S194928

In the Supreme Court of the State of California

CHRISTOPHER MAGNESS, **Petitioner,** **v.** **THE SUPERIOR COURT OF SACRAMENTO COUNTY,** **Respondent;** **THE PEOPLE OF THE STATE OF CALIFORNIA,** **Real Party in Interest.**	Case No.

Third Appellate District, Case No. C066601
Sacramento County Superior Court, Case No. 10F04832
The Honorable Ernest W. Sawtelle, Judge

PETITION FOR REVIEW

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

Real party in interest respectfully petitions for review of the opinion by the California Court of Appeal, Third Appellate District. The decision, Exhibit A, was filed on June 10, 2011, and is reported at 196 Cal.App.4th 630. The petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

ISSUE PRESENTED

Does a person who uses a remote control to open a garage door "enter" the home for purposes of the crime of burglary under California law?

STATEMENT OF THE CASE

Petitioner broke into the victim's car, which was parked in the victim's driveway, and removed the remote control for the garage door. The victim heard his garage door open, which prompted him to go to the garage, where he saw petitioner standing near the end of the driveway. On or about July 27, 2010, a complaint was filed in the Sacramento County Superior Court charging petitioner in count 1 with attempted first degree burglary of a residence (Pen. Code, §§ 459, 460, subd. (a), 664) and in count 2 with second degree burglary of a vehicle (Pen. Code, §§ 459, 460, subd. (b)). The complaint alleged that petitioner had suffered one prior "strike" conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). (See Pet.'s Exh. 1[1] at p. 4.) A preliminary hearing was held on August 31, 2010. (Pet.'s Exh. 1.) At the conclusion of the hearing, the district attorney requested that the court hold petitioner to answer on count 1 to the charge of completed, rather than

[1] Citations to "Pet.'s Exh. 1" are to Exhibit 1 in support of the petition for writ of prohibition; citations to "Pet.'s Exh. 2" are to Exhibit 2 in support of the petition; and so forth.

attempted, first degree burglary (Pen. Code, §§ 459, 460, subd. (a)). (Pet.'s Exh. 1 at p. 15.) The court granted the district attorney's request and held petitioner to answer on count 1 to the charge of first degree burglary and on count 2 to the charge of second degree burglary. (Pet.'s Exh. 1 at pp. 33-35.)

Immediately after ordering petitioner held to answer, the court granted the district attorney's motion to amend the complaint to strike "the 664 and the two places where it says 'attempted[]'" in count 1. (Pet.'s Exh. 1 at p. 35.) The court then deemed the complaint to be an information. (Pet.'s Exh. 1 at p. 35.)

On or about October 19, 2010, petitioner filed a motion pursuant to Penal Code section 995 to reduce count 1 to attempted first degree burglary. (Pet.'s Exh. 3.) On or about October 27, 2010, the district attorney filed written opposition to the motion. (Pet.'s Exh. 4.) On or about October 29, 2010, the court denied the motion. (Pet.'s Exhs. 5 & 6.)

On November 15, 2010, petitioner filed a petition for writ of prohibition in the Court of Appeal, Third Appellate District, challenging the superior court's denial of his motion pursuant to Penal Code section 995. On November 19, 2010, the Court of Appeal directed petitioner to file supplemental briefing addressing the question of whether the Court of Appeal's opinion in *People v. Calderon* 158 Cal.App.4th 137 (*Calderon*) was correctly decided. The Court further directed real party in interest to file a preliminary opposition to the petition and specified that the preliminary opposition should address the contentions raised in the petition as well as the question of whether the Court of Appeal's opinion in *Calderon*, *supra*, 158 Cal.App.4th 137 was correctly decided. On November 22, 2010, petitioner filed his supplemental briefing. On November 30, 2010, real party in interest filed preliminary opposition to the petition. On December 3, 2010, the Court of Appeal issued an alternative writ of mandate directing respondent, the Sacramento County Superior Court, to grant the relief requested in the

petition or to show cause in writing why it had not done so and why the relief requested by petitioner should not be granted. Upon ordering issuance of the alternative writ, the Court of Appeal ordered real party in interest to file a written return to the alternative writ. Real party in interest did so. Oral argument occurred on May 23, 2011.

On June 10, 2011, in a published opinion, the majority of a three justice panel of the Third District Court of Appeal issued a peremptory writ of prohibition restraining the respondent superior court from further proceedings against petitioner on the crime of first degree burglary, finding that the door of a building, by itself, cannot be deemed an instrument that "enters" the building for purposes of the crime of burglary. The majority held that if, in opening a closed door, the would-be intruder inserts any part of his body into the building, that is sufficient to constitute an "ent[ry]" for purposes of the crime of burglary. But if only the door itself goes inside the building, then there has been no entry and thus no burglary. In reaching its conclusion, the majority disagreed with *Calderon*, *supra*, 158 Cal.App.4th 137, which had reached the opposite conclusion, thus creating a split among the appellate districts. (Exh. A, maj. Opn. of Robie, J., at pp. 4-17.) The concurring justice agreed with the majority opinion but added that the use of electromagnetic waves to gain entry to a building is markedly different from the types of physical entry traditionally covered by the burglary statute.[2] (Exh. A, con. Opn. of Blease, J., at pp. 1-2.) The dissenting justice disagreed

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[2] The concurring justice conceded that, in the case at bar, "the electromagnetic wave caused the garage door to open." (Exh. A, con. opn. of Blease, J., at p. 1.) But the concurring justice deemed this case "a bridge too far" because "[t]he use of electromagnetic waves to gain entry to a building is, by analogy, 'markedly different from the types of [physical] entry traditionally covered by the burglary statute . . . .' (*People v. Davis* (1998) 18 Cal.4th 712, 719.)" (*Ibid.*)

with the majority's conclusion and believed that *Calderon* was correctly decided. (Exh. A., dis. Opn. of Duarte, J., at pp. 1-6.)

