IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHRISTOPHER MAGNESS.,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Party in Interest.

Case No. S194928

Court of Appeal No. C066601

Superior Court No. 10F04832

Court of Appeal, Third Appellate District
Sacramento County Superior Court, Honorable Ernest W. Sawtelle, Judge

PETITION'S ANSWER BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHRISTOPHER MAGNESS., Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Party in Interest.	Case No. S194928 Court of Appeal No. C066601 Superior Court No. 10F04832

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHRISTOPHER MAGNESS, Petitioner, v. SUPERIOR COURT OF SACRAMENTO COUNTY, SITTING AS A JUVENILE COURT, Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Party in Interest.	Case No. S194928 Court of Appeal No. C066602 Superior Court No. 10F04832

Court of Appeal, Third Appellate District
Sacramento County Superior Court, Honorable Ernest W. Sawtelle, Judge

PETITIONER'S ANSWER BREIF ON THE MERITS

ISSUE PRESENTED

Did the petitioner "enter" a home for purposes of first degree burglary when he used a remote control to open the garage door, but no part of his body or any instrument enter the garage?

REPSONDENT'S CONTENTION

A perpetrator who uses a remote control to open a garage door "enters" the home for purposes of the crime of burglary under California law.

PETITIONER'S CONTENTION

Simply causing a garage door to open with a remote control, without any physical entry of the alleged perpetrator, is not an entry for purposes of the crime of burglary under California law.

STATEMENT OF THE CASE

On July 27, 2010, petitioner was arraigned in the Sacramento Superior Court, on a complaint charging him with one count of attempted first degree, residential burglary, in violation of Penal Code section 664/459 and one count of second degree burglary, in violation of Penal Code section 459.[1] On August 17, 2010 petitioner entered pleas of not guilty to all counts.

A preliminary hearing was conducted on August 31, 2010, in Department 42 of respondent superior court, the Honorable Allen H. Sumner, presiding. At the preliminary hearing, the evidence presented on the attempted first degree, residential burglary was deemed to be sufficient to hold petitioner to answer to a completed first degree, residential burglary. (Pet.'s Exhibit 1 at pp. 33-35.)

At the conclusion of the preliminary hearing, petitioner was arraigned on the information. (Pet.'s Exhibit 2.) Petitioner entered pleas of not guilty to all counts and allegations. The matter was scheduled for trial on November 23, 2010.

On October 19, 2010, in Department 63 of respondent court, petitioner filed a motion to set aside the information pursuant to Penal Code

[1] All statutory references are to the Penal Code unless otherwise specified.

section 995. (Pet.'s Exhibit 3.) The prosecution filed an opposition on October 27, 2010. (Pet.'s Exhibit 4.)

On October 29, 2010, in Department 63 of respondent court, the Honorable Ernest W. Sawtelle, presiding, heard and denied petitioner's duly-noticed motion pursuant Penal Code section 995. (Pet.'s Exhibit 5 and 6.)

On November 15, 2010, petitioner filed a petitioner for writ of prohibition in the Third District Court of Appeal challenging the superior court's denial of his motion pursuant to section 995. On November 19, 2010, the Court of Appeal directed the parties 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, was correctly decided. The court further directed the real party in interest to file a preliminary opposition to the petition addressing the contentions raised in the petition. On November 22, 2010, petitioner filed his supplemental briefing and on November 30, 2010, real party in interest filed its preliminary opposition to the petition. On December 3, 2010 the Court of Appeal issued an alternative writ of mandate directing respondent to grant the relief requested in the petition or to show cause why it had not done so and why the relief requested by petitioner should not be granted. The court further ordered real party in interest to file a return to the alternative writ. Thereafter, oral argument was held on May 23, 2011.

On June 10, 2011, in a published opinion, the Third District Court of Appeal issued a peremptory writ of prohibition restraining the superior court from further proceedings against petitioner on the crime of first degree burglary, holding that if in opening a closed the perpetrator inserts any part of his body into the building, that would be sufficient to constitute an entry for purposes of the crime of burglary. However, if only the door itself goes inside the building and no part of the perpetrator's body enters, there is no burglary. (Maj. opn. at pp. 10-17.)

Thereafter, real party in interest petitioned this Court for review of the majority decision, and this Court granted review.

