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

REPLY BRIEF ON THE MERITS

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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

Petitioner contends that, because he did not physically penetrate the threshold of the Loops' residence, there was no evidence of an "entry" sufficient to satisfy the California burglary statute. (PAB[1] 11.) Petitioner's argument is without merit.

A. The Case Law and Legislative History Support the Conclusion That One Who Uses a Remote Control to Open a Garage Door "Enters" the Home Under California's Burglary Statute

As set forth in real party in interest's opening brief on the merits (OBM[2] 9-14), 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. Initially, this Court noted, as it had previously in *People v. Davis* (1998) 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.) This 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 *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

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[1] "PAB" refers to Petitioner's Answer Brief on the Merits.

[2] "OBM" refers to real party in interest's opening brief on the merits.

> 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.'"

(*People v. Valencia*, *supra*, 28 Cal.4th at p. 7, quoting *People v. Davis*, *supra*, 18 Cal.4th at p. 721, quoting, in turn, *People v. Gauze*, *supra*, 15 Cal.3d at p. 715.) This Court further noted that an entry may be effected by either the intruder himself or by an instrument employed by 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, citing *People v. Davis*, *supra*, at p. 717.)

In *Valencia*, this Court also discussed its 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 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, 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. Calderon* (2007) 158 Cal.App.4th 137 (*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. (*Id.* at pp. 139-140.) One of the accomplices kicked in the victim's door but, before the defendant or his accomplices could enter the 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 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.*)

Petitioner notes that, in reconciling *Davis* and *Calderon*, the majority of the Court of Appeal in the instant case concluded that:

> just 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. of Robie, J.[3] at pp. 12-13; see PAB 10-11, citing to maj. opn. at pp. 12-13.) By this argument, petitioner and the majority of the Court of Appeal understate the fact that this Court has elevated the concerns associated with the dangers to personal safety that are fostered by the crime of burglary. Indeed, this Court has repeatedly stressed that the burglary laws are:

> ". . . *primarily* designed . . . 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. Gauze*, *surpa*, 15 Cal.3d at p. 715, italics added; see also *People v. Davis*, *supra*, 18 Cal.4th at p. 721.)

Neither the majority of the Court of the Appeal nor petitioner address the fact that this Court has also asserted that burglary "remains an entry which invades a possessory interest in a building." (*People v. Gauze*, *supra*, 15 Cal.3d at p. 714.) As this Court explained in *Davis*, the placing of a forged check into a chute in a walk-up was not "the type of entry the burglary statute was intended to prevent," because it did not violate any occupant's possessory interest in a building or his or her personal freedom

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

from violence that might ensue from the unauthorized intrusion. (*People v. Davis*, *supra*, 18 Cal.4th at p. 720.)

Here, the Loops' possessory interest in their residence was violated when petitioner, a stranger to them, broke into their vehicle, removed their garage door opener, and opened their garage door. Their personal safety was also threatened. This constitutes a burglary.

Petitioner also contends that the majority of the Court of Appeal correctly concluded that the legislative history regarding the law of burglary does not support that the opening of a door in the manner in which it was opened in the present case satisfies an entry for purposes of the burglary statute. (PAB 11-12.) However, this claim also lacks merit. As the dissent correctly observed, the garage defined the boundary of the garage, and its intrusion into the airspace of the garage constituted the entry required for a burglary. (Dis. opn. of Duarte, J.[4] at pp. 3, 5-6.) As further stated by the dissent:

> 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 protection possessory rights [citation] or forestalling the germination of a situation dangerous to personal safety [citations].

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

Just as kicking in the door of a home does, an intruder's use of a garage door opener to open a garage violates the occupant's possessory interest and fosters a situation that can be extremely dangerous to personal safety. In the present case, 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

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[4] Further citations to the dissent's opinion will be designated as "dis. opn."

as an instrument used to penetrate the building. (See discussion of *People v. Calderon*, *supra*, 158 Cal.App.4th 137, *post*.)