REASONS FOR REVIEW

I. WHETHER THE DOOR OF A BUILDING ITSELF CAN BE DEEMED AN INSTRUMENT THAT "ENTERS" THE BUILDING FOR PURPOSES OF THE CRIME OF BURGLARY IS AN IMPORTANT QUESTION ON WHICH THERE IS A SPLIT OF AUTHORITY

As noted *ante*, the majority in the case at bench held that, if in opening a closed door, only the door itself goes inside the building, then there has been no entry and thus no burglary. (Exh. A, maj. opn. of Robie, J., at p. 17.) In so doing, the majority disagreed with "any suggestion in *Calderon* that the door of a building, by itself, can be deemed an instrument that 'enters' the building for purposes of the crime of burglary . . . ." (*Ibid.*)

This Court should address this important legal question presented in order to resolve a significant split of authority and to determine whether *Calderon* correctly states the law. (Cal. Rules of Court, rule 8.500(b)(1).) It should ultimately hold that the door of a building can be deemed an instrument that "enters" the building for purposes of the crime of burglary.

One commits burglary when he enters any "house, . . . or other building . . . with intent to commit grand or petit larceny or any felony . . . ." (Pen. Code, § 459.) At issue in the present case is whether a person who uses a remote control to open a garage door "enters" the home for purposes of the crime of burglary.

By way of background, in *Calderon*, *supra*, 158 Cal.App.4th 137, Division 2 of the Fourth District Court of Appeal addressed the issue of whether the door of a residence itself can be deemed an instrument that "enters" the residence for purposes of the crime of burglary. Calderon and two accomplices went to the victim's house in the early morning hours to collect a disputed debt. The victim awoke to the sound of someone moving

the handle of his front door. When he looked out his front window, he saw Calderon and two other men. One of the men pulled out a knife. The victim told the men to leave because he was going to call the police. At that point, the man who was holding the knife kicked in the front door. At issue was whether kicking in the door of a home can be sufficient entry to constitute burglary. Division 2 of the Fourth District Court of Appeal held that kicking in the door of a home is a sufficient entry to constitute burglary. The lynchpin of the Court's reasoning was the fact that "kicking in a door to a home invades the possessory interests in that home! Admittedly, the door is doing what a door is supposed to do, but it is doing so under the control of an invader, not the householder." (*Calderon*, *supra*, 158 Cal.App.4th 137 at p. 145.)

In discussing this specific issue, the justice who authored the majority opinion in the present case reasoned:

> Because the opening of a closed door was, at common law, relevant only to the element of "breaking" and *not* to the element of "ent[ry]," and because the California Legislature never required a "breaking" for the crime of burglary, we believe it would be anomalous to conclude that the opening of a closed door could, without more, satisfy the "ent[ry]" element of the crime. In essence, in determining that an entry with felonious intent -- however achieved -- constitutes the crime of burglary, the Legislature determined that it does not matter whether the perpetrator opens a closed door before entering or enters through an already open door. Under these circumstances, it would be contrary to the legislative intent to conclude that one who merely opens a closed door -- without otherwise intruding into the building -- has "enter[ed]" the building for purposes of the crime of burglary.
>
> While this means we disagree with any suggestion in *Calderon* that the door of a building, by itself, can be deemed an instrument that "enters" the building for purposes of the crime of burglary, we do not disagree with the result in *Calderon*, as it appears to us it would have been physically impossible for the defendant's accomplice to have kicked in the victim's door

> without a portion of his body crossing the threshold. It remains true under California law that if, in opening a closed door, the would-be intruder inserts any part of his body into the building, that is sufficient to constitute an "ent[ry]" for purposes of the crime of burglary. But only if the door itself goes inside the building -- as was the case here -- then there has been no entry and thus no burglary.

(Exh. A, maj. opn. of Robie, J., at pp. 16-17.)

The dissent strongly, and correctly, disagreed with the majority's conclusion, pointing out:

> *Calderon,* discussed at length by the majority, presented a situation similar to this case. The majority agrees with the *result* in *Calderon*, as it observes that kicking in a door without a portion of the kicking foot crossing the threshold is a physical impossibility. Assuming this observation is factually correct, what if the breach of the door were to be caused by the shockwave from a concussion grenade, for example, rather than a foot? *The exact same result is achieved*--the door is blasted inward--yet the first scenario is a burglary and the second merely an attempt?
>
> The end result of the majority's opinion in this case is to condition determination of the *fact* of entry on the *identity* of the invading entity, rather than on an analysis of the invasion itself. Under the majority's holding, if the invading entity be part of the house, even a part normally constituting a boundary, it cannot "enter" and thereby effectuate a burglary, even if it breaks the plane, invades the airspace, is under the direct control of the perpetrator, completely exposes the previously protected contents of the residence, and threatens both the possessory and personal safety interests of the victim. In my opinion, this reasoning leads to a distinction without a difference. It does not create a workable, *logical* rule.

