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. S194928

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

REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

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?

INTRODUCTION

Petitioner broke into the victim's car, which was parked in the victim's driveway, removed the remote control for the garage door, and opened the garage door. He was charged with attempted first degree burglary of a residence (Pen. Code, [1] §§ 459, 460, subd. (a), 664) and second degree burglary of a vehicle (§§ 459, 460, subd. (b)). At the conclusion of the preliminary hearing, the district attorney requested that the court hold petitioner to answer to the charge of completed, rather than attempted, first degree burglary (§§ 459, 460, subd. (a)). (Pet.'s Exh. 1[2] at pp. 15, 33-35.) 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.)

Petitioner subsequently filed a motion pursuant to section 995 to reduce count 1 to attempted first degree burglary. (Pet.'s Exh. 3.) The court denied the motion. (Pet.'s Exhs. 5 & 6.)

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 section 995. 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* (2007) 158 Cal.App.4th 137 (*Calderon*) was correctly decided. The court further directed real party in

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[1] Unless otherwise designated, subsequent statutory references are to the Penal Code.

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

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.

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. (Majority opinion of Robie, J.,[3] at p. 17.) In so holding, the court disagreed with the reasoning —although not the ultimate result—in *Calderon*. (Majority opinion at pp. 12-13, 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. (Concurring opinion of Blease, J.,[4] at pp. 1-2.)

The dissenting justice disagreed with the majority's conclusion and believed that *Calderon* was correctly decided. (Dissenting opinion of Duarte, J.,[5] at pp. 1-6.)

The majority's decision must be rejected. In reaching its conclusion, the majority incorrectly concludes that a door cannot be deemed an instrument that "enters" the building for purposes of the crime of burglary and adopts an interpretation that would lead to absurd results.

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[3] Further citations to the majority opinion will be designated "maj. opn."

[4] Further citations to the concurring opinion will be designated "con. opn."

[5] Further citations to the dissenting opinion will be designated as "dis. opn."

STATEMENT OF THE CASE

The facts surrounding the offense are taken from the majority opinion and are summarized as follows: On July 24, 2010, Timothy Loop was surprised to hear the garage door of his house opening. Loop ran from the home into the garage area and saw a man (later identified as petitioner) standing near the end of the driveway. Petitioner fled when Loop tried to confront him, but he was subsequently apprehended. Loop found the remote control for his garage door where he had seen petitioner standing in the driveway. The remote control had previously been inside Loop's locked car, 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.

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 (§§ 459, 460, subd. (a), 664) and in count 2 with second degree burglary of a vehicle (§§ 459, 460, subd. (b)). (See Pet.'s Exh. 1 at p. 4.) The complaint alleged that petitioner had suffered one prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12). (See Pet.'s Exh. 1 at p. 4.) A preliminary hearing was held on August 31, 2010. (Pet.'s Exh. 1.) At the outset of the preliminary hearing in this case, the deputy district attorney advised the court that, depending on the evidence adduced at the hearing, she might be arguing for a holding order for the crime of completed first degree burglary of a residence rather than for the crime of attempted first degree burglary of a residence as charged in count 1 of the complaint. (Pet.'s Exh. 1 at p. 5.)

At the conclusion of the evidence, the deputy district attorney asked the court for a holding order on count 1 for the crime of completed, rather than attempted, first degree burglary. (Pet.'s Exh. 1 at p. 15.) The court heard argument on the issue from the deputy district attorney and from counsel for petitioner. (Pet.'s Exh. 1 at pp. 15-21, 27-33.) The court then granted the

deputy district attorney's request and held petitioner to answer on count 1 to the charge of first degree burglary. (Pet.'s Exh. 1 at pp. 33-35.) The court asserted that its finding of sufficient evidence to hold petitioner to answer to the charge of first degree burglary was "entirely a legal question based on [its] reading and application of [*People v.*] *Nible* [(1988) 200 Cal.App.3d 838]."[6] (Pet.'s Exh. 1 at p. 33.) The court elaborated:

> I'm looking at the language in Nible on page 845 that says, "We hold, therefore, that when a screen which forms the outer barrier of a protected structure is penetrated, an entry has been made for the purposes of the burglary statute."
>
> Here, the garage door was penetrated by use of the clicker. But I'm relying in large part that the garage door was then physically opened. It's not just the use of the clicker; otherwise, it seems to me you could be arguing there's a burglary every time you had computer hacking of electronic wires of someone's house. That's not before me. I'm not sure that's envisioned by the burglary statute.
>
> But where the garage door is opened and it's opened by an electronic clicker, I'm reading the Nible case as saying that constitutes an entry. But that's a pure legal question. And if I'm wrong, I'm sure other courts will tell me I'm wrong.