STATEMENT OF FACTS

The preliminary hearing in this matter was held on August 31, 2010, before the Honorable Allen Sumner. The court acknowledged that the complaint alleged petitioner with one count of attempted residential burglary, one count of second degree burglary and one serious prior felony allegation. (Pet. Exhibit 1 at p. 4.) However, after presentation of evidence by the prosecution, the court held petitioner to answer to a completed first degree, residential burglary and a second degree burglary. (Pet. Exhibit 1 at p. 33.)

At the preliminary hearing, Sacramento County Sheriff's Deputy Mark Kuzmich testified that he spoke with Timothy Loop (Loop) on July 24, 2010, at Loop's residence regarding an earlier incident. Loop stated

that earlier that on the evening of July 24, 2010, while he was inside his residence, he heard his garage door open. (Pet. Exhibit 1 at p. 7.) Upon hearing the garage door open, Loop ran outside through his garage. (Pet. Exhibit at pp. 8, 12.) When Loop entered his garage, he observed a white male adult standing near the street end of his driveway. (Pet. Exhibit 1 at p. 8.) Later, Loop located his garage door opener near the sideway where he had observed the while male standing. (Pet. Exhibit 1 at p. 10.)

Loop further observed the white male run down the street away from his residence. Loop got on his bicycle and rode after the white male. Loop made brief contact with the man and observed him enter another residence. (Pet. Exhibit 1 at p. 8.)

Kuzmich later went to the residence where Loop had observed the white male enter. Kuzmich located petitioner at the residence. Petitioner matched the description of the white male Loop had observed near his residence. Loop later identified petitioner in a field show-up as the person he saw standing near his driveway. (Pet. Exhibit 1 at pp. 8-9.)

Loop further indicated to Kuzmich that his garage door opener had been in his locked vehicle prior to him finding it near where petitioner was standing at near the street. (Pet. Exhibit 1 at p. 10.) There was no evidence that petitioner ever physically entered Loop's garage.

ARGUMENT

I

THE COURT OF APPEAL IS CORRECT IN HOLDING THAT ONE WHO USES A REMOTE CONTROL TO OPEN A GARAGE DOOR DOES NOT "ENTER" THE HOME FOR PURPOSES OF THE CRIME OF BURGLARY UNDER CALIFORNIA LAW.

To prove the crime of first degree, residential burglary, in violation of Penal Code section 459, the prosecution must show that the perpetrator entered a residence and at the time of the entry, the perpetrator must have had the specific intent to steal and take away the victim's property, and have intended to deprive the victim permanently of the property in question. The evidence presented at the preliminary hearing does not support the charge of a completed residential burglary. The most that can be said regarding the evidence presented at the preliminary hearing is that petitioner attempted to enter the garage when he used the automatic garage door opener to open the garage door. There was absolutely no evidence that petitioner ever entered or inserted any tool inside the alleged victim's garage or residence.

A. "Entry" Into A Building In The Context Of Burglary

In *People v. Davis* (1998) 18 Cal.4th 712, the California Supreme Court reviewed the history of the law of burglary as it relates to the entry element. In *Davis*, the appellant was convicted of forgery and burglary after passing a fraudulent check to a teller through the chute in a window of

a bank. The prosecution in *Davis* cited *People v. Ravenscroft* (1988) 198 Cal.App.3d 639, in support of its argument that appellant Davis had committed an entry. In *Ravenscroft* the appellant was convicted of two counts of burglary after "surreptitiously stealing and inserting the automated teller machine (ATM) card of his traveling companion into two ATM's and punching in his companion's personal identification number in order to withdraw funds from his companion's account. (*Ravenscroft, supra*, 198 Cal.App.3d at p. 641.)

The *Davis* court rejected the logic in *Ravenscroft* and reversed Davis's conviction. The court cited *People v. Guaze* (1975) 15 Cal.3d 709, 714, for the proposition that "burglary remains an entry which invades a possessory right in a building." The court stated:

> Inserting 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. Such acts are no different, for purposes of the burglary statute, from mailing a forged check to a bank or check-cashing facility.

(*People v. Davis*, *supra*, at p. 722.)

In *People v. Valencia* (2002) 28 Cal.4th 1, the California Supreme Court held that removal of a window screen and entry into the space behind the screen constituted a burglary. The Supreme Court reasoned:

> In most instances, of course, the outer boundary of a building for purposes of burglary is self-evident. Thus, in general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry. In other instances, in which the outer boundary of a building for purposes of burglary is not self-evident, we believe that a reasonable belief test generally may be useful in defining the building's outer boundary. Under such a test, in dealing with items such as a window screen, a building's outer boundary includes any element that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization.