(Exh. A, dis. opn. of Duarte, J., at pp. 5-6, footnote omitted.) Real party in interest believes the dissent and *Calderon* both correctly decided this issue. The majority's opinion relies on an overly restrictive interpretation of what constitutes an entry for the purposes of the burglary statute.

In this case, the decision below will have wide-ranging consequences if left unreviewed. Given the split among districts of the Court of Appeal, one who uses a remote control to open a garage door risks being convicted of violating section 459 in those counties falling under the jurisdiction of the Fourth Appellate District. However, one who commits the same act would not be subject to prosecution for a violation of section 459 in those counties falling under the jurisdiction of the Third Appellate District. Further, given the split in authority, some trial courts in the First, Second, Fifth and Sixth Appellate Districts may follow the Third District Court of Appeal while others may follow the Fourth and Fifth Appellate Districts, thus creating the potential for a lack of uniformity from county to county and, potentially, trial court to trial court.

Review is required to resolve the conflict in decisions among districts of the Court of Appeal, and to settle this important question of law.

Dated: July 18, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 2,146 words.

Dated: July 18, 2011

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EXHIBIT A

Filed 6/10/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CHRISTOPHER MAGNESS, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C066601 (Super. Ct. No. 10F04832)

ORIGINAL PROCEEDINGS in mandate. Allen H. Sumner and Ernest W. Sawtelle, Judges. Peremptory writ issued.

Paulino G. Duran, Public Defender, Arthur L. Bowie, Supervising Assistant Public Defender, Alicia Hartley, Assistant Public Defender for Petitioner.

No appearance for Respondent.

Edmund G. Brown, Jr., and Kamala Harris, Attorneys General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Maggy Krell, and Sally Espinoza, Deputies Attorney General, for Real Party in Interest.

Standing in the driveway of a home, with the intent to commit larceny inside, a person uses a remote control to open a garage door, but then flees before going inside the garage when the homeowner responds to the opening door. Has the person committed first degree burglary or just attempted to do so? Our answer is that under Penal Code[1] section 459, there was no burglary, only an attempted burglary. Because that conclusion means, in this case, that petitioner Christopher Magness was held to answer for first degree burglary without probable cause, we will order that a writ of prohibition issue barring further prosecution of him for that crime.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, Magness was charged by complaint with the attempted first degree burglary of a house and the completed second degree burglary of an automobile. At a preliminary hearing in August 2010, the People presented evidence that on July 24, Timothy Loop was surprised to hear the garage door of his house opening. Loop ran from the house into the garage and saw a man (later identified as Magness) standing near the end of the driveway. Magness fled when Loop tried to confront him, but was later apprehended.

Where Loop had seen Magness standing in the driveway, Loop discovered the remote control for his garage door opener. The remote control had previously been inside Loop's locked car,

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1 All further section references are to the Penal Code.

which was parked in the driveway. The window seal on the car had been peeled back, and the window was down a couple of inches.

Based on this evidence, the People sought to have the court hold Magness to answer for a completed, rather than an attempted, burglary of the residence.[2] The prosecutor argued that "although [Magness] physically did not make entry" into the garage, using "the [remote control] to open the garage door is using an instrument to make entry." In response, Magness argued there was "no physical entry" into the garage.

The court (Judge Allen H. Sumner) concluded the evidence was sufficient to hold defendant to answer for a completed burglary because "the garage door was penetrated by use of the [remote control]."

In October 2010, Magness filed a motion under section 995 to dismiss the first degree burglary charge, claiming the evidence at the preliminary hearing was insufficient to support the charge because "[n]o part of [his body] entered the boundary of the garage," "[n]or did any tool act as an extension of [him] in order to penetrate the outer boundary of the residence."

The prosecution opposed the motion, arguing that "[t]he outer boundary of the home was clearly penetrated when the garage door was opened with the use of the [remote control]."

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[2] The completed burglary of the automobile also charged against Magness is not at issue here.

The court (Judge Ernest W. Sawtelle) denied the motion, concluding that "the use of a tool to open a door to a building, even if neither the tool [n]or the person operating the tool touches the inside at any time, . . . still effectuates an entry for purposes of a burglary."

In November 2010, Magness filed a timely petition for writ of prohibition, with a request for an immediate stay, seeking review of the superior court's denial of his section 995 motion.[3] In December 2010, we stayed Magness's upcoming trial and issued an alternative writ.

DISCUSSION

Under California law, a person commits burglary when he or she "enters any house . . . or other building . . . with intent to commit grand or petit larceny or any felony . . . ."[4] (§ 459.) Burglary of an inhabited dwelling house is burglary of the first degree. (§ 460, subd. (a).)

Here, the question is whether there was sufficient evidence that Magness "enter[ed]" Loop's house to hold Magness to answer for burglary, rather than merely attempted burglary. As the evidence before us is undisputed, the question is one of law,

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[3] A defendant may challenge the sufficiency of the evidence at the preliminary hearing by means of a motion to dismiss under section 995, and the denial of such a motion may be reviewed by means of a petition for writ of prohibition under section 999a. (See *People v.* Meals (1975) 49 Cal.App.3d 702, 706.)