(Pet.'s Exh. 1 at pp. 33-34.)

Petitioner subsequently filed a motion pursuant to section 995 to reduce count 1 to attempted first degree burglary. (Pet.'s Exh. 3.) In opposition to petitioner's motion, the deputy district attorney cited *People v. Nible*, *supra*, 200 Cal.App.3d at page 845 as holding "that when a [window] screen which forms the outer barrier of a protected structure is penetrated an entry has

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[6] As will be discussed further *post*, the Court of Appeal held in *Nible* that the penetration of a window screen, but not the partially-open window behind the screen, constitutes a burglarious entry. (*People v. Nible*, *supra*, 200 Cal.App.3d at pp. 841-843, 845-846.)

been made for purposes of the burglary statute." (Pet.'s Exh. 4 at pp. 4-5.) The deputy district attorney then argued as follows:

> It's clear that a garage door would be an outer boundary to a structure. It can also be reasonably inferred that the clicker was used in the present case to open the garage door. There is nothing to distinguish this act from someone using a screwdriver to pry off a window screen which is clearly under the law a burglary. The clicker is an extension of the Defendant just like the screwdriver would be the extension of a perpetrator.
>
> It's not the People's position that any foray of a radio wave into a home would be a residential burglary. What we have in this case is the use of a garage clicker initiating a mechanism inside the structure of a garage and opening it.
>
> The outer boundary of the home was clearly penetrated when the garage door was opened with the use of the clicker.

(Pet.'s Exh. 4 at p. 5.) The superior court ultimately denied petitioner's 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 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*, *supra*, 158 Cal.App.4th 137, 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. (Maj. opn. at pp. 12-13, 16-17.) The majority conceded that "one of the primary aims of the crime of burglary is to forestall the potential danger to personal safety that is created in the usual burglary situation" but construed this purpose in such a manner so as to conclude that it "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." (Maj. opn. at pp. 12-13.)

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 entry 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. (Maj. opn. at pp. 10-17.)

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.[7] (Con. opn. at pp. 1-2.)

The dissenting justice disagreed with the majority's conclusion, pointing out:

> The California Supreme Court has . . . *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 hold 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.

(Dis. opn. at p. 3.)

The dissent further reasoned:

> 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.)

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[7] The concurring justice conceded that, in the case at bar, "the electromagnetic wave caused the garage door to open." (Con. opn. 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.*)

> 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].)

(Dis. opn. at pp. 3-4.)

Real party in interest petitioned this Court for review of the majority's decision, and this Court granted the request.

SUMMARY OF ARGUMENT

In 2007, *Calderon* held "that kicking in the door of a home is a sufficient entry to constitute burglary." (*Calderon*, *supra*, 158 Cal.App.4th at p. 145.) The majority in the case at bench disagreed with *Calderon*'s finding that the door of a building, by itself, can be deemed an instrument that "enters" the building for purposes of the crime of burglary. (Maj. opn. at p. 17.)

The majority opinion is flawed. First, the majority incorrectly concludes that a door itself cannot be deemed an instrument that "enters" the building for purposes of the crime of burglary. In so concluding, it purports not to disagree with the result in *Calderon* and instead surmises that "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." (Maj. opn. at p. 17.) After analyzing the intent of the burglary statute, the *Calderon* court correctly reached the opposite conclusion, finding

that "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." (*Calderon, supra*, 158 Cal.App.4th at p. 145.)

Second, the majority's decision adopts an interpretation of what constitutes an "entry" under the burglary statute that would lead to absurd results.

