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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. _____
	)	
v.	)	2d Crim. Z123456
	)	
JOHN SMITH,	)	Los Angeles County
	)	Sup.Ct.No. X123456
Defendant and Appellant.	)	
_____	)	

**PETITION FOR REVIEW**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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THE PEOPLE OF THE STATE OF CALIFORNIA, )  
 ) No. \_\_\_\_\_  
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 ) No. Z123456  
 Plaintiff and Respondent, )  
 ) Los Angeles County  
 ) Sup.Ct.No. X123456  
 v. )  
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 JOHN SMITH, )  
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 Defendant and Appellant. )  

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**PETITION FOR REVIEW**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Pursuant to rule 8.500 (a)(1) of the California Rules of Court, petitioner, John Smith, respectfully requests this Court review the unpublished decision of the Court of Appeal, Second Appellate District, Division Six, which affirmed his conviction. A copy of the Court of Appeal's opinion, filed January 20, 2004, along with the modification of the opinion accompanying the denial of the Petition for Rehearing filed on February 19, 2004, are attached as Exhibit A.

Review is sought pursuant to California Rules of Court rule 8.500 (b)(1), to settle an important question of law and provide uniformity of decision.

## **QUESTION PRESENTED FOR REVIEW**

1. Did former Penal Code section 466 encompass only objects designed to pick locks as held by the court in *People v. Winchell* (1967) 248 Cal.App.2d 580 and *People v. Gordon* (2001) 90 Cal.App.4th 1409?

## **NECESSITY FOR REVIEW**

The Court of Appeal in this case construed former Penal Code section 466 to include the possession of “any” tool, thus departing from the holdings of two other appellate decisions and creating a split in authority on the question of the scope of former section 466. This Court should grant review to provide uniformity of decision in the lower courts (Cal. Rule of Court, 8.500 (b)(1).)

## **STATEMENTS OF CASE AND FACTS**

For purposes of the instant petition only, petitioner adopts the facts as presented by the Court of Appeal in its opinion.

## **ARGUMENT**

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT  
A FINDING THAT PETITIONER VIOLATED FORMER  
PENAL CODE SECTION 466 BECAUSE THAT SECTION  
ENCOMPASSES ONLY OBJECTS DESIGNED TO PICK  
LOCKS

Petitioner argued that there was insufficient evidence to support the conviction for possession of a burglar tool under former Penal Code section 466 because the porcelain chip possessed here did not fall within the ambit of that section. In rejecting this argument, the Court of Appeal stated that the statute “prohibits the possession of any

‘other instrument or tool’ with a criminal intent....” (Slip Opn. p. 5 as modified on February 19, 2004.) The Court of Appeal then concluded, without citation to authority, that the statute “encompasses objects as simple as a hammer or as sophisticated as a porcelain chip to break into buildings and cars.” (Slip Opn. pp. 5-6.)

This statement, however, is contrary to long-established case law. Over 30 years ago, in *People v. Winchell* (1967) 248 Cal.App.2d 580, the court held that to fall within the ambit of former Penal Code section 466 the other instruments or tools must be similar to those listed in the statute, and other items which may be commonly used in burglaries do not qualify. (*Id.*, at 586.) Thus, in *Winchell*, the court concluded that the weapon used in that case did not qualify under the statute. Like the weapon in *Winchell*, the porcelain chip here was not similar to the lock-breaking devices listed.

In the 30 years following the decision in *Winchell*, the Legislature twice amended former Penal Code section 466<sup>1</sup> without changing the language interpreted by *Winchell* or in any way indicating any disagreement with the *Winchell* interpretation. “When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts’

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<sup>1</sup>In 2002, the Legislature amended Penal Code section 466 to include porcelain spark plug chips or pieces. Although this will obviate this question in cases arising after 2002, this Court should address the issue here to clarify the law in cases falling under the old statute and to vindicate petitioner’s due process rights.

construction of that statute. (See, e.g., *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353; [citations].)” (*People v. Bouzas* (1991) 53 Cal.3d 467, 475.)

Moreover, in reaching its decision, the court expressly declined to follow *People v. Gordon* (2001) 90 Cal.App.4th 1409. (Slip Opn. p. 6.) In *Gordon*, the court held specifically that a piece of porcelain from a spark plug did not fall within the meaning of the statute. (*Id.*, at 1412-1413.)

The Court of Appeal’s decision here, thus, creates a split in the rulings of the lower courts by breaking with the *Winchell* and *Gordon* decisions. Therefore, this Court should grant review to resolve the conflict and rule, consistent with the holdings of *Winchell* and *Gordon* and the apparent intent of the Legislature, that former Penal Code section 466 does not encompass any object used to commit a theft, but only items like those listed in the statute which are designed to break locks. Then, because the record does not contain sufficient evidence to show that the item possessed by petitioner fell within the ambit of the statute, the finding that petitioner violated former Penal Code section 466 must be reversed. (*People v. Johnson* (1980) 26 Cal.3d 557, 577-578; *Jackson v. Virginia* (1979) 443 U.S. 358.)

**CONCLUSION**

For the foregoing reasons, petitioner urges this Court to review his case. Then because petitioner's federal due process rights were violated by the finding of guilt based upon insufficient evidence, this Court must reverse the finding that petitioner violated former Penal Code section 466.

Dated: \_\_\_\_\_

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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SUZAN HIER

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WORD COUNT CERTIFICATION

*People v. John Smith*

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 964 words.

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Attorneys for Appellant

EXHIBIT A