[4] As will become apparent, the statutory crime of burglary in California differs in several significant aspects from the common law crime.

that is, whether a person who uses a remote control to open a garage door from a distance away from the house "enters" the house for purposes of the crime of burglary under California law. We conclude the answer to that question is "no."

"A burglary [is] an entry which invades a possessory right in a building." (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) For a burglary to occur, "'any kind of entry, complete or partial, . . . will suffice. [Citation.] All that is needed is entry 'inside the premises' . . . ." (*People v. Valencia* (2002) 28 Cal.4th 1, 13.) "[I]f there is no entry, no burglary has occurred." (*People v. Davis* (1998) 18 Cal.4th 712, 723, fn. 7.)

"It is settled that a sufficient entry is made to warrant a conviction of burglary when any part of the body of the intruder is inside the premises." (*People v. Failla* (1966) 64 Cal.2d 560, 569.) Here, the People did not present evidence that any part of Magness's body entered Loop's house, including the garage. However, "a burglary [also] may be committed by using an instrument to enter a building--whether that instrument is used solely to effect entry, or to accomplish the intended larceny or felony as well." (*People v. Davis*, *supra*, 18 Cal.4th at p. 717.) The question here is whether by using a remote control to open Loop's garage door, Magness used an instrument to enter Loop's home.

According to the People, "the unauthorized opening of a garage door, whether by use of a garage door opener or by a handle on the door's exterior, constitutes a burglarious entry, with the garage door itself serving as an instrument used to

penetrate the building." In support of this argument, the People rely largely on *People v. Calderon* (2007) 158 Cal.App.4th 137. To understand the decision in that case, however, it is first necessary to examine two underlying cases -- *People v. Ravenscroft* (1988) 198 Cal.App.3d 639 and *People v. Davis*, *supra*, 18 Cal.4th at page 712.

In *Ravenscroft*, the defendant was convicted of second degree burglary for "surreptitiously stealing and inserting the automatic teller machine (ATM) card of his traveling companion . . . in two ATM's and punching in her personal identification number, which he had previously noted, on the ATM keypads in order to withdraw funds from her account." (*People v. Ravenscroft*, *supra*, 198 Cal.App.3d at p. 641.) The issue on appeal was "whether his insertion of [the] ATM card in the ATMs, mounted inside the banks and secured flush with the exterior walls of those banks, constitute[d] a sufficient entry of a building to support a conviction for burglary." (*Ibid.*)

Among other things, the defendant in *Ravenscroft* contended "his insertion of an ATM card into these ATM's . . . [did] not constitute an entry under . . . section 459 since he did not violate the air space of the bank buildings and because he had no control over the card while it was in the machines." (*People v. Ravenscroft*, *supra*, 198 Cal.App.3d at p. 643.) The appellate court disagreed, noting that "a burglary is complete upon the slightest partial entry of any kind . . . ." (*Ibid.*) The court rejected the defendant's argument that his actions should be distinguished from "more traditional violations of air space

with more traditional burglars' tools," finding the distinction "of no moment." (*Id.* at pp. 643-644.) According to the court, "The gravamen of burglary is an act of entry, no matter how partial or slight it may be, with an instrument or tool which is appropriate for the particular instance . . . . The insertion of a fraudulently obtained ATM card effectuates an entry into a bank's ATM for larceny just as surely as does a crowbar when applied to a vent." (*Id.* at p. 644.)

In *People v. Davis*, *supra*, 18 Cal.4th at page 712, "the issue was whether placing a forged check in the chute of the walk-up window of a check cashing business was a sufficient entry for purposes of burglary." (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 143.) The defendant contended it was not, and a four-member majority of the Supreme Court agreed. (*People v. Davis*, *supra*, 18 Cal.4th at p. 714.)

The Supreme Court first acknowledged (as noted above) that "a burglary may be committed by using an instrument to enter a building--whether that instrument is used solely to effect entry, or to accomplish the intended larceny or felony as well." (*People v. Davis*, *supra*, 18 Cal.4th at p. 717.) The court went on, however, to reject the contention that "the placement of a forged check in the chute of a walk-up window constitutes entering the building within the meaning of the burglary statute." (*Id.* at p. 718.) In doing so, the court disagreed with the reasoning of the *Ravenscroft* court. (*People v. Davis*, *supra*, 18 Cal.4th at p. 718.)

The Supreme Court first agreed that the *Ravenscroft* court had "correctly conclud[ed] that the [ATM] card was inserted into the air space of the ATM" and that "the rule governing entry by means of an instrument is not limited to traditional burglar tools." (*People v. Davis, supra*, 18 Cal.4th at pp. 718-719.) The Supreme Court determined, however, that "[t]he crucial issue" in *Ravenscroft* was "whether insertion of the ATM card was the type of entry the burglary statute was intended to prevent." (*Davis*, at p. 720.) The court "look[ed] to the interest sought to be protected by the burglary statute in general, and the requirement of an entry in particular" to answer that question and concluded the answer was "no." (*Ibid.*) In reaching that conclusion, the court explained as follows:

"The interest sought to be protected by the common law crime of burglary was clear. At common law, burglary was the breaking and entering of a dwelling in the nighttime. The law was intended to protect the sanctity of a person's home during the night hours when the resident was most vulnerable. As one commentator observed: 'The predominant factor underlying common law burglary was the desire to protect the security of the home, and the person within his home. Burglary was not an offense against property, real or personal, but an offense against the habitation, for it could only be committed against the dwelling of another. . . . The dwelling was sacred, but a duty was imposed on the owner to protect himself as well as looking to the law for protection. The intruder had to break and enter; if the owner left the door open, his carelessness would allow the

intruder to go unpunished. The offense had to occur at night; in the daytime home-owners were not asleep, and could detect the intruder and protect their homes.' . . .