ARGUMENT

I. ONE WHO USES A REMOTE CONTROL TO OPEN A GARAGE DOOR "ENTERS" THE HOME FOR PURPOSES OF THE CRIME OF BURGLARY UNDER CALIFORNIA LAW

The crucial issue in determining what constitutes an "entry" for purposes of the crime of burglary is whether it is "the type of entry the burglary statute was intended to prevent." (*People v. Davis* (1998) 18 Cal.4th 712, 720.) In answering this question, the court looks to "the interest sought to be protected by the burglary statute in general, and the requirement of an entry in particular." (*Ibid.*) Here, the Court of Appeal incorrectly found that the garage door could not be deemed an instrument that enters the building for purposes of the crime of burglary. (Maj. opn. at p. 17.)

A. "Entry" into a Building in the Context of Burglary

One commits burglary when he enters any "house, . . . or other building . . . with intent to commit grand or petit larceny or any felony . . . ." (§ 459.) The burglary statute does not define the term "enter."

In *People v. Valencia* (2002) 28 Cal.4th 1, this Court examined the parameters of an "entry" for purposes of a residential burglary in the context of the breaking of the perimeter of a house without actual entrance into the house. Specifically, in *Valencia*, this Court granted review to determine "whether penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute when the

window itself is closed and is not penetrated." (*Id.* at pp. 3-4.) At the outset, this Court noted, as it had previously in *People v. Davis*, *supra*, 18 Cal.4th 712, that California has "'greatly expanded'" the common law definition of burglary, which was limited to the breaking and entering of a dwelling in the nighttime. (*People v. Valencia*, *supra*, at p. 7, quoting *People v. Davis*, *supra*, at p. 720.) Under California's more expansive burglary law, "'[t]here 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. Valencia*, *supra*, at p. 7, quoting *People v. Davis*, *supra*, at pp. 720-721.) The *Valencia* Court observed, however, that "'"[a] burglary remains an entry which invades a possessory interest in a building."'" (*People v. Valencia*, *supra*, at p. 7, quoting *People v. Davis*, *supra*, at p. 721, quoting, in turn, *People v. Gauze* (1975) 15 Cal.3d 709, 714.) This Court went on to explain:

> '"'Burglary 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." [The burglary statute], in short, is aimed at the danger caused by the unauthorized entry itself.' [Citations.]"

(*People v. Valencia*, *supra*, at p. 7.) This Court also noted that an entry may be effected by either the intruder himself or by an instrument employed by the intruder, whether the instrument is employed solely to effect entry or also to accomplish the intended larceny or felony. (*People v. Valencia*, *supra*, at pp. 7-8.)

This Court in *Valencia* went on to observe that two separate approaches have been taken by the courts to determine whether a burglarious entry was

effectuated. (*People v. Valencia*, *supra*, 28 Cal.4th at pp. 10-11.) As described by the Court of Appeal in *People v. Wise* (1994) 25 Cal.App.4th 339: "The first approach examines whether the defendant crossed the boundary separating the interior air space of the building from the outdoors. The second approach looks to the reasonable expectations of the building occupants to be free from an intrusion." (*Id.* at p. 345.) This Court in *Valencia* concluded: "[A] window screen is clearly part of the outer boundary of a building for purposes of burglary. A reasonable person certainly would believe that a window screen enclosed an area into which a member of the general public could not pass without authorization." (*People v. Valencia*, *supra*, at p. 12.) This Court accordingly held: "[P]enetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute even when the window itself is closed and is not penetrated." (*Id.* at p. 13.)

In *Valencia*, this Court noted that its holding was consistent with the Court of Appeal's holding in *People v. Nible*, *supra*, 200 Cal.App.3d 838, the case upon which the superior court based its holding order in the case at bar (see Pet.'s Exh. 1 at pp. 33-34). (*People v. Valencia*, *supra*, 28 Cal.4th at p. 13, fn. 6.) The *Nible* court held that the penetration of a window screen constitutes a burglarious entry even if the partially-open window covered by the screen is not penetrated. (*People v. Nible*, *supra*, at pp. 841-843, 845-846.) Significantly, in *Valencia* this Court agreed with the following assertion in *Nible*: "The inhabitants of a building are just as likely to react violently to an intruder's penetration of their window screen as to the penetration of the window itself." (*People v. Valencia*, *supra*, at p. 13; see *People v. Nible*, *supra*, at p. 845.)

