criminalize the possession of any instrument or tool that could be used to commit any portion of a burglary, it could have simply referred to the required intent as the 'intent to commit burglary' instead of phrasing it to emphasize the element of entry. Moreover, as [*In re H. W., supra*] observed (albeit in making a different point), breaking is no longer a required element of burglary under section 459 [Citation] but section 466 still refers to an intent to break or enter, not just enter. *In our view, the statutory language's focus on gaining access to property is at odds with the*

> *view that the statutory definition includes any instrument or tool that is intended for use to commit crimes after access has been obtained.*

(emphasis added) (*Id.* at p. 93.)

Furthermore, the *Shaw* Court recognized the *Kelly/H. W.* construction of Penal Code section 466 would lead to "absurd" or "unreasonable" applications:

> Second, under California law burglary is an entry with the intent to commit *any* felony, not just theft-related offenses. A burglary is complete 'upon entry with the requisite intent to commit a felony or a theft..., regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed.' [Citation] Thus, the only element common to all burglaries is entry. Under [*People v. Kelly, supra*] and [*In re H. W., supra*]'s interpretation of section 466, burglary tools include any item that a defendant intends to use to commit any felony inside the entered property...*Limiting the definition of burglary tools to items that are intended to gain access to property avoids such unreasonable applications.*

(emphasis added) (*Id.* at p. 93.)

The Court ultimately reversed the defendant's conviction:

> ...an item does not qualify as a burglary tool under [Penal Code section 466] unless it is intended to gain access into property. As there is no evidence that Shaw used or intended to use the foil-lined bag to gain entry to Macy's, his conviction under [Penal Code] section 466 must be reversed.

(*Id.* at p. 94.)

Persuasive Application of Shaw to this Case

The application of the *Shaw* Court's reasoning to this case is clear. Like Shaw's "booster bag", there was no evidence Hadrian's pliers could be used for the purpose of "breaking, entering or otherwise gaining access" *into* a building, vehicle or other type of property. (*Shaw, supra,* 18 Cal. App. 5th at pp. 92 – 93; *Diaz, supra,* 207 Cal. App. 4th at p. 404; *Gordon., supra,* 90 Cal. App. 4th 1412 –

1413.) Instead, the record established Hadrian's pliers were "commonly" used to remove anti-theft security devices from items of clothing. (RT, pp. 32 – 33, 52.) In other words, the pliers - like Shaw's bag - were designed to facilitate a theft *after* he entered the store. (*Shaw, supra,* 18 Cal. App. 5th at p. 89.) Consistent with the statute's "focus on the element of entry", Hadrian's pliers cannot be considered an "instrument or tool" within the meaning of Penal Code section 466. (*Id.* at p. 93.)

Moreover, extending the reach of Penal Code section 466 to include a tool designed to remove a security device from an article of clothing - after the defendant entered a store - would lead to "absurd" or "unreasonable" applications. (*Id.* at p. 93.) If the Third Appellate District's interpretation of Penal Code section 466 is affirmed, the statute would criminalize the possession of any "item used to facilitate crimes committed once a defendant is inside the property" (i.e. an assailant's "piece of rope" or an arsonist's "book of matches"). (*Ibid.*) As the *Shaw* Court observed: "limiting the definition of burglary tools to items that are intended to gain access to property avoids such unreasonable applications." (*Ibid.*)

Penal Code section 466 prohibits the possession of specific tools or instruments designed to "break into or gain access to property" (*Id.* at pp. 92 – 93.) Hadrian's pliers were not designed and could not reasonably be employed for such a purpose. In accord with the *Shaw* Court's persuasive reasoning, the Third Appellate District's construction of Penal Code section 466 in this case is inconsistent with the statute's "focus" and should be reversed. (*Ibid.*)

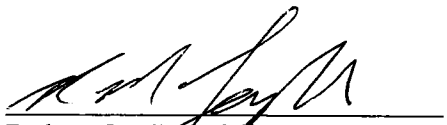
CONCLUSION

Hadrian'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, Hadrian 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: December 27, 2018

Respectfully submitted,



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 1,567 words in Appellant's Supplemental Brief 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 Northampton, Massachusetts.

Dated: December 27, 2018

Robert McLaughlin

Case Name: In re H. W. No: S237415

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 Supplemental Brief 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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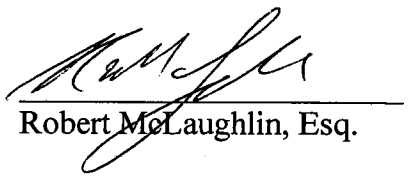
(continued on next page)

The envelope was then sealed and, with the postage thereon fully prepaid, deposited in the United States mail by me at Northampton, Massachusetts, on December 27, 2018.

I additionally declare that I electronically served a copy of this document with the Third Appellate District on December 27, 2018, before 5:00 p.m. PST via True Filing, in compliance with the Court's Terms of Use, as shown on its website.

I further declare that I electronically submitted a copy of this document with the California Supreme Court on December 27, 2018, before 5:00 p.m. PST via True Filing, in compliance with this 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 December 27, 2018, at Northampton, Massachusetts.



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