"In California, as in other states, the scope of the burglary law has been greatly expanded. There is no requirement of a breaking; an entry alone is sufficient. The crime is not limited to dwellings, but includes entry into a wide variety of structures. The crime need not be committed at night. . . ." (*People v. Davis*, *supra*, 18 Cal.4th at pp. 720-721, fn. omitted.)

Despite the differences between the common law crime and the statutory crime, the Supreme Court observed that "'[a] burglary remains an entry which invades a possessory right in a building'" and that "'"[b]urglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation--the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety." Section 459, in short, is aimed at the danger caused by the unauthorized entry itself.'" (*People v. Davis*, *supra*, 18 Cal.4th at p. 721.)

With this aim in mind, the Supreme Court concluded that "[i]nserting a stolen ATM card into an ATM, or placing a forged

check in a chute in the window of a check-cashing facility, is not using an instrument to effect an entry within the meaning of the burglary statute. Neither act violates the occupant's possessory interest in the building as does using a tool to reach into a building and remove property. It is true that the intended result in each instance is larceny. But the use of a tool to enter a building, whether as a prelude to a physical entry or to remove property or commit a felony, breaches the occupant's possessory interest in the building. Inserting an ATM card or presenting a forged check does not." (*People v. Davis*, *supra*, 18 Cal.4th at p. 722.)

This leads us to *Calderon*. In that case, "[t]he evidence . . . showed that [the] defendant . . . and two accomplices went to the victim's home in the dead of night, armed with knives, to collect a disputed debt. One of the accomplices kicked in the victim's door, but before anyone in the group had gone inside, the victim came running out." (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 139.) A jury found the defendant guilty of first degree burglary. (*Ibid.*) At sentencing, the defendant moved "to modify the burglary conviction to attempted burglary . . . on the ground that there had been insufficient evidence of an entry. . . . The trial court denied the motion, finding sufficient evidence 'that there was penetration both by the door and by the kicker's foot.'" (*Id.* at p. 142.)

On appeal, the defendant contended "that the instructions erroneously allowed the jury to convict him of burglary on the theory that the penetration of the victim's home by the victim's

own door constituted the necessary entry." (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 139.) Division Two of the Fourth Appellate District disagreed, concluding that "kicking in the door of a home can be a sufficient entry to constitute burglary." (*Ibid.*) In reaching that conclusion, the appellate court determined that "[a]lthough *People v. Davis*, *supra*, 18 Cal.4th [at page] 712 is not literally on point, its reasoning dictates the result here." (*Calderon*, at p. 143.) After discussing *Davis* at some length, the *Calderon* court summarized that "*Davis* focused on whether the insertion of the object into a building violated an interest that the burglary statute is intended to protect, such as the occupant's possessory interest in the building." (*Calderon*, at p. 145.) The *Calderon* court then concluded that "[s]urely kicking in the door to a home invades the possessory interests in that home! Admittedly, the door is doing what a door is supposed to do, but it is doing so under the control of an invader, not the householder. Moreover, kicking in a door creates some of the same dangers to personal safety that are created in the usual burglary situation--the occupants are likely to react to the invasion with anger, panic, and violence." (*Ibid.*)

From *Davis* and *Calderon*, we learn that if a person causes an object to intrude into a building, that act does not necessarily constitute an "entry" for purposes of the crime of burglary. Thus, under *Davis*, inserting an ATM card into an ATM machine or inserting a check into a chute does *not* satisfy the

"entry" element of burglary, but under *Calderon* kicking in a door does.

The People contend that "[t]he reasoning in *Calderon* is sound" and suggest that applying that reasoning here results in the conclusion that Magness "enter[ed]" Loop's house when Magness used "the garage door itself . . . as an instrument . . . to penetrate the building" because Magness's opening of the door "violated [Loop]'s possessory interest in his residence and further violated his 'personal interest in freedom from violence that might ensue from unauthorized intrusion.'"

Unlike the court in *Calderon*, however, we are not persuaded that the opening of a door constitutes the "ent[ry]" required for the crime of burglary just because that act may "create[] some of the same dangers to personal safety that are created in the usual burglary situation--the occupants are likely to react to the invasion with anger, panic, and violence."[5] (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145.) In other words, just because one of the primary aims of the crime of burglary is

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[5] Keep in mind that, for purposes of determining whether the defendant "enter[ed]" the residence, it did not matter whether the door in *Calderon* was kicked in or gently pushed open. What mattered -- if the door was to be deemed the instrument that was inserted into the air space of the residence -- was simply that the door moved inward. There is no rational basis for distinguishing between a violent kick and a gentle push in determining whether the "ent[ry]" element of burglary was satisfied. Either the door's movement back into the air space of the residence constituted "ent[ry]" by means of an instrument or it did not.

to forestall the potential danger to personal safety that is created in the usual burglary situation does not mean that the actual existence of such a danger in a particular case is what establishes that the "ent[ry]" required for burglary has occurred.