This Court in *Valencia* also discussed the holdings in *People v. Ravenscroft* (1988) 198 Cal.App.3d 639 and *People v. Davis*, *supra*, 18 Cal.4th 712. (*People v. Valencia*, *supra*, 28 Cal.4th at pp. 8, 10.) In

Ravenscroft, the Court of Appeal upheld the defendant's conviction for burglary where the "entry" was accomplished by the fraudulent insertion of an automatic teller machine (ATM) card into a bank ATM machine on the outside wall of the bank. (*People v. Ravenscroft*, *supra*, at p. 643.) However, this Court subsequently disapproved of the *Ravenscroft* holding in *Davis*, in which this Court held that placing a forged check into a chute at the walk-up window of a check-cashing facility does not constitute a burglarious entry. (*People v. Davis*, *supra*, at p. 722.) This Court cautioned in *Davis* that it is "important to establish reasonable limits as to what constitutes an entry by means of an instrument for purposes of the burglary statute." (*Id.* at p. 719.) This Court proceeded to assert: "The crucial issue . . . is whether [the] insertion . . . was the type of entry the burglary statute was intended to prevent. In answering this question, we look to the interest sought to be protected by the burglary statute in general, and the requirement of an entry in particular." (*Id.* at p. 720.) This Court ultimately held that, since the chute (or ATM machine, under the facts in *Ravenscroft*) was being used for its intended purpose, there was no violation of possessory interest, and thus, no burglary. (*Id.* at p. 722.)

In *People v. Glazier* (2010) 186 Cal.App.4th 1151, Division Three of the Second District Court of Appeal upheld the defendant's conviction for attempted burglary, specifically finding that the defendant had made a burglarious entry into the victims' residence by spraying gasoline into the crawl space with a pressurized paint sprayer and then inserting a burning pole into the crawl space as a means of setting fire to the home.[8] (*Id.* at pp.

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[8] In a footnote, the *Glazier* court offered the following explanation for why the accusatory pleading in that case had charged the defendant with an attempted, rather than a completed, burglary: "Count 2 was amended to charge attempted, rather than completed burglary, because that is how the

(continued...)

1160-1162.) In rejecting the defendant's argument, which relied on *Davis*, the *Glazier* court concluded that the defendant's invasion by instrument into the crawl space of the victims' home "violated the [victims'] possessory interest in their property." (*Id.* at p. 1160.) The court further concluded that the defendant's invasive acts violated the victims' interest in their personal safety. (*Id.* at pp. 1160-1161.)

In *Calderon*, the defendant and his accomplices went to the victim's home in the middle of the night, armed with knives, to collect a disputed debt. (*People v. Calderon*, *supra*, 158 Cal.App.4th at pp. 139-140.) One of the accomplices kicked in the victim's door but, before the defendant or his accomplices could enter the victim's residence, the victim came running outside. (*Ibid.*) A jury found the defendant guilty of first degree burglary. (*Id.* at p. 139.) On appeal, the defendant argued that the jury instructions had erroneously permitted 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. (*Id.* at pp. 139, 141.) In addressing the defendant's claim, the Court of Appeal cited *People v. Davis*, *supra*, 18 Cal.4th 712, for the proposition that, in determining whether a burglarious entry occurred, the focus should be 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." (*People v. Calderon*, *supra*, at p. 145.) The court then held that kicking in the door of a home is sufficient to constitute a burglarious entry whether or not any part of the perpetrator's body penetrates the building. (*Ibid.*) In so holding, the court noted that the defendant and his accomplices had invaded the victim's

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(...continued)
crime was originally alleged in the indictment." (*People v. Glazier*, *supra*, 186 Cal.App.4th at p. 1154, fn. 2.)

possessory interest in his residence by kicking in the door, and it further observed that "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.*)

B. *Calderon* Was Properly Decided

Calderon correctly analyzed the issue of what constitutes an entry under section 459. As the Court of Appeal reasoned in *Calderon*: "Surely 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." (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145.)