B. *Calderon* Was Properly Decided

In its opening brief on the merits, real party in interest argued that *Calderon* was correctly decided. (OBM 14-15.) Real party in interest maintains that position. Petitioner agrees that *Calderon* was properly decided but urges that it was decided correctly for the wrong reasons. (PAB 13.) Specifically, he claims that the mere opening of a door to a structure is insufficient to constitute an entry for the purpose of burglary. (*Ibid.*)

As discussed *ante*, in *Calderon*, the Court of Appeal 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.[5] (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145.) In so holding, the court noted that the defendant and his accomplices had invaded the victim's 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.*)

The reasoning in *Calderon* is sound. Unlike the defendants in *Davis* and *Ravenscroft*, in kicking in the victim's door the defendant and his accomplices in *Calderon* were not using the door as it was intended to be used by the public. As the *Calderon* court explained, "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

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[5] Underlying *Calderon* was a finding that, upon being kicked in, the door itself became an instrument used to penetrate the building so as to constitute an entry into the residence. (See *People v. Calderon*, *supra*, 158 Cal.App.4th at pp. 143-145.)

control of an invader, not the householder." (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145.) In addition, the kicking open of the 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 victim's possessory interest in his residence and further violated his "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).

C. The Majority's Interpretation of What Constitutes an Entry Would Lead to Absurd Results

In its opening brief, real party in interest noted the absurd results that would flow from the majority's decision. (OBM 16-17.) In particular, real party in interest pointed out that an intruder who used a laser to cut a hole in the window of a home and the glass cutout fell into the home would not have entered the home under the majority's approach. (OBM 17.) Notably, this Court has concluded that:

> [i]nstruments other than traditional burglary tools certainly can be used to commit the offense of burglary. A laser could be used to cut an opening in a wall, a robot could be used to "jimmy" a lock.

(*People v. Davis*, *supra*, 18 Cal.4th at p. 719.) Similarly, the Court of Appeal in *Calderon* explained that "*Davis* did *not* hold that what is controlling is the dictionary definition of 'instrument' or 'tool.'" (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145, italics in original.) Instead, the crucial issue is "whether [the] insertion . . . was the type of entry the burglary statute was intended to prevent." (*People v. Davis*, *supra*, 18 Cal.4th at p. 720.) And as the dissent in the case at bench correctly noted, by opening the door into the garage, petitioner constructively entered the garage, which resulted in an invasion of the occupants' possessory interest and created a situation dangerous to personal safety. (Dis. opn. at p. 4.)

Petitioner makes a slippery slope argument, warning that if this Court finds opening a garage door sufficient for a burglarious entry, intentionally accessing a neighbor's wireless internet could constitute burglary, leading to "absurd results." (PAB 17.) Real party in interest's position was, and is, simply that 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. (See discussion of *People v. Calderon*, *supra*, 158 Cal.App.4th 137, *ante*.) This Court need go no further than that to properly dispose of this case.

In any event, petitioner's slippery slope argument is hyperbolic and unsupported by the case law. Accessing one's wireless internet without consent would not constitute a burglary without an entry or invasion onto the victim's property. The Loops' garage door, which served as both an access point to their garage and as a physical barrier between the interior of their residence and the driveway, was opened. This unauthorized opening constituted a burglary under the law as it violated the possessory interest of Mr. Loop and his wife and also threatened their safety. Without the utilization of a door, a window, a skylight, a garage door, or other means of access to a person's home, it is difficult to imagine how one would make a residential burglary case through non-consensual wireless use.

Appealing to the majority of the Court of Appeal's reasoning, petitioner raises an additional slippery slope argument that is also hyperbolic and unsupported by the case law. Specifically, he asserts that under the reasoning in *Calderon*, a would-be intruder would "enter" under the burglary statute if he rang a doorbell to summon a homeowner who opened the door. (PAB 14, 17.) *Calderon* cannot fairly be read to stand for the proposition that the act of coaxing someone from a distance to open their front door constitutes a completed burglary. As set forth *ante*, central

to the Court of Appeal's holding in *Calderon* was the fact that the kicking open of the door violated the victim's possessory interest in his residence. (*People v. Calderon*, *supra*, 158 Cal.App.4th at p. 145.) Under petitioner's hypothetical, the opening of the door—although a penetration of the building—would not violate the possessory interest of the resident as the resident himself would have made the choice—albeit under false pretenses—to open the door and thereby break his home's perimeter. 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.

CONCLUSION

For the reasons set forth herein, as well as for those set forth in real party in interest's opening brief on the merits, real party in interest respectfully requests that the Court of Appeal's judgment be reversed.

Dated: February 9, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,715 words.

Dated: February 9, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Magness v. Superior Court (Sacramento)**
No.: **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 February 10, 2012, I served the attached **REPLY 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 February 10, 2012, at Sacramento, California.

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Declarant

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