Two examples will suffice to illustrate the point. More than 100 years ago, the Supreme Court recognized that if a person enters a grocery store during business hours with the intent to commit larceny, he has committed a burglary. (*People v. Barry* (1892) 94 Cal. 481-482.) And this is true regardless of the fact that such an entry -- peacefully, through the front door -- creates no risk of anger, panic, and violence.

More recently, this court concluded that the entry into a home for the purpose of selling fraudulent securities constitutes burglary. (*People v. Salemme* (1992) 2 Cal.App.4th 775.) Indeed, in *Salemme* this court specifically rejected the argument that the defendant's "alleged entry did not constitute burglary because the act posed no physical danger to the victim who had invited [the] defendant in to negotiate the sale of securities." (*Id.* at p. 781.) Instead, the court held that "if there is an invasion of the occupant's possessory rights, the entry constitutes burglary regardless of whether actual or potential danger exists." (*Ibid.*)

It follows from *Barry* and *Salemme* that the potential for anger, panic, and violence is not determinative of whether a particular intrusion into a building constitutes an "ent[ry]" for purposes of the crime of burglary. Thus, the fact that the

unauthorized opening of a door may -- as the People contend -- threaten the safety of the occupants of the building does not, by itself, justify the conclusion that the unauthorized act of opening a door qualifies as an "ent[ry]" for purposes of the burglary statute.

Nor do we find it particularly useful to make an ad hoc determination of whether a particular intrusion -- here, the unauthorized opening of a door -- "inva[des] the occupant's possessory rights." (*People v. Salemme*, *supra*, 2 Cal.App.4th at p. 781.) This is so because if the unauthorized opening of a door is enough to invade the occupant's possessory rights, as the People argue, then it does so regardless of whether the door opens inward or outward. And yet if the door opens outward, the mere act of opening the door has not resulted in any physical intrusion *into* the building. In light of this fact, if we were to conclude that "opening a door" constitutes the "ent[ry]" required for the crime of burglary, without regard to whether the door moved inward (intruding into the building) or outward (*not* intruding into the building), we would be approving the finding of an "ent[ry]" where there has been no physical intrusion into the building. Nothing in the case law supports such an extension of liability under section 459.

In the end, since we are construing a statute, "[o]ur fundamental task . . . is to ascertain the Legislature's intent so as to effectuate the law's purpose." (*People v. Mendoza* (2000) 23 Cal.4th 896, 907.) Where, as here, the statutory language is ambiguous, we may resort to extrinsic sources, such

as the history of the statute. (See *People v. Walker* (2002) 29 Cal.4th 577, 581.) Looking further into the history of the burglary statute, we find a reason to conclude that the mere opening of a door, even if unauthorized, is *not* an "ent[ry]" for purposes of the crime of burglary as our Legislature has defined it.

"California codified the law of burglary in 1850." (*People v. Gauze*, *supra*, 15 Cal.3d at p. 712, citing Stats. 1850, ch. 99, § 58, p. 235.) The original statute read as follows: "'Every person who shall in the night time forcibly break and enter, or without force (the doors and windows being open) enter into any dwelling-house . . . with the intent to commit [any] felony, shall be deemed guilty of burglary . . . ." (Comment, *Criminal Law--Development of the Law of Burglary in California* (1951) 25 So.Cal.L.Rev. 75, 77.) Similar language appeared in the original version of section 459, enacted in 1872; in the Code Amendments of 1875-1876, however, the Legislature "deleted the requirement that entry be made in the night time and deleted former provisions relating to the method of entry." (Historical and Statutory Notes, 48A West's Ann. Pen. Code (2010 ed.) foll. § 459, p. 490.)

By this latter amendment, the Legislature eliminated the common law element of "breaking" entirely from the crime of burglary. (See *People v. Gauze*, *supra*, 15 Cal.3d at pp. 712-713.) Yet it was the element of "breaking" to which the opening of a closed door was material under the common law. (See, e.g., Annot., Opening of closed but unlocked door as breaking which

will sustain charge of burglary or breaking and entering (1923) 23 A.L.R. 112, 114 ["It is well settled that the pushing open of a door entirely closed, but unlocked, is a sufficient breaking to sustain a conviction for breaking and entering, or burglary"].) Thus, at common law, if an intruder opened a closed door, the element of "breaking" was satisfied, but there still had to be an "ent[ry]" to complete the crime of burglary.

Under California law, no such breaking has ever been required. Under the original statutory language, set forth above, a burglary could occur either by "forcibly break[ing] and ent[ry]" or by an entry "without force (the doors and windows being open)." And by 1876, the breaking language was deleted entirely, leaving only the element of "ent[ry]" standing alone.

Because the opening of a closed door was, at common law, relevant only to the element of "breaking" and *not* to the element of "ent[ry]," and because the California Legislature never required a "breaking" for the crime of burglary, we believe it would be anomalous to conclude that the opening of a closed door could, without more, satisfy the "ent[ry]" element of the crime. In essence, in determining that an entry with felonious intent -- however achieved -- constitutes the crime of burglary, the Legislature determined that it does not matter whether the perpetrator opens a closed door before entering or enters through an already open door. Under these circumstances, it would be contrary to the legislative intent to conclude that one who merely opens a closed door -- without otherwise

intruding into the building -- has "enter[ed]" the building for purposes of the crime of burglary.