(*People v. Valencia*, *supra*, at p. 11.)

More recently, the appellate court in *People v. Calderon* (2007) 158 Cal.App.4th 137, examined whether there was an entry for the purpose of burglary when a door is kicked in by a perpetrator. The appellate court in *Calderon*, relying on *Davis*, concluded that the mere kicking in of the door by Calderon's companion was sufficient entry to constitute burglary. (*Calderon*, *supra*, 158 Cal.App.4th at p. 139.) Although there was a dispute in the evidence whether the person's foot that kicked in the door penetrated the outer boundary, or threshold of the door, the court held that the door itself was an instrument that penetrated the residence when it was propelled into the residence by the force of the kick, and therefore the only

entry necessary to complete the burglary. In so holding, the court, citing *People v. Davis*, *supra*, 18 Cal.4th at p. 712, reasoned:

> Significantly, *Davis* did not hold that an entry by instrument is made only if the object is used either to effect the entry or to accomplish the intended felony. And, again significantly, *Davis* did not hold that what is controlling is the dictionary definition of "instrument" or "tool." Indeed, it would appear that the forged check in that case came within the dictionary definition of an "instrument," because it was used to accomplish the intended felony. Rather, *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.
>
> 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. 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.
>
> * * *
>
> We conclude that kicking in the door of a home is a sufficient entry to constitute burglary.

(*People v. Calderon*, *supra*, at p. 145. Italic added.)

In reconciling *Davis* and *Calderon*, to the extent it disagreed with *Calderon*, the Court of Appeal in the instant case found that, "[J]ust because 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 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.) Citing *People v. Barry* (1892) 91 Cal. 481-482 and *People v. Salemme* (1992) 2 Cal.App.4th 775, the Court of Appeal further observed that:

> 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.

(Maj. opn. at pp. 13-14. Italics in original.)

Hence, because petitioner never physically went beyond the threshold of the residence, there was never the necessary element of an "entry" to satisfy the California burglary statute. The Court of Appeal further correctly observed and noted that the Legislative history on the law

of burglary in California likewise did not support the mere opening of a door, in the manner in which it was opened here, to satisfy the burglary statute. The Court of Appeal observed:

> Under the original statutory language . . . 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 the purpose of the crime of burglary.

(Maj. opn. at pp. 16-17.)

Real party in interest does not cite one case for the proposition that an entry is completed without the perpetrator ever physically entering the structure. In every case cited by real party in interest and the dissenting Justice in the Court of Appeal opinion in this case, the perpetrator physically entered or physically broke the threshold of the residence or structure contemplated, including *People v. Calderon*, *supra*. Nevertheless, "It would be 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 purpose 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." (Maj. opn. at p. 17.)

B. *Calderon* Was Properly Decided, But For The Wrong Reason.

To the extent *People v. Calderon*, *supra*, 158 Cal.App.4th 137, concluded that the appellant in that case was criminally liable for the commission of a completed burglary, petitioner agrees. Petitioner likewise agrees that based on the evidence presented in the *Calderon* case, the perpetrator in that case committed a completed entry to the extent that element was satisfied for the crime of burglary under California law. However, like the Court of Appeal in this case, and the sound reasoning articulated in its opinion in petitioner's case, petitioner disagrees with the notion that the mere opening of a door to a structure is sufficient to constitute an entry for the purpose of satisfying the "entry" element of the burglary statute. As observed by the Court of Appeal here, "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 purpose of the crime of burglary." (Maj. opn. at p. 17.) That would have necessarily been the case in *Calderon*. Any other suggestion that the mere opening of a door without the physical entry of some part of the perpetrator's body inside the structure, as suggested by the real party in interest and in the reasoning in *Calderon* constituting an entry for the purposes of a completed burglary, would be unsound and inconsistent with existing California law.

C. The Majority's Interpretation of "Entry" Would Not Lead To Absurd Results, However, The Dissent's Would.

Justice Blease in his concurring opinion correctly concedes that the "electromagnetic wave" in this case caused the garage door to open. (Con. opn.at p. 1.) Likewise, the Court astutely observed that "pushing a doorbell that summoned a homeowner who opened a door that swung inward," would achieve the same result. (Con. opn. at p. 1.) However, as the Court correctly observed, if we applied the reasoning in *Calderon* and that of the real party in interest to petitioner's case, the mere fact that a perpetrator could rang a doorbell and summon a homeowner to open the door would also constitute an entry under the burglary statute. The court observed:

> 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 home.* 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.**

(Con. opn. at p. 1. Italics and emphasis added.)