Unlike the acts of the defendants in *Davis* and *Ravenscroft*, who used a facility, i.e., a check chute or an ATM machine, as it was intended to be used by the public, the act of kicking in the front door in *Calderon* violated the victim's possessory interest in his home. The same is true of petitioner's alleged act of opening the Loops' garage door. The opening of the garage door was "'the type of entry the burglary statute was intended to prevent'" (*People v. Valencia*, *supra*, 28 Cal.4th at p. 13, quoting *People v. Davis*, *supra*, 18 Cal.4th at p. 720) as it violated the Loops' possessory interest in their residence and further violated their "personal interest in freedom from violence that might ensue from unauthorized intrusion." (*People v. Valencia*, *supra*, at p. 13, citing *People v. Davis*, *supra*, at p. 720.) Like the window screens in *Nible* and *Valencia*, the crawl space in *Glazier*, and the front door in *Calderon*, the victims in this case, Mr. and Mrs. Loop, were protected by their garage door, the opening of which provided unimpeded access to their home. Likewise in the present case, the Loops' possessory interest in their residence was violated when a stranger broke into their vehicle, removed

their garage door opener, and opened their garage door. Their personal safety was also threatened. This constitutes a burglary.

> The majority in the case at bar, however, was not persuaded that
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> > the opening of a door constitutes the "ent[ry]" required for the crime of burglary just because that act may "create[] some of the 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." (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145.) . . .

(Maj. opn. at p. 12, footnote omitted.) The majority also was not convinced that it was proper to focus on whether a particular intrusion "'inva[des] the occupant's possessory rights.'" (Maj. opn. at p. 14, quoting *People v. Salemme* (1992) 2 Cal.App.4th 775, 781.) The majority reasoned:

> 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.

(Maj. opn. at p. 14.)

As observed by the dissent (see dis. opn. at pp. 4-5), it is entirely rational—and workable—to turn burglary liability on whether a door opens inward or outward:

> 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*

(1996) 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.)

(Dis. opn. at pp. 4-5.)

C. The Majority's Interpretation of "Entry" Would Lead to Absurd Results

Not only is the majority incorrect that a door itself cannot be deemed an instrument that enters the building for purposes of the crime of burglary, but its interpretation of the burglary statute would lead to absurd results. As the dissent points out (see dis. opn. at p. 5), under the majority opinion the kicking in of a door would constitute an entry because a portion of the kicking foot would necessarily cross the threshold; an entry would not occur, however, if the door was opened by the shockwave from a concussion grenade.[9] In both instances, the same result is achieved—the door is forcibly opened—but, under the majority approach, the first scenario would constitute a burglary and the second merely an attempted burglary. In both situations, personal safety is endangered. And, as the majority concedes, "[O]ne of the primary aims of the crime of burglary is to forestall the potential danger to personal safety that is created in the usual burglary situation . . . ." (Maj. opn. at pp. 12-13.) As aptly put by the dissent:

> 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

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[9] As described by the dissent: "A concussion grenade 'is a grenade designed to inflict damage by the force of its detonation rather than by the fragmentation of its casing.' [Citation.] In other words, the destruction is caused by the shockwave created by its detonation, not pieces of the grenade itself." (Dis. opn. at p. 5, fn. 1.)

> 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. . . . [T]his reasoning leads to a distinction without a difference. It does not create a workable, *logical* rule.

(Dis. opn. at pp. 5-6.)

Following along the lines of the dissent's example, assume that none of the windows of a home have an outer screen. An intruder uses a laser to cut a hole in one of the windows of the home, causing glass to fall into the home. Under the majority's interpretation, this does not constitute an entry under the burglary statute because the intruder has not inserted any part of his body or an instrument under his control into the building. Yet if the same intruder uses a glass cutter to create a hole in the window and *any* portion of the glass cutter crosses the threshold, then he has committed a completed burglary. This is an absurd result.

In sum, just as kicking in the door of a home does, an intruder's use of a garage door opener to open a garage door violates the occupant's possessory interest and fosters a situation that can be extremely dangerous to personal safety. The majority's analysis is flawed, and its interpretation of what constitutes an entry under the burglary statute would lead to absurd results. For both reasons, this Court should reverse the judgment.

CONCLUSION

For the foregoing reasons, real party in interest respectfully requests that the Court of Appeal's judgment be reversed.

Dated: November 17, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5,313 words.

Dated: November 17, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Magness v. Superior Court (Sacramento County)**
No.: **C066601 / S194928**

I declare:

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

On November 18, 2011, I served the attached **REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 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 November 18, 2011, at Sacramento, California.

_____
Declarant

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