While this means we disagree with any suggestion in *Calderon* that the door of a building, by itself, can be deemed an instrument that "enters" the building for purposes of the crime of burglary, we do not disagree with the result in *Calderon*, as it appears to us it would have been physically impossible for the defendant's accomplice to have kicked in the victim's door without a portion of his body crossing the threshold. It remains true under California law that if, in opening a closed door, the would-be intruder inserts any part of his body into the building, that is sufficient to constitute an "ent[ry]" for purposes of the crime of burglary. But if only the door itself goes inside the building -- as was the case here -- then there has been no entry and thus no burglary.

DISPOSITION

Let a peremptory writ of prohibition issue restraining the respondent superior court from further proceedings against petitioner on the crime of first degree burglary. Nothing in this decision shall preclude the court from proceeding against petitioner on the lesser crime of attempted first degree burglary. The previously issued stay shall remain in effect until this decision is final.

ROBIE, J.

I concur in Justice Robie's majority opinion but add these comments.

On the assumption that the garage door opened inward, this case turns on the means by which the garage door was opened, the use of a remote control. The remote control emitted an electromagnetic (radio) wave that was received at the door by a radio receiver and converted into an electric current that powered a motor to open the door.

The People attempt to bring this case within those in which the defendant used a physical instrument to extend his or her reach to breach the wall of a building. The People necessarily must argue that an electromagnetic wave is the legal equivalent of a pry bar or other physical instrument by which "entry" to the garage, within the meaning of Penal Code section 459, could have been effected and a first degree burglary thereby committed.

It is true that the electromagnetic wave caused the garage door to open. But pushing a doorbell that summoned a homeowner who opened a door that swung inward, by the same reasoning would have caused an entry into the house. But I doubt that anyone would classify this an entry for purposes of the burglary statute.

I think this case is a bridge too far. The use of electromagnetic waves to gain entry to a building is, by analogy, "markedly different from the types of [physical] entry traditionally covered by the burglary statute . . . ." (*People v. Davis* (1998) 18 Cal.4th 712, 719.) "It is important to

establish reasonable limits as to what constitutes an entry by means of an instrument for purposes of the burglary statute. Otherwise the scope of the burglary statute could be expanded to absurd proportions," as, for example, when "a defendant who, for a fraudulent purpose, accesses a bank's computer from his or her home computer via a modem has electronically entered the bank building and committed burglary." (*Id.* at p. 720.)

This does not mean that the defendant goes free, for the use of the remote control surely constituted an attempt. Nor does the majority view prevent the Legislature from addressing the problem without endorsing other fanciful means of "entry."

BLEASE, Acting P. J.

I would deny the writ petition. In my view, the evidence that petitioner used a remote controller to open the garage door, and thus achieved the opening of the door into the space of the attached garage, supports a charge of burglary under existing precedent. Accordingly, I dissent.

Preliminarily, a factual clarification is appropriate. Petitioner correctly contends that the mechanics of the garage door were not fully described at the preliminary hearing. But garage door openers commonly consist of a motor attached to the top of the door, often by a chain. When the motor is activated, it pulls the door backward, so the door either folds or rolls up, depending on its construction, *into the garage*. Therefore, although the precise operation of *this particular* door was not described, I agree with the Attorney General that it is reasonable to infer that the door, while under petitioner's control, *entered* the garage. (See *People v. Laiwa* (1983) 34 Cal.3d 711, 718 [court must "draw every legitimate inference in favor of the information"]; *People v. Osegueda* (1984) 163 Cal.App.3d Supp. 25, 32 [entry may be shown circumstantially].)

This leaves us with a situation where petitioner: 1) used an instrument (garage door opener); 2) opened the garage door, thus *directly* controlling the path of the door *into the attached garage*, breaking the plane of the victim owner's possessory interest in the house as the door entered the airspace of the garage; 3) fully exposed the contents and occupants of the house to predation; and 4) created an extremely dangerous personal

safety situation for everyone involved. In my view, under existing precedent, what I have just described is a burglary.

Although I agree with the majority opinion that common law distinguished between breaking and entering, I disagree with its analysis of legislative intent and resulting position that there was no "entry" in this case, despite petitioner's unwelcome insertion of the garage door into the airspace of the residence.

Under common law, "breaking" was the use of any force to create a breach in a building that would allow entry, so even opening a closed door showed breaking. (3 LaFave, Substantive Criminal Law (2d ed. 2003) Burglary, § 21.1, pp. 206-207; 3 Wharton's Criminal Law (15th ed. 1995) Burglary, § 318, pp. 225-228 (hereafter Wharton).) The majority opinion observes that opening a door was *not* also entering, and reasons that legislation *expanding* California's burglary statute to eliminate the breaking requirement leads to the conclusion that it would be anomalous to find that opening a door could show entry.

I believe it is important to note that at common law, entry could be shown by use of an instrument where and only where the instrument was used to commit the intended theft or felony in the building. (*People v. Walters* (1967) 249 Cal.App.2d 547, 551; 3 Wharton, *supra*, § 323, pp. 248-250; Perkins & Boyce, Criminal Law (3d ed. 1982) Burglary, § 1, pp. 252-255.) This common law rule limiting the use of instruments explains *why* opening a door would show breaking, but would not also show entry--because the door itself was not the instrument used to commit the intended crime *within the building*.