The court gave other reasonable, realistic examples of how applying non-physical attributes to an entry, for the purpose of concluding an entry as required by the burglary statute, to as being a **"bridge too far,"** as observed in *People v. Davis*, *supra*, 18 Cal.4th 712. The court stated:

> 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 purpose of the burglary statute. Otherwise the scope of the burglary state could be expanded to absurd proportions," 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.)

(Con. opn. at pp. 1-2.)

On the other hand, the observations made in the dissenting opinion, with all due respect and candor, clearly lead to absurd and unworkable results. The dissent would hold that, "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." (Dis. opn. at p. 4.) Based on this reasoning, according to the dissent, "**if the breach of the door were to be caused by the shockwave from a concussion grenade** . . . *the exact same result is achieved* -- the door is blasted inward . . . is a burglary . . . ." (Dis. opn. at p. 5. Italics in original. Emphasis added.) Likewise, real party in interest suggest that following the reasoning in the dissenting opinion, if "**An intruder uses a laser to cut a hole in one of the windows of the home**, causing the glass to fall into the home," such conduct would constituted a completed entry for the purposes of the burglary statute. (RPI Opening Brief at p. 17. Emphasis added.)

Concussion grenades and glass cutting lasers constituting entry? These are exactly the type of absurd results *People v. Glacier* (2010) 186 Cal.App.4th 1151, warned us to avoid. "It is important to establish reasonable limits as to what constitutes an entry by means of an instrument for purpose of the burglary statute. Otherwise the scope of the burglary statute could be expanded to absurd results." (*Id.* at p. 1157.) What next...rocket propelled grenades or mortar fire from across town that land short of the structure but blows the doors and windows open? Ray-guns

that shoot laser beams from the stratosphere that can cut an opening into a wall? Or maybe ringing a doorbell that causes the homeowner to come to the door and simply open it and the person that rings the doorbell walks away never entering the residence? All of these, under the reasoning in the dissent and that of the real party in interest would constitute completed entries for the purposes of the burglary statute.

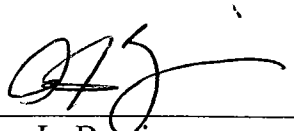
In today's world, electromagnetic waves, radio waves, sound waves, internet signals, GPS, and cellular phone signals are being pumped in, out, and through our homes and businesses every day. Under the dissent's and prosecution's logic, a person could be guilty of burglary just by intentionally accessing the wireless internet of his or her neighbors. Any suggestion that any of these non-physical attributes that merely cause an opportunity for an entry, constituting an entry, would be absurd, unworkable and clearly outside of what is intended for purposes of an entry to satisfy the California burglary statute.

CONCLUSION

For the foregoing reasons, petitioner respectfully request that the Court of Appeal's judgment be affirmed

DATED: January 23, 2012

Respectfully submitted,



Arthur L. Bowie
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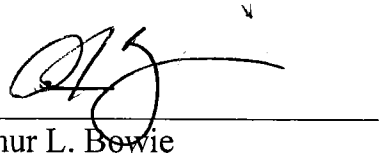
BRIEF FORMAT CERTIFICATION PURSUANT TO CALIFORNIA RULES OF COURT 8.204(c)

Pursuant to California Rules of Court 8.204(c), I certify that the foregoing brief is in 13-point, Times New Roman, proportionally-spaced typeface and contains 4,697 words, according to the word-count function of Microsoft Word, which was used to prepare the brief.



Arthur L. Bowie
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SUPREME COURT OF THE STATE OF CALIFORNIA
DECLARATION OF SERVICE

Case Name: Magness v. Superior Court (Sacramento County)

Case No.: C066601/S194928

I, the undersigned, declare as follows:

I, Arthur L. Bowie, am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 700 H Street, Suite 0270, Sacramento, California 95814.

On January 23, 2012, I served the attached

Petitioner's Answer Brief on the Merits

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing the envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid.

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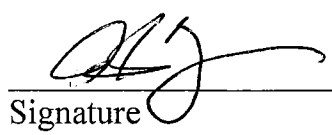
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 23, 2012, at Sacramento, California.



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