The California Supreme Court has, however, *rejected* the common law rule limiting the use of instruments to show entry. In California, "entry may be effected by the intruder or by an instrument employed by the intruder, whether used 'solely to effect entry, or to accomplish the intended larceny or felony as well.'" (*People v. Valencia* (2002) 28 Cal.4th 1, 8 (*Valencia*), quoting *People v. Davis* (1998) 18 Cal.4th 712, 717 (*Davis*).) "Thus, using a tire iron to pry open a door, using a tool to create a hole in a store wall, or using an auger to bore a hole in a corn crib is a sufficient entry to support a conviction of burglary." (*Davis, supra*, 18 Cal.4th at pp. 717-718.) Given these broad precedents, I do not find it anomalous to conclude that a door can be an instrument that satisfies the entry element of burglary, where the door opens inward and the instrument actually causing the door to open is under the direct control of the would-be intruder, as we see here.

The garage door itself defined the boundary of the garage. (*Valencia, supra*, 28 Cal.4th at p. 11 ["in general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry"].) The garage door protected the contents of the garage and provided the occupants of the attached house "'reasonable protection from invasion.'" (*People v. Elsey* (2000) 81 Cal.App.4th 948, 960.) By opening the garage door, petitioner exposed the property to predation, and exposed any occupants to danger. Therefore, liability for burglary is consistent with all expressed purposes of the burglary statute, whether

primarily protecting possessory rights (see *People v. Salemme* (1992) 2 Cal.App.4th 775, 781) or forestalling the germination of a situation dangerous to personal safety (see *Davis, supra,* 18 Cal.4th at pp. 716-723 [only those entries by instrument consistent with purpose of burglary statute suffice]; *People v. Calderon* (2007) 158 Cal.App.4th 137, 145 (*Calderon*) [kicking in front door suffices]; *Valencia, supra,* 28 Cal.4th at p. 13 [even "minimal entry" between a window screen and outer (closed) window is enough because it violates a possessory interest and the occupant's interest in freedom from violence that might ensue from unauthorized intrusion].)

Here, by opening the door *into* the garage, petitioner constructively entered the garage. The occupants' possessory interest was invaded by an object under the direct control of petitioner, through an instrument he wielded from outside. And no one was safe--neither petitioner, nor the homeowners who ran out into the open garage and discovered him in the driveway.

The majority opinion seems to suggest that it is irrational to turn burglary liability on whether a door opens inward or outward. I do not agree. The use of *physical entry* of an object under the *direct control* of the invader to mark the point at which burglary attaches is not irrational. Although debatable hypotheticals can be constructed, the general rule that entry must be an act breaking the plane or crossing the threshold of the building is well-established and workable. (See *Valencia, supra,* 28 Cal.4th at pp. 7-12 [discussing development of law of entry, stating penetration of "a

building's outer boundary" suffices]; *People v. Failla* (1966) 64 Cal.2d 560, 569 [sufficient if any part of intruder is "inside the premises"]; *People v. Wise* (1994) 25 Cal.App.4th 339, 345-347.)

Calderon, discussed at length by the majority, presented a situation similar to this case. The majority agrees with the *result* in *Calderon*, as it observes that kicking in a door without a portion of the kicking foot crossing the threshold is a physical impossibility. Assuming this observation is factually correct, what if the breach of the door were to be caused by the shockwave from a concussion grenade,[1] for example, rather than a foot? *The exact same result is achieved*--the door is blasted inward--yet the first scenario is a burglary and the second merely an attempt?

The end result of the majority's opinion in this case is to condition determination of the *fact* of entry on the *identity* of the invading entity, rather than on an analysis of the invasion itself. Under the majority's holding, if the invading entity be part of the house, even a part normally constituting a boundary, it cannot "enter" and thereby effectuate a burglary, even if it

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[1] A concussion grenade "is a grenade designed to inflict damage by the force of its detonation rather than by the fragmentation of its casing." (Dictionary.com Unabridged >http://dictionary.reference.com/browse/concussion+grenade< [as of June 6, 2011], [based on Random House Dict.].) In other words, the destruction is caused by the shockwave created by its detonation, not pieces of the grenade itself.

breaks the plane, invades the airspace, is under the direct control of the perpetrator, completely exposes the previously protected contents of the residence, and threatens both the possessory and personal safety interests of the victim. In my opinion, this reasoning leads to a distinction without a difference. It does not create a workable, *logical* rule.

Therefore, I cannot agree.

I further disagree with the position that this case turns on the means by which the garage door was opened, that is, the use of the remote control, as expressed by the concurring opinion and suggested by the majority (["The question here is whether by using a remote control to open [victim's] garage door, [petitioner] used an instrument to enter [victim's] home]). In my view, the analysis stops when we determine--as I believe we should for the reasons explained *ante*--that the garage door itself entered the residence by opening into the garage while under petitioner's control.

I respectfully dissent.

DUARTE, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Magness v. Superior Court (Sacramento County)**
No.: **C066601**

I declare:

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

On July 19, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 July 19, 2011, at Sacramento, California.

_____
Declarant

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